INTERNET

Hansard transcripts of public hearings are made available on the internet when authorised by the committee.

The internet address is:


To search the parliamentary database, go to:

http://parlinfo.aph.gov.au
Members in attendance: Senators Boyce, Brandis, Crossin, Furner, Humphries, Pratt, Ryan, Wright.

Terms of Reference for the Inquiry:
To inquire into and report on:
Human Rights and Anti-Discrimination Bill 2012
WITNESSES

ADAMS, Ms Lucy, Senior Lawyer, PILCH Homeless Persons' Legal Clinic, Public Interest Law Clearing House ................................................................. 56

BALL, Ms Rachel, Director, Advocacy and Campaigns, Human Rights Law Centre ................................. 56

BALL, Ms Simone, Lawyer, PilchConnect, Public Interest Law Clearing House ......................................... 56

BANKS, Ms Robin, Anti-Discrimination Commissioner, Office of the Anti-Discrimination Commissioner (Tasmania) .................................. 46

BERG, Mr Chris, Director, Policy, Institute of Public Affairs ................................................................. 37

BLANDTHORN, Mr Ian, National Assistant Secretary, Shop, Distributive and Allied Employees' Association ....................................................... 67

BREHENY, Mr Simon, Director, Legal Rights Project, Institute of Public Affairs ........................................ 37

BROWN, Ms Anna, Director, Advocacy and Litigation, Human Rights Law Centre ................................... 56

BRYANT, Ms Therese Mary, National Women's Officer, Shop, Distributive and Allied Employees' Association .......................................................... 67

CARNELL, Ms Kate, AO, Chief Executive Officer, beyondblue ............................................................... 71

COLEMAN, Mr Richard, Solicitor, Fairfax Media Ltd ................................................................. 37

DAVIS, Ms Anna, Co-Coordinator, National Alliance of Working Women's Centres .................................. 27

FEAR, Mr Joshua, Director, Policy and Projects, Mental Health Council of Australia ................................. 71

FLYNN, Ms Julie, Chief Executive Officer, Free TV Australia .......................................................... 37

GARDINER, Mr Jamie, Vice President, Liberty Victoria .............................................................................. 1

GIANNI, Mr Stephen, National Policy Officer, Australian Federation of Disability Organisations ........... 20

GOLDNER, Ms Sally, Treasurer, The Victorian Gay and Lesbian Rights Lobby Inc .................................... 1

HALL, Ms Lesley, Chief Executive Officer, Australian Federation of Disability Organisations ............... 20

HAMEED, Ms Shabnam, Industrial Project Officer, Safe at Home, Safe at Work Project, Australian Domestic and Family Violence Clearinghouse .................................................. 27

IRLAM, Mr Corey Brian, Member, The Victorian Gay and Lesbian Rights Lobby Inc ............................... 1

JOHNSTON, Mr Robert, Executive Officer, Australian Association of Christian Schools ......................... 62

LYONS, Mr Tim, Assistant Secretary, Australian Council of Trade Unions ............................................... 8

MAMMONE, Mr Daniel, Director of Workplace Policy and Director of Legal Affairs, Australian Chamber of Commerce and Industry .................................... 13

MARCUS, Ms Gaby, Director, Australian Domestic and Family Violence Clearinghouse ......................... 27

McCORMACK, Ms Fiona, Chief Executive Officer, Domestic Violence Victoria ........................................ 27

McFERRAN, Ms Ludo, Manager, Safe at Home, Safe at Work Project, Australian Domestic and Family Violence Clearinghouse ......................................... 27

NAYLOR, Mr Andrew, Chairperson, Human Rights Council of Australia ............................................... 46

PHILLIPS, Ms Julie, Manager, Disability Discrimination Legal Service and Villamanta Disability Rights Legal Service .......................................................... 20

SAAB, Miss Sylvie, Manager of Media Policy and Regulatory Affairs, Free TV Australia .......................... 37

SCHUBERT, Ms Georgia-Kate, Head of Policy and Government Affairs, News Limited, Joint Media Organisations ..................................................................... 37

SNEEDDON, Mr Mark, Crown Counsel, Advisings, Government of Victoria ........................................... 76

TAYLOR, Ms Jessie, Senior Vice President, Liberty Victoria ................................................................. 1

TKALCEVIC, Ms Belinda, Legal and Industrial Officer, Australian Council of Trade Unions .................. 8
WITNESSES—continuing

TOOHEY, Ms Karen, Acting Commissioner, Victorian Equal Opportunity and Human Rights Commission, Australian Council of Human Rights Agencies

WILSON, Mr Tim, Director, Climate Change Policy and the Intellectual Property and Free Trade Unit, Institute of Public Affairs
GARDINER, Mr Jamie, Vice President, Liberty Victoria

GOLDNER, Ms Sally, Treasurer, The Victorian Gay and Lesbian Rights Lobby Inc

IRLAM, Mr Corey Brian, Member, The Victorian Gay and Lesbian Rights Lobby Inc

TAYLOR, Ms Jessie, Senior Vice President, Liberty Victoria

Committee met at 08:51

CHAIR (Senator Crossin): I declare open this public hearing for the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the exposure draft of the Human Rights and Anti-Discrimination Bill 2012. The bill seeks to simplify and clarify the existing anti-discrimination framework by consolidating the existing Commonwealth anti-discrimination legislation into a single act.

The inquiry was referred by the Senate to the committee on 21 November 2012. The committee received a large volume of submissions for this inquiry and due to resource constraints has decided not to publish on its website every submission that it has received from individuals.

Today's hearing is open to the public and is being broadcast within Australia's Parliament House in Canberra and is also live on the website of the Parliament of Australia. A transcript of today's hearing will be placed on the committee's website when it becomes available.

I am going to invite witnesses to make a short opening statement of three minutes. Perhaps you could just succinctly give us your main arguments, and then of course we will go to questions. We already have your submissions; people will have read them. We are very limited on time because of the huge number of people we want to hear from today.

I do, though, want to 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 the committee. Such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee.

You do know that we prefer that all evidence be given in public, but you do have the right to request that that evidence be given in confidence or in camera. You would just need to seek the permission of the committee if that is your requirement. If you do object to answering a question then you should state why you would not want to answer that question and the committee will determine whether we actually insist on an answer. If we do insist on an answer, you do of course have the right to provide that answer in camera or in confidence.

I now welcome representatives of Liberty Victoria and the Victorian Gay and Lesbian Rights Lobby. We have submissions from both of your organisations, which we have numbered 379 and 534, respectively. I will ask you both to make some opening statements, and then we will go to questions. Mr Irlam and Ms Goldner, we will start with you first. Thank you.

Ms Goldner: Good morning Senators, and thank you for your time. The Lobby welcomes the introduction of this bill, some 17 years after the first bill by Sid Spindler that attempted to deal with sexual orientation and gender identity was discussed in the Senate. It is a very pleasing moment to see the broad, multi-partisan commitments to the introduction of these laws following the 2010 election and that 85 per cent of Australians polled in 2009 indicated their support for these new attributes. In terms of the definition of sexual orientation, we broadly welcome the approach taken, and we very much welcome the inclusion of relationship status within the laws, a recommendation of this committee's inquiry in 2010.

As well as being involved with the Lobby as the author of submission 482 on behalf of TransGender Victoria, I am able to speak about the challenges of the current definition of gender identity for transgender Australians. The test of genuine basis adds complexity and unnecessary detail. Its retention in the bill would result in courts and commissions intruding unnecessarily in the lives of transgender people at a time of stress and may even run to counter the aim of reducing discrimination and its impact.

The proposed definition of gender identity does not sufficiently include mannerisms or expression, which may result in some transgender people not being protected. For those reasons, we prefer the definition currently before the Tasmanian parliament and note with great understanding that the creation of the draft bill was happening at the same time as the Tasmanian state amendments were being introduced.

By respecting the government's aim to include intersex Australians, we note that discrimination faced by intersex people is on the basis of physical differences and not on the basis of their identity. Accordingly, again, we support the Tasmanian definition and propose that the government introduce intersex as a unique protected
attribute. This would not increase regulatory impact as it is already intended to be covered by the draft bill, and the explicit and easy-to-understand definition from the Tasmanian bill would reduce that regulatory burden. We note that the committee will be hearing from Organisation Intersex International Australia tomorrow in Sydney and broadly support their submission as one of the leading intersex organisations in Australia.

We note that the LGBTI grounds of sexual orientation, gender identity and the proposed attribute of intersex remain the key grounds that are not naturally associated with a function outlined for the specific commissioner. There is no longer a generic human rights commissioner. While we understand from the Attorney-General that the intention is that the president would fulfil the traditional role of human rights commissioner, we are concerned that this is not spelt out in the legislation. The lack of an explicit responsibility needs to be resolved, and we would discuss our preference for a specific commissioner to be appointed or funded. An alternative would be to reintroduce the human rights commissioner and assign those attributes to that role.

We would also urge the committee to amend the bill to state that those attributes are the responsibility of the president or other nominated commissioner to ensure that our issues remain included. We look forward to working with the committee to ensure that the quality of life—possibly the life itself—of LGBTI Australians is increased and that their health, happiness and ability to achieve their potential is enhanced by this law. I will hand over to Corey Irlam, who will speak to the issue of exemptions.

Mr Irlam: I will make it very quick, because of the time that we have available. When we are looking at exemptions today I would urge the committee to look at three different scenarios, the first being a person trying to access a government-funded service, the second being a person seeking employment by a religious body and the third being a student or parent enrolling into a faith based school. When we look at section 33 we need to consider its application in these three scenarios, for various reasons. We are concerned that the current proposal does not have a provision of transparency, meaning that LGBTI Australians, potentially pregnant women and a range of other Australians, do not know that they may face discrimination when accessing these services. This provision exists in South Australia and would enable thousands of people to know what they are walking into buying into that process.

I would also urge the committee to distinguish between the freedom of religion and the right to discriminate against people on the basis of sexual orientation and gender identity. Some may argue that this distinction is a furphy. But it is a very different message for the Australian parliament to send when looking at the way that we structure this bill. Indeed, within the religious community we have seen in the last week in the public media that there are people who want the right to discriminate and people who want the right to discriminate only in the area of employment. Reverend Peter Sandler from Anglicare South Australia said that Jesus never discriminated and nor should we.

Finally, we note for the committee’s benefit that many religious submissions to the committee call for the retention of the status quo. In this regard, the SOGI exemptions, we must look to the state legislation. Here we find that almost all states have a narrower definition than what exists in the current bill being proposed. In Tasmania, there is no exemption. Rather, there is a provision to discriminate on the basis of religion. Again, that distinction between god versus gay and the right to have freedom of association and freedom of religion. In states such as South Australia, there is a requirement to have transparency by publishing your intention and policies. In Queensland, the Northern Territory and Tasmania there is an inherent requirements test. These all raise the bar for the exemption compared to what is currently in the bill. Thanks for your time.

Mr Gardiner: It is an honour and a privilege to be in this first session speaking to the committee at this first hearing of this important inquiry. Liberty Victoria, as you know, has had a very longstanding role in advancing and protecting human rights and civil liberties. We want to make it clear that we strongly support this bill, subject to some things that we have all said, and believe that it should be recommended to the government with appropriate amendments, brought back to the parliament and passed in the first half of this year. We are supporting this bill because the consolidation will make the anti-discrimination law in this country at the federal level simpler and clearer. It was claimed that it would do that, and it will. We support the fact that there are new attributes—in particular the attributes of sexual orientation and gender identity, which were promised before the last election and indeed endorsed by all sides of politics. This is a very good thing.

We are very supportive of the way in which the bill deals with intersectionality—the overlap of more than one attribute—which hitherto at the federal level has been an impossible tangle. That has real meaning for people whose real experiences cannot be brought before mediation or other mechanisms when they had to juggle more than one act and squeeze through more than one definition. We support the much more modern and much clearer definition of discrimination and the erosion of the artificial distinction between indirect and direct discrimination. They are all one part of disregarding the human right to equality.

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE
We are very pleased to see, and urge a bit more of, better human rights integration. Anti-discrimination law is indeed, as this bill's title says, about human rights—the human right to equality—and our engagement with the human rights obligations that successive Australian governments over many years have ratified through human rights instruments. Indeed, Australia played an important role in the foundational Universal Declaration of Human Rights of 1948 when Australia chaired the General Assembly of the United Nations.

We are very pleased to see the acknowledgment of the existing common law understanding of harassment as being an essential and inevitable part of the notion of discrimination and the notion of unfavourable treatment. We will note some problems with the way that that has been drafted, but it is very important that in state law and in common law what we call harassment is already part of discrimination law.

Finally, I want to mention at this stage the important decision made in the drafting of this bill to exclude from the exemptions for religious bodies the provision of age care services to senior Australians, who vulnerable people. This is particularly important for lesbians, gay men and bisexual, transgender and intersex people who, if they are now in their 70s, 80s or 90s, have faced a lifetime of discrimination. It is about time it stopped when they are at their weakest in their final years. That is a very valuable improvement. As we have pointed out in our submission, that should be extended to more vulnerable people and more government funded services and indeed to employment as well. I now want to introduce my fellow vice-president, senior vice-president Jessie Taylor, who will address some of the things that we want to see improvements in. We appear before you representing quite a range of people. When we think about these things, we have a gay person, a straight person, a man, a woman, an atheist and a devout Christian. We miss out in terms of differentiation on race, I guess. Liberty is a very broad organisation. Its fundamental concern is about human rights. I will now hand over to Jessie Taylor.

Ms Taylor: I want to mention two main issues, one of which Mr Gardiner has already referred to. With regards to section 19(2), as Mr Gardiner has said, we welcome the acknowledgment of harassment as being a very important part of the framework of discrimination law and something that has been perhaps not given the acknowledgment that it requires up until now. However, we have some concerns about the wording of section 19(2)(b), including the fact that it features the words 'offends and insults'. That has the potential to trivialise the experience of people who have been subject to harassment and intimidation. We are slightly concerned as well that it brings over some of the more problematic language that has been grappled with in the context, for example, of the Racial Discrimination Act.

We also hope that perhaps more acknowledgment might be given to the subjective harm suffered by people as a result of discriminatory conduct. This means not only looking at the words spoken or written but also looking at the way that they are received and subjectively cause harm to a particular person.

The second thing that I will mention is the religious exemptions. We acknowledge that there are some valid circumstances in which an exemption ought to be allowed—for example, where a particular role has at its core the doctrine of a particular organisation, such as a minister or a teacher of religion. We would not argue against an exemption in that context. However, we are concerned about discrimination where a role being performed has no doctrinal centrality and relevance. We also, as Mr Gardiner has said, would like to see the way that aged care is now to be treated extended to other services and areas that share common features with aged care—for example, caring for and providing services to people who are very vulnerable. More often than not, these services are taxpayer funded. We would like to see that treatment extended to other services that share the same features as aged care.

We would also like to see transparency and accountability in the way that exemptions are managed such as through a licence model, for example, which was referred to in an earlier submission from Liberty Victoria and which we would be happy to answer any questions about.

Senator BRANDIS: My question is to the witnesses from Liberty Victoria. I largely agree with your submission. But I am bound to say that I am disappointed that you take such a Latin America e view of the threat that the provisions in relation to offence and insult pose to freedom of speech. We do not have time today to engage in some kind of academic argument about the relative importance of equality and liberty. But it disappoints me that Liberty Victoria is not more aggressively defensive of liberty of opinion and liberty of speech, which inevitably is going to potentially offend or even insult people. That having been said, you do, in paragraphs 27 through to 29 of your submission, recommend that clause 19(2) of the bill, which contains these words, be redrafted. Let us just be clear about this. Is it the position of Liberty Victoria that the words 'conduct that offends, insults' should not be part of this bill?

Mr Gardiner: Effectively yes, although there are other things that we would suggest as different ways of redrafting that. The point that we made—
Senator BRANDIS: Sorry, Mr Gardiner; I don't mean to interrupt you, but just cutting to the chase here: are you saying that they should be removed and that's it, so that the test is 'intimidates', or are you saying that they should be replaced with other words, and, if so, what?

Mr Gardiner: The difficulty with a question like that is that it cuts off my options, and I would like, with respect—

Senator BRANDIS: Well, I am trying to cut off the option. I am trying to bring you to a conclusion.

Mr Gardiner: The idea of the issue of harassment is really one of the question of how harm is caused, quite simply, from the dictionary definition. But the issue, where it is to be dealt with, especially as a free-floating issue rather than simply as a subset of discrimination, is that it should be more dilated by the question of harm. Words like 'intimidates', but also words like 'threaten' and—

Senator BRANDIS: Section 18C of the Racial Discrimination Act, as you know, also uses the word 'humiliates', which is not taken up here; I don't know why.

Mr Gardiner: The critical thing, as we said in our submission, is that, if a section like 19(2)(b) is to be retained, it should be explanatory and it should use words of sufficient seriousness and of objective harm. We have canvassed this issue in other submissions—definitely in the submission to the Attorney-General's Department, which I don't know whether you have got, but, if you have not, we will table it and give a copy to the secretariat. In that submission, we discussed in some detail the importance of referring to objective harm in this context, or what became this context. Obviously we were not dealing with a draft at that stage.

The notion of objective harm has to involve not subjective words like 'offend' and 'insult' but where conduct, including words, spoken and written, are known to cause harm, in particular on the basis of an attribute. It has to take into account not just what is done or said but the attribute and the history of discrimination suffered by people of that attribute. In the earlier submission, we specifically referred to how homophobic harassment leads schoolchildren—children generally, but they happen usually to be at school—to develop serious doubts about their own place in the world and pushes a higher proportion of young people into self-harm and indeed attempted and completed suicide than among any other group, with the possible exception of Indigenous people.

So the role of discrimination, the role of harassment—not necessarily directed exactly to the person but more generally on their attributes in relation to experience of discrimination in discriminated against groups—is one that is objectively, and established by scientific evidence to be, seriously harmful. This is known. So, if this is to be redrafted rather than just dropped out, it needs to make some reference to those issues of the causing of harm.

Senator BRANDIS: But, Mr Gardiner, it does. I am very conscious of the time, so I will be quick. As I understand you, you agree with me that 'offend' and 'insult' should be dropped out but, as I understand you, you would not like to see us or the bill lose the concept of harassment as a prohibited category of unfavourable treatment. But that is already dealt with in clause 19(2)(a). Clause 19(2)(a) identifies harassment as a category of unfavourable treatment. Clause 19(2)(b) identifies 'conduct that offends, insults or intimidates' as a category of unfavourable treatment. Clause 19(2)(b) does not define the meaning of 19(2)(a); they are separate categories. So, if we lose the words 'offends' and 'insults', we do not lose 'harass' as a category of prohibited treatment, because that is still there in 19(2)(a).

Mr Gardiner: I agree, but I am keen to place on the record our concerns about the issues of drafting around the question of objective harm, which may not need to be put in all in this context but is something that the committee may want to give attention to when thinking about this or related issues around harassment.

Senator BRANDIS: Sure. But, in any event, for you the governing concept is harm or what you call 'objective harm'.

Mr Gardiner: Yes.

Senator BRANDIS: That, I presume, would include psychological harm.

Mr Gardiner: Yes.

Senator BRANDIS: But it could not, surely, go so far as merely to include what people sometimes loosely call 'hurt feelings'—that is, a sense of offence.

Mr Gardiner: I agree.

Senator BRANDIS: Thank you.

Senator PRATT: I would like to ask a question about exemptions, noting of course that the explanatory notes to the bill say:
... to enable consideration of whether these specific exceptions are still necessary, taking into account the operation of the new ... justifiable conduct exception.

So, in asking about exemptions, I would like to ask, and I might ask both organisations to comment, about, if you like, the experience of people who might be turning up to use a particular service and some of the differences between, I suppose, organisations that may be branded as having a particular ethos because they are readily identifiable as having a religious affiliation—for example, an Anglican school—and someone who turns up to, for example, Employment Plus not knowing that it is under the auspices of the Salvation Army. So I suppose I would like you, if you can, to distinguish what you mean by the need to clarify exemptions.

Mr Irlam: Certainly, Senator. I think it is a really important point, because what we see is an everyday Australian walking into, in your example, Employment Plus, referred to them by Centrelink and most likely unaware that it is run by the Salvation Army. They are accessing that service. Everything goes fine. One day they come in with their same-sex partner. The person feels uncomfortable: 'Sorry, we can no longer provide this service to you.' The reason that that can occur is the exemption in proposed section 33, and it occurs more often than not on an ad hoc basis. There is no blanket process. There is no checkpoint at the beginning of entry. You are halfway through and something happens. Arguably it occurs when there is some other reason that means it is not quite so easy to deal with this person. Proposed subsection (2)(b) of proposed section 33, talking about religious sensitivities, is an 'or'. It is two categories; it is not one, saying you need to have a doctrine plus religious sensitivities. So therefore it could come down to any individual working for or accessing that service offended by a same-sex couple over there, and hence this comes in. Given that, for example, in Alice Springs in the Northern Territory, 100 per cent of aged care services are run by a religious organisation, given that a number of public hospitals are run as a public hospital by a faith based organisation in regional and rural areas around Australia and given the multitude of billions of dollars put into government funded services, this is a distinct problem not only from a geographical area but also from a capacity area, where you may not be able to access anybody other than a faith based service.

Senator PRATT: In that context: clearly, these organisations employ and service hundreds of thousands of Australians who may be unmarried women, who may be gay or who may be transgender. On a day-to-day basis they are probably not, in the main, being discriminated against. How is it that that cannot be upfront in that clarity about whether they are likely or unlikely to suffer some discrimination?

Mr Irlam: It certainly can happen. It happens in South Australia today. In order to access the religious exemption provision it is a requirement for you to publish the policy in a publicly accessible way. We would suggest that the committee should go one step further and make sure that that is an explicit reference to the act, because what can often be used are things like 'Christian values'. Now, 'Christian values' is a very contentious term because various organisations have different values that sometimes apply within the one situation.

For example, this committee has received a submission from Anglicare Sydney, saying, 'We don't agree with religious submissions;' yet we have seen in the public domain Anglicare Australia and Anglicare South Australia coming out and saying, 'We don't want to discriminate in the access of service provision'. How does a person know which Anglicare you can walk into and which one you cannot?

Senator PRATT: That is a very good question, thank you.

Senator BRANDIS: It shows you the morality of the Anglican Church.

Senator PRATT: Indeed!

Mr Irlam: If it goes across the board.

Senator PRATT: Perhaps Liberty Victoria could comment on that as well?

Mr Gardiner: First of all you referred to the general exception, and as a fundamental principle we would agree with that. It is the only thing that should apply. As my colleague said at the beginning: in relation to core religious training, observance and celebration, we have no problems with bona fide occupational qualification. For everything else, we agree, obviously, with what Corey Irlam has just said, and we draw attention to the fact that a blanket exemption is, of course, inconsistent with international human rights law—and you are considering this in that human rights framework. A blanket exemption tars the good with the bad. Anglicare South Australia does not want to be tarred, for example, with the bigot's brush that this exemption currently uses. At the very least, something like the South Australian scheme or the more detailed scheme that Liberty referred to in our submissions would be essential.

We have here—and we are happy to provide to the committee—two examples of religious leaders. One is Anglican, the Rev. Peter Sandeman, whom Corey Irlam referred to, and one Joumanah El Matrah, a devout Muslim. They do not want these religious exemptions to apply to them. From our submission, the law should not
label progressive human rights-respecting religious bodies with the narrow views of some. In our view, there should be no religious exemptions except for those core things. But we know perfectly well—we are political realists, that is the role we have always taken—that doing it all in one go is probably beyond the realm of political possibility. But there should be at the very least an extension, as Jessie said before, to government funded services.

There is no ground whatsoever whereby the Commonwealth should be able to outsource its responsibility to obey its own laws to bodies that refuse to obey those laws and insist that they are above the law. We know the results of allowing bodies to think that they are above the law; we have a royal commission coming up into that, and we do not want to see that again.

So no government funded body should be able to add their level of discrimination to the Commonwealth's own responsibilities. And, of course, the age care service provisions, which is an admirable advance, should be extended to all services for vulnerable people—young people, old people, people with disabilities, people in remote communities. It should be extended to people with all sorts of issues.

And, critically, after whatever you end up recommending to the government and after the government decides—it is not your role, of course, to second guess the government—that remains must be open and transparent. And, as Mr Irlam said, it must be specific with no vague reference to religious values: 'In this service we discriminate on the basis of marital status—against unmarried women, or pregnant unmarried women, or sexual orientation—in this way.'

Mr Irlam: It is our Christian faith.

Mr Gardiner: Yes.

Senator WRIGHT: Good morning. I would like to be really clear on that particular issue that you are raising. You have talked about the religious exceptions and exemptions and the effect that they have. I will ask Mr Irlam and Ms Goldner first of all: to what extent do you think that the general justification defence—which is then based on an absolute clarity of principle in terms of establishing why there should be an exception on a case-by-case basis perhaps—could be improved and used in place of permanent exceptions such as those applying to religious organisations in schools?

Mr Irlam: It is very open to being able to use the broader defence, justifiable conduct exemption. I am not sure that politically and publicly it will go down to completely removing religious exemptions but perhaps the appropriate way to include that concept would be to put in a justifiable conduct clause within the religious exemption. I think the easier transparency option that we are proposing would make the public aware. It is not something that necessarily needs to be approved by the Human Rights Commission. It is something that you can just publish and lodge. Given that companies produce policies and publications left, right and centre—whether it be a job description or a service brochure—the regulatory burden should be negligible.

I would note, for the committee's reference, that the regulatory impact statement that was not on your website but was on Attorney-General's discusses what we are proposing as option 3 within its religious exemption in some detail. However, it comes to the conclusion that it is unable to identify the number of religious bodies who do discriminate and therefore cannot interpret the regulatory burden. I would argue that that is a fairly weak justification for not going down that option.

Mr Gardiner: What I will say is, 'Hear, hear!' On the more general questions you ask about whether or not a general exemption should do for everything, in a sort of purist drafting world one would say, 'Yes.' But the reality is that it helps the clarity and usability of legislation to point out the obvious. So, where there are exceptions—and there are exceptions—that are clear examples of the justifiable conduct exemption, you might as well say them out loud. But a blanket religious exemption is not one of those. It is one, in fact, that is there because it is not justifiable. And that is the difference.

Senator WRIGHT: Interesting! One of the ironies that strikes me—I certainly think the exception for aged care services has been welcomed by many—is that while there may be a requirement that a religious service provider has to make the accommodation available to people, for instance who are gay, they have the right not to employ people within their service. So essentially it seems to me that there is going to be a real dissonance, potentially, in terms of the values or the sense of comfort or welcome that someone who is required to be accepted there is going to feel if they are aware of a policy whereby the staff cannot be—

Mr Irlam: I think you are right. However, the challenges is that if you look at the position of an organisation like the UnitingJustice, which is shared by many of the progressive faith based churches—this is what I see from my conversations with them, anyway—you find that what they are calling for is an exemption for senior
management positions, where there is an inherent requirement to lead the organisation with that faith. They are not calling for it to apply to the gardener in the school or the $15-an-hour PCA in an aged care facility.

How you draft that, though, might be challenging, so it seems that the Attorney-General's Department just have to do a blanket for all employment. I think that they could probably have a little bit more time to figure out how to do what Uniting Justice is talking about where there is an inherent requirement or for leadership positions that that clause would only apply to it then, because you do need to have the employees of an organisation to help create the culture of an organisation to make it a safe and inclusive welcoming environment for those people accessing the service.

Ms Taylor: Liberty Victoria supports protection from discrimination in contexts such as aged care and those to which we believe should be extended or it to be given not only to the recipients of those services but also to the people delivering them. So where there is not perhaps what can be called a core leadership or values based role if you are delivering medication or taking out rubbish or cleaning or nursing or whatever it might be, dependent on the philosophy of an organisation, if I can put it that way, then the people providing those services ought also to be protected from discrimination on the basis of whatever attributes might be relevant to them.

Ms Goldner: I wanted to add to Mr Irlam’s remarks. In terms of people accessing service provision, particularly young people, if they are accessing a service and by chance they come across a person who is gay, lesbian, bisexual, transgender or intersex, that can be a huge boost to them, a sense of relief that improves their mental health. Let us say it as an employment service. It can help them get back into work more quickly, which means the service is more effective and it is more effective use of taxpayers' money. To have that openness of the staff is a real boost for those people and those services.

Senator WRIGHT: In relation to the intersex issue, Ms Goldner and Mr Irlam, you support the proposal to include intersex status as a separate protected attribute. You also support, I think, the definition that is used in the bill that is before the Tasmanian parliament—

Mr Irlam: It passed the lower house and is currently before the upper house.

Senator WRIGHT: Can you explain briefly why you would say that it is necessary to have it as a separate protected attribute and why you support that definition in particular?

Ms Goldner: Certainly. Intersex is more an issue of differentiation in bodily sex as distinct from the issue of identity, which is perhaps a little more intangible. They are separate issues. It is why, for example, the organisation Transgender Victoria, with which I am also involved, does not represent intersex. We cannot claim to have that specialised area of expertise. It is necessary to recognise those differences. The Tasmanian definition also gives a fuller degree of coverage to intersex people than the current wording which is based on state or territory definitions. We also point out that the New South Wales Anti-Discrimination Board’s opinion after investigating current definitions has found that the current definitions used in state and territory law do not cover intersex people. We would again defer to the organisation Intersex Internationale for further detail tomorrow.

Mr Irlam: Can I put that in context for you. The current definition before the bill is similar to the New South Wales provision. If you take the example of a woman, born a woman, legally a woman, identified as a woman, walks into Fernwood gym, has what appears to be in the change rooms a small penis because of their intersex differences and is asked to no longer attend that gym. In this situation it is not about their gender identity, it is about their physical differences. That is why the proposed definition in Tasmania is more appropriate.

Senator WRIGHT: I think we do need some concrete context because it is not something that many people have very much knowledge about.

Mr Irlam: It has taken me years to get my head wrapped around it and I still do not have it.

CHAIR: I thank the four of you for your attendance this morning and your two organisations for your submissions. I know the time has been short but, as you see, we have got a lot of material. If we need to we will come back to you but our time is pretty short. You have been of great assistance. Thank you very much.
LYONS, Mr Tim, Assistant Secretary, Australian Council of Trade Unions

TKALCEVIC, Ms Belinda, Legal and Industrial Officer, Australian Council of Trade Unions

[09:35]

CHAIR: I welcome you both. We have numbered your submission 310 for our purposes on the website. I will ask you to speak to that submission very briefly, and then we will go to questions.

Mr Lyons: Thank you, Senator. I am mindful of your injunction to be quick. It is clear from the written submission that we filed that the fundamental capacity in which we comment on this bill is in the context of the workplace and the rights of employees. Our fundamental position is that we welcome the draft of the bill and urge its passage, subject to the matters that we have raised in our written submission, which I will go to.

We make the point in opening that effective antidiscrimination legislation and having a regime that is effective is crucial to social inclusion and full participation in public life by members of the Australian community. We also note that there is an important relationship between the antidiscrimination regime and employment, in particular to facilitate full labour market participation and diversity of employment outcomes. We also believe that improved social inclusion and labour force participation benefits our society and economy more broadly. Australia, in our view, does not have the luxury of not ensuring that we get the fullest possible labour market participation for all members of our community, and we believe there is a productivity benefit from ensuring, via an appropriate federal regime, that the full range of the Australian community is able to participate fully in paid employment.

We also note that the need for reform of antidiscrimination legislation in the legal framework is made clear by the statistics, including one we note in particular: ABS data released on 16 November last year indicated that around 20 per cent of pregnant women still reported discrimination in the context of employment, indicating that there is an ongoing task for the legal regime to perform. It is clear, in our view, that there needs to be improved efficacy in relation to the law in this area if we are going to turn around statistics of that nature.

We would note three positives in particular in relation to the bill. The first is that we support the introduction of a shared burden of proof. We note that that is broadly consistent with the approach of other legislation that deals with workplace discrimination, such as the Fair Work Act; although this draft does not go as far as the Fair Work Act in respect of the general protections in reversing the onus of proof, but it is an improvement. Secondly, we support the no cost jurisdiction, which, again, in an employment relations context, is consistent with the approach that workplace relations law more generally takes, where people have the opportunity to agitate their rights without facing the deadening fear of meeting the costs of their employer. Thirdly, we support the simplified definition of discrimination.

However, we do believe that there are some improvements required to the bill. These are set out in our submission, but I will touch on four of them. Firstly, we say that there has been a missed opportunity to reform the overall antidiscrimination legal framework, in particular to provide positive obligations on duty holders to promote equality, as well as the capacity for someone, such as the Human Rights Commissioner or other representative organisations, to bring representative claims in cases of systemic discrimination. We note that, while discrimination is experienced generally as an individual function, it is often systemic in its incidence. We think having a way whereby matters can be dealt with on a systematic basis is important. We would have hoped that there would have been improved advocacy in support and representation for complainants made as provision of the bill and we are disappointed that there has not been, and we would also support increases in the level of punitive damages to deal with the worst instances of abuse.

Secondly, in respect of protected attributes, we note in particular that the notion of family and carers' responsibility should be captured by the bill. The bill as drafted only deals with the term 'family responsibilities'. We strongly urge that be changed to 'family and caring responsibilities' to make it consistent with the Workplace Gender Equality Act and, indeed, the language that is used elsewhere in the Fair Work Act. We think that is an important point for consistency of federal law. We are also disappointed in clause 43 of the bill, which is the carve out for domestic workers. This will be an emerging issue for Australia if you think about the context of projects like the NDIS, which will see people with vouchers employing people in their own homes, and the emerging issue of home-based aged care. This will be a growing portion of our workforce and I think we will, in the end, regret not taking the opportunity to include appropriate protections for what will be a growing part of the Australian workforce.

Thirdly, in respect of exemptions, exceptions and defences, we do not support the limitation of the reasonable adjustments provision only applying to disability discrimination and we seek that that be made more broad. In respect of the exemption around inherent requirements of the job we are concerned that, as drafted, that is too
wide and will provide too great an ability for employers to simply say matters are an inherent requirement of the job. We take the committee to some examples of that in our written submission. Coupled with that is the new justifiable conduct exemption in section 23. While we support it in principle we note that, in context of the other matters, having a general defence potentially diminishes—we say inappropriately—individuals' anti-discrimination protection; so those matters really, Senators, are a combination of the fact that, if you have a watering down of the obligation to make reasonable adjustments, you have an extension of the inherent requirements defence and you have a new general defence. Our concern is that the cumulative effect of that is to remove people's rights and we make some suggestions about how that might be remedied.

Finally, we note that in relation to the proposed code of compliance, in our view the role, scope of application and enforcement of the code is unclear and we have a concern that if the provisions of the code do not actually provide enforceable rights for employees, its utility and efficacy is really questionable. We set out in our submission why we think that needs some addition. Given the time, Senator, I will leave it there.

CHAIR: Senator Furner, I will go to you for questions.

Senator FURNER: Mr Lyons, can you explain to the committee the average or the contemporary leave entitlements associated with domestic violence leave, please?

Mr Lyons: I might defer to my colleague on that question, Senator.

Ms Tkalcevic: It is regulated, by and large, by agreements in the workplace and they vary from being able to use your existing paid leave entitlements through to additional entitlements; in one instance, a workplace has unlimited paid leave for domestic violence purposes. So it varies considerably, and the ACTU's view is that people experiencing domestic violence should also have been covered as having a protected attribute under the exception.

Mr Lyons: It is fair to say, Senator, the incidence of the explicit right to take leave for domestic violence related incidents is not common and, more generally, people have to access other forms of leave.

Senator FURNER: Is there any evidence for, or examples of, where your affiliates have associated and identified examples of discrimination as a result of taking that form of leave at all? Have you got any feedback on that?

Ms Tkalcevic: Yes, it exists. The key is that the push to achieve the leave entitlements is fairly recent; it has been mostly over the last year and I think it is at the point now where it is almost a million workers who are now able to access some form of leave for domestic violence. But the provisions require someone to actually identify themselves as experiencing or having experienced domestic violence which leaves them vulnerable to discrimination. So I think that the key here is that, if you are going to extend the application of domestic violence leave to employees, then you have also got to offer some protection if you are going to require, as I think is quite reasonable, some sort of evidence or acknowledgement from the employee to someone in the organisation that they are going through this.

Senator FURNER: Lastly, you advocate a change to punitive damages in the proposed bill. What are you proposing in that area?

Ms Tkalcevic: In our original submission to the Sex Discrimination Act review, way back in 2008, we advocated that, for example, regimes such as the consumer and competition legislation and many other forms of legislation have punitive damages as a preventative mechanism, and the antidiscrimination legislation, particularly in Australia as compared to, for example, the US, has very little preventative mechanism, because the damages are quite low.

Senator HUMPHRIES: I want to ask you about the comments you made in the submission about the deletion of the reference to formal equality in favour of achieving substantive equality. Can you explain what you mean by that and give me an example of what you think would be achieved by deleting the reference to formal equality?

Ms Tkalcevic: The difference, as I understand it, is that formal equality revolves around the concept of treating like with like, and substantive equality acknowledges that not everyone is like and that sometimes, in order to treat someone equally, they need to be treated differently. This is particularly critical given that there is no positive obligation on duty holders in this draft legislation that obliges them to eliminate discrimination and promote substantive equality.

Senator HUMPHRIES: Isn't that a good thing, though? Should it really be the objective of discrimination legislation to engineer, in effect, discrimination to achieve outcomes of equality in terms of the position that people find themselves in? If a person is discriminated against in employment because of their sexuality or their age or whatever, that is a kind of discrimination you should eliminate. But, if a person has a different outcome in
their income level or their status in employment because they work harder or they are better at their job or more intelligent or whatever, surely that is not an outcome that ought to be affected or influenced by discrimination legislation? And isn't that what you are arguing for?

Ms Tkalecic: No.

Senator HUMPHRIES: Give me an example of the kind of substantive equality which should be promoted at the exclusion of formal equality.

Ms Tkalecic: In the instance where someone has a physical disability which precludes them from being able to do something in a certain way but they can do it in a slightly different way, perhaps with minimal adjustment to the workplace, substantive equality means actually doing it that way so that that person can achieve the same outcome. So it is just acknowledging that the two people may have a slightly different way of getting there. In the example of someone who has family responsibilities, holding meetings after work hours would not be achieving substantive equality, because one of those people cannot come after work, so it would just mean making an effort to hold the meetings at a time when everyone can make it.

Mr Lyons: Perhaps a good example would be that, if an adjustment is made to the way a job is performed to enable a person with a disability to perform that job, that is a way of ensuring substantive equality, but it would involve the employer treating two people who are doing nominally the same job marginally differently. I think that is the kind of example that we would go to.

Senator HUMPHRIES: I can see what you are getting at, but what role does that kind of adjustment have in discrimination legislation, where we are attempting to eliminate treatment which is unfair? Are you suggesting that some obligation should be placed on employers, for example, to achieve substantive equality by virtue of these sorts of provisions, and, if so, how does that work? To what extent can an employer be penalised if they decline to pursue substantive equality among their employees?

Ms Tkalecic: Our point is that, as a general principle, to treat people equally when they are not coming from equal positions is discriminatory in many instances. For example, making a promotion contingent on being able to work certain hours when you know that that is not going to be possible for one person, if it is not genuinely required for the job, is discriminatory.

Senator HUMPHRIES: That would be an example of indirect discrimination, though, wouldn't it?

Ms Tkalecic: That is right, but, because we now have the simplified one definition, that definition of indirect discrimination does not exist anymore. We now just have one definition of discrimination, so the ACTU's submission is that this concept of making reasonable adjustments where it is appropriate, or at least having that obligation built into the definition, picks up what used to be in the 'indirect discrimination' definition, which is that there is a component in the definition of discrimination that would require at least looking at whether an employer has made an effort to make reasonable adjustments or whether the discrimination is—

Senator HUMPHRIES: Isn't it very hard for legislation to require an employer to look at something without having an obligation to actually perform it, to actually achieve that objective? I will come back to the point. How would you change the legislation to require an employer, in this case—or anybody else, for that matter—to achieve substantial equality as opposed to provide formal equality in opportunities and so forth in their workplace?

Ms Tkalecic: If the object of the act is to achieve substantive equality, that sets the context from which discrimination is looked at, so we are suggesting that that is one way. The other way is that—if you look at particularly proposed sections 23 and 24, which are the exceptions—built into the exceptions should be some concept of making reasonable adjustments. So, yes, there is an exception if it is an inherent requirement of the job, but an employer must demonstrate that they have at least considered whether that job could have been done in a different way or whether the inherent requirements are in fact genuinely inherent requirements and whether reasonable adjustments could have got around that.

We are saying that for proposed sections 23(6) and 24(4) at the moment the obligation to make reasonable adjustments is limited to disability. We are saying that it should be extended to all attributes, in the context that if reasonable adjustments cannot be made or they are not appropriate then the exception stands and it is a genuine requirement of the job. However, if, for example—and we use this case study in our submission—a pregnant woman is told that it is an inherent requirement of the job to stand on her feet for 12 hours a day, even though she works at the checkout counter and it would be eminently easy to just put a high stool there, it would not get up.

There have to be some boundaries around what you say is an inherent requirement of the job. We have so many examples of this being abused. It is just a guise for genuine discrimination against someone who is a mature-aged
worker—having to perform squat tests when there is actually no requirement that they squat or bend over or do various physical things on their job. There have to be some kinds of boundaries where you can say, 'Is this genuinely an inherent requirement, and is there a small and appropriate reasonable adjustment that could have been made to make this not a genuine requirement?'

Mr Lyons: It is about how the—

Senator BRANDIS: The examples you instance are perfectly commonplace examples of what would be called indirect discrimination.

Ms Tkalcevic: Yes.

Senator BRANDIS: So isn't that a problem with the bill—to remove indirect discrimination?

Ms Tkalcevic: It was a concern of many of the expert discrimination groups that if you remove indirect discrimination you remove that context, and that is what we are gravely concerned about. We agree with the idea of simplifying the definition, because it was quite confusing for the parties: indirect or direct? For employers and employees it was confusing. But what we have lost here is the context that the indirect discrimination picked up, which is that treating like with like is not always fair. Treating a pregnant woman the same as someone who is not pregnant and not being able to establish that that is a genuine requirement of the job is indirect discrimination, but it is not picked up in the drafting of this legislation.

Mr Lyons: Which is why our suggestion about the amendment to the objects and proposed sections 23 and 24, just going back to Senator Humphries's question, was trying to ensure that the total matters of context are taken into account when these matters are judged.

CHAIR: I am going to take the liberty as chair of asking the next question here, because I want to ask about domestic and family violence. We know that in the discussion paper there was a suggestion that discrimination against victims of family violence, particularly in the workplace, should be considered in this draft legislation, and it is not. Does the ACTU have a view about the inclusion of it?

Mr Lyons: We support it being included as a protected attribute and said so in the submission.

CHAIR: Would you be able to furnish some examples for us and take that on notice to support us if we were inclined to recommend that in our draft report?

Mr Lyons: I am happy to take that on notice and come back to you, including that we might amplify the answer to Senator Furner's question, which went to the incidence of the availability of that leave, as well. We will do that.

CHAIR: Can I just get you to clarify. You talked about the definition of family responsibilities. You are talking about family and carers?

Mr Lyons: Family and carers, which would provide consistency with the language that is used in the Fair Work Act and other pieces of Commonwealth legislation.

CHAIR: Thanks for that.

Senator WRIGHT: I will just quickly follow up that issue. That is what I was going to take up. Why do you think that the current protection on the basis of family responsibilities is not sufficient to extend by association, for instance, to carer or caring responsibilities? I think you say in your submission that it should be explicitly stated to be included. Also, why is it an important thing to have those sorts of carer responsibilities protected in all areas of public life, which is what you are putting in your submission?

Mr Lyons: Having been through this on a couple of other occasions where different pieces of Commonwealth legislation use marginally different terms, I suppose the base answer is that people tend to interpret it as meaning that the parliament intended to do something different. So there is a base reason here, which is that it is much easier for everybody involved in ensuring the implementation of the act and compliance with the act if people do not use different terms if they do not mean different things. The concepts around family and carers responsibility, the language we propose, are developing a much more settled meaning, I think, in the context of workplace relations law more generally, so that is why we propose that that be included. The bill as drafted appears to have some narrowing effect of what would otherwise apply under the Fair Work Act, and that would in our view not be appropriate, for the reasons we advance in the submission.

Senator WRIGHT: I understand that, but why is it important then, in your view, explicitly to make sure that carer responsibilities are included? Indeed, you suggest that it should be expanded beyond work related areas to all areas of public life. Just briefly, why?
Ms Tkalcevic: I think the concept of 'carer' is broader than 'family', and the laws Tim mentioned are moving away from narrow definitions of family, particularly with a view to, for example, Indigenous kinship relationships and the trend towards acknowledging that a variety of relationships exist that go beyond our traditional concept and traditional definitions of immediate family, so it is a progressive and more inclusive terminology. There was a second part to your question?

Senator WRIGHT: Really, in a sense, I am asking you: what is the public good? Why are you advocating that someone should be protected from discrimination on the basis of carer responsibilities?

Mr Lyons: The public good is the one that I opened with, I think. There is a public good associated with ensuring that people are able to fully participate in public life, including employment, and not be excluded from it on the basis of their caring responsibilities. Given the matters that my colleague has raised and matters associated with the demographic bump that Australia is going into, there will be a greater and greater call for people to be engaged in caring responsibilities, and it is going to be increasingly inappropriate on a public policy basis to say that it is okay to exclude people on the basis of their caring responsibilities—and we all take a broad definition of that in this law, as we would advocate in relation to other equivalent legislation.

Senator PRATT: I want to ask about the standing to represent complainants. Noting that I think most people who are members of unions would be somewhat surprised to find that unions are unable to represent them in such circumstances, I was interested in the significance of that problem.

Ms Tkalcevic: Obviously we oppose that particular drafting of the clause. It is disappointing—particularly with respect to the no-cost jurisdiction, it is important to all complainants whether they are unions or not to have access to affordable representation, particularly if they may not be able to claim costs back. We advocate very strongly that representative organisations, such as union—

Senator PRATT: What are the consequences of the situation as drafted?

Mr Lyons: It is likely to be that people will not be able to enforce their rights because they will have to reply on other representation. This has occurred to me personally in a couple of other contexts. It is very difficult to explain to a union member who goes to their union with a matter arising in the context of employment that for some technical reason associated with legislation the union is not technically able to represent them. It is a very difficult thing to explain to the individual punter.

Senator PRATT: Particularly when the union would otherwise be prepared to do so.

Ms Tkalcevic: That is right.

Mr Lyons: Indeed. I think the practical effect of the provision as drafted will be that people will not be able to enforce their rights.

CHAIR: Thank you both for your submission and your time. If you could follow up with some of those issues and provide the information back to the committee, that would be most helpful.

Mr Lyons: We will. I thank the committee for your time.
MAMMONE, Mr Daniel, Director of Workplace Policy and Director of Legal Affairs, Australian Chamber of Commerce and Industry

[10:03]

ACTING CHAIR (Senator Humphries): Welcome. Thank you very much for appearing today. We have your submission, numbered 411. Do you wish to make any amendments or alterations to that submission?

Mr Mammone: No.

ACTING CHAIR: I invite you to make a short opening statement. We have a lot of witnesses and not much time, so could you please make your statement reasonably short. The committee will then proceed to ask you some questions.

Mr Mammone: Thank you. The Australian Chamber of Commerce and Industry welcomes the opportunity to participate in this inquiry which is examining the government's exposure draft bill, the Human Rights and Anti-Discrimination Bill 2012. ACCI would like to acknowledge the constructive dialogue it has had with the government over the course of the year.

Unfortunately, the timetable which has been established by the committee for providing a written submission to this inquiry has now allowed ACCI to provide a comprehensive submission addressing every aspect of the exposure draft, which was released a month prior to the closing date of written submissions. The exposure draft represents, for the first time, a significant rewriting of federal antidiscrimination law in Australia. The exposure draft and accompanying explanatory material spans over 400 pages and, as such, it is not possible to consider each clause of the exposure draft to assess its intended impact and any unintended consequences. The written submission should be understood to be a preliminary assessment of the exposure draft which is made without prejudice to ACCI or our members' further consideration.

ACCI provided the government in February 2012 with a detailed written submission in response to the government's issues paper. ACCI provided in-principle support to the government's policy goal to consolidate antidiscrimination laws into one statute at the federal level. ACCI continues to have a legitimate interest in advocating the views on behalf of employers and the business community on antidiscrimination legislation, and the government has provided a number of mechanisms for the business community to provide their views since it released its discussion paper in September 2011.

The government indicated its intention to embark on an ambitious project to consolidate the five separate pieces of antidiscrimination acts in 2010. The then Attorney-General and the then Minister for Finance and Deregulation announced on 21 April 2010 that the government intended to streamline antidiscrimination legislation into one, single comprehensive law. There was no previously articulated election commitment to embark on such a reform other than to create two new additional protections.

The government by deliberately choosing to deliver this project as a joint initiative through the Better Regulation Ministerial Partnership Stream was ostensibly a positive signal that there would be beneficial outcomes to business and employers who are duty holders under existing legislation applying at federal, state and territory levels. A further media release by the then Attorney-General, the Hon. Robert McClelland, and Senator Penny Wong on 22 September 2011, which accompanied the release of the discussion paper, further indicated and reaffirmed the original policy intention of the government.

ACCI has not been able to engage in extensive discussions with its members and the business community since the exposure draft was released. However, the following issues have been identified in ACCI's written submission to this committee inquiry as either (a) significant issues for the committee's attention or (b) contrary to ACCI's primary written submission in response to the exposure draft and will require reconsideration by the government. This submission should be read in conjunction with ACCI's earlier comprehensive submission, which is attached to this submission.

Finally, ACCI commends the submissions that have been received by this committee from ACCI members—in particular, Master Builders Australia, the New South Wales Business Chamber through ABI, and the Victorian Employers Chamber of Commerce and Industry.

ACTING CHAIR: Thank you, Mr Mammone. I will kick off with a question. You refer to the problem that the legislation does not define what is meant by things like political opinion, social origin, medical history and so forth. Assuming that they are appropriate protected attributes—and I assume you agree with that—do you think that workable definitions of those things are actually achievable or are the concepts too difficult to pin down to make them amenable to clear definition for the purposes of certainty for, for example, employers?
Mr Mammone: In our submission we have indicated at page 3 issues we have identified with definitions. We have expressed concern that a number of these attributes in the exposure draft have not been defined and therefore it is up to the courts to determine that, which exposes employers and aggrieved applicants to litigation to determine what the nets and bounds of the new terms in the exposure draft if it becomes law.

With regard to the new protected attributes, we do not support the inclusion of the protected attributes for work related matters in the consolidated bill. This was not something that was expected as part of the consolidation exercise. Currently there is no avenue of recourse to the courts for an aggrieved person to litigate on those protected attributes. I go to the issues of definitional clarity. Obviously it is for employers as duty holders and to provide education to employees, for which they are vicariously liable. I can imagine a situation where one of our members, such as VECCI, is presenting a seminar to members. On the screen a slide shows one of the new protected attributes. Is political opinion. What does this mean? There is no clarity or further explanation, apart from looking at what previous courts have said in the past on various issues.

Senator BRANDIS: Mr Mammone, I just want to correct something, because I would not want us to fall lazily into the habit of adopting the government's rhetoric. This has been described as a consolidation of five existing anti-discrimination statutes. The Attorney-General has said that. The cabinet secretary on television and in a debate with me last night said that. But it is not, is it? A consolidation means you put a pre-existing number of elements together into a generic single bill. But as you yourself have said, Mr Mammone, there are new protected attributes identified in this bill that are not part of the pre-existing five bills. There are other aspects of this bill that are not to be seen in any of the pre-existing five bills.

Do you agree with me that this is more than a consolidation, that when one considers the new elements of this bill it not merely consolidates the existing law but takes it beyond where the pre-existing five bills were?

Mr Mammone: I guess we would have to say that the exposure draft, as it is drafted presently, does not represent a consolidation of the existing five statutes and we have indicated that the main issue, we say, departs from the existing regime, so it is a misnomer to characterise the current exposure draft as consolidating the five existing acts, and the explanatory materials indicate there will be costs to employers as a result of the changes—updating policies, for example, and training requirements. There obviously are major significant changes.

Senator BRANDIS: None of which are features of the pre-existing five anti-discrimination statutes, right?

Mr Mammone: To be accurate, as our analysis has so far indicated, the new test is a departure in terms of discrimination. There are elements that look like they are derived from at least one of the four main statutes, but we look at it as a total package.

Senator BRANDIS: Yes.

Mr Mammone: And as a total package it is not a true consolidation exercise, in that sense. We are disappointed so far with the exposure draft and hope that the government will take on board the issues that have legitimately been raised by industry through this forum.

Senator BRANDIS: I suppose the only reason this term 'consolidation' has crept into the language is the Prime Minister and her senior ministers, with characteristic dishonesty, have called it a consolidation—when we know that it is not.

Senator FURNER: I do not think those sorts of comments are beneficial in respect to the discussions of this particular bill before—

ACTING CHAIR: We will not adopt that procedure for the rest of the hearings. I am happy to work by that rule but it has to be consistently applied. You might proceed, Senator Brandis, without the embellishment please.

Senator BRANDIS: I have finished.

Senator FURNER: Mr Mammone, the Business Council of Australia submissions indicate that they have an issue associated with the shifting of the balance or the burden of proof, in favour of applicants. I am wondering what the position of the ACCI is on this particular area. Do you support that view or do you have something else to indicate?

Mr Mammone: We were fairly clear in our written submission in response to the government's issues paper in that we did not see a need to alter the existing burdens and legal tests. Whether it is evidentiary burden or legal burdens we do not support what is being called a shifting burden of proof. We have made that clear in our submission to this inquiry. These are significant issues. Once you start changing the burdens of proof and who needs to establish certain factual elements of conduct and defences et cetera, it is something which, in a consolidation exercise, should not be a feature, if it really is consolidating the existing arrangement. The existing arrangement is that the applicant bears the onus of proof, largely. There is obviously some indirect discrimination.
where it shifts, but by and large we would probably support the BCA's submission—having not read the BCA submission.

Senator FURNER: It is only a brief, only a few pages. Notwithstanding that, surely if you create a scenario where a job applicant presents themselves regardless of what attribute may fall under either of the five current acts in terms of a situation where they foresee, as a result of not being a successful applicant for a job, surely the evidence sits with the respondent to demonstrate the reasons why applicant was unsuccessful in getting the job as associated with establishing the grounds that they were not discriminated against in that particular circumstance.

Mr Mammone: Our view is fairly consistent. It has been articulated to the government in terms of where we think the ownership should remain and that should be with the applicant.

Senator FURNER: So you do not agree that the respondent would have the information substantiating the reasons why the person was not discriminate against?

Mr Mammone: The respondent may, depending on who the respondent is. If we are talking about vicarious liability, if an employee or an agent of the employer committed the awful conduct, that person would then have to sit in the witness box, so to speak, and give direct evidence in terms of what they had in mind. The High Court decision in the Barclay matter, which was looking at the adverse action provisions in the Fair Work Act, illustrates that, with the reverse onus of proof under the Fair Work Act, you need the primary decision maker to explain the decision they took. If we are talking about how this might apply in the real world across small businesses across Australia, which make up the bulk of employment entities, basically that change, coupled with the changes to costs, we see would increase the net litigation in terms of whether an applicant would choose to use these new provisions to follow an application, as opposed to listing state or territory laws which do not have the reverse onus of proof. This is a fundamental departure from existing antidiscrimination statutes.

Senator BRANDIS: There seems to me to be an entire misunderstanding by some as to what reversing the onus of proof means. If you look at clause 124 of the bill, you see that there is a presumption created against the respondent, unless the contrary is proved—those are the words of clause 124. I think your point, Mr Mammone, is that if an applicant brings a case and the respondent goes into the witness box, inevitably they are going to be asked by the applicant's counsel in cross-examination about the impeached decision. That is not the same thing as reversing the onus of proof, is it? But it is not as though there will not be an occasion given to the applicant to interrogate the respondent about the reasons for the decision?

Mr Mammone: I am not sure whether I can provide a fairly detailed response.

Senator BRANDIS: It was more in the nature of comment, but my point is that people should not elide the two concepts of the respondent being required to explain something, as they inevitably would be, under cross-examination in the witness box at the hearing of one of these applications, and an actual formal reverse of the onus of proof and the creation of a formal legal presumption.

CHAIR: The witness does not necessarily need to answer that question. We might move on to Senator Wright.

Senator WRIGHT: I would like to ask some questions about this too, Mr Mammone. I am not sure that it is quite accurate to talk about this as being a reversed onus of proof in any case. My understanding of the bill is that it is now going to be a shared onus of proof whereby there is a requirement on an applicant to make a prima facie case that there has been some form of discrimination and then, at that time, the burden of proof shifts to the respondent. My understanding of the rationale for that is that usually it would be the respondent who would be more likely to have possession of evidence as to why a particular decision was made or a particular action was taken and would then address that prima facie case that has been established. So there is a bar that has to be reached first and then the burden of proof will shift to the respondent, who will then have responsibility in terms of the evidence they may have at their disposal. I would ask you: isn't it more efficient, in terms of court time, resources and legal costs, for the party that is more likely to have possession of the evidence—because they are the party that took the policy, made the action or made the decision—to bear the burden of producing that evidence?

Mr Mammone: I think to answer that we have to go back a step in terms of what has changed with the tests, because the onus of proof is linked to the tests. What is being proposed is a fundamental rewrite of the existing tests for proving direct discrimination, not so much for indirect discrimination, on my reading, but I am hesitant to give any concluded view about the two tests that are proposed. We are now shifting to a concept more akin to the adverse action provisions under the Fair Work Act which is linking adverse treatment based on a prohibited ground rather than saying: is there discrimination and how do we assess discrimination? We do that based on
comparators. We acknowledge that is not a straightforward test that the courts have had to grapple with as much as the litigants and their advisers, but we would not need to talk about shifting onuses of proof if we kept the current test. This is the essential point that we are raising.

We look at it on a total package basis. What are an employer's liabilities as a duty holder as a result of these new proposals? If the new law means that an applicant is able to make a claim and basically hedge their bets on whether the employer will defend the matter in the courts, then the employer, knowing full well that they will have to expend time, money and resources in legal fees et cetera to defend the matter in court and will not necessarily be able to recoup those costs if they are successful, will ultimately make a commercial decision in a number of cases to settle the matter before it goes to court. So these issues on the whole probably will not even be ventilated in the court; they will be determined between the parties before the matter is judicially determined. These are some of the issues we have raised in our comprehensive submission to the government in early 2012 and reiterated before this committee.

I think you have accurately described what has been said in the explanatory materials as being the intent in terms of a shift in burden. What is a shift in burden? I am not quite sure what a shift in burden is. I know it has been called a shift in burden.

**Senator BRANDIS:** It has been called a shift in burden—

**Senator WRIGHT:** With respect, Senator Brandis, I am interested in hearing from Mr Mammone.

**Mr Mammone:** It is not something I am familiar with because I do not think it is a feature of the current discrimination provisions, either state, territory or federal. It is hard for us to assess what the government has said is intended in that respect.

**Senator WRIGHT:** Do you have a concern that the shared burden of proof would result in unmeritorious matters succeeding at hearing, either before the commission or in courts?

**Mr Mammone:** We have the experience to date unfortunately with the unfair dismissal system, for example, generating what has been colloquially described as 'go-away money', whereby the employer makes a decision to settle the matter before it goes further, even though they think they have a valid reason or defence. Also, through feedback through our membership, these things also arise in other spheres, such as antidiscrimination laws. That is not something we would like to see in a consolidated antidiscrimination bill. We generally thought that the consolidation exercise would lead to better outcomes for both applicants and businesses who are duty holders. That was expressed time and time again throughout the exercise. Ultimately, we can only judge what the exposure draft is before this committee and before us and make as best assessment as is possible as to what the intended consequences and unintended consequences are.

**Senator WRIGHT:** The alternative concern, arguably, from the point of view of many people who have made submissions—and this has given rise to some of the rationale for the shifting of the burden of proof, the sharing of it—is that there are—

**Senator BRANDIS:** It is two completely different concepts—

**Senator WRIGHT:** They are completely different, but they are not mutually incompatible, Senator Brandis. Indeed, it is a shared burden of proof under this draft provision and it has shifted—it has changed. So the concerns that have been raised are that there are great numbers of people who have certainly perceived that they have been discriminated against, and indeed may well have been, but it has never been tested because the situation has been too difficult when they have not had the ability to obtain the evidence that is needed. The bar, in the current situation, has been too high. I ask you about that—competing harm, essentially, from the scenario that you are putting, and that this is actually designed to ensure that where people have legitimate concerns about having been discriminated against that they can actively do something to ensure their own protection.

The other aspect of that is: isn't there fairly clear evidence in research that has come out of the US and so on that having a more equal workplace in fact is actually beneficial to business in many ways—particularly in profits, and productivity as well? We are talking about competing difficulties, and I am putting to you that this is in fact designed to do this, as opposed to where you are saying that there is evidence of 'go away' money and that there are a lot of people who have not ever been able to get the protection that the law has ostensibly provided them with because they have not had the ability to make that case.

**Mr Mammone:** I think, to be fair, that in the difficulty in making a complaint, and the crucial decision of whether to litigate, that those are significant decisions for any individual. So I do not cavil with the fact that there may be some individuals who have decided not to proceed to launch a claim or a suit against an employer or co-worker et cetera. I do not have any figures or data, and the inquiry does not seem to have any of that sort of data.
in front of it. But what we are dealing with is what the government said that they would do in this consolidation exercise. I am using what was described by the government.

Part of the joint media release on 22 September 2011, which we have alluded to in our submission, says:

Bringing the laws together into a single, streamlined and comprehensive antidiscrimination act will improve the quality of the regulatory regime by simplifying and clarifying obligations and also reducing compliance costs for business in training and educating staff on discrimination matters.

Unfortunately, considering the total package before us, what the government intended to do—what this inquiry is set up to inquire into and to look at the exposure draft—we cannot agree that that has delivered those laudable policy objectives which were announced by the government.

There may be some benefits in changing the onus of proof for applicants. There will be, undoubtedly—the government has said as much in the explanatory materials. We are here to represent the interests of the duty holders, and obviously the balance has to be right. But if we are talking about consolidating the existing laws, this is not achieving that.

There may be a policy debate about shifting burdens of proof and tests; we did not think that that was part of this exercise. If there is a debate to be had about whether we should have the existing burdens of proof and tests, and the exemptions that apply to a whole range of areas, including employers and religious organisations, then that is a debate that we are quite willing to be involved in, and have. But this is not what we need to debate.

Senator WRIGHT: Mr Mammone, with respect, I think you are in the middle of that debate right now.

Senator RYAN: Is that a way—

Mr Mammone: The feedback that we have received to date—it is only preliminary feedback in the time available—is that there is a concern, a well founded concern amongst SMEs, particularly small businesses, that they will be exposed to increased risk of litigation. Whether they put in place the best-practices policies and do all the training, employers cannot prevent, 100 per cent of the time, people in the workplace doing unlawful things. This is the concern we have with the unfair dismissal system and the adverse action provisions which, we know from the feedback to us, are generating the colloquial go-away money.

Senator RYAN: Is that a way to avoid the cost of further litigation?

Mr Mammone: One of the factors involved in determining to settle the matter is to avoid extra time, cost and inconvenience associated with defending it in arbitration or court proceedings.

Senator RYAN: I want to turn, particularly, to smaller businesses here. One of my colleagues this morning, in the defence of the reversal of onus, referred to who holds the information. One of the arguments put is that it is much easier for a company the size of Woolworths to manage this legislation than it would be for a small retailer that might employ family members and one or two part-timers, because they would obviously have very different HR processes and very different retention of information of conversations. Do you think this exposure draft fails to take into account the differences in the way small and family enterprises are run, particularly with the way they manage staff and manage interactions with customers, and particularly in the context of the dramatic expansion in the number of protected attributes?

Mr Mammone: I think that one of the biggest issues currently for small businesses to navigate is the application of multiple sets of laws applying for virtually the same conduct. In Victoria, for example, a small business with a couple of staff will need to comply with the Victorian antidiscrimination legislation; if this becomes law, the federal consolidated discrimination legislation, which has different tests and different protected attributes et cetera; as well as other legislation like the Fair Work Act, which also covers discrimination related matters. It is that net burden in trying to understand, as a duty holder, what my obligations are. And if I am spending all my time asking, ‘How do I comply with the law as it currently stands?’ that detracts from what employers are primarily interested in doing and what their workers are interested in participating in: running a business and hopefully making enough money so that it can be viable, keep people on the books and employ new people. What we would not want to see, as a result of this consolidation exercise, is small business diverting a lot of resources to trying to understand how to comply and defending their actions before the Human Rights Commission, conciliation proceedings or the courts. It would take time out of the workplace to go and participate in those proceedings.
Senator RYAN: So is it your view that this exposure draft would represent an increase in the regulatory burden upon small business because of the increase in the number of protected attributes, which does dramatically increase the exposure to potential litigation or claims?

Mr Mammone: It is certainly not a net reduction in the regulatory burden.

Senator RYAN: So it does not achieve your objective, which was consolidation to make compliance easier for SMEs.

Mr Mammone: As we said, the government's policy intention was sound. What we hope will result from this inquiry is that this exposure draft—which is not a bill—goes through another filter and another process and really does represent a consolidated version of the existing framework, because the suggestions that industry had made to government before it finalised the exposure draft were addressing those issues. Small business was telling us that the current definition of 'disability', for example, is very wide, and it has been discussed in earlier Senate committee inquiries. So it is those sorts of issues that we want the government to look at in terms of how the existing regime—not the consolidated bill but the existing regime—affects SMEs, particularly small business, and what things could be improved with the existing regime that would make a difference to small business and so on. I would unfortunately have to agree with you that there will be a net increase to small business based on our analysis of the bill.

Senator RYAN: This is my final question. I am not sure if you have had the chance to look at some of the other submissions, but the previous witnesses, the ACTU, wanted to add to the list of protected attributes a person's criminal record so that people could not be discriminated against on the basis of, presumably, having a criminal record. So many SMEs are in fact family businesses which have spouses, children and others working in businesses. Does ACCI have a view, or are you consulting at the moment, on that particular suggestion? I would imagine that many of the family businesses I know would be troubled by all of a sudden having to establish, if they did discriminate on that basis—and of course they would have to be willing to explain this, illustrate it and win the case if a claim were made—that they might have some discomfort about family members working with someone with a criminal record.

Mr Mammone: As I understand the government's position on that particular attribute, it was not included in the consolidated bill, for sound reasons.

Senator RYAN: Yes, that is why I asked. It was another suggestion.

Mr Mammone: We had indicated to the government that the existing work-related protections, based on ILO conventions, should not be transplanted in a consolidation bill. Unfortunately, the government has chosen to include the other protections and has sensibly left out the criminal record provision. The criminal record provisions do have some work currently in terms of the ability for the Human Rights Commission to conciliate and make a report, and there are guidelines that we have provided input into and that the Human Rights Commission have issued. I think they have already issued, very recently, guidelines on employer best practice in terms of relying on such information for making recruitment decisions et cetera. So we are obviously glad that the government has not included that particular attribute in the consolidated bill, and we would be concerned if the government acted on the ACTU's requests. I have not read the ACTU's submission.

Senator RYAN: Thank you.

ACTING CHAIR: Are there further questions?

Senator PRATT: Just very briefly, I note that your submission says that you are pleased that representative actions are not included in the exposure draft, but your submission before us on that was probably before the government's inquiry. But it does not articulate why that is the case.

Mr Mammone: Sorry—why we support—

Senator PRATT: Why you oppose representative actions. It is not articulated in your submission before us.

Mr Mammone: Yes, I understand. It is because it is not part of the existing framework of anti-discrimination laws. If it were to be included, the Attorney-General's own strategic framework has pointed out—and we have provided input—that changing those sorts of provisions would have the potential to increase litigation. So that is something we did not support in terms of this consolidated exercise. Obviously there are others that have views contrary to that; their view is that there should be representative actions. But we did not feel the need to further explain it in this committee inquiry. But those are the main reasons why.

Senator PRATT: So the only reason you can give is that you believe it would increase the amount of litigation? There is no intrinsic reason in relation to the nature of the cases themselves that that should be the case?
Mr Mammone: I could go into further detail, and I am happy to take that on notice, but there are issues associated with the objectives of, perhaps, the person that is not the complainant in a particular matter in representative actions. So there are a whole range of issues and associated policy reasons why we would oppose representative actions.

Senator PRATT: In relation to new attributes, I am a little bit confused by the position you have taken, noting that you have given clear support in the past to the inclusion of gender identity and sexual orientation.

Mr Mammone: That is quite simple. Those were two election commitments by the Labor government to which we had no in-principle objection. The only issue we wanted to discuss with the government about those two protected attributes is the definitions of them, to ensure it was clear to duty holders what that means. There is no inconsistency, and I apologise if it appears that there is in our submissions, but we do acknowledge that it is attributes that are picked up in other jurisdictions.

Senator PRATT: Where you say the expansion of the protection attributes is contrary to the position articulated in its earliest written submissions, you still retain support for those two grounds provided that is clear?

Mr Mammone: Yes. We only cavil at the new protected attributes based on the ILO conventions, which are currently not able to be ventilated through the courts. Those are the ones that we oppose.

ACTING CHAIR: I thank both of you for appearing today and for your submission. I think you have got some questions that you have taken on notice from Senator Pratt and possibly others.

Proceedings suspended from 10:41 to 11:06
Welcome. We will reconvene this public hearing into our consideration of the draft Human Rights and Anti-Discrimination Bill. We have numbered your submissions Nos 309 and 366 for our purposes. I invite you to make some very brief opening comments and talk to us about your submission, then we will go to questions.

Ms Hall: Thank you for the opportunity to present today. AFDO is the peak national body for people with disability. We are funded by the Commonwealth government and our membership consists of other national organisations and state organisations that represent people with diagnostic disabilities—different disabilities—as well as demographic things such as people from non-English-speaking backgrounds.

Firstly, we support the consolidation of the legislation. We think it is a great opportunity to move forward and it will certainly assist our constituency in their endeavours to get their basic human rights. We are particularly pleased about the intersectionality of the attributes and also the addition of sexual identification. That is one of the attributes. We are pleased about this because people with disability come from many different attributes and include people who have different sexual identities.

There are a range of things that we are concerned about. We are concerned to keep the current protections that exist within the DDA and we want to strengthen those protections, particularly around reasonable adjustments. We also want some of the protections that are there for other attributes to be extended to people with a disability, in particular around vilification and the attribute for people with different racial identities. We believe that protection should be extended to people with disability.

Our main concerns are about access to justice under the legislation. People with a disability mostly come from very impoverished backgrounds. We do believe that for this legislation to be effective for people with a disability it has to be affordable to them and it has to be accessible to them and that the affordability and accessibility come down to things like costs. We believe that people with a disability should not under any circumstances be required to pay costs.

We are also concerned that there are no exemptions in the legislation and that is one of the things that we are happy to explore further. I will leave it at that for the time being.

Ms Phillips: I just want to note that our principal solicitor was due to come with me today and he is ill, so I might have to take some questions on notice.

We are a very small community legal centre, and all we do is discrimination matters. We would say that the case law reflects that the DDA has not been successful in achieving its objectives. We note that a Federal Court judge in open court made a comment about the legislation, saying that it was, in his opinion, inadequate in its current form, and we agree.

Last year, in the Federal Magistrates Court a deaf woman made a complaint against a public hospital for the right to an Auslan interpreter. She lost that case, and, apart from the fact that the right to a sign language interpreter is enshrined, we thought, in domestic legislation but also international, she had a costs order made against her as well. I guess that is an example of the two main issues that we have with the current legislation—that is, the inadequacy of the legislation and the system that means that probably a deaf person would not in the future dare to make a complaint in relation to their right to an interpreter because of this example of costs.

So we are excited about the opportunity to change both the system and the legislation and we are very happy to be here.

CHAIR: That is great. We will go to questions.

Senator Humphries: You have made the point—certainly you, Ms Hall, did—about the paying of costs and you argue there should be no awarding of costs against a complainant in a disability discrimination matter. Do you accept that there are such things as vexatious claims? If there are, what should the law do to discourage people from making such claims?

Mr Gianni: We note that in the legislation that exact point is covered, in that, at any point during the process—as I read it anyway—a vexatious claim can be stopped and discontinued by the Australian Human Rights Commission or by the court.
Senator HUMPHRIES: But, by its nature, a vexatious claim probably will not succeed anyway, so the person who brings it is going to fail at some point in the proceedings, if it truly is vexatious. But, if it is simply terminated, that does not necessarily defeat the purpose of the person bringing the claim for vexatious reasons, given particularly the fact that, for every claim that actually reaches a tribunal or court, there might be nine that have to be settled because of uncertainty before that point. So, short of actually just rejecting the claim, even partway through the proceedings, should there be other mechanisms to discourage vexatious claims? In other legislation—and I think in this legislation hitherto—there was the capacity to award costs against a party who had brought an unmeritorious and intentionally unmeritorious claim. Why shouldn't that provision still be in the legislation?

Ms Phillips: We do not object to that provision. For example, VCAT currently is seen as a no-cost jurisdiction but there are exceptional circumstances that cover that sort of thing. We accept that there are vexatious litigants and we believe that, in exceptional circumstances such as those, costs orders should be open. But we would like to start from the main plank that it is a no-cost jurisdiction in terms of the applicant. But we have no objections to the point you are making there.

Mr Gianni: Just to clarify it for me, Senator, are you of the view that the attribution of costs is the way to stop vexatious litigants?

Senator HUMPHRIES: I am not putting a view. With respect, it is us who are seeking your views. I am simply saying to you: if you accept that there are such things as vexatious litigants, does there not need to be something to discourage them from proceeding to make vexatious claims? At the moment, there is the capacity to award costs against them if the tribunal feels that they have wasted the court's time and, for that matter, the expenses of the party that they have brought a claim against.

Ms Hall: The other issue that I think we would want to raise is what the definition of a vexatious claim is, because certainly some claims that are deemed to be vexatious we would consider not to be vexatious.

Senator HUMPHRIES: When you say they have been deemed to be vexatious but you dispute that definition, do you mean the courts have deemed them to be vexatious?

Ms Hall: No, I do not mean the courts. But certainly other people perceive them as being vexatious. What we want is a fairly strict understanding of what might be a vexatious claim.

Senator HUMPHRIES: But that is what the courts are there to determine. Have you got any examples of where courts have found claims to be vexatious that you would not consider to be vexatious?

Ms Hall: I cannot give you any specific examples at this stage.

Senator HUMPHRIES: You might take that on notice if you like. You suggest the setting up of a human rights fund to assist people in support of the lodging of discrimination complaints. How would that work? Who would assess what is meritorious and worthy of funding and what is not?

Mr Gianni: In a similar way to the way the fund operates now: legal aid for the state jurisdiction.

Senator HUMPHRIES: Legal aid is not available just for applicants; it is also available for defendants in certain circumstances, isn't it? But you have advocated that it be only for applicants, or complainants?

Mr Gianni: Yes, so that would be the case for people with disabilities.

Senator HUMPHRIES: Why?

Mr Gianni: Because of the points that we make about the position that people with disabilities find themselves in in the community. They are an extremely poor sector of our community. They are people who experience a great deal of justice and discrimination. The idea that they might incur costs, or need to try and find people to do pro bono work for them, holds them back from making submissions.

Ms Phillips: If you look at the Victorian Auditor-General reports of 2007 and 2012 on the state of education for children with disabilities in Victoria, and the Victorian Equal Opportunity And Human Rights Commission report last year, you will find that there is a consensus among some that education opportunities for people with disabilities are extremely poor, so obviously they are going to fall into a low-socioeconomic group. It is not only money for lawyers that sometimes is required; even if one finds, for example, a no win no fee law firm to take something on, costs such as transcripts, expert reports, video conferencing and things of that nature preclude people with disabilities from having access to the justice system. Even if they do find lawyers and barristers—and that is a problem—there are also these costs, which can add up to thousands of dollars. So, even if the law is perfect, if you have got a system that does not allow you to access it, there is really no utility in it. We think applications should be able to be made to a fund for reasonable costs, and if individuals have to show some evidence of their financial state, I think that it is reasonable as well.
Senator HUMPHRIES: Ms Phillips, you said in your submission that you do not support exceptions for people with a disability in clause 40 in relation to defence and peacekeeping. Why do you argue for that?

Ms Phillips: It is a bit the same as employment: there is obviously going to be the need for an inherent requirement for somebody to undertake the duties that they are required to do. In the police force, for example, we have had a number of complaints; in that situation I think it is similar. There are all sorts of positions in peacekeeping, and some of them will require some skills and duties and some of them will require others. If someone has a disability but is still able to perform those requirements, I think that probably needs to be tightened up—and that would be acceptable, as it is in employment. But generally speaking we find that, with the police force for example, a disability is used without any thought going into whether that person is able to do the job. If it were rephrased in order to protect both parties, that is a possible win-win for everybody, but we recognise that there could be times when one particular person due to a particular disability may not be able to meet the requirements of that particular position, and we are fine with that.

Senator HUMPHRIES: The requirements for the Defence Force, for example, in theory at least, are that every uniformed member of the Defence Force is capable of meeting certain fitness requirements. Obviously some have a greater capacity than others, but the intention is that everybody who joins and maintains membership of the Defence Force has a certain level of physical capacity to do a range of things, even if they are working at a desk all the time. I suppose the presumption here is that a person with a disability will be assumed not to have that capacity, and presumably the onus then falls on the person making the claim to demonstrate that there is some capacity for them to perform that role.

Ms Phillips: And they may pass the fitness regime because they may have a disability such as diabetes or a non-physical disability. Our experience, in relation to the police force for example, is that everyone has to pass the fitness test, but then some go into an area where they never have to be fit again and are not so. So I think just a sensible approach to those sorts of things is needed.

Senator PRATT: I would like your views on the restrictions on representative actions. It largely means that people are denied the opportunity to have an organisation represent them directly—for example, unions and so forth.

Ms Phillips: We do not agree with it. We do not see that there is a need for it. We particularly support an organisation being able to do these things on behalf of people with disabilities—and I will hand over to AFDO after this, because I am sure they have a view as well. There are a whole lot of reasons why some people with disabilities are not equipped in many ways to run these sorts of complaints. One that comes to mind is somebody who is unwell with a mental illness. The stress and strain and the behaviour of some respondents are significant. It really is a huge burden that goes on sometimes for a number of years. It is obviously going to benefit people with disabilities and allow them to use the law, which they may not have felt they can use themselves, if an organisation can act on their behalf. If there is a systemic problem in relation to policies that are discriminatory or practices that are affecting a lot of people, to be honest, it just makes sense, for a number of reasons, for a group to be able to run one case rather than have to rely on 20 people to run a case—economically as well.

Ms Hall: The other aspect of it is that with individual claims that may be settled either at conciliation or beyond that—and quite often there are confidentiality agreements, including in those settlements—what we find is that those particular settlements have no effect on the overall structural barriers that occur and that the practice continues. There are numerous cases, for example, around education where individuals have taken out complaints but the practice still continues in the overall system. It is just not the way to achieve structural change. We believe that this legislation has a role to play in structural change, and that should be done through representation.

Senator PRATT: That could be not only through representative actions but also through not limiting claims to individuals.

Mr Gianni: Yes, encouraging the capacity for organisations to intercede at points during the proceedings and for individuals to join them.

Senator PRATT: So that other applicants could join a case?

Mr Gianni: Yes.

Senator PRATT: That, Ms Hall, would be much more influential on the kinds of situations you are talking about, where systemic discrimination continues, possibly sometimes even within the same organisation.

Ms Hall: I am finding it difficult to hear, I'm sorry.

Senator PRATT: I beg your pardon. My comment, which is a question also, relates to if you have other applicants that can join a case, that would help address the systemic discrimination that continues despite the fact that complainants may have had successful cases in the past.
Mr Gianni: Yes, it would be very practical.

Senator FURNER: In your submissions you indicate that the development of specialist disability legal centres should be funded. Have you done any costings?

Mr Gianni: We have already got them, so what we are suggesting is that they be further supported so that they receive an increase in funding to be able to provide the support required for people with disabilities to make their applications.

Senator FURNER: What sort of increase in funding are you proposing?

Mr Gianni: We have got one of the legal services here. I expect she would say treble it! They are funded a pittance.

CHAIR: You should probably give us whatever figure you like. Whether we could do anything about that is another thing. But get that big ambit claim out there.

Ms Hall: The other issue is that there are also gaps in the disability legal service representation. For example, at the national level the only body that deals with HIV-AIDS is based in New South Wales. It is an organisation that has been able to build up very specialist experience and advice around people living with HIV and AIDS. Yet in the other states it requires the more general disability legal services to respond to it. In terms of everyone's huge case load it is very difficult and it is difficult to build up the body of knowledge that is required at times around particular issues.

Ms Phillips: Just to answer the question about funding, all I can say is we are 2.6 full-time staff for the state of Victoria and one of those people is an admin person and one of them is me, which leaves two solicitors who are not full-time. As you can imagine, we are not in a position to do a lot of litigation. Employment and education cases can often run for between a week and four weeks and there is just no way we can do that. There is a significant difference between someone being able to access a free legal centre and not. They have got two choices: pro bono and no win, no fee. On pro bono I am generalising but you tend to have difficulty getting pro bono for significant cases. You tend to get barristers who might be junior and wanting some work and have some time. I am generalising; someone will give me some examples of some quite eminent barristers who have worked pro bono. But that is a difficulty. It also means sometimes getting on board legal people who are not familiar with discrimination and, if they are, not familiar with disabilities and have a significant learning curve to understand the issues themselves. On no win, no fee, they are sometimes very difficult to get. If there was a no-cost jurisdiction completely in the Federal Court they would not be doing this work at all, so that would cut them out. So we probably would ask for our funding to be trebled, or pick a figure and we would appreciate it. But with 2.6 for the state of Victoria our hands are tied much of the time and legal aid is not able to step in very often.

Mr Gianni: That is why we think that two-pronged approach is particularly important, extra support for the community legal centres that work in disability and the funding of legal aid.

Ms Hall: And particularly when you do this in the context that the majority of discrimination cases that come up are around disability. So it is quite significant.

Senator WRIGHT: Thank you. That highlights for me that the issue about having protections in law is the ability to actually then pursue those so that they are not just rhetoric but can actually be realised on the ground for people whose lives are affected by discrimination.

I would like to ask you, Ms Phillips, some specific questions in relation to your submission. One of them is about a fairly straightforward statement that you do not support exceptions for people with a disability in relation to the insurance and superannuation exceptions in clause 39. Could you elaborate on that, please.

Ms Phillips: Yes. I am reminded of a girlfriend of mine who lives in the States and was denied insurance because she filled out a form and admitted to having migraines, which really was fairly nonsensical. Therefore she could not get health insurance. I think that when insurance companies are allowed to legally discriminate against people with disabilities we find that there is a heavy hand about the slightest disability that they believe may cause them to pay out money. With the definition of disabilities, many people have a disability of one sort or another. Some are your traditional disabilities, and there are others which some people would not perhaps classify as a disability but do meet the definition. I think that to deny a whole section of the community insurance due to a disability is quite severe. I also think about genetic diseases and the interest in those, the predictions of disability and the reluctance to be interested in covering those as well. I feel that it is far too severe, is used unfairly and cuts a whole portion of the community out, and I do not think that is reasonable.

Senator WRIGHT: Can I also take you to another aspect of your submission, where you state that you believe that the attribute of criminal record should be included in the list of protected attributes. Could you just
elaborate on that and whether in fact that has some kind of particular relevance to disabilities or whether it is just an additional comment that you have made.

Ms Phillips: We have clients who have disabilities and criminal records, and sometimes they have criminal records because of their disability. When I say that, there are a lot of young men, for example, with—if you look at the research—language disorders, mild intellectual disabilities or high-functioning autism who are involved in the criminal justice system for various reasons. One is to do with a lack of education—and that goes back to the paucity of our education—and illiteracy; other reasons are that they are naive and are persuaded to do silly things. Other examples are people with mental illness who, while unwell, have done something that has breached the law. So there are a number of people that we see that have a criminal record.

I understand that employers are not keen on this and will say, 'Why should we have someone who has broken the law working for us?' If I were hiring an accountant and I saw that they had been convicted of fraud and money laundering, I probably would not be too keen, and I think it would be reasonable to suggest that I would not want to hire that person. But if I wanted to hire an accountant and when they were 17 they were arrested for being drunk and disorderly and breaking into a milk bar, and they are now 35, I think it is not reasonable. So again, with other things, there will be some times when it is very reasonable, depending on the charge and the conviction, depending on what you want to hire a person for who may have had a disability. It is reasonable in some cases. Where it is just totally irrelevant, it seems unfair in those cases to be able to just say, 'No, we can deny you this position on the basis of your criminal record.' At other times it will be reasonable. So we do not believe there should be a blanket ban.

Senator Ryan: Ms Phillips, the query I would have is that, to use that criminal record example that you referred to there, we are effectively going to be substituting the judgement of an officer appointed by the Commonwealth for the judgement of the person who might be making that employment. It becomes increasingly difficult, particularly for SMEs that do not have an HR department or do not have expertise or guidance on these issues, to make a decision that gives them a degree of confidence that they cannot be litigated against. Secondly, it is very rare that someone will explicitly give a reason that someone might not get a job. So we have officials, as a result of the reversal of the onus of proof, trying—to use a famous phrase—'to peer into the windows of many souls' and find what motivated this decision. Doesn't that pose a real risk that we are going to be dragging a lot of people into the net of litigation, who, on the other side, might be SMEs or family businesses that do not have the resources and capacity—and may experience financial hardship, as you described some of your constituents as having—and would be unable to take legal action? I have noted that another one of the things that you have suggested is the need for funding for people to take legal action but no-one ever seems to suggest that a small family business that might only make a profit of $80,000 or $90,000 a year faces many of the same challenges as an individual.

Ms Phillips: You have raised a few points there. To address your last one first, if I look at the history of complaints and decisions, I do not find that this is an issue—I do not want to use the word 'important' because I know it is important to them—commonly people are concerned about it. You are quite right: often employers do not tell people why they have not got a job, and that is why direct discrimination is so impossibly difficult, often. People are clever, and even if they do not want to employ the receptionist in the wheelchair they are not going to say, 'We're not employing you because you are in the wheelchair.' They make up something else. That is an issue that I do not think that we can get around. And they are often almost impossible to prove, to be quite honest. So I think if you look at the history of it you will see that the law is on the side of the SMEs because, unless you have some tangible evidence, how do you prove that is someone is discriminating against you on a particular basis if they do not make it clear?

Senator Ryan: We have seen with unfair dismissals that SMEs are particularly fearful—regardless of whether, as some would assert, it is not well grounded, the fear is there—that an environment where you have a no-cost jurisdiction and you have a reversal of the onus of proof, because once the prima facie case is established there is a reversal in the sense that someone must establish that they have reasonable grounds for the decision, that it is not just the decision but the actual process that is the great fear.

So, a small retailer may genuinely believe that they did not discriminate but, due to the fact that in this debate we are using the term 'discrimination' very differently to what the person on the street understands—'formal' versus 'substantive' and the impact of decisions as to opposed to whether people were treated equally—they fear the process: the cost in time and stress and the financial cost. Many small businesses have an income level that is not far different to an average wage.

Ms Phillips: I cannot comment on unfair dismissal, and I acknowledge the fear and concern, however I do not think the fear and concern is enough to stipulate what goes in. Even with the reversal of proof, obviously there are
people who come to see us and in the end, after looking at everything—or perhaps at the end of a conciliation when we have the evidence, let's say in a small business claim—we say to them, 'Look, you may or may not be right that this person discriminated against you but they have been able to articulate why you did not get the job and they have provided us with the applications of the other people who did. It clearly shows here that they required a BA in this and you did not have it. So you are not going to be able to prove that this is due to a disability, or a criminal record and a disability.'

Now, even if the onus of proof is on the shop-owner, let's say, if they have not discriminated against someone they should be able easily to articulate why it was that they chose one person over another. Therefore, if they are doing the right thing I do not think that their fears are justified, because they will be able to make their case.

**Senator RYAN:** There are two things there, though. Firstly, with respect, I think you undervalue the time for a person who runs their own business: this might suck up weeks of their time. I am not trying to dismiss the grievance of the person who may or may not have been discriminated against. But this may take up weeks of the business person's time, for which they have no capacity—they do not have built-in redundancy with other managers who can step in.

Secondly, we then get to this challenge. Let us say that a business person, to use your example, said, 'I wanted this person to have a BA,' and the person who was alleging discrimination did not have that. We do then get to a slippery slope where the judgement of an official gets substituted for the judgement of the employer. So if that job was, say, for a receptionist or someone standing behind a till in a retail outlet, the official may say, 'I don't think that was a reasonable request, a reasonable criteria, of the employer.' Those decisions start to creep in. So we would be seeing a reduction in the capacity of someone to set a criterion, before any applicants have come in, which is questioned almost purely because someone is alleging discrimination.

**Ms Phillips:** There are a couple of things. In relation to judgement and an official making a judgement in preference to the person on the spot: I guess that is what happens in every other area of the legislation anyway. That is just what happens. In the end, it is a court, rightly or wrongly, that makes a decision about whether an action by somebody, whether it is a small business owner or a teacher or somebody else, has been reasonable or not.

In relation to the time and effort, I think to myself: 'We are 2.6. I am a manager. Our organisation has to comply with lots of legislation as well.' Once you set yourself up to do so and you make sure you know what your relevant legislation is and you put in practices to abide by it, it is not as heavy a duty as everyone is, I think, making it out to be.

In terms of employment, usually people advertise for positions and they put clearly, in a position description or an ad, what qualifications or requirements are necessary for that job before they meet anyone with a disability or a criminal record, or interview. So, in my opinion, it is not that difficult for somebody to say, 'We had this requirement; we posted it before we interviewed; there was a good reason as to why we had it.' I think history has shown us, in terms of discrimination claims, that they will not have the difficult time that I think they are concerned about. But the opposite scenario is: if we do not have this then small businesses will be able to discriminate at will, and I think that that is unacceptable.

**Mr Gianni:** Could I add something there?

**Senator RYAN:** There is one quick point I want to make. If you look at the great majority of smaller businesses, they are in hospitality and retail. A lot of their job ads are 'Help wanted' written with texxa or printed and put in a shop window. They do not have job criteria like we might, even though you have 2.6 staff, where you have processes. I suppose, when you say you do have processes in place, this legislation is not a consolidation; it is a dramatic expansion of protected attributes which a small business would have to take into account tomorrow if this became law today that they would not have had to take into account today.

**Ms Phillips:** In terms of reasonableness, there are probably many good reasons why a small business should not just put up a texxa sign saying, 'Help wanted,' or, in addition to that, should have a position description, which might take them 10 minutes to type up and which they can use for the next five years. Again, I do not think this is a burden that is onerous, and I think that they are precautions that, for many reasons—unfair dismissal; a whole lot of reasons—perhaps should be addressed by small businesses anyway, as I have to do in my capacity as manager of a 2.6 organisation.

**Mr Gianni:** Senator, what I wanted to add in listening to the interaction was that I think it is important to point out that SMEs or small businesses in Australia make a wonderful contribution to the employment of many people in our community and many people with disabilities, and most of them, by far, do not discriminate. Most of them are, in fact, really able to provide a terrific working environment for those people that they employ. In
fact, many small to medium enterprises in Australia are owned and run by families who have experienced enormous discrimination in their own time and have a deep and real understanding of what discrimination means in Australia—a personal understanding of that. That is why I think many of them make such terrific employers.

CHAIR: We do not have any other questions for you and we need to get to our next witness today with this busy schedule. I thank all of you very much for your two submissions and for making yourselves available this morning. We appreciate that, thank you.
Evidence from Ms Davis was taken via teleconference—

CHAIR: I am just going to ask the other witnesses from the Australian Domestic and Family Violence Clearinghouse to come forward now. Anna, are you on the phone now?

Ms Davis: Yes, I am. Hi.

CHAIR: It is Senator Crossin here. When I get home I am going to shout you guys a new music background for your answering machine and drag you into the 21st century, Ms Davis.

Ms Davis: Yes, it is appalling, isn't it?

Senator BRANDIS: You are discriminating against them because of social origins.

CHAIR: That might be my next contribution to the Working Women's Centre, I reckon.

Ms Davis: We would gladly accept that, thank you.

CHAIR: Now you have enough funds out of us, you can shout yourselves a new answering device.

Ms Davis: Yes, that is quite true.

CHAIR: I do not think I have heard that screechy music for about 30 years.

Ms Davis: It is actually quite hard for me to hear you. I am not sure if that is just my phone, or—

CHAIR: You are coming through quite clearly for us.

Ms Davis: Okay, that is good.

CHAIR: Perhaps if I just talk a bit louder.

Ms Davis: The volume is fine, it is just the clarity is not so great.

CHAIR: All right. We have an expert working on that. It might be the room. I want to now formally welcome representatives of the Australian Domestic and Family Violence Clearinghouse. We have Ms Davis from the Working Women's Centre in the Northern Territory via teleconference.

We have submission No. 24 which has been lodged with the committee. I am going to ask you, in a minute, to provide us with some opening statements. Ms Davis, for your information—because you are on the phone—down here are myself as Chair; Senator Humphries as Deputy Chair; his colleagues Senator Brandis and Senator Ryan; my colleagues Senator Furner and Senator Pratt; Senator Wright from the Greens; and our committee secretariat. There is quite a bit of interest in this draft legislation.

Who is going to start off? Ms Marcus, and then we are just going to work our way along the line; almost—I will leave it to you.

Ms Marcus: I am just going to read a brief opening statement. Thank you for the opportunity to meet with you today. The Australian Domestic and Family Violence Clearinghouse has been in existence for the last 12 years and over that time we have monitored and carried out research on a wide range of issues that either help or hinder the prevention of domestic violence and recovery from the effects of that violence. From our experience and what is most relevant to our presence here today is the need for victims of violence to gain economic security, and central to this is their access to stable and secure employment. Obviously, there are other factors that are important as well; but, without a home and without a job and therefore without financial security, victims of violence are more likely to return to a violent partner and less able to secure a future without violence for themselves and for their children.

Our work in initiating and supporting the Safe at Home, Safe at Work project, which I am sure most of you are familiar with, stems from this understanding and to date this work has been extremely successful. But we all know that change is a fickle thing, and we believe that one of our best ways to ensure that this change remains
and that progress in this area continues is by having domestic and family violence included as an attribute under this proposed legislation.

The proposal is supported by the Australian Human Rights Commission and by the United Nations Special Rapporteur on Violence against Women, Rashida Manjoo, who observed during her visit in Australia that this legislation would be a progressive and constructive contribution by Australia to the global fight to prevent violence against women and would make Australia fully compliant with a number of conventions and treaties. In addition, the Australian national plan to reduce violence against women highlights economic and financial security as one of the key requirements to ensure that violence against women is adequately dealt with.

I urge you to support our proposal and to ensure that the gains made for victims of domestic and family violence are securely enshrined in legislation. That is my opening statement and we are all going to address various parts of our submission in turn. So I will pass you on to Ludo.

Ms McFerran: Our work has been very much directed by the fact that the vast majority of those experiencing domestic violence are actually in paid employment. In 2011, we conducted a big national survey on this matter and found that a significant number of workers were affected by domestic violence—almost one in three. It found that, of those, half said that domestic violence affected their capacity to get to work, and one in five of those experiencing domestic violence said it had actually followed them into work, and it is that ‘following them into work’ which affected their work performance and their work safety.

So, based on this, we would argue that this is an industrial issue that needs to be addressed in Australia in a mainstream way because of the significant numbers and the effect on productivity in this country and safety in the workplace. We are aware of an objection that this is a new issue raised in a consolidation process, but we would argue that in fact this issue has been addressed in this country since the 1970s and this country has been marked by the strong bipartisan support given across government to find appropriate legislation and policies to reduce the domestic violence impact.

This is for us a once-in-a-decade opportunity to make a real difference in terms of protecting those who are experiencing domestic violence. The work that we are doing is international best practice, and we see this as another example of Australia taking a real lead in this fashion. I am now going to pass on to Shabnam, who is going to address a very specific industrial aspect of this.

Ms Hameed: Employment legislation does not and cannot adequately protect employees from discrimination on the grounds of domestic violence as the status of victim of domestic violence is not listed as a protected attribute in the Fair Work Act under section 351 Discrimination, as protected attributes are limited to those in federal, state and territory antidiscrimination laws. This means that employees who are victims of domestic violence who are dismissed, injured in their employment, had their positions altered to their prejudice or discriminated against have no redress under this section of the act. Similarly, prospective employees who are refused employment or who are discriminated against by the prospective employer in the terms or conditions offered have no redress under section 351 of the Fair Work Act. Unfair dismissal protections and adverse action protections are currently available under the Fair Work Act but are limited in their scope. Industrial but not legislative protections in the form of no adverse action subclauses are available but are limited in their coverage and currently only cover fewer than 20,000 employees Australia wide. Unfair dismissal claims are limited to dismissals and do not protect employees who are not dismissed but injured in their employment or have their position altered to their prejudice or discriminated against. Adverse action protections are limited to employees who are treated adversely on the basis of a workplace right. Currently, fewer than one in 10 employees have domestic violence workplace rights and these employees are only protected against adverse action by the employer in relation to that workplace right. For instance, an employee with a right to domestic violence leave in their EBA would be able to bring an adverse action claim in the instance that the employer discriminates against them because they applied for or took DV leave. However, that same employee would not be protected in any way should the employer discriminate against them on the basis of being a victim of domestic violence and not in relation to domestic violence leave.

Should the Australian government, in line with the Australian Law Reform Commission recommendations, amend the Fair Work Act to provide provisions such as domestic violence leave to all Australians through the National Employment Standards, the same limitations would apply to the discrimination and the adverse action protections. For all Australian employees to be protected against discrimination on the basis of being a victim of domestic violence the antidiscrimination law needs to be amended to include the status of the victim of domestic violence as a protected attribute, as the antidiscrimination legislation underpins the Fair Work Act. Changes to the Fair Work Act alone will not adequately protect victims of domestic violence.
Ms Davis: I am sorry if I am repeating anything that has been said as I really cannot hear you but I will take my opportunity to talk now. This is a very significant issue for the clients of the Working Women's Centre. It is one that we see that very regularly. Over the 20 to 30 years that the centres have been in operation it is one that has come up again and again. We have found that the majority of clients who approach us with this issue share some common themes in their cases and we have case studies on all of these issues. Generally, we see women who have been terminated because the perpetrators of domestic violence have basically made their lives hell at work by coming to work, harassing them or their co-workers or by interrupting their work. We have seen women who have been terminated or treated adversely because of their poor performance at work or their absenteeism and this absenteeism and poor performance has been caused by either stress from the domestic violence they have been experiencing or sometimes from their efforts to try to deal with the domestic violence.

We have seen women who are unable to get to work because of the domestic violence, whether that is the perpetrator withholding their keys, barring their access to transport or money or sabotaging childcare arrangements. We have seen it quite regularly. We have also seen women who resign or feel forced to resign because of the shame, embarrassment and stress of dealing with domestic violence and also sometimes because of the disclosure of domestic violence and the prejudice or perceived prejudice from employers or fellow workers.

For almost all of these cases, unfortunately, we found that there is no statutory readress. We do our very best to find a remedy but the available remedies that we have—for example, unfair dismissal, general protections or existing antidiscrimination—are almost always inadequate. We find that we are trying to squeeze a set of facts into legislation that has not been designed for that set of facts. It is very frustrating for us as advocates and it is devastating for the client to find out that they do not have rights of law because of this issue. When we do manage to get a case through, because the legislation that we have been using is not specifically designed to capture domestic violence it results in the case being inherently weak, with very uncertain outcomes, and it just further shames and stigmatises the issue and the client.

Just this week I saw a client—I have changed a few details; I will call this client Mary—who worked as an attendant at a children's recreation venue. She had moved house following domestic violence, to escape her partner. She was worried that her ex-partner would try to come to work to find her because it was the only address he had for her. She told her boss what had happened and she asked the boss to have a photo of her ex-partner circulated to the staff so that they would be aware of him and could block his entrance. He refused to do this. He said, 'I'm not your personal security guard.' One day her ex-partner did indeed come to her work. He was let through and he verbally assaulted her in front of quite a lot of children and their parents. She was sacked. The boss said he was sorry, that he did not want to lose her but he had received complaints from parents following the incident and he said that his other staff felt unsafe and he had to protect them and to protect the children who frequent the venue. In this case she had no eligibility to claim unfair dismissal. She had worked there for only four months. Like many women escaping domestic violence, she had had a series of casual and short-term jobs. Even if she could meet the qualification period for unfair dismissal, the employer could mount a pretty strong argument for valid reason for the dismissal. This is just one case study. We could provide several more which outline this issue.

In summary, we believe the law is currently failing women like Mary and the women we see with this issue. We believe workers need rights at law to protect them from discrimination based on being victims and survivors of domestic violence.

Ms McCormack: I am the CEO of a peak body for family violence services and I represent AWAVA today. AWAVA is a federally funded women's alliance, which is funded to ensure that women's everyday voices can be heard by governments. Our members are a range of different women across Australia and also services interested in the issue. I will give some brief information about the breadth and the impact of violence, not just on health outcomes for women and children but also on the community. Violence is the most significant contributing risk factor to Australian women's health and lives before the age of 45—across the Australian economy, 13.6 billion every year. On average, or woman is murdered almost every week as a result of family violence. Family violence is a factor of only 50 per cent of substantiated child protection cases in Victoria and also was a factor in 62 per cent of child deaths known to child protection in 2010. It is the key driver of homelessness across Australia. Women, children and young people leaving the home because of violence comprise the largest cohort of homeless clients. In Victoria, 44 per cent of those seeking homelessness support do so as a result of family violence. So it is rife in our community and the impacts on health outcomes for women and children are significant and protracted. Often we see women experiencing long-term and chronic poverty and homelessness as a result. Added to the difficulties is the cost of housing and also the shortage of affordable housing—the cost of private rental. Then on top of that is the common experience of discrimination on the basis of family violence when seeking housing.
AWAVA put out a call to members for case studies, experiences from women. We got a lot of stories from women, from community legal services, from homelessness services and from family violence services. There was a common theme about really poor attitudes towards women who were having applications terminated or rejected by real estate agents on the basis of family violence and also rejected by public housing authorities, and of women being blamed for property damage or debt, incurred because of property damage perpetrated by their ex-partner, when the women were trying to secure housing elsewhere. Housing is really critical, obviously, for women and children to re-establish their lives. I have other case studies which I can speak to if necessary.

Senator BRANDIS: I want to explore a core issue. Of course this is a deep, deep social problem. Nobody for a moment underestimates its significance and its importance. But I have a problem with regarding antidiscrimination law as the appropriate vehicle to deal with this problem. I am going to make a comment and invite you to respond, if I can approach it this way. It cannot be the case, surely, that it is the role of antidiscrimination law to protect people against anything bad that has happened in their lives.

All of your comments have been directed to the workplace environment, so let me stay with the workplace environment. I will use the example that Ms Davis gave of the woman whose former partner had, through a series of aggressive, violent and invasive actions, made it effectively impossible for her to attend work. That is a shocking thing to happen to someone and it is shocking behaviour on the part of the former partner, but I do not see how it can be the employer's responsibility to be a guarantor to that woman against the unacceptable conduct of the former partner. Indeed, I cannot immediately see why being the victim of wrongful conduct is an attribute. It is merely a fact in someone's life. It does not seem to me like gender, race, sexuality, religion or other attributes merely to say that somebody has incurred terrible difficulties in their life as a result of the malign agency of somebody else which makes it difficult or impossible for them to have a regular workplace experience: (a) I do not see it as an attribute in the same way as the other attributes set out in the bill are; and (b) even if it is conceptually properly to be regarded as an attribute—this fact of events in somebody's life—why should it be the employer's responsibility? Why should he wear the cost of that, as opposed to government, through social service provision, or others?

Ms McFerran: Thank you, Senator, for that interesting question. We have not talked only about the workplace; Fiona is representing the position on housing discrimination as well. This process is not about something bad happening in people's lives; it is about the reaction of other people and the attitudes of other people to something bad that does happen to almost a third of the population in this country. Our work is all about trying to find ways that the community—friends, colleagues and workplaces as part of the community—can support a third of the population through this crisis in their lives. As I said, our work through the survey has identified that, for a significant number of people going to work, this is affecting their capacity to get there. It is affecting their ability to do their job when they are at work. It is a major distraction. We are talking about abusive phone calls and people actually coming to work, as given in the case in the Northern Territory.

Senator BRANDIS: Those are the facts that you have painted.

Ms McFerran: If I could finish, what we are talking about is very real, practical responses that workplaces can make to make sure that their employees are safe. The example given in the Northern Territory was simply putting up a photograph. We could check in with Anna about this, but it may well be that her client there had an order that said that her ex-partner was not to come to her workplace. So simply putting up a photograph that would then alert the workplace that this person has approached it not only would keep that employee safer but would keep all employees of that place safe, because the simple thing is that you call the police and make sure that person cannot have access to the place.

Senator BRANDIS: That might be a very good idea. I do not profess to be a specialist in industrial law, but it seems to me that that is probably within the concept of the general obligation to provide a safe system of work. So it may very well be that the issues that you address are appropriately an aspect of industrial law, but I am still struggling to understand why the fact that people suffer these misfortunes and these bad treatments is appropriately to be dealt with through, specifically, discrimination law.

Ms McFerran: Perhaps I will refer you back to my colleague Shahnam on this. Would you like to draw the Senator's attention to—

Ms Hameed: You are right. When we are talking about people at work we are not asking the employer to wear the cost. It is an industrial issue, and addressing the industrial issue has benefits both for the worker and for the employer.

The Fair Work Act is underpinned by the antidiscrimination acts. One of the sections listed where you can get redress if you are treated unfairly or adversely—those are two different words, so if you are treated badly—is
section 351. All the areas where you cannot be discriminated against are listed—the protected attributes. Those protected attributes are mirrored in the antidiscrimination acts. There are no protective attributes listed that are not mirrored in the antidiscrimination acts. So for the Fair Work Act to work in the industrial aspect, the antidiscrimination law needs to be amended.

Senator BRANDIS: Does it? It seems to me that there is a tendency to equate unfair treatment and antidiscrimination. To me at least, unlawfully discriminatory treatment is a subset of unfair treatment, but they are not the same thing. To my mind there are categories of unfair treatment that do not constitute unlawful discrimination but ought nevertheless be dealt with, particularly in industrial law, but not through the antidiscrimination legislation.

Ms Hameed: I suppose what we are trying to do here is to get it to become a protective attribute. We understand that unless it is named specifically as a protective attribute that we cannot call it unlawful discrimination. We believe there are very good reasons to make it a protected attribute.

CHAIR: Perhaps following on from the line of reasoning Senator Brandis has put forward: would these not have been the same arguments that people might have had many years ago as they tried to get breastfeeding as a ground for discrimination? Could you not argue that that is really a health issue, and should be addressed as a health issue as opposed to this argument that it is a workplace rights issue?

I know we could say, 'Well, we tuck discrimination against breastfeeding in there because, of course, it is a discrimination law, I suppose, is not designed to be an impingement on workplace productivity.

Ms McFerran: Yes, they are. An associated matter here is, 'Doesn't it come under sex discrimination?' But we have argued—as has the Australian Human Rights Commission, after much deliberation—that simply being a woman does not make you a domestic violence victim. Also, there is increasing knowledge about how this affects men as well, so it is a non-gendered issue. It is not a women's issue; it is much broader than that.

CHAIR: How many awards or agreements would now actually have a domestic violence clause in them?

Ms McFerran: We have over a million workers and something like 150 industrial instruments that now contain these, so we have certainly made some real progress there. But as Shabnam has pointed out, this still represents a small proportion of the Australian workforce.

Senator PRATT: Following up from Senator Brandis and trying to get to the bottom of this issue that somehow domestic violence might be intrinsically different to other attributes: if someone has, for example, a seizure on the way to work, and that prevents them from getting to work, they would have access to antidiscrimination law. You are simply arguing for what should be a fairly similar kind of protection, surely?

Ms McFerran: That is right. I actually wondered whether Anna—did you want to come in at this point and make any comments on—

Ms Davis: Yes. Sorry, Ludo, I can barely hear. I am not even really sure what part we are up to. Could someone repeat it into the phone?

Senator PRATT: The question is in relation to the argument that domestic violence is somehow intrinsically different to other anti-discrimination attributes. The example I gave was someone having a seizure on the way to work versus someone being detained by a violent partner.

Ms Davis: I think there is some difference, but I do not think that means that discrimination does not occur on the basis of domestic violence. I can give case studies that show that it is quite common for victims of domestic violence to be fired just because the employer feels uncomfortable with domestic violence or has prejudice against women or employees who are going through those issues. They blame the victims for the situation, or they might see that termination is the only way of reducing the risk of violence or harassment in the workplace. I think that that quite clearly falls into the area of discrimination, when somebody is being treated differently, because of an attribute that they hold, to their fellow workers.

On that other issue that was raised—why is it the employer's responsibility?—I think that it is a public responsibility and that anti-discrimination law serves to spread that responsibility publicly. Employers are one group who need to take responsibility as well. So I do not think it is putting all the responsibility on employers; I think it is including employers in the public group that take responsibility for combating discrimination in society.

Senator PRATT: Thank you. Can I ask Ms McFerran about work done to help employers understand the nature of this attribute and their capacity to understand it and perhaps also to comment on the fact that anti-discrimination law, I suppose, is not designed to be an impingement on workplace productivity.
Ms McFerran: That is right. Thank you for that, Senator Pratt. Yes, certainly I think a strong motivation in this is to introduce an educative function amongst workplaces and in housing provision in this country to raise awareness about the sorts of pressures put on people experiencing domestic violence and that, as part of a whole community, we want to support those people through this crisis in their life. The very clear examples and case studies that we are able to produce both in the workplace and in housing provision in Australia demonstrate that it is a daily experience of, at best, a misunderstanding of what is happening in people's lives and the role of all of us in the community to help support people through this. At worst, people are suffering discrimination.

What we are seeking from housing providers and from workplaces is better understanding. I took note earlier of the questions about the roles of SMEs in discrimination support, and we have certainly had a great deal of discussion with SME representative organisations. We are very conscious about the important role SMEs play in the Australian economy and as employers of women as well. We see some of the best stories coming out of SMEs about their capacity to support people through these crises but also, unfortunately, some of the worst stories. What we are seeking is working with SME organisations to share those best stories, if you like, and say, 'This is what positively can be done.'

Senator PRATT: Can you perhaps comment on the productivity issue? Clearly, these episodes may just be short term, and yet someone may suffer a long-term consequence of the loss of their job. But, if the circumstances can be mitigated quickly, you can find long-term solutions. But the attribute almost reinforces itself and people become compoundingly vulnerable to it because of a lack of job security, if you like.

Ms McFerran: All the international evidence is that women who have experienced domestic violence are more likely to have broken career pathways as they have had to leave jobs more frequently. They are going to be employed in lower paid work consequently and generally be much poorer than women who have not experienced domestic violence. People not being able to get to work because of being restrained or injured and when at work not being able to perform their duties because of being anxious, distracted or unwell or being abused or assaulted at work means that this is going to affect productivity. There is a hidden side to that. There is growing evidence that it is not only the people who are being abused but the people who are doing the abuse because they at work means that this is going to affect productivity. There is a hidden side to that. There is growing evidence that it is not only the people who are being abused but the people who are doing the abuse because they are taking time at work to abuse their ex-partner. Productivity is being affected because those people are not doing their job, either.

Senator PRATT: If someone loses productivity and that happens on an ongoing basis then that becomes the attribute on which someone's performance may in the future be assessed. What I am taking from what you are saying is that domestic violence is in the long term quite separate to the question of productivity, which may in fact impact on someone's long-term employability. I want some reassurance that you are able to distinguish between those two things so that employers are able to protect their workplace productivity.

Ms Marcus: What you are asking is whether it is ongoing issue. With all aspects of domestic violence, the better intervention that is put in place the more quickly the issue is resolved. One of the interventions that can obviously put in place is giving the victim workplace security as well as other things. If she feels secure in her job and if, for example, there is a domestic violence clause in place in that workplace she knows that she is supported by her work and will be enabled to deal with the whole issue much more effectively. Therefore, her productivity will be curtailed for a much shorter term. We are not looking at this as a simple solution. It is part of a package of solutions.

Senator PRATT: In the same way that it might be for an attribute like disability.

Ms Marcus: Exactly.

Senator WRIGHT: I am interested in expanding this discussion a little bit beyond what we have been mainly focusing on, which is the workplace. You mentioned accommodation. I would like to get an idea of how this affects people on the ground, whether it is something unfortunate that is occurring in their lives or whatever. What are some of the examples such that, by nature of that particular event, people are being affected by being discriminated against in the sense that a choice is being made about how to treat them that is not relevant to the decision that is being made. That is what I am trying to work out.

Ms McCormack: We have some example cases. One is of a woman who was a resident for five months at a refuge and who was trying to access a private rental property. The application process was in train with the real estate agent, but when he discovered that she had experienced family violence and that she would be using a bond she was told that she could no longer apply for tenancy. When questioned about the decision, the real estate agent said that she would not be a reliable tenant and that there were concerns about the ex-partner returning. A woman in a rural town with three children was unable to access private rental properties in town because she had been informally blacklisted as a result of the violence because of noise complaints about the violence perpetrated in...
town on properties that she had shared with her ex. A woman with a two-year-old child had been experiencing family violence and had an intervention order. The perpetrator broke into the house and set fire to her kitchen. She was given 24 hours by the real estate agent to get out of the house. Because of the negative backlash from previous agents she had much difficulty in getting further accommodation. The property manager asked whether she would be best somewhere else. She has also been declined practical support from the service that was supporting her because she did not want that to prevent her, through discrimination, from keeping her tenancy in private rental. Common themes include: women being blamed for the violence of perpetrators, it being assumed that the perpetrator will return, it being assumed that in relation to property damage she is responsible and the victim being discriminated against in terms of getting further housing.

Senator WRIGHT: I am just trying to distil what that means. Those are perceptions essentially about the attributes of a person by virtue of the actions of another person, so there are assumptions being made that then have an effect of them being deprived of a service or treated adversely in some way because of things that are not necessarily related of any action of that person.

Ms McCormack: Yes, that is right.

Senator WRIGHT: It is an attribute. It is because of events that that person has been involved with that something is seen as intrinsic to them. I am trying to work out what the commonalities are with the other attributes that Senator Brandis has referred to. As a result of decisions that are made by another person who discriminates against them they then end up in an adverse situation. I would make the point that even if domestic and personal violence was included as a personal attribute, there would still be the requirement that the conduct would still have to fall within the definition of 'discrimination' within the act. It is not just any conduct; it would have to fall within that definition. The 'legitimate reason' defence would also have to be got around. There is always that requirement: that for conduct is to be found to be unlawful discrimination then there must be no legitimate reason for that conduct. Those are things that we should also consider in thinking about whether or not it is appropriate to include this as a personal attribute.

Ms McFerran: It would be really interesting to ask the Australian Human Rights Commission these questions. I know that they have deliberated a great deal on this. It took them some time to come to their conclusion. They put in a separate submission on this matter to this process. They would probably be able to reflect in some depth on your questions on this.

Senator BRANDIS: Looking at the 18 protected attributes in whatever the clause is of the bill, the thing that continues to trouble me is that none of them involve the agency of a third party. A person's gender is a personal attribute, a person's sexuality is a personal attribute, race is and so on. What you are talking about is the intervention of a third party that intrudes on a victim's life in a particular way. It troubles me that it seems at least implicit in your argument that there is only one interest at stake here, and that is the interest of the victim. But, Ms McCormack, to use the example that you used of the rental property, the landlord has an interest in protecting their property. The neighbours have an interest in their peace and quiet. The fact that a third party might engage in what would in your scenario be criminal activity is an issue for the criminal law. If it happened in the workplace, it could very well be an issue of industrial law. But you do not seem—if I may respectfully say so—to accept that the victim is not the only innocent party here. The landlord is an innocent party; the neighbours are innocent party. I do not know if you are familiar with the so-called Coase theorem about the problem of social cost, but there is a social cost and it seems to me at least that it should not have to be borne only by one person. Do you accept that?

Ms McCormack: What we are talking about are discriminatory attitudes resulting in discriminatory behaviour as a result of another person's—

Senator BRANDIS: What?

Ms McCormack: actions—

Senator BRANDIS: You are talking about the perpetrator of the violence?

Ms McCormack: Yes—negatively impacting on a victim.

Senator BRANDIS: But that is a given; we know that is happening. My question is a different question. Why should—to use one of the scenarios you gave—the landlord have to absorb the social cost of that?

Ms McCormack: The landlord would have to absorb the social cost of that if that negatively impacts on a family. From my perspective, I think as a community we have a responsibility to ensure that women and children can be housed—
Senator BRANDIS: But you are running two things together, Ms McCormack. You are on the one hand saying the community has a responsibility to this woman—and I agree with you—but you seem then to be saying the way in which the community's responsibility is to be discharged in this instance is by throwing the whole of the social cost of this circumstance on the landlord, and that does not seem fair to me.

Ms Hameed: Part of our argument is about the extra prejudice that people who are victims of domestic violence face, as opposed to other victims of crime. I would find it unbelievable, if someone broke into my house and set my kitchen on fire, if my landlord decided to throw me out on that basis. What I would presume they would feel for me is sympathy. They would try and recover the costs, of course, and the costs would have to be covered either by the criminal, Victims of Crime, the bond—whatever process one goes through. But I think everyone around me would find it shocking, if a stranger broke into my house and set my kitchen on fire, for the landlord to then throw me out. I think there is an extra prejudice that victims of domestic violence face that other victims of crime do not.

I will give you an example from the workplace, and this is a real example. A club dismissed someone on the basis that a patron, who was also the ex of the person being dismissed, was harassing them at the club. Had it been any other patron, the club already has processes in place to remove that member from the club, to bar them from the club et cetera if the same or similar behaviour—unpleasant behaviour, behaviour that was disrupting the club or whoever—was taking place. In one instance the prejudice of being a victim of domestic violence led to that person being terminated. In the instance that just a rowdy person was engaging in exactly the same behaviour, the bar attendant would not have lost her job.

Senator BRANDIS: But, Ms Hameed, even the fact that you couch your answer in the language of prejudice does not seem to me to be right. Coming back to the instance of the violent ex-partner breaking in and setting fire to the kitchen and the landlord throwing out the tenant—and the tenant will be in breach of the covenants of the lease—the landlord is not doing that because he has a prejudice against the tenant; the landlord is doing that to protect his property. And I am not even sure the instance you give, even were domestic violence to be listed as a protected attribute, by the way, will be captured by this bill. As long as the landlord were able, with the reverse onus of proof as it is, to demonstrate that his purpose was to protect his property—nothing against the tenant; feels very sorry for her—I am not sure the landlord is doing anything wrong, unless you accept that the landlord has an obligation of custodianship or trusteeship for the tenant, which he does not. It is purely an arms-length commercial relationship.

CHAIR: We are debating a point here and we are running out of time, so I will go to Senator Ryan for his questions.

Senator RYAN: I have a follow-up to the issue Senator Brandis raised. There are a couple of issues that concern me. Let us say we have a small business and we have a case of a person who has a violent partner. They have undertaken every legal avenue possible to them. They have an AVO out and the person is not allowed to approach them, it might be in a strip shop, but in essence they are relying upon the police to enforce that AVO if this person decides to break it. There is also a burden upon an employer to provide a safe workplace for the other employees. An employer can genuinely be in a conflicted situation here, where a law such as this could mean they have no way out. If they are trying to protect their other employees and there have been instances—I do not think these are fanciful—where the police cannot get there in the time, the only way they have to protect their other employees is to not keep employing this person as a casual, for example, because I think termination brings in other issues of unfair dismissal. What is your view about that? An employer can be stuck with—whether it is OH&S, whether it is a situation like this—an environment where there is no way for them to comply with the law, and that particularly worries me.

Ms McFerran: The information we have back from small businesses, as I said, is that many small businesses handle this incredibly well, because small businesses know all their employees, and the violence will be being experienced by the owner of the small business as well. They operate flexibly and creatively to protect the people who are working around them. We would certainly argue that we want to promote those flexible, supportive arrangements, which, to the best of our knowledge, have proved incredibly effective.

Senator RYAN: I appreciate that. I am trying to avoid a situation where, in those cases where all best endeavours are made but it is too far away from a police station and there is a particularly violent offender, a situation, for example, where an employer is confronted and compliance with the law is, in all senses, impossible. We have heard before that small business is very good, and I understand that. The relationship of employer and employee at a small business level is usually much more personal than in a larger business. But would that scenario worry you? Is that a conflict we need to avoid?
Ms McFerran: No, it would not worry me personally. I am not a lawyer, so I will put that up-front, but I would have thought in that circumstance, if all parties had made every possible attempt to set in place good safety plans and orders were existence and the police were actively engaged in this and cooperating, that there would be no case for discrimination—

Senator Ryan: This is my problem with this provision, though, that the very instance of being dragged through this process imposes an enormous cost on a small business. They have got to go to conciliation—because we have seen an increase in the number of protected attributes—and if a prima facie case is established they then have to go through a more formal process. I take your point, but involving an agent of the Commonwealth in this, the authority of the state, actually does impose a dramatic cost on the small business, because taking five days out of the business and employing a lawyer to help you through this is a substantial cost, and I think you underestimate transaction costs.

Ms McFerran: But, as I said, my impression would be that, where all the parties have taken every reasonable action possible to protect someone—and my knowledge of this area comes from having worked in this area since the seventies—in a situation where it is clearly a very dangerous situation, then people generally make other arrangements. They do not continue. They might move interstate or something like that.

Senator Ryan: I accept I am not as familiar with the—

Ms McFerran: What we are trying to do as far as possible is to have people stay in their homes and stay in their jobs, but that is where we are normally dealing with reasonable people. Once there is an order that requires that they change their behaviour and if they do not then there will be serious sanctions, those reasonable people then behave differently. If there is a clear message coming from the protected person's workplace that they are not welcome at that workplace, that they will not be allowed entry, that they are not to attend at that workplace, then those people stop trying to do that. We are talking about, hopefully, the vast majority of cases. I think you are talking about extreme cases. They certainly happen, but I think in those cases—and Fiona can see whether she agrees with me on this—people usually would not remain in the workplace. And that is certainly not what we are seeking. As I said earlier, we are absolutely seeking to raise awareness and support on this and to highlight the positive and flexible approaches that have been taken by small business in these cases.

Senator Ryan: I appreciate that, and we heard that about the disabled community before. My concern is that I think there is a constant understating of the cost of this process, particularly upon smaller businesses. Formulating plans and having to go through a mediation is not a cost-free process in a cost-free jurisdiction for the small business.

Ms Davis: Could I add something here?

Chair: Ms Davis.

Ms Davis: Just on that point about cost: I can see the point. I think, though, that we need to look at costs pretty broadly, and I think at the moment that without any legal protections the full cost of prejudice associated with domestic violence in employment is being borne by the victim, and they are not to blame. The cost is also, in some cases at the moment, being borne by the employer, but that is probably not very well understood. But when you think about the amount of people who are losing their jobs and the lost productivity associated with that and the employers who are trying to protect their workers and protect their workplaces because of these issues, those costs are already having an effect on both the employers and the victims.

Now neither the employer nor the employee is the true cause of the costs—we know that. So I guess we are talking about the question of how we spread those costs around. I do understand that it can be costly for an employer when somebody takes a case against them under antidiscrimination law or the Fair Work Act, but I think what we are missing here is that, if something is made unlawful under legislation, there is a greater incentive for employers to avoid terminations happening. So we are hoping that, if antidiscrimination law includes domestic violence as a grounds for discrimination, there will be associated training and education with that to increase employers' understanding and tolerance of these issues. Hopefully this will lead to fewer terminations or less adverse actions in the future and therefore reduce costs for both the employers and the victims.

Ms McCormack: It is also important to consider these provisions in the prevention of violence against women, which, as I said, is such a devastating cost to the community and to families. Family violence or violence against women occurs in countries across the world to a greater or lesser extent depending on a number of different things, but one of the key things is the status of women. The ways in which women are discriminated against are critical to their vulnerability to further disadvantage. So, if we are going to build healthier and safer communities, it is really critical that women are protected by the way in which they are discriminated against and,
given that they—women and children—are the key victims of violence in the community, it is really important that we consider these protections not just for individual cases where women are discriminated against but against the overall impact on building a healthier and safer community.

CHAIR: All right. I am going to finish it there because we have cut well and truly into our lunchtime. Can I thank the five of you. Ms Davis, thank you very much for your time this morning.

Proceedings suspended from 12:43 to 13:38
BERG, Mr Chris, Director, Policy, Institute of Public Affairs
BREHENY, Mr Simon, Director, Legal Rights Project, Institute of Public Affairs
COLEMAN, Mr Richard, Solicitor, Fairfax Media Ltd
FLYNN, Ms Julie, Chief Executive Officer, Free TV Australia
SAAB, Miss Sylvie, Manager of Media Policy and Regulatory Affairs, Free TV Australia
SCHUBERT, Ms Georgia-Kate, Head of Policy and Government Affairs, News Limited, Joint Media Organisations
WILSON, Mr Tim, Director, Climate Change Policy and the Intellectual Property and Free Trade Unit, Institute of Public Affairs

Evidence was taken from Ms Flynn, Miss Saab, Ms Schubert and Mr Coleman via teleconference—

CHAIR: Welcome. Ms Schubert and Mr Coleman, are you on speaker phone?

Ms Schubert: Yes, we are. We will bring it closer to us.

CHAIR: Because you are on speaker phone, we are having a lot of difficulty making out what you are saying.

Mr Coleman: And vice versa: I am having trouble understanding you too.

CHAIR: That may well be because you are on speaker, we think. I am not sure we can do much about it. We will just have to proceed. I have got submissions from each of these three organisations. They are on our website and they are numbered 331, 330 and 484 respectively. I assume each of the three organisations have something to say as an opening statement. Please be very brief, like a couple of minutes each, because the value is in our asking questions really. Let us start off with the Institute of Public Affairs.

Mr Breheny: We thank the committee for inviting us to give evidence this afternoon. The exposure draft Human Rights and Anti-Discrimination Bill 2012 is an attack on our fundamental freedoms. The draft bill is not simply a consolidation of existing Commonwealth acts, as the government has claimed; it is a radical overhaul of antidiscrimination law. There are many problems with the draft bill. The most concerning aspect of the draft bill is the significant threat it poses to freedom of speech. The definition of discrimination has been expanded to include conduct that offends or insults. Given this new definition of discrimination, the inclusion of political opinion as a ground on which a claim can be made is absurd and dangerous. Under the draft bill, you could be taken to court for saying something that offended someone because of a political opinion they hold.

The freedom to express political opinions in all areas of public life, even those that offend and insult others, is central to the functioning of our system of government, as the High Court has found. By undermining the freedom of speech, the draft poses a grave threat to the health of Australian democracy. It is wrong to say that the draft bill could be amended to a point where it is acceptable. Simply removing the words 'offend' and 'insult' from the new definition of discrimination will not save the draft bill. The real problem is the whole project itself. The draft bill is not about antidiscrimination; instead, the consolidation project has resulted in a draft bill that undermines liberty and places the state at the centre of our interpersonal relationships. Rather than making the law clearer and simpler, the draft bill adds significant complexities to this area of law.

The draft bill also reverses the burden of proof for claims of discrimination. This is completely unacceptable. The person bringing a legal claim should always bear the burden of proving their case. This principle—the idea that a person is innocent until proven guilty—is the centrepiece of a just legal system. Reversing the burden of proof creates an unjust system.

The draft bill will erode civil society by encouraging reliance on apparatus of the state for the resolution of private disputes. It threatens to lead Australia towards a US-style culture of litigation. The constant erosion of our freedoms must end. This draft bill is a disturbing example of the ever-increasing power of the state. It shows that it is now time to swing the pendulum back towards liberty rather than away from it and to take back control of our own lives. The draft bill is a threat to freedom of speech, freedom of association and freedom of religion. The Institute of Public Affairs calls on the committee to recommend the outright rejection of this dangerous draft bill.

CHAIR: Thanks very much. Ms Schubert or Mr Coleman?

Mr Coleman: I will make a few points from the Right to Know Coalition. The first thing that we are recommending is that the terms 'offends' and 'insults' be removed from section 19 of the draft bill. We think that this lowers the threshold unacceptably for these types of complaints and it is likely to inhibit freedom of speech and have a chilling effect here. We can see an increased number of cases being brought under this legislation, if it...
ever is passed through parliament, because it will be much easier for the thin-skinned and the oversensitive to bring these types of actions.

Secondly, we do not think that there should be a subjective test. We think that an objective standard should be inserted into section 19 equivalent to the test that is in section 51. We object to the reversal of the onus of proof. This onus of proof that is proposed is the same onus of proof in defamation and is one of the main reasons why our defamation laws in Australia are frequently criticised for being oppressive and for restricting free speech. So we think that we should maintain the existing burden of proof.

**CHAIR:** All right. Thank you, and thanks for being so concise. Miss Saab or Ms Flynn, do you have some comments as an opening statement?

**Ms Flynn:** Yes, thank you very much. We support the joint media submission. We put in, however, a separate submission to make the point around the fact that commercial television broadcasters have a code of practice and have a complaints provision. This is well understood and well used, and we think that that is a point that should be taken into consideration when the bill as a whole is being looked at. We share the concerns raised by Mr Coleman. We also have some additional concerns about the exception for media not being consistently applied, and we are happy to talk about that. We do agree most strongly that the drafting of this bill as it currently is will have a severe chilling impact on all broadcasters across the many programs that are produced in any one given day. Thank you.

**CHAIR:** All right. We are going to go to questions.

**Senator HUMPHRIES:** Can I turn first of all to the submission from the IPA. I was intrigued by the conclusion that you reached that the effect of this legislation is to reintroduce the law of blasphemy. Can you just explain how you come to that view.

**Mr Breheny:** By defining 'discrimination' by reference to conduct that offends, insults or intimidates a person on the basis of particular attributes and then including religion as one of the attributes, it means that you can now take someone to court for offensive comments that they make about your religious views. This, to me, is a clear reintroduction of blasphemy law, and it would seem to me to be a completely inappropriate result of this bill.

**Senator HUMPHRIES:** With the difference being, I assume, though, that under the old blasphemy law you needed to prove that the offending words confronted or affronted mainstream religious sentiment or something of that sort—I have not precisely drafted that—whereas under the proposed law you would only need to prove that you have offended a person's religious views, even if they are not mainstream.

**Mr Breheny:** To a very large degree, this is more dangerous than a traditional blasphemy law because in traditional blasphemy law you could follow an approved and existing doctrine. This is a shifting blasphemy doctrine where it is entirely dependent on the person who is listening to your particular views about religion. So we consider this to be very akin to blasphemy laws, but it is a different beast. But it would certainly make discussion about religious doctrine in any of the areas of public life that have been described extremely risky and extremely dangerous, and you would be potentially liable if someone took offence or felt insulted.

**Senator HUMPHRIES:** You also talk in your submission about the reversal of the burden of proof and you point out that the person has to make the allegation and:

The court only needs to conceive of discrimination occurring on the basis of facts that are presented by the complainant.

The conclusion that there was discrimination need not be the only or even the most likely inference to be drawn from the facts; it is sufficient that it is within a range of reasonable inferences.

So that means that as a complainant you do not have to prove that, on the balance of probabilities, this was what happened; you only need to prove that this is one possible interpretation of what has occurred.

**Mr Breheny:** Essentially, it just needs to be imaginable to the court that discrimination could have occurred based on the facts provided by one side, the complainant. The point that we are making here in relation to the reverse onus of proof is that we have as a central principle of our legal system—a central principle that has been developed over hundreds of years of English common law—the idea that the complainant should be the one that bears the onus of proving their claim. It makes sense on a number of levels, but one of those is the idea not just in a legal sense but also as a matter of logic that people must be presumed innocent until proven otherwise—until it is proven by the complainant that unlawful conduct has taken place.

That seems to me to be a pillar of any just legal system—but certainly Australia's legal system. By reversing the onus of proof—and all we have seen is spin from the government and from others that this is a shifting or a sharing burden of proof—you undermine that principle and therefore create an unjust legal system, when the current system is one that is proper and is just.
Senator HUMPHRIES: Indeed. I would like to direct a question to Free TV Australia or to Joint Media Organisations—but perhaps more particularly to Free TV Australia. In any given year, how many complaints would Australian television stations receive about the content of matters broadcast by those stations—the sort of thing that you might say offended viewers within the terms of this legislation?

Miss Saab: Obviously it varies from year to year but currently it is around 10 to 15 per cent of complaints. Some years it might be higher if there is a particular issue that pops up, as it does in some of these categories from time to time. But I think the most significant figure I can give you is that on the complaints that were adjudicated by the ACMA over the last five years, there have only been four complaints that have been upheld.

Senator HUMPHRIES: You said 10 to 15 per cent. What figure are we talking about of the total number of complaints each year?

Miss Saab: The total number of complaints—that is right.

Senator HUMPHRIES: But what is that total number? That is what I am asking.

Miss Saab: It varies. In 2010, I think it was around 3,000.

Senator BRANDIS: I want to explore some perhaps unintended consequences of this bill and I want to direct your attention specifically to clause 17, the protected attributes—of which there are 18 listed. Of the 18 listed, 11 are defined in the definition section of the bill and seven are not. Of the seven protected attributes that are not, two of them, paid political opinion and social origin, are new but they are also vague. I want to put a hypothetical proposition to you and invite you to comment. It is not a hypothetical, actually; I will draw an example from real life and invite you to comment on it. We all remember the infamous Andrew Bolt case in September of the year before last in which Mr Bolt was successfully proceeded against under section 18C of the Racial Discrimination Act for saying some, I thought, perfectly sensible things about the availability to white-skinned Aborigines of welfare benefits designed for Aboriginal Australians. It seems to me that under this draft legislation Mr Bolt could have said, 'I was expressing a political opinion and that is a protected attribute under section 17(1)(k), and I was expressing that opinion in the course of my work as a columnist, which is specifically provided for in clauses 22(2)(a) and 22(3), and you are now proposing to subject me to unfavourable treatment, which is unlawful under clause 19(2). We don't even need to get into the question of whether it offends or insults; it is unfavourable treatment because I'm the subject of complaint and potentially, as occurred in the particular case, I was the subject of an adverse finding which limited my freedom to express these wicked views.'

I use that real-life example to illustrate the point that including political opinion as a protected attribute must mean all political opinion. We cannot say that political opinions which the squishy left like are okay and that political opinions that the stentorian right like are prohibited, so it must mean all political opinions. But if you protect all political opinions, including political opinions which, arguably, are invidious to other objectives of the act, does that not mean that the effect of the act is to work against itself so that the very conduct which, under some provisions, would be unlawful is, under at least the political opinion attribute, protected and would that therefore not always be a defence? Would you like to comment?

Mr Berg: I might ask Simon whether he can answer the legal question but I think there is a very important point, that once you start making a decision about what speech can or cannot be said lawfully or legally and once you start writing laws that specify that, then to a large degree that makes all opinion political in some way. You could express something contrary to existing law and, regardless of whether it is obviously political content, it is a political opinion. The more we extend these sorts of laws, the more we extend vilification and discrimination and harassment law, we are going to head down that rabbit warren and courts are going to have to start debating these circular issues.

Senator BRANDIS: Do you say anything, Mr Breheny?

Mr Breheny: I would agree that examples like the one you have highlighted are open on a black letter reading of the law. One of the things which has shocked me is just how many of those seemingly absurd examples would be open to courts looking at particular situations that might come before them and applying the law as we have it in the exposure draft bill.

Senator BRANDIS: You see, a lot of public comment, including from me, has focused on what I say is the overreach of including offence and insult are as among the defined categories of unfavourable treatment but my concern is that the vice of this bill, so far as concerns freedom of speech, goes much further and, because of the very vagueness in which the protected attributes are expressed, particularly the newer protected attributes, nobody knows where they stand in relation to freedom of speech. It might be that this in fact, as in the example I gave you, is an extreme protection of freedom of speech because all political speech will be protected, if you cannot
treat somebody unfavourably because they express a political opinion. But I suspect a court would read that down and say it has to be subject to the overriding objectives of the act and read in context.

But my concern is that, by juggling these vague and undefined concepts, at the very best for this bill it leaves one uncertain as to what one might in fact say in the exercise of one's freedom of speech. One does not even need to get into the debate about whether 'offend' or 'insult' should be relevant categories of unfavourable treatment. And that—and perhaps Ms Flynn and the other media people might care to comment—has the chilling effect that we will never know what an invidious effect this has had on freedom of speech, because of self-censorship.

CHAIR: Does anyone want to answer that or comment? I am going to have to go to someone else before we run out of our time with you.

Mr Breheny: I would completely agree.

Mr Wilson: Can I just say that I probably agree as well. Particularly for concepts like 'social origin', which are very amorphous concepts which can be moved and bent and interpreted in different ways, you create a huge problem. As you rightly point out, Senator Brandis, what that in the end will do is suppress freedom of speech, not because people get taken to court but because it becomes almost impossible to know what you can and cannot say, and as a consequence people will have no choice but to say nothing.

Senator BRANDIS: Mr Wilson, I completely agree with you! But I have an even deeper concern, because, probably unlike some of you at the IPA—I know the IPA; I know their general philosophical orientation—I strongly support anti-discrimination law. My deep concern is that this is not really an anti-discrimination law at all; it is something else packaged up as an anti-discrimination law. Because it overreaches so far, particularly in relation to the provisions that we have been discussing, it is really a law against controversy, because, if we have an undefined category of political opinion and we have undefined criteria of insult or offence, nobody knows what they can say, and therefore maybe in a robust political discussion they might throw caution to the winds and say it anyway, but the media, who might be subject to a liability, as Mr Bolt's broadcaster was, will self-censor, and it will have this chill effect. That is not what anti-discrimination law was ever intended to do.

Mr Breheny: I would agree, and the one comment that I would make about that is that this is a perfect example of why the consolidation projects will fail. The reason it has failed and the reason we have this absurd definition of discrimination under the exposure draft is that there are differing concepts under the existing discrimination acts, and you cannot merge some of these concepts. You cannot merge them without losing all meaning of what discrimination—and the word 'discrimination' is defined in here—actually is.

Senator BRANDIS: Yes, I agree.

Senator FURNER: I would like to hear your opinion—and this is based on the submission of another submitter, the Ambrose centre, in particular on this part that we are debating now in respect of section 19. They infer that the part would go to the extent that if a person criticises a political party, a political leader, it therefore opens that person or that party, subject to the offence, to be considered a complaint for discrimination as well. Do you concur with that view, or do you have a different position?

Mr Breheny: One of the things that I would say is that there are all number of hypothetical scenarios that can be thrown up by this legislation. Because this is such a radical overhaul of existing discrimination law, it is unclear whether or not a court would decide one way or another on those questions, but certainly on my reading of this law it is open to a court to determine questions like that, where a complainant would win cases like that.

Senator FURNER: Are you familiar with the Catch the Fire case at all?

Mr Breheny: Yes, I am.

Senator FURNER: In terms of that particular case, does this draft legislation concern you in regard to that example being used for that individual to be open for discrimination?

Mr Breheny: I think it is clear that people who hold religious views that are different to those expressed may have been offended. I think it is clearly open that others would have been offended by what went on by things that were said by Catch the Fire ministries.

Ms Flynn: If I could just comment on section 19. Our concerns and I think the broader concerns of the media submitters are that 'offend' or 'insults' is very much a lower threshold than has ever been there before. The complication with it is added to by the fact that it is a subjective standard, because the proposed definition of discrimination in this section is entirely subjective. That leads to section 18C of the Racial Discrimination Act; it imposes an objective reasonable test, which is replicated in section 51 of the bill dealing with racial vilification but it is not replicated here at all. And there is no exception provided at section 19 for media organisations,
despite the fact that there is an exception provided at section 51 for racial vilification. I think we would all share the concerns about the level of inconsistency in the drafting of the various elements of this bill.

Ms Schubert: I might just build on Julie's comments and say that, then when we look at section 53 in relation to publications, the exception that is provided at 53 is actually not as broad as that provided at section 51 racial vilification. So, again, we would like to see that replicated. It goes to the heart of the issue of inconsistencies throughout the bill.

Mr Breheny: One thing I would add is that not only is there a reasonable person test under existing racial vilification laws, under section 18C of the existing Racial Discrimination Act and also under section 51 of the exposure draft, but also in relation to sexual harassment where a similar test is used there is a reasonable person test as well. It seems like the reasonable person test has been omitted from section 19 of the exposure draft purposefully.

Senator PRATT: Clearly, you have not said you are against antidiscrimination law as a whole per se. In terms of the way the system currently operates, are you generally supportive of the overall operation of antidiscrimination clauses for individuals?

Mr Breheny: I would certainly say that the current discrimination regime is preferable to the exposure draft.

Senator PRATT: Do you support antidiscrimination law in general—along the lines of how Senator Brandis might characterise it?

Senator BRANDIS: What might I characterise?

Senator PRATT: I don't know.

Unidentified speaker: You vandalised it.

Senator PRATT: No, you did not; but I am interested to hear how you would characterise antidiscrimination law that you might support.

Mr Wilson: We obviously think that discrimination for non-performance based reasons is a terrible idea, least because it is inefficient, as Simon rightly outlined. Apart from the removal of section 18C, we are broadly comfortable with where current discrimination law is. We certainly support very strongly discrimination law related to government and the way it operates towards government, but in a broad philosophical concept we are not a big fan of discrimination law being imposed across civil society in the private sector.

Senator PRATT: So if someone is discriminated against because they are an unmarried mother who is working at a government school, should they have recourse to antidiscrimination laws?

Mr Wilson: A government school is a government school and, of course, as we have already outlined, there should be antidiscrimination provisions provided for government employment.

Senator PRATT: What if it is private sector employment?

Mr Wilson: As we have already stated, we think discrimination is abominable and actually does nothing and does not serve the best interests of those within those schools—for instance, if it happened within the private sector, an independent school. But, ultimately, schools should have a choice about what they think best fits with their values and their aspirations around whom they should employ.

Senator PRATT: So if the private sector wants to choose between two employees, one of whom has some protected attributes and the other of whom does not but on paper they look pretty equal, should they have the right to discriminate according to those attributes?

Mr Wilson: It is a hypothetical example that would be almost impossible to answer because we do not know the details of it—

Senator PRATT: Should the private sector able to make its choice?

Mr Wilson: The private sector should be able to make choices, and they do themselves a disservice if they do anything in employing people who do not get employed on performance grounds.

Senator PRATT: Do you believe someone should have recourse to anti-discrimination law under those circumstances, or not?

Mr Berg: The principle that we keep dismissing, or forgetting, in all this discussion about discrimination law, particularly in the exposure draft, is one of the most basic human rights, which is the right to freedom of association. It has been recognised as such throughout the long history of human rights. It is in the US bill of rights and it is in the UN declaration of human rights but it is rarely, if ever, discussed when we discuss these sorts of things. We have come here today to discuss the exposure draft. As Simon and Tim have said, in our view the existing system is vastly preferable to the exposure draft. But we do agree that we have some serious concerns
about some of the existing anti-discrimination law, which we hopefully look forward to discussing in the future if a future government starts pulling it back.

Senator BRANDIS: It seems to me that your objection to discrimination is essentially an economic objection—that it is an inefficient allocation of resources—not a moral objection. But let me put a—

Mr Wilson: I would tackle that by saying it is not actually true. Each one of us as individuals opposes discrimination on non-performance grounds on multiple grounds, one of which might be economic, but also of course on moral grounds about our own sense of personal morality.

Senator BRANDIS: Let me throw a really simple example at you that has happened in Australian history endless times, though not recently: an Aboriginal person goes into a pub in some outback town, and the publican, who operates under a licence, says to the Aboriginal person, ‘We do not serve blacks here.’ Should there be a law against the publican saying that? I say there should be. What do you say?

Mr Breheny: We share your disgust.

Senator BRANDIS: Should there be a law against it?

Mr Breheny: Seriously, on a personal level we share your disgust; we are just as morally outraged as everyone else in the room. The distinction we make, though, is between us making moral judgements and us making legislative judgements, and those to us are two completely separate questions.

Senator BRANDIS: So you do not think legislative judgements are also moral judgements?

Mr Berg: The Australian delegation to the original convention on anti-discrimination pointed out that you cannot legislate people into morality. We share the Australian delegation's view on that.

Senator WRIGHT: We are really talking about legislating about behaviour, aren't we?

Mr Breheny: Yes.

Senator WRIGHT: And that is something we can do. Mr Wilson, I would like to go to the issue of exceptions for religious organisations and schools. I noticed on 16 January this year that you tweeted—can I quote your tweet?

Mr Wilson: Yes, you can quote because I do not remember it.

Senator WRIGHT: You said, 'Basically I think religious employers should be able to discriminate but not with public funds.' Can I take it from that that you are of the view that it is not acceptable for religious organisations, or schools, that are receiving public funds to discriminate in a way that would be contrary to what are essentially going to be legislated public standards of behaviour?

Mr Wilson: I think it is very entertaining how my tweets have been brought up in parliamentary inquiries, but of course the limitations of 140—

Senator BRANDIS: That is because you are such a celebrity, Mr Wilson!

Mr Wilson: The reason the word 'basically' is there at the front is because 140 characters does not perfectly include every dimension of my opinion. I think that, just because we have seen an engorgement in the size of the state, civil society organisations therefore do not become a part of the state. As we have already said, and made clear, we think anti-discrimination laws are a reasonable operation for matters of the state, but a religious school by itself does not automatically become part of the state. So I am clarifying that tweet by saying I think people should reasonably have a right to exist outside of the state even though they might receive public funds.

I say this from a bit of public experience. My partner—who, just in case there is any ambiguity about it, is a man—used to work within the Catholic education system. He decided to remove himself from the Catholic education system because of the real possibility that, because of his sexuality, he would be unable to progress in a standard way through the system. It is particularly unfortunate, but, as Mr Berg already outlined, the principle of freedom of association is a human right; it is an incredibly important one, like free speech; and it is one that we will stand by and that we think it is appropriate to defend, even in difficult circumstances.

Senator WRIGHT: On the example that Senator Brandis gave about the Aboriginal person being served in the pub, what would be your view about that in terms of legislation as opposed to personal moral affront or disgust at that behaviour?

Mr Wilson: My personal and moral affront is unambiguous about that sort of conduct. Part of the unintended consequence of anti-discrimination laws is that, by not allowing that person to show their bigotry and their hatred towards somebody else, the public cannot boycott that venue and hold people to account for their conduct. This is part of the problem. I understand the hypothetical. I understand why it is so outrageous, because I share that view, but will anything necessarily be achieved by that in terms of advancing the interests of those persons? No. It
means a racist gets more money. If you think that is a good outcome then maybe there is something to be said for imposing morality through law. I am not such a big fan of giving racists money.

Senator WRIGHT: So if we were discussing the introduction of the original Racial Discrimination Act, for instance, you would be putting the position that that was a mistake and that we should not be doing it?

Mr Wilson: I have not read the Racial Discrimination Act recently so I cannot answer that question.

Senator WRIGHT: It is essentially legislation that was historically designed to deal with behaviours that meant significant members of the Australian community could not participate fully because of behaviours of others, so the freedom to associate would trump freedoms of other people to be able to participate in the economic and social life of the nation.

Mr Wilson: As I keep pointing out, such conduct and discrimination abhors me, but the principle of human rights is that they apply to everybody equally and that everybody has them, and one of those is the freedom of association. Unless, Senator, you are disputing that, then I do not think they should be trumped by law. In fact, the very principle of human rights is that they cannot be taken away by government; they have to operate and exist outside government.

Senator WRIGHT: But you would agree, and this is part of the discussion we have been having today, that human rights sometimes butt up against each other and it is a matter ultimately of balancing those, one against the other.

Mr Wilson: No, you have a human right of freedom of association, you have right of speech; I am not sure I am convinced there is a human right against discrimination, as abhorrent as it is.

Senator WRIGHT: I was not at all intending to suggest personally you had a different view. This is an issue where we have to look at the legislation and look at behaviours that we are legislating for, irrespective of what people say their moral views are.

Mr Wilson: I understand, Senator. This comes back to the point that we are here to make around free speech. The principle around free speech is that people have a right to free speech. They do not have a right not to be offended or insulted, as the provisions of the bill currently lay out. This is a fundamental problem with the bill, because there are some things people are inferring or manufacturing into being some sort of human right so you can have one knock out the other. That is not how human rights work. Human rights are indivisible and are given to you basically because of your birth. In this case I am not convinced that there is actually a conflict of human rights, as you outlined.

Senator WRIGHT: Yes, but we have definitely had a discourse that goes further than just talking about free speech in terms of the role of anti-discrimination legislation. Essentially, I have heard that there is a position or a view being put that it is perhaps not legitimate to even be looking at broader aspects of anti-discrimination legislation, leaving aside the free-speech issue.

Mr Wilson: No, you have not actually heard that, Senator. What we have made crystal clear is we believe that anti-discrimination laws should operate on government. That is different from what operates within the private sector and within a free society, in the same way that we do not believe that Greenpeace should be forced to hire a particular person who is a big advocate of the coal industry, or that Joy 94.9, a gay and lesbian radio station in Melbourne, should be forced to employ a homophobe, or any other similar situation you can come up with. Discrimination occurs within society. Sometimes it exists for the right reasons, because there are organisational goals that people, when they freely come together and associate, believe in. People should be allowed to reasonably exercise those and they do themselves a disservice if they shoot themselves in the foot and they subtract people from employment because of something that is not relative to the objective of the organisation. I think it is a very fair and reasonable principle.

Senator BRANDIS: You seem to be taking—if I may say so, Mr Wilson—a very absolutist view of freedom of association. I myself think that freedom of association is a less absolute right than freedom of speech, but there are other rights as well with which it might be inconsistent. The philosophical problem I have with your position is that you seem to live in a universe in which there is a nice jigsaw puzzle of mutually consistent rights. I myself, as you may know, am a great fan of Sir Isaiah Berlin, and one of his teachings was that rights are sometimes incompatible and inconsistent. Freedom of association as an absolute might be incompatible and inconsistent with certain other rights, and I am just struggling to understand why it is that, in your view, freedom of association, important though it is, excludes all other rights that might come into competition with it—unless you think that is impossible, but I do not know how you can say that.

Mr Wilson: I will let my colleague Chris Berg make a comment on that at the moment, but I am not—
CHAIR: This is going to be the last section we go to.

Mr Wilson: Okay. I am not saying that; I am saying that, when there is a case of two human rights up against each other, there is an appropriate accommodation between the two. But what I am critiquing here is that we are not talking about one human right trumping another; we are talking often about concepts of social or civil rights, which are different from human rights. That is the point I am making. But I do think it is concerning if we are now seeing even the opposition and the Liberal Party advocating for a position that is not in favour of freedom of association.

Mr Berg: Senator, I would be happy to discuss the philosophy of it.

Senator BRANDIS: We do not have the time to do that now. But, Mr Wilson, all anti-discrimination law in a sense is a limitation on an absolutist position on freedom of association in service of other rights.

Mr Wilson: Objectives or rights.

Senator BRANDIS: I would say 'rights'.

Senator BOYCE: Chair, am I able to ask a question or have we run out of time?

CHAIR: I am very happy, as long as it does not get hijacked by somebody.

Senator BOYCE: Yes. I want to get back to the bill, if I could, and ask Free TV and the joint media witnesses a question. You spoke about the chilling effect that this legislation would have on your ability to publish or broadcast any material. Are you able to give us some examples of this, please?

Mr Coleman: I can give you a recent example of that where there was a hearing at VCAT in Melbourne over a cartoon published in the Australian Financial Review. It was a cartoon of Italy, but Italy was changed and it was called 'Berlusconia'. It was a satirical cartoon, and the point of the satire was to express an opinion about the effect that Berlusconi's personal and political conduct had had on the reputation of Italy. It was a very witty cartoon, but the fact is that undoubtedly it did offend a number of Italian-Australians. But, in my view, it then gave rise to, in part, a political campaign by some card-carrying members of Mr Berlusconi's party in Australia against the Australian Financial Review, conducted through the Italian media in Australia. We ended up before the tribunal in Victoria. The matter went to a hearing. During the first day, we resolved to mediate it and we did achieve a resolution, which had not been possible prior to the hearing. But that was on the existing legislation, and that gave rise to this action, which I think was very unfortunate. I anticipate that, under the proposed legislation, such actions will be so much easier to bring.

Senator BOYCE: Thank you. Do you have any comment, Ms Saab or Ms Flynn?

Ms Flynn: I think we would just point to the example that is in the joint submission, which is the claim filed against SBS in the Human Rights Commission. That concerns the broadcast of a documentary entitled As it happened: the Armenian genocide. SBS was able to successfully defend itself by demonstrating that a wealth of academic and historical experts agree with the historical conclusions. SBS also emphasised the documentary focused on events which happened nearly a century ago. For both these reasons, they were able to establish that, by an objective and reasonable standard, the documentary should not have been broadcast any material. Are you able to give us some examples of this, please?

Ms Schubert: Referencing the inconsistencies throughout the bill and the issues that we raised earlier about the subjectivity and those sorts of things, the effect could well be far-reaching and could include things that you read in the newspaper today, things that are broadcast tonight, things that you hear on radio—everything from same-sex marriage through to soccer riots through to women in combat; you could go through a very long list of things. They are all very, very real threats under this exposure draft of the bill.

CHAIR: We are going to have to finish, because we are nearly 20 minutes over time here. Senator Ryan?

Senator RYAN: I have a very brief question. Can I ask all the participants here: following the Bolt case, have any of you or your members or your organisations changed your internal processes with respect to compliance with the law as you now see it following the Federal Court case in Bolt v Eatock?

Mr Coleman: I am aware of the judgement and have read the judgement. I took it on board, but I would not say that we have changed our procedures in our approach. It is just another judgement that you build into your memory bank when you are assessing articles.

Senator RYAN: Does it mean you have changed the filter by which you look at copy or news stories?
Mr Coleman: I am sorry; I did not—

Senator RYAN: Has it informed and changed the filter that you put over new stories before publication? You said you take it into account.

Mr Coleman: Yes. I think so. It is just something else that you are aware of, where an article came unstuck in a particular tribunal, and you keep that in mind when you are assessing articles before they are published.

Senator RYAN: Do any of the other people on teleconference wish to provide a comment?

Ms Flynn: No. I think we would all agree with that. We already have very specific requirements under our code, and they would be the things that people would take into account. But obviously, in the same way as Mr Coleman from Fairfax has just mentioned, this would be another judgement that an individual broadcaster would have to feed into their—

Senator RYAN: To those at the table: the IPA publishes a great deal; it publishes prominently and gets some attention and you have probably got your opponents in the public sphere; do you look at what you publish through a different prism following the Bolt case?

Mr Berg: In our perspective, we would be more than covered by the constitutional right of political communication. Very rarely do we publish material that would come close to the domain of 18C. But, having said that, we do attach occasionally publish articles on issues like the intervention or Aboriginal policy and so forth, and, when we do, we have to take into account the Racial Discrimination Act and the new interpretation of what we consider 18C to be after the Bolt case.

CHAIR: We have severely gone over time and run out of time. Ms Saab and Ms Flynn, thank you for your attendance and your submission today. Ms Schubert and Mr Coleman, thank you as well. And I also thank the three gentlemen here. Thanks very much.
BANKS, Ms Robin, Anti-Discrimination Commissioner, Office of the Anti-Discrimination Commissioner (Tasmania)

NAYLOR, Mr Andrew, Chairperson, Human Rights Council of Australia

TOOHEY, Ms Karen, Acting Commissioner, Victorian Equal Opportunity and Human Rights Commission, Australian Council of Human Rights Agencies

[14:32]

CHAIR: I now welcome representatives from the Human Rights Council of Australia, the Office of the Anti-Discrimination Commissioner in Tasmania and the Australian Council of Human Rights Agencies. We have submissions from each of the three agencies. We have numbered them 474, 429 and 358 respectively. I invite you to make a very brief opening statement each and then we will go to questions.

Mr Naylor: The Human Rights Council of Australia supports the bill. There are aspects of the bill that can be, but as the first significant review of Commonwealth anti-discrimination legislation since the Brennan committee in 2009 and in the absence of a national bill of rights the bill, in the council’s opinion, is the most important legislative measure. For the bill to be effective, it has to have four things. It has to comply with Australia’s international human rights obligations, it has to set standards of conduct that are consistent with and that exemplify the principles of equality and non-discrimination, it has to avoid as far as possible inconsistencies with state and territory legislation and it has to be workable. The legislation is not mere rhetoric. People are discriminated against all the time in their daily lives and it is important that, while it be workable, this bill as the national anti-discrimination sets the tone for how we treat one another moving forward into the rest of the 21st century.

The council accepts that there are tensions sometimes between conflicting rights. There are tensions between the criteria that I have outlined. Just by way of illustration, in the context in particular of clause 23, which is the general exception provision that seeks to apply international law to create a general exception, the council has a concern about whether that exception is too open-ended and impractical and is too subjective as to the intentions of the discriminator. The council does not for a minute object in any sense to the intention or the motivation behind the concepts that have been imported into the provision but quite how you tease out that in practice—whether it will be workable in practice—is a matter of some concern. There is no guidance, for example, in clause 23 about the kinds of conduct that will be permissible. There is an objectivity requirement in relation to the proportionality of the contact vis-a-vis the aim, but the legislation needs to guide members of the public generally, it does not need to guide international human rights obligations, it has to set standards of conduct that are consistent with and that exemplify the principles of equality and non-discrimination, it has to avoid as far as possible inconsistencies with state and territory legislation and it has to be workable. The legislation is not mere rhetoric. People are discriminated against all the time in their daily lives and it is important that, while it be workable, this bill as the national anti-discrimination sets the tone for how we treat one another moving forward into the rest of the 21st century.

The council accepts that there are tensions sometimes between conflicting rights. There are tensions between the criteria that I have outlined. Just by way of illustration, in the context in particular of clause 23, which is the general exception provision that seeks to apply international law to create a general exception, the council has a concern about whether that exception is too open-ended and impractical and is too subjective as to the intentions of the discriminator. The council does not for a minute object in any sense to the intention or the motivation behind the concepts that have been imported into the provision but quite how you tease out that in practice—whether it will be workable in practice—is a matter of some concern. There is no guidance, for example, in clause 23 about the kinds of conduct that will be permissible. There is an objectivity requirement in relation to the proportionality of the contact vis-a-vis the aim, but the legislation needs to guide members of the public generally, it does not need to guide international human rights obligations, it has to set standards of conduct that are consistent with and that exemplify the principles of equality and non-discrimination, it has to avoid as far as possible inconsistencies with state and territory legislation and it has to be workable. The legislation is not mere rhetoric. People are discriminated against all the time in their daily lives and it is important that, while it be workable, this bill as the national anti-discrimination sets the tone for how we treat one another moving forward into the rest of the 21st century.

The council accepts that there are tensions sometimes between conflicting rights. There are tensions between the criteria that I have outlined. Just by way of illustration, in the context in particular of clause 23, which is the general exception provision that seeks to apply international law to create a general exception, the council has a concern about whether that exception is too open-ended and impractical and is too subjective as to the intentions of the discriminator. The council does not for a minute object in any sense to the intention or the motivation behind the concepts that have been imported into the provision but quite how you tease out that in practice—whether it will be workable in practice—is a matter of some concern. There is no guidance, for example, in clause 23 about the kinds of conduct that will be permissible. There is an objectivity requirement in relation to the proportionality of the contact vis-a-vis the aim, but the legislation needs to guide members of the public generally, it does not need to guide international human rights obligations, it has to set standards of conduct that are consistent with and that exemplify the principles of equality and non-discrimination, it has to avoid as far as possible inconsistencies with state and territory legislation and it has to be workable. The legislation is not mere rhetoric. People are discriminated against all the time in their daily lives and it is important that, while it be workable, this bill as the national anti-discrimination sets the tone for how we treat one another moving forward into the rest of the 21st century.

The council accepts that there are tensions sometimes between conflicting rights. There are tensions between the criteria that I have outlined. Just by way of illustration, in the context in particular of clause 23, which is the general exception provision that seeks to apply international law to create a general exception, the council has a concern about whether that exception is too open-ended and impractical and is too subjective as to the intentions of the discriminator. The council does not for a minute object in any sense to the intention or the motivation behind the concepts that have been imported into the provision but quite how you tease out that in practice—whether it will be workable in practice—is a matter of some concern. There is no guidance, for example, in clause 23 about the kinds of conduct that will be permissible. There is an objectivity requirement in relation to the proportionality of the contact vis-a-vis the aim, but the legislation needs to guide members of the public generally, it does not need to guide international human rights obligations, it has to set standards of conduct that are consistent with and that exemplify the principles of equality and non-discrimination, it has to avoid as far as possible inconsistencies with state and territory legislation and it has to be workable. The legislation is not mere rhetoric. People are discriminated against all the time in their daily lives and it is important that, while it be workable, this bill as the national anti-discrimination sets the tone for how we treat one another moving forward into the rest of the 21st century.

The council accepts that there are tensions sometimes between conflicting rights. There are tensions between the criteria that I have outlined. Just by way of illustration, in the context in particular of clause 23, which is the general exception provision that seeks to apply international law to create a general exception, the council has a concern about whether that exception is too open-ended and impractical and is too subjective as to the intentions of the discriminator. The council does not for a minute object in any sense to the intention or the motivation behind the concepts that have been imported into the provision but quite how you tease out that in practice—whether it will be workable in practice—is a matter of some concern. There is no guidance, for example, in clause 23 about the kinds of conduct that will be permissible. There is an objectivity requirement in relation to the proportionality of the contact vis-a-vis the aim, but the legislation needs to guide members of the public generally, it does not need to guide international human rights obligations, it has to set standards of conduct that are consistent with and that exemplify the principles of equality and non-discrimination, it has to avoid as far as possible inconsistencies with state and territory legislation and it has to be workable. The legislation is not mere rhetoric. People are discriminated against all the time in their daily lives and it is important that, while it be workable, this bill as the national anti-discrimination sets the tone for how we treat one another moving forward into the rest of the 21st century.

The council accepts that there are tensions sometimes between conflicting rights. There are tensions between the criteria that I have outlined. Just by way of illustration, in the context in particular of clause 23, which is the general exception provision that seeks to apply international law to create a general exception, the council has a concern about whether that exception is too open-ended and impractical and is too subjective as to the intentions of the discriminator. The council does not for a minute object in any sense to the intention or the motivation behind the concepts that have been imported into the provision but quite how you tease out that in practice—whether it will be workable in practice—is a matter of some concern. There is no guidance, for example, in clause 23 about the kinds of conduct that will be permissible. There is an objectivity requirement in relation to the proportionality of the contact vis-a-vis the aim, but the legislation needs to guide members of the public generally, it does not need to guide international human rights obligations, it has to set standards of conduct that are consistent with and that exemplify the principles of equality and non-discrimination, it has to avoid as far as possible inconsistencies with state and territory legislation and it has to be workable. The legislation is not mere rhetoric. People are discriminated against all the time in their daily lives and it is important that, while it be workable, this bill as the national anti-discrimination sets the tone for how we treat one another moving forward into the rest of the 21st century.

The council accepts that there are tensions sometimes between conflicting rights. There are tensions between the criteria that I have outlined. Just by way of illustration, in the context in particular of clause 23, which is the general exception provision that seeks to apply international law to create a general exception, the council has a concern about whether that exception is too open-ended and impractical and is too subjective as to the intentions of the discriminator. The council does not for a minute object in any sense to the intention or the motivation behind the concepts that have been imported into the provision but quite how you tease out that in practice—whether it will be workable in practice—is a matter of some concern. There is no guidance, for example, in clause 23 about the kinds of conduct that will be permissible. There is an objectivity requirement in relation to the proportionality of the contact vis-a-vis the aim, but the legislation needs to guide members of the public generally, it does not need to guide international human rights obligations, it has to set standards of conduct that are consistent with and that exemplify the principles of equality and non-discrimination, it has to avoid as far as possible inconsistencies with state and territory legislation and it has to be workable. The legislation is not mere rhetoric. People are discriminated against all the time in their daily lives and it is important that, while it be workable, this bill as the national anti-discrimination sets the tone for how we treat one another moving forward into the rest of the 21st century.

The council accepts that there are tensions sometimes between conflicting rights. There are tensions between the criteria that I have outlined. Just by way of illustration, in the context in particular of clause 23, which is the general exception provision that seeks to apply international law to create a general exception, the council has a concern about whether that exception is too open-ended and impractical and is too subjective as to the intentions of the discriminator. The council does not for a minute object in any sense to the intention or the motivation behind the concepts that have been imported into the provision but quite how you tease out that in practice—whether it will be workable in practice—is a matter of some concern. There is no guidance, for example, in clause 23 about the kinds of conduct that will be permissible. There is an objectivity requirement in relation to the proportionality of the contact vis-a-vis the aim, but the legislation needs to guide members of the public generally, it does not need to guide international human rights obligations, it has to set standards of conduct that are consistent with and that exemplify the principles of equality and non-discrimination, it has to avoid as far as possible inconsistencies with state and territory legislation and it has to be workable. The legislation is not mere rhetoric. People are discriminated against all the time in their daily lives and it is important that, while it be workable, this bill as the national anti-discrimination sets the tone for how we treat one another moving forward into the rest of the 21st century.
about positive change without the need for a complaint. Complaint means somebody has felt harm even if it is not proven to have happened. I am very interested in how we look to prevent discrimination and put more emphasis on that.

In terms of my experience as the Tasmanian commissioner, I have been in the job now for 2½ years and one of the interesting things about Tasmania that I am very proud of is that it was the last state to implement antidiscrimination law and it learnt from the experience of others—I guess that is what I am hoping we could do here. It implemented what I think is a very fine piece of antidiscrimination legislation. It is still heavily reliant on individual complaints. So to that extent I think it has some shortcomings but I hope that during my term I will be able to address with the government some opportunities for further reform.

There are four aspects of the Tasmanian bill that are highly relevant to the key issues that are in debate around the federal bill. One of them is the inclusion of political opinion as a protected attribute. It is protected in Tasmania, as it is in some other jurisdictions. It has not been the basis of very much complaint at all—I can think of one or two complaints in my time as the commissioner. Again, it has not been an area where we see a lot of people exercising claims. It is always important to keep in mind what the experience is of those jurisdictions that have the protection already: how is that protection being exercised?

The second is section 19(2)(b), the clarification of ‘unfavourable’ as including, but not limited to, conduct that offends, insults or intimidates, I think it is—I cannot remember the precise words in the federal bill. The Tasmanian act has a provision, section 17(1), which provides that it is unlawful to engage in conduct that offends, insults, humiliates, intimidates or ridicules another person on the basis of a limited range of prescribed attributes. Those attributes include relationship status, and relationship status specifically deals with same-sex relationships in Tasmania.

Again, we have very limited experience with that provision because we do not get a lot of complaints of offensive conduct on the basis of relationship status, and certainly not arising from public discourse. That may seem surprising, but it is the reality; I think that people can engage quite actively in public discourse without causing offence. There is a proposal to amend the act in Tasmania to extend protection to all protected attributes, and that certainly got through the lower house. The bill to amend this is now in the upper house, and I suspect that as a result of the public debate federally we might see a little bit more discussion about it in our parliament.

But I do think it is important to understand that a lot of the harm that is done through discriminatory attitudes comes about in precisely this way—through insulting, intimidating and offensive behaviour or words. If we are truly going to understand the experience of people who are discriminated against and who have fewer opportunities because of protected attributes, we need to find some way to ensure that people understand that the way they use language can be part of the problem.

Another issue that I just want to touch on briefly is the exceptions in respect of religious bodies. Tasmania does have exceptions, but they are the narrowest of any state or territory. They have been in place for the entirety of the legislation’s history—12 years of legislation. I am not aware of complaints during my period as commissioner—and I deal with all of the complaints—where a religious body has sought to rely on one of those exceptions. This is quite interesting to me, because you would think that the exceptions are there to allow them to engage in a whole lot of conduct. In the main, what I see are organisations, including religious bodies, relying on an argument that in fact what they did was not discriminatory. They were not targeting a protected attribute; they were acting because of a rational basis for what they did—a person was not suitable for the job for reasons irrespective of their protected attributes.

I think that what it has meant in Tasmania is that religious bodies have perhaps turned their minds in different ways to how they ensure that their religious practice does respect the rights of others to the greatest extent possible without interfering with their doctrinal approach. They have done that, and I think they have done that very effectively. I know that I have had very open and honest conversations with religious bodies in Tasmania about some issues for schools, and those are very respectful conversations. I suspect it is easier to have that kind of respectful conversation in Tasmania because the law applies largely to everybody in the state, including all religious bodies, with limited exceptions. I think that we are proof that you can do it; you can have very constrained exceptions, and that can work for the faith based organisations.

Finally—and I suspect this is not a highly contentious issue—the question of gender and intersex identity is being redefined in Tasmanian law to make it clearer and to ensure that the full spectrum of gender and gender identity is fully protected. My concern with the federal bill is that it takes a binary approach to gender: it suggests that you are either male or female, and that your identity is either male or female. I think that contemporary thinking suggests—and I think more than suggests but indicates—that that is an incorrect analysis of the human experience and that there are in fact people across a spectrum of gender and gender identity. I urge the committee
to recommend to the government that the definition in the bill be amended to reflect the new Tasmanian provisions and to separate out intersex, because intersex is not an identity issue; it is actually a sex characteristics issue, and it is important to give that protection. Thank you.

CHAIR: Thank you very much. Ms Toohey, do you have any opening comments for us?

Ms Toohey: Just very briefly: I am here on behalf of the Australian Council of Human Rights Agencies. Our submissions were made on behalf of all the state and territory equal opportunity commissions excluding the New South Wales commission and the federal commission. A number of those commissions also made separate submissions, so really the ACHRA submissions look specifically at areas where there is an interaction between the proposed bill and state law.

There are about four key issues that we want to put on the record here that are addressed in both our submissions—in particular, issues arising from the provisions relating to legislative instruments, so the provisions that relate to exemptions, special measures and compliance codes, which represent a significant expansion of the federal commission's powers. These mechanisms certainly have the potential to provide a complete defence to a complaint of discrimination at a state or territory level, and that is obviously a concern for our commissions when there is no obligation provided in the legislation for consultation between the federal commission in making a decision about those compliance codes and the state bodies or indeed the communities affected by those decisions. Generally, for any matter where there is a regulatory ability to provide a defence to a complaint, that matter is contested in court. There is no requirement for that in the current legislation, and again it leaves it open, for example, for state bodies, public and private bodies to apply for the commission to sign off on a compliance code which may well have the effect of providing a defence to discrimination that happens at a state level, without the state having the opportunity to provide that input.

The other couple of areas have been briefly mentioned by the other people appearing. The religious exceptions, as Ms Banks has mentioned, operate in a range of ways across the various states and territories. The concern with the current draft of the legislation is that it actually has the effect of reducing protections in a number of those states, and that was not the intent of the bill as we understand it. Our concern at a state level is that people who currently have a higher level of protection to do with religious organisations would actually have those protections reduced if the current draft were to proceed.

Again, the ACHRA submissions support the specific inclusion of protection on the grounds of intersex. A number of states already include that in a number of definitions, and certainly each of the state commissions represented with the ACHRA submission was very clear that it is very important that that be included as a separate ground, not within gender identity but sitting within a specific definition within the legislation.

ACHRA was also very strong on the fact that a number of states also provide protection for discrimination on the ground of criminal record and that that ground should be restored in this legislation. It is actually being removed in the consolidation. The commissions were very concerned that there is a group of people who are very vulnerable to discrimination who have actually had their protections reduced, which again was not the intent of the legislation.

ACHRA is very supportive of the bill and certainly commends the bill. ACHRA also encourages the committee to recognise that clearly, while some elements of the community have concerns about elements of the bill—some of those elements clearly have existed for many years—it is important to recognise the opportunity that we have here to extend, consolidate and clarify the protections of some of the most vulnerable members of our community. Thank you, Madam Chair.

CHAIR: Thanks very much. I need to ask people to have maybe three questions each, and we might fit everybody in.

Senator PRATT: Ms Banks, on the significance of splitting gender identity and intersex, I think you said that it relates to intersex status being a sex characteristic and a biological characteristic as opposed to gender identity, which is an identity issue. What problems are caused in the current way the draft is written in conflating the two?

Ms Banks: The key problem is that the current draft still requires a person to identify as one or other, so a person who is intersex who does not identify as male or female would not have protection under the act on that basis, which is problematic for a very significant and growing population of people who are intersex.

Senator PRATT: They may not identify as one or the other because essentially they have the biological characteristics of both. It would be like asking me to be a man or—

Ms Banks: I do not think I can answer that very well. Somebody who is intersex would be better at answering what it would feel like to have to identify one way or the other. Part of the issue is that it still requires an election, almost, of identity. But, secondly, they are different things. Gender identity—the gender a person feels they are—
is quite different conceptually from what their the sex characteristics are; and to conflate them does serve to confuse. I think also one of the important benefits of naming attributes and doing it well—I noted Senator Brandis' earlier comment about some of the definitions; some of the concepts are not particularly well defined—

Senator BRANDIS: Or defined at all.

Ms Banks: or defined at all, yes. There is a public benefit in actually naming intersex as a protected attribute because it increases community understanding that people exist in our community who are intersex—quite a significant number of people. Subsuming it within gender identity loses that educative benefit and I think that is a very significant part of what we are seeking to achieve—awareness in the community that this is a reality for many people and they do experience discrimination because of it.

Senator PRATT: Lastly, can I ask all of you, in relation to exemptions and exceptions as they relate to the contracting-out of government services. Tasmania has moved some way on this. On one hand you can take, for example, a private school which is clearly branded with a religious branding and consumers will know what they are getting, versus someone who turns up to an organisation like Employment Plus; they are told by Centrelink they have to go and yet they may find that they do not have any anti-discrimination protection. All of you will have a reflection on how those things should more ideally work.

Ms Toohey: Certainly the ACHRA position is that discrimination laws should be extended as far as possible, particularly where there is public money involved. Certainly there are a range of services—aged care, child care, legal services, employment services—where public money is provided to faith based or other organisations, and the ACHRA view is that those organisations clearly should be bound by the same discrimination law protections as any other organisation operating in a public space.

Ms Banks: I probably do not have much to add other than it seems to me that, if somebody is operating a business or has a business model and is competing with others, they should be bound by the same laws. It is a fairly simple principle. We would all hope that the law applies to us all equally and that we are not above the law.

Senator PRATT: Can I ask in relation to education—I personally do not support exemptions in schools—when they have an overt religious affiliation versus other services, how should we navigate this when a school clearly has a particular ethos that it wants to uphold? What is the Tasmanian experience of getting through that?

Ms Banks: The Tasmanian experience to date has been that there is no exception for enrolments in faith based schools in Tasmania and that has been the subject of quite a lot of discussion recently because, as part of the proposed reforms, some of the faith based organisations sought to have an exception added to the Act to allow them to discriminate in enrolment and admission on the basis of religion. It was interesting because it was on the basis of religion, not on the basis of any other grounds. It is an interesting thing that in Tasmania the organisations have constrained it to religion. I have worked with those groups and what was proposed in the draft legislation, but failed to pass the lower house, was the power to grant an exemption to a school where it had more students seeking to enrol in or be admitted to the school than it had spaces available for. In that circumstance the school would be able to seek an exemption to permit it to discriminate in favour of children of that faith or students of that faith. That meant that it was not an open slather; you could not do that whenever they liked. So, if they had five students and they had 100 places available, they would not be able to do it—unless they had 110 students seeking admission. So it really is where a choice had to be made.

My personal view—because, as I said, the parliament has not accepted that there should be any exception included or any exemption power—is that, if it is a faith-based school, it makes sense that if they had to make a choice that faith would be part of that decision, but on no other ground. I am hoping that there will be an opportunity in the upper house to revisit the decision to exclude it. I think it is an important progress in how we deal with these issues—rather than full exceptions, which are effectively seen by many organisations as carving out an area from the coverage of act, saying that in limited circumstances an exemption should apply the parliament sets the framework of that exemption and empowers the commissioner to apply it. It has been a very interesting experience to work through those issues.

Senator RYAN: I want to go to the faith-based schools issue and put a scenario to try to understand your way of thinking on this. A Catholic or a Christian school—and I have been to these schools—have very strong views on abortion. It is also a live political issue, I think it is fair to say. Take, for example, the case of a teacher at a school expressing a view on whether or not abortion should be legal—which is very much against the doctrine of the faith. The Catholic Church and various other churches—for better or for worse—have a very strong view on whether abortion should be legal. That is clearly also a political opinion, which, under this draft, is a protected attribute.
Do you believe that the school or the institution—in this case, the one I am thinking about is the Catholic Church—should be prohibited from taking action against a teacher who is actually doing something that is directly contrary to a particularly core view? And it is an employment relationship and it is done with public funds—because we have a choice-based school system with a non-voucher voucher and money follows the student. What is your view of a scenario like that? Should the institution be restricted from taking action against a person who is saying something contrary to, in this case, a central tenet of what the school teaches?

Ms Banks: I would start by saying that I think it depends where they are saying it, but let us say—

Senator RYAN: Say they are saying it in a classroom. They are teaching religious education. I had teachers who taught maths where you would have social discussions. They are saying it in the classroom at some time.

Ms Banks: I think the bill actually provides the balance. The justification defence, I think, would be arguable in that situation. I think that is the balance that the bill provides. It says, yes, political opinion is protected but, if you can justify the conduct under section 23, it is defensible conduct. I think that is an important balance—that we do not just say we carve out a whole area of activity; we say this is in principle the protection people have and there are circumstances where conduct is defensible.

Senator RYAN: In this case you say it is arguable, which means that it is contestable.

Ms Banks: Yes.

Senator RYAN: Let us assume that there was counselling and there were requests and the education office, which usually run on a state or divisional level, said, 'You really need to stop doing this'—and I always consider these laws through the prism of what happens at the extreme, what happens at the margins—and the person just kept doing it. People are sending their children to this school and presumably faith is one of the issues.

The problem I have with what you are putting is that we are then saying to an official appointed by the Attorney-General, 'You are going to make this decision as to what is reasonable', because there is no more guidance here. There is no guidance here to say whether or not it is reasonable. We are simply saying that we are not going to allow the community to make the decision; we are going to rely on a person who we appoint to make a very important value judgement about whether or not it is reasonable. That is taking a prerogative very much away from the community in this regard. I am using that as an extreme example because it can happen and can happen very easily because of the size of our non-government education system.

Ms Banks: I presume when you are talking about an official you are talking about a judge of the Federal Court, because that is who would be making that decision. They are empowered every day to make decisions on quite contentious issues.

Senator RYAN: If you go to the tax act or corporate law, I remember studying these things and they are huge. We do not just have broad phrases, or we try not to, where value judgements and moral judgements are made. Particularly when it comes to the law of contract or a very highly codified law like the Corporations Act, we have in one case centuries of common law that restrict judicial just discretion. There are not that many cases of contract that come up before a court where the principles have not been considered before. With the corporate law and the tax law the parliament takes a very detailed approach to proscribing and prescribing activity. But in this case we are saying that a school in a state which has acted reasonably but has a teacher who insists on expressing their view and says because of this bill, 'I have got the right to express my political opinion,' a profound tenet of that institution cannot be defended. That is one of the reasons parents are sending their kids there. I think that is a pretty substantial assault on civil society and the rights of the community. We are not saying that teacher cannot work in the state system, we are not saying that teacher cannot work at another school, maybe another Christian school that has a different view. But you are saying the right of the institution to have its views reflected in this is going to be overseen by broad-brush law and we are allowing a judge to make this pretty big value judgement.

Ms Banks: I am saying I think the conduct of the school is likely to be defensible. You referred to the common law developments around contract. We have had 1,000 years of contract law; well, not 1,000 years. I cannot remember my contract law history. Discrimination law is new law. In Australia it is 30 years of law and these things are developing, and they develop through the same approach that the common law of contract developed, through judges making judgements and helping us to understand what is and is not acceptable conduct. I am wondering if one of my colleagues might want to respond as well to the question asked.

Senator BRANDIS: I would like to follow on from what you just said, Ms Banks. Knowing many federal judges as I do and being good mates with more than a couple as I am, I never cease to be astonished at the innocent belief that Federal Court judges somehow are equipped to make the most profound moral judgements about society's problems. It has got nothing to do with what they have ever been taught at law school, it has got nothing to do with what they have ever encountered in legal practice. This insouciant faith in the wisdom of
Federal Court judges as philosophers and ethicists astonishes me. You obviously do not know any. Having made that observation, I have got three questions, one to each witness. Ms Toohey, do you draw a distinction between unfavourable treatment and discrimination, and what is it?

**Ms Toohey:** In the Victorian law discrimination is defined as unfavourable treatment, so—

**Senator BRANDIS:** Is that it?

**Ms Toohey:** As the Victorian commissioner—

**Senator BRANDIS:** So they are the same thing.

**Ms Toohey:** That is one of the definitions in the Victorian law and, yes, unfavourable treatment based on an attribute covered by the legislation.

**Senator BRANDIS:** That is an important qualification. Is it unfavourable treatment or is it unfavourable treatment based on an attribute?

**Ms Toohey:** By virtue of how the law operates, it is with reference to the attributes covered by the law.

**Senator BRANDIS:** Right. This is my concern with the growing overreach, as I see it, of antidiscrimination law, that the more you extend the number of attributes that are able to be relied upon the more you reduce what is described as antidiscrimination law to being merely a law against unfavourable treatment. Bizarrely, you end up exactly where the IPA were when they gave their evidence and basically said they do not philosophically believe in antidiscrimination law at all. If everything is antidiscrimination, then nothing is antidiscrimination and you are left with this husk of a law which merely says: people should not be mean to each other. It provides no protection at all to vulnerable people who are peculiarly susceptible to unfair treatment such as Aboriginal people, gay people or pregnant mothers and so on. Do you see my point, Ms Toohey?

**Ms Toohey:** I understand your point but there are a list of attributes in the legislation, certainly in the Victorian legislation and in the draft.

**Senator BRANDIS:** Indeed.

**Ms Toohey:** As I understand it and certainly in Victorian Law there is an evidence base, based on those attributes, for those attributes being in there because of unfavourable treatment which leads to poor social and economic outcomes, unemployment and a lack of access to education. At this stage, as I understand it, in the exposure draft there is a similar list of attributes. It is not a broad-brush, unfavourable treatment for everybody.

**Senator BRANDIS:** No, it is not but only because, as you say, there are some defined and limited attributes upon which it is conditioned. But do you accept my broader point that the more widely you expand the number of attributes, the more you weaken the focus of the law so that it ends up being a general law prohibition against unfavourable treatment—people treating each other badly so that you are back with Mr Wilson and the IPAs and we do not have an anti-discrimination law at all?

**Ms Toohey:** I would argue that the expansion or the inclusion of some attributes relates to recognition that there are groups within society that are disadvantaged. Certainly, that is our experience in the Victorian context.

**Senator BRANDIS:** And it should be limited to disadvantaged groups, shouldn't it?

**Ms Toohey:** It should be limited to groups that no doubt can demonstrate that disadvantage.

**Senator BRANDIS:** Ms Banks, coming to you on a different point: do you say, if I understood you correctly, that all gender identities should be regarded as special attributes?

**Ms Banks:** Gender identity, as a concept and as defined, should be a protected attribute under the act.

**Senator BRANDIS:** That is, all gender identities?

**Ms Banks:** I am not sure what you mean by that.

**Senator BRANDIS:** You are the one who introduced the term 'gender identities' into the discussion or perhaps Senator Pratt did. This issue arose in your discussion with Senator Pratt. I just want to make sure that we understand what we are talking about so that male, female, intersex or whatever else there might be—

**Ms Banks:** Transgender, transsexual spectrum—

**Senator BRANDIS:** Transsexual—all of those gender identities should be—

**Ms Banks:** Except that intersex is not a gender identity. I guess that was the opening point.

**Senator BRANDIS:** Just going through the other protected attributes here—for example, immigrant status. Does that mean people from all countries in the world who are immigrants should be within the protected attributes and that should be a protected attribute? Or only people from some countries?
Ms Banks: Under my legislation it is being an immigrant.

Senator BRANDIS: So from every country?

Ms Banks: Yes, because you have to show the unfavourable or the discriminatory treatment on that basis. Some immigrants will never be able to show that because they will not have experienced that unfavourable treatment.

Senator BRANDIS: All nationalities?

Ms Banks: Again, yes.

Senator BRANDIS: All political opinions?

Ms Banks: I suspect the answer to that should be yes, again.

Senator BRANDIS: So if a person expresses a political opinion which is racist or homophobic, that should be protected?

Ms Banks: It is political opinion.

Senator BRANDIS: Okay. So to use the example I gave to the IPA people, when Mr Andrew Bolt, in a workplace environment, expressed some views which were subsequently found, whether rightly or wrongly, by the Federal Court to be of a racist character, under this draft law he should not have been subject to any unfavourable treatment or his employers should not have imposed any conditions on his employment in view of him expressing those racially offensive opinions—offensive to the applicants in Eatock and Bolt, anyway?

Ms Banks: As I understand it, it was not an issue of his employer treating him unfavourably as a result of him expressing his views.

Senator BRANDIS: Does the inclusion of political opinions in the protected attributes—you agree with me that that means all political opinions—mean that nobody in the various categories defined by the bill as ‘public life’ should ever be the subject of unfavourable treatment?

Ms Banks: I think you are avoiding the fact that there are exceptions built into the legislation, for very good reason, particularly in relation to speech. It is always a balance. You recognised this yourself in your questions and discussions with the IPA. These rights—freedom of speech, freedom of association, the right to equality and the right to nondiscrimination—do come into contact from time to time. We have to find—

Senator BRANDIS: I did not say there is any such thing as an absolute right to equality.

Ms Banks: I did not suggest that you did. I was observing that you earlier indicated that you do understand that rights come into conflict and one of the roles of the parliament is to find the appropriate balance of those rights to set the guidance for judicial decision makers on how they should apply that balance to specific instances of alleged discrimination.

Senator BRANDIS: You are paraphrasing what I said, so I cannot but agree with you. It is all very well to say that, from a philosophical point of view, that may be the case—as I say it is—but when the parliament writes an act it is not the same thing. The parliament should not be writing an act which is internally inconsistent; it should avoid doing that. When I look at the list of protected attributes and I see political opinion as one of the protected attributes in an act which elsewhere seeks to protect people on the basis of their sexuality, their race and so on, it seems to me that there is written into the heart of this act an inconsistency. That same conduct, from the point of view of protecting people from being discriminated against racially or on the basis of the sexuality or whatever, or offended or insulted because of their race or sexuality or whatever, is also protected conduct because the expression of political opinions, which might be racist or homophobic, is protected conduct. Do you see that there is an inconsistency at the heart of the act?

Ms Banks: I actually do not think that the expression of political opinions that are racist, for example, is necessarily protected conduct. What is protected as the attribute of having political opinions.

Senator BRANDIS: They are protected attributes. You agreed with me that political opinions, in clause 17 of the bill, means all political opinions. That must mean racist political opinions and homophobic political opinions and political opinions hostile to the tenets of one religious faith or another.

Ms Banks: I think the latter are religious opinions rather than political opinions.

Senator BRANDIS: Be that as it may—

CHAIR: We need questions, not debate.

Ms Banks: I do not think I can answer that question because I do not think inconsistency exists.

CHAIR: I think we have got to stop having a debate and just get to questions and answers.
Senator BRANDIS: Mr Naylor, at paragraph 2 of your submission you say that the HRCA welcomes and strongly supports the enactment of the consolidated human rights and racial discrimination act. You go on to say ‘it is a very good improvement on the current range of laws, which suffer from a range of inconsistencies and omissions’. So you acknowledge that it is more than a consolidation; it is an improvement which deals with some matters which the current suite of human rights bills does not deal with?

Mr Naylor: Indeed. The proposed bill creates a provision in relation to sexual orientation that is not currently on the books.

Senator BRANDIS: So it is wrong to say this is a consolidation; whether for good or bad, it takes the law forward in significant ways.

Mr Naylor: It has been described all the way along as a consolidation. I think it is true to say also that the bill creates substantive changes to the current law. Indeed, I welcome the process in that regard.

Senator BRANDIS: Sure; indeed you do, and that is clear from your submission. My point is a narrow one—that it is misdescription to say that it is merely a consolidation. It is both a consolidation and an extension of the existing law, is it not?

Mr Naylor: It is primarily a consolidation, I think, but it also makes some substantive changes.

Senator WRIGHT: Ms Toohey, I would like to take you to your submission, proposing that criminal record be included as a protected attribute. I would like you just to explain why you think that is important. I think the submission makes the point that it is an omission in the sense that there is some level of protection or some level of redress available where criminal record has been used as a discriminatory basis in the current law and that that is not included. Why is that important?

Ms Toohey: It is currently covered under the Human Rights Commission Act provisions, so it is protected in the area of employment. It is also covered under some state laws as a protected attribute at a state level. The ACHRA position is that we are getting increased reports that people are experiencing discrimination, particularly in employment, on the grounds of criminal record and also access to services, but often on the grounds of irrelevant criminal records. So people are unaware that they get criminal record checks done. They are unaware of what their obligations are. So they exclude people from employment and certainly from goods and services on the basis of a criminal record that does not appear to be relevant. Some of those records, as we know, go back many, many years. At this stage there are very limited protections. While the current protection in Commonwealth law certainly is not adequate in that it is not enforceable in a court, it does provide some level of protection, and the removal of that, in our view, is a reduction in the current level of protections available.

Senator WRIGHT: Can you give some idea of the sorts of goods and services, or the implications on the ground for people, and why it matters? Does it disproportionately affect people of disadvantage? We have been having the discussion about what the point of anti-discrimination law is.

Ms Toohey: I think the federal commission has put out a set of guidelines on criminal record and discrimination on the grounds of criminal record which are very good and which talk about the need to assess the record against the particular inherent requirements of the job that the person is applying for. We have reports, particularly from the Aboriginal community and from advocates working with young people, that records around things like public space offences, in particular, become relevant. In Victoria there is no spent conviction protection at the moment. So if someone does a criminal record check you are very vulnerable in terms of the information that is provided. And because there are inconsistent provisions across the country around spent records you can have very long criminal records being produced and people being discriminated against for events that occurred many, many years ago. Certainly some of the matters we have seen are about events that occurred 20 or 30 years ago. And again, because of a lack of consistency in the application and the support given to people with a criminal record, it is very difficult for employers in some circumstances to know when they should or should not discriminate, so they elect to be very conservative about it.

So, we do not have that protection in Victoria, but in the other states and at a federal level, where there is some protection, we have seen matters affecting particularly the Aboriginal community, some of the migrant communities and certainly young people. But I have also seen matters of people who are 50 or 60 who have criminal records going back to an event that occurred 30 years ago and who are being refused employment now. So it is a very relevant issue. I think with the increase often in offences around public space it is becoming more and more relevant, particularly to young people, and in the long run will lead to many of them being affected in terms of their employment and therefore their economic wellbeing.

Senator WRIGHT: Certainly that accords with passionate entreaties that have been put to me at times from the Aboriginal community about the way it affects Aboriginal people seeking employment. It is a barrier for them
to get out of that unemployment situation. The other thing is that I think you made reference to our international human rights obligations as well. Could you just expand on that briefly—on why it is important in terms of conventions that we have actually signed up to as a nation?

Ms Toohey: Certainly under the International Labour Organization obligations, criminal record is one of the protected attributes. While to date it has not been, as I said, an enforceable attribute—so you have not been able to prosecute a matter in court—it has enabled the federal commissioner and those of us who work in human rights to use the irrelevant criminal record argument that exists at an international level to work with employers around their policies and practices around that. Again, in Victoria it is a particular issue because of the spent convictions scheme, and, again, there are inconsistencies across the country. It is an area I think where, as you have said, there are groups that are particularly vulnerable and, in not complying with our international obligations—and certainly the commitments that were made in this exposure draft not to reduce protections—we certainly think that there are groups in the community that will be made more vulnerable to social and economic disadvantage.

Senator WRIGHT: So the ILO provisions are not just an enabling arrangement; they are actually, you would say, an obligation that we have signed up to, to do—what?

Ms Toohey: The ACHRA members would say that they are an obligation. I think one of the other issues for the ACHRA members is that, because there is patchy implementation at a state level, providing a safety net at a federal level means that it is a conversation that we can have at a state level about the need for that protection to be enacted at a state level. If it is not enacted at federal level, to meet those international obligations, it becomes difficult or more difficult for us to have that conversation. As I said, it is very relevant for a number of our stakeholder groups.

Senator BOYCE: I just wanted to raise with you the question of the inclusion of social origins as a protective attribute. A lot of submissions sort of said, ‘What is it and why should it be there?’ Are any of you aware of any cases or complaints that might be brought because that is now there that have not been able to be brought?

Ms Banks: It is tricky, and I do not purport to be an expert on this, but one of the issues that is regularly raised with me in Tasmania is of people who, because of where they live and because they live in an area that is—

Senator BOYCE: A bad suburb or something—is that what you mean?

Ms Banks: Yes, a bad suburb—that kind of stuff—and a suburb that is dominated by people on Social Security benefits, just cannot put their postal address on a job application; they are overlooked automatically. People in some of those suburbs in Tasmania will get a post office box in a nice suburb in order to avoid the problem of being discriminated against because of, in this case, a combination of where they live and the reputation of that suburb in terms of its social origin. I think it is a tricky concept and I think it probably needs some framing around it to make it an effective concept in discrimination law. But that is a very clear and cogent example I hear about all the time in Tasmania.

Senator BOYCE: Does anybody else have any comments?

Ms Toohey: That is consistent with research that we are aware of that has been done around the blind testing of applications that do not get looked at or get refused on the grounds of postcode, essentially. Again, there are a number of matters raised with us about people from particular suburbs or regional areas not being considered because of perceptions of, as Ms Banks has mentioned, the social and economic circumstances of those particular suburbs. That has certainly been the most common area that has been raised by the ACHRA members, and we would support the inclusion of that but also clarification around exactly what it is intended to cover.

Ms Banks: One of the issues in previous work that I have dealt with is the experience of homeless people in terms of discrimination. To me, social origin should contemplate people whose lived experience is that of being homeless or having been homeless and how that impacts on them.

Senator BOYCE: I was just wondering. I would not have thought of that as a ‘social origin', to be perfectly honest—

Ms Banks: And that is one of the difficulties I guess: is it or isn't it?

Senator BOYCE: I understood it had something to do with caste systems and international or other cultures' discrimination.

Ms Banks: That is why it probably needs some work on definition.

CHAIR: Time is—

Senator BOYCE: One more question?

CHAIR: Very quickly—
Senator BOYCE: It is a very brief question. Whether it will have a very brief answer I do not know.

CHAIR: If it is not brief you will have to get it cut off and take it on notice.

Senator BOYCE: Many of the submissions to the inquiry have been very, very concerned about the inclusion of those terms, 'insults, offends or intimidates,' into paragraph 19(2)(b). Why do any of you not find that inclusion concerning?

Ms Toohey: The ACHRA submission essentially says that we appreciate that there has been a lot of commentary in that space. Our concern is the absence of some clarification around what discrimination means. In our view the combination of 19(2)(a) and (b) essentially suggests that those behaviours in the particular context and in the areas that are described within the legislation protects people from those behaviours on the grounds of their attributes. Certainly at a complaint-handling level it is useful to have that clarification, because often people do not know what we mean by discrimination. The fact that it now includes harassment and a number of other definitions is very helpful for us at a complaint-handling level.

We would certainly say that it is a useful clarification. We agree that there may need to be some clarification of the specific terms, given people's concerns about the use of the word 'offend' in particular. I might pass to Ms Banks, though, because the Tasmanian law does specifically use that terminology and she has some quite specific experience in that.

Ms Banks: Yes, the Tasmanian act does use 'offend and insult' as well as 'intimidate,' 'ridicule' and 'humiliate'. It has a subjective element to it—so, a person is offended on the basis of a protected attribute and, as I said, there is a limited range. It also has the element where a reasonable person would have anticipated that offence, humiliation or whatever else. It does provide a balance by not being a purely subjective, 'I felt offended'—it requires a secondary element.

Our experience is that it has not been a provision that has been used to challenge public discourse and free speech in that sense. It has been used to challenge both actions and words that were, I would say, highly offensive to an individual person. We also have what I call 'vilification'. It is an incitement provision, and has a higher test for it. This provision has been used, and I think it is framed to identify interpersonal conduct rather than public conduct. The incitement provision does the public work.

I understand the concerns, and I think that the really important concern is: are we working with words that are too subjective? I think that rather than throw the baby out with the bathwater it would be good to work on if we can develop that further so that people do understand it. I think it is important to put into the act what we mean. Lawyers might understand what might be contemplated within the scope of 'discrimination' but the general public do not always understand. In my experience, many people think that as long as you treat everybody in the same way that you are not discriminating against them, and that is not conceptually correct in discrimination law. So the more that we can clarify what is needed, and what the courts have held to be discrimination in the past, and build that into this legislation, then I think that has a better educative effect.

Mr Naylor: I think that the Human Rights Council has not dissimilar concerns in relation to the clarity, or the breadth, of 19(2)(b) in particular. As a general proposition, the council would not want a situation where near offence or insult—the kind of conduct which is at the lower end of the spectrum—is—

Senator BOYCE: The 'Yar! Boo! Sucks!' sort of behaviour?

Mr Naylor: Yes. In one sense, this picks up on the point being made by Senator Brandis earlier: it is important that the legislation be meaningful. The traditional causation test is an attempt to give meaning to the legislation. Whether that is altogether appropriate with the removal of the comparator, I would have to say that I am not altogether sure. But it is important that the legislation not extend its reach too broadly, and I think that near offence or insult perhaps does that. I think it is a definitional problem.

CHAIR: We are going to have to finish it there. I thank the three of you for your submissions and, certainly, a lot of your time this afternoon. Thanks very much.
ADAMS, Ms Lucy, Senior Lawyer, PILCH Homeless Persons' Legal Clinic, Public Interest Law Clearing House

BALL, Ms Rachel, Director, Advocacy and Campaigns, Human Rights Law Centre

BALL, Ms Simone, Lawyer, PilchConnect, Public Interest Law Clearing House

BROWN, Ms Anna, Director, Advocacy and Litigation, Human Rights Law Centre

[15:31]

ACTING CHAIR: I welcome representatives of the Human Rights Law Centre and the Public Interest Law Clearing House. We have submissions from you: 402 from the Human Rights Law Centre and 425 from the clearing house. Thank you for that. Do you want to make any amendments or alterations to your submissions? No? Thank you. I ask each organisation to make a short opening statement, please, perhaps starting with the Human Rights Law Centre.

Ms Brown: We would like to begin by thanking the committee for the opportunity to give evidence today. We believe that the current reform agenda affords an opportunity to address the shortcomings of federal anti-discrimination law—shortcomings that are well evidenced and have been highlighted in successive reviews over a number of decades, including this committee's 2008 review of the Sex Discrimination Act. The Human Rights and Anti-Discrimination Bill, whilst not perfect, makes significant strides towards reconciling the laws, removing unjustified inconsistencies and strengthening and modernising protections—significant strides in the right direction. For example, clarifying and simplifying the definition of 'discrimination', introducing a shifting burden of proof and requiring parties to pay their own legal costs all constitute substantial improvements on the current regime.

We do have concerns with the bill, including the breadth of the defence of 'justifiable conduct'; the scope of certain permanent exceptions, particularly the religious exceptions; and the failure to adopt reforms that would more effectively address systemic discrimination. We hope that this inquiry is able to address these concerns and ensure the bill's passage. The bill builds upon years of inquiries and broad consultation, and it would be a great shame if we missed the opportunity to update and improve these laws, which play a vital role in making Australia fairer.

Ms R Ball: I would like to make some preliminary comments, specifically around the issue of burden of proof. It is not correct to say that the bill reverses the onus of proof, as has been claimed in some of the commentary and in evidence today. The bill in fact sets up a shared onus, which is a different thing. A reverse onus would mean that the complainant did not have to produce any evidence upon making a claim. In fact, under the bill complainants still have to prove that unfavourable treatment occurred, and they also have to provide evidence that it constitutes unlawful discrimination. It is only at that point that the respondent is called upon to provide evidence about the reason for the conduct. The obligation to produce evidence under this system rests with the person who has access to the evidence. The main change here is that currently complainants are required to provide evidence of the state of mind of the respondent. This is often extremely difficult, if not impossible, for people who have legitimately experienced unlawful discrimination. As a result their claim may fail or, more likely, they may be deterred from making a complaint in the first place. This means that unlawful acts of discrimination—something that we all agree has no place in Australian society—go unaddressed and are implicitly condoned.

Ms Adams: Thank you for the opportunity to provide evidence today. I will give a brief introduction on behalf of PILCH, and my colleague Simone Ball will talk about issues that specifically relate to the not-for-profit sector, on behalf of PilchConnect.

As many of the committee would know, PILCH provides free legal advice, representation and referrals to people who may not otherwise have access to legal services. Our clients are a broad and diverse group of people and organisations, including older people, people experiencing or at risk of homelessness, people with a disability, LGBTI people, asylum seekers and refugees, and not-for-profit organisations. Our submissions and our input is informed by this work.

PILCH supports the passage of the Human Rights and Anti-Discrimination Bill. We welcome the bill as a long awaited simplification of antidiscrimination laws in Australia. The bill presents significant improvements in efficiency, fairness and accessibility. It offers a balanced approach to addressing discrimination in Australia. The key strengths of the bill include a simplified definition of 'discrimination', which removes the unwieldy comparator test; the inclusion of sexual orientation and gender identity as protected attributes, subject to the minor amendments referred to in our submission; a shifting burden of proof, which is a sensible approach to
evidence that recognises that respondents are in the best position to provide and establish the reasons for their conduct; and an approach to costs which supports access to justice.

Although there is much to recommend the bill there is room for improvement. In particular, the protection against criminal record discrimination has been diminished. This will impact access to employment and ability to reintegrate into the community for people with criminal records, regardless of how minor or irrelevant those records are. Social status, including homelessness, unemployment and receipt of social security should be a protected attribute. The experience of the PILCH Homeless Persons' Legal Clinic shows us the devastating effect of discrimination against homeless people on a day-to-day basis, and yet this discrimination remains lawful in Australia.

The exceptions under the draft bill should be modified. While we support the inclusion of a general exception on the basis of justified conduct, what constitutes a legitimate aim under the legislation is currently unclear, and this risks reducing the protection provided under the act. A blanket exception for religious organisations from antidiscrimination obligations is inappropriate. These organisations should be required to be accountable for their decisions in the same way as other organisations. Finally, the bill should prioritise substantive equality over formal equality. It should include a positive duty to promote substantive equality and address systemic discrimination.

To the extent that these recommended amendments cannot be incorporated before enactment, we suggest that a comprehensive review is undertaken of the act, in which its operation can be reviewed on the evidence. Any refinement to the already vast improvements to protection against discrimination can be made at that point.

I will now pass to my colleague Simone Ball, who will talk from the perspective of PilchConnect, which is uniquely placed to comment on the experience of not-for-profit organisations.

Ms S Ball: PilchConnect provides free and low-cost legal advice, information and training to not-for-profit community organisations. Through our work we are acutely aware of the regulatory and compliance burden faced by small-to-medium not-for-profit organisations. The high demand for our service is evidence that there is a need for support for a sector that is often resource poor yet shows a real desire to be compliant.

The groups that we assist are typically under-resourced. They are run by volunteers and cannot pay for legal advice. It is therefore imperative that the bill is easy to understand and workable for community groups and their volunteers in practice. While we support the passage of the bill, we urge the committee to have regard to our written submission and particularly our recommendations on volunteers' vicarious liability and clubs and member based associations. I would like to make the following key points. Firstly, we welcome the bill's recognition of volunteering within an area of public life. However, the inclusion of 'volunteer' within the definition of 'employee' is problematic and likely to cause confusion within the sector. We would prefer to see volunteers covered in their own right and accompanied by legislative definition.

Secondly, we are concerned that imposing vicarious liability on community organisations for acts done by volunteers in connection with their role is too broad and may lead to reluctance by not-for-profits to involve volunteers. We submit that liability should only attach where a community organisation exerts a certain level of direction, control and supervision over its volunteers. Thirdly, the definition of clubs and member based associations is unclear. We would prefer to see the definition used in the model occupational health and safety laws or at least some more clarity provided on what is meant by the phrase 'provides and maintains facilities in whole or in part from the funds of the associations'.

Finally, we note that the explanatory notes to the bill mention guidelines and compliance codes to assist business to understand their obligations, but there is no reference made to the not-for-profit sector. We emphasise that not-for-profit specific guidance and education will be critical to assist the sector to understand their new obligations and to support compliance. We thank you for this opportunity to contribute to the committee's consideration of the bill.

ACTING CHAIR: Thank you very much to all of you. You have all made comments about what ought to change about the legislation, about shortcomings and difficulties with it. In fact, it is fair to say that there has not been a witness whom we have heard from today who has not made a number of similar comments, from different perspectives very often; they have all suggested significant change ought to be made to the legislation.

We also know that this legislation has been brought forward after a discussion paper which had a fairly brief exposure in the public domain. This exposure draft was put out there over the Christmas period and this committee has to report on it by 18 February, which is a very short period of time, and it is expected—at least it seems to be the case—that the government plans to pass the legislation in the first half of this year.
Ms Adams, you said before that you thought if these flaws cannot be fixed before the legislation is voted into law then there should be a review of the legislation afterwards. Surely it is incumbent on us not to do that—to pass legislation with so many loose ends or areas of concern—but rather to make this process happen before the legislation is passed. Surely it is not wise to be rushing through something as seminal as our fundamental human rights law in this kind of context. We should be getting the issues that you and others have raised right before it becomes law.

Ms Adams: Certainly to the extent that any of the issues the various groups have identified can be addressed—and a lot of the recommendations that have been made are for practical drafting changes, which I guess is the purpose of the exposure draft that this input is submitted. It is important that we keep in mind the numerous benefits that this legislation presents. An extremely long amount of time has been taken and numerous consultations have gone in to get it to the point where it is at now. I think from PILCH's perspective, it is important that we do focus also on the benefits. While there is room to strengthen it, it is an important piece of legislation that has been long awaited, and it is important that we do not disregard the benefits it can provide by focusing on the amendments that have been recommended.

ACTING CHAIR: All right.

Ms R Ball: Can I add to that as well?

ACTING CHAIR: Yes, briefly please.

Ms R Ball: Sure. From our perspective, it is not at all a bill that is going to be rushed through parliament. In fact, we appeared before this committee making these very same points, in a lot of cases when the committee did the inquiry into the Sex Discrimination Act, and a lot of the issues that are being raised now were raised then as well. There has been ample time for consultation on the discussion paper and less time on the bill, but I think that there has been a significant amount of consultation on this bill. The position that we take is that, if a few minor amendments were made to this bill and it were passed very soon, it would still be a very welcome amendment, a long-overdue amendment, to Australian law.

ACTING CHAIR: And if those minor amendments were not made?

Ms R Ball: I think that there are some drafting inconsistencies that can be easily fixed. If the minor amendments were not made then I still think that the passage of the law would be welcome, but that is the point of this inquiry process. It is to air out some of those things that can be changed so that the law can be passed as soon as possible.

ACTING CHAIR: Well, it certainly would not be welcomed by some. There are some very trenchant critics of the fact that this legislation does introduce that very highly subjective question of criminalising, or at least making unlawful under the legislation, speech which offends, intimidates et cetera—the language which has been much discussed already. I am frankly just surprised that human rights organisations—most of those appearing before us today; in fact, all of them—have not mentioned this until prompted.

Ms R Ball: That is one of those issues that we say can be easily fixed. We take out proposed section 19(2)(b). We do not think that it is important or central to the operation of the act. The language of 'offends' and 'insults' is no longer there, and the problem that has received so much attention goes away.

ACTING CHAIR: If it is taken out, but I think we have to work on the premise that it is not going to be taken out. It has been the subject of intense debate around this bill so far. There is not the slightest indication that the government intends to change that clause. If it does, great, another debate, but I think we need to work on the assumption that it is not going to change. In raising the issues that you saw as a problem, Ms Ball, you did not mention that particular provision.

Ms R Ball: We have made submissions about it in our submission, though, and the recommendation that it could be amended or deleted is contained in our submission.

ACTING CHAIR: All right, but do you accept that it is a central concern about this legislation that, if it remains in the bill, the capacity to require people to take remedial action around comment that offends or insults somebody else, as it stands now in the legislation, is a serious concern? In the language, for example, used by former Chief Justice Spigelman, he said, 'The freedom to offend is an integral component of freedom of speech,' and the subjective nature of the proposed test is 'a significant redrawing of the line between permissible and unlawful speech.' Isn't that a central issue and, if it is not amended, a central flaw with this legislation?

Ms Brown: I think that what a large part of the commentary has missed in all of this is that those words have with them and carry with them a large body of case law that has interpreted those words. Not all of us that have been making—
Ms Brown: We obviously agree with you, Senator, that the definition should be amended, but there was obviously a basis for the Attorney-General's Department to propose this drafting. You will have an opportunity to ask them about this, but I think the basis for that drafting was that it was drawn from an existing body of case law.

ACTING CHAIR: I do not think that is the case, but we will ask the department about that.

Senator FURNER: I have some questions of PILCH. In your submissions you make reference to a proposition of including in protected attributes the case of persons that may have experienced domestic or family violence. We have heard evidence today from a variety of submitters indicating that as well. Do you have any supporting cases you can rely upon as to why we should consider that sort of proposal?

Ms Adams: Certainly in our first submission on the consolidation we highlighted a case study of a woman who had been a victim of domestic violence and had had to flee her home. Sadly, this is not an uncommon situation. Domestic violence is the single greatest cause of homelessness in Australia. She had had to leave her home and enter an emergency accommodation with her children. She had presented at the local caravan park, seeking that as accommodation. She had been accepted but, upon their understanding that she was in receipt of welfare support from a domestic violence agency, that position or place in a caravan park, with her children, was no longer available.

We used that case study to identify the intersectional discrimination that vulnerable women in this position experience. She was a victim of domestic violence, she was a single mother and she was also a person experiencing homelessness. And on that basis her trustworthiness was assessed and judged, and a determination was made that she would not be living in that caravan park.

Senator FURNER: There has been some evidence provided today about circumstances involved in domestic violence situations in the workplace, including the perpetrator making inappropriate approaches to the victim in the workplace. In some circumstances there has been leave as a result of enterprise agreements. I think in excess of one million workers have that sort of entitlement. Is that something you are comfortable with—having that sort of leave entitlement? And do you have any experience of any abuses in the workplace as a result of that?

Ms Adams: Certainly those kinds of specific questions we will leave with the domestic violence experts. I guess our focus, particularly through the Homeless Persons' Legal Clinic, is on women experiencing homelessness, intersecting with being victims of domestic violence. So I will just reiterate the submissions made in the earlier hearing today by the Domestic Violence Coalition.

Senator FURNER: Do you have any information to support this particular proposition?

Ms R Ball: I think we did hear ample evidence of these sorts of incidents earlier in the day, but I could take the opportunity to address some of the concerns that were raised about potential protection for domestic violence as a protected attribute. One of those concerns was that protecting discrimination on that basis would be a misuse of anti-discrimination law and that it would be a clumsy way of trying to fix all the problems and injustices that go along with being a victim of domestic violence. I think the point that was being missed in that conversation was that that attribute would still have to fit within the framework of anti-discrimination law. What would be targeted is just the discrimination that takes place on the basis of that attribute, not all the other things that go along with being a victim of domestic violence.

Senator PRATT: Regarding the participation of effected groups in special measures, it has been put forward in your submission, I think, Ms Brown that there is not currently any requirement for participation of effective groups in the design and implementation of such measures. Can you outline for me why that is important?

Ms R Ball: It is important in ensuring that a special measure is legitimately something designed to benefit the group that it is directed towards. There are cases domestically and internationally where there have been some debate and discussion about that. The protected group has been of the opinion that in fact the policy is a burden on them. That is the issue, and that is what the consultation in particular is designed to protect against.

Senator PRATT: Which may or may not resolve the issues being put forward. On the importance of imputed identity—imputed sexual orientation or gender identity—I note that the current definition in relation to gender identity says that the identification must be genuine, and there can be some problems with that. But it does seem slightly contradictory that you can be protected for presumed attributes at the same time, if you do have them, that purportedly it has to be a genuine identification.
Ms Brown: We would agree, Senator. No-one has given an explanation of why the term 'genuine basis' is required in the drafting. I think that explanation or the justification needs to be established or those words should be removed. As they are read, we would be agree with you completely that it does not make sense that someone can be protected even if they are perceived to be transgender or perceived to be of a particular gender identity and yet the definition of gender identity has this requirement. It is offensive to transgender people and it is simply not necessary.

Senator PRATT: Perhaps Pilch might also comment on this given your relationship with a wide range of other NGOs et cetera. The tightening up of exemptions is important in terms of people being able to access services and know whether they are likely to be discriminated against. The Human Rights Law Centre remarked that there should at least be a notification process so that people can be clear about whether they are accessing a service that is retaining the right to discriminate against them or not.

Ms Adams: We are happy to comment on that, particularly from the perspective of the Homeless Persons' Legal Clinic, where we are often working in tandem with a number of faith-based organisations that provide really excellent services to vulnerable members of our community. I guess our concern with the blanket exception is that it is not needed. Those organisations can rely on the general exception of justified conduct. The issue of the receipt of public funds for provision of services, particularly to disadvantaged members of the community, has been spoken about today, and we reiterate the importance of that issue.

Another thing we raise is that in our experience dealing with these faith-based organisations, this exception is antithetical, I guess, to the approach that they take to providing services, which is inclusive, compassionate and non-discriminatory. On that basis our argument is that the blanket exception is not needed.

Ms Brown: In answer to your question about the notice provision, yes, we did of course make a number of recommendations about how these very broad exceptions could be curtailed and the impact of them mitigated. One of the suggestions is that we think at the very least, if individuals are obviously dealing with organisations, they need to know if they could actually be subject to discrimination on the basis of a protected attribute. The way this could be achieved is by requiring these organisations to lodge a notice with the Australian Human Rights Commission. Also—and I think more importantly, because lots of people do not go to the Australian Human Rights Commission website as much as we think it is a very good website, when people are applying for jobs or when they are engaging with these organisations—when they are requesting services or goods—they need to be forewarned and forearmed about the prospect that they may be discriminated against so that they can make an educated decision about whether they engage with that service provider.

Ms R Ball: I would like to add something on the exceptions. I think that careful thought needs to be put into the inclusion of pregnancy and potential pregnancy as attributes that engage these permanent exceptions. We have not heard a justification for those specific attributes.

Senator WRIGHT: Could I take you, Ms Adams, to Pilch's view about social status as a protected attribute, which has not been included in the draft bill at this stage? Could you outline what that means in your view—flesh that out for us—and the extent of discrimination that people might experience on the basis of the social status? Essentially, why does it matter and why should that be included as a protected attribute?

Ms Adams: Since we were established in 2001 we have provided services to over 5,000 people experiencing or at risk of homelessness. Through that work we do see on a daily basis the discrimination that this client group faces. We conducted a consultation in 2006 with 183 people who had experienced homelessness. Seventy per cent of them identified that they experienced discrimination on the basis of their homelessness or their receipt of social security or their unemployment or a combination of those things when trying to access accommodation; 60 per cent identified that they had felt that they had experienced that same discrimination when trying to access goods and services; and 50 per cent of those people identified that they felt discrimination had prolonged their homelessness and made it more difficult or impossible for them to find a sustainable pathway out of homelessness. It does prevent people accessing goods and services. It prevents them accessing accommodation. It essentially presents a barrier to economic and social participation and exacerbates social exclusion. The impacts of that are numerous, including on people's physical and mental health. Our view is that it is a clearly identifiable characteristic. Homelessness can be defined with sufficient precision and this has been done by the ABS for the purpose of statistical calculations; similarly, unemployment and receipt of social security are clearly identifiable. Discrimination on this basis—

Senator WRIGHT: You would perhaps, in terms of social status, envisage that if that was to be included it would then need to be defined, perhaps, in terms of one of those three aspects that you have talked about—because it is a very amorphous concept otherwise, of course.
Ms Adams: Yes. Our submission is that social status would include each of those three in the definition. There is precedent in comparable jurisdictions for analogous protections against discrimination on the basis of social status, which we have discussed in more detail in our submission.

Senator Wright: Thank you for that. Can I perhaps go to Ms Ball from the Human Rights Law Centre? In relation to some of the evidence that we are hearing from the IPA earlier on today where they were predominantly the organisation that was raising concerns about the effect of proposed new attributes on business, for instance. I understand that some of those new attributes—or all of them—are already covered in fair work laws. Are you aware if that is the case, and have they caused controversy? In a sense there is a 'floodgates' argument or a concern that this is new, but my understanding is that it is not so new.

Ms Brown: I will answer that if you do not mind, Senator Wright. Yes, you are perfectly correct. There are four attributes—those four new ones named in the bill, religion, political opinion, social origin and industrial history—that are already covered under the Fair Work Act; so it is incorrect and very misleading to actually portray this bill as extending the reach and the number of protected attributes to any great extent. Similarly, a number of these are also already covered, as is nationality or citizenship, under state and territory anti-discrimination regimes. These are attributes that already have coverage in other jurisdictions in Australia so it is not unprecedented or unusual for this bill to propose that they be covered in the workplace.

Ms R Ball: In fact, businesses already have the obligation not to discriminate on those bases.

Senator Wright: Can I just follow up on a slightly different issue on which there was also a great deal of discussion—I think most of you were in the room and would have heard it—in relation to the protected attribute of political opinion. Again, I understand that it is protected in many state antidiscrimination laws anyway—perhaps not in exactly the same wording but the concept is similar. Again, on the basis of your expertise, is that the case?

Ms R Ball: Yes, political opinion is covered in the Fair Work Act and is also covered in various state and territory laws. It is described variously as political activity, belief, or conviction, but that concept is already captured in anti-discrimination laws.

Ms Brown: I should correct my earlier answer: medical history is not included in the Fair Work Act but it is generally covered under disability discrimination law. There are very few complaints that have been made under this protected attribute in the Australian Human Rights Commission jurisdiction in any case.

Senator Wright: Thank you.

Acting Chair: We will have had to move on from that point. Thank you very much, each of you, for appearing today and for the submission that you have given to the committee.
JOHNSTON, Mr Robert, Executive Officer, Australian Association of Christian Schools

[16:04]

CHAIR: Welcome. We have your submission, which we have numbered 359. I invite you to speak to that for a few minutes and then we will go to questions.

Mr Johnston: Thank you for the opportunity to appear before the committee and to make further representations on behalf of our almost 120 AACS member school communities. While AACS is not opposed in principle to the consolidation and simplification of the antidiscrimination law, this draft legislation goes much, much further than that. AACS, therefore, has to express very strong concerns about the current draft, which we consider to be in places menacing and disturbing in terms of a piece of proposed legislation. These are strong and measured words that we use because we consider many of the proposals in the draft to be dangerous new directions for our society if they were to be passed into law. While purporting to be clearer and stronger in offering protections for individuals and organisations, the proposed legislation is for some the exact opposite. While claiming that there will be no reduction in existing protections, the legislative draft clearly does not deliver on that promise.

In its current form, this piece of drafting has all of the appearances of a second bite at the Human Rights Act by another name. It opens up many more opportunities for core human rights issues arising from this proposed law to be determined outside of the legislation by courts and tribunals. Our greatest concerns with the current draft are as follows—

No. 1: it does not adequately nor consistently distinguish between discrimination and unlawful discrimination.

No. 2: it introduces a distinction between formal equality and substantive equality with the apparent purpose of leveraging affirmative action on behalf of those who wish to assert their rights over other’s rights. Yet it neither defines nor rigorously justifies this distinction. This seems to us to be a blatant form of social engineering and is not the way that we should be dealing with the legitimate concerns of genuinely vulnerable populations.

No. 3: it is cast, we believe, far too broadly for the Commonwealth’s current head of power under the Australian Constitution relating to the prohibition of unlawful discrimination on the grounds of sexuality, gender identity and marital or relationship status.

No. 4: its proposed new protective attributes of political opinion and social origin are neither defined nor justified and go well beyond the protection of rights envisaged in article 2 of the ICCPR. These extensions in our opinion would be very dangerous and loose criteria to be introduced and would potentially feed politically motivated punitive litigation that could silence healthy debate and undermine community cohesion.

No. 5: it introduces conduct that offends, insults and intimidates as bases for potential unlawful discrimination. This is an extraordinarily low threshold to be embedding in law, especially when coupled with proposed new onus of proof being placed on the respondent rather than the complainant. This is an alarming and dangerous innovation, the likes of which has already been tried and, to our view, somewhat discredited in Victoria. Far from strengthening the human rights of freedom of speech and expression, this innovation inevitably silences constructive and robust debate on any issue on which one might choose to be offended.

No. 6: it fails to take the opportunity to clarify and strengthen freedom of religion as a basic human right as distinct from an oddity that needs the protection of exceptions and exemptions. We would draw your attention to section 12 in our submission on this issue.

No. 7: its inclusion of sexual orientation and gender identity as protected attributes, when coupled with other new elements in the draft, would almost certainly open up the way for vexatious, opportunistic and punitive litigation. We draw your attention to section 13 of our submission on this issue.

No. 8: its removal of exemptions and exceptions for religious organisations operating aged-care facilities on the grounds that the facilities receive Commonwealth funding is a very dangerous and unwelcome precedent for any religious organisation that currently receives government funding.

No. 9: its inclusion of religion as a protected attribute in relation to the workplace is a strange and a very piecemeal and disjointed way of dealing with the perceived problem.

We urge that this committee therefore reject the present draft and take due consideration of the representations that we and others have made in bringing forward the next draft. Thank you.

CHAIR: Thanks, Mr Johnston. We will go to questions.

Senator PRATT: Mr Johnston, some Christian schools may discriminate on the basis of some of the attributes listed in this bill and others do not, but it is very hard for enrolling parents of students to know explicitly
which kind of school they may be enrolling their child in. Do you think it would be objectionable for Christian schools to be able to place on the public record a statement of which attributes they would like to retain the right to discriminate on in line with the ethos of their school?

Mr Johnston: There is no doubt at all that, in the objects of association of each of our organisations, nearly all of our schools would have a statement of faith and that in that statement of faith they would identify the authority on which they rely for making such discriminations or judgements or choices. I am certainly not opposed to nor do I think our schools would be opposed to the need for clarification, if the law required it, to declare those bases upon which they were making discriminations or judgements or choices.

Senator PRATT: It is interesting from the point of view that we know that, for example, there will be gay teachers and that there are gay students or there are same-sex parents with children in these schools. Many of them see positive experiences for their families and children, and that will remain the case. In other instances, something happens and that is no longer the case. It seems to me very unfair on these families that they should not be forewarned adequately, in an explicit way, of the potential that they may be discriminated against. I know of many schools that have very clear, positive relationships with same-sex parents of children in those schools, but they have not made that explicitly clear and these things are only really learned by reputation of the school. You are in effect saying you would have no problem with Christian schools being forced to say which side of the fence they are on in relation to those issues?

Mr Johnston: As we have said in our main submission, we believe that the problem we currently face is primarily a product of the exceptions and exemptions ideas. We do not believe that they are helpful and we think that by far the better way would actually be to describe in the legislation the concept of religious freedom. If you enshrine the whole of the human rights act, with religious freedom being declared upfront, then it actually takes away the need for exceptions and exemptions. In that context, I think it would be quite reasonable for us to then actually require our schools to declare those bases upon which they were making choices and judgements so that people could be well-informed.

Senator PRATT: So you would not support such a measure unless the religious freedom issue was also dealt with?

Mr Johnston: Yes.

Senator PRATT: Okay.

Senator HUMPHRIES: Mr Johnston, a number of witnesses have put to us concerns about the exemptions in the legislation for a number of practices around religion. It has been argued that it is better to effectively apply all of the protected attributes with respect to everything that happens, or most things that happen, within religious and faith-based organisations like schools and require the organisations to demonstrate that they have a form of discrimination which is justified, or can be justified, under the legislation—in other words, suggesting that you demonstrate why you need to exclude and not hire a person in a same-sex relationship or whatever it might be that offends against the philosophy of the school or the church behind the school. What is your response to that argument? Why can't we do what those critics have suggested?

Mr Johnston: I am not sure I fully understood the question, but I will have a go and you can follow it up if you like. I think that we need to acknowledge that discrimination is taking place on a daily basis in every organisation, so we are talking here about unlawful discrimination. When we discriminate, we do it on the basis of things that we hold dearest—beliefs and values that we hold. We do that in all forms of life and in all kinds of institutions, day in and day out—sometimes on political judgements and sometimes on social judgements, and all sorts of things of that nature. We do that in the context of Christian schools based on the fact that we believe that the Bible has certain things to say which we think are non-negotiable. Therefore, on the basis of their non-negotiability, what do we do? Do we live with hypocrisy and not take them seriously, or do we say, 'We're going to be consistent with the things that we declare we believe'? So we would prefer that we go out there into the public space and say, 'This is what we're about, this is what we believe and this is the way we will practise.' Of course, we will do that in the context of much more than just the discriminatory act; we will do that in the context of the relationships that we have with our families, our students, our teachers and, in fact, the wider community. So, from our point of view, we would see that the discrimination is done in a way that does not intend to cause a breakdown in social cohesion so much as to bring clarity to the way in which we exist within the context of our society and the way in which we bring to bear our beliefs in that context. Does that answer your question?

Senator HUMPHRIES: It explains the philosophy behind what you want to do. I suppose the question here is where the definitional onus falls. If we define what the features of freedom of religion are, for example, and we define all the things that allows churches or adherents to churches to be able to do—the freedoms that they
have within the term 'freedom' of religion—then that sort of solves the problem. But the legislation is couched in a different way. It is couched from the point of view of protection of other people's rights, I suppose, and it is suggested that if one of the rights of a religion offends against one of those other rights—say, the right of a homosexual person not to be discriminated against—then it is incumbent on the organisation that wants to compromise that right to prove that they have a reason for doing so. It is a question of, perhaps, the semantics as to where that onus falls. But—if I might put words in your mouth—you do not believe that you ought to be asked to justify every instance where you wish to demonstrate that you have a religious belief which allows you to engage in a form of discrimination that, but for that belief, would not be allowed under the law that is being put forward here.

Mr Johnston: I think the answer I have to give is: no, I do not think we should be required to do that. On the other hand, I think that religious organisations should be very conscious of the need for them to live consistently with the things they say they believe. It would, I think, be mischievous in a society not to do that. So certainly we would not want to be, I suppose, selective in the way in which we go about exercising our rights in that regard.

Senator HUMPHRIES: One set of witnesses have argued that freedom of religion should allow organisations to appoint ministers of religion according to the requirements of the faith but not necessarily to appoint teachers to teach in church schools, exempt from other laws relating to discrimination. You would argue, would you, that all of those things are bound up together, that if the church teaches certain things, as part and parcel of freedom of religion you are entitled to make sure that the people teaching the tenets of that faith in a school run by the church adhere to and respect and honour those tenets of the church's faith.

Mr Johnston: First of all, I need to declare that most of our schools are not church-based schools, and that brings a complication in so far as we are nondenominational, or interdenominational in some cases. That means that the basis upon which we are making a judgement about matters of faith is defined by our objects and our statements of faith and the word of God as distinct from the tenets of the church. So we really need to declare that the basis upon which you make a judgement about what is Christian differs from community to community, and therein lies a further complication that needs to be understood in the context of this law, I believe.

Senator WRIGHT: I am interested in understanding how the current exceptions are operating in practice now. Can you think of instances where Christian schools, or religious schools because it is broader than Christian, are lawfully discriminating against people under current exceptions and how they are operating in practice. What sort of decisions might be made?

Mr Johnston: In matters of faith, for example, when a person comes to make application for a position in our schools we would want to be sure not only that they share that faith but they are able to articulate that and demonstrate it in lifestyle choices and so forth. So all of our staff in our school—a gardener in the school in which I was principal for 27 years, for example, was also there for 27 years and was a very significant player in terms of some of the pastoral work. So some of our kids who were struggling with the classroom environment would often be given over to his supervision for a task for a period of time in order for them to cool down from the frustrations of the classroom. Obviously we want a person there who will be consistent with the values and beliefs of the school, so a discrimination is made even in the employment of people who are not teachers because of the fact that they model their faith in these sorts of contexts. The way in which people deal with complaints, for example, is covered largely by the statement of faith and the policy framework of the school, and therefore we would want people in reception functions, in office functions, to be modelling those values that we believe are consistent with our statement of faith. So not just teaching but in fact for all positions in the school we are making a discrimination on the basis of faith—not an unlawful discrimination but we are making a discrimination there.

In the case, say, of people who have had a criminal record, which was used previously, we would be quite discerning there. I know a person who was involved in the murder of his wife as the result of a domestic thing and after he had been in jail for a period of time he was employed after a very careful process. We would have perhaps chosen a different situation for different people—sometimes a discrimination that we believe the risk is too great and other times a discrimination that we think this person has proven himself to be able to be relied upon in this context.

Senator WRIGHT: That would not currently be unlawful discrimination irrespective of who is making that choice. Surely that would be a similar process or decision that many employers might make irrespective of whether they are faith-based on not whether to employ someone who has been in prison for murder and appears to be remorseful or for whatever reason. You do not require a specific religious based exception to enable you to make those sorts of judgements. I am trying to work out really why it is that religious organisations or schools would say that you require greater abilities to discriminate than what other organisations operating within the broader society would require on a daily basis.
Mr Johnston: Perhaps if I can complete the illustration, the context of that particular fellow who was employed was very much a consequence of a religious experience that he had gone through, and he was demonstrating a considerable understanding of how that had transformed his way of thinking about life and the management of his anger. So while we worked it through, his religious faith was very important to that decision. So that is where that comes in. Certainly in the context of the employment of people who have a strong disagreement over a matter of values, for example—so this is where our view, for example, of sexuality, sexual choice and marital status comes into play—obviously we are wanting our teachers, our staff, to model the faith to the kids that are part of that community and, therefore, when a person says, 'I am choosing to pass from one partner to another partner to another partner,' it is a model that we do not want to commend to our kids, and so it would affect our desire to continue the employment of that person, and we would negotiate with that person accordingly—or, in the case of employment, not employ that person if they were not in a relationship of commitment to a single person of the opposite sex.

Senator WRIGHT: What about enrolment policies—for, say, children whose parents are in same-sex relationships?

Mr Johnston: Our schools would vary on that. Some of our schools would, I think, be cautious about that, and other schools would be quite open to it, recognising that, in fact, it is the child that is coming to the school and that, as long as the parents were committed to the vision of the school and the beliefs of the school, some of the schools, at least, if not the majority, would accept that that was a legitimate basis upon which they should accept the enrolment of that child. It is not so much their lifestyle choices—unless they were wanting to push those lifestyle choices against the culture of the school, in which case that would be a matter that would need to be discussed at some length with them.

Senator WRIGHT: But the exceptions that are included in the current draft act would enable the school to make those decisions if they wished to do so—

Mr Johnston: Yes; indeed; correct.

Senator WRIGHT: without it being unlawful discrimination. I am envisaging a scenario where parents turn up and ask to enrol their child at a kindergarten or preschool or a primary or secondary school—or, indeed, a scenario where a child is enrolled and, as sometimes occurs, a parent who has been in a heterosexual relationship at some point changes and falls in love with someone else of the same sex. A school, my understanding is, under the proposed exceptions would then be at liberty to say, 'We will lawfully discriminate and require that child to be removed from the school because it is inconsistent with the tenets of the faith.' I have difficulty, I will say, in accepting that that is appropriate in Australian society.

Mr Johnston: I have been faced with that situation myself on several occasions as a principal of a school, and my response was very much as yours is: and that is that we will negotiate and work with the family for the sake of the child rather than deal with that in a punitive or fairly heavy-handed way.

Senator WRIGHT: But in that case you have the discretion because there is no protection for those families.

Mr Johnston: Yes; correct.

Senator WRIGHT: The other thing is: what about the view that that legislation that ultimately is passed by our parliament reflects the community's view, because that is how it gets through the parliament, essentially, as we are living in a democracy—after a process, perhaps, like this, which has been very intense and longstanding, and reflects, therefore, community standards. And so organisations and bodies that are receiving public funds should have an obligation to respect and abide by the prevailing community standards that enable everyone in a society to be able to participate fully, especially in relation to inherent attributes that are part of who they are.

Mr Johnston: I hold a different view about the issue of government funding. I do not think the issue of government funding should be tied to those sorts of conditions. The reason I believe that is that I think that the government very often relies upon the service of other organisations to be able to deliver its obligations and that, therefore, it could be argued that, as long as the parents of an organisation are choosing that particular institution—be it a church school or a hospital or whatever it might be—that is their choice. The task that is therefore being provided for government—the assistance of government in the delivery of community services like education and health—is an assistance which comes at a discounted rate to the government, and we would argue that those issues should therefore be separated. There should not be an alignment where you say you accept the government subsidy on the condition that you do this, this and this. I think that there are some conditions that must apply. Obviously, for example, I do not believe that our school should operate in a way that is not robust in terms of financial prudence and that things of that nature should therefore be a requirement if you are going to receive government money. But I think this particular condition that you are talking about would be a step too far.
Senator WRIGHT: So not prevailing community standards regarding equality of people within Australia.

Mr Johnston: The problem I have is: what is a prevailing community standard? It is really dependent upon who you talk to as to what is a prevailing community standard. If you look at the statistics from various commentators on that you will see that they vary as widely as the commentators. I think it is a problem trying to identify what is a community standard. It is quite a loose thing.

Senator WRIGHT: I will not get into a debate with you about that and about how, generally, we can sense what are community standards. In a sense, this is a process of establishing what they are. If I could come back to Senator Humphries' question. Given the exploration we have just had, which shows that if there are these blanket exceptions there is a great degree of discretion available which, as has been pointed out, often families or people involved in the system will not necessarily be aware of until it is perhaps exercised on them adversely. Something happens and they find out that they are in a school that will not accept changed relationship status or something. I put the question to you again: instead, why not have the ability to go to the justified defence provisions to make the case when it is necessary rather than having these blanket exceptions which then potentially adversely affect many Australians, unknowingly, that they are dealing with an organisation that will actually use their discretion in a way that is adverse?

Mr Johnston: I understand the point you are making, but we would far prefer to see it done by means of saying, 'This is primarily about the issue of religious freedom and if we are going to have religious freedom it would be far better for the act to be encased in an understanding of what religious freedom is and how it is protected rather than dealing with it through this oddity of exceptions and exemptions.' We would far prefer not to be cast into the situation of having to appeal to and justify under an exceptions and exemptions regime in the case of the privileges or freedoms that we enjoy. Does that answer your question?

Senator WRIGHT: No, not fully, but I do understand the philosophical position that you have just been putting, which is slightly different to what other organisations have been putting to us about that particular kind of notion of religious freedom or right of religious freedom. I do understand that.

CHAIR: Mr Johnston, thank you very much for your submission and for your time this afternoon.

Mr Johnston: A pleasure; thank you very much.
BLANDTHORN, Mr Ian, National Assistant Secretary, Shop, Distributive and Allied Employees' Association

BRYANT, Ms Therese Mary, National Women's Officer, Shop, Distributive and Allied Employees' Association

[16:33]

CHAIR: Welcome. We have your submission, which we have numbered 218. I am going to ask you to provide us with comments about your submission and then we will go to questions.

Ms Bryant: Thank you for the opportunity to speak with you today. I draw your attention to the detailed written submission that you have just referred to. I will not reiterate that, except to say that there are some key issues for us which I would like to highlight and then of course we are very happy to answer any questions that you may have to the best of our ability.

The SDA supports in principle the consolidation of the relevant legislative instruments. However, it must be recognised that such an exercise does carry with it many challenges which must be effectively dealt with. The most fundamental challenge in this exercise of consolidation is to ensure that basic human rights and freedoms are protected and, if possible, enhanced in the drafting of new legislation. Among the most basic of human rights and freedoms are freedom of expression, freedom of association and freedom of belief. The only acceptable and valid caveats on such freedoms are where their exercise would seriously endanger public safety or security. The fact that someone may say something that offends or upsets another person is not a sufficiently valid reason to curtail their freedom of expression. The government has an overwhelming responsibility to ensure that its legislation protects and enhances human rights. Anti-discrimination laws applying these fundamental principles can contribute to the wellbeing of society. Conversely, where these principles are not fully observed, there can be a curtailment of basic human rights.

An area of grave concern to the SDA is clause 24 of the bill, 'Exception for inherent requirements of work'. This clause has the ability to seriously undermine the effectiveness of the act and, as such, the SDA objects to the provisions of clause 24 in the strongest possible terms. The SDA's experience is that the term 'inherent requirements' is grossly abused by some employers as a mechanism to discriminate against and terminate employees who may require some accommodation of their needs in the workplace. The provisions of clause 24 as they now stand would conceivably allow retail employers—the largest employers of women in Australia, and the ones that we deal with most regularly—to discriminate against employees, including in regard to offering or terminating employment and to determining or applying terms or conditions of employment. For example, retailer employees could say to employees with family responsibilities that their business is a 24-hour business and it is an inherent requirement of the job to be available to work whenever the store is open for business. Retail employers could say to employees with family responsibilities and no child care after 6 pm or on weekends that their responsibility is grossly abused by some employers as a mechanism to discriminate against and terminate employees who may require some accommodation of their needs in the workplace. The onus is on the employee, who could say to pregnant employees that it is an inherent requirement of the job to work at least one or two nights per week and at least one day every weekend. They could say to employees who may require some accommodation of their needs in the workplace. The onus is on the employee, who could say to mature-age workers that it is an inherent requirement of the job to be able to squat and that they need to be able to pass a squat test. They could also say to employees needing time to breastfeed or express milk during a shift that it is an inherent requirement of the job to be on the shop floor for the full shift and not to be taking extended breaks.

These are not just matters of theoretical possibility. In fact, the SDA has had reports about retail employers have already made these statements to employees, usually preceding them with 'if you can't meet the inherent requirements of the job then you will have to leave'. Expanding the concept to all protected attributes without a requirement to consider reasonable adjustments for attributes other than disability means it would be easy for employers to discriminate on the basis of any of the protected attributes by claiming that it will prevent the employee from being able to meet any inherent requirement of the job that the employer nominates. They would be able to do this without any obligation to examine the availability and feasibility of less discriminatory alternatives. The only protection available to employees will be to become involved in lengthy arguments as to whether the requirement is an essential element of the position, the results of which would be very uncertain. In these scenarios, the onus is on the employee, who is in a vulnerable situation, to be informed of their rights and to argue for their retention in the workplace, when it should be clear in the legislation that these scenarios would constitute discrimination.

The terms of reference in regard to this bill state that the bill does not propose significant changes to existing laws or protections but is intended to simplify and clarify the existing anti-discrimination legislative framework.
Clause 24 of the exposure draft does propose significant change to, and extension of, exceptions under existing laws and will mean that many workers will be disadvantaged by it. The SDA recommends that the proposed legislation be amended so that it is clear that employers are required to make reasonable adjustments in working arrangements for workers with any of the protected attributes, especially for pregnant employees and those with family or caring responsibilities. It should be clear that these reasonable adjustments should be made unless those adjustments will cause unjustifiable hardship to the employer, in which case the employer should be required to demonstrate the existence of these unjustifiable hardships. If the government does not want to significantly change existing laws, then an option is to include what is currently provided in separate legislation by providing the duty to provide reasonable adjustments in the definition of discrimination in addition to the provisions in regard to exceptions for inherent requirements. This would not simplify the legislation but neither does it extend the exemption of inherent requirements of the job to additional protected attributes.

An alternative simpler solution would be to delete clause 24 altogether and extend the reasonable adjustments clause in 23(6) to all protected attributes. If clause 24 is to be retained, we recommend that the requirement to make reasonable adjustments in clause 23(6) and in clause 24(4) apply to all protected attributes. The SDA also recommends that clause 23 be amended to provide that employers have an obligation to examine the availability and feasibility of less discriminatory alternatives to justify discriminatory conduct and be required, as part of any defence, to demonstrate that they have done this.

The SDA has concerns in regard to the compliance codes as they are described in the exposure draft and believes that further thought needs to be given to their role, development, how they would work in practice and to their value. We are obviously supportive of organisations and industry bodies developing pre-emptive measures and dedicating resources to the prevention of discrimination but would prefer to replace the codes of compliance, as described in the exposure your draft, with the model used by WorkSafe where standards are developed at a national level in genuine consultation with all stakeholders, including unions, and are obliged to adhere to them, unless they can demonstrate why that is not appropriate. We have made mention in our submission about the references in the exposure draft to the Legislative Instruments Act and the fact that there is not a requirement to consult in instruments that relate to employment and that that is of concern.

The other key point we would like to make is in terms of family and caring responsibilities, that we would prefer the term to be expanded to family and caring responsibilities throughout the draft bill and be applicable in all areas of public life to make it consistent with the terminology used throughout the Workplace Gender Equality Act and in section 351(1) of the Fair Work Act. Thank you.

**Senator FURNER:** In your submission in dealing with the proposition of positive duty—and may I commend you in putting the suggestion forward—you indicate that employers are not compliant with 106 of the Sex Discrimination Act 1984 already by enhancing or creating a different environment where the requirement is upon employers to comply with a whole host of other parts of—looking at the current arrangements—five pieces of legislation dealing with discrimination. What will bring the employers around to comply with their obligations?

**Ms Bryant:** We think there does need to be a positive duty in the act. I was going to say that in my preliminary remarks but did not quite get there. We have been saying that consistently since the review of the Sex Discrimination Act. In our submission we explained how the all reasonable steps requirement currently in the Sex Discrimination Act, as you just described, is already not being adhered to and so there needs to be a stronger duty put on employers to encourage them, shall we say, or require them to take necessary steps to be having policies and educating their staff and putting better practices in place in their work places.

**Senator FURNER:** So greater than section 106 of the Sex Discrimination Act?

**Ms Bryant:** Yes.

**Senator FURNER:** And what would that be?

**Ms Bryant:** I think probably just what I have said. There would be a requirement to have policies in place that deliver certain standards. In the bill, it talks about the commission being able to review things like action plans and policies; that would be a voluntary thing. I would like to see that strengthened, and there may be a possibility for doing that in compliance codes—but I am not sure.

**Senator FURNER:** Just on the inherent requirements: I am from Queensland and at times the particular trading hours vary. For example, an employee is working in a retail outlet from Monday to Friday and then, over time, there is a shift in the trading hours to incorporate Saturday and Sunday. At what stage does the inherent requirement change in terms of what you are proposing by removing clause 24? I think you indicated that. Are you suggesting that that follows the change of the trading hours as well making sure that it is a wholesale protection of an employee as result of the inherent requirement of the needs of the business?
Ms Bryant: What I am proposing is more that there needs to be reasonable adjustments made and that there is a requirement for the employer to examine what alternative possibilities there may be to whatever discriminatory conduct they may be proposing. So, if it is a matter of extended trading hours and people have family responsibilities such as young children who need child care and there is no child care available, there obviously needs to be some discussion and consideration of those family responsibilities in balance with the needs of the business.

Senator FURNER: Gotcha. Thanks, Chair.

Senator PRATT: I am struck, Mr Blandthorn and Ms Bryant, by an apparent contradiction in your submission. On page 2 of your submission you argue:

… religious organisations being free to operate without undue state control of their affairs, this should not be seen as “permission to discriminate” but rather as protection of basic human rights.

Therefore, you are supporting the argument that religious organisations should have the right to those exemptions on the basis of freedom of religion rather than a right to discriminate. That is what your submission says. For instance, you have a woman who is pregnant, who is single, who is working behind a register and who is told by her employer that it is an inherent requirement of the job that she stand to conduct her duties. If that woman worked behind the register of a charity store with a religious affiliation, under what you are proposing she would be in an entirely different situation from one where she worked at, say, a Coles supermarket.

Mr Blandthorn: The answer is yes; they would be. It comes back to first principles, as far as we see it. Australia is a democracy. A fundamental principle of a free and democratic country is a respect for basic human rights and freedoms. One of them is freedom of belief. We do not walk away from that. We think it is a fundamental in a free and democratic country. If a person chooses to seek employment with an organisation that has a particular view of the world and has particular beliefs then that organisation is entitled to make a judgement as to whether it offers employment on a certain basis.

I think there is a difference, however, between that and normal employment practices. Normal employment practices are what would apply in case of pregnancy. That is not an issue that goes to, in my view, religious belief. Let us assume that the lady who is pregnant has been given a job in the establishment you are talking about, and that they have accepted her and she has accepted the employment. I think it comes back to a traditional employment practice arrangement, and that the normal provisions of the appropriate legislation should apply.

Senator PRATT: Except that pregnancy is one of those attributes that are exempt under the religious freedom aspects of this legislation.

Ms Bryant: With regard to pregnancy and potential pregnancy, we would agree with some other submissions that have said it is difficult to justify why those two attributes are listed. For religious organisations that may be objecting to pregnant teachers who are unmarried. The discrimination would not be on the basis of their pregnancy; it would be on the basis of their marital status. So, for working arrangements I do not actually see the justification for pregnancy and potential pregnancy being included in the list of attributes.

Senator WRIGHT: You are appearing as a trade union. To what extent are you concerned about the fact that you would have members of your trade union who would find the position you are taking in relation to, for instance, the religious exemptions that would allow an organisation or a school to discriminate actively against someone on the basis of their sexual orientation to be deeply concerning and, in fact, antithetical to the very persons that they are—the people who are members of the union? How do you reconcile that? I have concerns, because I have two children who are members of your union.

Mr Blandthorn: I do not think what we are saying is contradictory in any way. We are saying that in any legislation government drafts, government has to start from first principles, and first principles include a respect for human rights and freedoms. That is where we are starting from: we are saying that legislation, whatever it is, has to respect human rights and freedoms.

They are set out in various instruments—for example, the UN declaration on human rights, one of which is the right of people to freedom of religious belief. We are talking here about fundamental freedoms and fundamental beliefs. In terms of the workplace, if you look at the industrial agreements the SDA enters into, there is no provision in those agreements for discrimination based on sex, marital status, sexual orientation or anything else. We make that very clear in our agreements. So there are two very different things that we are talking about here and we must be careful not to mix them up. One is at the workplace level and the other is at a much higher level: it is about fundamental principles that must direct government action in the framing of legislation. What we are concerned about here is that the government may not have given sufficient attention to recognising the importance of those fundamental principles in the drafting of this legislation.
Senator WRIGHT: What about the view that Australia has signed up to many different conventions that reflect different human rights, and that sometimes those human rights will butt up against each other? There will be a matter of getting a balance. And there would be people—and, no doubt, some of your members—who would equally strongly say that the right to participate in Australian society and the right to be employed and to use the skills that they have are not incompatible with those, and that there is a right to be able to do those things—particularly if it is not possible to draw a link between the inherent characteristic or attribute they may have, which may be their sexuality, and the requirements of the job, which might be to teach physics, for instance—as opposed to what you are suggesting, which is a freedom of religion and a freedom of religious thought, which does not necessarily impinge on that.

If you have an employee who is working, for instance, in a school environment, and who is not doing things overtly—behaving inappropriately in the workplace, which would be an industrial practice that would come under industrial law—but in fact they happen to be having a private relationship where they are in a same-sex relationship, you are saying that the overriding—whatever it is—of freedom of religion should absolutely be greater than their rights under other conventions and under Australian society to participate fully and to be respected for who they are in Australian society. My concern about that is, and again I say, that I am sure that position would well be antithetical to some of the people you purport to represent as a union. I am interested in how you can reconcile that.

Mr Blandthorn: With respect, I think you are extending by a very great margin what I am saying, because I am not saying what you might have suggested. What I am saying is that looking at the retail industry, for example, I would not accept that a person's sexual orientation had any relevance at all to whether they got or maintained employment or promotion in a retail establishment. It is just an irrelevancy, in my view. On the other hand, if an organisation happens to be a religious organisation and wishes to run an operation such as a school in accordance with its beliefs, it is entitled—under freedom of religion, under freedom-of-belief principles—to determine who it will engage to carry out the activities of that organisation.

Senator WRIGHT: What if it is a retail establishment run by a faith based organisation—the sort of example Senator Pratt gave earlier?

Mr Blandthorn: If you are talking about the example Senator Pratt gave—and this is a very limited set of examples, but they do exist, so it is relevant—then I think that if an organisation wishes to set up some sort of operation, to sell second-hand clothing for example, and that operation is demonstrably a part of its overall operation, such as St Vincent de Paul and the Salvation Army, then they are entitled to say, 'We are organisations that have religious beliefs, and we are therefore entitled to employ people in our operations, whatever they happen to be, who are in accord with our beliefs.' I think that is perfectly reasonable and perfectly in accord with instruments such as the UN declaration.

Senator WRIGHT: I understand that that is what you think, Mr Blandthorn. I am interested in what your members think. And what about the members who do not think that? That is all I am saying to you, I guess.

Mr Blandthorn: Sure.

Senator WRIGHT: Thank you.

CHAIR: Since nobody else has questions, I thank you both for your submission and certainly your time this afternoon. It is appreciated.
CARNELL, Ms Kate, AO, Chief Executive Officer, beyondblue

FEAR, Mr Joshua, Director, Policy and Projects, Mental Health Council of Australia

[16:57]

CHAIR: I welcome representatives from beyondblue and the Mental Health Council of Australia. Ms Carnell, it is a pleasure to see you again. And Mr Fear, good afternoon. We have submission 217 and submission 586; they are the numbers we have given them on our website. I am going to ask you both to make some opening comments, and then we will go to questions.

Ms Carnell: In the interests of brevity, and taking into account that you have had a long day, I will keep my opening statement to an absolute minimum. This afternoon I am going to limit my comments to section 39 of the bill, which provides for an exemption, as you would be aware, for insurers, and not cover the other issues that beyondblue covered in our legislation.

Senators will be aware that this issue has been an issue for a very long time. In fact, I think in 1993 there was a report of the inquiry into human rights of people with mental illness, which was put together by the precursor of the Australian Human Rights Commission, which highlighted this area. That is 20 years ago—and you would have to say that in the last 20 years not much has changed. I will table today a report that both the Mental Health Council and beyondblue put together in 2011-12, which was on mental health discrimination and insurance. So we did quite a significant amount of research looking at what the situation is now, and I will leave that for the senators. That raised exactly the same issues. In 2002 beyondblue and the Mental Health Council started negotiations with the insurance industry to encourage the insurance industry to change its approach to discrimination against people on the basis of their mental health status. Since that time, we have had roundtables, subcommittees, committees, MoUs, inquiries—just about everything you can imagine. Over 10 years now, again, not much has changed in that space.

You would be aware that insurance companies are currently granted a pretty rare privilege that they are able to discriminate in areas where others cannot—a privilege that I suppose is mirrored in the new draft legislation from the old discrimination legislation. Existing legislation and the proposed new legislation requires insurers to base any discrimination upon sound evidence—that is, actuarial or statistical data. Unfortunately over the years of attempted reform, we still regularly hear of practices in the insurance industry—and many of them are outlined in the document that I have given you—that are certainly discriminatory and are not based on evidenced that we can find anywhere. Whether it is in research or in literature, we have asked the insurance industry constantly over the years for evidence upon which they have based their discriminatory practices on and we simply have had no response whatsoever. In fact, industry representatives have told us in a number of these meetings that the reason they are unwilling to discard these practices is simply because they have no reliable Australian data to base any decisions upon. So they have been quite open with us that they do not have any data, which in our view means that they cannot do what they do in the marketplace. In fact in many insurance policies, we see things called catch-all clauses. I am sure that you would have seen some of these. I will give you an example of one. This is an exclusion clause from an income protection policy. I will quote it exactly.

No income protection benefit will be paid upon this plan if illness or injury is caused wholly or partly, directly or indirectly arising from any anxiety state or disorder, depression, adjustment disorder, emotional and behavioural disorder or disorder related to stress or to fatigue including chronic fatigue, psychosomatic disorders, their treatment or any complication thereof.

I leave it with you. We see these sorts of exclusion clauses in insurance policies all the time. Of course what they do is they confuse actually diagnosable conditions with symptoms like stress, fatigue. We often see insomnia in these sorts of areas, which are conditions which may or may not be related to a mental health issue. We regularly see quite severe mental health issues in the same catch-all clause as stress or depression or anxiety, which obviously are not the same conditions. People are excluded on the basis of these catch-all clauses. I will give you a quick example because I do not want to take any time here. Andrea—this is a real case—has mild anxiety and has never had any time off work or taken medication for her condition. She was denied income protection insurance because she accessed psychological services funded under Medicare. The insurance company would not consider her application even with an exclusion for mental health issues and did not contact her GP or her psychologist to obtain details of her condition. I have got many of these. We even get scenarios where people are excluded because they saw a counsellor. There is the case of Tony, a former soldier who saw a counsellor for a period of years when he moved into civilian employment. He tried to access life or income protection insurance and when the insurance company discovered he had been to counselling he was excluded from any further claim that he might have for losses due to any mental health problems, despite the fact that Tony was never diagnosed with a mental illness.
We see these situations time and time again. A strong motivation for our joint submission has been that these are really powerful disincentives for people doing the right thing by their health. For Tony that transition between the armed forces and the civilian workforce in civvy land was a really big transition. Having counselling was a very sensible decision for Tony in that transition. Are we saying to people who do the right thing by their health that they will be discriminated against when it comes to insurance? That is exactly what we are saying.

Some insurance companies say, 'We'll consider you for insurance once you haven't had any treatment or been on medication for a period of time.' This encourages people not to be on medication. I do not think that is always such a good idea! It also means that people who may who would like to see their doctor again, for whatever reason, feel uncomfortable doing so because they will not be able to seek insurance.

So, when governments, beyondblue and the Mental Health Council continue to encourage people to seek help if they are suffering some symptoms that could develop into depression or anxiety, we are fundamentally putting them into a place where they might be—in fact, are likely to be—discriminated against. So we, jointly, are encouraging people to do something that, under current practice in the insurance industry, could end up causing them quite significant issues. I think this is a very real problem.

I refer to one part of the legislation. As you are aware, under clause 39, insurers can discriminate if they have data to back it up. We are arguing that we have never seen that data. It is never made available. People cannot seek the data. If they seek it they do not necessarily get it. In fact, I think you would have seen in some of the submissions from the insurance industry that they indicate that people should not get the data because they would not understand it—it would be far too complicated. We are suggesting that that data should be provided in plain English terms so that people can understand it.

But there is a second bit of the legislation, which suggests that if no such actuarial or statistical data is available and cannot reasonably be obtained the discrimination is reasonable having regard to other relevant factors. There is nothing in the legislation to define what 'other relevant factors' might be. There is some case law in this space, and it suggests that 'other relevant factors' should be 'all relevant factors'—things that might reduce risk and things that might increase risk. And they should be factors relevant to the person not just to the insurance company. But the fact is that the insurance companies determine what the relevant factors might be and then do not make the information available to the person that they have knocked back. This is simply unfair, and it is certainly discriminatory.

We are asking the committee to look at tightening up the requirements under the new act, taking into account what is happening here is that we are seeing a straight mirroring of what has been in place in the past, and what has been in place in the past has not worked. We still have this level of discrimination happening. That is about it.

CHAIR: Mr Fear, do you want to add anything to those comments or will we go to questions?

Mr Fear: I think we should go to questions.

Senator HUMPHRIES: Thank you for that. I think you make a compelling case. Can I just be clear what you are asking for. You have recommended in your earlier submission to the discussion paper, I think, that you want to prohibit discriminatory requests for information relating to experience of mental illness within the insurance industry. So you are saying a question could be asked of a party seeking to be insured providing it can be justified by the insurance company concerned that it relates to producing data which is useful in determining the risk associated with insuring that person?

Ms Carnell: We do not believe that our ex-Defence Force person should have been asked whether he had been to counselling because we do not think that the insurance industry has any data to suggest that somebody who has been to counselling is a greater risk. So I think it comes down to that. What was the basis of the question? If there is no actuarial data to suggest that somebody who has been to counselling is necessarily a greater risk, there is a question as to why the question was relevant in any way. We also have a number of other proposed amendments that we think could address the issue, and I will provide comments. I do not think you want me to read them.

Senator HUMPHRIES: No, but it will be useful to know what we are talking about.

Mr Fear: She might be referring to beyondblue's first submission.

Ms Carnell: That is right.

Mr Fear: There is also a second submission which has some more detailed proposed amendments.

Senator HUMPHRIES: Okay.

Ms Carnell: These are the copies of those right now I am just giving to you.
Senator HUMPHRIES: Right. I just want to be clear that you are not suggesting the removal of the exemption in clause 39; you are simply saying it should only apply where there is justification provided by the industry for the discrimination that may apply.

Ms Carnell: Yes.

Mr Fear: Yes, we recognise that there is very much a case for insurers to price risk but the stories we see suggest that they are not assessing risk in a way that is consistent with evidence that we can even conceive of. We are suggesting that the legislation be tightened and clarified so that insurers and people accessing insurance understand what kind of evidence is acceptable and not acceptable.

Ms Carnell: We regularly get insurers saying, 'We do it because everyone else does.' I do not think that has any traction really.

Senator HUMPHRIES: No, indeed. If we were to put ourselves into the shoes of an insurance company, what do we imagine the risks are associated with insuring a person with mental illness? I ask that question because I understand that most life insurance policies do not cover a person in the event of suicide, so if a person was arguably suicidal there would not be any risk associated with the insurance company covering them because they would not have to pay out anyway in the event of suicide. What do you suppose are the risks they are trying to get at here or are they simply not thinking this through?

Ms Carnell: What they have told us in various meetings is fundamentally this is a really hard area because you cannot do a blood test for it and it is not a broken leg. Therefore, they bundle all these hard things together and put them into the bracket of 'undefined risk', which means you end up with the sort to people who jump out of planes with parachutes and that sort of stuff. People who do things that are really risky have real trouble getting insurance like people with mental health. So once you put people into this undefined risk bracket, you either end up excluding them or giving them really higher premiums.

Mr Fear: It is probably worth pointing out that there is some good evidence from academics that people with certain kinds of mental illness, such as schizophrenia and bipolar disorder, can experience comorbid physical health conditions which raise their risk profile but not in a way that would enable you to say that this person is uninsurable. Also at the same time those types of applicants, people with schizophrenia, are lumped into the same bucket as people with depression who may have had one episode when they were 25 and 20 years later they need to disclose that on an application form. We do not think that that is a satisfactory use of evidence.

Ms Carnell: We also think that there are an awful lot of people with schizophrenia who are very well managed, have a good, solid employment record and so on, so to be excluded is in our view discriminatory. In those sorts of cases let us have a look at the individual situation and not go down the blanket exemptions space even for people with quite severe conditions.

Senator HUMPHRIES: Sure. One last question from me: you recommend in your submission, Mr Fear, that when an insurer refuses to provide cover to someone it must also provide an explanation of its decision to the applicant in plain English. I think that is a good idea from the point of view of transparency. Do you think there is a risk this could lead to litigation, though, based around the basis on which a company has refused to provide a policy of insurance?

Mr Fear: I guess I would suggest there is a risk that consumers will be more aware of their rights under law and will seek to challenge insurers who drag their feet and are not acting in appropriate ways consistent with the law. I would suggest that in that case litigation is entirely reasonable.

Senator HUMPHRIES: Yes. But you also, I suppose, argue that it is less likely to be refused, because the company cannot actually put down in writing a good reason why they should not provide a policy of insurance.

Mr Fear: Correct.

Ms Carnell: And that is quite seriously what we are trying to do here. I think the intent of the discrimination legislation and the new legislation is that, unless there is a good reason and good data, people should not be discriminated against. That is, I think, the intent. The problem is that it is not the practice.

Mr Fear: The insurance industry is very fond of telling anyone who will listen that we are a nation of underinsured people, but these kinds of practices are leading to widespread underinsurance among, possibly, millions. So I am not sure they join the dots on that, but there is a big market they are not tapping.

Senator HUMPHRIES: Also undertreatment, presumably, as people avoid getting treatment for illnesses because they feel they might void their insurance or not get insurance.

Mr Fear: It is something we have heard doctors, for example, getting very annoyed about—that their patient will not be open about their situation because of insurance issues.
CHAIR: I just wanted to clarify something here. With this sheet you have given us of suggested amendments, I am having difficulty working out whether they would be something you would put in like a code of practice for insurers, rather than discrimination legislation.

Mr Fear: We make proposed amendments in a much more detailed fashion in our submission.

CHAIR: Yes.

Mr Fear: These are more a summary of those, but it is probably worth pointing out that we have tried to get the insurance industry to adopt some voluntary guidelines or a code of practice for many years and have come up with very little—including the Australian Human Rights Commissions Guidelines for Providers of Insurance and Superannuation.

CHAIR: And they will not adopt that? They will not engage in discussion about it?

Mr Fear: No.

CHAIR: Okay. I just wanted to clarify.

Mr Fear: They will engage in a discussion. They will have many meetings.

CHAIR: Yes, right.

Senator WRIGHT: Yes, it is a compelling argument. Clearly the unintended or very adverse poor public policy consequences of people avoiding taking helpful, proactive treatment—we know early intervention can be much more effective in terms of long-term prognosis and so on—are really a concern. I refer to two of the things that you have identified as being problems: one is refusal of insurance and the other one is higher premiums. This obviously can really only address the refusal issue, but would you be saying that essentially, by trying to require more transparency about decision making and more reliance on real data—and not just essentially prejudice, often—it would potentially have the flow-on effect of having more realistic premiums depending on the particular circumstances or condition of the person who is seeking the insurance? It would be hard, I think, to legislate to have that additional requirement in there, but that might be an ongoing effect.

Ms Carnell: We are absolutely confident that if insurers were really required to come up with actuarial or statistical data to show that people with depression, anxiety, insomnia or stress are somehow a bigger risk then those people would end up insured, because we know that the vast percentage of people who have those conditions are not an increased risk at all. They are just being lumped in with a whole range of other issues that may have some risk issues here. We have no problems with insurers discriminating based upon data; it is that simple.

Senator WRIGHT: I am just wondering if—particularly regarding the clarification of all relevant factors aspect, which takes into account beneficial as well as prejudicial factors about a person's circumstances—you are saying that there would potentially be differential premiums depending on risk, even if there were a slightly increased risk, but they would be much more able to be determined as to why those premiums are there rather than just a refusal, or very high premiums, to try to almost encourage someone to go away.

Ms Carnell: Absolutely. We have seen other relevant factors being that everyone else does it. Our manual tells us so. Other relevant factors can only be relevant, possibly, to the insurers.

Mr Fear: Another relevant factor which industry has pointed to is their business model, which involves, say, providing insurance to people applying online and making an assessment very quickly, and embedding in that process an automatic refusal for a reported mental health problem. One of the most relevant factors is someone's personal circumstances and, at the moment, the business model does not allow them to assess those personal circumstances appropriately.

Ms Carnell: And the next time you apply one of the questions is, 'Have you ever been knocked back?' You end up having to say yes, and that creates a whole range of other issues.

Senator PRATT: You have given us a good argument in relation to mental illness, but I am interested to know what else you have picked up in addressing this issue. I know you are a mental health organisation, but if we are going to get it addressed then, clearly, there would be people with other attributes also suffering similar knock-backs from insurance agencies.

Mr Fear: The data on age and sex, and the risk profile associated with that, is quite robust. In fact, it is probably the first thing an insurer would look at. Disability, on the other hand, may be much harder to get a handle on.
Senator PRATT: Yes, so there is a range of other health attributes, and if we are going to tackle this issue it has to be not only about mental illness but also about the insistence on data for all of those exemptions that they are currently exercising.

Ms Carnell: Absolutely. Clause 39 is broad based; mental health falls under the disability part, but it includes all areas. Again, if insurers are going to discriminate then it has to be based upon good data. If they have no data then they cannot discriminate. That should be what happens—it just is not, for all the reasons we have been talking about.

CHAIR: Thank you both very much for your submission and time this afternoon. It is much appreciated.
SNEDDON, Mr Mark, Crown Counsel, Advisings, Government of Victoria

[17:23]

CHAIR: I welcome the representative from the Victorian government.

Mr Sneddon: I am here to make submissions on behalf of the Victorian government in support of their written submission.

CHAIR: That submission is No. 355 of the committee. I invite you to make some opening comments and then we will go to questions.

Mr Sneddon: Thank you, senators, for the opportunity to appear. The Victorian government has identified six major concerns regarding the exposure draft of the bill that it wishes to raise before the committee here today. The first is the expansion of the definition of discrimination and the scope of unlawful discrimination. The second is the large but unclear extent of the expansion of the areas in which discrimination will be prohibited to any area of public life and the consequent expansion of the prohibition to apply to a much wider range of activities of ordinary people than most current anti-discrimination law does. The third is the effect of this expansion of area of operation to any area of public life in that it appears to intrude Commonwealth regulation for the first time into a very wide range of Victorian government administrative responsibilities without adequate policy justification.

The fourth major concern is that while this project began as a consolidation of four principal existing Commonwealth anti-discrimination laws, in the result the draft bill creates a new and wide-ranging regime which duplicates and goes beyond the existing eight state and territory anti-discrimination laws. And there is, in the material supporting the bill, no clear or coherent policy justification for the addition of this extra layer, and no adequate provision in the bill to prevent the current concurrent operation of the bill with state and territory laws and to manage what appear to be inevitable inconsistencies between them.

Fifthly, there will be an increased compliance burden on small- to medium-sized businesses and voluntary organisations in Victoria, which is of concern to the Victorian government. Sixthly, there are some serious doubts regarding the legislative power of the Commonwealth to legislate in relation to a number of provisions of the draft bill.

I will briefly outline those, but the Victorian government is essentially requesting the committee to recommend that the draft bill should not be submitted to the parliament in its current form. Rather, the bill should not be submitted until the Commonwealth government has provided an adequate opportunity for state and territory governments to be properly consulted on this proposal, including through the Standing Council on Law and Justice.

As regards the first point, the expansion of the definition of discrimination and the scope of unlawful discrimination, the law proposes to extend the definition of unfavourable treatment which can constitute discrimination to include conduct that offends or insults another person based on the 18 protected attributes, such as age, gender, political opinion and the new and undefined term of social origin. Under this proposal, simply expressing a view that others find offensive or insulting because they or their associates have such an attribute could constitute an act of discrimination for which the person expressing the view may be subject to legal proceedings and possible sanctions. That would be a significant expansion of the coverage of anti-discrimination laws as they exist at the moment. Furthermore, the prohibition on insulting or offensive conduct is based on a subjective test—that is, the subjective reaction of the complainant, rather than any objective considerations.

Secondly, on the extension of the coverage of the draft bill to any area of public life, the term 'area of public life' is not exhaustively defined and is likely to cover a very wide range of contexts indeed. As senators would be aware, the usual approach of anti-discrimination law up to this point has been to regulate persons and groups of persons who have economic or social power to discriminate in particular areas, so it is common enough in anti-discrimination law to read about prohibitions on discrimination directed to providers of employment, providers of education services, suppliers of goods and services, clubs and sporting associations. But this bill will instead cover an enormous range of person-to-person relationships by extending its field to any conduct in connection with any area of public life, so it would prohibit any person treating any other person unfavourably because of a protected attribute if the unfavourable treatment occurs in connection with any area of public life.

That means that the bill is likely to regulate the conduct of any employee of a business, any student at a school, any customer in a shop, any volunteer in a community organisation, any blogger on the internet and so on. When the inclusion of offensive or insulting conduct is added to that expansion to any area of public life, the draft law will apply not only to statements made in public debate but also to conversations which are not purely private in places such as workplaces, schools, clubs and entertainment venues. That has a very serious consequence, in the Victorian government's submission, for freedom of expression. Not only is the proposal contrary to longstanding
freedoms under Australian law; it is also contrary to the right to freedom of expression set out in the International Covenant on Civil and Political Rights, which is one of the treaties on which the draft bill purports to be based.

The third point I wish to make is the particular effect on Victorian government—and, indeed, other state government—administrative responsibilities from this expansion to areas of public life. Under the Victorian Equal Opportunity Act, government services are subject to the act but government activities which do not involve the provision of services are not covered. Under the bill, the coverage of any area of public life would appear to cover for the first time almost all state government activities. It would seem to potentially intrude into areas such as policing, the administration of justice, the making and operation of guardianship and administration orders and the management of vulnerable children or people with mental illnesses, all of which appear to be conduct connected with an area of public life. The potential impact on law enforcement and corrections could be significant. Under the draft law, state authorities could be curtailed in their efforts to protect the community by anti-discrimination claims brought by suspects, offenders and prisoners.

The draft law gives a general exemption, interestingly, to Commonwealth government activities that are necessary to comply with a Commonwealth act or instrument or a court order or some tribunal orders. Indeed, the state equal opportunity act provides a similar exemption for conduct of the state government necessary to comply with a state act or instrument. But this bill does not include such a general exemption for activities necessary to comply with state acts and instruments and tribunal orders. The Commonwealth gets an exemption but state governments do not. Instead, to get such an exemption the states have to ask a Commonwealth minister to make a regulation, a process that has not worked under the Disability Discrimination Act. This, in our submission, is a discriminatory anomaly that should be rectified.

The fourth point is that duplication of the existing eight state and territory anti-discrimination laws is made without a clear policy justification or appropriate management of inconsistency risks. The Commonwealth could have undertaken this consolidation project by harmonising the provisions of its four main acts. Instead, the bill takes every opportunity, it appears, to create a new and wide-ranging anti-discrimination regime as an added lawyer of regulation, duplicating and exceeding state and territory regimes with different rules and different exemptions for the same types of conduct.

The continued operation of the state and territory laws is assumed but not guaranteed. That depends on the minister making regulations specifying those state and territory laws and continuing those regulations in force. There is a general provision in the bill that seeks to preserve the operation of concurrent state laws provided they have the regulations to permit their continued operation. But that provision is inadequate. It does not, for example, provide double jeopardy rules and other provisions that exist in the concurrent operation provisions in the Disability Discrimination Act and the Sex Discrimination Act.

No thought appears to have been given by the drafters as to how specific inconsistencies between the operation of state and territory anti-discrimination acts and this bill will be resolved or the burden that this uncertainty will be placing on complainants and duty holders.

The draft law gives the Australian Human Rights Commission the power to issue compliance codes that can override state and territory anti-discrimination laws. Although the commission has to consult with the relevant state government it does not have to have their consent to override state and territory anti-discrimination laws. The Victorian government is most concerned that this power would give a Commonwealth administrative body the power to displace state anti-discrimination laws and commissions in a wide range of industries and sectors.

The fifth point that I wish to make today is about the increased compliance burden on small- to medium-sized businesses and voluntary organisations in Victoria. The bill is likely to result in an enormous increase in red tape, which will impact hardest on small- and medium-sized business and on small volunteer run community organisations. They will need to contend with a new layer of law, as described, in an already complex area with a broad new definition of discrimination and with liability of directors and office holders for the actions of their employees and their volunteers—including, it appears, what those employees and volunteers may say in their workplace to other employees or customers. And they will be facing for the first time a reverse onus of proof, with anyone accused of discrimination required to justify their conduct with reasons.

Sixthly, there are some serious doubts regarding the ability of the Commonwealth to legislate in relation to a number of the provisions of the draft bill. Firstly, the draft bill principally relies on the Commonwealth's external affairs power. However, it is arguable whether all aspects of the draft bill relate sufficiently to the implementation of the international treaties on which the bill appears to rely to give effect to them. For instance, it is not clear that the treaties cited in the bill oblige the Commonwealth to prohibit unfavourable treatment in connection with any area of public life on the basis of all or most of the protected attributes. Second, and a point made by others, relates to the broader definition of discrimination. As former New South Wales Chief Justice, James Spigelman,
has said, none of Australia's international treaty obligations require us to protect any person or group from being offended. Arguably, the prohibition on conduct which offends or insults undermines, in fact, a right to freedom of expression, which the ICCPR obliges the Commonwealth to uphold. Of course, to that it could be added that that provision may fall foul of the constitutional implication of freedom of political communication.

Finally, the likely application of the draft bill in a manner that could restrict state governments in areas such as law enforcement and other core functions may also be beyond the Commonwealth government's powers, and open to challenge on the basis of intergovernmental immunities.

For those reasons the Victorian government is of the view that the draft bill should not be submitted to the parliament in its current form, but rather that full consultation should be undertaken after authoritative legal advice has been obtained and the matter has been discussed by all the participating governments at the standing committee on law and justice.

CHAIR: Was the Victorian government not one of the stakeholders consulted in this draft?

Mr Sneddon: I am not sure about the level of consultation. I understand there were informal consultations between officers of the federal Attorney-General's Department and the Department of Justice, but there were no consultations at ministerial level or at ministerial office level.

CHAIR: Right, that may well be; we have a draft here and not a final piece of legislation. But also: did the Victorian government provide a submission to the discussion paper?

Mr Sneddon: I am not sure, but I think not. I think—and I stand to be corrected on this—it was only done at the level of informal discussions between officers.

CHAIR: Sure, okay.

Senator HUMPHRIES: There are so many questions, but I might put some of them on notice. Can you just explain quickly this idea of displacing state antidiscrimination legislation? Can you give me an example of a piece of state antidiscrimination legislation which is displaced or compromised in its operation by virtue of the operation of this federal legislation?

Mr Sneddon: Yes, I can. It is rather complex because the interaction happens at a number of levels in the bill. First of all there is a general provision which says that the bill is not intending to displace the concurrent operation of state antidiscrimination legislation which is specified in regulations by the Commonwealth minister. This means that at that level if the Commonwealth minister does not make and maintain the regulations specifying, for example, the Victorian Equal Opportunity Act, that provision will not prevent the operation of section 109 in displacing the operation of the Victorian act.

Even assuming that such a regulation is made and maintained by the Commonwealth minister, I suppose you then have three other aspects. One is the question as to whether there may yet be covering the field inconsistency. The High Court has said that the sort of general provision that this act is not intended to prevent the concurrent operation of a state or territory act which is consistent with and capable of operating concurrently with a federal act. I am paraphrasing—that is the provision, I think in clause 14 of the bill. The High Court has said that that is an interesting indication of the parliament's intention but that it is not definitive. So if the parliament has nevertheless expressed itself in such a way as to cover the field, the High Court may well say, 'No, it is inconsistent'.

The second aspect is that there may still be direct inconsistency, even if there is no covering the field inconsistency. That is not a displacement of the entirety of the state acts. There may be a range of direct inconsistencies. The government has said in its submission that the areas of direct inconsistency may be legion. There is a different definition of what constitutes discrimination, there are different exceptions and there is a possibility that the Victorian Civil and Administrative Tribunal may give an exemption in a particular area which the Commonwealth human rights tribunal might not, or vice versa. And so you are going to run into the possibility of exceptions in a whole range of areas.

Volunteers are covered under the federal bill but they are not covered under the state bill. There are numerous places: there is a different definition of clubs in the different acts, so some are covered here and some are covered there. At numerous points there will be issues of potential direct inconsistency between the two acts, which that statement in clause 14 about not trying to cover the field will not affect. The final point about inconsistency is the power which is given to the Human Rights Commission to issue compliance codes. Now they are voluntary in the sense that they have to be agreed by an industry or a sector which signs up to those compliance codes, but there is a very attractive carrot for industry and sectors to do that. If they sign up to a compliance code promulgated by the commission then they have complete exemption and safety from being prosecuted or complained about in terms of the rules under the bill and, if the code so provides, under state and territory laws. So it is highly conceivable
that the commission in its negotiations with a sector or a group of bodies would say: 'Don't worry about that. We will fashion a particular compliance code for you and that will take you out of the range of most of the bill but also the relevant state and territory laws.' That is why I say the Victorian government has concerns that, as this process evolves, a Commonwealth administrative body in its negotiations with private sector and other stakeholders will effectively be able to cut large swaths out of the jurisdictions of state and territory antidiscrimination laws and the role of antidiscrimination regulators and commissioners.

Senator HUMPHRIES: Many of the witnesses today have bridled at the description of the legislation reversing the onus of proof. They say, no, it does not reverse the onus proof; it shares the burden of proof. What is your response to that?

Mr Sneddon: To be blunt, Senator, I think it is sophistry. The burden of proof in any civil proceeding, which is what the reversal provision relates to, is on the complainant or the plaintiff. To say that, after the plaintiff produces a prima facie case that they have been discriminated against on a particular reason, the provision then says the onus shifts to the defendant to say, 'No, it wasn't that reason,' or 'I want to prove what the other reason is,' is to my mind a reversal. For example, there is a COAG process going on at the moment where all states and territories are looking at provisions which impose liability on directors where companies, of which they are a director, commit a criminal offence. Many of those provisions say that, if a company commits an offence, the director commits an offence provided there is prima facie evidence the director was not acting reasonably or exercising due diligence, at which point the burden shifts to the director to prove that they exercised all due diligence and took all reasonable steps. The Australian Institute of Company Directors and every other stakeholder in that process considers that to be a reversal of the onus of proof.

Senator HUMPHRIES: One more, if I can squeeze it in: the ACTU submission argues that the definition of employer in the bill should include the Crown in right of the states and territories. What is your response to that argument?

Mr Sneddon: I think I should take that on notice because I cannot now remember what the position is under the Victorian act. It binds the Crown, but whether it binds the Crown in its capacity as an employer, I am sorry, I cannot remember. If it does, I will answer the question.

CHAIR: As there are no further questions, Mr Sneddon, thank you very much for your time this afternoon and your submission from the Victorian government.

Committee adjourned at 17:43