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Official Committee Hansard

SENATE

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Reference: Effectiveness of the Commonwealth Sex Discrimination Act 1984

TUESDAY, 9 SEPTEMBER 2008

SYDNEY

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SENATE STANDING COMMITTEE ON

LEGAL AND CONSTITUTIONAL AFFAIRS

Tuesday, 9 September 2008

Members: Senator Crossin *(Chair)*, Senator Barnett *(Deputy Chair)*, Senators Farrell, Feeney, Fisher, Hanson-Young, Marshall and Trood

Participating members: Senators Abetz, Adams, Arbib, Bernardi, Bilyk, Birmingham, Mark Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Jacinta Collins, Coonan, Cormann, Eggleston, Ellison, Fielding, Fierravanti-Wells, Fifield, Forshaw, Furner, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Ludlam, Lundy, Ian Macdonald, McEwen, McGauran, McLucas, Mason, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Pratt, Ronaldson, Ryan, Scullion, Siewert, Stephens, Sterle, Troeth, Williams, Wortley and Xenophon

Senators in attendance: Senators Barnett, Crossin and Feeney

Terms of reference for the inquiry:

To inquire into and report on:

The effectiveness of the Commonwealth Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality, with particular reference to:

a. the scope of the Act, and the manner in which key terms and concepts are defined;

b. the extent to which the Act implements the non-discrimination obligations of the Convention of the Elimination of All Forms of Discrimination against Women and the International Labour Organization or under other international instruments, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights;

c. the powers and capacity of the Human Rights and Equal Opportunity Commission and the Sex Discrimination Commissioner, particularly in initiating inquiries into systemic discrimination and to monitor progress towards equality;

d. consistency of the Act with other Commonwealth and state and territory discrimination legislation, including options for harmonisation;

e. significant judicial rulings on the interpretation of the Act and their consequences;

f. impact on state and territory laws;

g. preventing discrimination, including by educative means;

h. providing effective remedies, including the effectiveness, efficiency and fairness of the complaints process;

i. addressing discrimination on the ground of family responsibilities;

j. impact on the economy, productivity and employment (including recruitment processes);

k. sexual harassment;

l. effectiveness in addressing intersecting forms of discrimination;

m. any procedural or technical issues;

n. scope of existing exemptions; and

o. other matters relating and incidental to the Act.

WITNESSES

Committee met at 9.43 am

CHAIR (Senator Crossin)—Good morning, everybody. I declare open this first hearing of inquiry by the Senate Standing Committee on Legal and Constitutional Affairs into the effectiveness of the Commonwealth Sex Discrimination Act 1984. This inquiry was referred to the committee by the Senate on 26 June for report by 12 November 2008. We have received 70 submissions for the inquiry. Most of those submissions have been authorised for publication and are available on the committee's website.

I remind all witnesses that, in giving evidence to the committee, they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as contempt. It is also contempt to give false or misleading evidence to the committee.

The committee prefers all evidence to be given in public, but under the Senate's resolutions, witnesses have the right, upon request, to be heard in private session. It is important that witnesses give the committee notice if they intend to seek to give evidence in camera. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken, and the committee will determine whether it will insist on an answer. In doing so, we will have regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that that answer be given in camera.

I remind people in this room to switch off mobile phones or turn them to silent mode. There may be a need for witnesses to stay behind after concluding their evidence, in case Hansard has any queries or areas they may want to clarify. I welcome representatives from the Australian Human Rights Commission. I notice for the record a change of name, and the committee acknowledges that. I thank Mr von Doussa for making himself available today. I recognise that he is not officially the president of the Human Rights Commission, but his knowledge and expertise in this area will benefit our inquiry. The committee appreciates Mr von Doussa giving his time post his appointment.

[9.43 am]

BRODERICK, Ms Elizabeth, Federal Sex Discrimination Commissioner, Australian Human Rights Commission

GOLDIE, Ms Cassandra, Director, Sex and Age Discrimination Unit, Australian Human Rights Commission

HELY, Mr Brook, Senior Legal Officer, Australian Human Rights Commission

von DOUSSA, Mr John, Immediate Past President, Australian Human Rights Commission

CHAIR—We have received your submission which, for our records, we have numbered 69. At the outset, I thank you for a very comprehensive submission, which certainly has targeted and clarified some of the areas we need to concentrate on during the next three days. Do you need to make an amendments or alterations to your submission?

Ms Broderick—No amendments, Senator.

CHAIR—I invite you to make a short opening statement. Only Senator Barnett and I are here today. We concur that we will hear your opening submission, go through your submission section by section, and then have dialogue on where you believe improvements could be made.

Ms Broderick—Thank you very much, Senators, for providing the Australian Human Rights Commission with the opportunity to appear before you today as part of this important inquiry into the effectiveness of the Sex Discrimination Act. Senators, you may be aware that last year, shortly after I became the Sex Discrimination Commissioner, I went on a national listening tour. During that time I travelled to every state and territory to hear firsthand about the state of gender equality in 2008. I met over a thousand women and men from all walks of life. Many thousands more followed our journey on the internet and a number of those people contributed through my online blog.

My firm conclusion from that tour was that while we had good experience in terms of reducing overt discrimination, or a lot of the formal discrimination against women, our progress towards achieving true gender equality in Australia has stalled. I became convinced that, as a nation, we need to re-energise our efforts to find innovative solutions to the systemic gender inequality that persists in many people's daily lives. As a result of the national listening tour, I identified five national priorities for my term as commissioner whose achievement I believe will contribute to making a significant difference in this area. One of those five was modernising our laws, in particular the Sex Discrimination Act, so it was wonderful to hear about this inquiry.

Your inquiry enables us to focus our attention, almost a quarter of a century after the enactment of the Sex Discrimination Act, on how to reform the act into a first-class national gender equality law which will build a fair and equal Australia. From that perspective, this is a very exciting opportunity. We hope that the comprehensive and detailed submission we have filed provides the committee with a road map for achieving this important reform.

In our submission, Senators, you will see that we are recommending a two-stage process of national reform to the Sex Discrimination Act to be completed over three years. There are changes to the Sex Discrimination Act that can be made now to significantly strengthen the effectiveness of the law. To that extent, we make 54 recommendations for immediate implementation, and that is our stage one. However, we consider that some of the reforms to the act require a more extended period of consultation to achieve the right outcome.

The commission is keen to promote the harmonisation of federal anti-discrimination laws, including through reform the Sex Discrimination Act. Therefore we propose two stages for the reform process. As I said, we have made 54 recommendations for reform that can be done now, and a second stage would include an investigation into the merits of adopting a comprehensive single equality act at a federal level. You will see an equality act is a feature of a number of the submissions that have been put to this inquiry.

An equality act would involve incorporating the Sex Discrimination Act with other federal discrimination laws, such as the Disability Discrimination Act, into one piece of legislation. This would be a major reform, so it needs adequate time to be investigated. We therefore propose that this committee support a national inquiry into the merits of adopting an equality act. That would deliver a considered view on whether having a single federal equality act is indeed preferable to the current situation of separate federal acts. A national inquiry into an equality act could take place as one of the outcomes of the forthcoming Australia-wide consultation to determine who best to recognise and protect human rights and responsibilities.

In our written submission to the inquiry, we set out 11 options for reform that we think are better considered as stage two, so they would not form part of stage one. If the committee is not minded to support the inquiry into the equality act as stage two, then we would recommend referring stage two reforms to the Australian Law Reform Commission, or some other suitable body, to make sure that we complete the overall reform process.

I will now spend a few minutes just focusing on what we are proposing as stage one. As I said, we have made 54 recommendations. I would like to group them and highlight the four stages of reform that we are focusing on. The first one is around the family responsibilities provisions of the act. My listening tour confirmed for me that there remain major barriers to supporting paid workers, both women and men, to balance their family and carer responsibilities with their paid working lives. Right now women continue to perform the bulk of unpaid work, yet enabling the equal sharing between women and men of responsibilities such as caring for our children, elderly parents and loved ones with a disability, is really at the heart of gender equality.

This balancing of paid and unpaid work is a problem that must be solved, both for the health of our working population and for business and the strength of our economy, if we are to ensure a sustainable workforce into the future. In our submission, in stage one we are proposing changes to the Sex Discrimination Act that will provide greater certainty for business and better protection from discrimination for people with family and carer responsibilities. These changes include prohibiting indirect discrimination as well as direct discrimination, and I will talk a bit more about that later, extending protection throughout the course of a person's employment rather than just on dismissal, as currently conceived under the act, and the third one will be about codifying the existing law to create a positive duty on employers to reasonably accommodate the

needs of people with family responsibilities. They are some of the first changes of reform in family responsibilities.

The second area that we are focusing on is around sexual harassment. My listening tour highlighted to me that it is an ongoing problem in many Australian workplaces. The definition of sexual harassment in the act has stood the test of time quite well. However, we are proposing a number of changes in this area that would extend the level of protection to classes of persons where protection under the act either is unclear currently, or insufficient. In that area, we are extending the level of protection or recommending it being extended to workers who are harassed by customers or clients, to students under the age of 16, and to students and staff regardless of whether the harasser comes from the same educational institution or not, which currently is one of the limitations. They are some of the recommendations relating to sexual harassment.

The third area for reform is around equal coverage for men and women. At the moment there are a number of ways in which the Sex Discrimination Act does not provide equal protection for both men and women. This is understandable, recognising that in 1984 the Sex Discrimination Act was enacted primarily to implement our international obligations under CEDAW. However, in 2008, we consider that to promote substantive gender equality in this country it is essential that the SDA applies equally for the benefit of both women and men, and we make recommendations on how to do that.

The fourth and final area I would like to address in my opening statement upon which we have made recommendations is around strengthening the powers of the Australian Human Rights Commission. We make a number of recommendations about strengthening the powers by, for example, giving the commission the power to certify special measures that will promote gender equality and by enabling the commissioner to initiate an investigation into cases involving major systemic breaches of the act, with the commission being able to commence legal action in the Federal Court as a last resort, if that breach continues or persists.

They are really the main areas of reform. Our submission is much more extensive than that, but I just wanted to highlight those four areas. In conclusion, the Sex Discrimination Act matters. It matters as a tool for driving systemic and cultural change which is needed if we are to live in a country where men and women enjoy true gender equality in their daily lives. The act has been in operation for nearly 25 years. Like most law, it is time to renew it to ensure that it continues to be an effective platform for progressing gender equality.

Australia has great potential to be a leader on the global stage here. It is my hope that our leadership will include championing national reforms to ensure that our women and men and our boys and girls achieve their maximum potential, irrespective of gender. I heard that aspiration coming through to me loud and clear as I travelled around Australia on the national listening tour. This inquiry is an exciting opportunity to ensure that we can progress in gender equality and that we do not disappoint the next generation of Australians. Thank you very much for accepting our submission and inviting us here to talk to us today.

CHAIR—Mr von Doussa, did you want to say anything?

Mr von Doussa—I do not want to add to that, Senator. We propose to split up different sections between us and speak to them, if that is convenient to you.

CHAIR—Sure. Do you want to commence with some general questions, or do you want to go through and deal with this in parts?

Senator BARNETT—I would like to ask some general questions. Thank you for your opening statement, Ms Broderick. Listening tours are very important and are well appreciated—certainly after an election that one has lost, or otherwise. Can you tell us the nature of the tour, the types of organisations you met on the tour, and the extensiveness of the tour?

Ms Broderick—We travelled to every state and territory. The reason I did so was really to answer the question of where we are with gender equality in 2008. I figured I could sit in a room and read a whole lot of reports or I could get out and actually speak to men and women, which is what I decided to do. We met very widely. We met with business groups and community groups. We went out to workplaces. We met with special interest groups. We consulted very widely and held public consultations. Not only did we go physically, we also did our listening tour over the internet, so we had a virtual listening tour whereby people could follow the major issues that were coming up as we travelled around, and post their stories on the blog. We collected a lot of high quality stories that way.

Out of that process came an agenda for reform not just from the listening tour but also that built on some of the work that the Human Rights Commission had previously done. We identified five areas that we would focus on, such as the area of driving down the incidence of sexual harassment, women in leadership, the issue of strengthening the laws, which this ties into well, balancing paid work and family, and particularly in that area the issues around a paid maternity leave scheme for Australia.

Senator BARNETT—You have a copy of your report there, have you?

Ms Broderick—Yes, I have a copy of the report that I can make available to you.

Senator BARNETT—That would be appreciated, thanks. Did you have public hearings in each state and territory?

Ms Broderick—We did public consultations, yes.

Senator BARNETT—Very good. You said you met employee groups. Did you meet church groups and religious organisations and different ones across the spectrum?

Ms Broderick—Yes. A number of them came to our public consultations. We also met with government and ministers. We met with the Minister for Women in every state.

Senator BARNETT—Very good.

Ms Broderick—We met with business groups as well.

Senator BARNETT—I do not know whether this is a general question or whether I can deal with it along the way—either way, I do not mind—but have you looked at the overseas experience in terms of these issues? I notice that you have recommended the option of an equality act in due course. I am interested in the overseas experience with respect to sex discrimination and gender equity issues. I do not know if you have considered that or fleshed that out. I am happy to deal with it now or later; I do not mind.

Ms Broderick—In relation to paid maternity leave we have, particularly what the overseas experience has been, but we have not specifically in relation to an equality act.

Ms Goldie—Senator, I might refer you to the submission that we prepared for the committee in which we included a number of annexures. I refer you to annexure C.

Senator BARNETT—What page is that?

Ms Goldie—It begins at page 290 of our lengthy submission. In that annexure we set out for you an overview of the jurisdiction that deals with sex discrimination in Canada, the United Kingdom and in New Zealand, which often are common comparators for us in Australia in the legislative environment, the national institutions and the kinds of power that, in 2008, the equivalent human rights commissions in those countries have available. That gives you some indication of some of the comparisons. As you go through some of our specific recommendations, where appropriate we refer to similar powers that, for example, already exist in other countries. That might assist you.

Senator BARNETT—Good. I look forward to having a look at that. As a quick summary, are there any key comparisons that you would like to share with us in regards to the UK, New Zealand and Canada?

Ms Goldie—Senator, I would suggest it might be useful for us to do that when we get to discuss the area of additional powers that we propose for the commission. We could explore that in relation to the specific suggestions we have there.

CHAIR—Ms Goldie, quite a number of submissions refer us to the United Kingdom's Equality Act and make reference to that as being a way to go, I suppose, in this country, although we have not examined why they believe that is the case. I noticed when reading them over the weekend that they refer quite substantially to what has happened in the UK.

Ms Goldie—The United Kingdom has been quite an extensive and well-resourced process of reform to move towards a gender equality duty. That is one of the reasons why we have certainly expressed a keenness to support an inquiry into a similar kind of arrangement at the federal level here in Australia, but we encourage that to be done through a more extended process over a three-year period to ensure that we get it right. As we know it is not always a simple matter of picking up a model from another country and inserting it into the Australian context.

We need to look at how that would work in the light of existing arrangements we have—for example, the Equal Opportunity for Women in the Workplace Agency is a unique feature of the Australian setting—and how we would move towards building on the arrangements we already have. We have suggested an extended process of consultation where we would have a greater

opportunity to draw on the experience of the UK. I think they are still learning from the reforms they have put in place there.

Senator BARNETT—Have you done an analysis of the US and compared us with the US?

Ms Goldie—In the light of the time frame that was available to us for the preparation of our submission, we decided to focus on Canada, the United Kingdom and New Zealand. If we had a more extensive process in terms of the equality act, of course we would be keen to look at some other jurisdictions such as the United States.

CHAIR—We might better use our time if we go to your executive summary on page 9, rather than your 54 recommendations, and have some dialogue more than a question and answer session so that you can take us through your dot points. That would better identify the issues in *Hansard* for us and perhaps make it a bit easier to crystallise where you, as a pre-eminent body, think some changes could be made. Your first dot point is 'Improve the objects and interpretation of the Act to comply with international obligations', and there are some submissions that reflect the belief that at this point in time the objects of the act do not reflect what we have signed up to internationally. Would that be your intent here?

Ms Broderick—That is right, Senator. We have two main issues with the way the objects of the act are currently drafted. We are concerned that they do not fully give effect to our obligations under CEDAW. The main reason for that is, as currently stipulated in section 3 of the act, we have a limitation which is 'so far as is possible'. When we talk about eliminating discrimination, we say 'so far as is possible', whereas under CEDAW it is a total and general prohibition. We think that the words 'so far as is possible' limit the obligations we have under CEDAW. We have made a recommendation that we remove those words. That is recommendation No. 2, which states:

Amend the objects of the SDA to remove 'so far as is possible' and fully reflect the obligations of CEDAW.

The other issue is to maybe insert an express requirement that the act should be interpreted, not just in accordance with CEDAW but also with the ICCPR and the ILO, particularly ILO 156, which relates to discrimination on the basis of family responsibilities, and the ICESCR, which is the economic, social and cultural rights convention. Part of the reason for that is that that would assist in extending the coverage of this particular act to men. They are the two main issues, unless my colleague has anything to add to that.

Mr Hely—The only other point we make in the submission is about also referring in the object of the act to achieving substantive equality to make it clear in the minds of the courts that we are not just dealing with formal equality, about treating people identically, but about achieving something more than that, which is picking up the threads of what CEDAW is seeking to achieve.

CHAIR—When you say we should reflect the international obligations under the ICCPR and ILO conventions, in what way does that benefit equality between men and women? Can you give us an example of that?

Ms Broderick—For example, if those other international obligations were picked up, when we look at 'family responsibilities', which is currently quite limited for men, it would allow us to give greater protection to men on the basis of family responsibilities. We believe that that is important in progressing gender equality in Australia. At the minute, there are some limitations around that.

Mr Hely—Section 9 of the SDA draws on all the available heads of Commonwealth legislative power to give the SDA its broadest possible effect as far as it is constitutionally possible to do so. All of those heads of power are expressed in gender neutral terms, so they apply equally to men and women. If a claim is against a corporation, a man has protection equal to that of a woman. The only exception to that is section 9 (10), and essentially that gives effect to the external affairs power. In relying on the external affairs power, the government has given effect only to CEDAW.

Because CEDAW is expressed for the protection of women only, if you are in an area where no other head of constitutional legislative power applies, such as in an unincorporated body or a state government, a woman will have protection because CEDAW will give her protection, whereas a man will not. It is only in those small areas, but they can be significant areas.

Senator BARNETT—What is your solution to that?

Mr Hely—It would be looking at amending section 9 subsection 10 so that instead of relying on the external affairs power just to give effect to CEDAW, it would be to give effect to our other relevant international obligations in relation to discrimination, such as ICCPR, ICESCR and the ILO conventions.

Senator BARNETT—Do you think we need to do that legally and constitutionally to make it valid so that this law can apply appropriately to men?

Mr Hely—That is correct.

Ms Broderick—Senator, when you look at the definition of 'convention' under this act, it means CEDAW, basically, so it does not pick up the other international conventions.

Senator BARNETT—If we pick up the other international conventions, do you think there is adequate coverage in their terms and conditions that would make it possible for this act to then cover men?

Mr Hely—Yes.

Senator BARNETT—Is that a 'yes'?

Mr Hely—Yes, it is. ICCPR has a provision which deals with discrimination and it is in non-gender specific terms, so it applies equally to men as it does to women.

Mr von Doussa—Senator, it is only in that fine area where you are dealing with aspects of the community that are not covered by other heads of constitutional power, such as the corporations

power. It is dealing with individuals, unincorporated associations and so on, but there is quite a significant group of people in the community who are not caught under CEDAW.

Senator BARNETT—Absolutely: community groups, volunteer organisations. Yes, indeed.

Ms Broderick—Yes, Senator. That is one of the things we will look at in coverage.

Mr Hely—The provision that we have recommended it be modelled on is the equivalent existing provision under the DDA, the Disability Discrimination Act, which works in those sorts of terms.

CHAIR—Let us move on to your definition of direct discrimination.

Mr Hely—The first dot point there is referring to the issue of moving away from having a comparator. The object of that recommendation is aimed at making our definition of direct discrimination simpler and clearer. In our view, what direct discrimination boils down to is whether or not a person has been treated unfavourably—in other words, they have been subjected to a detriment—because of the fact that they are a woman or a man, or pregnant, or have family responsibilities or what have you, or because of the fact that they have a characteristic that generally appertains or is imputed to persons of that particular group.

The focus of inquiry is really on causation—about whether or not there has been a detriment—because of the fact of membership of a relevant group or having relevant characteristics. In our view, that is what the definition should reflect. Engaging in a hypothetical comparative exercise as to how someone else may or may not have been treated in same or similar circumstances is often a very useful analytical tool for answering that question of causation. But in our view, including it as a separate element in the definition as a substantive positive duty of an applicant to establish as a question of fact can involve a very artificial distraction from that central inquiry.

It can also involve engaging in very abstract and distracting exercises which can take the focus away from what really should be the central issue. To give an example, the Sex Discrimination Act clarifies that breastfeeding is a characteristic appertaining to women, but if there is a claim of discrimination on the basis of breastfeeding, the comparison is with a man, in the same or similar circumstances. There just is not really a fair comparison. Men do not breastfeed and they do not do anything that is even remotely similar to breastfeeding. Yet a claim cannot succeed unless the applicant can positively establish that there is a comparator so that this comparative exercise can be undertaken.

The model which we are proposing is not anything new; it is simply to adopt the definition which applies in the ACT and has applied there for about 17 years. It is a much simpler definition and it focuses on that causation element to say, 'Has the person been treated unfavourably because of the fact that they are a woman or breastfeeding or pregnant', or what have you. The experience, as I understand it, shows that that comparative exercise is still engaged in. The courts recognise that that can be a useful tool, but its usefulness will vary from case to case. In some cases there will be a very clear parallel that can be drawn, but in other cases there just will not be, or in other cases there might be a range of comparators to which

regard can be had. That comparative exercise can still be engaged in by the courts, but it is not a rigid threshold requirement that needs to be established in every case.

Mr von Doussa—Removing the comparator would give us a definition that would be fairly similar to the one in the Racial Discrimination Act that has not got a comparator in it. It is not a novel idea.

CHAIR—It is not in the RDA, but it is in the Sex Discrimination Act.

Ms Broderick—That is right, and it leads to the creation of artificial comparators.

Mr Hely—Even within the SDA itself, the test which is applied for victimisation, for example, does not use the comparator test. It uses the same sort of test that applies in the ACT for discrimination. It is a simpler definition to apply and to understand. It is easier for litigants and it is easier for the courts and for all parties to know what is expected of them and what they can expect.

Senator BARNETT—Is it in the DDA?

Mr Hely—No, the DDA follows the same model on this as the SDA does.

Mr von Doussa—There is a comparator in the DDA.

Senator BARNETT—That is what I was asking.

Ms Broderick—Yes.

Senator BARNETT—The implications of removing the so-called comparator, as you refer to it, lowers the burden of proof. Is that correct? Secondly, it imposes a form of strict liability so that it is evidently easier for the complainant to achieve success.

Mr Hely—Can I deal with our first point? I do not think it changes the burden of proof. The burden of proof would stay the same in all cases under the SDA. In relation to whether or not it eases that burden for a complainant, I think that the central question is always going to be whether or not the treatment has been based on their attribute. The difficulty that confronts applicants in most cases is how they prove that the treatment to which they have been subjected was because of their sex, or what have you.

That difficulty is not changed in this. What it ensures is that the courts are focusing on that as being the proper question. That is what the court is there to decide—whether or not the treatment they have complained of is because of their pregnancy or their sex or marital status or what have you and not for some other reason. I do not think it would have the effect to which you refer.

Senator BARNETT—I will take up your example of breastfeeding. I am a big fan of breastfeeding; I have three kids and so on. Take the scenario where we are sitting in a room like this at, for example, a council meeting or some sort of meeting, the mother is breastfeeding, the baby is screaming its head off, and the person next to the mother cannot hear and cannot concentrate. That person makes a complaint and says, ‘Look, we can’t have an orderly meeting.

It is very difficult to comply with our responsibilities as councillors', or whatever. What happens in a situation like that? What would you say in that situation?

Mr Hely—The courts, in looking at the causation question, look at what they refer to as the true basis for the relevant action or treatment. In the example you have just given, I think that first of all the court would be still be at liberty to apply a comparative analysis and say, 'What would have been the situation where it was a screaming child for some other reason, such as when children might be screaming unrelated to breastfeeding?' The court might say, 'Here the true basis for this treatment has nothing to do with the fact that she is breastfeeding. It is because she has a screaming child, and that's what led to this treatment.' I do not think it necessarily leads to strict liability in the sense just because you have a relevant attribute, which is breastfeeding, when you were subjected to a detriment. That is still not enough; you still have to establish that causal link between the attribute or characteristic and the treatment you have received.

CHAIR—We might move on because I am mindful of the time. Does that cover your dot points over the discrimination area, do you think? Do you want to talk about indirect discrimination?

Mr Hely—The other point that is worth mentioning in relation to direct discrimination is about looking at the onus of proof on applicants in establishing the causation element. The courts have long acknowledged to the highest level that this is the significant difficulty for applicants—establishing the causal link. The reason for that difficulty is that it requires an applicant to positively prove essentially what was in the mind of the respondent, which is a very difficult thing to do and often applicants are reliant solely on inferences.

In our submission we have noted that this is a significant issue that has been raised in the courts and by commentators in Australia and elsewhere. We put forward three options for consideration. The first option is to give guidance under the SDA on relevant common law principles that already apply. It is not effectively changing the law. It would just be reflecting what the common law principles are about drawing adverse inferences when a party has the means to put evidence before the court and they have failed to do so.

The second option is drawing on the experience in the UK and throughout Europe. That is a shifting evidential onus whereby once an applicant essentially can establish a prima facie case that there is a relationship between their attribute and the treatment, the evidential onus shifts to the respondent to explain why they acted as they did. The third option reflects the current position under the workplace relations act in dealing with these sorts of issues, which is a complete reversal of onus. We have put up those three options which all draw on existing provisions that are out there and deal with this specific issue.

I will move on to the next dot point, which is in relation to indirect discrimination. Indirect discrimination deals with a situation where people essentially are treated the same, but where the treatment has a disproportionately adverse impact on particular people because of their being a member of a relevant group. What cases often turn on in indirect discrimination cases is whether the relevant requirement, condition or practice is reasonable. Reasonableness is the relevant threshold.

In the submission we have referred to the experience overseas and comments that have been made by commentators in this area. We question whether or not reasonableness is an appropriate standard in this area. The SDA draws on Australia's human rights obligations and, as such, effectively that is a form of protection of human rights. International jurisprudence on limitations of human rights establishes that for a limitation to be justified, it needs to be something more than just reasonable. It needs to be pursuant to a legitimate object and it needs to be proportionate to the achievement of that object.

In our view, it is time to reconsider whether or not reasonableness hits the mark on that. We have referred to the fact that the equivalent standard in dealing with indirect discrimination in the UK, Canada, the US and in the EU uses a higher standard that draws on human rights principles of proportionality and necessity.

CHAIR—The next one is pretty obvious, 'Specify breastfeeding as a separate protected ground'. Would this apply, for example, in the case of a woman breastfeeding in a food court in a shopping square?

Ms Broderick—That is right, in the provision of goods or services.

CHAIR—She could not be asked to leave simply because she was breastfeeding. Is that the case?

Ms Broderick—That is right. The reason that we are saying it needs to come up a level and be the same as the other protected attributes is really for the avoidance of any doubt—it is a bit unclear because of the comparator problem that Brook has been talking about—but it is also for educative purposes and to bring us into alignment with a lot of the state and territory acts that have breastfeeding as a separate protected ground.

Senator BARNETT—How do you respond to the screaming baby scenario I mentioned earlier?

Ms Broderick—That would not change because the same answer that Brook gave before would apply. It would just be that there is a prohibition on discrimination against women who are breastfeeding. The answer would be the same.

Mr Hely—The way the SDA is currently drafted, it would seem that the intent is that breastfeeding discrimination is already covered. It is just that it is in a more indirect way that you get there. What we are suggesting is that it should just be put up front and made clear that breastfeeding is a protected attribute.

CHAIR—I notice that SCAG has set up a group to look at harmonisation of discrimination laws across states, territories and the Commonwealth, but I assume you are recommending this because it would bring us up to the level of what states and territories have. You could do this, regardless of that process. Is that right?

Ms Broderick—That is right. It would be amending the federal act so that people, irrespective of where they live in Australia, would have this as a base level protection.

CHAIR—The next dot point is:

Remove discriminatory effects of the current definition of 'marital status' by renaming as 'couple status' and expanding the definition of 'de facto'.

We now have an omnibus bill that will change the Acts Interpretation Act. Can you tell us how that fits in with the exercise we are currently involved in?

Ms Goldie—Senator, you would be aware that the SDA has been included in the omnibus bill as one of the 100-odd pieces of federal legislation where there exists particular provisions that do not provide for equal treatment for couples, regardless of the sexuality of that couple. Our recommendations reflect the underlying principle that is being pursued through that particular reform. We understand that the existing bill addresses the area of unequal treatment in the area of family responsibilities in relation to de facto couples, but we are aware that at this time our recommendation in relation to marital status under the SDA has not been addressed.

We are keen to ensure that that particular area of unequal treatment is also covered as part of the reform process. Whether it is picked up in the current work that is being done through the omnibus legislation or whether it is addressed to this inquiry, we are very keen to see that also covered.

CHAIR—This recommendation would complement what is happening with the omnibus bill. Is that correct? It is not in conflict with it. That is what I want to grapple with.

Ms Goldie—At the moment, on our reading of the omnibus bill, it is clear that our particular recommendation about addressing marital status under the SDA has not been covered by the omnibus bill. We are keen for that to be picked up as well.

Ms Broderick—The family responsibilities part of it has been.

Senator BARNETT—Say that again. You are saying that it has not been picked up under the omnibus bill.

Ms Goldie—No, it has not at this time.

Senator BARNETT—The Sex Discrimination Act?

Ms Goldie—No.

Ms Broderick—No, that is not exactly it. The family responsibilities provisions have been picked up. Therefore, when we talk about family responsibilities, we talk about caring for same-sex partners. That part of it is picked up in the omnibus, but the marital status part of it is not.

Ms Goldie—That is right.

Senator BARNETT—And you think it should be?

Ms Goldie—Yes.

Ms Broderick—Yes.

Ms Goldie—The marital status provision at the moment applies to people who are in a de facto relationship, but only if you are in an opposite sex relationship. Our recommendation is simply to extend that protection to people, regardless of whether or not it is a same-sex relationship or an opposite sex relationship.

CHAIR—You will also make a submission to us in respect of that for our inquiry into that, will you not?

Ms Goldie—Yes, we will.

Senator BARNETT—But are you seeking to remove the words 'marital status' and replace them with the words 'couple status' relationship?

Ms Goldie—Yes, that is right. That would be consistent with the language that is being pursued through the current federal reforms.

Senator FEENEY—Where a 'couple' relationship is the definition in the same-sex provision.

Ms Goldie—Yes.

Senator BARNETT—Is the marriage relationship different, in your view, to a de facto relationship or any other relationship?

Ms Goldie—Senator, our view is that the effect of our proposed recommendation would not be a way to pursue protection from discrimination on the grounds of sexuality. What we are proposing here is where there is an example of a person being discriminated against because they are in a relationship. For example, an employer takes the view that, because you are now in a relationship, you will be less likely to be prepared to travel and somehow you do not get a promotion because you are now seen as being in a 'couple' relationship and therefore you are not prepared to be as mobile as a single person would be. We want to ensure that a person is protected from that kind of discrimination, whether or not they are in a same-sex relationship.

Senator BARNETT—That was not my question. Nevertheless, I accept what you are saying and where you are coming from. But that was not my question.

Ms Goldie—I am sorry, Senator. Could you repeat the question?

Senator BARNETT—What is the difference, from your perspective, between a marriage relationship and a de facto or other type of relationship? Is there any difference?

Ms Goldie—For the purposes of this particular provision?

Senator BARNETT—No. I am asking as a general question: What is the difference between a marriage relationship and a de facto relationship, or other type of relationship?

Ms Goldie—The marriage relationship is obviously one where somebody has been able to access the ceremony under the Marriage Act, and the question is whether you are in a de facto relationship. We would say that for the purposes of protection under the SDA, it should not matter whether or not it is a same-sex relationship or an opposite sex relationship.

Senator FEENEY—Dare I say that this legislation makes no judgement about the respective merits or otherwise of marriage versus de facto, but rather just operates to remove discrimination.

Senator BARNETT—One might say that it does by lumping together those in a marriage relationship with those in a de facto relationship or other type of relationship under the one term called a 'couple' relationship.

Senator FEENEY—Which would then by consistent with our same-sex bill.

Ms Goldie—Yes, that is right.

Senator BARNETT—Which has not been reviewed, commented on or reported on by this committee. Correct?

Mr von Doussa—Senator, at the moment there is a definition of 'marital status' in the Sex Discrimination Act. It includes de facto relationships, but they have to be de facto relationships between opposite sex people. It is the opposite sex part at which we are really aiming this amendment.

CHAIR—Redefining 'marital status' to 'couple status' expands the definition rather than devalues the marital status. Is that correct?

Mr von Doussa—Yes.

CHAIR—So 'couple status' would now include three sorts of couples rather than two. It is not a devaluing of the marital status, but an expansion of couple arrangements. Is that correct?

Ms Goldie—That is right.

CHAIR—Is that a fair summary?

Ms Goldie—That is right. The protection also extends if you are treated adversely because you are single, rather than that you are in a relationship.

CHAIR—Let us move on to:

Increase protection from discrimination on the grounds of family and carer responsibilities and include a positive duty.

I think that is fairly obvious, but just quickly give us an example of that. I am mindful of the time.

Ms Broderick—Just quickly, at the minute the act is limited in terms of the protection from discrimination on the grounds of family responsibilities. It is limited in two ways: it talks only about direct discrimination, and we know that most discrimination that occurs in this area is the result of acts or requirements which, on their face, are neutral, because they equate everyone equally, but they have a disproportionate impact on people with family responsibilities. That is the first limitation, and that is direct only, not indirect as well.

The second is that you can bring an action under the family responsibilities provision only if you are dismissed or sacked, rather than throughout the duration of your employment. Women can get around that limitation because they can bring an indirect sex discrimination complaint. Judicial notice is taken of the fact that women have caring responsibilities for children—not so much that they have responsibilities for older people, but that they have caring responsibilities for children. No judicial notice is taken of men have caring responsibilities for young children.

The limitations in the family responsibilities provision, as are currently set out, really have a greater negative impact on men than they do on women because women can bring the treatment under indirect sex discrimination. What we are saying here is that we need to extend protection, not just for direct discrimination but also indirect discrimination. The other thing is that it should not just be dismissal but should be throughout the duration of employment. The final recommendation is that we move to a positive duty to reasonably accommodate. That seeks reasonable accommodation of people with family responsibilities.

CHAIR—Okay. We have gone through coverage for men and women.

Senator BARNETT—On this positive duty to eliminate discrimination, are we talking about quotas?

Ms Broderick—No. What we are talking about there is that an employer cannot unreasonably refuse to accommodate family responsibilities of both men and women. It is not about quotas. It is really about ensuring that people with family responsibilities and their reasonable requests are considered. I do not know whether anyone wants to add anything about positive duty.

Mr von Doussa—Duty already exists in relation to women with childcare responsibilities, but it arises under the sex discrimination provisions because women have primary obligations in this community to look after children, so there is a differential between men and women. But what we are seeking to do is put that same sort of positive obligation to take reasonable steps to accommodate, or make provision for, the needs of a particular employee, male or female, in caring not only for children, but in caring for other members of the family as well.

Ms Broderick—And to men.

Mr von Doussa—Yes, and to men; caring for men and women, as well as caring for children or old people or disabled members of the home.

Mr Hely—In relation to coverage, the way that the act operates is that it does not just say it is unlawful to discriminate in anything. It says it is unlawful to discriminate in particular areas of public life. It puts out a bit of a patchwork of provisions to ensure that, in the relevant areas of public life such as employment, goods and services and education, there is no discrimination.

The recommendations we have made in relation to coverage is ensuring that there are not gaps in that coverage. For example, in relation to volunteers, currently their protection is unclear because they need to be able to establish that they are an employee before they are able to be protected. If they are some form of volunteer, that might be difficult for them. We think that their need for protection is just as great, but currently their protection is unclear, so that should be clarified.

CHAIR—Currently, Mr Hely, if you are a volunteer and you are being even sexually harassed, you cannot take action under this act.

Mr Hely—That is right, potentially not. It would depend on whether or not you were able to establish that you fall within the categorisation of an employee. If you are attending one afternoon a week at the school tuckshop to help out, you might have some difficulty in convincing a court that you fall within that classic employment relationship. We are saying that you should be entitled to protection under the SDA just as much as is someone who is being paid.

Likewise at the moment there is an exclusion in relation to discrimination in employment and sexual harassment for state governments and state instrumentalities. That is something that is quite unique in the federal discrimination acts. None of the other federal discrimination acts have it. We are suggesting that that should be removed to give those employees protection equal to that of any other employee.

Likewise because independent contractors are not an employee, they can fall outside the provisions of the act, even though, for example, if they are on a work site and they might be subjected to discrimination or sexual harassment. Because they do not have that employment relationship, they might be left without a remedy because they might fall into the gap.

Senator FEENEY—Can you tell us anything about the incidence of that occurring?

Mr Hely—At the moment, given that they fall outside the act, we have not had many cases that have been considered. In fact, I am not aware of any cases at all have been considered. Certainly in relation to state government employees, you would not even get through the gate because the act expressly does not apply to you. Anecdotally we are told by our complaints department that we get a lot of complaints that are made particularly in relation to independent contractors because the workforce is changing.

There is a greater contracting out of roles. When their complaint is made, we are left with the situation of not being able to say specifically whether they are covered or not. All we can say is that their coverage is unclear, but that in our view they should be covered. The act should clarify that. I think they would be in dangerous territory if they went before the courts on that.

Senator FEENEY—Has there been any litigation that has gone through the threshold of establishing an employment relationship?

Mr Hely—In the context of independent contractors and under the Sex Discrimination Act, not that I am aware of. The other coverage area we have referred to is in relation to partnerships. At the moment there is a limitation on the size of partnerships before the relevant discrimination

provisions kick in, and it is a partnership of six or more. We have suggested that that limitation is no longer required.

CHAIR—Business partnerships are they?

Mr Hely—Yes.

Senator BARNETT—What page is that on?

Ms Goldie—Page 123.

Ms Broderick—Recommendation 24. Part of our reasoning behind that is that we know women are working more and more in small business, and therefore it seems to have an artificial limitation of six. It does not make sense.

Senator FEENEY—Can you tell us anything about the origin of that limitation?

Mr Hely—I am not aware of it.

CHAIR—And why the magic number six came up?

Ms Broderick—No, I am not sure.

Mr Hely—Companies do not have any limitation. You can be a sole trader or a two-person company and you will still be covered. Likewise partnerships are covered in other aspects of the act. This limitation of numbers applies in discrimination as to who is made a partner, or is refused benefits of a partner and that sort of thing. In our view it just no longer has relevance and should be removed.

Senator BARNETT—Your recommendation is to remove that reference altogether and just impose personal liability on each individual person?

Mr Hely—The liability currently applies to the partnership. At the moment the provision says that a partnership has to have six or more partners. We are saying just get rid of that six or more partners part. There are some other minor points we make about coverage. They relate to tightening up the provisions and making sure that they are all covered.

CHAIR—We will move on to sexual harassment.

Ms Broderick—As I said in my introduction, it was a key theme that was coming through the listening tour. A lot of women wanted to talk to me about that. When we looked at it, the definition has stood the test of time, despite the fact that sexual harassment has a new frontier in terms of technology—text messaging and social networking sites. We are keen to extend the coverage of protection, firstly to protect workers who are harassed by customers or clients. At the minute, if I am a customer and I am harassed by a worker, I have protection; but if I am a worker and the client or customer harasses me, there is no protection for me as a worker. We make recommendations relating to that.

A second area is in schools. At the minute under the act, the harasser needs to be an adult student, which is 16 years or over. But if I harass two students, one who is 16 and one who is 15 years and 9 months, the 16-year-old victim has protection whereas the 15 years and 9 months year old student does not have protection. We are saying we should remove the age limit for the victim. We are not exactly sure why the victim has an age limit. We looked at it, but we could not really see anything.

CHAIR—If I am 13 and I am being bullied through the internet or harassed—

Ms Broderick—Currently you do not have any protection under the Sex Discrimination Act. We can understand why there was an age limit for the harasser at 16. That is about understanding that actions have consequences and having responsibility, but we cannot understand why there is that provision.

Senator BARNETT—Does that still apply?

Ms Broderick—That is still there, yes. We are not recommending any change to that, but we are recommending a change to the age of the victim—that there not be a stipulated age.

Senator FEENEY—Might it have been because a younger victim would have recourse to criminal law rather than SDA?

Mr Hely—Not all sexual harassment meets the threshold of being criminal. It is a much broader spectrum of conduct.

Ms Broderick—The other thing around schools is that there is currently a requirement that the harasser must be at the same educational institution as the victim. If I go to the school sports carnival and a lot of neighbouring schools are there and I am harassed by a student or a teacher from another school, then I do not have any protection. We are saying that we should remove the requirement that the harasser must be at the same educational institution as the victim.

Senator BARNETT—Can I just get something clear in my head? This is only in regard to sexual harassment.

Ms Broderick—Yes.

Senator BARNETT—Surely we want to have a system that applies to harassment across the board and has laws that protect kids or whoever is being harassed? What we are doing or looking at is that you are developing a system or making recommendations regarding sexual harassment, which is different to harassment generally.

Ms Broderick—You are right, Senator. It is different to harassment generally. It is only sexual harassment that is provided for in the act. It is quite well defined in the act as unwanted conduct of a sexual nature. It is not a broader bullying or harassment. Presumably there are other rights of action.

Ms Goldie—Yes, for general conduct.

Ms Broderick—Already there would be potentially other remedies in terms of occupational health and safety, or in terms of duty of care obligations. You would have alternative ways in which you could seek redress. The Sex Discrimination Act deals specifically with sexual harassment. We are keen to ensure that the coverage is adequate in that area.

Senator BARNETT—Sure. The question that I think others would ask is: Would the remedies that are available to others when it comes to harassment apply? I assume you believe they are inadequate or substandard when it comes to sexual harassment. Why should the same laws not apply with regard to harassment across the board? You are creating a different level of burden of proof or whatever with respect to sexual harassment.

Ms Goldie—The Sex Discrimination Act deals with sexual harassment because it is a form of sex based discrimination. This is a particular piece of legislation that deals with that particular aspect of inappropriate treatment. We are not making any submissions here in terms of whether or not there is a need for reform in other areas of the law that might deal more generally with harassment on different kinds of grounds.

Senator BARNETT—Sure. That will be an issue for us. What does the DDA say about that? What does the Racial Discrimination Act say about harassment?

Mr Hely—The DDA has specific provisions that deal with harassment on the basis of having a disability. They are covered under the DDA.

Senator BARNETT—Are they consistent with what you are proposing, or are they different?

Mr Hely—They are a little bit different because sexual harassment is not just harassment. It is a specific form of harassment. Under the DDA, the harassment provisions are broader. They relate to if you are harassed because you have a disability. As far as I am aware the provisions have not been used very much generally because, if you can show that you are being harassed because of your disability, you will be able to show that you are being discriminated against because of your disability. The harassment is the detriment and the causal element is there as well.

I know that the SDA does not deal with that specifically. To the extent that you can show that you are being harassed because of the fact that you are female, or you are pregnant, or what have you, that would probably be covered under the discrimination provisions. To the extent that the harassment has no gender element at all and is just children bullying, that would currently fall outside the act.

Senator BARNETT—And the Racial Discrimination Act?

Mr Hely—Likewise the Racial Discrimination Act has specific racial vilification and racial hatred types of provisions, but again there has to be a racial element to it. It is not enough just to show that you were being bullied.

Senator BARNETT—I hope you understand where we are coming from as legislators. We are hopefully trying to come up with some sort of consistent approach across the board that makes sense and says, 'Here's a rule and a set of rules about disability, for sex, for race, and then

this is a set of rules for everything else with respect to harassment.' This is the challenge we have.

CHAIR—We will move on quickly to exemptions. I am conscious that we have probably only got about 10 minutes remaining.

Ms Broderick—In relation to the exemptions, there are currently 15 permanent exemptions under the act. Some permanent exemptions promote substantial gender equality by allowing for differential treatment. If we look at section 31 in the act, it allows the granting of privileges in connection with pregnancy or childbirth. For example, organisations can roll out paid maternity leave schemes, and that is not seen to be discriminatory under the act. But there are other exemptions which place a limitation on the human right to gender equality. There has been some criticism of the act for having the number of exemptions it has.

Given that it was a reasonably short period of time in which to put our submission together, what we are saying is that we are recommending that we have a three-year sunset clause on all the permanent exemptions during which time there will be full consultation. We will have the voices of various stakeholders heard and a determination will be made as to whether or not these exemptions should remain as is, should be narrowed, or should be removed.

In a lot of the exemptions, the right to equality is inherently qualified to the extent that it is necessary to strike an appropriate balance with another human right. We think that just removing all the permanent exemptions would be a significant change to the federal equality laws. The fact is that all states and territories have some level of exemptions. We are recommending that there be an examination so that there can be good consultation and good consideration as to whether they should remain in their existing form.

Senator BARNETT—Can I just say quickly on that that I just find it bordering on bizarre that you would have a permanent exemption and you are recommending a sunset clause which would remove that after three years. That is my understanding from reading your submission. How could it be permanent? It seems to be a tautology.

Ms Broderick—What we are saying is that, with those exemptions, yes, there should be a sunset clause. You are right, Senator. But during that time, there should be an examination as to whether it remains in its current form or not.

Senator BARNETT—Why can you not have an examination without putting a sunset clause on it? If you want an examination, why do you not recommend examination? You are recommending a sunset clause. I assume from that that you mean that they disappear in three years.

Ms Broderick—One of the reasons we are doing that is there have already been three different reports into the exemptions. Various recommendations have been made. That was 14 years ago. We are saying that, nearly 25 years later, we should have a full examination of this and, failing that, that they would be removed.

Senator BARNETT—That is okay. We can differ on those things. It is referred to as permanent, so you would probably want to remove the word 'permanent' if you did not support the exemption as being permanent. Nevertheless, I think we can move on.

CHAIR—We could further clarify that through further examination.

Senator BARNETT—Sure.

CHAIR—The next area is complaints handling. Your recommendations are:

Extend the time limit for commencing actions in the Federal Court or Federal Magistrates Court.

Enable public interest organisations to commence actions for breaches under the Sex Discrimination Act.

Mr von Doussa—The complaints issue is dealt with in section 13. There is a lot of information between pages 180 and 203 dealing with the role that the complaints process plays. That is very important in the whole structure of the Sex Discrimination Act. You will see coming through that a general plea for additional resources to enable that work to be maintained and continued.

You are aware of our funding issues, which you will find expressed in a number of paragraphs in this part of the submission. But it is very important to recognise that funding and resources are important. When we get onto dealing with inquiries and so on in a minute, while there were some avenues that could be pursued which would be very beneficial to promoting gender equality, the commission cannot really do those things, unless it has the financial ability to do it.

CHAIR—What is the current time limit?

Mr von Doussa—The time limit is 28 days. You will remember that complaints are made, processed through the commission, and will come to an end, if they are not conciliated, by a notice of termination. There are 28 days from receipt of the notice of termination to commence the court proceedings.

CHAIR—And that is too short?

Mr von Doussa—The reality is that there is time spent while matters are in the post and so on, and people get a notice with a date on it and do not realise that time is running from when they get it. They panic and they try to get advice. To get the proceedings done, 28 days just seems a bit short to us, and we have suggested increasing it to 60.

CHAIR—Sure.

Mr von Doussa—That is a fairly straightforward amendment. The standing to bring complaints is dealt with from pages 204 to 209. That is a more significant thing. At the moment a complaint can be brought by an individual who is aggrieved or by some body or an organisation on behalf of that person, and the commission will look at the complaint. But if it is not resolved when it comes to the point of issuing proceedings, it is only the aggrieved person who can issue the proceedings.

CHAIR—Not the organisation.

Mr von Doussa—Not the organisation. There is no room for interest groups that have a real interest in pursuing equality issues to take up the matter at the litigation level. We have given a reference on page 205 to a case of Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council, which just demonstrates the point. A special interest group made the complaint. It went through the commission. They then tried to take it to court and were told that they did not have the standing to do it. It is just a question of extending the standing.

The next part of the submission is section 14. On page 210 there is a summary of our position. The powers that the commission already has to carry out policy development, education, research, submissions, and public awareness, et cetera, are adequate, but they are dependent upon funding. We get back to that same issue. However, we then make a number of suggestions that will improve on what is an adequate situation and make it considerably better.

The first thing we have suggested on page 224 is increasing the inquiry power. The functions are usefully set out on pages 214 and 215. There are certain powers in the Sex Discrimination Act, but they are powers that vest in the commission, not in the commissioner.

CHAIR—Yes, I see.

Mr von Doussa—The commission has additional powers under the Human Rights and Equal Opportunity Act. The critical one that we feel needs to be extended more into the Sex Discrimination Act area is the power in section 11(1)(f) of the Human Rights and Equal Opportunity Act, which is the power to make inquiries into breaches of human rights. On the face of it, that seems to be quite a wide power, but when you look at the act, it is limited to acts or practices of the Commonwealth. There is not a general power to conduct inquiries independent of a complaint into many of the broad public issues that are covered by the Sex Discrimination Act. For example, we could not conduct an inquiry into the practice of leasing agents for rental properties. It is simply not an act or practice of the Commonwealth.

The suggestion is to examine that and extend the inquiry power so that, under the Sex Discrimination Act, action could be taken to deal with systemic issues, even when there is not an individual complaint. The process that we have suggested is that the commissioner, not the commission, be given power to initiate an inquiry, to investigate it, to try to settle it, even on the terms of undertakings and so on, and maybe even on enforceable undertakings.

CHAIR—How would a commissioner determine what would be initiated? What would be a trigger for the Sex Discrimination Commissioner to say, ‘I think there’s a problem here. We need to look at it as a body.’

Mr von Doussa—We get a lot of inquiries that do not turn into complaints. Organisations will come to us and say that there is a problem. Listening tours and things like that bring to our attention that there will be issues that maybe require further investigation. Our own consultations can produce something. But absent a complaint, our powers are limited.

CHAIR—I see.

Mr von Doussa—What is suggested is that the commissioner have the power to pick up systemic issues and try to resolve them, but, if resolution proves impossible, the commissioner then brings the issue to the commission which makes a decision to take it to the court. In those situations we would not go through the normal conciliation process. There would be conflicts and so on.

Senator FEENEY—Why does the commission not conduct itself in that manner in other spheres of its activity where it has the power to initiate inquiries on its motion?

Mr von Doussa—We have done numbers of major inquiries like the same-sex inquiry, *Bringing them home: the stolen children report*, and those sorts of things. There is a process of consultation, an inquiry, an examination, and then a report to parliament. But where we are dealing with actual discrimination issues and where, if an individual made the complaint, you could go to court, we are trying to give a wider power to initiate investigations, and ultimately get it to court, if it cannot be resolved, to get an injunctive order or some order directing that there be put in place training programs, action plans in a particular industry and so on. That is what is being suggested there.

Certifying special measures is an issue we have raised. At the moment there are provisions in the act for special measures to be taken. If a complaint is made that there is discrimination because of a special measure, it is up to the respondent to establish that it was a special measure that meets the requirements of section 11(1), and then it is a defence. It seems to us that to give certainty, not only in this act but in others also. We ought to have the power to be able to say that if someone comes to us with a proposal or action plan, we can say, 'This is sufficient to constitute a special measure'; and then, by reason of certification from the commission, those concerned would know that that is a defence, and they could continue to act on that.

We have made suggestions about intervening and amicus curiae issues there. Really what we are suggesting is that at the moment we have a power which enables us to apply to a court to appear as amicus curiae or to intervene, but it is dependent upon the court accepting us. The Victorian legislation gives a vested right to appear. We are suggesting that this should be upgraded so that we have a right to appear, or the commissioners have a right to appear as amicus curiae. There is an incidental point that, where the commissioners appear as amicus curiae, they can appear as such at the trial but they cannot appear as such if there is an appeal. Really their power ought to be extended to cover that.

Finally on page 240 in recommendation No. 51, we suggest that there be an independent monitoring and reporting function given that is similar to the social justice report. There should be a power to make an annual report. We have left it open whether you think there ought to be a duty to do it, as the Social Justice Commissioner has. We make the point that it is a complex issue. In Victoria, they did not require an annual report from the Equal Opportunity and Human Rights Commission on the ground that it would be too expensive. We acknowledge that it is a big exercise to do a major report every year which would require consultations, et cetera, in the early stages to set benchmarks and standards against which we would report, but it would be a very beneficial exercise if it were done. That is the independent monitoring position.

CHAIR—We are seriously out of time.

Mr von Doussa—The final thing we wanted to say is that we support this notion of harmonisation that has already cropped up.

CHAIR—I notice at dot point 17 you have, of course, that if you are going to do all of this, you will need extra funding. I think we will clearly get that message. We cannot expect you to take on all of these extra powers and responsibilities without additional funding. Perhaps Hansard will put that in bold and capital letters for us! I just wanted to ask one final question. I certainly have in my mind what you mean by the second stage, which is that we really cannot, after a three-day hearing in the Senate, suggest there be an equity act for Australia. That needs quite long, thoughtful consultation Australia-wide.

A lot of submissions are put to us vis-a-vis the permanent exemptions. Quite a lot said that we should keep them, but a number have said that they need to go now; the time has come for them to go. We could take evidence about that for and against, but at the end of the day, whether or not we keep or abolish those exemptions is a matter that a much broader inquiry should deal with?

Ms Broderick—If we were to look at an equality act, then Senator a review of exemptions would come up in that particularly in so far as they are a general limitation provision. The whole approach to discrimination law would change if there was an equality act. It may mean that we do not have any exemptions if we were to move down that route.

Ms Goldie—As you say, Senator, there are a number of submissions that propose what is called the human rights framework to the protection from discrimination and the right to equality. Part of what that means is that the right to equality is never completely absolute. In international human rights standards, that is well recognised. If you were, for example, to remove all the permanent exemptions, which are a way of trying to limit fields of life in which the right to equality should not be recognised as at 1984, you would need to consider carefully in which circumstances you would enable some limitation on the right to equality.

We have a discussion of that in our submission. We acknowledge the merits of looking at inserting a general limitations clause which would provide that you would have to show, if you are going to limit the right to equality, that you are pursuing a legitimate aim in human rights terms and that the way in which you are limiting the right to equality was proportionate to the aim that you are pursuing, and that you are pursuing the least restrictive measure, recognising how important the right to protection from discrimination is in the Australian context and internationally. There are some submissions that present that option to you now.

From the commission's point of view, we are keen to express an interest and a preference for supporting an inquiry into the equality act. That would be a major reform. It is an example of the path that the UK has gone down, and we welcome that, but we propose a three-year time frame. Our sunset clause on the permanent exemptions is linked to that time frame. That would enable us to carefully consider the way in which you would allow for some form of limitation on the right to equality at the federal level.

Senator FEENEY—In terms of a balance with religious freedom, for example, section 38 provides an exemption for religious schools. Can you give the inquiry any insight into the incidence of behaviour that would attract discriminatory provisions in the public school system

but, by virtue of certain exemptions, not otherwise? What I am driving at is: how big a problem is this?

Ms Broderick—If we look at the section 38 exemption, we have included in the submission that on 2006 figures there were 112,000 people employed in the private school system. It would be that group, but that did not take into account tertiary education at, say, the Australian Catholic University and Notre Dame University.

Senator FEENEY—Sure.

Ms Broderick—It is a wider group than that which currently does not have protection under the act because of that exemption.

Senator FEENEY—In theory then, a school in the private system has a discretion to not employ a person because they are in a same-sex relationship, for instance. That is not a discretion that exists elsewhere. How often do you think that, and incidents like that, arise?

Ms Goldie—Just to be clear, Senator, the protection that is not available under the SDA is not in relation to same-sex relationships; it is de facto relationships, even in an opposite sex context.

Senator FEENEY—Sure.

Ms Broderick—It would be on the basis of marital status.

Ms Goldie—Or pregnancy. Outside of a marriage relationship, for example, you currently are not protected at the federal level.

Ms Broderick—For example, an unwed mother.

Senator FEENEY—Yes.

Ms Broderick—In terms of the number and whether or not those complaints are brought to us, I am not exactly sure.

Mr von Doussa—The difficulty is that they do not come to us because they are so plainly outside our jurisdiction.

Senator FEENEY—So you would not know. You do not know.

Mr von Doussa—No. It is an exemption that applies across the board, such as to the gardeners, the clerical worker and to the tuckshop lady and so on, and goes well beyond the tenets of a religious school.

Senator BARNETT—Just quickly, can you advise the committee when SCAG reports?

Mr von Doussa—On the harmonisation, my recollection of it is that there is only the Commonwealth and one state that is engaged in that exercise at the moment, with the right for

others to come in if they want to. I imagine they are reporting it in an ongoing fashion. I am not sure of a date. I just had the impression they would report periodically.

Senator BARNETT—You do not know the date or whether it is this year or next year.

Mr von Doussa—No. It is not universal. It does not involve all the states at the moment.

Senator BARNETT—It is not?

Mr von Doussa—No.

Senator BARNETT—Okay. We can get more advice on that. Do you support quotas? In terms of gender equity, it is a big issue and certainly some organisations do. Do you support quotas?

Mr von Doussa—Senator, I do not think that question can be answered, given the generality in which it is put, because the quotas have to be justified as a special measure. You have to look at the total circumstances of the situation.

Senator BARNETT—A number of recommendations support proactive or positive discrimination, so in that instance, do quotas come into being part of that solution?

Ms Goldie—Under the Sex Discrimination Act, it is already permissible for there to be differential treatment on the grounds of gender, if you can show that it satisfies the test of being a special measure, and that to achieve an equality of outcome there may need to be some form of differential treatment on the face of it to get to that end result.

The act does not provide for any obligation in terms of quotas, for example. But if the senators were minded to support our recommendation to give the commission the ability to certify something as a special measure and if an employer came to us and said, 'We've seriously looked at this question and at management level we consider that a solution for us is to consider some kind of quota system in a particular context for a limited period of time to try to accelerate some of the progress', that would enable the commission to rigorously assess that application, to ensure that it is grounded in the principle of non-discrimination, and to be able to certify that as a special measure.

The nature of special measures is that they are limited in time. We would be proposing that we would have the ability to certify a special measure only up to five years. We would have to revisit that question for it to be recognised as an ongoing special measure.

Ms Broderick—Where we see special measures occurring is that businesses look at the retention of women as a business issue. They identify that a lot of women are leaving at a certain point and therefore they will put in a program or policy. It may be women's mentoring but it will potentially be something that relates to women only. At that point they come to us and say, 'We've looked at the business issue. Could you certify this as a special measure?' Currently there is no certainty that business walks away with. Our ability to be able to say, 'Yes, that is a special measure and therefore it is not discriminatory', will be advantageous in moving along gender equality.

Senator BARNETT—Just very quickly: I may have missed it in your submission, but do you support CEDAW's optional protocol?

Ms Broderick—Yes. We are on record as supporting Australia signing up to the optional protocol.

Senator BARNETT—Thank you. Finally, in regard to your support for maternity leave, who pays?

Ms Broderick—We have suggested to the Productivity Commission a scheme which is federally funded at the federal minimum wage.

Senator BARNETT—That is in your submission?

Ms Broderick—That is in our submission, yes, and we have submitted that in phase one, there should be 14 weeks that are federally funded at the federal minimum wage.

Senator BARNETT—Thank you.

CHAIR—I thank the Human Rights Commission very much for their time today and for their submission. It has been very, very helpful in getting us on the road to reforming the act. We appreciate your time.

Ms Broderick—Thank you.

CHAIR—We will have a five-minute break. I know we are running a bit behind time, but I am sure it has been quite useful.

Proceedings suspended from 11.11 am to 11.24 am

MacDONALD, Ms Edwina Catherine, Law Reform Coordinator, Womens Legal Services Australia, National Association of Community Legal Centres

SOUTHGATE, Ms Shirley, Principal Solicitor/Acting Director, Kingsford Legal Centre, National Association of Community Legal Centres

CHAIR—I welcome representatives from the National Association of Community Legal Centres. Thank you for your submission which, for our purposes and for the purposes of Hansard, we have numbered 52. It is available on the website. Before I ask you to make an opening statement, do you need to make any changes or amendments to that submission?

Ms Southgate—No, Senator.

CHAIR—Would you now like to make an opening statement and we will then go to questions?

Ms Southgate—Thank you very much for the opportunity to provide some evidence to the committee and to answer any questions that you may have about our submission. I will make some general points to emphasise the purpose of the submission and I will ask Ms MacDonald to look specifically at the international human rights obligations and how they might inform this legislation. The national association represents community legal centres across Australia. Many of those community legal centres practice in discrimination law. Kingsford Legal Centre, the legal centre at which I work, is one of those centres.

In preparing our submission we have drawn from our experience in advising and representing people with complaints of sex discrimination and other forms of discrimination, so it comes very much from the practice perspective of providing that assistance. In taking the opportunity to review the Sex Discrimination Act it has become apparent to us that the legislation does not have the capacity to deal with systemic discrimination. It deals with individual complaints—the sorts of complaints that we handle every day—and, to a large degree, it deals with formal equality.

That is all it can deal with. In light of this gap—it is quite a fundamental gap—in the way the legislation is able to work, it is our submission that the Sex Discrimination Act cannot be made best effective simply by tinkering around at the edges with some of the small procedural amendments. Rather, we have suggested a legislative regime that implements Australia's international human rights but it needs to be practical, it needs to be accessible, it needs to be effective, and it needs to have an internal coherence and logic that leads it to do that. To make those sorts of changes requires a far greater exercise. We have suggested, much as HREOC has, that there is a lengthy process in looking at how equality is best legislated for.

That process is one in which we would be keen to continue to be involved. We were keen to look at moving beyond a simplistic notion of equality and looking for a legislative framework that promotes and facilitates substantive equality. That is a legislative regime that necessarily tackles systemic discrimination. Such a system removes the burden of proving discrimination from resting entirely on the person that is discriminated against. Usually that would be the most vulnerable and probably the least resourced party to the whole exercise. It is part of our

submission that a legislative mechanism that clearly outlines positive duties for promoting equality and eliminating discrimination provides greater certainty for all the parties that might be involved in a discrimination complaint.

We have also looked at the need for a regulatory regime that includes positive duties and that can be monitored so that they can be reported against, whether or not that is via an annual report or occasional and ongoing reporting requirements. We have not looked at the mechanisms in detail but we have looked at the specifics. However, one of the things that we have looked at is that monitoring process. The positive duties that allow a monitoring process will improve the capacity for preventing discrimination. Clearly, one of the objectives of this inquiry is: How best can we do that? By dealing with systemic discrimination rather than dealing only with individuals on a case-by-case basis, the underlying causes of that discrimination hopefully can be adequately addressed so that there is less and less of a requirement for that individual complaint to be brought.

We have also looked at whether such a systemic process would provide greater opportunities for education about equality and promoting equality. It seems that it does. Because it deals with it in a much more strategic and long-term way it also allows the commission, employers, government and other agencies to look at the process of education in relation to equality. One of the systems we looked at that has done this would be the process of dealing with occupational health and safety problems. The occupational health and safety regulatory regime is a regime where duties and responsibilities in the workplace are clearly understood. They are easy to educate people about and they probably change the way people view what is appropriate in the workplace in relation to those duties.

A similar kind of understanding, education and change could be brought about in relation to discrimination—a similar sort of process. Clearly, we have talked about expanding and extending the powers of the Sex Discrimination Commissioner and HREOC, or the Australian Human Rights Commission. We have also noticed that the requirement for increased resources and funding is a big issue. We looked at what it would take to put together such a significant change. Clearly, it is something that cannot be rushed. The act has been in place for 25 years. Twenty-five years ago it was probably quite cutting edge, but things have changed and our understandings have moved on. If we are to make this change we need to do so in a considered fashion and I suggest that we need to take into account a lengthy consultation process about how best it could be done.

I think that the two-stage process HREOC talked about this morning has great merit. We had the benefit of reading its submission. We also note that the Attorney-General, Mr McClelland, has undertaken to hold consultations in relation to a charter of rights. Equally, potentially that could pick up consultations around an equality act that would look at a framework for a positive duty kind of legislative regime in relation to sex discrimination.

Ms MacDonald—As Shirley mentioned, we would briefly like to touch on Australia's international obligations. As the Human Rights Commission mentioned this morning, the Sex Discrimination Act is an important vehicle in implementing Australia's obligations under CEDAW but also under several other treaties. Australia's obligations with respect to gender equality go beyond CEDAW, which codifies women's rights to non-discrimination and equality with men. Australia is also obliged to ensure the equal right of men and women to the enjoyment

of civil, political, economic, social and cultural rights under the ICCPR and also ICESCR. In addition, Australia is also a signatory to ILO treaties that create obligations with respect to reconciling work and family.

We suggest that these obligations provide an effective human rights framework within which substantive equality for women and men can be achieved. However, at present it is our view that Australia is not meeting all those obligations through the Sex Discrimination Act, or through other legislation. We think that this review of the Sex Discrimination Act provides the parliament with a great opportunity to ensure that Australia's human rights obligations are fully implemented in our domestic legislation, and also with a way to move forward in achieving gender equality. Some of the changes we think would need to be included to better implement our international obligations are, as HREOC already mentioned this morning, including in the objects of the act, an aim of substantive equality and also the implementation of Australia's international obligations, which would include these instruments that I have mentioned.

Also, a general prohibition of discrimination that is not limited to any field of activity or any sphere of life; the removal of the permanent exemptions that are detrimental to achieving the aim of gender equality; the protection from discrimination of all people with parental and caring responsibilities; providing the Human Rights Commission with the power and the resources to monitor laws, programs and practices directed at the achievement of women sustaining equality; and also providing the commission with the power and resources to investigate, of its own notion, conduct that appears to be unlawful under the act.

In addition to better implementing Australia's existing obligations we also recommend that the Australian government withdraw its reservation to CEDAW about universal paid maternity leave and that it implement mandatory paid parental leave. We believe that such changes are essential in ensuring substantive gender equality in Australia. Just to conclude, I echo Shirley's thanks for inviting us to attend today's hearing and for listening to our submission.

CHAIR—Thank you very much and thank you also for your submission. How many recommendations have you given us? There is in excess of—

Ms Southgate—There are 45.

CHAIR—There are 45. Thank you for the work that you have put into that. I wish to ask you about systemic discrimination. You said that the act perhaps needs amending to deal with that. Could you give me some practical examples of the ways in which you think amendments ought to occur?

Ms Southgate—I think we have addressed amendments largely in relation to expanding the powers of the Sex Discrimination Commissioner.

CHAIR—Does your section start on page 12?

Ms Southgate—One of the things that becomes apparent when we have been working obviously with ongoing individual clients is that they often come in with the same stories and sometimes even with the same respondents. You have repeat respondents who frequently settle, for example, at conciliation. One of the amendments that would be very helpful would be similar

to the ones President von Doussa was talking about. In monitoring matters that come before the commission, if there are trends that highlight particular problems, the commission, and in particular the Sex Discrimination Commissioner, has the capacity to say, 'I can see that this is a difficulty.'

If they have the power to initiate their own inquiry and that inquiry potentially leads through to the process of litigation, if necessary, they have the capacity to say, 'This is a systemic problem that we have seen.' It might involve an industry and maybe one respondent. The commissioner then has the capacity to look at that as a system difficulty rather than to allow individual complainants to bear the burden time and again.

Senator FEENEY—You made the point in your submission about this being a problem for people from a non-English speaking background. Could you make some further remarks about that?

Ms Southgate—Certainly. There are number of things about that. The first is that the process itself is quite complex and onerous. The legislation is complex and the process involves making a complaint, framing it in a way that properly captures where it sits within the legislation, being able to represent yourself at conciliation, which is what often happens, and potentially what you do if you are in the Federal Court. For somebody from a non-English speaking background that is overwhelmingly difficult to do.

Senator FEENEY—Indeed, it is for most citizens.

Ms Southgate—For most people, yes; it is difficult to do. The other thing we picked up is that there is an issue of intersectional discrimination, or compound discrimination, which I guess is quite a difficult concept. The experience of discrimination for a woman from a non-English speaking background is a separate and unique experience to that of an English speaking woman. There is no capacity within the legislation to say, 'This is a whole unique experience.'

You might be able to say, 'I have a complaint under the Race Discrimination Act, and I have a complaint under the Sex Discrimination Act', but you cannot say, 'As they intersect it becomes a different experience.' There is no capacity for the courts to take that into account. That is something that is probably difficult to address in the separate pieces of legislation, but it might well be better addressed in an equality act.

Ms MacDonald—Could I add to that by referring to tackling more actively systemic discrimination? Because of the way it works at the moment there are two examples. One example is where you have the same individuals coming again and again, it is being settled, and it is not being dealt with across the board. The other example would involve people who are deterred from going through this system for emotional or financial reasons. They might not have the time or the energy.

If you do not have the individual complaint nothing can happen, whereas if you have more monitoring and investigative powers the commission does not have to wait until somebody is willing to take on that organisation or that policy. It can step forward and say, 'There is a problem here and we would like to look at it so that that burden does not have to go on to the individual.'

Senator FEENEY—How closely would you make your analogy with occupational health and safety regimes? Obviously occupational health and safety regimes have all sorts of powers. Employers have a range of incentives and disincentives inside those systems, financial and otherwise. There are inspectors with certain powers and so on. I was interested in your analogy and I would be interested to hear how closely you would draw it?

Ms Southgate—I have not done a very close section by section comparison of how you might make the two work together. This afternoon you are going to talk to Dr Smith, who will be able to emphasise the United Kingdom example, which looks at setting up codes of practice that allow reporting against certain standards, and that then will allow you to monitor how that happens. An individual's right does not have to be infringed so that he or she is worse off. You can say, 'This is an obligation that you have. This is the proper standard of behaviour within this workplace.' In meeting them that is great; you have met your obligations, as you would for occupational health and safety.

If you fail to meet them I suggest there would be a range of measures—rather than rushing to punitive measures, which I do not think are necessarily helpful—that might allow encouragement and facilitation for employers and organisations to get up to the standard that is appropriate to ensure that the place is non-discriminatory and that there is a promotion of equality. I do not know whether there is necessarily as close an analogy as, 'You breached it and we will fine you.' There is room for a much more positive way of bringing people along to meet the standard that is required.

Senator FEENEY—'You have breached it and now we will lecture you.'

Ms Southgate—Or, 'We will work with you to establish what you can do.'

Senator FEENEY—It is an educational process?

Ms Southgate—Yes.

CHAIR—There has been a lot of interest about amending the act to better recognise family responsibilities as a ground for discrimination.

Ms Southgate—Yes, certainly.

CHAIR—Can you summarise for us what you have put in your submission? Does it complement what the Human Rights Commission was saying to us today?

Ms Southgate—Very much, yes. I do not think there is much that I can add except to say that clearly it is difficult for men with carer responsibilities. I have had a number of clients to whom I have had to say, 'We cannot pursue this matter or we go into state legislation.' I would say that the potential for redress is more limited there because you have a damages cap. I have had quite a number of male clients for whom that has been an issue. Clearly, the other big issue is that you have to be sacked before you can access it.

That is a major impediment in dealing with discrimination on the basis of carer responsibility because it happens, for example, in return for maternity leave. You might be told, "You have

been demoted. You still have your job', or 'We have changed the hours', or 'There are other disadvantages. You cannot go on that training course.'

CHAIR—Or, 'We have restructured the workplace while you were away.'

Ms Southgate—You could be told, 'We have restructured things.' Clear detriments are going on. It is related to the carer responsibility. There is no redress under this legislation.

Ms MacDonald—There is also access to promotion. That is one issue that is not covered. To reinforce what the Human Rights Commission said this morning, we support the definition of 'family responsibilities', being extended to include same-sex couples and general caring responsibilities.

Senator BARNETT—Do you support the removal of the words 'marital relationship' and replacing them with the words 'couple relationship?

Ms MacDonald—Generally, we do not have a preference either way. We think that people in same-sex relationships should receive protection from discrimination. I would have thought that HREOC's proposal, which I understand is consistent with the omnibus bill, would be less controversial than including same-sex de facto relationships in the definition of 'marital status'. As the committee pointed out earlier, basically it is to ensure that all these types of relationships are protected. That would be the end result that we would be interested in seeing any change—specifically having a recommendation as to the drafting of that change.

CHAIR—I wish to ask you about exemptions. Some people said in their submissions that those exemptions should no longer exist. The human rights commissioner said to us that that is a pretty broad call and that we should have further and extensive consultations about it. Do you have a view about how we should treat that?

Ms Southgate—The view that we have in our submission is that permanent exemptions should not be permitted under the legislation. Some things that are included in exemptions in the legislation, in sections 31 and 32, probably better sit as temporary special measures, or special measures. But the permanent exemptions that exist allow for protection without reflection on how that protection prohibits or interferes with somebody's enjoyment of other human rights that are protected. We had the example earlier of section 38 and religious schools. By having that as a permanent exemption there is no requirement to address what other human rights that ought to be protected in Australia are being infringed on by this exemption.

Is it required? Is it proportional? Does it have a legitimate aim? Does it allow for a change in understanding and attitude of those who are adherents to that faith? One of the things we noticed when looking at submissions that have been provided to the committee was that a number of submissions from religious bodies state, 'By allowing a permanent exemption from within the adherence to that faith you do not allow questions or movement.' A religious faith is not a static thing; it is not something that is unchanged over time.

Senator FEENEY—That is also a matter for debate.

Ms Southgate—Yes.

CHAIR—Do you think exemptions should be given, say, for a five-year period or something?

Ms Southgate—We have suggested that, if there is an exemption, there needs to be a time limit. We see quite a tight time limit of 12 months. I know that that is probably the shortest time limit that has been provided. That time limit might include the sorts of consultations you might do relating to an equality act, but not a permanent exemption. Is there is a reason why that exemption is required? Why is it the least restrictive measure to take? A time limit must be placed on that exemption so that it can be reviewed.

Senator FEENEY—Under section 37 would that not mean that every major religious institution in this country would be turning up every 12 months for a renewal of their exemption?

Ms Southgate—Yes.

Ms MacDonald—We are not tied to the 12-month period. Obviously the Human Rights Commission could better advise on the bureaucratic burdens. Essentially, we are saying that we agree with the Human Rights Commission. No human right is absolute. They must all be viewed in relation to one another. The problem with the permanent exemptions is that they do not prioritise it. By having a permanent exemption for religion you are prioritising the right to freedom of religion over the right to live free from discrimination. We suggest that you get rid of the permanent exemptions but that you retain a process, or a balancing act must take place. Rather than just saying, 'The freedom to religion will always trump the freedom to live free from discrimination', you can look at it on a case-by-case basis.

As Shirley and Cassandra Goldie mentioned earlier this morning, you could look at whether it has a legitimate aim, whether it is proportionate and whether it is the least restrictive measure. You could also look at what it is saying. Do you need a blanket exemption? Do you need only a specific exemption that is to do with parts of the act but not all the act in order to allow the school or the religious institution to abide to its doctrines and tenets? We are not saying that there would never be a case where the right to religious freedom might mean that the right to live free from discrimination needs to be balanced. It is just that there needs to be a process so that we can look at that rather than saying 'In all circumstances this right will be superior.'

As Shirley mentioned, there is disagreement on this issue within religious communities and denominations. I refer the committee to the collaborative submission from leading women's organisations and women equality specialists, which also supports repealing religious exemptions. I note that that is endorsed by a number of religious bodies which include the Catholic Womens League Australia, the Muslim Womens National Network of Australia, the National Council of Jewish Women of Australia, the Ordination of Catholic Women and Australian churchwomen, and also a number of religious leaders, including the Anglican Archdeacon Dr Sarah Macneil and Anglican Reverend Canon Dr Colleen O'Reilly. We need opportunities for discussions to take place within religions to establish whether or not that exemption is needed.

Senator FEENEY—As you have eloquently put it, those submissions obviously are indicative of there being live and, hopefully, fruitful debates inside those churches. But, as you

can imagine, we are loath for an instrument of the parliament to start arbitrating discussions that go on inside those churches.

Ms MacDonald—Having the exemption on a case-by-case basis allows consideration of the issues. Also, it is not arbitrating that the church must have the discussion; it is providing a forum for people within those institutions to embrace issues, to have them considered, and for religions to evolve over time, which is something that they do.

CHAIR—I wish to ask you about sport. First, if the objects of this act were amended to reflect our international obligations would that cover the concerns that you set out in paragraph 149 on page 33 of your submission? Second, is it not the case that girls do not participate in the male competition of Aussie Rules after the age of 14, but they then go into women's AFL teams like they would, say, for basketball or softball at a certain stage?

Ms Southgate—I will deal with the first part of your question first. There is. Would the implementation of Australia's obligations under CEDAW adequately address that? I think that it goes a long way towards addressing it. I think we would need to look specifically at the context of Australia and how organised sport is arranged in Australia to establish the practical mechanisms that would give effect to CEDAW. That question is not answered by saying that the obligations are met. I think that there is extra work to be done. In this context how do you give effect to those international obligations? In relation to your question about allowing girls to play AFL beyond the age of 14, in many cases competitions would not be available for girls over that age. There are not necessarily enough teams available to make a competition viable.

But the point really is that people should play on merit and capacity. That should not necessarily be determined by an arbitrary age cut-off. For example, already in New South Wales older boys are allowed to play in under-age rugby teams because of their size and weight. That is where their ability sits them, and vice versa. Some youngsters at nine who are bigger than me probably ought to be playing in the under twelves. So there is a shift. How do we put people in the appropriate place to play? What are the appropriate questions to ask? Sex is not the only question that would be appropriate in that sort of circumstance. What are their physical attributes and what is their capacity?

Senator BARNETT—I wish to go back a step if I could. How many legal centres do you have in Tasmania? It is an important question from a Tasmanian senator.

Ms Southgate—I understand, but I do not know off the top of my head.

Ms MacDonald—I would be guessing but I think there are a handful—possibly five. There is certainly a women's legal service and there is also a general service in Launceston and in Hobart.

Ms Southgate—I think there are four or five. Those are tenancy services.

Senator BARNETT—You put this submission together. With whom did you consult? I know that you represent a lot of centres all around Australia. What decision-making applied to this submission? Did you refer to a board? How did this come about, or did you just prepare it?

Ms Southgate—The submission happens as a result of various processes. Within the national association networks work on particular issues. There is a human rights network, a women's network, and we communicate largely by email or telephone conference, understandably, because we are quite spread out. Once the inquiry was initiated—I am part of the human rights network and Edwina is part of the women's network—we put out a call to all centres and to all principal solicitors to ask for their input. We listed the sorts of things that we were looking at, essentially we gave them this inquiry's terms of reference, and we asked them to provide us with input into that inquiry.

We also talked to the organisations that were part of the women's collaborative submission that you have received. So we have gone outside community legal centres as well and participated in some phone linkups to consult around that area. The national association was also involved in putting together the last shadow report on CEDAW that was done. We looked at extensive consultations that came out of that process to establish how that reflected on these terms of reference. Having done that, I took the lead in coordinating it and then it was a case of coordinating the input and doing the editorial work to put it together.

Senator BARNETT—Do you have a national board and what role, if any, did it play?

Ms Southgate—There is a board for the national association. The submission went to the board and it also went to the board of the combined group in New South Wales because they are also part of this submission. They assessed the submission and they signed off on it before it was submitted to the Senate.

Senator BARNETT—So both the national board and the New South Wales board signed off on it?

Ms Southgate—That is right.

Senator BARNETT—Did you consult with any of the religious organisations about your recommendations to remove the exemptions—some might say that they are pretty strong recommendations—and to bring back one-year temporary exemptions? Did you consult with any organisations before you made that recommendation?

Ms Southgate—We took advice from the collaborative group that was working on that submission, and the input that they had had from religious women's organisations.

Ms MacDonald—And, as part of the telephone linkups we had with them, we also discussed the issues with representatives on that organisation from religious organisations.

Senator BARNETT—Finally, in your submission you referred to the Canadian experience. Have you looked at any overseas examples, specifically, the United States model?

Ms Southgate—We have not looked specifically at the United States model. The research that we did necessarily was truncated by the short timeframe. We looked at the United Kingdom and at Canada—we did not look at New Zealand specifically either—and we relied on research work that had been done by academics rather than doing all that work ourselves.

CHAIR—Thank you very much for your submission, and thank you for taking the time to appear before the committee today. It is appreciated.

Ms Southgate—Thank you very much.

Ms MacDonald—Thank you.

[11.56 am]

McKAY, Ms Julie, Executive Officer, UNIFEM Australia

NIKIBIN, Miss Elnaz, Lawyer, UNIFEM Australia

SHEER, Miss Noa, Intern, UNIFEM Australia

STRONG, Mrs Rosalind Maybanke, President, UNIFEM Australia

CHAIR—I welcome representatives from the United Nations Development Fund for Women. Thank you for making yourselves available to meet with and appear before the committee this morning. We have received your submission. For our purposes and for the purposes of Hansard, it is numbered 19. Do you wish to make any changes or amendments to that submission?

Mrs Strong—We put together the submission in a relatively short timeframe, so we have had some further reflection on a couple of the points that we made. One relates to the point about term of reference (m) and appears on the second last page of the submission. We have taken some more advice on the paragraph that talks about the reasonableness test. Whereas we would wish to retain the comment that we think reasonableness is ambiguous, we do not necessarily believe in the material in the United Kingdom report—I hope I am saying this correctly—and we would like to delete the last sentence of that paragraph.

Senator FEENEY—UNIFEM Australia believes that that paragraph should be deleted?

Mrs Strong—The last sentence in that paragraph. However, we wish to keep the first two sentences. In relation to the issue of existing exemptions, we have had further thought about that and we believe we should have made a commentary also about voluntary bodies and not just religious bodies.

CHAIR—You might want to talk to us about that, or we can ask you questions.

Mrs Strong—When we get to that point.

CHAIR—I invite you now to make a short opening statement. We will then go to questions and have some dialogue about it. Thank you very much.

Mrs Strong—Thank you, Senator. As you know, UNIFEM is the United Nations Development Fund for Women. One of its main responsibilities in working in developing countries is assisting those countries in the implementation of CEDAW. Our interest springs from that. UNIFEM Australia is a voluntary organisation that works to support UNIFEM's aims. We are not lawyers, which is why we are very pleased to have Gilbert and Tobin with us to assist with our submission.

I would like to highlight the key points that we have made. Firstly, we see as extremely important the removal of the reservation that Australia has on paid maternity leave. A system of

paid maternity leave should also be urgently implemented. In doing that, the consultations of the Productivity Commission obviously will be important. We believe that there should be wide consultation within the community, not just with industry, in relation to that matter. We also think that contemporary notions of equality include shared responsibility for care giving, so the issue of paid maternity leave should be extended to include paid paternity leave. Referring to equal pay we believe that the Sex Discrimination Act needs forcefully to recognise the right to equal pay.

The Workplace Relations Act covers equal remuneration but it does not outline the right to equal pay. We believe that this act should do that in any review of it so that there could be redress. Referring to family responsibilities, as has been pointed out this morning, the Sex Discrimination Act covers issues relating to dismissal and to family responsibilities and there is some form of redress. However, there are other issues for the duration of employment, such as training and promotion throughout the lifetime of somebody's employment in an organisation where family responsibilities could be seen to be interfering and discriminating. We believe that that should be extended.

We have made points about women in leadership. Currently the Sex Discrimination Act is silent on this issue, although it is an element of CEDAW. We seek a clause that recognises the role of women in leadership in political, community and business life. We recognise that this is likely to be a symbolic clause but, by having a reference in the act, we think it would be a strengthening of the situation in Australia which, at the moment, relies mostly on goodwill and the good faith of government or organisations to have programs to devote funding to this area. We believe that there should be a reference to the desirability of women in leadership roles. We are particularly concerned about the issue of intersecting forms of discrimination. We believe it is highly ineffective only to reference one form of discrimination through this act.

We note that, for a number of different sorts of discrimination, the Australian Human Rights Commission must be given an opportunity to refer to discrimination through several different pieces of legislation. We highlight in particular the Indigenous experience, but other racial and disability discrimination must be cross-referenced with the fact of being a woman. That intensifies discrimination. We believe that that intersection should be strengthened and there should be specific clauses about it. Coming to the issue of exemptions, as we have stated in our submission we agree with the commentary that has already been made this morning. It is a very broad ambit of exemption just to say that all religious bodies should be exempt from the act.

We believe that this area should be carefully reviewed and changed to fulfil the intention of article 5 in CEDAW. We understand that the exemption that is granted to voluntary bodies does not need those voluntary bodies to demonstrate that the exemption relates to the purposes of their organisation. That is where we would insert a matter relating to voluntary bodies. When we come to the final point we make about costs, we are advised that there is a reluctance to use some of the provisions that exist under the Sex Discrimination Act because of the matter of costs. Previously there was an opportunity for conciliation under HREOC, which is now the Australian Human Rights Commission.

We suggest that provisions in other legislation would allow for the matter of costs to be dealt with more fairly and equitably and would not discourage people from taking action. Finally, UNIFEM Australia is particularly interested in educating people about the human rights issue.

The Australian Human Rights Commission's new mission statement, vision statement, aims and objectives are very encouraging in this regard, and the role that it would be taking. The issue of the adequate resourcing of the Australian Human Rights Commission is a matter of concern, especially in view of recent budget cuts.

CHAIR—Thank you very much. I have a number of questions that I want to ask you. I am aware of the work that you do internationally. A couple of weeks ago I spent a few days in East Timor and I met your people working up there. I must say that it was most impressive. It was hard work but what they do is most impressive. Would you say that our current Sex Discrimination Act could be held up internationally as one the best?

Mrs Strong—I think it certainly was at the time. I think it was widely regarded and in 1984 Australia was applauded for those provisions. However, I think it has been overtaken in other countries. As I said earlier, we are not lawyers but our knowledge comes through our network of national UNIFEM committees. We were interested to hear of the outcomes in the United Kingdom about the right to equality. UNIFEM UK has been involved in some of the discussions leading up to that. Two of our board members are about to go to a meeting in Iceland where all the national committees will be meeting. One of the things that people will bring back to us from that meeting is information about its implementation there.

We also observed that in Sweden, another country with which we have a close relationship through UNIFEM, there are much better provisions for maternity leave, paternity leave, and so on. Although we do not have a detailed understanding of what happens elsewhere, we observe that our act is now out of date and definitely not contemporary with issues in the Australian workplace.

Ms McKay—Australia is very much seen to be needing to be a leader in the region in the implementation of CEDAW. In considering any review of the SDA we should consider that role of also supporting Pacific nations to implement CEDAW to ensure that we do model best practice at all times.

CHAIR—From my research and from reading submissions I am aware that after nearly two years of consultation the United Kingdom has moved to an equality act, which combines what we know as our Race Discrimination Act and our Sex Discrimination Act. It came into effect in late 2007. This morning the Human Rights Commission suggested that we should move that way, but there should be a second stage of reforming the act, and that second stage should be national consultation in this country. I do not know whether you have seen the submission of the Human Rights Commission. Do you think that is the way to go? It would be useful for us to know your views on that.

Mrs Strong—This morning we had an opportunity to hear their presentation. We have not read the whole 242 pages, as no doubt you have, but we are interested in their view. I believe that the issue of a three-year consultation period is a good one. We are advised that there is a certain advantage in having separate bits of legislation for the different forms of discrimination. In discussions with Elnaz this morning that was one point of view that was put forward. We are not deeply informed, but I wonder whether Elnaz would like to comment.

Miss Nikibin—The comments that were made this morning prior to coming to the Senate were restricted to the concern that if you were to mix together the three pieces of legislation you would lose a focus on how certain types of discrimination could vary, and how certain circumstances could lead to specific outcomes. The two-stage process recommended this morning by the commission is particularly encouraging because it requires consultation. We recommend that consultation should be pursued, in particular to ensure that if the three acts were to be merged into one the different parts, characteristics and types of discrimination would nevertheless be considered in one act that reflected all three parts.

CHAIR—You have focused on the implementation of CEDAW, which is still fairly limited. It has been put to us that the objectives of the Sex Discrimination Act should be expanded to recognise other international obligations, which would then give equal rights to men and women under this act. Could you give us some comments about that?

Mrs Strong—We are not deeply informed in that respect but we would not disagree. The Sex Discrimination Act is not simply limited to the female sex, is it? But because of CEDAW being the prompting instrument to get us to here that is the way it comes across. In the commentary that I made about paid paternity leave and the issue of family and caring responsibilities we definitely agree that this is a shared set of responsibilities. Because of the work UNIFEM has done in relation to men's roles in caring, ending violence against women, and so forth, we support the notion.

CHAIR—You wanted to make some comments about including voluntary bodies under existing exemptions. Is it your view that the exemptions should be abolished? The community legal centre just said that exemptions should be there for only one year or three years and that people should reapply, whereas the Human Rights Commission said we should not move at all on exemptions until we have had some broader consultation about them.

Mrs Strong—I will ask Elnaz to speak in more detail about this. Our general view is that one human right does not cancel out another human right. So you need to have a forum, a discussion, or a process whereby you can balance them out. In making the statement that the current exemptions for religious organisations are far too broad, even though they relate to their belief system, we think that is elevating religion above all other human rights. We think there should be a process of rebalancing that issue.

CHAIR—You said that they were far too broad. If religious bodies have an exemption does that go to the hiring of ground staff or security and cleaning staff?

Mrs Strong—My understanding is that nobody working within a religious school, for example, can bring any case through this legislation. Is that correct?

Miss Nikibin—Section 38 refers to treatment relating to a person's sex, marital status, or pregnancy in connection with employment. That section, which is quite broad, would apply to anybody employed by an educational institution.

CHAIR—If you are a cleaner, a ground staff person or a security guard, as opposed perhaps to a teacher or a person of significance, it would also apply to you?

Miss Nikibin—Yes. That is my understanding of section 38. Indeed it would.

CHAIR—Do you think that these exemptions are too broad?

Miss Nikibin—There are two sets of comments. First, we believe that the exemptions conflict with the obligations under CEDAW—to recognise that women have the right to employment and not to be discriminated against during employment. That conflicts with the idea that religious institutions are able to dismiss an individual based on marital status, sex or pregnancy. If we were to put aside that view, freedom of religion places an obligation on us at least to recognise the right to impose religious beliefs in the employment arena. At the very least it should be limited, it should be proportionate and it should be clearer.

The Australian Law Reform Commission has written reports on how it disagrees with section 38. At the very least section 38 should not include pregnancy or sex. Our recommendations in the alternative would go along those lines. There are also concerns about section 39, which deals with voluntary bodies. Section 38 specifically outlines that a religious institution can discriminate based on marital status, sex or pregnancy if it is in accordance with its religious creed or beliefs, whereas section 39 does not limit this discrimination provided it is in accordance with the constitution of the volunteer body or the membership requirements. It simply states that it is not unlawful for a volunteer body to discriminate against a person on the ground of a person's sex, marital status, or pregnancy in the admission of persons as a member or in the provision of benefits.

That leaves it quite broad, in that it enables a voluntary body to choose to discriminate on the basis of a person's marital status, even if it is taking both married and unmarried people within its organisation, but it chooses to discriminate against one person on that basis. In our view, the protection that exists under the act at the moment is not effective. We recognise the commission's perspective this morning, in that some exemptions allow for positive discrimination. To some extent women need to be discriminated against, in that they need to be provided with better benefits or better opportunities.

Senator FEENEY—You are talking about positive discrimination?

Miss Nikibin—That is correct. In that regard not all exemptions should be disposed of, but at least sections 38 and 39 must be considered. If it is the commission's view that a higher level of consultation should be taken into consideration, we would certainly support that. However, in the meantime measures can be taken to limit the effects of sections 38 and 39 while that consultation is taking place, to provide clear direction or to give some direction to women about how section 39 works.

CHAIR—You wanted to include some comments about voluntary bodies.

Mrs Strong—I think Elnaz covered the point that we wanted to make.

Senator FEENEY—I was interested in your remarks concerning women in leadership positions and I noticed that you picked on the public sector, if I could put it in those terms. Of course, I am also aware of the fact that representation of women on corporate boards, for instance, is at a very low level. Do you have any remarks about how you think the act should

operate with respect to the private sector and women in leadership positions, incorporated associations, public companies, and so forth?

Mrs Strong—We do not see a way of having a legal requirement or quotas, but we think that a statement should pick up issues in CEDAW relating to the contribution that women make and the importance of women in leadership roles throughout the community. As I said, we see it more as a symbolic commentary. We do not imagine that there would be legislative provision to ensure that the unfortunate situation that prevails in Australia is redressed.

Senator FEENEY—Insofar as what you are proposing is a statement of intent or purpose, you want it to apply to Australia as a whole, not simply the public sector?

Mrs Strong—Yes, absolutely. I am sorry if I left that impression.

Senator FEENEY—I just wanted to clarify the matter. I refer, next, to voluntary bodies. While I take your well-made points about how that operates, as I understand it you are not suggesting that voluntary bodies should not attract an exemption, are you?

Miss Nikibin—No. I do not suggest that because I am quite conscious of the fact that there might be women voluntary bodies that just want to limit their voluntary activities to some sector. Indeed, their exemptions have practical purposes but I think because of the way in which they are drafted at the moment they leave room for discriminatory actions to be taken by members of voluntary bodies.

Senator FEENEY—Could you give me an example?

Miss Nikibin—Sure. Let us say that I wanted to become part of a voluntary body—I will not name a particular body—and from the minute that I became a member I had difficulties with the president and I never really got along with the president. Let us say that I decided to enter into a relationship with an individual, I did not want to get married and, in the course of my relationship with this individual, I became pregnant. This president, who had violently disliked me for quite for while, decided that this was not right, that he did not like this piece of action and that he was going to dismiss me because I was now pregnant.

Based on my lack of marital status he might say, 'I am not happy with this and you are no longer a member of the organisation.' On that basis, looking strictly at the way section 39 reads at the moment, it does not leave me with any recourse under the Sex Discrimination Act because this person is a president of the voluntary body and the voluntary body has dismissed me based on my marital status and on the fact that I am pregnant. But I know—and a lot of people in this organisation know—that being in a de facto relationship is not a requirement to be a member of that organisation or to continue to receive benefits from that organisation.

Senator FEENEY—Is that not the point? It depends on the association. If it is a knitting club details about your relationship would be immaterial. I certainly accept that. If it is a moral paragons club those factors would start to matter in the make-up of the association.

Miss Nikibin—Right.

Senator FEENEY—Do you have any comment about that?

Miss Nikibin—At the moment section 39 would allow both to dismiss me, based on my status whereas, for example, under section 38 we limit the requirement to enable someone to be dismissed on that basis on the idea that it is based on their faith and on their religious beliefs. Under section 39 we do not require that for a voluntary institution. So one that does not base its membership or its activities on some moral code or on certain beliefs nevertheless could dismiss me on the basis of my marital status or pregnancy. In that instance I would not have any recourse under the Sex Discrimination Act because of the way in which section 39 is drafted.

Our recommendations are that both instances are not correct, based on how CEDAW is drafted. The main aim of CEDAW is not to allow for discrimination based on marital status, pregnancy or sex. If we were to go along the lines of considering the commission's proposal for a lengthy consultation process, in the meantime these fundamental deficiencies in the Sex Discrimination Act should be considered.

Senator FEENEY—Thank you very much.

CHAIR—I have one last question. You suggested that the act should be reworded to replace the burden of reasonableness. Is that similar to what Commissioner Broderick was talking about this morning?

Mrs Strong—Yes, I believe so. I am sorry that I did not highlight that point. We think that the discriminator should be required to demonstrate that point rather than the person who has been discriminated against.

Miss Nikibin—That goes back to our idea and also links to our submission on costs. Gilbert and Tobin have acted pro bono in a number of instances where claimants have sought recourse under the Sex Discrimination Act. A burden is placed on an individual who, in some instances, is fighting against a big corporation or an employer. There is pressure in proving the intention of the employer. It is difficult as the material is not there. There is no access to the employer's statement or state of mind. Conduct does not rest with the employee; it rests with the employer. It is quite costly to get legal representation to establish a lengthy process of discovery and to get ideas about an employer's intentions.

On top of that if you lose the matter you risk paying the costs of the big employer who has probably hired one of the most expensive law firms in the country. In our view this is one of the fundamental difficulties with the Sex Discrimination Act as it stands at the moment. Whilst these rights exist, people are often reluctant to engage in promoting these rights on the basis that costs discourage them to go any further.

Senator FEENEY—How does legal aid operate in this jurisdiction?

Miss Nikibin—So far as I understand it, legal aid would be required to do a means and merits test to evaluate whether a person is eligible for legal aid. In many instances there is an argument as to the effectiveness of this legal merits and means test. In many instances people fall outside the bracket. You might have the costs to pay for a lawyer to represent you, but it is a much heavier burden if you have to pay for the costs of the other side if you lose. That is not covered

by legal aid and it would not be covered by lawyers acting on a pro bono basis. Even if we offered a free legal service the costs of paying the other side's representatives is enough to turn someone away from pursuing a claim under the Sex Discrimination Act.

We have legislation, for example, the Native Title Act, which recognises that certain groups in the country do not have the means to pursue legal action. We recognise that costs should be limited in those instances. It is certainly our view that individuals who fall under the Sex Discrimination Act fall within that category of people that may not have the means to pursue legal action.

CHAIR—Thank you very much for your time today.

Mrs Strong—Thank you for inviting us.

[12.26 pm]

O'DOHERTY, Mr Stephen, Chief Executive Officer, Christian Schools Australia

SPENCER, Mr Mark, Director, School Administration Support, Christian Schools Australia

CHAIR—I welcome representatives from Christian Schools Australia. Thank you very much for your time and for making yourself available to meet with the committee. The Christian Schools Australia submission has been lodged with us. For our purposes and for the purposes of Hansard it is submission No. 27. Just before I ask you to make an opening statement, do you want to change or amend that submission at all?

Mr O'Doherty—No, thank you.

CHAIR—You are welcome to make a short opening statement and we will then go to questions.

Mr O'Doherty—Thank you. It is important to state from the outset that Christian Schools Australia supports and endorses the objects of the Sex Discrimination Act. Antidiscrimination is a very important Christian principle. The life of Jesus in particular is an example of someone who did not discriminate against people on the basis of their background or characteristics, their gender, and so on. Throughout history the Christian church has been amongst those agencies of society leading the charge against discrimination in its worst forms. The abolition of slavery and many other examples from history attest to the fact that for Christians to regard all people as equal is an extremely important part of what they believe.

The basis of that comes from one of our deepest beliefs, which is that God made everybody in his own image. Other Christian doctrines that relate to this include the doctrine that Jesus died on behalf of everybody, irrespective of their background, and that the spread of the gospel by people such as the Apostle Paul and others aimed at bringing together people of disparate backgrounds who had this set of beliefs. Our first point is that an end to discrimination is very important to Christians. I refer to the act itself. Having read through parts of many of the submissions before you, it is important to inject some reality into the debate.

The exemption that is offered to religious schools, the Christians schools that we represent, is very limited. It applies only to employment and to dismissal, that is, the act of employing somebody or the act, if necessary, of dismissing somebody. The submissions before you that talk about the broad nature of exemption and allowing Christian schools to discriminate against individuals in the daily course of events or in their employment are not true. The exemption, which is extremely limited, relates only to section 14(1)(a) and (b) of the act. That refers to arrangements made for the purposes of determining who should be offered employment. Section 14(2)(c) refers to the dismissal of an employee.

Those are the only sections in which the exemption applies. Therefore, for the record, it is not lawful for a Christian school to discriminate in relation to conditions of employment, to deny

employees access, or to limit their access to promotion, transfer, training or any of those sorts of things that go to making up how a community works. The exemption applies only to employment and dismissal.

Senator FEENEY—Excuse me for interrupting at this juncture but would that be arguable? I would have thought that the whole contract of employment enjoyed an exemption. Is there some litigation, some precedent that establishes as a matter of fact what you propose?

Mr O'Doherty—I am telling you what the act states. The tribunal, of course, interprets the act in various ways.

Senator FEENEY—The making of the contract of employment and the severing of the contract of employment are both covered by the act.

Mr O'Doherty—Yes, they are; that is what the act states.

Senator FEENEY—It talks about the arrangements made when offering people employment and determining who should be offered employment. It explicitly does not deal with the terms or conditions on which employment is offered, which is to be found in paragraph (c) of section 38(1). That is our understanding of the scope of the act and how it is intended to work.

Mr O'Doherty—There is a further limit, which is that an employer who wanted to discriminate in that way would need to establish a nexus between the act of discrimination, that is, making a discriminating choice, and what is necessary in order to link with what is called religious susceptibilities in the act, or the doctrines, tenets, beliefs and moral teachings of that religion. That is a further limit on the application of this act. Again, we would argue that that does not give us what some people have described as a blanket exemption in order to make any discriminatory practice lawful. It just does not do that. It is not for us to discriminate against people in that way.

Section 38 of the act states that it must be in good faith in order to avoid injury to the religious susceptibilities of adherence to that religion or creed. We believe that the act is built on an important idea that religions themselves must be able to operate freely in our society and, from time to time, determine how those doctrines and beliefs are applied. The fact that those systems are open to theological and cultural debate within a religious body as big as a denomination or as small as a local church proves, in our case, that Christian religions take this seriously. They think all the time about the application of their doctrine to life. In my opening remarks the next thing I want to say is that the area of contention for Christian schools in employment matters is not to do with a person's sex, whether he or she is male or female, and it is not to do with whether or not persons are pregnant or otherwise.

The real issue we are talking about—the issue with which your committee really needs to grapple—is in the area of moral behaviour as it relates to the genuine requirement of a Christian school to employ people who can truly act in a way that is consistent with the beliefs that they are required to teach. When this matter has come up for review every year in every jurisdiction around Australia, governments have always left this exemption in place. At some level part of our democracy states that a parliament is not the place that is competent to determine how a religion needs to be able to teach its doctrines and tenets. For Christian schools and, to an extent

for schools of other faiths, although I am here today to speak for Christian schools, every member of that community that is employed in any capacity within a school is required to act in a manner that upholds the beliefs to which they attest.

Firstly, we need to be able to show that a person believes and attests to the teachings of the religion and, secondly, we require those people to act in a manner that is consistent with those beliefs, tenets and the teachings of the religion. We do not want people to be forced to be hypocritical in saying one thing from 9.00 am until 3.00 pm and then doing a different thing after school. Children who go to that school would rightly be able to say, 'Sir, you told me this at 2.30 pm today, but at five o'clock I saw you doing something completely different.' It is true that your words reflect your actions. I think that is an important principle that the parliaments of Australia have rightly upheld in maintaining an exemption for this purpose every time this kind of provision is reviewed.

The final thing that I want to say in these opening remarks is this: If the exemption is to be removed—and many people who have provided submissions have called for that—it seems to me that in an evidence based society and in the evidence based climate of policymaking that we have in the twenty-first century, no-one that I read about or hear from has proved that harm comes from the way in which this exemption is being applied. Senator Feeney, that probably goes to your question. Apart from the odd flair-up in the media there is no backlog of cases before the tribunal or anywhere else where someone has fronted up and said, 'Because I am a woman, because I am pregnant, or for whatever reason, I have been acted against unjustly.'

Senator BARNETT—I have a great deal of sympathy for your position. Perhaps that is the wrong phraseology, but I see things in the terms in which you have said them. One point has been made in this debate for which I have some time, that is, the proposition that the exemption as it exists at the moment does not provide a proper balance between the freedom of religious expression and the freedom to be free from discrimination. In fact, the exemption as it is presently structured provides for the primacy of the freedom of religious expression. I am interested in hearing your remarks about that. I refer to the extent of the discretion provided to you by the exemption and cannot help but think that the discretion is very broad, which might be appropriate.

The fact that religious schools have a broad discretion in matters of employment might be appropriate. I have not resolved that it is not but I am keen to establish the dimensions of that discretion. I cannot help but think, based on your submission, that a school has a broad discretion to terminate the employment of any person it deems not to be living a life consistent with its own religious beliefs and tenets. I would be interested to hear your remarks about that. I am trying to get a more forensic sense of the nature of this discretion. It might be that there is no backlog of such cases because Christian schools, and hopefully all religious schools, conduct themselves in a manner that is professional, proper, and consistent with community standards. But it is not impossible that there is no such backlog because there is no jurisdiction to hear such complaints.

Mr O'Doherty—That is a very good point, Senator. We do not want to see anybody unfairly dealt with in employment. That is not our objective and it is not the objective of my association or the schools that I represent. There are jurisdictions in which these cases can be heard and there is also the jurisdiction of public opinion. The mere fact that there is an exemption does not

stop people from making complaints. Yet complaints are seldom made or go through to the tribunals, either state or federal, that deal with these matters. We seldom see cases appearing in the media where people are claiming to have been dealt with unjustly.

I will ask my colleague who deals with these matters in various tribunals to comment more on this matter in just a moment. However, I want to refer to your first question, which was one of balance. You asked me whether the balance was right. International covenants place a high priority on children having the freedom to be able to be brought up within the belief structure of their family. Australia is a signatory to those international covenants. In our view it would be a very sad day if an Australian government tipped the balance against the right of children and their parents to live freely and to be educated freely within the teachings of a religion, whether it be Christianity, the Islamic faith, Judaism, or the other religions that flourish in Australia.

We think one of the great contributions that Australia is making to our world today is that we are able to have parliaments that say, 'We can provide a pluralistic freedom to religions in our community to express themselves, to educate their kids, and to live and work together in our community without feeling the need to clamp down on religious practices as has occurred in Europe. There is a lot of debate in educational policy about the so-called organisation of our communities that would come from the growth of Christian schools and Islamic schools in communities living side by side around Australia. Having worked with Islamic school organisations that are counterparts to our own, and having observed what kids are doing on the ground in schools around Australia, my observation would be that the existence of these religious schools is working towards the good of Australian society being harmonious rather than working against it.

If we allow children to learn the tenets and basis of their religion, first, they will have an inquiring mind about what other people believe and, second, they will respect all people. Our religion teaches them to respect all people, regardless of their beliefs. I think the balance is appropriate, as that is the question that you asked. I would be very loath to see Australia moving down the path, for example, of banning the wearing of hijabs, crosses and other things. I refer to the heinous public policy moves that have been conducted in Europe. It seems to me that it is only making matters worse.

Senator FEENEY—That is only France, is it not—or has it gone beyond France?

Mr O'Doherty—It is evident in other parts of the world, for example, in the United Kingdom. I believe that the High Court recently upheld a case in which a student wore to school what she described as a purity ring. This ring said that she promised she would remain chaste until she was married. The school said, 'You cannot wear that because you are not allowed to wear jewellery at school.' She said, 'It is a purity ring. For me it is a religious symbol.' On the basis of a report that I read I believe they went all the way to the High Court. I am looking to my left as I am sure Mark will correct me if I am wrong. They went all the way to the High Court which basically said, 'Yes, it is a religious symbol.'

The fact that that argument could be had shows how silly things can get when legislators, and those who interpret legislation, start to apply rules to these kinds of areas. I think that a bit of personal freedom and giving responsibility back to a community goes a long way. Perhaps Mark could address the issue of jurisdictions and their application. I sense that what you are really

inquiring into is whether what we have is employment and dismissal alone, or whether it is something much broader that lets us discriminate against a person who is employed and who remains employed.

Mr Spencer—That probably arises out of the way in which the legislation is drafted. Section 38(1) refers to the fact that it is not really unlawful in connection with the employment of a member of staff. Quite a broad form of words is used there, but nothing in section 14(1)(a) or (b) or section 14(2)(c) renders it unlawful. Those paragraphs deal only with employment and dismissal. Our understanding of the application of that is that section 38(1) does not apply to the discrimination that would be covered, for example, by section 14(1)(c), which deals with the terms and conditions of employment.

Senator FEENEY—I accept what you say. My proposition is that if it is as you say I think we are in agreement that it is a very broad discretion. I think it would be open to a school to terminate the employment of a person because that person's conduct and/or the leaks were inconsistent with the school's stated beliefs and tenets. I think that is a broad discretion. As I said at the outset, I am not convinced that you should not have that broad discretion. I am really interested in ascertaining the scope of that discretion. It is indeed a broad discretion. We are referring to a gardener, a person in an ancillary responsibility, let alone a teacher, a principal or a senior administrator.

Essentially, all such persons can be employed and/or terminated if their activities are deemed to be inconsistent with those of the school. That might be life in the big city and that might be appropriate. Please do not think I am advocating that it is not appropriate, but I think we need to call a spade and a spade and we need to comprehend the nature of the discretion and how broad it is.

Mr O'Doherty—We are happy to acknowledge that, Senator. We are happy to have the debate. We enjoy the debate; we are not afraid of debate in any sense. The reason for that breadth—it relates to teachers, administrators, as well as ancillary staff and so on—is because of a belief within our style of education, our pedagogical approach, that the entire community is responsible for sharing the faith, living by the faith, and therefore transmitting what is known as the informal curriculum to students, not just the printed words or the moral teaching but the reality of living by that moral teaching in day-to-day life. It is important to state that it usually raises its head in relation to a person's behaviour.

If a gardener were acting aggressively in a community that was committed to peaceful coexistence, that gardener would be falling short of the tenets of the religion that we are teaching and action would be taken to restore that gardener to a peaceful way of life. If not, it would be fair enough for the people running that school to say, 'You are not exemplifying the teachings of this school that we require for people to get on. We require people to act respectfully towards each other, therefore you will be dismissed because your behaviour was outside the tenets and doctrines of the religion.' That is the reason for the breadth. However, in some respects it also gives boundaries in relation to what action will be taken by our schools.

Boundaries occur because action has to be taken against behaviour that is evident. We would not want to sack, and nor could we sack, anyone who just had impure thoughts. If that were the case I think we would all be in trouble. There has to be some evidence of—

Senator FEENEY—I am purer than the driven snow.

Mr O'Doherty—Okay. I take your point, Senator. In that case you can work in any of our schools. A person has to show that his or her behaviour is outside the teachings. I think that provides some boundaries. It is not an unbounded discretion whatsoever; not by any means.

Senator FEENEY—My recollection is that your submission did not touch on section 37 exemptions for religious churches and institutions. Is that correct?

Mr Spencer—No, it did not. It is not that we have no interest in that, but our association is a school association and that is where our focus was.

Senator FEENEY—Right. Do you have any comment regarding section 37? We heard evidence in earlier submissions about that. I just wondered whether you had any comment to make.

Mr O'Doherty—Our comment would be very general. Speaking both as members of Christian churches and also because all our schools were started by local churches, I think the issue is important. Religion needs to be able to go about its business freely when it comes to these areas of moral teaching. If a parliament is not competent to judge whether or not a religion is speaking the truth, that is, the religious truth—I am not saying that parliaments are not full of competent people—but competent in the religious sense—

Senator FEENEY—If we could ascertain that we would be living in a different world.

Mr O'Doherty—I am talking about competence in the legal sense. If a parliament decides that it will not legislate that there is no God and that there is a part of life for which it will not legislate, that is, the condition of the human heart and the beliefs of people in our society, we need to allow religious bodies the freedom to go about that part of their work unfettered by juris prudence. I am sure that churches do not want to discriminate either. As I said, I refer the committee to the truth. Notwithstanding the things that can be said about churches, throughout history they have worked for freedom and they have worked for an end to discrimination. They have been very important agents of change in our society.

Senator BARNETT—Can we go back a step to your opening remarks when you said that you had had contact with and responded to state and territory reviews of their relevant laws. Is there anything that you have learned from that experience that would be of merit to advise us so that we could learn from your experience of state and territory laws? Have they consistently allowed the exemption for religious entities such as yours? Is any state or territory taking a different view? Could you comment on that?

Mr O'Doherty—In general terms it is right to say that the exemption applies in one form or another in every jurisdiction of which I am aware. The jurisdiction that has made a slight change to the way in which this provision works is Queensland. It removed the exemption, the general exemption as expressed here, and it replaced it instead with a genuine occupational requirement test. There is a genuine occupational requirement test in the Sex Discrimination Act. As we read it though, it would need to be amended to provide the kind of protection that our schools would be asking for in employment matters. But the committee might consider that that is the

appropriate way to go. We are not unhappy with what occurred in Queensland about four or five years ago when the act was amended there.

Senator BARNETT—Do you have a preference?

Mr O'Doherty—The preference is to leave the exemption as it is. On the very simple plain-speaking Australian approach, if it ain't broke, don't fix it. We do not see evidence that it is broke and we do not think, therefore, that it needs to be fixed, notwithstanding the fact that people may have philosophical objections to it. We do not see any harm that is occurring because of the way it is now.

Mr Spencer—It is a formulation of a form of words that is fairly consistent across other federal acts, for example, the Workplace Relations Act relating to unlawful termination, and the Human Rights and Equal Opportunity Commission Act. Most of the other state jurisdictions have a very similar form of words.

Senator BARNETT—Those words being? I do not want to tie you down but are you referring to the permanent exemption?

Mr Spencer—In section 38(1), yes. It refers to conduct in accordance with the doctrines, tenets, beliefs, or teachings of a particular religion in order to avoid injury.

Senator BARNETT—So words similar to that in each state and territory?

Mr O'Doherty—Whichever words they choose, generally they establish a couple of principles. Firstly, there must be a genuine doctrine to which people adhere and, secondly, that doctrines must be important. To offend it would injure the susceptibilities of those people who adhere to that doctrine. Those are the key points.

Senator BARNETT—That is based on the principle that we have freedom of religion in this country?

Mr O'Doherty—Yes. So the two overriding principles for us are, firstly, freedom of religion, as you have expressed and, secondly, that there is a legitimate role in being able to choose people who can demonstrate that religion. The demonstration of a religion is an essential component of being able to teach the religion, or at least to teach in an institution that is established for religious purposes, amongst other things.

Senator BARNETT—As a result of the interaction that you have had with the states and territories is there anything else that you believe has merit for us to be aware of?

Mr Spencer—We refer in our submission to a recent case in New South Wales before the Administrative Decisions Tribunal. In that cased the tribunal, on fairly similar wording in the New South Wales Anti-Discrimination Act, interpreted the particular religion as referring to the Christian religion—quite a broad definition. In that case it posed particular problems. It was a case relating to same-sex couples. The tribunal found that because there were a variety of views relating to that theological issue within the broad Christian church that was not a valid basis for an organisation with a narrower view to discriminate upon.

In our submission we talked about the possibility of reviewing the existing wording in section 38 to make it clear that when the tribunal looks at doctrines, tenets or beliefs, it is talking about a particular faith, community or entity involved rather than looking at a very broad sweep of the whole of Christendom where there obviously could be quite a divergence of views.

Senator FEENEY—I want to ensure that I understood you because that sounded like a fascinating point. Essentially, the tribunal made a finding about the state of debate inside a denomination of the Christian church?

Mr Spencer—Correct.

Senator FEENEY—Upon finding a live debate inside that denomination it resolved that there were insufficient grounds inside that church for the dismissal of a person. Do I have that right?

Mr Spencer—It was a little broader than that. It said that it was within Christian churches generally, not even a denomination but Christian churches.

Senator FEENEY—All of them?

Mr Spencer—All of them. It then went on to say, 'For completeness we will consider the case of this denomination', which happened to be the Uniting Church, again, a fairly diverse denomination.

Senator FEENEY—Indeed; it is a broad church.

Mr Spencer—Looking at that particular denomination it found that there was some divergence of views.

Senator FEENEY—As there is on everything, I think.

Mr Spencer—As it happened, the Wesley Mission, the particular body involved, had a much narrower view of what is acceptable behaviour on that issue.

Senator FEENEY—Are you able to cite that case for me?

Mr Spencer—It is referred to in our submission.

CHAIR—Page 6 of your submission identifies that, yes.

Senator FEENEY—Terrific. Thank you very much.

Mr Spencer—Our understanding is that there was not a lot of debate around that issue; it was more a case of the tribunal drawing a conclusion that the relevant religion was the Christian religion because the witnesses, et cetera, referred to themselves as Christians rather than identifying themselves as a narrower group, which may have been an oversight on their part. We would argue that that is not a helpful position.

Senator FEENEY—I can see why you might say that.

Senator BARNETT—Let us look at an ideal world in terms of this legislation and how you would like it to look. I note that your conclusion five states that, in the event of a widening of the scope of the act, the existing exemptions for the expression of religious freedom may all need to be expanded. I want to focus on that area for the moment. We have talked about the exemption being reasonably narrow as it applies at the moment to the employment and termination of an employee or person. I think you specifically referred to section 14(1)(c), which relates to the terms and conditions of such employment. In the ideal world, would you prefer that the exemption apply to the terms and conditions of the employment rather than just to the bookends of any employment, as in the commencement and conclusion thereof?

Mr O'Doherty—The initial response is that if we think that a matter is so serious then it will become a matter for dismissal. It seems to me that that puts a nice limit on things. We actually do not want to do something that might encourage unfair or discriminatory practices to occur between those two bookends. If it is that important then it should be a matter for dismissal.

Senator BARNETT—There must be cases where discipline may be applied, or some sort of guidance or counselling is given to the employee or the relevant person. Surely if you are going to have an exemption for the termination thereof you would also want to apply the same principles as an exemption for those circumstances that I have discussed.

Mr O'Doherty—I think I understand what you are asking. In practical terms, an employee would be informed that a matter might be of sufficient importance that it could lead to their dismissal if counselling was not followed. Once again, I therefore think it is sufficient in order to impose that restriction to make sure that schools are dealing with matters that are genuinely important and genuinely go to the issue of dismissal. I do not think we are arguing for a widening of it at that point.

Senator BARNETT—Let us go to your conclusion five. Can you expand on that conclusion where if the scope of the act is broadened you will need expand the expressions of religious freedom?

Mr Spencer—I would like to make one further point about your previous question. It is probably worth noting, at the risk of being repetitious, that we are not seeking through this exemption to have different pay or conditions or any other differential treatment for men and women. I think that, as Mr O'Doherty said at the beginning, we are supportive of the Convention on the Elimination of All Forms of Discrimination Against Women, the act and those principles. We are not trying to use this as a backdoor method of imposing any detriment upon women. It really comes down to those matters of faith that we are trying to hone in on.

In relation to any widening of the scope of the act, following on from that, we are concerned about ensuring the ability to act in accordance with our religious beliefs within the teaching and mentoring roles within our schools. That conclusion is in some ways indicating that, if the act were to be widened, there are some submissions that start to talk about issues of gender rather than sex, which may open up the possibility of other interpretations of behaviours, activity or lifestyles that could potentially be drawn within the boundaries of the act. If that were the case,

we would want corresponding changes to the exemptions to ensure that our existing exemptions will still apply to those new or potential forms.

Senator BARNETT—What are the differences between sex and gender as you see them?

Mr O'Doherty—This goes to the heart of the most controversial of the matters. As the act is written, we do not seek to discriminate on the basis of sex or pregnancy. Marital status is obviously an important one in relation to certain moral teachings of churches relating to marriage. If the act started to redefine sex to include chosen gender, as some acts have, that is clearly a matter on which churches have taken a view. That becomes a very important matter in schools employing persons who will be able not only to adhere intellectually but also live by the teachings of the religion in relation to sexuality.

I suppose conclusion five is inviting the committee to consider again what would happen if the definition of sex was chosen. If you refresh the language in legislative terms to start using the word 'gender' instead of 'sex', or if you started to include the language of 'chosen gender', that would raise specific flags for Christian schools and other Christian organisations, which I think we would then be asking you to address separately, or at least ensure that our ability to discriminate included the ability to discriminate on issues such as chosen gender.

Senator FEENEY—Which is the status quo, is it not?

Mr O'Doherty—It is.

Senator BARNETT—Mr O'Doherty, you refer in your remarks to marital status. There is a recommendation that the words 'marital status' be replaced with 'couple relationship'. What would you say to that suggestion?

Mr O'Doherty—Provided we were able to discriminate on the basis of couple relationship, if the exemption remained and it applied to couple relationships we would be happy with that. The issue for us is whether that relationship was conducted in a manner which was in accordance with the moral teachings of the church or the school that would be employing the person.

Senator BARNETT—I put it to you that there is a good deal of concern regarding the removal of the words 'marital relationship' in this and in other legislation.

Mr O'Doherty—In general terms, the organisation I represent and I do not believe that the definition of marriage should be broadened or diluted to include same-sex couples.

Senator BARNETT—You see them as a different entity from a de facto relationship?

Mr O'Doherty—A same-sex couple?

Senator BARNETT—No, a marriage relationship.

Mr O'Doherty—A marriage relationship is a qualitatively different relationship to a de facto relationship. It has a particular meaning in both common usage and law. It has a particular

meaning in the teachings of the Christian church, and we believe it is appropriate for that to remain recognised in our statutes.

Senator BARNETT—Have you looked at any overseas comparisons, such as the United States, and the regimes they might use there or in other countries? Do you want to alert the committee to your views on those regimes?

Mr Spencer—Again, a few of the previous submissions have noted the short timeframe and we have not had a lot of time to undertake that task. We are happy to come back to the committee with further material on that if you would like us to.

Senator BARNETT—I will not say you are a lone voice, but you are a voice that we have heard this morning and we have had a number of other submissions and presenters to the committee, and there will be further tomorrow and the next day, saying that these exemptions should be removed. I appreciate your input and views. Do you think there are other groups such as yours and other church organisations that would support your view that perhaps have not had the time to make a submission to present a view similar to your own?

Mr O'Doherty—Indeed we do. This is a very important issue for Christian churches and communities and for Christian folk in our broader community. I referred to our experience in Queensland earlier. In that case there had been no inquiry and there was not even any warning. Suddenly an amendment was lobbed into the single chamber of parliament. It may have been the Attorney General who said to me that they had received more submissions on that issue than they had on the issue of the road through the koala colony on the Gold Coast. It was just incredible how many submissions they received. That underlines that these are very important issues.

At the end of the day, we enjoy a nice balance of freedoms in Australia. People have freedom to express their religion and part of that is the freedom to have their kids educated in a school where people are free to overtly live by the moral teachings of the church, and are required to do so. Parents, in particular, would be very alarmed if they felt that while they were choosing a particular type of education from a particular moral, ethical or religious framework that that education was rendered ineffective—it was basically made useless—by the removal of the ability of those schools to choose people who could teach their kids in the way that parents want them to be taught.

CHAIR—That would apply to Muslim and Islamic schools as well, not just Christian schools.

Mr O'Doherty—Absolutely and most assuredly. While we appear today on behalf of Christian schools, I know that the views that we have expressed are shared broadly by other faiths. We definitely support the right of other faiths to enjoy exactly the same exemptions that we do to establish their schools in the way that our community does and to enjoy the privileges and freedoms of our pluralistic society.

CHAIR—Thank you very much for your time this afternoon. It is appreciated. The committee stands adjourned for lunch.

Proceedings suspended from 1.07 pm to 1.50 pm

SMITH, Dr Belinda, Private capacity

CHAIR—I formally welcome Dr Belinda Smith from the faculty of law at the University of Sydney. We have your submission and for our purposes it is numbered 12. Do you want to make any changes or amendments to that?

Dr Smith—I have provided to the secretariat a bundle of documents that are the publications to which I have referred. I have also provided an extra document that I would like to append. There are copies of the one-page table, entitled 'Regulatory options and choices'.

CHAIR—We have that. I move that we receive these as a further submission. I am sure that is approved. I invite you to make a short opening statement and then we will go to questions.

Dr Smith—Thank you very much for allowing me the opportunity to speak. I have a bundle of publications here and I am happy to take any questions on them. I have summarised some of the key points in my submission. I know that quite a number of the other submissions have referred to them, so I thought it might be useful to provide them in hard copy. I have also provided an electronic copy to the secretariat. The other one is a table that I will use. I would like to spend a few minutes going through the table and emphasising a few points from my submission.

This table is a framework that have developed that I have found useful. You have probably seen it in my submission and it comes up in other submissions. It is a framework to think about how we regulate anything, but in this case it is discrimination. It has four elements represented by the four columns. When we think about regulating something, we must first establish a rule. What are the options for rule? It could be a negative one, such as, 'Don't do something'; a positive one, such as, 'You must promote equality'; a general one that then needs a mechanism to get the detail about what it means; or it could be a very specific one about doing or not doing this stuff.

Once you have established the rule, the next element of any regulatory system is to ask who gets to bring an action to identify a breach. Who is the prosecutor? I have listed the options and the highlighted bits are the ones that we have in place at the moment for sex discrimination. They are the options for the enforcer are a public prosecutor, an agency, an advocacy group or, in the case of discrimination law, the victim and only the victim. When the action is brought, what is the process for identifying whether or not there has been a breach? Again the options are a private conciliation, a public hearing or other mechanisms.

If a breach has been found—that is, someone is liable—what are the options? I have broken those down to think about our alternatives. We can have compensatory remedies, which are compensating and provide redress to the individual victim. It may be money or reinstatement—anything that redresses the individual victim's harm that has already occurred. It may also be punitive damages to the victim or a penalty like that in the Workplace Relations Act or the Occupational Health and Safety Act. It may also be corrective; that is, orders made to correct and to prevent further discrimination. As you see by the highlighting, the only orders that can be made under our system are these compensatory orders.

The table has proven useful in thinking about how our system of discrimination laws works and in comparing it with alternative systems, whether it is occupational health and safety, the consumer, competition, environmental or whatever. You think about the nature of the rule, who enforces, what is the process and what are the possible remedies.

I have focused on three things in my research. One is this framework I have developed to help me to understand how we regulate for equality Australia and it enabled me compare it with other countries. I have just started to do a little of that in respect of the UK and Canada. You can see that my publication is specifically focused on family-friendly workplaces, that is, family responsibilities discrimination. The third thing I have looked at specifically is direct discrimination and the rule about direct and indirect discrimination, and specifically the narrowing of the scope of direct discrimination—particularly after the High Court case of Purvis v New South Wales. I am happy to talk about any of those aspects.

That is just a few points from my submission. Again, I use the table to think about things that I would see needing reform, even just walking across the table. I think Australia has done well to use discrimination laws to address the more blatant kinds of discrimination and to instil a norm of non-discrimination. But it really is mostly about the formal equality, about the most blatant stuff, not the systemic, structural stuff.

I think Australian lags behind the leaders such as Northern Ireland, Great Britain, Canada and South Africa in terms of developing sophisticated and innovative ways of addressing inequality. I support the HREOC proposal that this be a two-stage inquiry and that there are things that could and should be done immediately. But there are a lot of things that I think we could learn from these other countries that have developed other regulatory frameworks and have had them in place long enough to see some of the results. But we need to do research and we need to have public debate to think about how they might work in Australia.

In terms of what we could do immediately, I think some of the most pressing needs are fixing our definitions of discrimination. The way in which direct discrimination has been interpreted by the High Court has narrowed it so far, almost beyond what the average, everyday person would understand to be discrimination. We should think about the burden of proof for applicants. The Workplace Relations Act has a shifting burden. The applicant establishes a prime face case of discrimination and the respondent then bears the burden of having to show that it was not for a prohibited reason.

I also think the rule needs to be changed in terms of family responsibilities. As you know, it is extremely limited under the federal legislation. Family responsibilities discrimination is prohibited only in respect of direct discrimination, employment and only dismissal. It does not cover indirect discrimination, which I would argue is the primary form of discrimination experienced by those with family responsibilities.

If we are going to retain a general prohibition and conciliation as a primary form of dispute resolution, we have a problem in the system in that we have a general rule that says you must not discriminate and the only mechanism in the system to give that more detail—What is discrimination and what is not discrimination? What is harassment, what is not harassment?—is through court cases. Yet we have a process that, to its credit, is about private conciliation and resolves matters, but it does not provide precedent that elaborates on that general rule. So we

have no other mechanism in this system to explain to employers, education providers and others what is discrimination and harassment. HREOC does a great job in terms of producing information or guidelines, but with no legal force.

I have two final points. Moving across the table in terms prosecution, I do not think we are ever going to get at systemic discrimination if we always leave it up to the disadvantaged victim to bring these claims. We need an agency that has some capacity to support applicants or to initiate claims themselves. To make the system more sophisticated and preventative—moving across to the sanctions—we need a range of remedies and sanctions, not merely compensation.

Under the existing system, it does not matter whether an employer has discriminated 10 times blatantly, egregiously and intentionally, the court can still not order anything but redress for the victim. It cannot say, 'You need to develop a policy. You need to take this legislation seriously. You need a whack over the head.' It cannot do any of that. It is all about what you have caused to the victim post facto. They will direct an order just to the victim. They are the key points from my submission. I am happy to take any questions.

CHAIR—Can you explain the impact of the court's decision in Purvis v New South Wales, the particular problems that causes that complainants and the impact it has had?

Dr Smith—I am very happy to. In the second article in the documents, I tried to explain Purvis by comparing it with our first discrimination case in Australia, which was Wardley. You may remember that Mrs Wardley tried to become an Ansett pilot. She applied to become a pilot, and she was the only female applicant. She had the qualifications, experience and flight hours and so on and she compared favourably with all the other candidates—the men. However, she still did not get the job.

Ansett said, 'We don't hire women.' But it also said, 'It wasn't because you are a woman that we refused to give you the job.' It was because in the interview they asked her whether she was intending to have a family. She said, 'Yes, I do intend to, but I will have a serious career and I will come back.' Ansett then said, 'You are going to take leave and you will necessarily have to take leave if you get pregnant. We have compared you with applicants who are not going to take leave.' They said, 'We did not exclude you because you are a woman; we excluded you because you are going to take maternity leave.'

When you do this comparison in the legislation, as is required for direct discrimination, it says you must compare the applicant with a comparator who is not of your trait—in terms of sex, it is a man—who is in the same circumstances. The big question was what were the circumstances. Ansett said, 'Someone in like circumstances is someone who is also going to take leave.' By arguing that you should attribute the leave to the comparator you in effect take away what was part of the protective trait—that is, gender. The court then said, 'No, no, you can't do that. That is too integrally connected to the trait.'

That is a long way of getting to Purvis, 30 years later. There we have a child with a disability in a school. One aspect of his disability manifested itself in his behaviour, which is antisocial. The school let the student in and tried to accommodate him. It did not work out and then they expelled him because of his behaviour. The parents brought an action of direct discrimination

and argued that the school expelled him and treated him differently to someone without his disability. The school said, 'Without a disability, but with same behaviour.'

It was a question of what it means to be in like circumstances. They said, 'Yes, his behaviour was because of his disability. But to comply with direct discrimination, all we have to do is to treat him the same as anyone else who behaves in that way.' So it separates something that is integral—in this case it was the fact that Daniel's behaviour was part of his disability—and gives it to the comparator and says—in this case to an education provider, but it may be an employer—all you have to do to comply with direct discrimination is to treat consistently. Pick your criteria, whatever criteria—height, weight, behaviour, leave taking, tenure, unbroken tenure, whatever it is—but just apply it consistently. It does not matter whether that characteristic is integrally connected.

CHAIR—Do you think that this act should be amended now to stop that sort of—I was going to say behaviour—prejudice?

Dr Smith—I think it decimates the scope of direct discrimination. It reduces the scope of direct discrimination right back to blatant. So I cannot say that you cannot get the job because you are a woman; I cannot say, 'I assume she is going to take leave because she is a woman.' But if I have asked you and you say you are going to take leave or you are going to behave that way or whatever, that is fine. It has reduced the scope of direct discrimination. Everything else now has to be argued as indirect discrimination, which is much more complicated.

My argument would either be that we need to re-open direct discrimination to say you cannot just remove characteristics and treat them as the circumstances if they are not connected, or we need to rethink this bifurcation between direct and indirect and treat it more like the Canadians do. Let us stop arguing about whether it is this or that and get to the point about whether it is legitimate or reasonable, or is it the least restrictive way of achieving what we want to achieve and balance it.

CHAIR—I also want to ask about the proactive model, particularly in Canada and the UK. A number of submissions talk about that. Can you talk about that model and how it might apply in this country?

Dr Smith—My research is on the UK, and Canada is much more limited in respect of Australia. If you look at this table, one of the first questions here is whether you have a negative rule that you must not discriminate or a positive rule that you must do something—that is, the education provider, the employer, or the goods and service provider. Then there are options about whether it is substantive or procedural.

The US, Australia, Canada and the United Kingdom originally adopted a negative anti-discrimination law system—an individual, complaint based, human rights based mechanism. What we have seen in the leading countries—Canada and the UK—is a positive duty that supplements that. They still have an anti-discrimination law system, and it is supplemented by a positive duty. This varies. For instance, in the UK the positive duty is imposed only upon public authorities.

One way to think about it is that we have an existing system—which is our Equal Opportunity for Women in the Workplace Act. That is in effect a positive duty because it says to employers not only that they must not discriminate but also that they must do something. It is a very mild, soft process of obligation. What must you do? In Australia you must audit your workplace, you must consult, you must develop a plan and you must report.

The UK has gone further than that. It says, drawing on regulatory theory, that you must promote equality—that is the general duty—and then it gives specific duties along the lines of the EOWA. You must develop a program and identify the particular problems in your workplace. You must audit and find those problems. Importantly—something that differs from our EOWA—you must publish that information in a way that is comparable so that stakeholders can actually use it to start lobbying for change and to make informed decisions.

Senator BARNETT—Does that apply in the workplace for all businesses?

Dr Smith—Public authorities.

Senator BARNETT—Just public authorities?

Dr Smith—In the UK it applies to public authorities and those companies that provide public services; that is, outsourcing. I understand that in Canada it applies to the private sector as well.

Senator BARNETT—No matter the size of the business?

Dr Smith—No matter the size, because it is proportional to what they can do.

Senator BARNETT—How is it proportional if they have to submit a plan and publish relevant reports?

Dr Smith—If you have five employees, it is fairly easy to see your representation. So we have one manager to the three down here. What plan? We have looked around and we do not see any problems; we have done this. There may be fewer problems. If you have a workplace where there are no women then a plan would be to think about how to recruit. I am not sure about the full scope of the Canadian laws. I think the appendix of the HREOC submission has more detail. Again, this is why I think it has a lot to offer us in terms of learning. But we need to do a lot more research before we just try to implement it.

Senator BARNETT—I do not want to go into it now, but it clearly has implications for small business or micro business, in particular, who do not necessarily have the resources that the big corporations or certainly a government department has to prepare such plans and papers.

Dr Smith—That is right. Sandra Freedman, who is a leading Oxford discrimination law scholar, has been particularly focused on measures that are proportional to the problem. So, if a small business has fewer problems, then measures have to be proportional to that. A larger workplace is going to have much more to do.

CHAIR—If you were going to look at something like this you could get the equal opportunity for women in the workplace agency—

Dr Smith—Yes.

CHAIR—to perhaps start with larger businesses.

Dr Smith—Absolutely.

CHAIR—100-plus or 50-plus employees.

Dr Smith—Yes.

CHAIR—Is it a bit like, say, occupational health and safety management plans?

Dr Smith—Exactly.

CHAIR—You have to have and occupational health and safety and system plan in place in your workplace.

Dr Smith—You would have an equity plan.

CHAIR—Which might go to women, any SB or indigenous.

Dr Smith—The Canadian one is not limited to women, nor is the UK one. It started with race and last year introduced disability and gender. The UK one has those three and Canadian one—

CHAIR—Are there sanctions if you do not have such plans?

Dr Smith—The enforcer is the commission, and the commission has a range of sanctions. It is like occupational health and safety in that it has responsive regulation. You can start with education and compliance notices saying: 'You haven't had a look at your workplace. You haven't developed a program. You haven't submitted a program. What are you doing? Let us help.' Then it can be enforced if nothing is done. It is a responsive regulation; there is a range of things that can come into play before it gets to that. In the UK the general duty is enforceable by the commission and there is some scope for individuals to enforce through judicial review, but that seems quite unworkable.

Senator FEENEY—Is there an inspectorate of some kind?

Dr Smith—My sense is that the organisations that have inspection capacity at the moment are Auditor-Generals, the occupational health and safety system and other inspectors. Perhaps not OH and S.

Senator FEENEY—The occupational health and safety system can.

Dr Smith—They have inspectors. Because they are public sector organisations, they are under the same obligations. The UK duty does not apply just to employment; it applies to the provision of their services and their policies. If you are a public authority, this duty is imposed in respect of your employment, what you do and your policies. Any inspectorate has to factor this into their

own work. So if they are now inspecting then one of their changes might be to add gender, disability or race equity into the work that they do in identifying problems.

My understanding is that the commission has relied mostly upon the inspectorates to feed that information back or for public employees or service providers to flag it to the commission. In Northern Ireland—which has a much more comprehensive system and was probably the forerunner of all of this—it is much more comprehensive in that every organisation has to submit its plan to the commission and the commission will review, evaluate, vet, develop and so on. It is much more full on.

Senator FEENEY—I guess they have long experience of sectarian discrimination.

Dr Smith—The sectarian problem was the basis for developing that plan and that is where it has had the greatest success. In some ways it might be a more intransigent problem, but a clearer one for seeing results. Do we have better representations or not? It is dichotomous. You can get the figures and it is simple. Gender equality in some ways is more complicated. Racial equality might be more complicated, too, and disability. If you are just talking about two groups, it might be simpler.

Senator BARNETT—You have looked at the Canadian and the UK experience and explained a little bit about that. Thank you for that. Can you tell us a little bit about how it works in the US?

Dr Smith—I am not an expert on the US. One of the key reasons I have not looked at the US is that I think it is more backward than Australia. It has some merits. In terms of an anti-discrimination law model, the Australian anti-discrimination laws are pretty much based on the US model. The two differences I note are that the equal opportunity commission has the power to support applicants and to initiate and act on behalf of applicants. When they receive a claim, they can strategically take up claims and negotiate for across-the-board settlements. We saw a massive one for Morgan Stanley a few years back. They can do that strategically. But that will depend upon the resourcing of the commission.

The second difference is the range of sanctions and the key difference is that in the US punitive sanctions and punitive damages are available. As you probably know, most litigation in the US goes to a jury and the damages can be extremely high. I think they are capped at $300,000 for general damages and $300,000 for punitive damages for any individual event.

My understanding of the US is that there is a much greater threat of high damages and of reputation damage. That is why I would be concerned about following the US path. There is also more resistance from employers. I think there is less scope for thinking about how to improve, develop and correct rather than you either fund liability and get a big whacking stick or you do not. I do not think there is a pyramid of remedies, which is what I would advocate.

We need to think in a more sophisticated way about whether an employer is on board but does not have resources, or is not on board at all, or on board and has the resources but just screwed up anyway. We need to think about the individual employer or education provider—the full gamut of the act. We need to think more carefully about having a range of remedies and an agency that can do that.

The other thing about the US is that it is my understanding that the indirect discrimination provisions are much more difficult to pursue. But they have many, many, more cases running on direct discrimination and they have a lot more creative jurisprudence on that. I do not know how applicable that is to Australia.

In terms of affirmative action, they have it in limited fields in education and so on. One way in which I understand that they have been more effective, or at least used this tool, is through procurement limits. There are federal directives saying you cannot engage in a federal contract if you do not have an affirmative action plan in place.

Senator BARNETT—They obviously have a federal system. Does the description you have provided relate to federal laws?

Dr Smith—Federal.

Senator BARNETT—Or does that include the state laws?

Dr Smith—States do have anti-discrimination laws as well, but I do not know anything about them.

Senator BARNETT—So the description you have given is of the federal regime?

Dr Smith—And it has a similar array of sex discrimination, race and disability provisions. The disability one has a more proactive obligation to accommodate. It has age discrimination as well, and it has the constitutional protections.

Senator BARNETT—I have one other question relating to the High Court and Purvis. You referred to that earlier. I have not read it, so I am not up to speed on it. Can you summarise the findings of that case?

Dr Smith—Yes. The application by the student was only about direct discrimination. The applicant's foster parents said to the school, 'You have directly discriminated. You have treated Daniel less favourably than a comparator in like circumstances.' What was interesting about the case was that at the time there were various exceptions under the act. The case was in New South Wales.

Senator BARNETT—So it was under the New South Wales act?

Dr Smith—No, it was actually a federal act. At that time in New South Wales, the student could have chosen to take action under the New South Wales or the federal law. They went federal, I am assuming for a particular reason. When applying to enrol at a school, the prohibition says to the school, 'You must not discriminate on the basis of disability, unless in accommodating a student it would impose and unjustifiable hardship.' There was a weighing or balancing provision. Then, New South Wales said, 'If you have taken a student in, and you have tried to accommodate and it has not worked, you are then allowed to expel on the basis of disability up to the point of unjustifiable hardship.'

The federal act had that balancing or exception on the way in but not on the way out. So, Daniel, the student, was attending the school and he was then expelled because of his behaviour, which related to his disability. The High Court was between a rock and a hard place. It gets this case where this school, this principal, has done what it could—it has complied with occupational health and safety system obligations to teachers, parents, teachers' aides and other students and so on—but has asked whether this school treated this kid differently from someone without a disability. It clearly has, but not if you attribute the behaviour.

The High Court had no capacity because the legislation did not have that exemption at the time—it now has the exemption; it was quickly corrected—to do the balancing that most human rights legislation needs. You need to be able to balance and say, 'Did they do enough? Have we balanced the needs of all these others against the needs of Daniel?' There was no balancing. So the High Court had to decide whether he was treated differently.

Senator BARNETT—Was it a unanimous decision?

Dr Smith—No, McHugh and Kirby dissented.

Senator BARNETT—Five to two?

Senator FEENEY—What was the disability?

Dr Smith—Daniel had many different disabilities and they manifested in visual impairments, mental impairments and behavioural problems.

Senator FEENEY—Was his behaviour a direct result or an indirect result of this?

Dr Smith—It is not a question that the only reason Daniel behaved like this was because of his disability. The case now says to employers, education providers or whoever, 'You don't have to ask why someone behaves the way they do—whether it is because of a disability or they are having a fight with their mum—they just have to be treated the same way. You don't have to ask if someone is taking leave to have a baby, to write their first novel or go to the Olympics or whatever.'

Different sorts of leave are not treated any differently, even if some are more gendered than others, some are related to a disability, a racial issue or anything else. We do not have to ask about direct discrimination anymore. Of course, there is still indirect discrimination, but it is much more complicated and harder to understand and harder to prove. For direct discrimination it is much narrower. It really is just a procedural fairness issue about consistency.

Senator FEENEY—What was the comparator?

Dr Smith—The question was should the comparator be someone without a disability. Clearly, yes, the comparator had to be someone without a disability. The question was whether or not they should have Daniel's disability attribute to them. Should the school be able to say, 'We treated him the same as anyone who behaved that way.'? Or should it have to treated him differently because his behaviour was to do with his disability?

Senator FEENEY—Even though the court has a discretion about the comparator, you still say that it is a structure?

Dr Smith—The High Court has that discretion, but it has now pronounced that all of these factors need to be treated as circumstances. What the High Court did not do was say, 'in this particular case', 'under the disability act ', or 'because we have this legislative anomaly'. There were no limitations in the wording of their case. What we have seen is that that has been applied as a precedent in race cases, in sex cases and in family responsibility cases. It is now the way in which all courts and New South Wales tribunals interpret direct discrimination.

Senator FEENEY—You said that is uniformly to the benefit of the defendant?

Dr Smith—I do not like to think of it in terms of benefit or detriment to a defendant. Employers have to do what they need to do, but it means the employer has to bear no cost of thinking about the different context of and the differences in gender, race or disability. They just have to treat behaviour as behaviour. It removes any obligations.

In respect of disability, the court said you could use a criteria if it was an inherent requirement of the job and accommodating would impose an unjustifiable hardship. You do not have to worry about that hardship part any more; you do not have to accommodate at all; you do not have to get to the exceptions because you do not get past the definition. If you can show that you have treated consistently then you have not treated differently in the way that you have constructed that comparator.

Most cases which might have run as direct discrimination will just fail at that point. You will not ever get to those exemptions which allow for the balancing which has a degree of accommodation and a weighing up of legitimate aims of businesses, organisations and other people's needs, different values and so on. There is no weighing up; there is no capacity for the court to examine. It is here.

Senator BARNETT—You said that the government quickly responded with an amendment. Is that what you are referring to? When did that happen and what was the effect?

Dr Smith—They included an exception that said that a school may treat someone with a disability differently if accommodating them would cause an unjustifiable hardship. But it is irrelevant now because, as I said, you do not get to that exception anymore. There are only two exceptions once you have proven direct discrimination. So the applicant proves direct discrimination and the respondent gets to claim exception. We do not have to claim exception if you cannot get past the definition. Two things have happened, first, the federal government introduced the exception.

Senator BARNETT—When was that?

Dr Smith—I think it was before Purvis was even decided—2003. It might have been 2004. It was fairly immediate. The other thing that happened that made Purvis irrelevant to the specific field of Purvis, which is education, is the disability education standards. They apply to the Purvis-type situation now, and they have a positive obligation to provide reasonable adjustment.

That scenario would not come under discrimination anymore. Yet the decision in that context has spread.

Senator BARNETT—Can we put aside Purvis for one moment and this amendment to have unjustifiable hardship? What is your response to that scenario?

Dr Smith—I think we should have that sort of unjustifiable hardship exception across the board. But it is irrelevant if we are not going to get to it. If we have a really narrow interpretation of direct discrimination, we never get to do that balancing. I think all discrimination laws have to have some degree of balancing. It needs to balance different objectives and who is bearing what costs. If we could define direct discrimination so narrowly that there is no discrimination, we will not get to that exception.

In indirect discrimination, a balancing is built in. You impose a requirement—a behavioural standard—that disproportionately impacts upon that particular group—disabled, family responsibilities or whatever—and is not reasonable. That whole question of what is reasonable is the balancing; it is built into the definition but it is not indirect. We have narrowed 'direct', and the exceptions become irrelevant or just not used. That leaves open indirect and the question is how accessible is indirect to understand and enforce.

Senator BARNETT—What do you think?

Dr Smith—I think it is virtually impossible for your average person who experiences indirect discrimination to understand it. I do not think you would even understand what it was let alone be able to think about whether a condition requirement or practice that has been opposed that is a substantially higher proportion of the non-comparator group can comply with which you cannot comply and is not reasonable in all the circumstances. It would be difficult to understand that, let alone breaking it down and prosecuting it in a federal court, for an average person who is disabled or who has suffered sex discrimination. Sex discrimination is different; it is a different test. I think the Sex Discrimination Act has a better indirect discrimination test. Even that concept is difficult to understand, but it is better in that it has a balancing. I think that is critical.

Senator FEENEY—Your submission is silent on the question of the permanent exceptions that exist. Do you have any remarks to make concerning the existence of those permanent exceptions in the SDA?

Dr Smith—I do not have any specific remarks. Mine are more about framework. Whilst we have blanket prohibitions, we need blanket exceptions. If we change the prohibition to create more capacity to do weighing up then we do not have to have these blanket exemptions for religious organisations. It does not allow us to ask, 'Are you engaging a priest or a gardener?' It is a blanket one and we need that because we have this blanket exception of 'Have you or haven't you?'

Whereas if we had a model of defining the problem and the prohibition in a way that you could say: 'Okay, what you are you trying to achieve? Is that a legitimate goal? Have you imposed that criteria in a bona fide way? What are the balancing considerations?', you do away with the big problem about these blanket exceptions. It brings it back to the question that we

need to focus on: Who is bearing what cost and is that the most effective way of achieving this goal? Then you have to ask who is making those decisions.

Senator BARNETT—Who would be making those decisions?

Dr Smith—At the moment it is the courts. I think the courts struggle with that. We need to develop more mechanisms for human rights organisations, businesses and other stakeholders to develop codes and the detail of what is reasonable in particular circumstances. We look at the fair dismissal code being brought in and defining this thing called 'fairness'. What is that general thing? Let us give it detail. Okay, we have only employers having input to that. A better system would involve all stakeholders working out what is fair, devising more detail and thinking about what factors should be balanced. It might be okay for the courts as long as they get enough guidance and the structure of that guidance has been developed well by stakeholders.

Senator FEENEY—In some foreign models that you have characterised as being more advanced than ours—

Dr Smith—More sophisticated.

Senator FEENEY—More 'proactive models' is perhaps the better way of phrasing it. Are there exemption regimes within their legislative frameworks?

Dr Smith—I am not entirely sure, but I know the Canadian system is not as bifurcated direct and indirect. In 1999, they gave that up and said it is ridiculous to try to squish it into this or this. They have a three-step test, which I have set out in the submission, that goes through these things. Again, you do not need to get to the blanket exceptions because you have already dealt with reasonableness and weighing up.

Senator FEENEY—I have read those three tests that you refer to and I accept a lot of what you say, but I can still imagine how it is possible for religious institutions, for example, to fail those tests.

Dr Smith—Are you thinking it is not a legitimate goal or there is not a less restrictive way of addressing that goal?

Senator FEENEY—Some religious institutions have intrinsically discriminatory doctrinal and organisational behaviours. They simply do. The fact that a Catholic cardinal can only be a man, for instance, would struggle to fit the three criteria you point to.

Dr Smith—Yes.

Senator FEENEY—Do you agree?

Dr Smith—I agree. I presume that if they had exceptions they would be more narrow, because a lot of them could be taken out or narrowed down to the real nub. There might still need to be some very narrow ones. I am not sure; exceptions are not my forte.

CHAIR—Thank you.

Senator BARNETT—I refer to the question that Senator Feeney asked. Could you consider a model that would allow for a Catholic cardinal to adequately meet the three criteria or other criteria that you could envisage?

Dr Smith—Yes, I could draft you a model now. Religious organisations have to have protection and religion has to be a value that gets weighed up against other factors. We have businesses that say that the business imperative is the most important issue and we have feminists who say this and religious who say that. We have to work out how to balance them.

Senator BARNETT—Based on the status quo, we have this blanket exception, as you know, for religions, sport and whatever. Could you consider a model that could take them into account without going down the exemptions path but using your criteria path instead? If you want to take that question on notice and let us know your thoughts on that, that would be of interest.

Dr Smith—It might be safer.

Senator FEENEY—I cannot imagine that Canada wrestled with this issue without creating any exemption for Quebecois let alone plenty of other institutions.

Dr Smith—I think its proactive model was in the US and probably stemmed from religious protection. We do not have religious protection.

Senator FEENEY—That is a good point.

Dr Smith—We have not dealt with having religious protection. We have only very limited religious protection at the state level. I think that has been developed more at that level and then it competes, whereas ours only competes as an exception. It is the carving out; it is not the competing protection.

Senator BARNETT—If you can point to any models or if you have any advice on that. please let us know.

Dr Smith—I can safely take it on notice.

CHAIR—Thank you, Dr Smith.

[2.36 pm]

BOWTELL, Ms Catharine, Senior Industrial Officer, Australian Council of Trade Unions

CHAIR—Ms Bowtell, I welcome you as a representative of the Australian Council of Trade Unions

Ms Bowtell—Thank you. The author of our paper was unable to make it, so I may have to take some questions on notice and get back to you. I apologise in advance for that.

CHAIR—That is fine; we understand that. Your submission is with us and we have given it No. 55 for our records. Do you need to make any amendments or changes?

Ms Bowtell—No.

CHAIR—Do you want to make a short opening statement on Belinda Tkalcevic's behalf and on behalf of the ACTU?

Ms Bowtell—I speak on behalf of the ACTU, but I may not be able go into all of the detail that you might want. There are really three themes to the submission we have put to you. They are fairly broad. They go to these things: First, it is our submission that it is time to reconceptualise how we deal with discrimination law in Australia and to move away from the individual complaints based model to a model which looks more at the things that Dr Smith was talking about; that is, using a broader range of regulatory tools to ensure that the behavioural change that we are seeking in the workplace occurs. From our point of view it is workplaces, but it also occurs with other service providers.

We should look at using that broader range of regulatory tools and move from the obligation to not discriminate. We should move away from that and towards a more positive obligation of fair treatment or a duty to eliminate discrimination. Rather than saying, 'You will not discriminate', there will be a positive duty to eliminate discrimination. Although in our submission we say, 'as far as practicable'. We are not saying it is an absolute duty, but an aspirational and targeted duty. We have listed a number of potential regulatory tools that we think could be useful in that environment. They go to things like the power of the agency to investigate breaches of discrimination law or discriminatory conduct, and the issuing of improvement notices and own-motion proceedings.

We also have another cluster of recommendations that go to things that are probably beyond the current thinking about the Sex Discrimination Act and get into the area of equal opportunity in the workplace agency, but things like mandatory audits, broadening the scope of audits, the introduction of equality representatives and those sorts of things. There could even be some fairly light touch regulation, like looking at accounting standards as a way of ensuring that the type of behaviour is regularly monitored.

That is the first group of recommendations, and they arise from a thinking that is not dissimilar to what Dr Smith was talking about. We say that here is a behaviour we want to

change in workplaces. If we look at what we do, for example, around health and safety, we say we want people to create safe workplaces and we put in place workplace representatives, health and safety committees, and we have an investigatory agency that investigates breaches or potential breaches and does spot inspections. Where breaches are found, a notice to improve is given. If that is not complied with, prosecution ensues.

In anti-discrimination, we say 'Here is a change we want you to make in your behaviour. We want you to provide fair workplaces and move towards equality. If anyone complains, here is the avenue you can use.' They are very different models of trying to bring about changed behaviour. We said, 'Why don't we drop some of the tools that we have used in occupational health and safety into this area?'

The second set of recommendations we have put to you really go to ways that you can broaden the outcome from a successful complaint. We have looked partly at the capacity for the courts to make a broader set of orders; that is, not just compensation orders but also closer integration with the workplace relations system. As workplace relations practitioners, we know about the capacity to move from an individual dispute to broader workplace change, and the tools that are available in the workplace relations system have been really useful in that. Award-making powers, agreement-making powers, compulsory conferences and so on have been really helpful in that area. We think that closer integration between anti-discrimination and workplace relations would be useful in that area.

The third set of recommendations goes to improving the lot for individual complaints. It is about more rapid access to conciliation, having the case heard more quickly, the capacity for representative actions and so forth. There are three clusters: The general schema, the way to broaden the outcome from a successful complaint to workplace change, and assistance to individual complainants.

CHAIR—I am looking at your summary of the recommendations on page four of the submission. Do you actually think that the act could strengthen the individual complaints based model? I think we have covered class and systemic discrimination. In fact, the Human Rights and Equal Opportunity Commission put to us this morning that it would like the commissioner to have powers to investigate systemic discrimination. Would you support that?

Ms Bowtell—Certainly. It is also something that has been recommended to the Victorian parliament in its recent review of its equal opportunity legislation. It was recommended that there be the capacity for own-motion investigations. I think the Victorian inquiry's recommendation is only where a matter extends beyond to a class workers rather than to an individual complainant. We would certainly support that.

CHAIR—How would the individual complaints based model be strengthened?

Ms Bowtell—Individual complaints obviously need a remedy and they are also part of the framework of dealing with discriminatory practices. To improve the lot for individual complainants, one of the key problems is the time that it takes from the lodging of a complaint to the satisfactory dealing with that complaint.

If you compare anti-discrimination timeframes with workplace relations timeframes, you can lodge an unfair dismissal complainant with a New South Wales tribunal at the moment and you will be conciliated within three weeks. If it is not resolved at conciliation, it will be listed for hearing within another three weeks. If you look at the way anti-discrimination complaints are handled, it is probably 12 months from lodging the complaint to getting anywhere near the court. Then you have the formalities of court proceedings, which means that it is probably 18 months to two years from complaint to outcome for a complainant.

CHAIR—Is that because of the process in the act or is it because of under-resourcing?

Ms Bowtell—I think it is internal procedures in the agency to start with in the conciliation. Then it is the fact that it is a court based process rather than a tribunal based process. The problem with that is that if you are looking to address a workplace based complaint, the most important thing you can do is to keep people in work. If the complaint is not resolved—that is, they have been either dismissed or suffered a detriment—and that is not resolved until some time down the track, you do not have any remedial outcomes in the workplace, because the complainant is separated from the workplace. Her outcome is not seen by her colleagues and so on, so it does not have that flow-on effect that a rapid response can have where things are fixed, everyone is back, relationships are back to normal and work can continue.

That is not always the case; I would not like to pretend that that is always the case in workplace relations disputes. But rapid turnaround is a really important feature of being able normalise the relationship when people have made a complaint in workplace relations disputes. It is not a feature of sex discrimination complaints. That would be the first thing in terms of assisting complainants—that is, to speed up the process.

The second thing would be assistance with litigation. We rely on the complainant to bring the complaint. We would like to see a body able to assist complainants with their litigation. It could be a separately funded agency. It depends to some extent on how much HREOC is responsible for compliance as to whether it can also assist with prosecutions. But there can be models whereby a separately funded legal unit can consider public interest-type litigation on behalf of complainants or representative action on behalf of complainants. The ACCC can take representative action on behalf of small businesses that are unable to fund their own litigation. So I think it would be fairly easy for an agency to be equipped to fund litigation on behalf of complainants as well.

CHAIR—Dr Smith's and a couple of other submissions alluded to this issue of positive duty. Let us just pick up on the issue that Senator Barnett raised before. Should it go to public agencies and private enterprise? If private enterprise, should there be some threshold initially? Should it be for employers with 100 or more employees or should it be everybody? How would you apply that?

Ms Bowtell—I think they are two separate issues. The first is whether there is a positive duty or a negative duty. We support a positive duty—that is, a duty to eliminate discrimination or a duty to provide fair treatment. That is a general duty. How that is given effect becomes the issue around whether there is compulsory reporting, compulsory auditing, compulsory lodging of plans and those sorts of things.

In our view there is no reason to exempt the private sector or to exempt business on the grounds of business size. But the obligation would clearly be higher the more sophisticated the organisation is. If you look at something like, for example, the obligation to accommodate a request or to consider a request for part-time work or flexible work for parents of young children—which was introduced during the family provisions test case into the award system and is now part of the proposed national employment standards that will form part of the government's workplace reforms—that will apply to all businesses, regardless of size.

But one of the factors in the reasonableness of the refusal to accommodate the request for flexible work will be the size of the business and the capacity of the business' HR section and all those other things. You can impose a general obligation, but the compliance will be different depending on the capacity of the organisation. We would rather see a higher standard and then allow a sliding model of compliance depending on the capacity to comply.

Senator BARNETT—I will flesh it out. I am particularly concerned about small business and micro business. They tell me every day that they have too much paperwork, too many government terms and conditions to complete rather than actually running their businesses. This is obviously another thing for them. How would you respond to their concerns and how could that be accommodated?

Ms Bowtell—It depends on which concern you are asking me about. If you are asking whether they are concerned that they have to try to eliminate discrimination in their workplace, I would say that they probably already have that obligation now but it is just not very clear to them. Amending the legislation would make it clearer to them. Are you asking how I would respond were there to be an extended auditing requirement? That is if, for example, the requirements of the Equal Opportunity for Women in the Workplace Act were to be extended to businesses with fewer than 100 employees so there was a mandatory annual reporting requirement. Is that the question?

Senator BARNETT—Yes, that is right. Dr Smith gave a very comprehensive overview. One of the options was preparing a plan, providing the papers and outlining how they are complying. That would be compulsory. You referred to a compulsory obligation or compulsory arrangements to meet the obligations. I am asking how it would work.

Ms Bowtell—As I said, I think that the compliance obligation on a smaller business would be of a lesser standard than that on a larger business. The complexity of the report that they would have to lodge would also be less. You could have checklists and all sorts of tools to assist small businesses to comply.

One of the things the ACTU and I are attracted to is working with the accounting profession. Everyone has to have their books audited regularly. The risk of prosecution for health and safety breaches, the risk of complaints about equal opportunity breaches or breaches of a positive obligation to eliminate discrimination should be taken into account in terms of whether companies are meeting their risk management obligations.

Senator BARNETT—So they should all have a plan?

Ms Bowtell—We think they should all be required to report on how they are going towards meeting their duty to eliminate discrimination. Whether that would go to a plan or not is not something we have put in our submission. We would support a regulatory requirement for all businesses to report on whether they are meeting that duty. The current reporting requirements for plans have not been effective for a very long time. They may have been effective—

Senator BARNETT—With respect to what?

Ms Bowtell—With respect to the Equal Opportunity for Women in the Workplace Act, which applies to all businesses with more than 100 employees.

Senator BARNETT—And the public service?

Ms Bowtell—Some of the public service, but not all. Universities are required to report under that legislation. I do not think the commonwealth government is required to report under it. I would have to follow that up, but I do not think the commonwealth government is required to report under that legislation.

Senator BARNETT—Can you let us know if you find out? That is fascinating.

Ms Bowtell—The sanction for failure to report is being named in parliament. But there is no auditing of the quality of the reports. There is also no auditing of the requirement to consult with stakeholders in the development of the report. Without the full armoury, reporting for reporting's sake is not something we would support. It would have to be something that was going to make meaningful change to behaviours.

Senator BARNETT—I know what some small businesses would do. They would throw up their arms and say, 'I'm off out of here.' I do not know whether you have put your mind to the issue we raised with Dr Smith relating to exemptions. Some submissions have said that we should remove all the exemptions. Christian school representatives earlier said that it is very important that they should be retained. Have you considered a model that could apply where you do not have exemptions but you take into account their needs and desires and, for example, religious freedom and the important principle that we hold to in Australia with regard to that particular proposition?

Ms Bowtell—We have not addressed the notion of exemptions in our submission. But I think the ACTU would endorse what Dr Smith put to you. Our preference would be for the balancing. The model we have proposed for the past six or seven years in relation to how work and family issues are to be accommodated workplaces is to say that you have to take into account acuteness of the family responsibility and the needs of the business, and balance those two in determining the obligations of employer and how the employer meets those obligations.

That notion of balance has been central to the work that ACTU has done in relation to work and family and that issue of exemptions. I think we take same approach. The most important thing is being able to balance the operational requirements of the business. It is not so much the operational requirement but the religious freedom that is the central to the organisation balancing that with the other social good that we are seeking to address through a sex discrimination act.

Senator BARNETT—Does the ACTU and perhaps the Independent Education Union have a policy with respect to exemptions to your knowledge? Has there ever been any industrial disputation around these exemptions? Has the IEU ever had to deal with an industrial dispute based around the exemption being applied to dismissing an employee in circumstances where union might have taken issue?

Ms Bowtell—I am aware that the IEU has taken cases in relation to workers who have been dismissed or refused employment based on some aspect of their personal life. But I would not want to speak on behalf of the IEU in relation to their policy. We can follow that up with them and provide the secretariat with that information from the IEU if that would be helpful. I would not want to talk on their policy, but I am aware that they have certainly had circumstances where they have had to advocate on behalf of members in relation to instances of their personal life being considered relevant or not relevant in respect of employment.

Senator FEENEY—I am interested ascertaining whether that is a fringe or occasional problem or a systemic problem.

Ms Bowtell—Yes, I would have to check that with IEU.

Senator BARNETT—Do you want to alert the committee to any overseas models that you think are worthwhile considering? Have you looked at the US arrangements? What response would you have to the US framework?

Ms Bowtell—The only thing that we picked up from the US in our submission is the fact that the cap on damages is much higher. That is the capacity for punitive damages. Frankly, our preference is not so much for punitive damages but for broad orders that go beyond compensating the individual to organisational change at the workplace. It is preventative orders rather than punitive orders. That would be our preference.

We are quite attracted to UK's new equality act. The feedback that we have had from the Trade Union Congress—there was a delegation from the congress here six weeks or so ago—was that they are most concerned that the settlement was that the reporting obligations apply only in the public sector. They can see that that may well in fact create market failure; there will be some disincentives in the market in relation to higher obligations on public sector employers than those on private sector employers. They would be promoting with the Brown government—or a new Labor government if there were to be one, or a new conservative government if there were to be one—extension of that act to the private sector as well. They advocate the model, but they do not advocate having a distinction between the public and private sectors.

Senator BARNETT—Thank you.

CHAIR—I do not think we have any more questions and I know you are on a time line. Thank you for your submission and for making yourself available today. It is appreciated.

Ms Bowtell—It is my pleasure.

CHAIR—The committee is adjourned until tomorrow morning in Melbourne.

Committee adjourned at 2.57 pm