CHAPTER 5

EXCEPTIONS TO UNLAWFUL DISCRIMINATION

5.1 Division 4 of Part 2-2 of the Draft Bill contains exceptions to the unlawful discrimination provisions, which exempt activities in a range of scenarios that would otherwise be unlawful discrimination. Submitters and witnesses raised various issues in relation to these exceptions, with a particular focus on the general 'justifiable conduct' exception, the 'inherent requirements of work' exception, and the exceptions for religious organisations.

General exception for 'justifiable conduct'

5.2 Clause 23 introduces an exception to unlawful discrimination for 'justifiable conduct', which applies in relation to all protected attributes.

5.3 Subclause 23(3) provides that conduct of a person is 'justifiable' if:

- it is engaged in, in good faith, for the purpose of achieving 'a legitimate aim' (paragraphs 23(3)(a)-(b)); and
- a reasonable person in those circumstances would consider that engaging in the conduct would achieve that aim (paragraph 23(3)(c)); and
- the conduct is a proportionate means of achieving the aim (paragraph 23(3)(d)).

5.4 Subclause 23(4) provides that several matters must be taken into account when considering if subclause 23(3) has been satisfied, including: the objects of the Draft Bill; the nature and extent of the discriminatory effect of the conduct; and whether the person could have engaged in other conduct with less or no discriminatory effect.

General views on clause 23

5.5 A number of stakeholders expressed in-principle support for the introduction of a general exception for 'justifiable conduct': for example, the Discrimination Law Experts Group stated that this single exception is preferable 'in place of the confusing array of singular and inconsistent exceptions that exist in the current laws'.[1] Concerns were raised, however, that the current wording of clause 23 needs improvement.[2]

5.6 Suncorp argued that the drafting of this exception is too broad, and that without further guidance from the government significant judicial interpretation of key

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1 *Submission 207*, p. 23. See also: Australian Council of Human Rights Agencies, *Submission 358*, pp 11-12; Human Rights Law Centre, *Submission 402*, p. 44; Australian Chamber of Commerce and Industry, *Submission 411*, p. 4; Public Interest Advocacy Centre, *Submission 421*, pp 27-28; Law Council of Australia, *Submission 435*, p. 33.

2 See, for example, Victoria Legal Aid, *Submission 346*, pp 17-19; Australian Chamber of Commerce and Industry, *Submission 411*, pp 4-5; Law Council of Australia, *Submission 435*, pp 33-36; Ms Katherine Eastman SC, *Submission 452*, pp 6-8.

phrases in clause 23 will be required, possibly leading to unnecessary disputes and complaints being brought.[3] Other stakeholders agreed that this exception has been too broadly drafted, and could therefore diminish protections against discrimination if it is not reworded.[4]

5.7 Job Watch argued that clause 23 should be removed from the Bill altogether because this exception 'will be ambiguous, complex and uncertain and create an abundance of case law leading to further complexity'.[5]

Possible changes to clause 23

5.8 Several amendments to clause 23 were proposed by submitters. For example, the Discrimination Law Experts Group argued that the reference to an aim that is 'a legitimate aim' in paragraph 23(3)(b) should be replaced by an aim that 'is consistent with achieving the objects of the Act', in order to ensure that there is a clear connection between the justifiable nature of the conduct and the human rights objectives of the Draft Bill.[6] The Human Rights Law Centre agreed that, unless these principles are applied, 'there is a real risk that duty-holders will seek to defend discriminatory conduct on the basis of a profit motive or administrative efficiency'.[7]

5.9 The Australian Council of Human Rights Agencies recommended that clause 23 should define 'legitimate' and 'proportionate', and should also 'clarify that purely financial or commercial imperatives cannot justify discriminatory conduct'.[8]

5.10 Ms Kate Eastman SC argued that, from a practical perspective, the current wording of subclause 23(3) poses an unworkable test because it cannot apply to a person who acts without any particular purpose or unintentionally treats another person unfavourably. Ms Eastman also noted the 'onerous evidentiary burden placed on anyone seeking to rely on this defence' and the fact that 'there is no guidance on how concepts such as proportionality should be assessed'.[9]

5.11 Ms Eastman suggested that subclause 23(3) should be replaced with a simpler test based on the concept of 'reasonableness', so as to provide that conduct is justifiable 'if the conduct was reasonable in the circumstances of the particular case'.[10]

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3 *Submission 279*, p. 3.

4 See, for example, The Equal Rights Trust, *Submission 367*, pp 24-25; Human Rights Law Centre, *Submission 402*, p. 44; Mr Tim Lyons, Australian Council of Trade Unions, *Committee Hansard*, 23 January 2013, p. 9.

5 *Submission 275*, p. 9, quoting from Job Watch's submission to the Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper. See also: Civil Contractors Federation, *Submission 307*, p. 12.

6 *Submission 207*, pp 24-25.

7 *Submission 402*, p. 45.

8 *Submission 358*, p. 13.

9 *Submission 452*, pp 6-7.

10 *Submission 452*, pp 7-8. Ms Eastman noted that the concept of 'reasonableness' has been used for many years in federal anti-discrimination law, and is familiar to the Australian courts.

5.12 The Law Council of Australia also preferred a 'reasonableness' test, as opposed to the current drafting of subclause 23(3). Such a test would avoid the need 'to identify a legitimate aim behind the conduct in every case' and reduce the potential for 'subjective considerations to be determinative' in complaints cases.[11]

5.13 The Department provided the following comments in relation to the formulation of the 'justifiable conduct' exception:

> Clause 23 is intended to align with the international human rights law concept of 'legitimate differential treatment'. Although a new concept to Commonwealth anti-discrimination law, it requires similar analysis to the defence of reasonableness in existing indirect discrimination provisions in the anti-discrimination Acts, and reflects the policy rationale underpinning existing exceptions and exemptions.[12]

Exception for inherent requirements of work

5.14 Some submitters opposed the inclusion of the 'inherent requirements of work' exception in clause 24. The Australian Council of Trade Unions contended that, since clause 24 will apply to all protected attributes under the Draft Bill, it represents a significant expansion from the current legislation:

> Current legislation provides an exception allowing employers to discriminate on the grounds of the inherent requirements of the job only in the areas of Disability, Age and Sex Discrimination in more restrictive terms than the provisions in the exposure draft. Expanding the exception to all areas of discrimination and expanding the terms of the exception will mean that it will be easier for employers to discriminate on the basis of any of the protected attributes by claiming the employee is unable to meet an 'inherent requirement' of the job.[13]

5.15 The ACTU argued that under the Draft Bill:

> The only protection available to employees will be becoming involved in lengthy arguments as to whether the requirement is an 'essential element' of the position, the results of which would be very uncertain. In these scenarios the onus is on the employee who is in a vulnerable situation, to be informed of their rights, and to argue for their retention at the workplace, when it should be clear in the legislation that these scenarios would constitute discrimination.[14]

5.16 The Discrimination Law Experts Group agreed that extending this exception to all protected attributes represents a 'potentially substantial broadening of its application and a reduction in protection against discrimination'.[15] In addition, the 'inherent requirements of work' defence would already reasonably be covered under

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11 *Submission 435*, pp 35-36.

12 *Supplementary Submission 130*, p. 9.

13 *Submission 310*, p. 9.

14 *Submission 310*, p. 9.

15 *Submission 207*, p. 26.

the general defence provisions in clause 23, and the inclusion of clause 24 would have the effect of significantly undermining the protective role of clause 23:

> The primary purpose of introducing a general justification defence (cl 23) is to ensure that organisations have sufficient scope to achieve their legitimate aims (such as appropriate recruitment and performance management of employees), subject to appropriate constraints…Under the inherent requirements provision in cl 24, duty bearers can determine what a job entails and how it is to be carried out (that is, its inherent requirements) without any obligation to examine the availability and feasibility of less discriminatory alternatives as is required under cl 23.[16]

Departmental response

5.17 The Department made several points in its supplementary submission relating to clause 24. It explained that clause 24 'is not intended to set a lower threshold than the existing exceptions' and that, according to jurisprudence on the meaning of 'inherent requirements', employers are not permitted to organise or define their business to permit discriminatory conduct.[17] The Department explained that the question of whether a condition is an inherent requirement of the job is 'an objective element that is not simply a matter of employer discretion':

> Inherent requirements are those which are permanent and inseparable from the nature of the particular work—that is, no adjustment could be made. If an adjustment to work practices can easily be identified that would allow discrimination to be avoided it is very unlikely that a specific policy will be an inherent requirement of a job.[18]

5.18 The Department also pointed out that the burden of proving that a condition is an inherent requirement of the job will be borne by the employer, as is the case currently.[19]

Exceptions for religious organisations under the Draft Bill

5.19 The committee received submissions from a wide variety of individuals, academics and organisations with differing views regarding the exceptions for religious organisations contained in clauses 32 and 33. Clause 32 outlines exceptions for the appointment of priests, ministers or members of religious orders, while clause 33 provides broader exceptions for religious bodies and educational institutions.

Balancing freedom of religion with the right to equality and non-discrimination

5.20 In commenting on the religious exceptions, submitters and witnesses discussed how anti-discrimination legislation should deal with the interaction between

16 *Submission 207*, p. 26.

17 *Supplementary Submission 130*, p. 10.

18 *Supplementary Submission 130*, p. 10.

19 *Supplementary Submission 130*, p. 10.

the right to religious freedom and expression, and the right of individuals to equality and non-discrimination.

Arguments for more explicitly referencing the right to religious freedom

5.21 Many religious organisations pointed out that freedom of religion is acknowledged as a fundamental human right under Article 18 of the International Covenant on Civil and Political Rights (ICCPR), as well as being recognised under other provisions of the ICCPR and other international treaties.[20] These groups asserted that, by dealing with religious practice and education through 'exceptions' to anti-discrimination provisions, the Draft Bill inherently undermines the value of religious freedom as a right in and of itself. For example, the Australian Association of Christian Schools remarked:

> [T]here is a misconception held by many that religious freedom is a lesser right, an *'exceptional'* right, rather than a concept which should be included within the very definition of unlawful discrimination itself. It is therefore both misleading and unhelpful to deal with the issue of *'religious freedom'* by way of *'exceptions'*.[21]

5.22 Submitters suggested amendments to the Draft Bill relating to recognition of religious freedom, including:

- incorporating a recognition of the right to religious freedom in the definition of unlawful discrimination;[22] or
- amending the heading of Part 2–2, Division 4 – currently 'Exceptions to unlawful discrimination' – to read 'When discrimination is not unlawful', and the heading of Subdivision A – currently 'Main exceptions' – to read 'Reasonable grounds for different treatment' and then deleting the word 'exception' throughout the Division, in order to avoid treating religious freedom as an 'exception';[23] or
- adding a paragraph to the 'justifiable conduct' exception in clause 23 to explicitly provide that the 'protection, advancement or exercise of another human right protected by the [ICCPR] is justifiable conduct'.[24]

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20 Australian Association of Christian Schools, *Submission 359*, p. 11; Australian Catholic Bishops Conference, *Submission 360*, pp 2-3; Ambrose Centre for Religious Liberty, *Submission 409*, p. 5; Australian Christian Lobby, *Submission 419*, pp 4-5; Freedom 4 Faith, *Submission 447*, p. 19.

21 *Submission 359*, p. 12 (emphasis in original). See also: Australian Christian Lobby, *Submission 419*, pp 4-5; The Salvation Army Australia, *Submission 499*, p. 6.

22 Professor Nicholas Aroney and Professor Patrick Parkinson AM, *Submission 558*, Attachment 1, pp 5 and 7. See also: Australian Association of Christian Schools, *Submission 359*, p. 13.

23 Freedom 4 Faith, *Submission 447*, pp 20-21.

24 Freedom 4 Faith, *Submission 447*, p. 22.

5.23 Religious organisations also asserted that they are not claiming to be 'above the law' with regards to anti-discrimination provisions, but rather that the law should be designed to adequately protect freedom of religion in specific circumstances. Bishop Robert Forsyth from Freedom 4 Faith contended that religious bodies are still subject to the law, but are the beneficiaries of specified exemptions within the law, 'as, indeed, are social clubs and political parties and a whole range of things':

> The law does apply to us all. It is just that it applies in different ways to us. And in terms of implying that we have the right to just arbitrarily pick on people, I would regard it as unlawful, for example, for the Anglican church to withhold emergency relief services to someone on the basis of their sexual orientation. There is no doctrine in our church that holds that; in fact, to withhold such relief is contrary to our doctrines…[I]t may happen, but it is indefensible, and it is not protected by this law.[25]

Arguments for limiting religious freedom in justified circumstances

5.24 Some submitters argued that the broad exceptions granted to religious organisations give too much weight to the right to religious freedom, compared to the competing rights of equality and non-discrimination.[26] For example, the Human Rights Law Centre argued that, in cases of competing rights, neither should automatically prevail:

> If a discriminatory policy or practice is explained and shown to be reasonable and proportionate then the discrimination should be allowed…[W]hile [the proposed exceptions] may allow for justifiable discrimination in some circumstances, they may also allow for discrimination that is not reasonable and proportionate. Importantly, these broad permanent exceptions leave no scope for analysis or consideration of either the merit or the effect of the discrimination in question.
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> Currently, the religious exceptions set up a regime whereby religious freedom cannot ever be curtailed in the name of equality. This regime perpetuates a false and unjustified hierarchy of rights, entrenches systemic discrimination and generally restrains society's pursuit of equality.[27]

General arguments that religious exceptions are not needed

5.25 UnitingJustice Australia did not support broad exceptions for religious organisations, except in relation to the ordination or appointment of religious leaders:

> We acknowledge…that the exercise of religious freedom is subject to the regulatory norms that govern Australian society…
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> We do not believe that [clause 33] is necessary, in light of the need to balance the rights of the wider community with the freedoms to be afforded to religious groups…When religious bodies are provided [with] what

25 *Committee Hansard*, 24 January 2013, p. 26.

26 See, for example, The Humanist Society of Victoria, *Submission 153*, p. 2; The Equal Rights Trust, *Submission 367*, pp 30-31; Australian Lawyers for Human Rights, *Submission 406*, p. 11.

27 *Submission 402*, p. 47.

> amounts to a 'blanket exception', there is no incentive for that body to ensure that it does not discriminate, and no incentive to promote equality and inclusion in areas of employment and representation other than those leadership positions necessary to maintain the integrity of the religious organisation.[28]

5.26 Some submitters and witnesses contended that the religious exceptions in clause 33 are unnecessary due to the justifiable conduct exception in clause 23. For example, Ms Lucy Adams from the Public Interest Law Clearing House Homeless Persons' Legal Clinic told the committee:

> [W]e are often working in tandem with a number of faith-based organisations that provide really excellent services to vulnerable members of our community. I guess our concern with the blanket exception is that it is not needed. Those organisations can rely on the general exception of justified conduct…Another thing we raise is that in our experience dealing with these faith-based organisations, this exception is antithetical, I guess, to the approach that they take to providing services, which is inclusive, compassionate and non-discriminatory. On that basis our argument is that the blanket exception is not needed.[29]

Protected attributes to which religious exceptions apply

5.27 The Discrimination Law Experts Group argued that, if religious exceptions are to be retained in the Draft Bill, 'pregnancy' and 'potential pregnancy' should be removed from the list of attributes to which the exceptions in clause 33 will apply. In particular, potential pregnancy 'can operate as a proxy for sex discrimination in relation to all women before menopause, and may enable discrimination on the basis of sex in a covert way'.[30] The Reverend Brian Lucas from the Australian Catholic Bishops Conference agreed that the protected attribute of potential pregnancy could be removed from the religious exceptions, stating that 'the doctrinal position of the Catholic Church would be fully supportive of not discriminating against people on the basis of potential pregnancy'.[31]

5.28 The Human Rights Council of Australia went further, arguing that there is 'no logical reason' for religious exceptions to apply to some attributes, such as sexual orientation and gender identity, and not to others such as race. It contended that 'the only attribute that is distinguishable logically for religious purposes is religion', and recommended that religious exceptions apply only to the attribute of 'religion'.[32]

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28 *Submission 466*, pp 7-8.

29 *Committee Hansard*, 23 January 2013, p. 60. See also: Australian GLBTIQ Multicultural Council, *Submission 383*, pp 7-8; Public Interest Advocacy Centre, *Submission 421*, p. 30; Victorian Gay and Lesbian Rights Lobby, *Submission 534*, p. 30.

30 *Submission 207*, p. 27. See also: Australian Council of Trade Unions, *Submission 310*, p. 11; Independent Education Union of Australia, *Submission 356*, pp 1-2; UnitingJustice Australia, *Submission 466*, p. 8.

31 *Committee Hansard*, 24 January 2013, p. 29.

32 *Submission 475*, p. 11.

Exceptions for religious organisations in relation to employment

5.29 Submitters commented on the exceptions contained in paragraphs 33(3)(b) and 33(4)(b), which permit religious bodies and educational institutions to discriminate in matters relating to the employment of individuals by those organisations. Several submitters welcomed these exceptions, asserting that it is important that educational institutions and other bodies established for religious purposes be allowed to make employment decisions in accordance with those purposes. For example, Freedom 4 Faith stated:

> No faith-based organisation seeks to discriminate against anyone else but many choose staff, or at least prefer staff, who adhere to the beliefs of the organisation, because such beliefs are central to the expression of the organisation's work and purpose.[33]

5.30 Mr Robert Johnston from the Australian Association of Christian Schools explained how this process can work in practice:

> In matters of faith…when a person comes to make [an] application for a position in our schools we would want to be sure not only that they share that faith but they are able to articulate that and demonstrate it in lifestyle choices and so forth. So all of our staff in our school—a gardener in the school in which I was principal for 27 years, for example, was also there for 27 years and was a very significant player in terms of some of the pastoral work [at the school]...Obviously we want a person there who will be consistent with the values and beliefs of the school, so a discrimination is made even in the employment of people who are not teachers because of the fact that they model their faith in these sorts of contexts…So not just teaching but in fact for all positions in the school we are making a discrimination on the basis of faith—not an unlawful discrimination but we are making a discrimination there.[34]

5.31 The Anglican Church Diocese of Sydney contended that organisations hiring employees in accordance with their founding values and identity is necessary for religious and non-religious organisations:

> The staff of an organisation determine its culture and identity, particularly over time. Many of the Christian charities that have maintained their Christian identity over time have done so because they have strict recruitment practices.
>
> This is uncontroversial in other areas of society. An environmental group would not be expected to employ people who do not believe in climate change and a political party would not be expected to employ staff who do not share its ideology, whether in a frontline position or otherwise.[35]

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33 *Submission 447*, p. 23.

34 *Committee Hansard*, 23 January 2013, p. 64.

35 *Submission 380*, p. 13.

5.32 Other submitters argued that the exceptions for religious organisations in relation to employment are unjustified and should be removed from the Draft Bill. For example, Job Watch contended that the list of attributes that can be the subject of discrimination by religious organisations does not bear any relationship to a person's ability to successfully undertake the duties or responsibilities of a particular job:

> [T]he relationship status or sexual orientation of a person who is employed to perform cleaning duties at a church or a person who is employed as a mathematics teacher at a religious school are irrelevant as those attributes do not provide any meaningful information in relation to determining how well they can perform their respective jobs. Likewise, a person who is employed to perform cleaning duties at a church or a person who is employed as a mathematics teacher at a religious school does not need to '[conform] to the doctrines, tenets, or beliefs of that religion' to be able to adequately perform their duties.[36]

5.33 The Independent Education Union of Australia agreed that there should be a 'readily ascertainable relationship between the position an employee holds and an employer's ability to rely on the proposed exceptions'.[37] The Queensland Independent Education Union argued that the more limited employment-related exceptions for religious employers under Queensland anti-discrimination legislation should be adopted in the Draft Bill.[38]

Conduct which 'conforms to the doctrines, tenets or beliefs of a religion'

5.34 Subparagraph 33(2)(b)(i) and subparagraph 33(4)(c)(i) provide for, in relation to religious bodies and religious educational institutions respectively, an exception for discriminatory conduct engaged in, in good faith, that 'conforms to the doctrines, tenets or beliefs' of a religion.

5.35 The Discrimination Law Experts Group expressed concern that, with respect to religious educational institutions, paragraph 33(4)(c) expands the limits of discrimination previously allowed:

> Under s38 of the [Sex Discrimination Act] discrimination by religious educational institutions was allowed only when it was necessary in good faith to avoid injuries to religious susceptibilities of adherents of the religion or creed. But under cl 33(4)(c) of the Draft Bill, discrimination is allowed also in the alternative, when it conforms to the doctrines, tenets or beliefs of the religion. No case has been made to justify this expansion of the exception[.][39]

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36 *Submission 275*, p. 8.

37 *Submission 356*, p. 2.

38 *Submission 342*, pp 3-5. Under section 25 of the *Anti-Discrimination Act 1991* (Qld), the religious exception related to employment is limited to discrimination where a person openly acts in a way that is contrary to the employer's religious beliefs and it is a genuine occupational requirement that the person acts in a way consistent with the employer's religious beliefs in the course of work.

39 *Submission 207*, p. 28. See also: Equality Rights Alliance, *Submission 352*, pp 11-12.

5.36 Several religious organisations contended that the inclusion of these subparagraphs will ultimately require the courts to make rulings on whether certain activity is in conformity with religious doctrine or belief, matters which are not easily established and which judicial bodies may not have appropriate expertise to determine. Freedom 4 Faith argued that wording religious exemptions in this way can lead to 'complex and fruitless arguments about what is and is not required by the doctrines of the religion or a group within a religious tradition'.[40] UnitingJustice Australia submitted that such concepts are often unhelpful in law:

> This language is contested even within religious communities themselves, and so to require participants in court proceedings to present and decide on a definitive definition of any of these terms is problematic.[41]

5.37 The Australian Association of Christian Schools argued that the courts 'must not be called on to arbitrate on what is, or is not, a Christian community's doctrine, tenet, belief or teaching…[They] will almost always lack the competence to do so'.[42]

Limited exception for Commonwealth-funded aged care services

5.38 The committee received extensive commentary on the issue of the limitation on religious exceptions in relation to Commonwealth-funded aged care services, in subclause 33(3). Many stakeholders opposed the introduction of these limitations, while others expressed strong support for their inclusion.

Arguments supporting the inclusion of subclause 33(3)

5.39 A number of submitters and witnesses applauded the limitations provided in the Draft Bill in relation to Commonwealth-funded aged care provision.[43] COTA Australia submitted that it was supportive of the approach of the Draft Bill in ensuring that 'the particular needs of older [LGBTI][44] people are recognised and that aged care facilities will not be able to take advantage of the religious exceptions'.[45]

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40 *Submission 447*, p. 22.

41 *Submission 466*, p. 8.

42 *Submission 359*, p. 14. See also: HammondCare, *Submission 388*, p. 13.

43 See, for example, Australian Association of Social Workers, *Submission 227*, p. 6; Australian Federation of AIDS Organisations, *Submission 239*, p. 6; Australian Psychological Society, *Submission 308*, p. 6; Equality Rights Alliance, *Submission 352*, p. 13; Diversity Council Australia, *Submission 378*, p. 6; Australian GLBTIQ Multicultural Council, *Submission 383*, p. 7; Ms Jessie Taylor, Liberty Victoria, *Committee Hansard*, 23 January 2013, p. 7; Dr Justin Koonin, NSW Gay and Lesbian Rights Lobby, *Committee Hansard*, 24 January 2013, p. 2; Associate Professor Mark Hughes, *Committee Hansard*, 24 January 2013, p. 40.

44 'LGBTI' is a term used to describe lesbian, gay, bisexual, trans, intersex and other sex and gender diverse communities.

45 *Submission 430*, p. 5.

5.40 The National LGBTI Health Alliance argued:

> Health service delivery in Australia is a universal good, and the provisions in the exposure draft will provide helpful relief to older LGBTI people when their overall health and well-being is beginning to decline. Admission to an aged care facility can be stressful in the best of circumstances, and thus this limit on exemptions is welcome.[46]

5.41 Associate Professor Mark Hughes told the committee that discriminatory conduct against LGBTI individuals in aged care settings is a significant problem, and cited the findings of a research survey of LGBTI persons in aged care in Queensland. Results from the survey show that 'approximately 40 per cent of those who had received aged-care services reported a negative experience in relation to the treatment of their sexual orientation or gender identity':[47]

> [T]he evidence from my own and others' research both Australian and international indicates that LGBTI seniors do experience discrimination accessing and receiving health and aged care services. I have had relayed to me stories of discrimination including physical abuse by residential care staff, hospital staff failing to involve same-sex partners in decision-making and counsellors and social workers making inappropriate assumptions about people's lifestyle…Just as significant, though, as people's experience of actual discrimination is their fear or expectation of discrimination and the consequent harm this produces. LGBTI seniors, as we know, grew up in an era when homosexuality was criminalised and mythologised, and this message that discrimination of LGBTI people is acceptable has been reinforced by the longstanding exemptions for religious bodies in our anti-discriminatory laws.[48]

5.42 Dr Jo Harrison, a researcher into LGBTI aged care issues, agreed that it is essential for these groups to be protected from discrimination in the area of aged care:

> Those currently requiring aged care support at a formal level, or approaching this point, must be protected completely from any form of discrimination so that despite the likelihood that they may be 'invisible' by virtue of lifetimes of hiding and fear, their safety and human rights are guaranteed.
>
> …Arguments relating to the matters of 'sensitivity of other residents' in a residential facility or 'protecting religious freedoms by denying same sex couples shared facilities' are not sensible, given evidence that residents of aged care facilities have been shown to have responded positively to sensitive processes of education and communication in relation to fellow LGBTI residents.[49]

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46 *Submission 320*, p. 2.

47 *Committee Hansard*, 24 January 2013, p. 40.

48 *Committee Hansard*, 24 January 2013, p. 40.

49 *Submission 413*, pp 1 and 2.

5.43 Associate Professor Hughes argued that taxpayer-funded aged care services must be provided on a non-discriminatory basis:

> If we do not want discrimination happening in age care settings then I think we need to make that very clear to all providers. If people are prepared to completely fund their own care and if…organisations were prepared to raise funding in other ways that would be fine but the concern for a lot of people, myself included, is that taxpayers' money will be used to actively discriminate against older, vulnerable people solely on the basis of their sexual orientation or gender identity. I think most Australians would be quite shocked if they realised that was the case.[50]

Arguments opposing the inclusion of subclause 33(3)

5.44 In contrast, many submitters and witnesses expressed the view that the limitations to the exception for religious bodies in respect of Commonwealth-funded aged care in subclause 33(3) should be removed. The Australian Catholic Bishops Conference submitted:

> People considering a move into a church aged care residential facility have an expectation that the particular ethos of that church will be upheld at the facility. If a resident is not prepared to abide by that ethos, the Church aged care facility should have the freedom to refuse to accept that person. To deny this is to deny religious freedom and, among other matters, would require religious communities whose charism is to live in communion with the aged and share a home with them to act contrary to their callings.[51]

5.45 Catholic Health Australia (CHA) argued that it should be lawful for religious aged care providers to decline to provide a specific service where to do so would contravene religious beliefs. It argued that making this unlawful may breach Australia's obligations under the ICCPR and expose the Draft Bill to possible legal challenge on these grounds. CHA proposed that subclause 33(3) could be amended rather than removed entirely to provide that the section not apply when a decision of an aged care provider is made 'reasonably and in good faith'.[52]

5.46 Mr David Martin from HammondCare, a non-denominational Christian aged care service provider, told the committee that while HammondCare itself does not discriminate on any grounds in the provision of services:

> [F]aith-based organisations should continue to operate under internationally recognised religious freedoms to run services and employ staff in alignment with the openly and honestly held views of the organisation…[T]his will ensure that faith based organisations can continue to freely make the best possible care based decisions for their people and for the people in need whom they care for.[53]

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50 *Committee Hansard*, 24 January 2013, p. 42.

51 *Submission 360*, pp 6-7.

52 *Submission 386*, p. 4.

53 *Committee Hansard*, 24 January 2013, p. 35.

Removing of religious exceptions in relation to the provision of services

5.47 The committee heard evidence from many stakeholders that the limitations imposed on religious exceptions in relation to aged care should be extended to other areas.[54] For example, Dr Justin Koonin of the NSW Gay and Lesbian Rights Lobby told the committee:

> Over the past few weeks we have heard hundreds of stories…of bullying, vilification, physical assault and harassment on the basis of sexual orientation and gender identity from teachers, cafe workers, patients seeking health care, schoolchildren and members of the Australian community accessing essential services funded by the government, often in organisations that would be exempt from the law under the current exposure draft. It is difficult to see how this kind of treatment can be justified by the rhetoric of avoiding injury to religious sensibility. Moreover, it is difficult to see how LGBTI people accessing these services could feel safe if employees are subject to discriminatory practices and policies. Therefore, limitations need to apply to employment in these areas as well.[55]

5.48 In relation to educational institutions, Dr Tiffany Jones noted research findings showing significant levels of discrimination, bullying and harassment against individuals on the basis of sexual orientation and gender identity in religious educational institutions in Australia. Accordingly, Dr Jones argued that it is inappropriate for these institutions to retain broad exceptions from anti-discrimination provisions.[56]

5.49 The Discrimination Law Experts Group applauded the limitation on the religious exception in subclause 33(3) in relation to Commonwealth-funded aged care, but argued:

> [A]s a matter of principle…public funding should not be spent on *any* activities that are discriminatory. Allowing religious-based discrimination in publicly funded schools has the potential to undermine community harmony by allowing children to be isolated from the experiences of other groups in society, and confined to a narrower range of experiences. This is not an effective way for a society to prepare the next generation to work together harmoniously with people who have different customs and beliefs. A religious group that operates an organisation or school with public funding should not be excused from complying with a basic human rights

54 See, for example, Castan Centre for Human Rights Law, *Submission 249*, pp 6-7; North Melbourne Legal Service, *Submission 327*, pp 4-5; Diversity Council Australia, *Submission 378*, p. 6; Australian GLBTIQ Multicultural Council, *Submission 383*, p. 7; Legal Aid New South Wales, *Submission 498*, p. 3; Victorian Gay and Lesbian Rights Lobby, *Submission 534*, p. 32.

55 *Committee Hansard*, 24 January 2013, p. 2.

56 *Submission 3*, pp 20-23.

> guarantee of non-discrimination. The same argument is made for public funding of services generally, and for health services in particular.[57]

5.50 The Discrimination Law Experts Group recommended that the exclusion of publicly funded aged care from religious exceptions should be extended to apply to 'all Commonwealth-funded services in the educational, health, social, community, commercial and other sectors'.[58] This position was supported by other submitters to the inquiry, such as the Human Rights Council of Australia:

> [A]ny religious exception [should] not apply to any activity which is partially or wholly funded by public funds. In such cases no question of expression of religious freedom arises. Rather it is reasonable for the State to require public funds to be expended and applied wholly in accordance with principles of non-discrimination.[59]

5.51 Dr Koonin from the NSW Gay and Lesbian Rights Lobby argued that a clear distinction should be drawn between an organisation's religious functions and other service it provides on behalf of the government:

> There is an important distinction between functions of an organisation that are inherently religion, such as the selection of priests, and those where the organisation is essentially acting as an extension of government in the provision of goods and services, particularly where they are funded by the government to do so. Internationally, anti-discrimination law in countries including the UK, South Africa and New Zealand makes this distinction clear.[60]

Maintaining the integrity of religious organisations

5.52 Mr Dominic Cudmore, a legal adviser to HammondCare, raised concerns that limiting the exceptions for religious organisations in receipt of public funds in areas other than aged care could result in unacceptable government interference in such organisations:

> The government can dictate the mission, the values, the principles that a private entity, be it faith based or not, [if] receipt of public subsidies is to follow. A number of years ago the Human Rights Commission, under its previous name, issued guidelines on employment for faith based organisations in receipt of government subsidies, and there was a significant public debate and eventually those guidelines were withdrawn because of public concern about the government's attempt, at least in

57 *Submission 207*, pp 28-29 (emphasis in original).

58 *Submission 207*, p. 29.

59 *Submission 475*, p. 13. See also: Australian Association of Social Workers, *Submission 227*, p. 2; Castan Centre for Human Rights Law, *Submission 249*, pp 6-7; National LGBTI Health Alliance, *Submission 320*, p. 3; Human Rights Law Centre, *Submission 402*, pp 48-49.

60 *Committee Hansard*, 24 January 2013, pp 1-2.

> respect of the guidelines, to dictate to private organisations how they were to run and what their mission was to be. So that is a problem for us.[61]

5.53 The Reverend Lucas from the Australian Catholic Bishops Conference made a similar point about whether religious educational institutions should retain their current ability to discriminate in relation to whom they provide education. The Reverend Lucas argued that, as a matter of principle, religious schools should be allowed to determine their own enrolment policies to uphold the ethos of the school, even if this may favour applicants of a particular religious background, or exclude applicants on other specified grounds.[62]

Facilitating choice between different service providers

5.54 Religious groups emphasised that enabling choice between service providers in areas such as education is crucial. The Reverend Lucas contended that in a multicultural society such as Australia, the need for diversity in the types of service providers available should be upheld:

> The default position…in Australian society is not secularism; the default position is pluralism. So, when the government contracts for services, it does it within the context of a plurality of applicants, who will express a range of different cultural and ethical positions. Likewise, when organisations tender for those services, they do so clearly on the basis of what they will and not do, and it will be only on the rarest of occasions that services that cannot be provided because of some religious position of an organisation are unavailable from some other organisation.[63]

5.55 Mr Corey Irlam from the Victorian Gay and Lesbian Rights Lobby told the committee that this is not always practical for same-sex couples, and that in many areas there are only limited options for access to services from non faith-based providers:

> Given that, for example, in Alice Springs in the Northern Territory, 100 per cent of aged care services are run by a religious organisation, given that a number of public hospitals are run as a public hospital by a faith based organisation in regional and rural areas around Australia and given the multitude of billions of dollars put into government funded services, this is a distinct problem not only from a geographical area but also from a capacity area, where you may not be able to access anybody other than a faith based service.[64]

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61 *Committee Hansard*, 24 January 2013, p. 37.

62 *Committee Hansard*, 24 January 2013, p. 28.

63 *Committee Hansard*, 24 January 2013, p. 28.

64 *Committee Hansard*, 23 January 2013, p. 5. See also: Associate Professor Mark Hughes, *Committee Hansard*, 24 January 2013, p. 41.

Tasmanian model for limited religious exceptions

5.56 Several stakeholders raised the example of the current anti-discrimination regime in Tasmania, where religious exceptions are much narrower than those proposed in the Draft Bill. Under the *Anti-Discrimination Act 1998* (Tasmania), the legislative exceptions for religious organisations extend only to the protected grounds of 'religious belief or affiliation' and 'religious activity', and not to other attributes such as 'sexual orientation' or 'gender identity'.[65] Ms Robin Banks, the Tasmanian Anti-Discrimination Commissioner, informed the committee that this legislative model has operated in Tasmania for over a decade with few problems:

> Tasmania does have exceptions, but they are the narrowest of any state or territory. They have been in place for the entirety of the legislation's history—12 years of legislation. I am not aware of complaints during my period as commissioner—and I deal with all of the complaints—where a religious body has sought to rely on one of those exceptions...In the main, what I see are organisations, including religious bodies, relying on an argument that in fact what they did was not discriminatory...
>
> I think that what it has meant in Tasmania is that religious bodies have perhaps turned their minds in different ways to how they ensure that their religious practice does respect the rights of others to the greatest extent possible without interfering with their doctrinal approach. They have done that, and I think they have done that very effectively. I know that I have had very open and honest conversations with religious bodies in Tasmania about some issues for schools, and those are very respectful conversations…I think that we are proof that you can do it; you can have very constrained exceptions, and that can work for the faith based organisations.[66]

Transparency in the operation of exceptions for religious service providers

5.57 Several stakeholders also argued that, if religious exceptions are to be maintained in the Draft Bill, greater transparency is required in the way those exceptions are exercised by organisations. For example, Dr Koonin from the NSW Gay and Lesbian Rights Lobby told the committee:

> Where it is proposed that exemptions be relied upon, they need to be transparent and publicly available, as members of the public are entitled to know that there is a risk of discrimination if they engage with the organisation in any capacity.[67]

65 Sections 51-52, *Anti-Discrimination Act 1998* (Tasmania).

66 *Committee Hansard*, 23 January 2013, p. 47.

67 *Committee Hansard*, 24 January 2013, p. 2.

5.58 The Discrimination Law Experts Group suggested that religious organisations intending to rely on the exceptions in clause 33 should be required to notify prospective employees and students of that intention in writing prior to employment or enrolment:

> Without a notice provision, individuals may choose an employer or school with no knowledge or warning that they are thereby sacrificing their right to protection from discrimination. This can be a serious matter for a teacher choosing in which education system to pursue their career, or a student making a choice of school and hence education system.[68]

5.59 Academics from the University of Adelaide Law School argued that religious exceptions in the Draft Bill should operate in a similar manner to those found in the South Australian *Equal Opportunity Act 1984*. Under that legislation, religious educational institutions must have a written policy regarding any discrimination practices, and must give a copy to any prospective employees as well as any other members of the public who request it.[69]

5.60 The Human Rights Law Centre agreed that religious institutions should be required to provide notice of discriminatory practices, and suggested that, in addition, or as an alternative, a religious organisation relying on the exceptions in the Draft Bill should be required to lodge a notice with the Australian Human Rights Commission (AHRC) which specifies the exempted policy or practice:

> [T]his requirement for notice would ensure accountability to the wider community. When the body that wishes to discriminate receives public funds or where the discrimination in question has some other public impact, there exists a greater need for accountability.
>
> Such a requirement may also encourage religious bodies to assess whether the discrimination is necessary and appropriate in each case.[70]

5.61 In this regard, the AHRC informed the committee that it does not support any mechanism 'requiring religious organisations to apply to the [AHRC] for temporary exemptions or other certification, having regard in particular to the regulatory impacts of such an approach'.[71]

5.62 The Reverend Lucas noted that, in relation to Catholic health and aged care services, there are already publicly available materials outlining the services that will be provided by Catholic operators:

> [T]he code of ethical standards for Catholic health and aged care services is a publicly available document. It runs to 81 pages and goes into a great deal of detail as to what services are and are not provided in Catholic health and

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68 *Submission 207*, p. 28.

69 Ms Anne Hewitt, Professor Andrew Stewart, Professor Rosemary Owens, Ms Gabrielle Appleby and Ms Beth Nosworthy, University of Adelaide Law School, *Submission 204*, p. 6.

70 *Submission 402*, p. 50.

71 *Submission 9*, p. 11.

> aged care...The whole world knows that there are certain services that are not available at [a Catholic] hospital and to suggest that that hospital in order to be a publicly funded public hospital should provide those services cuts right across one of those fundamental issues of religious freedom. But on the question of transparency that was referred to, that document on ethical standards is freely available.[72]

5.63 Mr Robert Johnston from the Australian Association of Christian Schools told the committee that his organisation would be comfortable for the publication of notices by schools regarding discrimination policies if the Draft Bill went further to protect religious freedom:

> [I]n the objects of association of each of our organisations, nearly all of our schools would have a statement of faith and in that statement of faith they would identify the authority on which they rely for making such discriminations or judgements or choices. I am certainly not opposed to nor do I think our schools would be opposed to the need for clarification, if the law required it, to declare those bases upon which they were making discriminations or judgements of choice…If you [amend the Draft Bill] with religious freedom being declared upfront, then it actually takes away the need for exceptions and exemptions. In that context, I think it would be quite reasonable for us to then actually require our schools to declare those bases upon which they were making choices and judgements so that people could be well-informed.[73]

Departmental response

5.64 In a supplementary submission to the committee, the Department noted that throughout the consultation process the government had stated its intent not to alter the current religious exceptions, apart from considering how they may apply to discrimination on the new grounds of sexual orientation and gender identity. The Department explained that the Draft Bill therefore 'replicates the wording of the existing exceptions in the [Sex Discrimination Act] and [the Age Discrimination Act] and applies to the attributes covered in those Acts (with the addition of sexual orientation and gender identity)'.[74]

5.65 In relation to Commonwealth-funded aged care services, the Department noted that a range of views were presented during the consultation process, and that three options were considered in the Regulatory Impact Statement to the Draft Bill, namely: maintaining the status quo (option one); stating that religious exceptions do not apply to religious organisations providing aged care services with Commonwealth funding (option two); and stating that exceptions do not apply to religious organisations providing any services with Commonwealth funding, but permitting discrimination in employment (option three):

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72 *Committee Hansard*, 24 January 2013, p. 27.

73 *Committee Hansard*, 23 January 2013, p. 63.

74 *Supplementary Submission 130*, p. 12.

> The Government chose Option Two given the need to ensure people are not discriminated against in the receipt of aged care paid for, at least in part, by Commonwealth funding. In this case, the benefits to older [LGBTI] people of improved wellbeing and emotional support by living as a same-sex couple outweighed any cost to aged-care institutions. As set out in the Regulation Impact Statement, this would better balance the rights to freedom of religion and freedom from discrimination and provide greater accountability and transparency for the use of Commonwealth funding.[75]

75 *Supplementary Submission 130*, p. 13.