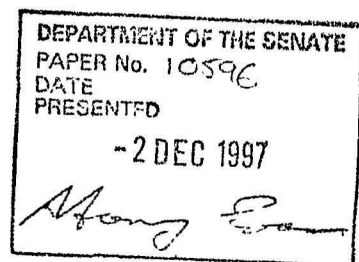




COMMONWEALTH OF AUSTRALIA



SENATE

LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE

Reference: Sexuality discrimination inquiry

MELBOURNE

Thursday, 8 August 1996

OFFICIAL HANSARD REPORT

CANBERRA

SENATE
LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE

Members:

Senator McKiernan (Chair)

Senator Abetz	Senator Cooney
Senator Bolkus	Senator Ellison
Senator Bourne	Senator O'Chee
Senator Cook	

Participating members

Senator Robert Brown	Senator Margetts
Senator Bob Collins	Senator Neal
Senator Coonan	Senator Stott Despoja

Matters referred by the Senate for inquiry into and report on:

1. The need to protect Australian citizens against discrimination and vilification on the grounds of their sexuality or transgender identity, as dealt with by the Sexuality Discrimination Bill 1995 [1996], with particular reference to Australia's international obligations in relation to sexuality discrimination and transgender identity and the action required to meet those obligations.

2. Measures which need to be taken to remove any legislative and administrative provisions which are currently discriminatory on the grounds of a person's sexuality or transgender identity.

3. The extent to which current legislation at a State level addresses discrimination on the grounds of sexuality or transgender identity and the extent to which Commonwealth legislation should take account of these provisions.

4. The appropriate scope of Commonwealth sexuality discrimination legislation and, in particular, the need for provisions including, but not limited to, the areas of:

- (a) public education;
- (b) appropriate exemptions;
- (c) dispute resolution;
- (d) remedies;
- (e) the availability of class actions; and
- (f) review of the legislation

5. The extent to which the Sexuality Discrimination Bill 1995 [1996] effectively addresses the issues of sexuality and transgender discrimination and vilification and the nature of any amendments required to make it more effective.

WITNESSES

CHAPMAN, Ms Anna-Louise Margaret, Lecturer in Law, Law School, University of Melbourne, Parkville, Victoria 3052	272
CONNOR, Ms Louise Mary, Industrial Officer, Australian Council of Trade Unions, 393 Swanston Street, Melbourne, Victoria	308
COOPER, Mr Dias, Associate Member, Gay Men and Lesbians Against Discrimination, PO Box 240, East Melbourne, Victoria 3002	333
DAVEY, Mr John Patrick, Legal Officer, Gay Men and Lesbians Against Discrimination, PO Box 240, East Melbourne, Victoria 3002	333
GORTON, Mr Michael, Commissioner, Equal Opportunity Commission Victoria, 3/380 Lonsdale Street, Melbourne, Victoria 3000	221
KEENAN, Mr Tony, Affiliate Representative, Australian Council of Trade Unions, 393 Swanston Street, Melbourne, Victoria	308
KELSEY, Mr Richard Norwood, Member, Brethren, 51 Danin Street, Pascoe Vale, Victoria 3044	266
KENNEDY, Dr Trudy, Director, Gender Dysphoria Clinic, Monash Medical Centre, Clayton Road, Clayton Victoria 3168	290
KIPER, Ms Debbie, Senior Legal Officer, Equal Opportunity Commission Victoria, 3/380 Lonsdale Street, Melbourne Victoria 3000	221
LANGLEY, Ms Jane Anna, Member, Transgender Law Reform Association, 12 John Street, Fitzroy, Victoria 3065	290
LAWRENCE, Ms Kate, Community Lawyer, North Melbourne Legal Service and Federation of Community Legal Centres, 504 Victoria Street, North Melbourne, Victoria	320
MORGAN, Mr Wayne Kenneth, Lecturer in Law, University of Melbourne, Parkville, Victoria 3052	272
MUEHLENBERG, Mr Bill, National Research Coordinator, Focus on the Family Australia, 60 Carroll Road, Oakleigh South, Victoria 3167	249
PETERS, Ms Julie Elizabeth, Convenor, Transgender Law Reform Association, 12 John Street, Fitzroy, Victoria 3065	290
RAY, Mr Darren Charles, Executive Officer, The ALSO Foundation, 1st Floor, 35 Cato Street, Prahran, Victoria	320

RYAN, Ms Caroline, Affiliate Representative, Australian Council of Trade Unions, 393 Swanston Street, Melbourne, Victoria	308
SHAW, Mr Anthony Linus, Male Co-convenor, Gay Men and Lesbians Against Discrimination, and Convenor, Australian Gay and Lesbian Inter-Faith Federation, PO Box 240, East Melbourne, Victoria 3002	333
SPINDLER, Mr Sid, Policy Researcher, Australian Democrats, former Senator, 62 Wellington Parade, East Melbourne, Victoria 3002	236
STEVENS, Mr Peter Russell, Member, Brethren, 51 Danin Street, Pascoe Vale, Victoria 3044	266
STOKES, Mr Peter Phillip, Public Officer/Co-founder, Salt Shakers, 6 Tonmar Court, Forest Hill, Victoria 3131	249
WALKER, Ms Kristen Louise, Lecturer in Law, Law School, University of Melbourne, Parkville, Victoria 3052	272
WAY, Mr John Charles, Member, Brethren, 51 Danin Street, Pascoe Vale, Victoria 3044	266

SENATE
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Present

Senator McKiernan (Chair)

Senator Abetz

Senator Ellison

Senator Bolkus

Senator Stott Despoja

Senator Cooney

The committee met at 8.58 a.m.

Senator McKiernan took the chair.

CHAIR—I declare open this public hearing of the Senate Legal and Constitutional Affairs References Committee. On 30 May 1996, the Senate agreed that the committee inquire into and report on sexuality discrimination by the first sitting day of March 1997. The committee's terms of reference have been advertised and provided to all interested organisations and individuals.

This is the third in a series of hearings that the committee will conduct in the states and territories. Today the committee will hear evidence from the Victorian Equal Opportunity Commission; the proponent of the bill, the former Senator Sid Spindler; Christian ethics groups; legal practitioners and academics; the ACTU; and gay and lesbian and transgender groups.

It should be noted that these proceedings and submissions given as evidence are protected by parliamentary privilege. Parliamentary privilege confers special rights and immunities in order for senators and others to discharge the functions of the parliament. The committee has authorised the recording and rebroadcasting of these public proceedings in accordance with the rules contained in the order of the Senate dated 23 August 1990.

[9.00 a.m.]

GORTON, Mr Michael, Commissioner, Equal Opportunity Commission Victoria, 3/380 Lonsdale Street, Melbourne, Victoria 3000

KIPER, Ms Debbie, Senior Legal Officer, Equal Opportunity Commission Victoria, 3/380 Lonsdale Street, Melbourne Victoria 3000

CHAIR—Thank you for your attendance here today to assist the committee in its deliberations. We also thank you for the submission which you earlier sent to the committee. We have formally received that and authorised its publication. It is now a public document.

I now invite you to speak to the submission and highlight the points that you want to highlight. At the conclusion of that, I will invite members of the committee to address questions to you.

Mr Gorton—The Equal Opportunity Commission has been in existence in its current form for two years. It is a commission of five members: four part-time members and one full-time member, who is also the chief executive of the commission. I am one of the part-time members of the commission; otherwise, I am a member of a Melbourne law firm. I am assisted today by Debbie Kiper, one of our senior legal officers.

Since 1 January 1996, the commission has had the responsibility to deal with discrimination on the basis of lawful sexual activity. Whilst the Equal Opportunity Act has for some years dealt with other grounds of discrimination, it is only since 1 January that Victorian legislation was amended to operate in relation to age, lawful sexual activity and a number of other areas. I suppose the most important one for today's discussion is lawful sexual activity.

In introducing the legislation in the Victorian parliament, the Attorney-General made it clear that the legislation was intended to protect homosexuals, lesbians and heterosexuals. Accordingly, the commission has taken a broad interpretation of the term 'lawful sexual activity' to mean 'sexual orientation'. In our literature and in our determinations, we have taken that broader meaning as intended by the Attorney-General.

The functions of the Equal Opportunity Commission, as you may be familiar, are similar to those of the federal commission. We deal with all complaints of discrimination under the state legislation, seek to investigate those complaints and conciliate the complaints between the parties involved. If we are unable to conciliate and if the complainant so chooses, they can take their complaint on to a formal public hearing before the Anti-Discrimination Tribunal.

We also, by agreement with the Commonwealth, deal with all federal complaints

under the Sex Discrimination Act, the Racial Discrimination Act and the Disability Discrimination Act. We deal with those complaints in a similar way; that is, we investigate the complaints and attempt to conciliate the complaints. If that is not possible and a referral is required by the complainant, the complaint is then passed back to the federal commission for a determination. I note that the proposed bill that we are discussing today is drafted in similar language to that used in the other federal pieces of legislation and that it contains similar methods for dealing with complaints; we would certainly endorse that process.

As you may be aware, the Equal Opportunity Act deals with a broad range of grounds, including age, disability, industrial activity, marital status, parental or carer status, physical features—which is a unique ground under the Victorian legislation—pregnancy, race, sex, sexual harassment and personal association. There are a number of extensions to those grounds in our legislation, including people assumed or presumed to have those characteristics—whether or not they in fact have them. We can also deal with people proposing to discriminate rather than actual discrimination, and we can deal with people who are personally associated with someone with a particular attribute. So a person may not meet the ground of discrimination themselves, but they may face discrimination because they are personally associated with someone who does. That is an additional ground under our legislation.

Senator COONEY—Who else now includes age?

Mr Gorton—Most of the states, I think. We have caught up with the mob, as it were. South Australia, New South Wales, the ACT and, I think, Queensland have age covered. So it is becoming a more uniform ground.

Until 1 January, lawful sexual activity was not covered by the Victorian legislation. Despite that, for a number of years preceding that, we did receive a number of complaints dealing with discrimination on the basis of sexual orientation. Since the act was introduced on 1 January, we have received 45 formal complaints and 170 phone inquiries—that is to 30 June. Prior to that there were a substantial number of complaints. Those figures alone suggest that there is a significant amount of discrimination in the Victorian community concerning issues of sexuality discrimination.

As we have said in our submission, the February 1994 report of GLAD—Gay Men and Lesbians Against Discrimination—details that, in a survey of 1,000 gay men and lesbians, 45 per cent of gay men and lesbians had experienced discrimination or harassment because of their sexuality; 29 per cent of lesbians and 26 per cent of gay men had experienced problems, including harassment, on the basis of sexuality in education; and 41 per cent of lesbians and 25 per cent of gay men reported discrimination in the receipt of services based on their sexuality. Twenty-two per cent of lesbians reported discrimination in receipt of police services and 17 per cent reported discrimination in the receipt of medical services. The figures were 33 per cent and 16 per cent respectively for

Seventy-two per cent of gay men and lesbians indicated that at least one of their five closest friends had suffered discrimination.

The commission has also recognised that it is not just individual acts of discrimination that the legislation would be intending to deal with, or that the Victorian legislation would deal with, but that there appears to be some systemic discrimination in the systems and services operating within the community that fail to adequately affect the status of homosexuals and lesbians as well as benefits granted, particularly in relation to government services. We have particularly highlighted the situation of same-sex relationships. A number of issues are referred to in the paper, particularly in relation to government services, taxation issues, superannuation, health benefits and simple things such as stamp duty exemptions in relation to married couples other than same-sex relationships. The Victorian legislation addresses some of those issues but not all of them, and that is obviously a matter for policy makers.

In relation to our functions dealing with complaints, the vast majority of complaints that the commission has received over the last six months relate to employment. So the types of discrimination we have dealt with in actual complaints to the commission mainly relate to fairly direct discrimination upon discovery of identity or status in employment with fairly severe consequences, such as loss of employment and loss of benefits. We have had a number of complaints that have dealt with government services or parts of legislation which meet exemptions under our legislation, in which case we have not been able to deal with them. A number of the complaints have been resolved satisfactorily, but the vast majority of those complaints that we have had so far are still in conciliation, as you might expect.

The commission's success rate regarding conciliation is reasonably satisfactory. I think about two-thirds of complaints that we receive are resolved in some way either by agreement of the parties or at least withdrawal of the complaint or some other way. Only about five per cent of the complaints that we actually deal with would go on to the tribunal, so it is only a very small percentage that actually go on for public hearing.

Senator COONEY—What about the confidentiality of complaints?

Mr Gorton—The commission, in dealing with complaints, deals with them in absolute confidentiality. So whilst we can publish case studies, and we have done so, we cannot reveal details of any complaints before the commission. If it goes on to the tribunal, of course, it is a public hearing. The decisions of the tribunal are public as well.

We have been guided in establishing our regime for dealing with the new legislation by looking at the operation of other states' bodies and the federal Human Rights and Equal Opportunity Commission. I will just give you an example or feel for the sorts of statistics we are expecting. In looking at other states, we have seen that the sorts of statistics dealing with sexual orientation are somewhere between two and five per cent of

the total amount of complaints received. Victoria could expect, in a full year under the new legislation, to receive about 3,000 complaints. We would expect sexual orientation to constitute somewhere between two, three or five per cent of those complaints.

The commission also has an information and education function, and that is not just dealing with the complaints as they arise but also addressing the discrimination before it arises so that people are aware of their legal obligations and their responsibilities and their rights under the legislation as well. We will table and pass around a kit of materials that the commission has already published relating to sexual orientation particularly. The commission obviously has had to address the issue of ensuring that adequate information does get to the gay and lesbian community as much as possible to advise them of their rights so that they can take advantage of the new legislation.

I will just give you an example of some of the activities we have undertaken so far. During a particular weekend a couple of weeks ago at one of the festivals in Melbourne, this poster appeared in most gay venues around Melbourne and at functions. It received a great deal of attention within the gay and lesbian community and has become a bit of a hot item of late because it was very well received. It instantly addressed the point and got the message across that there is legislation dealing with the issue. There is a copy of the poster and the materials for you.

CHAIR—The wording is not seen to be offensive.

Mr Gorton—No. We have not published it in the broader community. This was specifically designed as a piece of education for basically explaining the legislation to people most affected by it, and it has been very well received.

The commission also has developed a reference group involving representatives of most of the significant gay and lesbian organisations and associations as well as representatives of government departments and other areas. So we have the Victorian police and the Department of Education represented. The Department of Health and Community Services, now Human Services, is also represented.

That is in an endeavour to maintain a two-way dialogue. The commission explains how it proposes to deal with issues. We obtain feedback on what we are intending to do and what we should be doing and what we can do, as well as bring some of the more obvious information and education issues to a broader audience. That reference group has been very helpful in developing systems for the commission and providing some feedback on how we are going, so we are very grateful for the assistance that we have had from various groups in relation to that.

Dealing with our submission in relation to the particular piece of legislation—having given an introduction to the sorts of issues and, I think, established the need for legislation of this type—just judging by the level of complaints of discrimination that have

been identified under our legislation and previously, I would like to move to the measures to remove discriminatory legislative and administrative provisions. Under the Victorian legislation, there are two provisions which deal with this. Under the Victorian legislation there is an exemption for conduct that is required or permitted by other statute. To the extent that governments—federal or state—legislate, and people act in accordance with that legislation or pursuant to that legislation, that may constitute an exemption under our legislation. There are two measures in the legislation to deal with that issue. The first is section 207, which requires the minister—in this case the Victorian Attorney-General—to cause a review of all legislation to be undertaken for the purpose of identifying provisions in legislation which discriminates. There would be a systematic procedure seeking to identify those parts of Victorian legislation which discriminate, even though they might constitute the exemption under the legislation. We understand that that review will be undertaken in the near future. We are hopeful that the review will be undertaken in conjunction with the Equal Opportunity Commission.

To give you some idea of the magnitude of that task, there are approximately 600 principal acts in Victoria and 665 principal statutory rules which would need to be reviewed. Our estimate is that two appropriately qualified people would take at least 12 months to carry out that task.

The commission also, as part of its duties, has a responsibility to advise the minister if, in the course of our duties, we become aware of discriminatory provisions in legislation. So there is also a notification procedure where we would notify the Victorian government of any provisions of legislation which we believe to be discriminatory, notwithstanding that it might otherwise meet the exemption, and the commission certainly has that responsibility.

The extent of the Victorian legislation and how it deals with discrimination on the basis of sexuality has been identified in the paper. It has a number of exemptions which have been addressed publicly by others. Obviously, the policy background to the Victorian legislation is a matter for the Victorian parliament, but there are some exemptions which deal with religious bodies, there is an exemption which deals with child care and there is an exemption which deals with small business—that is, businesses which employ four or fewer people.

The Victorian legislation does not directly deal with issues of same-sex couples, although same-sex couples can find some protection under some of the other provisions of the legislation, including sex discrimination on the basis of gender, marital status and some other issues. So there is some coverage, but the legislation does not deal directly with the question of transgender issues either.

The inquiry asks for information regarding the extent to which Commonwealth legislation should take into account state legislation. We have put the view that any Commonwealth legislation should not operate on the basis of the lowest common

denominator. It should not seek to remove any benefits that already exist in state legislation. To that extent, it should not be narrower than any existing state legislation, so that the highest level of protection is maintained.

In regard to the scope of the Commonwealth legislation, we suggest that there is a need for a public information and education role. We think that is important to supplement the role of just dealing with discrimination complaints as they arise. You can often do a lot more in an information sense or an educative sense than you can when dealing with individual complaints.

In relation to exemptions, we have noted that the Victorian act contains a number of exemptions, but we have suggested that it would be appropriate for federal legislation to maintain an exemption that simply permitted the tribunal or commission to review exemptions on the basis of a case by case application. That exemption procedure is supported. We support the exemptions which are presently contained in clauses 28 to 30 of the bill.

In relation to dispute resolution, we support the current system that operates in Victoria and largely through the Human Rights and Equal Opportunity Commission at a federal level. Obviously complaints dealing with sexuality are going to involve a great degree of sensitivity. These complaints particularly deal with issues of identity and status and people resolving conflicts, sometimes within themselves, in relation to these issues. There is also the question of coming out, which is involved in dealing with a complaint of discrimination. By making a complaint and attempting to address the discrimination that they face and the disadvantage that they suffer, there is also the coming out or identification, which may complicate their own feelings in the way of addressing the problem. A complaints resolution system which includes privacy and confidentiality goes some way to assisting those issues. It does not completely eliminate them, so there is still a need for some sensitivity in the way those complaints are dealt with.

We support access to remedies that are consistent with other federal legislation, such as the sex, race and disability discrimination acts. We support the availability of appropriate class actions and, in relation to the review of legislation, we have addressed that matter previously. Anti-discrimination legislation is not new in Australia or Victoria. The first targeted piece of discrimination legislation was over 20 years ago with the Racial Discrimination Act.

The Victorian Equal Opportunity Act commenced in 1977. I think the discrimination legislation has found a great level of acceptance and broad support in the community. To the extent that the bill under consideration is consistent with the objectives of the Victorian act, the commission is also broadly supportive of the bill. We see it as a method by which redress by individuals unlawfully discriminated against can be covered. Hopefully, in the longer term it will lead to a reduction in discrimination on the basis of being gay, lesbian or transgender. We believe that any federal legislation should, as with other

legislation, operate cooperatively with state legislation and state bodies so that there is the broadest coverage possible.

Senator COONEY—Mr Chairman, I have noticed that there is a very eminent former senator in our midst.

CHAIR—We have become used to having eminent former senators in our midst during this inquiry.

Senator COONEY—This one is from this very city.

CHAIR—We will deal with him later.

Senator COONEY—Aren't you going to welcome him? That is discrimination.

CHAIR—Thank you very much for that summary, Mr Gorton. I have a couple of questions to add. In your submission you state at 1.2 that you are not going to comment on the matter of Australia's international obligations. When I read the submission cold, I found that a very strange comment coming from a body such as yours. Is there any particular reason for it?

Mr Gorton—The Victorian Equal Opportunity Commission does not have the same problems, constitutional issues, as the federal body does, and I suppose we really felt it was outside our brief. We might all have personal comments to make in relation to those issues but, as a commission, we deal with state legislation. Its constitutional position is determined by the Victorian state constitution, and we would not claim to be experts in relation to the broader aspects of international law.

I can simply say that obviously a lot of what the Victorian commission does and the basis of the equal opportunity legislation is founded in international obligations such as: the UN Convention on Human Rights, the international covenant and various other pieces of international human rights legislation. To the extent that the international community has been able to find a common ground on human rights issues and has addressed basic questions of civil and political rights which are now accepted worldwide, the Victorian legislation and any federal legislation should similarly reflect those international obligations.

CHAIR—Thank you for that. The other thing I found somewhat difficult to understand was the opening comments in your submission where you talk about lawful sexual activity and do not give an explanation or a definition of what 'lawful sexual activity' is. In reading this on an aircraft going between A and B, I just could not understand what lawful sexual activity was in the state of Victoria. I do not think it did explain it at all. Some people could put a spin on it which could mean that anything other than heterosexual sex between consenting adults was unlawful.

Mr Gorton—In the narrowest sense 'lawful sexual activity' would mean any sexual activity that was not unlawful. This hearing is taking place in Victoria rather than other states and, obviously, the sort of sexual activity we are talking about today is entirely lawful. It is a term that is reflective of the Queensland legislation; it is not a term that has found favour with all groups but it is the term that we have.

The reason we have referred to the Attorney-General's comments is that it explains the way in which we interpret the term; that is, to give it its broadest possible meaning as would seem to have been intended by the parliament. In introducing the legislation, the Attorney-General explains that the term was intended to cover identity and status. So it is not just a question of activity; it is a question of identity and status, and that is the status of being homosexual, lesbian and/or heterosexual. So we have therefore given the term a broad meaning in the way we have dealt with it. In all of our material you will see that we refer to it quite simply as 'sexual orientation'.

Senator STOTT DESPOJA—But the words 'bisexual', 'lesbian' or 'gay' are not specified in the act at any stage. One of the comments that has come up during this hearing, as I understand it, is that people have argued that perhaps a more explicit definition would be appropriate in the bill that is before us.

Mr Gorton—When the legislation was being debated by the parliament, there was a reasonable public discussion about that term being unacceptable to some groups. Yes, it does not explicitly recognise that in the legislation. But in interpreting the legislation in accordance with the ordinary principles of statutory interpretation, we are entitled to look at the second reading speech particularly. We believe that is an interpretation that is totally sustainable.

CHAIR—I just thought it was a bit strange. This publicity material did take me somewhat aback when I read it first, where it says, 'There should be a law to deal with all you dykes and faggots.' I thought immediately that there would be a complaint going in about the use of that language. Certainly, if I had said things like that to Darren Ray some years ago, he would certainly have complained about me.

Were there any misunderstandings from the homosexual, transgender, lesbian, gay community that is being protected by this legislation about the definitions? The other group I would particularly be interested to hear whether you had any response from were the Christian or religious groups; did they put their own interpretation on what lawful sexual activity was?

Mr Gorton—At the time the legislation was debated, there were a number of views represented publicly. Since we have dealt with it as the commission, we have not had any dealing necessarily with Christian groups or other groups about our interpretation. We have looked at the legislation; we developed our interpretation and ascertained what we thought was the proper meaning; and we have implemented that.

At the time that we started our reference groups—for example, with representatives of the gay and lesbian community—there was some misunderstanding, some reserve and some concern at the use of the term that is in the legislation. We therefore carried out a great deal of consultation about our interpretation because we saw our interpretation as going some way to addressing those concerns and allaying those fears. I think there has been some satisfaction in the way that the commission has addressed the issue, because it does give the term—as the legislation gives it to us—a broader meaning than might otherwise have been assumed.

CHAIR—Thank you.

Senator BOLKUS—Can I just ask for some general information, I suppose. You identify three areas as the areas where you have found discrimination: education services, police services and medical. But you have not mentioned a whole lot of others such as workplace, accommodation, sporting clubs, even superannuation and so on. Do you keep statistics and can you give us any more detailed information on the sorts of areas that really do cause problems?

Mr Gorton—We do not have extensive statistics because until 1 January this was not a ground under our legislation. We kept general statistics of complaints and inquiries regarding sexual orientation generally, simply to record that we were receiving possible complaints on that ground even though it was not covered by the legislation. Of the 45 official complaints we have had since 1 January, most of those relate to employment. Most of the complaints we have received to date relate to direct discrimination in employment. Other groups, who I think are present today, would probably have more detailed statistics than we would have in relation to that.

We are aware of substantial anecdotal evidence that has been presented to us of discrimination in the police force, discrimination in education or discrimination in receiving medical services. I should say that one statistic we do have, and could probably supply, is in relation to discrimination on the basis of HIV-AIDS. That has been a ground under our legislation for some time under the general heading of impairment or disability discrimination. So we have dealt with that issue for some years.

Senator BOLKUS—Is there any information on the breakdown between government and private organisations?

Mr Gorton—We cannot keep information on that basis because it tends to identify the respondent in a complaint. So we can only say that the sorts of complaints we have received cover the broad range of employers.

Senator BOLKUS—The only other area I wanted to pursue was that of transgender. You have coverage over sexuality, but you don't over transgender.

Mr Gorton—Not explicitly, no. That has been a concern and that has been addressed to us through our reference group—and we do have representatives of that community in our reference group. It is an issue that we are attempting to cover through our information and education function. Transgender issues can come up under the sexual orientation provision. It can come up under some other provisions as well, but it is not directly addressed in the legislation.

Senator BOLKUS—Do you think the sexuality and the other provisions cover most of the problems that you might come across in that area?

Mr Gorton—It is impossible to say. We have had the legislation in operation for only six months, and I would like to have a bit more information before I put a concluded view on that. We have already identified a number of areas where it would not be covered. So, to that extent, we have already seen some areas that would not be covered by the complaints procedures in our legislation.

Senator BOLKUS—Such as? You can give us information on that later if you like.

Ms Kiper—A lot of the queries which are received in relation to transgender issues actually would not come under the confines of the legislation in that they cannot be moulded so as to fit into one of the existing sections. For example, in so far as transgender issues do not relate to a sexual orientation they will not come under the lawful sexual activity provisions. In so far as transgender issues relate to someone who identifies as a particular gender, they cannot lodge a complaint under another gender. The problem is where it comes into how to use the sex discrimination sections within the act to cover the transgender issues that arise.

Senator ABETZ—I was just wondering with the discrimination aspect and the development of social public policy, would the anti-discrimination reach as far as, let us say, IVF programs for people suffering from HIV-AIDS and lesbians who might want to be part of the IVF program? Does the legislation extend that far in Victoria? What are the sorts of public policy social considerations that you would say affect that area?

Mr Gorton—It is not an area that has been tested in Victoria as yet. I have seen some information from Queensland which suggests that in relation to IVF it may amount to discrimination, not necessarily on the basis of sexuality but on gender or in relation to the status of the person as a parent, as the partner in a marriage or as a de facto or whatever. So there are some areas where it crosses into other grounds of discrimination. The fact that someone was refused a medical treatment because of their sexuality I think would be squarely addressed under our legislation. In relation to HIV-AIDS, I would have to be cautious in case it was seen that that might come under the exception for public health issues. I would have to think about that.

Senator ABETZ—Could you take that on notice?

Mr Gorton—Yes.

Senator STOTT DESPOJA—I would like to add to Senator Bolkus's question about transsexuals. Do you have a view about the appropriateness or otherwise of transsexuals and about identity being included in the bill?

Mr Gorton—We have no objection to the broad formulation that is presently in the bill. It seems consistent with the objects of our act—that is, to remove discrimination for reasons unrelated to the particular conduct, so discrimination in employment and provision of services. The objectives of the legislation are to end discrimination simply on the basis of the status or identity of a person. So to that extent I believe the proposals in the bill are consistent with those broad objectives.

Senator STOTT DESPOJA—You quote the GLAD survey in here. I recall that that organisation had some concerns with some of the amendments to your act. I am wondering if you have had any feedback from that organisation since or any views as to how they are responding to the working of the act?

Ms Kiper—We have several members of GLAD on the Gay and Lesbian Reference Group. The issues surrounding the exceptions had been raised with us prior to the legislation being introduced as well as subsequent to its introduction. Part of our information and education program is to explain the way in which the commission will interpret and apply those exceptions. So yes, we are aware of the concerns that were raised. As far as we can go is to interpret the legislation at this stage.

Mr Gorton—I would think that an organisation such as GLAD would maintain its opposition to some of those exceptions. We have to implement the legislation as has been passed through the Victorian parliament. However, in looking at some of the wording in those exceptions, there are some objectives tests in that legislation which we have said would be very difficult to establish to our satisfaction that the exception applies.

In the dialogue that we have had through our reference group, I think people have found some comfort at least in the fact that the precise wording of the exceptions does enable some reasonableness tests and some objective tests before anyone could attempt to rely on them. So to some extent the original fears that the exemptions might represent some broad exclusion from the protection of the legislation I think have been allayed, but I would not want to represent that as being that the objection to the exceptions themselves has been withdrawn.

Senator STOTT DESPOJA—I just want to return to an earlier query I had about the nature of the wording and whether or not it should be more explicit. In terms of the Sexuality Discrimination Bill, do you recommend that the wording be more explicit and

that it actually specifies gays, lesbians, transsexuals and bisexuals in the bill?

Mr Gorton—From the point of view of the commission implementing legislation, we would always prefer certainty.

Senator STOTT DESPOJA—All right. Thank you.

Senator COONEY—Can I go through the commission again. You have got four part-timers?

Mr Gorton—Yes, four part time and one full time

Senator COONEY—How are they appointed?

Mr Gorton—Appointed by the Governor in Council.

Senator COONEY—Do you apply or do they appoint?

Mr Gorton—I think in this particular case there were applications, a number of interviews were conducted and appointments were made.

Senator COONEY—But do people apply to go on the panel?

Mr Gorton—There has been only one panel so far, so it has occurred only once. I was certainly interviewed for the position at the time I was appointed. It is a government appointment.

Senator COONEY—For how long?

Mr Gorton—We have a five-year term.

Senator COONEY—Is that the same for the full-timers?

Mr Gorton—Yes, all members.

Senator COONEY—What about the tribunal?

Mr Gorton—It is a similar position. They have a five-year term and they are appointed by the government of the day.

Senator COONEY—Is there an appeal from the tribunal to the Supreme Court?

Mr Gorton—Yes, there is on points of law.

Senator COONEY—Have any decisions gone off from the tribunal to the Supreme Court?

Mr Gorton—Yes. The tribunal, which was formerly known as the Equal Opportunity Board, has been in existence since 1977 and during that time a number of decisions have gone through to the Supreme Court.

Senator COONEY—Is there any difference between the tribunal and the old Equal Opportunity Board in structure?

Mr Gorton—No, the board in structure is the same, and the transitional provisions in the legislation are preserved. It has just been given a new name.

Senator COONEY—So it is the same thing with a new name?

Mr Gorton—Yes. There are some procedures that have changed in the course of the new legislation.

Senator COONEY—What are those procedures? I am just wondering why they made the change.

Mr Gorton—As I understand it, and I can only go by media reports, it was a complete review of the equal opportunity system in Victoria. The act that we have now has been completely rewritten from the former equal opportunity act.

Senator COONEY—And how much change has come about as a result of that? I do not want to go deeply into it, but what was the thrust of the change?

Mr Gorton—The major change in the 1995 act is the extension of the grounds to include age and lawful sexual activity and an extension of some areas of sexual harassment. Some of the extension grounds include personal association and physical features, and lawful industrial activity is broadened from what it was previously under the act. So there is a great deal of broadening in it.

There are some changes to procedure. Many of the changes were in fact recommended by a parliamentary review of the legislation under SARC, the Scrutiny of Acts and Regulations Committee of the Victorian parliament, some 18 months to two years ago. So there have been some improvements in procedure. From the commission's point of view, we have certainly been able to handle complaints with a number of refinements that we would say are certainly advantageous.

Senator COONEY—And there are much the same sort of people on the board now as there were before, or has there been a change in personnel?

Mr Gorton—I think there has been some change, but I could not quantify it.

CHAIR—The exemptions that are proposed in the Commonwealth Sexuality Discrimination Bill have received some criticism in the submissions that we have received to date. But we have also heard much more pointed criticism of the exemptions, particularly the religious exemptions contained in your act. Could you give us an explanation of what those exemptions are?

Mr Gorton—In the Victorian legislation, there is a broad exemption in section 75 for religious bodies. It relates to:

- (a) the appointment or ordination of priests, ministers . . .
- (b) the training or education of people seeking ordination or appointment of priests, ministers . . .
- (c) the selection or appointment of people to perform functions . . . or otherwise to participate in any religious observance or practice.

There is also an exemption for anything done by a body established for religious purposes that conforms with the doctrines of the religion and is necessary to avoid injury to the religious sensitivities of people of the religion. There is then a separate exemption in section 76 in relation to religious schools. That relates to a school which:

- (a) establishes an educational institution to be conducted in accordance with religious beliefs or principles; or
- (b) directs, controls or administers an educational institution conducted in accordance with religious beliefs or principles.

That is, again, a relatively broad exemption which permits them to act if it is in accordance with the relevant religious beliefs or principles.

Senator ABETZ—Does that apply to all appointments at that school, not only the teaching staff?

Mr Gorton—Only to the extent that it relates to the religious beliefs or principles. It does not just apply to sexual orientation; it applies to all grounds under the legislation. A similar but not identical provision, for example, is found in the federal Sex Discrimination Act in relation to the appointment of priests and ministers. It would not permit an educational body to appoint people and discriminate on the basis of gender, for example, unless that was absolutely in accordance with their religious beliefs or principles. Looking at that objectively, we have some difficulty in seeing that as a broad exemption if properly applied.

CHAIR—I do not suppose there is a spare copy of the act.

Mr Gorton—No, but we can certainly get one to you fairly quickly.

CHAIR—In these days of cost cutting, it might help.

Mr Gorton—I can give you my copy but it is heavily notated.

CHAIR—Any further questions? There being no further questions, thank you very much for your attendance here today and for assisting the committee in its deliberations.

[9.40 a.m.]

SPINDLER, Mr Sid, Policy Researcher, Australian Democrats, former Senator, 62 Wellington Parade, East Melbourne, Victoria 3002

CHAIR—I do not have to tell you, as a former senator, how the committee operates. You are not only a former senator but a former distinguished member of this committee from whom we are now taking evidence. On behalf of all committee members I welcome you here today and indeed wish you well in your retirement; we trust that it is fruitful for you. We will not waste any more time with the—

Senator COONEY—I have to go, unfortunately, to a funeral. I apologise to the committee and the witness. I would like the opportunity to catch up with him at some other stage.

CHAIR—Are there any particular questions you want to address to Mr Spindler before you leave?

Senator COONEY—No, I would not be game; they would be too well answered.

CHAIR—Thank you, Senator Cooney. Mr Spindler, I invite you to make some opening remarks and then I will invite members of the committee to address questions to you.

Mr Spindler—Thank you, Mr Chairman. This is, for me, an unusual position to be in but not an unwelcome one. Yesterday, I was present at the meeting in Sydney. While I have always been of the view that the Senate committee system is extremely useful, provides democratic access and an opportunity for ordinary people to examine legislation, being in this position and finding one of my bills to be examined with such care and impartiality was a very valuable and welcome experience.

I thought it might be useful for me to outline very briefly the motivation that led me to prepare this bill; deal with some of the exemptions because they have not all been dealt with by the committee and they have not certainly been dealt with in a body; briefly comment on some of the matters that were raised yesterday which might be useful; and then be available for questions.

I had become aware over time of the discrimination the various minorities suffer in our community including homosexual, bisexual and trans-gender people. There is—and I am sure the committee has had its attention drawn to it—considerable evidence. I will quote one out of the list of problems that gay and lesbian people have experienced on page five of this report by GLAD *Not a Day Goes By*:

Public violence, where 70 per cent of lesbians and 69 per cent of gay men reported being verbally abused, threatened or bashed in a public place.

Mr Chairman, it is my firm view that a community is judged by how it treats its least advantaged minorities. Certainly I would add to that the personal observation that, as a child in Europe, I have experienced what prejudice—extreme prejudice—can lead to if it is visited upon minorities in a community. I believe that it is the responsibility of parliament, indeed the responsibility of every citizen, to reduce, as far as possible, discrimination against particular people.

The question of course arises: why should we, as a society, discriminate against certain people? Why should we disadvantage them, exclude them or, in the vernacular 'pick on people' simply because they are of a particular sexuality? It is clear they are different, they are a minority and there is an ingrained prejudice, even hatred.

I am rather sad—and it has been one of the difficulties for me in this particular endeavour—to find that some sections, not all, of the so-called christian community take a particular strong view. I have tried to cope with that because I was brought up in the Lutheran church and I was taught tolerance. I was taught to love thy neighbour. I was taught that christians should take care of the poor, the disadvantaged, the people that are unjustly treated in our society, and I have found that very difficult to reconcile.

The *Old Testament*, Leviticus, includes—and I think it is something that not many people would still accept—the injunction that, where male to male sexual activity occurs, such people should be put to death. Unfortunately, that sort of attitude still persists in some sections of our community.

I draw the attention of the committee to some of the material that is still around and, in particular, an article that was published in *Lock, stock and barrel* by Mr Ron Owen which is headed *Bible law says: death to sodomites. Are you free to say it*. I will be happy to table that particular article, Mr Chairman.

Material is also being distributed at various public functions; in this case a gun show here in Melbourne. This is a sheet which photocopied some of the stickers that were available, one of which says:

Gay rights? Under God's law the only "rights" gays have are the rights to die. Leviticus 20:13.

I am gratified that that is not the overall position of christians or the established churches. In conjunction with this material, I would like to read out—and I do not have multiple copies—some material that was provided to me which refers to a statement made by the Catholic church. It is an extract from a letter that was sent to me. It says:

Further to my letter last week I have now been able to obtain two extracts from Catholic Church documents dealing with discrimination on the grounds of sexual preference. As I mentioned, the Church's hard line position on homosexuality generally is not completely reflected in comments on discrimination.

The first comes from the Catholic Catechism published in 1993. This book was 20 years in the making and is meant to be a definitive statement of Catholic belief. It was approved 'at the highest level' in the Vatican.

Paragraph 2358 reads:

The number of men and women who have deep-seated homosexual tendencies is not negligible. They do not choose their homosexual condition; for most of them it is a trial. They must be accepted with respect, compassion, and sensitivity. Every sign of unjust discrimination in their regard should be avoided. These persons are called to fulfil God's will in their lives and, if they are Christians, to unite to the sacrifice of the Lord's Cross the difficulties they may encounter from their condition.

Another comment comes from a 1986 statement "The pastoral care of homosexual persons" by the Congregation for the Doctrine of the Faith.

It is deplorable that homosexual persons have been and are the object of violent malice in speech or in action. Such treatment deserves condemnation from the church's pastors wherever it occurs. It reveals a kind of disregard for others which endangers the most fundamental principles of a healthy society. The intrinsic dignity of each person must always be respected in word, in action and in law.

It is on the basis of this debate and such sentiments that I have proceeded with the drafting of the bill. The bill is really trying to say to all of us that a person's sexuality should not matter when we are dealing with employment, when we are dealing with access to education, when we are dealing with superannuation, when we are simply going down the street.

I have had the advantage of briefly glancing at the submission that will be presented after mine by Salt Shakers. I pick up just one comment from that which says something like the Democrats are promoting homosexuality, and that that is indicated by the fact that we have employed homosexual people in our offices, and that, in fact, we have preselected candidates. The answer to that is that it really did not occur to us that the sexuality of these persons mattered. People were judged on the basis of whether they could perform the job, whether they would be a candidate that could fulfil the duties of a candidate, and sexuality did not matter.

I recall that when I was a researcher and senior adviser to Senator Don Chipp there were at least two homosexual people employed on staff, and even then it did not matter. In one particular case I was asked, and I said, 'Look, I don't know.' I think it is that attitude that we are using to bring forward.

At the same time, we do realise that in attempting to inculcate in our community an attitude that is freer of prejudice than it is now, we cannot move too far ahead of established prejudices and established public opinion. To enable us to introduce and have passed a piece of legislation which, together with public education efforts, will hopefully change the tenor and the attitudes in our community, we cannot be too far ahead of public opinion.

It is with that in mind that we have inserted in the bill a number of exemptions which I think might be worth pointing out to the committee, because I think it is relevant to the way in which the bill has been prepared. If that is convenient, I will proceed to do that now, Mr Chairman. I refer the committee to clause 10(3) which says:

The Bill shall not apply to a person who employs someone to carry out domestic duties in one's home

That is simply to take account of the fact that, having regard to what people do in their own homes, where their children might be present, it is not for the state to intervene, it is not a public matter. I believe that should satisfy the concerns of many people who have expressed fears about what they will be compelled to do or not to do within the confines of their own home.

The next exemption I would like to point to is clause 10(4), which is the exemption for religious schools. I have had extensive consultation with churches and with organisations representing religious schools. The Salt Shakers' submission says that I have not consulted as adequately with people outside the homosexual communities. The consultations were different, but nonetheless very searching and very all-encompassing. Literally hundreds, indeed thousands, of mail-outs have gone to all churches and correspondence in the hundreds was engaged in.

I am referring in particular to the Christian Schools National Consultative Group, which is comprised of the Australian Association of Christian Schools, the Lutheran Schools of Australia, the Christian Community Schools Limited, the Christian Parent Controlled Schools Limited and the Seventh-day Adventist Schools.

It was in very detailed discussions on the wording that the exemptions should take that this group was particularly helpful. The final recommendation that this group made found its way into the bill as an exemption, by saying that there should be exemptions from the provisions of the bill if compliance would conflict with the religious susceptibilities of adherents of that religion or creed. That leaves it open to members of a congregation to say, 'Well, the teachings of my religion might be more stringent, but this congregation does not find that it offends the susceptibilities.' I believe it is a useful exemption to have in the bill.

Senator ABETZ—On that point, what does 'susceptibilities' mean? Why was not a phrase like 'religious conviction' used as opposed to 'susceptibilities'?

Mr Spindler—Convictions would be quite acceptable as an alternative. I think they are interchangeable. What it tried to—

Senator ABETZ—I do not want to get you off the track of your submission, I was just interested in that word.

Mr Spindler—We were intent to find an expression which encompassed convictions, but also feelings—that it was a bit wider, in a sense, than simply strictly teachings or tenets, that that is how people themselves, directly and personally, were affected by it.

The next one is in the area of accommodation—clause 19(3)(a). Again, an exemption is granted for people who wish to provide accommodation in their own home for less than three commercial clients. The view was taken that if people provided accommodation for more than three people on a commercial basis, they were more like a boarding house or a commercial undertaking—a public facility—that should be open to people who were seeking accommodation. But if it was in your own home where you provided for less than three people in such a situation, you should be able to choose who would live in your home.

Senator ABETZ—Whereabouts is that?

Mr Spindler—It is clause 19(3)(a). I should also refer to clause 26. This is the one that prohibits the inciting of hatred on the grounds of sexuality or transgender identity. It is important to note that there are significant exemptions to cover the free speech argument. It states:

This section does not make unlawful:

- (a) a fair report of the public act referred to in subsection (2); or
- (b) a public act, done reasonably and in good faith, for academic, artistic, religious instruction, scientific or research purposes or for other purposes in the public interest, including discussion or debate about, and expositions of, an act or matter.

We have taken care to ensure that the free speech rights of citizens were not in any way limited.

I draw the committee's attention to special measures, clause 27. This received some attention yesterday. It goes back to the decision to include heterosexual people in the bill as well. That was done to make it quite clear that this bill is directed to provide equality for all people. It was not directed to give particular preference to one group or another. Once you did that, you had to answer the argument: what about people, either heterosexual or from the gay communities, who wanted to be on their own for the purposes of advancing their particular aims and objectives? Clause 27—the so-called special measures clause—covers that. This may require some further detailed examination and research because I realise that yesterday former Senator Puplick expressed some concerns about the wording and the possible consequences of that provision.

The next section I would like to draw your attention to is clause 28, which provides an exemption for religious bodies in the ordination, appointment and employment of priests, ministers of religion and so on, and the training or education of people seeking ordination as well as the selection, appointment and employment of people who perform

functions related to that. That is an interesting clause.

I did consult with a number of people who are currently seeking ordination from various churches and were finding some resistance to that. I said, 'What is your view? Do you think we should ask churches to be absolutely even-handed? Should we not provide for an exemption?' The answer was, 'No, that is something we would like to work through within the church structure. We don't want to have legal provisions interposed.'

The next one I would like to draw the committee's attention to is not so much an exemption but a delay in the bill taking effect. Clause 29 provides for six months delay to enable the Commonwealth to amend other acts currently on its books to fall in line with this bill if it is passed. It should be noted that six months is a tight time scale for this task. That may be something the committee should, at some stage, address.

Clause 30 deals with superannuation. I accept that should be slightly narrower and should deal with behaviour that is assessed on the basis of actuarial statistics rather than a class of people. So that may require some further examination.

Finally, the very important clause 31 enables the Human Rights and Equal Opportunity Commission to grant an exemption in any case that is brought up to it where it thinks it is reasonable. That was put in for obvious reasons. This is a bill where you could, at any turn, be confronted with unintended consequences. We wanted to make sure that when that happened there was a way out. It occurred to me yesterday when I was listening to women's sporting organisations which were concerned about the effect that transgender people might have in competitive sport that this would be one way of dealing with it—you refer them to this clause.

But I also accept that—and I think it was mentioned by one of their representatives—where a small sporting organisation is confronted with that problem, it possibly should not be expected to take this path, which would require considerable effort and some small cost, although not a great deal of cost.

If I can jump to my reactions to some of the things that were said yesterday. I believe that the case that was made for competitive sport, be it athletics or be it some team sports in this situation, does need some reaction. I personally would see no problem with the insertion of a clause that provides an exemption for an organisation holding a belief reasonably in all the circumstances to exclude from that activity a transgender person who has been a male and who has become a woman but who clearly, as stated in evidence, still has physical characteristics which to a large extent belong to their former gender.

It is a difficult one, because we do not wish to create a situation where transgender people are prevented from participating in sporting activities. But we need to take account of the situation where you are engaged in competitive sports, particularly at the elite level. I also accept the argument that there are various steps leading up to that. There are some

sports, like snooker, where it would not make any difference. That is why I am suggesting that it should not be an absolute blanket exemption, but rather one that says that the belief that that person should be excluded should be reasonably held.

There were some other points made yesterday that I wish to advert to. I have already dealt with the sporting one and the reason why we include heterosexuals to make it an all-encompassing bill. Comment was made by some witnesses that the International Covenant on Civil and Political Rights was not clearly adverted to. It actually is. So is the ILO 111. Both are listed in clause 4, Application of the act. The ICCPR is subsection (1). The International Covenant on Economic, Social and Cultural Rights is subsection 2. Subsection (3) says:

... the Convention concerning discrimination in respect of employment and occupation in 1958. . .

It is my impression that this is the formal title for ILO Convention 111. I may stand corrected, but that was what I was previously advised.

The comment that transgender should be added to the title of the bill is probably reasonable. Representative organisations should be entitled to appear for other people. It is also one that should be considered. I must confess to a very obvious omission, and that is that under the anti-vilification provisions we should have included harassment. That certainly should be added to the bill in that section. I will be happy to deal with questions.

Senator ABETZ—I will ask Mr Spindler a number of questions on the social policy or public policy aspect. Do you believe that your bill would give equal rights for, let us say, lesbians to apply for the IVF program?

Mr Spindler—IVF programs are dealt with by the states and the bill is specifically directed to deal with Commonwealth laws. So it is certainly not the intention of the bill to bring that about.

Senator ABETZ—But as a public policy issue would you see any difficulty with that? Or would you say, for example, that it is better for a child to be brought up by a man and woman rather than a man and man partnership or a woman and woman partnership, discounting at this stage single parents, if that is the situation that you are confronted with, all other things being equal in relation to income?

Mr Spindler—Senator, the question, in a sense, is not relevant to the bill because the bill does not provide for this, but I am quite happy to put my personal view on record. My personal view is that children require a caring environment and I believe that, in all decisions that are made as to how children should be looked after, we should decide in a given situation with a given range of options available—and they will be limited options, by necessity—how the welfare of the child is best attended to. Who will provide the greatest love, the greatest care and the greatest amount of material benefits, if you wish to

include that.

I might mention in the context of that answer that at one stage I was tempted to include in the bill that people should be treated as individuals for social security benefits purposes and that there should, therefore, be an incentive for family units, whichever way you wish to define that, to be formed. At the moment—this is quite strange for a society that places such a great value on families—we actually provide a disincentive for people to form the family because social security benefits are reduced when you are a member of a family, even a de facto family, depending on how we extend that concept.

I was told after some research that that would cost about \$12 billion in any one year and I decided not to buy into any more fights than was absolutely necessary. It illustrates, I think, that what we should aim for is a civilised society, that is, that we should provide care for family members, for children, and that perhaps two elderly ladies living together with no sexual connotations in their behaviour are just as much a caring family unit as are the father, mother, 2.5 children and the white picket fence. I do not mean that facetiously, but I think we need to move away from the rigid concept that this is the only type of unit that will provide the caring, loving relationships that we all need.

Senator ABETZ—I agree with you. The Family Court, I think quite reasonably, has made decisions that, taking everything into account, have awarded custody to parents who are in a homosexual relationship because of all the factors involved. My question was, though, all factors being equal—let us say like the two elderly women living together with no sexual relationship—do you think it is better for children to be brought up with the two role models of a man and a woman rather than just a female role model, although duplicated, or a male role model duplicated.

Mr Spindler—I think there is ample evidence—and I substantially agree with it—that a child benefits from a parental situation with two people of different gender because there are different aspects, different ways of looking at a whole range of things that a man and a woman may differ on. I would also say that you can get that differentiation in the situation of the same sex couple, I am told.

Senator ABETZ—You have sort of answered it, but then you have taken it away again.

Mr Spindler—Because I do not think that we should be too rigid in that. All things being equal—and I do not quite know what that means sometimes—in general terms, there seem to be certain advantages for a child to experience care from a man and a woman. In one sense that situation is very often duplicated, I am told, in the same sex relationship. People have different orientations. It does not go so far as to say they are male and female, but there is some of each in all of us. The weighting can be different and similar approaches and different contributions can be made by two people even though by all accounts they are of the same gender. I am just warning against being too rigid and

too clear cut on that.

Senator ABETZ—Can I move to the visions of your bill and the exemption in relation to domestic duties?

Mr Spindler—Yes.

Senator ABETZ—What would you say about employment situations that occur in somebody's home which are not of a domestic nature? Income earning for that particular person, family unit or grouping of people would quite often occur, especially nowadays with people working from home. They might have somebody coming in to do the books or whatever or they have an office which is the front of the house. You can walk in and out of the house, the family toilet is the office toilet and the family kitchen is the office kitchen. Do you think that exemption ought be applied to something which of nature must be small businesses that are operated from what are otherwise domestic premises?

Mr Spindler—Basically, yes.

Senator ABETZ—But your bill does not allow for that, does it?

Mr Spindler—Actually my attention was drawn to the fact yesterday that 'domestic' is not clearly defined. We have to go back to the intention of the provision. The intention of the provision is that people should be in control as to who comes into contact with their immediate family members in their home. That is the intention. There is another aspect to it apart from the activity and that is the degree of closeness of integration of the place of business—if I may call it that—and the home, the kitchen and the toilet.

If you have a situation where a shop, although it is on the same piece or title of land, is totally separate having separate toilet and kitchen facilities, obviously that particular concern does not arise. But where I have somebody working at my dining room table and making coffee and tea in my kitchen, then your concern is well justified and the provision should cover it. I think we should have another look at it.

Senator ABETZ—In relation to accommodation, if I read that correctly the exemption there is if people are actually living within a particular structure. For example, if I owned a block of land and strata titled three units that might all be conjoined and then rent them out as single or one person units, would that apply to that sort of structure or only if they are actually within the same building?

Mr Spindler—No. I do not think it is intended to be limited to the one building. But, again, the degree of separation or the degree of conjointness would be an issue. Again we need to look at whether that should be more clearly specified. But if you are subletting your sunroom or if you are subletting a granny flat that is nevertheless just across the yard, then that provision should clearly apply. If you have a block of four flats which are

in the backyard and are quite separate, I think you have moved beyond the exemption that this provision is intended to supply. But there are obviously factors that would impinge on a particular situation.

Senator ABETZ—How would your legislation apply, if at all, to the following example which surprisingly is a real live example? A person trains for the ministry in a Christian church and the central body or whatever determines that they ought to do their apprenticeship—for want of a better term—with a particular minister. The apprentice to be finds out that the minister is a practising homosexual and says, 'Look, I do not want to be part of being in such a close working relationship because I find that difficult.' That person is then denied from being placed in any other ministry or parish with any other minister and was therefore denied being able to do his apprenticeship and as a result become a minister. Would your legislation cover that sort of situation?

Mr Spindler—I would hate to be the judge in that case. I think it is a very difficult one. I do need to take that on notice and look at it very carefully. For religious bodies, clause 28 would probably allow the church to actually do that. Whether it should or should not be allowed to do it is another question. But clause 28 would probably provide them with cover for that because it says that a church can do that.

CHAIR—Thank you for your time. Are there any other questions?

Senator STOTT DESPOJA—You would have heard me bring up this morning with the EO commission the idea of the wording and the fact that some of the submissions before us have suggested a more explicit definition of sexuality. In fact, one submission—the Cole submission—suggests that 'sexuality' in itself is rather a neutral term and that in fact the bill should specify certainly gays and lesbians. I am just wondering why you did not choose to do that and should we?

Mr Spindler—It is actually a very simple answer but a literal answer. We have specified homosexuality, bisexuality and heterosexuality and then transgender which does not fall under the term 'sexuality'. We have used homosexuality rather than gay and lesbian because I was advised that homosexuality covers both and that that is the proper way to do it when you are drafting a bill.

I appreciate that, psychologically, for lesbians, it might be better for them to see the word 'lesbian'. So I have no strong feeling or aversion one way or the other. One should look at it, and if it is felt, and if the committee feels, that it would be better to include the term 'lesbian', then I would have no objection to it. But literally, in terms of the dictionary definition, homosexuality covers both and that is why it was not separately mentioned.

Senator STOTT DESPOJA—I grant that it is probably not necessarily a legal issue so much as a visibility issue.

Mr Spindler—That is right.

Senator STOTT DESPOJA—Another suggestion was made, but it was not specifically in reference to this act but amendments to other acts. Do you have any opposition to the idea of amending the Commonwealth Privacy Act in regard to personal information and changing the definition of personal information, especially in the case of transsexuals so that they do not necessarily have to provide the same level of personal information and thus identify a previous lifestyle that is embarrassing or discriminatory?

Mr Spindler—I think that would be in keeping with the intent of this bill, and I personally would favour it.

Senator STOTT DESPOJA—Another criticism that arose out of one of the submissions was your qualification of the aim of the bill in which you said 'in so far as possible'. Was there any particular reason that you did that, or was it because it was legally more appropriate. The bill says:

The purpose of this Act is to eliminate, as far as possible, discrimination against people on the basis of their sexuality or transgender identity.

Mr Spindler—I was advised by parliamentary counsel that that is the proper way of putting it. To make the claim that this bill will eliminate discrimination in all the areas in which it covers is an outlandish claim, and, therefore, one should be a little more modest and insert that clause. In a sense, I think it reflects my own view.

I must say that a piece of legislation such as this will not do away with discrimination by waving a legislative wand, but it is an essential move for two reasons. Firstly, it sets a standard by the parliament of the country to say what is acceptable and what is not acceptable. Secondly, it also gives teeth and substance to an educative process. I have found that you can talk until you are blue in the face, but unless there is some legislative substance to back what you are saying and to provide a measuring stick for the debate at various points, that community education process does not really take place.

Senator STOTT DESPOJA—You have answered my questions about religious exemptions. Another issue that I understand has come up is the argument that this bill, which deals with discrimination on the basis of sexuality, should not necessarily involve transgender issues. What is your response to that? Do you believe that, perhaps, they should be separate in some way?

Mr Spindler—There are some areas where discrimination applies to both areas. In a sense, it saves putting up a separate bill. What is important is to make sure that transgender is covered clearly, and I accept the suggestion that maybe it should be clearer in the title. The title of the bill says:

An Act to prohibit discrimination on the ground of sexuality or transgender identity.

So it is already in the short title.

As I was working on the bill, it was drawn to my attention that the transgender issues have been neglected in legislation across the country with the exception of a couple of states. It needs to be urgently done, and I saw no reason to reject that and not to include it. I think there is some value in applying it to the common concerns but then clearly separating it in some sections where it requires specific attention.

CHAIR—Perhaps I might make an explanation about the number of submissions that the committee has received to date. We have received around 180, many of which I have already seen and some of which I have not. I have asked that they not be put up for public release at this time until we check with the individuals who put in their submissions—many of whom included personal information—to ensure that they wanted the submissions to be made public. That has caused some delay. I apologise for that delay to the committee and to the people interested in this inquiry. The submissions that are on the public record are from the people and groups and organisations whom we are hearing from over these four days. I thought I had better put that explanation on the public record.

I do have one question to you, Mr Spindler, in regard to an area of controversy that has arisen in many of the submissions, not all of which you would have seen at this time. It relates to clause 107—the rights of same sex couples under laws of the Commonwealth. It has received some attention, both in support and in opposition. Have you any comments on that?

Mr Spindler—Yes, I have. It was drawn to my attention in January this year that sections of the communities affected by it had some objection to it. I then sent out a letter asking, 'Do you want it in or do you want it out?' to all those people with whom I had had contact at previous consultations. I sent some 300 letters. The replies that came in ran about three in favour and one against.

The people who expressed concern based it on two grounds. The first group—and, to give them credit, probably the main one—said, 'Our relationships are special and we do not want them necessarily covered by the definition of a heterosexual defacto relationship. We want more time. The community is divided. We would like to think about it.' My reaction to that is that the factors that determine whether a heterosexual relationship exists in a defacto way seem to me to be not all that different to the factors that one would use in the same sex couple situation—financial, interdependence, cohabitation under the one roof, sharing of resources, mutual support and all those sorts of things. While I respect what has been said to me, I wonder where the real concern is in this one.

The other one is perhaps a bit more mercenary and implied rather than stated—that is, if they are classed as a couple and if they are on social security benefits of one sort or another, the total amount paid would reduce. I do not think that was the main consideration, but it may have affected some people. The answer to that is that you must

take the good with the bad. If you want equality, you need to take equality for the detrimental effects as well as the benefits.

CHAIR—Just in regard to that matter of submissions, I would hope that the committee would be in a position to approve for release the majority of the submissions at our hearings in Adelaide next week. There will be a lot more information going into the public record.

Mr Spindler has given the committee a copy of an extract from a July/August 1995 edition of a magazine called *Lock Stock and Barrel*, which we have received as an exhibit. Earlier the Equal Opportunity Commission of Victoria provided the committee with an information kit, which we also received as an exhibit.

Mr Spindler, it was a pleasure to meet up with you again and to have you on the other side of the table from the Legal and Constitutional References Committee. Thank you for your assistance to the committee in its deliberations.

Mr Spindler—Thank you, Mr Chairman. I would be happy to appear again if the committee requires it.

[10.41 a.m.]

MUEHLENBERG, Mr Bill, National Research Coordinator, Focus on the Family Australia, 60 Carroll Road, Oakleigh South, Victoria 3167

STOKES, Mr Peter Phillip, Public Officer/Co-founder, Salt Shakers, 6 Tonmar Court, Forest Hill, Victoria 3131

CHAIR—I welcome the representative of Salt Shakers and the representative of the Focus on the Family Australia. The committee has received submissions No. 137, which is from Focus on the Family Australia, and No. 140, which is from Salt Shakers. We have authorised their publication. They are now public documents in the public domain. I would invite you now to make an opening statement, at the conclusion of which I will invite members of the committee to address questions to you.

Mr Stokes—We would request to be treated as two groups. We will split the time. I will make a brief statement and then hand over to Bill for his time. Is that okay?

CHAIR—It probably will be. We have some limitations on time.

Mr Stokes—I will be brief. As a representative of the 98 per cent of the community who will be adversely affected by the granting of anti-discrimination and vilification rights towards the less than two per cent of people who are homosexuals, I thank you for this opportunity to speak.

It was interesting that Sid Spindler picked up some comments that I had here under 'Aim of Bill' because I wrote, 'Currently, all people are already equal under law in Australia.' We need to remember that fact before we digress onto specific laws for specific people. Existing laws protect all citizens in cases of assault and libel. And let us not be misinformed by the wording of this bill. It is not a bill designed to protect all the community. We believe Sid Spindler has one aim in mind in this bill, and that is to protect the homosexual.

The initial issues paper, circulated by Sid, apparently partly researched by Joseph O'Reilly, was circulated to and discussed by homosexual groups. Very few other groups were involved. The whole paper is about the normalisation of homosexuality and the most efficient method of introducing these so-called reforms so as to minimise the least backlash from the rest of the community. That is clearly outlined in issues paper No. 1. Point 3.2 of the issues paper actually suggested that it would be better to 'design a bill which aims at a modest advance only . . . to make the bill more palatable to a greater number of people and therefore more likely to pass'.

I would point out that we did have some discussion with Sid Spindler. He chose to ignore our basically Christian representation. He always liked to quote the *Old Testament*

and talk about the death of homosexuals. We pointed out that that death was superseded by the coming of Christ and that certainly, if they continued in their lifestyle, as all of us, we will die. It is what happens afterwards that makes the difference.

Most churches today do not uphold to the killing of homosexuals, because that was changed by the *New Testament*. It is wrong to assert that apart from one or two very small radical groups—such as those running *Lock Stock and Barrel*—it is not the general interpretation of the church today that homosexuals should be killed. That is not for us to judge. In fact, it is quite the opposite. Most churches are moving towards an open position of accepting homosexuals into their churches as people seeking after change, but they are not accepting them in the sense of accepting their lifestyle and saying, 'We will accept them as they are.'

Having made that point, I go on with what is written here. Exemptions: it was only after significant lobbying against the bill, mainly from church groups and schools, that exemptions were inserted on religious grounds. The homosexual community wanted unimpeded access to all groups, so they actually lampooned Mr Spindler in the newspapers for backing down and putting exemptions into his bill.

The deceit is again obvious: get the bill passed with these exemptions and then, just as has been happening in New South Wales recently, attempt to quickly remove them at a later date. This is nothing but a confidence trick to try to lull the only coordinated vocal opposition, which actually speaks for the majority of people, into a false sense of security.

Exemptions are in fact discriminatory in themselves. It seems strange to have an anti-discrimination bill and then actually discriminate within that bill by putting in exemptions. If this bill were in the best interests of the majority, there would be no need for this subterfuge. There is no need for exemptions because in fact there is no need for this bill.

We covered in our main submission the issues of whether anti-discrimination legislation is justified for a minority group who, as Denis Altman—a self-confessed homosexual—says, are involved in a chosen lifestyle. I do not intend to go over that here.

Vilification: the inclusion of vilification legislation is nothing but a move to prevent free speech, despite what Sid Spindler has already stated. It will restrict people's right to make statements. We have already seen occurrences of that within the New South Wales rulings. Anybody who opposes the normalisation of homosexuality will be in fact attacked under the vilification law, whether those statements be medically made or otherwise.

If members of parliament truly believed that this bill was in the best interests of the majority, there would be no need to attempt to silence the opposition. Australians must guard the right of free speech on all issues. Vilification legislation is mind control. This is

borne out by experiments to 'de homophobe' students in New South Wales schools. After initial lessons, it was found that they soon reverted to their so-called 'homophobic' attitudes after about six months and needed further programming. The training failed because the majority of the community, including our children, know that the homosexual lifestyle is not a natural one. You cannot reprogram groups of people against their natural inclinations. A law will not change the way people think. It will simply make them resent the law and those who made it.

Sid Spindler may see this bill as compassion, but true compassion helps people out of their dilemma, not constrict them within it. The American Psychiatric Association changed its position on the abnormality of homosexuality only under extreme political pressure and guerilla tactics from the homosexual lobby. Despite this, 69 per cent of psychologists surveyed three years later still believed that homosexuality usually represented a pathological adaptation. When asked the source of homosexual problems, 70 per cent said it was the result of personal conflict rather than social stigmatisation.

Changing the law will not change the basic natural inclination to believe that homosexuality is not natural.

Senator BOLKUS—Mr Stokes, you indicated you were not going to read the whole lot. If you do, there will not be time for any questions. We are obviously capable of reading—

Mr Stokes—I did not actually say I would not read the whole lot out—

Senator BOLKUS—But if you do you might actually be there until 11.30.

Mr Stokes—Okay. You have in front of you Dr Nicholai's statement. I will not read that. There are over 200 centres in the United States successfully helping homosexuals regain their true identity, which I think is a clear indication that we have two alternatives: trap them within the lifestyle or help them out of that lifestyle.

The main point of this statement is the public health issues. Statistics available from the Sydney men and sexual health study in New South Wales and other sources clearly indicate that the homosexual lifestyle revolves largely around promiscuous anal sexual activity involving hundreds of brief encounters. The dangers to public health from this sort of lifestyle are well documented. Modern trends towards greater acceptance of homosexuality and its promotion by misguided law makers, film makers and the media is having a growing detrimental effect on the heterosexual, as well as the homosexual, society.

It was interesting to read this weekend's *Australian Magazine* where Gabrielle Morrissey made this statement:

If you don't provide information you are putting them (our young people) in jeopardy. There's a misconception among teenagers in some pockets of the population that, because either culturally they want to maintain their virginity or they're simply terrified of getting pregnant, they can engage in unprotected anal intercourse. That's a new trend. They are having anal intercourse before they have penile-vaginal intercourse. That's frightening because HIV is spread through unprotected anal intercourse. It's extremely dangerous.

They are not my words. They are the words of a sexologist. We need to consider whether we want to promote that lifestyle.

Another substantiation of that is the fact that, in America, AIDS was first called GRID—gay related immune deficiency. It was only changed because of political correctness. We know that in Africa anal intercourse is used as a prevention of pregnancy and, because of that, there is a widespread risk of AIDS. If that comes into our own heterosexual community here in Australia, then we go down the same track. So any promotion or normalisation of anal intercourse into the community is going to kill many, many people.

In conclusion, those who act out their fantasies in private and do not publicly flaunt their so-called sexuality are left alone. It was interesting to note this morning the number of complaints against discrimination and that two to five per cent were on this basis of sexuality. Most of those were employment. Where are all the cases of discrimination?

As I have said, if people want to act their own fantasies in their own bedrooms, they are left alone. Is this bill designed to promote the open, public flaunting of a particular sexual fantasy? Do we give special rights to other exhibitionists, such as graffiti artists? Do we give them special rights because their environment has given them a desire to paint on walls? Of course not. Do we give a thief who claims his environment in his youth produced a propensity to steal special rights? Of course we do not. That would seem absurd.

I would like to suggest that it is no more absurd than to give special rights to the homosexual community in Australia. Society must maintain every right to discriminate against immoral, unhealthy, society-disturbing behaviour or we cease to be a democracy. If companies can say no to supporting churches or the racing fraternity when approached for support, why should they not be able to say no to another group of people that push a lifestyle they do not agree with? Currently, that is not the case. Companies are being virtually blackmailed into supporting homosexual organisations because of anti-discrimination legislation by the states.

Certainly we should show genuine compassion to the homosexuals and lesbians who realise they are trapped perhaps through an early life experience in this behaviour and are seeking relief from it. Those who flaunt their so-called sexuality and want to encourage others to become involved have no right to special rights.

CHAIR—Mr Stokes has provided the committee with an additional submission to

the earlier submission from Salt Shakers, the Christian ethics action group. Is it the wish of the committee that that document be received as a submission? There being no objection, it is so ordered.

Senator BOLKUS—Who are the Salt Shakers? How big is your organisation, how many members are there and what is your position in it?

Mr Stokes—We started less than two years ago as a group within our own church community to educate the church community about activities going on in the world, such as abortion, euthanasia and homosexual rights.

Senator BOLKUS—Which church community is that?

Mr Stokes—It was started at Crossway Baptist Church in the eastern suburbs of Melbourne. We very quickly grew to basically a national organisation. We are now printing nearly 3,000 newsletters a month which we write and distribute amongst the Christian community.

Senator BOLKUS—In which states?

Mr Stokes—All states.

Senator BOLKUS—Where would most of your members be?

Mr Stokes—Most of our members at the moment are here in Melbourne. We have about 1,300 members here in Melbourne and the rest are scattered around Australia.

Senator BOLKUS—And would they all be of Baptist background?

Mr Stokes—No, we reach every denomination. One could say that we do not actually have membership. We have simply a mailing list which people request to go on. We have done no publicity. We have not pushed our organisation. It has just simply grown, we believe, by God's guidance. That has taken it right across the country. People are writing to us every day requesting more information on these issues and to get on our mailing list.

Senator BOLKUS—You said that you thought most churches do not believe in death for homosexuals.

Mr Stokes—That is correct.

Senator BOLKUS—Which ones do?

Mr Stokes—I am sure there are pockets of people, such as people who claim to be

Christians and who write articles such as *Lock Stock and Barrel*, who would still forget that Christ came as a way out from sin. The whole thing about the *Old Testament* is that homosexuality is a sin and punishment for that sin is death. That same statement could be said for many sins in the *Old Testament*. In the *New Testament* we read that Jesus Christ came, he died for our sins in our place and therefore that death penalty has been taken away if we put our trust in him. So there isn't a death penalty for the homosexual here on earth. There may be a death penalty afterwards depending on what you believe about life after death.

Senator BOLKUS—So, if you are a Christian homosexual, you should not incur the death penalty, but if you are not—

Mr Stokes—I have severe questions about whether you can be a Christian homosexual, because the *Bible* clearly states that it is a sin and to become a Christian one must repent from your sin. If you do not repent from homosexuality, I question the Christianity.

Senator BOLKUS—Does it bother you that many churches, if not most, these days are taking a much different attitude to homosexuality and people are not in the church seeking after change, as you put it?

Mr Stokes—Actually, that is not true. Small groups in a number of denominations, often led by people who are in fact homosexuals, are making statements to suggest the church should accept homosexuality as an act of God, a gift of God, et cetera. The vast majority of Christians in Australia, across all denominations, would hold firm to what the *Bible* says about homosexuality and are not prepared to accept that line.

We have heard a lot about the Uniting Church and their sexuality report. That is a very small number of people within the Uniting Church. In fact, the vast number of people we have contacted from the Uniting Church—and we have quite a lot of Uniting Church people on our mailing list—are against that sexuality task force report.

Senator ABETZ—Robert Stringer, when I asked him whether that report would be accepted by the majority of the Uniting Church membership, conceded that he thought less than 50 per cent would in fact agree with his view.

Senator BOLKUS—It is still a very strong number, even though it might be less than 50 per cent.

Senator ABETZ—Talk to other Uniting Church people, they will tell you it is down to 10 per cent—just to give you a bit of a flavour.

Mr Stokes—I would suggest that 10 per cent is far more the likely figure.

Senator BOLKUS—You say homosexuals should be normalised. How do you suggest we go about that?

Mr Stokes—I did not say that homosexuals should be normalised. I said that we should not normalise homosexuality.

Senator BOLKUS—I think at one stage you talked about them being not beyond treatment.

Mr Stokes—I am suggesting that, as the statement says, there are over 200 groups in America and numerous groups in Victoria, including here in Melbourne, that are assisting people come out of their homosexual lifestyle, in the same way as females who have trauma from sexual abuse as a child and have difficulty with a male/female relationship are actually being helped out of that into normal sexuality and a normal relationship with the opposite sex. Because it is a psychological position, people can come out of that and live normal heterosexual lifestyles. In fact, there are many, many people that have evidence of that. We have some in our own congregation that have come out of homosexuality or lesbianism and are now leading normal heterosexual lifestyles.

Senator ABETZ—Page 1 of your submission, under the heading 'Why Sexuality?' states:

A lifestyle that is based on very unhealthy and unnatural sexual behaviour and one that is of particular concern due to the much lower life expectancy of its participants.

Do you have any research that you can point to or refer us to to substantiate that claim? Most members of the committee will be aware that we have heard a lot of claims from differing people and it is nice to know what sort of back-up they have for those assertions. In relation to Mr Muehlenberg's submission, the 85 or whatever footnotes were very helpful for me.

Mr Stokes—We probably need to do a bit of that.

Senator ABETZ—Rather than take up time now, could I ask you to go through your submission and footnote any non-footnoted assertions? Could you provide us with a new copy of this, just with little numbers and then a footnotes list so that we can analyse what the footnotes say. I have been on Senate committees where certain things have been footnoted and then I have got the book out of the reference library and the book does not assert what the person in the submission says. I like to go back to the basic source to make up my own mind.

Mr Stokes—It is not adequate to say that certainly all the statistics in there can be substantiated, but Bill could probably give you a natural figure on when that statement was made.

Senator ABETZ—If you could do that, that would be helpful.

Mr Stokes—We will do that.

Senator STOTT DESPOJA—On the point of research, Mr Stokes, I would appreciate any evidence or research that you have that comes from Australian sources. I note that you rely quite heavily on American commentators and research. I recognise you have the Denis Altman stuff, but I notice that that is getting a bit dated. So any information that you would be prepared to provide the committee with, information that is Australian and perhaps more recent, would be of assistance.

Mr Stokes—Okay. Most of the work has been done in America, of course, but we will provide what we can.

Senator STOTT DESPOJA—In your opening you claimed that this bill was unnecessary because there was in fact equality before the law. In many of the submissions we have received, the arguments are contrary to that: that in the case of employment or superannuation, in a range of areas, people are discriminated against on the basis of their sexuality. I would like to ask you a very general question: do you support discrimination on the basis of sexuality?

Mr Stokes—I would have to say, in the sense that I believe people have the right to make moral judgments, yes, there is a right to discriminate. If you take away that right to discriminate, then you take away elections. At elections, we have a right to discriminate between one political party or another. We have a right to discriminate on a whole range of issues. For many years one used to say that to be discriminating was a good trait, if you discriminated right from wrong. The path we are being led down here is to ignore our moral values and be told that you cannot make a moral judgment about somebody's lifestyle. Mr Spindler made the point—and the question was asked—about an apprentice going to a church, if he wanted to be a member of the clergy, and finding that the senior clergyman was homosexual. If any young fellow went into a normal apprenticeship in a business and found that the person he was working with was a homosexual, under this bill, he would not have the choice to say, 'Excuse me, but I don't want to work in this situation.'

Senator STOTT DESPOJA—In an apprenticeship situation, should someone who is a homosexual be sacked from their employment as a consequence of their sexuality, on the grounds of their sexuality?

Mr Stokes—I am not suggesting that a person should necessarily be sacked because of his homosexuality, if he keeps it within the privacy that everybody else keeps their sexuality. One statement that was made in one report said, 'I can't go into school on a Monday morning and talk about the weekend I've had because it was a homosexual orientated weekend.' But very few people go into school on a Monday morning and talk

about their heterosexual weekend. We do not all boast about our sexuality. It is only when one wants to flaunt their sexuality and play it out—males cannot sexually make advances to females. Yet we are saying here that we cannot discriminate against the male-male situation or even the female-female situation.

Senator STOTT DESPOJA—I think we might have a different interpretation of what the bill seeks to do. Would you or your organisation support, for example, the reintroduction of criminal sanctions for consensual homosexual activity?

Mr Stokes—Not done in private, no, because privacy is privacy.

Senator BOLKUS—Can I just pick up on that? You said, for instance, in the provision of superannuation services or whatever Senator Stott Despoja asked you about, that people should be allowed to make moral judgments. You also acknowledge that people have the right to have their own sexuality. On which aspects of morality do you think it is fair ground for the providers, for instance, of superannuation to make moral judgments? Would you leave it at homosexuality? Is there an consistency when you say that people have the right to have their own sexuality but at the same time say that they could be discriminated against?

Mr Stokes—I think it is interesting to read—and I have given you a copy of this—the letter from Sid Spindler which talked about ACLGR's comments of not wanting de facto status. What we see there is a clear example of wanting some of the benefits that the heterosexual community has from its commitment of marriage—

Senator BOLKUS—But that is not the question, though, is it?

Mr Stokes—It comes back to that because marriage brings with it a lot of responsibility and a lot of commitment. For that some rewards are given, such as superannuation is given tax free.

Senator BOLKUS—On those grounds, therefore, you would deny people access to super on the basis of being in a de facto relationship rather than being married?

Mr Stokes—They are not denied access to that superannuation; they are denied the tax advantage of access to that superannuation. In other words, any person can leave in their will anything they like to anybody—superannuation money or anything else. If it is not paid out to a person, it is paid out to that person's estate and that estate could legally be left to anybody.

What we are saying here is that, if somebody is not prepared to accept, in this case, even the commitment of a de facto relationship, they should not get that access. Personally, I am against de facto relationships. I believe that, if you are not prepared to commit yourself to the traditional marriage relationship, you should not have those

benefits, because society is built on committed family relationships.

Senator BOLKUS—Though we do live in a society where there is diversity in terms of people's living arrangements. They are no longer small minorities; there are large numbers of people living in non-nuclear families. How do you handle that?

Mr Stokes—Whether that makes it right or wrong has to be judged by a country's values. If we allow somebody to speed down the road at 160 kilometres an hour because they want to, then it endangers other lives. What we are talking about here is a lifestyle that is killing people. We are talking about accepting it as a normal lifestyle. We have to be very careful about going down that track.

CHAIR—I noticed that Mr Muehlenberg's submission was somewhat critical of the committee for the advertising and the time frame in which people were allowed to make submissions. I make the point that it is quite a normal time frame that we were operating to.

Mr Muehlenberg—I find that with other inquiries as well. I do not like it there either, but fair enough.

CHAIR—But, if you do feel further constrained by it, we can extend to you what we extended to Mr Stokes—the ability to put in additional material, which we would be more than happy to receive. Apart from the advertising that the committee did, which cost in excess of \$10,000 in major print media throughout Australia, we also wrote to major national institutions, including church groups, directly telling them about the inquiry and inviting them to make submissions. Many of them have made submissions and we are hoping that next week we will be in a position to publish the majority of those. Mr Muehlenberg, I invite you now to make an opening statement. I also remind you of the time. We now have a problem, and other witnesses who are here are awaiting their turn.

Mr Muehlenberg—I will try to be brief. Most of what I have to say is in the written submission, which you already have, but I might highlight a few points. I begin by saying that I heard an interesting comment this morning by the Leader of the Democrats; since we have a few here today, maybe I can recall that line. Cheryl Kernot was saying that the \$8 billion budget cuts would basically destroy our social fabric, our social cohesion. I think that is a very legitimate concern for her to have. I am all in favour of social cohesion. The whole point of my submission is basically to say that, if this bill goes through, there will be even more damage done to the social fabric. Damage will be done not only to families but to society as a whole.

As Eric has said, my submission contains a fairly well documented set of information on the extremely high risk behaviour involved with homosexuality. Mr Stokes has alluded to some of these. There is plenty of it there, simply from medical or scientific journals. Even from the homosexual community itself you get quite a bit of interesting

information. By the way, if you are looking for good Australian statistics, you really should look at the SMASH report—the Sydney men's health report—that came out in Sydney about a year or a year and a half ago. It details very extensively, in four volumes, the behaviour patterns, the risks involved—the whole range of issues. That is a good Australian document that I would refer you to.

When we study these documents, both those from here and those from overseas, we find simply that the homosexual lifestyle does cause very severe public health and safety risks. We know, for example, from the literature, that the average homosexual may have something like 100 sexual partners per year, some boasting of many more. The average homosexual may have eight times greater likelihood of having syphilis; 14 times greater likelihood of having hepatitis A and B; and about 400 times greater likelihood of having HIV. We know from the latest HIV surveillance statistics that something like 86 per cent of all cases of HIV are still confined to male homosexuals, with the remainder being intravenous drug users or bisexuals. The point is pretty clear that it is not exactly a healthy lifestyle. If you talk to any medical doctor who treats homosexuals, he is dealing with a whole series of problems—not just HIV-AIDS but various sexually transmitted diseases. There are bowel syndrome problems, and a whole range of terrible problems. If it is true, as we say, that homosexuality is basically a chosen behaviour—it is something you can choose to engage in or pull out of—then it is a very high risk behaviour.

My concern arises partly from the fact that I am a parent with three small children. I am trying to raise them in a society which says, 'There are a lot of things you guys should not be doing. You should not smoke cigarettes; it is going to get you into a lot of trouble. You should not take drugs, like I did. It got me into a lot of trouble. A lot of my friends died of overdoses.' I am trying to let my children know that certain behaviours are just too risky to mess around with.

Homosexual behaviour, as we pointed out in our submission, is a very high risk behaviour; it is very dangerous. I am confused as a parent—let alone as someone concerned with public policy issues—about how I can tell my kids to stay clear of high risk behaviours. The government can spend millions of our tax dollars on 'Quit smoking' campaigns, 'Do not drink and drive' campaigns, drug use—the whole range of dangerous behaviours. We are spending money on telling our people that it is not only wrong to do it but that it is dangerous and that it is unhealthy for you and for others. Therefore, do not get involved; do not do it. Yet, on the issue of homosexuality, we are saying that this is just another lifestyle choice; this is just something that you can do if you want it. We are saying that there is no big deal, throw on a condom if that makes you feel better.

It seems to me that my kids are going to get very mixed signals which say, on the one hand 'Don't smoke, don't take drugs, don't drive while drunk' and, on the other hand, 'Go ahead and engage in any kind of sexual activity knowing that certain kinds of activities are much more risky or dangerous than certain others.' I am at home trying to tell my kids, 'Watch out for certain kinds of sexual activity that are very dangerous.' But

then I will have to be competing with this. This is where we get into the normative effect of the law. As you know, whenever legislation is passed, it sends out a signal to society that perhaps this behaviour is acceptable, or at least that the government condones it, perhaps blesses it. I am worried as a parent about how I am going to deal with raising my kids when legislation like this goes through. As we have also noted, there is the double-edged sword to this: whenever you grant special rights to one group of the community, often that is at the expense of others, by taking away their rights.

If I had the time—and I do not have this in my submission—I could list case after case of either countries or states where this kind of legislation has been enacted and other people have been severely discriminated against. Here is just one quick story. In Wisconsin—which is where I come from; I am married to an Australian so that is my excuse for being here—at the same school of the same university I went to there was a girl who was looking for a room-mate. A lesbian applied, she turned her down. For whatever reason, she did not want to have a lesbian room-mate. Because recently passed sexuality discrimination legislation was in effect—very similar to this one—this girl was taken to the equal opportunity board and given a 4½-hour grilling.

She came out in tears and said that she felt that she was in China, not the United States. She was told to pay the lesbian a \$1,500 fine and to write a public letter of apology. She was told her behaviour would be monitored for the next two years to make sure that she did not relapse into this kind of politically incorrect behaviour. Basically she said at the end of it, among other things, 'I'll go bankrupt even just having to pay this \$1,500 fine.' The commission said, 'Well, that is of no concern to us.'

Mind you, I can multiply these stories throughout the day because I am sure that you have heard stories on the other side like 'We have been discriminated against'. So can I simply say that two wrongs, as we know, do not make a right. To discriminate and give special privileges to one group of people at the expense of another is not going to solve problems of discrimination; it is going to in fact create many more. I do not want to see that.

I know of cases here in Melbourne. Religious newspapers were told they could not advertise for Christian room-mates or Christian employees in a store, yet that is being done all the time. As you know if you pick up any homosexual newspaper, there are hundreds of ads in the back saying, 'Wanted: gay room-mate', gay this, gay that. They seem to have certain privileges that the rest of the community do not have and this kind of legislation, it seems to me, will grant even more special privileges to a small percentage of the community, but the rest of the community will suffer.

Finally, I will conclude here, you may have seen this in last week's *Australian*, but the New South Wales vilification legislation is now being reviewed because of one case where a schoolboy called another schoolboy a poofter. The guy withdrew the complaint yet, of course, the guy of whom the complaint was made had his name splattered all over

the papers. So even though the complaint has been withdrawn, he is still getting the flack of it, and they are saying, 'Well, maybe we need to review this legislation.'

The whole point of this is that anybody can make a complaint under this bill and it is all covered by our tax dollars, but the person to whom the complaint is made has to go into the commission, the courts or wherever the case may be and pay all the bills. Whether he wins or loses, he is up with all the court costs. It just seems to me that the whole onus—the whole burden of proof—is on those against whom the charges are made. And you say, 'There are exemptions for religious bodies.' Well, they are very, very narrow indeed.

It seems to me, for example, that if you are talking about sexuality and you had a Muslim printer who was told by somebody he wanted to print some pornography and the Muslim printer said, 'No. Because of my Islamic beliefs I do not want to print your booklet,' that is not going to be covered here. Let us say a Jewish bookshop owner wanted to employ somebody. Again, he may not prefer to have a homosexual in his bookshop. That is not covered here. There are a whole range of issues. One can go on and on.

CHAIR—The committee would like an opportunity to address questions if you have finished.

Senator BOLKUS—I just have a couple of questions. You seem to be really concerned—and I think your concern is fair enough—about health and diseases that can be transmitted. Would you advocate greater public expenditure in terms of education on safe sex?

Mr Muchlenberg—It depends what you mean by safe sex. If it means simply throwing more condoms at the problem—as we know, the HIV virus is 50 times smaller than your average pore in the condom—I would not recommend it. That is simply playing Russian roulette. You are saying to a kid, 'Put on a condom and your chances of getting a sexually transmitted disease like AIDS will be reduced.'

By the way, there are something like 56 different STDs going on at the moment. There were only about three or four when I was a kid or you were a kid. We are getting a whole outbreak of these. So if you mean by that simply putting on a condom, then I would say that is going to be counterproductive. If you mean teaching a whole framework of values that go with it—getting parental input, telling kids that abstinence is not a bad way to go, that you can learn to say no, just like we do with cigarettes or drugs—and those things were components in your education program, I would be pretty happy with that.

Senator BOLKUS—I suppose what I am getting at is that we do have people who do not really explore their sexuality. They may in fact be homosexual; they might be bisexual. In a sense they might be celibate. Much of your argument was based on the

health risks. It seems to me that there are pockets of areas where the health risks are not as great, though they may not suit your morality or other people's morality. All of those people are in a difficult situation. They can be discriminated against. That does not justify legislation in your eyes?

Mr Muchlenberg—Again, it is looking at the issue of giving a certain lifestyle special privileges by law, knowing that in so many other areas we do discriminate. We do say that certain people cannot go into a restaurant, like smokers. They cannot fly in an aeroplane.

Senator BOLKUS—This is anti-discrimination. This is basically targeting areas where those people are discriminated against, whether it is super or in the work force or whatever.

Mr Muchlenberg—Again, all of that needs to be looked in the context of why it is there in the first place. Why has marriage and family traditionally been given, if you will, special privileges and benefits? Simply because society has always looked on marriage and family as such an important institution, not only for the raising of children but for social cohesion, which the Democrats are concerned about. It has been willing to say, 'Yes, we will give you special benefits simply because you are willing to put in the extra responsibilities that go with it.' What we are looking at here is getting all the benefits of the marriage relationship without any of the responsibilities.

We talked earlier when Senator Spindler was looking at this question by Eric Abetz about raising children. It seems to me that a lifestyle which is highly promiscuous with such a turnover of partners is not really in the best interests of a child. That was the whole reason marriage was given special benefits, if you will—it used to be a long-term, for life commitment. I know now that it is changing a lot, but we thought that, for the interests of the children, marriage should be given these special privileges.

I read just the other day a study done by two homosexual psychologists. It had a large sample group and they looked at the question, 'How many of you are actually monogamous?' Two per cent was the figure they came out with from this large sample group. They found that not one person of that two per cent actually did not have outside sexual flings as well. This is a fairly radically different kind of lifestyle from your average heterosexual partner who may have the occasional affair. Generally speaking, they are light years apart in the terms of the benefits and the security they can offer to children. That is why society has given these special benefits and that is why I am against granting special privileges on the basis of somebody's sexual behaviour which, again, will take away from somebody else's rights of conscience and rights of who they can rent to, who they can employ. I just think it is the wrong way to go.

Senator BOLKUS—So it is essentially protection of the family that you are concerned about?

Mr Muchlenberg—That is a big part of it.

Senator BOLKUS—What do you then do with the situation which happens quite often on a Monday morning of a married bloke coming into work boasting about a big weekend out and how many sex partners he might have had over the previous week or so? A fair amount of that goes on. Would you justify discrimination on them?

Mr Muchlenberg—It is not the issue. We are not talking about laws which say you can or cannot talk about certain things Monday morning in the school staffroom. I heard those homosexuals who called in on this radio program. This was just after the Victorian equal opportunity amendment went through. Peter Couchman said, 'Call in and tell us all your cases of discrimination. Tell us how you are being discriminated against.' Two callers called in. That was the only thing they could come up with—'We come in on Monday, we have done our thing, but we feel a bit embarrassed to share in the school staffroom.' I thought if that is the extent of the discrimination they can come up with as leaders of homosexual organisations this is not much of a big deal.

But this is not the issue. Again, it is the whole point that public policy should promote the importance of marriage and the family simply because no society can long survive that minimises or undermines the institutions of marriage and family. That is a much broader discussion than what we have here. But, again, it just seems to me that this whole thing is just unnecessary. It is promoting a lifestyle that is going to send the wrong signals. It is going to discriminate against a whole lot of other people.

Senator STOTT DESPOJA—Thank you for supporting Senator Cheryl Kernot and her commitment to social cohesion. You would have noticed yesterday she also used the word 'fairness' which is something that this committee, and certainly Senator Spindler's bill, is hoping to address as well. You have consistently argued that there are special privileges in law that homosexuals enjoy. Yet the opening of Mr Stokes's submission suggests that this bill is unnecessary because all groups, including homosexuals, currently enjoy equality before the law.

Mr Muchlenberg—Bear in mind we are two different groups. But in terms of basic human rights, homosexuals enjoy the same benefits that anybody does—freedom of speech, assembly, the whole bit. We are talking about these special twilight areas, if you will—superannuation. Again, as I said before, society seems to have a vested interest in why it has given families and marriages in the past these kinds of special benefits to the exclusion of others.

If we want to change that—if we want to say as a society we no longer think marriage is important, two-parent families are important—fine, we can debate that in parliament. We can look at that whole issue. But to have this kind of Senate inquiry which will grant special status to a behaviour based group simply on the basis of some of these points, which seem to me not to be extremely important, is the wrong way to go. The

basic rights are there for anybody to enjoy.

Senator STOTT DESPOJA—You mentioned freedom of speech and it is something that recurs in your submission and also Mr Stokes's submission. It is an argument that has come out in submissions against the bill. For the assistance of the committee, could you inform us specifically what part of the bill you believe contravenes in some way or restricts or limits freedom of speech? Can you specifically refer to a section or part of the bill?

Mr Muehlenberg—I can give you cases of existing bills, for example, the New South Wales legislation—

Senator STOTT DESPOJA—No, I mean in regard to this bill. In what way would it curb freedom of speech?

Mr Muehlenberg—Given that there is a fair amount of drawing upon the existing New South Wales vilification bill that was used in this bill, I know of a number of cases there where people's rights to speak out, say, in letters to newspapers, have been—

Senator STOTT DESPOJA—That is the New South Wales—

Mr Muehlenberg—The homosexual vilification legislation.

Senator STOTT DESPOJA—My understanding is that section of the bill has not been utilised. Without referring to that bill you have no specific examples—

Mr Muehlenberg—I can imagine any number of cases coming up just as they did when existing legislation like this was passed.

Senator STOTT DESPOJA—I will not anticipate but I think it is important for the committee to know if there were specific examples where freedom of speech would be incurred.

CHAIR—Would you like that question on notice? Have another look at the bill and then come back to us.

Mr Muehlenberg—Yes.

Senator STOTT DESPOJA—Do you support the idea of discrimination on the basis of homosexuality? That is, if somebody, for example, in an employment situation was to declare their homosexuality, do you believe that they could be sacked or that they should lose their job on that ground?

Mr Muehlenberg—Again, I think the question has been asked in the wrong way. I

think the question should be: should small businesses and home-run businesses especially have the right to choose whom they would like to have in their employment? I would imagine in many cases the employer could not care less. He wouldn't care if the person was homosexual or not.

In some other cases the employer may care, and especially small businesses, home businesses, and I think they should not be denied the right to say who would be the best for their position. Whether or not it is an irrational basis for them not liking that applicant—it may be that they do not like tennis players; there could be any number of things—the point is: why grant special rights to a certain lifestyle-based group that other groups similarly do not have? I think, again, a family, a small business, should have rights to say, 'Look, this is the kind of person I want for the job; I prefer not to have this kind of person.' I think that is an important right which Australians enjoy having.

Senator STOTT DESPOJA—I apologise, but I have a similar question to the one I asked Mr Stokes. Do you support the reintroduction of criminal sanctions, sanctions in law, against consensual lesbian or homosexual activity—gay and lesbian sexual activity?

Mr Muehlenberg—Again, it is a question that could be padded out to make a proper answer, but I would say, just as the government has had a number of rulings on the books in terms of other unhealthy lifestyles—whether it is cigarette smoking and a whole range of other things it was thought in the best interests of the community, because of the high risk behaviour involved to have, as you put it, discriminatory measures—there may be a case in this area as well, just as half of the American states, for example, still have such legislation on the books. Again, I think on questions of public health and safety, there may be a case for such legislation.

Senator STOTT DESPOJA—Thank you.

CHAIR—Mr Muehlenberg, thank you very much for your attendance here today, and to you, Mr Stokes, as well for your attendance and your assistance to the committee.

[11.34 a.m.]

KELSEY, Mr Richard Norwood, Member, Brethren, 51 Danin Street, Pascoe Vale, Victoria 3044

STEVENS, Mr Peter Russell, Member, Brethren, 51 Danin Street, Pascoe Vale, Victoria 3044

WAY, Mr John Charles, Member, Brethren, 51 Danin Street, Pascoe Vale, Victoria 3044

CHAIR—The committee has received your submission and yesterday authorised its publication. It is now on the public record. It is submission No. 62. I now invite you to speak to the submission and, at the conclusion of your opening address, I will invite members of the committee to address questions to you. We are running behind schedule and we have a fairly big afternoon in front of us. We are desirous of having a break for lunch as well, but at the same time I do not want to inhibit any interchange between the committee and yourself.

Mr Stevens—Mr John Way will give the introductory remarks.

Mr Way—I have some notes here, if it is all right to read from those to save time. The stand we take as set out in our submission is based on the clear teaching of the *Christian Holy bible*. To discriminate because of a person's race, colour or other physical characteristics is clearly wrong. God is no respecter of persons; he had made us all of one blood, and every nation here that fears him and walks in righteousness is acceptable to him. But the principle of discrimination between right and wrong and between persons practising what is right and what is wrong is threaded throughout scripture from beginning to end. That is integral to the Christian faith.

God's love to man flows out and is fully shown to us in the glad tidings of grace because Jesus bore, instead of us, God's judgment upon sin—our sins. God has not and does not condone sin and will finally judge sinners who refuse his gospel of repentance towards God.

The *Bible* could hardly be more explicit in its judgment of sodomy—read Romans, chapter 1; I Timothy, chapter 1—and it is clear in its direction to Christians to withdraw from iniquity—refer to II Timothy, chapter 2. We practise separation from evil in every area of our lives, which includes our homes and our businesses. We are not motivated by malice or by hatred towards our fellow man; we want to make that point quite clear. For this reason this proposed bill could well make it unworkable for us and many other Christians to continue our way of life in employing persons in small business in Australia. Currently we would represent about 1,000 employers throughout Australia employing at

least 6,000 persons.

Senator ABETZ—How many in your congregation? I read those figures, but—

Mr Way—How many?

Senator ABETZ—In your congregation—denomination, I should say—Australia-wide?

Mr Way—I suppose about 10,000. Thus, in attempting to eliminate discrimination against one class of persons, the government would be discriminating against Christians.

A further aspect of this matter which is greatly concerning to us is government's responsibility to govern for the welfare of society. For example, for many years now it has been established that smoking is a health hazard, and government has acted energetically to educate persons and discourage this practice. As a result, smoking and its associated problems have declined. Shouldn't our government have the same sense of responsibility to its citizens with regard to sodomy where the behaviour of maybe two per cent of the population accounts for possibly 50 per cent of the tragic AIDS epidemic cases in this nation and where the average lifespan of persons practising this way of life is nearly half that of persons following a normal family traditional way of life? Shouldn't government be raising a warning flag?

We submit that it is unbecoming to good government and a costly injustice to society to single out behaviour which is an obvious perversion of nature for the distinction of special class protection. We might also mention that the claim to genetic tendency which is sometimes spoken of is unproven. It is plausible but unproven and, even if proven, would no more validate sodomy than genetic tendency would validate, say, criminality or violence or alcoholism.

In conclusion, we wish to just request that at least a conscience clause could be provided for persons such as ourselves which could easily be provided, as is already provided in the Victorian legislation, extending to us to cover the situation where we are faced with this problem in our homes and particularly in our businesses. A copy of such a clause is available. We thank you for your attention to our submission.

CHAIR—On that last point that you made, have you read the exemptions that are contained in the bill?

Mr Way—Yes, we have read those exemptions which cover, as I see it, a church operating within its own four walls and its own administration and education or discipline or direction, but we are talking here about the operation of our businesses. Many of us are small business persons employing our own families perhaps, or maybe some others, and this is going to put us head on against this situation in business.

CHAIR—I think Senator Abetz was asking for a copy of the clause.

Senator ABETZ—The Victorian clause.

Mr Way—The Victorian clause—yes, I have got one here.

Senator ABETZ—If I could read this:

Religious beliefs or principles

Nothing in Part 3—

and I am not sure what part 3 of the act deals with—

applies to discrimination by a person against another person if the discrimination is necessary for the first person to comply with the person's genuine religious beliefs or principles.

That, of course, would apply to things such as employment that you are concerned about. What if I, as a person with some money, of the Christian persuasion, decide to purchase a house for Christian students to share together, for example, or heterosexual students or whatever to share? Let us say there are more than three, that is exempted—and university houses usually have more than three; down my way they do, they usually stick them in every possible room in the house. If that person did that as part of their religious belief, they would be exempted, as I would read that, whereas under this legislation, they would not necessarily be so exempted. That is a very interesting exemption; thanks for that. Were you here earlier?

Mr Way—No.

Senator ABETZ—I asked Mr Spindler about it. In section 19, with regard to accommodation, there was an exemption if you lived there or had a relative living there, with up to three people. So there are slight exemptions but there were not any for employment. Then there was another one for employment of a domestic nature from the house, and that is in paragraph 10(3). But if you were not there, then that is fine.

CHAIR—How much scrutiny has your organisation, your church, put the bill through? My reason for asking that question is that you attach to your submission your submission which we talked about previously, to the Attorney-General's Committee here in Victoria. Have you scrutinised in depth and in detail this bill that is before the Commonwealth parliament? It is different from what was contained in the Victorian legislation.

Mr Way—We have gone through it. We realise there is a difference. The difference lies in this question of the employing of persons. That is where we feel the conflict will be. There is not an exemption to cover that, as there is in the Victorian

legislation, which is why we used that submission which was previously used. It covers basically what we are trying to say.

CHAIR—With regard to various industrial relations acts that apply throughout Australia, does your organisation, your church, receive any exemptions from the provisions of that legislation?

Mr Way—Yes.

CHAIR—You do?

Mr Way—Conscience clauses, yes.

CHAIR—Could you elaborate on that? Help me to get an understanding of the exemptions in this particular case.

Mr Stevens—Section 267 of the Industrial Relations Act—there are provisions for conscience there. It has been there for 40 years.

CHAIR—Can you elaborate? What are the exemptions?

Mr Stevens—There is provision for conscience in 267.

CHAIR—Conscience?

Mr Stevens—Yes, Christian conscience.

Senator BOLKUS—We will have to look at that provision, as well as the Victorian one which you have suggested to us. Essentially, you are saying that if you had the capacity to get exemption because of reasonably held religious beliefs, then you could be satisfied?

Mr Stevens—Yes, that is right.

Senator STOTT DESPOJA—In your submission you state that it is Victoria and New South Wales EO and industrial relations legislation.

Senator ABETZ—What about the employment area? Is that the only area you are concerned about, or are you concerned about, let us say, where you would not be employing somebody but renting out your house—an investment house, a warehouse or an office block—that you may own? Somebody might say, 'Look, I want to use this for the gay and lesbian rights movement, we want to rent a house and conduct our operations from there.' Should the exemptions be applying to that as well, from your perspective?

Mr Way—Although we do not rent out houses, other persons may, other Christians may. We do not as a rule do that, nor do we rent out business premises to other persons, as a rule. But other persons may do that, therefore it should be covered for a genuinely held conscientious belief.

Senator ABETZ—You did not cover that because that is not part of your business practice?

Mr Way—No. What we did cover was the question of employment. The question of, say, a contractor having to work in a brothel or, say, a printer having to print blasphemous material. Those are the kinds of situations that have arisen with our people in the past. This is the problem we have.

Mr Stevens—We would like exemption in the areas of supply of goods and services, as well as the area of employment that has been mentioned.

Senator BOLKUS—We can spend some time looking at the exemptions that you have offered us as precedents. That might give us a way through it.

CHAIR—Mr Way, Mr Stevens and Mr Kelsey, thank you very much for your attendance here and your assistance to the committee.

Mr Kelsey—There is just one thing I wish to point out. We have talked about the Victorian legislation and the exemption that is included in the Victorian legislation. There is a second exemption included in the Victorian legislation which we would be glad to also have included, which relates specifically to small business. The first exemption that we have just identified was section 77, which was on the basis of religious beliefs or principles. But the Victorian legislation goes one step further and provides an exemption blanket, if you like, for a business that employs no more than five people. That is a very helpful clause because it then takes away the argument as to whether religious beliefs are genuinely held or not.

Clearly, we do hold those beliefs. But the presence of that second clause would cover most of the approximately 1,000 businesses that we are talking about. They would fall into that small business area. That clause for exemption of small businesses, we feel, is very valuable and we would suggest that if it were possible for that also to be included, it would be appreciated.

Senator ABETZ—In your general knowledge of the small business area, would it be fair to say that most of the businesses that have five or less employees are family based businesses?

Mr Kelsey—That is exactly right. In my own business we employ seven people, but the definition in the Victorian legislation is five people who are not family members.

That applies in my business.

Senator ABETZ—Without dragging this on too long, what is the definition of 'family member'?

Mr Kelsey—As far as the legislation is concerned—

Senator ABETZ—Does that go to grandparents, cousins, uncles and aunts?

Mr Kelsey—It just says 'relatives of the employer'. It is obviously not intended to be a broad definition; it is intended to be narrow. The exact wording is of no real consequence to us.

Senator ABETZ—But the cost of getting an exemption—and there is the possibility under the legislation to get an exemption—or defending an application can be nearly ruinous to some small businesses who do not have the degree of cash flow and flexibility. That has been very helpful, I must say, thank you.

CHAIR—If the parliament were to insert a clause such as you suggested into the bill, could you live with the bill?

Mr Way—Yes, we would have no difficulty with that. We do not have any difficulty with the principle, just with the application of it. Is that what you meant?

CHAIR—That is what I meant, yes.

Senator STOTT DESPOJA—I have one query about the exemption in the Victorian legislation. Is it true that there is a similar exemption clause on the grounds of race in that bill?

Mr Way—I was not aware of that.

Senator STOTT DESPOJA—Okay, that is something we will find out.

CHAIR—Thank you very much.

[12.03 p.m.]

CHAPMAN, Ms Anna-Louise Margaret, Lecturer in Law, Law School, University of Melbourne, Parkville, Victoria 3052

MORGAN, Mr Wayne Kenneth, Lecturer in Law, University of Melbourne, Parkville, Victoria 3052

WALKER, Ms Kristen Louise, Lecturer in Law, Law School, University of Melbourne, Parkville, Victoria 3052

CHAIR—I call the committee to order and welcome the three law lecturers from the University of Melbourne. In what capacity do you appear before the committee today?

Mr Morgan—As a private citizen.

Ms Walker—As a private citizen.

Ms Chapman—As a private citizen.

CHAIR—We have now published Ms Walker's submission No. 116, Ms Chapman's submission No. 98 and Mr Morgan's submission No. 141. All three submissions are now on the public record and part of the public debate on the bill that we are talking about. I invite you to make an opening statement, then I will invite members of the committee to address questions to you.

I apologise for the delay in proceedings. I think you are aware of why that happened. We are keen and eager to hear what views you have to express to the committee.

Mr Morgan—Senators, if it is all right with the committee, we would like to divide our submission up so that we address different terms of reference of the committee. To facilitate that we thought it would be best if Anna Chapman speaks first about the need for such anti-discrimination legislation and the content of it. Then I will address the issue of Australia's international obligations, and then Kris will address the issue of constitutional power.

Ms Chapman—The first point I thought I would start speaking about is the need for federal legislation, both for lesbians and gay men and also transgender people. There certainly is a lot of empirical evidence—both from Victoria and interstate, particularly New South Wales—that there are high levels of discrimination and harassment and vilification of both lesbians, gay men and also transgender people. So there certainly does seem to be a need for legislation. I think the legislation we have is inadequate. The federal legislation really covers only particular instances of discrimination. It does not cover

vilification, and it certainly does not cover transgender people.

The state legislation we have varies from state to state. Of course, Tasmania and Western Australia have neither sexual orientation grounds nor transgender grounds. Even amongst the other states, only three states have transgender grounds. Even grounds such as transgender grounds and sexual orientation grounds, which some states have, are generally inadequate for a number of reasons. You are probably aware of the wide-ranging exemptions that exist, particularly in Victoria. So I think the existing legislation is inadequate, and I think there is a need for federal legislation. There is also an argument of consistency, that there is a need to have federal legislation that is consistent throughout Australia.

The second point I wanted to address was the wording of the sexuality ground. I think there is a need for at least the word 'lesbianism' to be explicitly included in the ground. There seems to be quite a lot of evidence, particularly from New South Wales, that lesbians do not always feel included in the word 'homosexuality'. It has been, and still seems to be, particularly associated with sexual activity between men. So I think there is a need to explicitly include the word 'lesbianism'.

The third point I wanted to address in the wording of the ground is 'heterosexuality'. My view is that the word 'heterosexuality' should not be included in the wording of the ground. I say that for the reason that there is no empirical evidence that heterosexual people are discriminated against or vilified because of their sexuality. It cannot be said that including heterosexuality would meet any unmet need, because there is no need for that protection. I think, more importantly, it would derogate from the protection offered to lesbians and gay men. I say that because there are a number of gay and lesbian specific groups that would then be open to heterosexual people under such a ground.

I do not think temporary exemptions and special measures are sufficient, because they are ambiguous and they have been used in ways that would perhaps not bring about real equality in terms of outcome, and I am thinking specifically of the Proudfoot case. So I think that there are problems in including the word 'heterosexuality', and I think it should not be included.

In relation to some other provisions in the clause, I think the bill should be brought up to date. What I mean by that is that the bill should be brought into line with the recent amendments to the Sex Discrimination Act, which occurred last year. There were some amendments late last year to the Sex Discrimination Act in relation to indirect discrimination and also in relation to the wording of special measures provisions. I think it is important that the bill take advantage of that investigation of appropriate wording and adopt that wording.

The last thing I want to mention is clause 107 on same-sex relationships. Kris

Walker is going to speak about that, so I will leave that to her. My view is that the clause should be deleted from the bill.

Mr Morgan—I will address the issue of Australia's international obligations. In my view, as an international lawyer and somebody who looks at human rights quite a lot, Australia does have international obligations to protect people on the basis of their sexuality. Those obligations stem from two sources: firstly, treaty sources, primarily the International Covenant on Civil and Political Rights; and secondly, customary international law sources. I want to briefly address both of those sources of obligation for Australia.

I will turn first to the International Covenant on Civil and Political Rights. The covenant is a broad document which outlines Australia's obligations with respect to the human rights of all of its citizens. The covenant includes two clauses which state that all people within Australia's jurisdiction should be treated equally and should be accorded the same rights under the covenant; that is, article 2.1 and article 26 of the covenant.

As you are probably aware, both of those articles of the covenant do not specifically mention sexual orientation or sexuality or some analogous ground. They are both what we call 'open-ended clauses'. In other words, they say that no discrimination is to take place. They enumerate a number of grounds and then they say 'or on any other basis'.

The Human Rights Committee in the Toonen decision, which is the only decision which has specifically looked at the issue of the rights of gay men and lesbians, specifically gave its view on the question of whether the covenant as a whole protected gay men and lesbians against discrimination. In the Toonen case, they recognised that those open-ended clauses in article 2.1 and article 26 did protect people on the basis of their sexual orientation.

Given that view by the Human Rights Committee, in my submission, the International Covenant on Civil and Political Rights specifies Australia's international obligations and makes clear, particularly article 26, that Australia has an obligation to protect gay men and lesbians and transgender people from all forms of discrimination. That obligation includes passing legislation to ensure that such discrimination is illegal.

I will turn to the second head of Australia's major international obligations under customary international law. Over the last 20 years there have been many developments with respect to the protection of sexuality and also the protection of transgender people in a number of states around the world. Our international law obligations do not just stem from the treaty; they also developed from customary international law—that is, the practice of states themselves.

If we look at that practice—particularly if we look at the practice of those states with which Australia normally associates itself; that is, the WEOG, the Western European

and Other States Group—we will see that there is now substantial practice to demonstrate a great international concern over the treatment of sexual minorities and transgender people. We have seen developments in this area in terms of constitutional protection in some states. We have seen national anti-discrimination laws in other cases. We have seen regional and local anti-discrimination laws in a number of other cases. We have also seen protection under refugee status laws and requirements. A number of countries regard sexuality as a ground for being granted refugee status.

Also, we have seen developments within international conferences, particularly the Beijing conference on women's rights and also the Vienna Conference on Human Rights. In both of those conferences, states associated with Australia—and in the case of the Vienna Conference, Australia itself—expressed international concern over the treatment of sexual minorities. So when we look at that state practice of those states with which Australia associates itself, we can see that these international obligations now form part of customary international law.

Finally, on the issue of international obligations, I would also like to highlight that international law is further formed by the opinions of what is called, 'eminent publicists'. This is a subsidiary source of international law. If I could draw the attention of senators to the bibliography which I included in my submission, there is now quite a substantial volume of work by publicists who recognise that international human rights law does include obligations to protect people on the basis of their sexuality. In fact, in the last couple of years there have been three quite weighty books published on the subject. Also, our own past human rights commissioner, Brian Burdekin, has concluded that Australia does have international obligations. So on the basis of those three sources of international law—treaty, customary international law and the writings of eminent publicists—it is my conclusion that Australia does have international obligations to protect gay men, lesbians and the transgendered from sexuality discrimination.

Senator COONEY—On that bibliography, in the last section, 'Sexuality and Anti-Discrimination Law in Australia', is it the first or the third of those references we should be looking at?

Mr Morgan—Both, definitely.

Senator COONEY—Is one better than the other?

Mr Morgan—They address different issues.

Ms Walker—I might address the question of the constitutional power of the Commonwealth to enact sexuality discrimination law. Firstly, I would just point out that there are a number of heads of power available to the Commonwealth which can justify anti-discrimination legislation in this area. For example, the corporations power, the territories power, the banking power. Those powers are uncontroversial and I am not

intending to address them in any detail. They will not, however, justify the enactment of comprehensive anti-discrimination law and that is where the external affairs power comes into play. It is my submission that the external affairs power will justify legislation to protect people from discrimination on the basis of sexuality.

No doubt the committee is aware that the external affairs power quite clearly permits the Commonwealth to implement international obligations under both treaties and customary international law. I think Wayne has outlined quite cogently that Australia does have obligations to protect people from discrimination and those international obligations then, if you like, activate the external affairs power and permit legislation that is designed to protect people from discrimination on that basis.

In addition, if the committee was not satisfied that we have an international obligation, I would also point out that it has been accepted that an international obligation is not a prerequisite for legislation under the external affairs power. International concern is also sufficient to activate that power. In the context of sexuality discrimination, I think it is very clear that there is considerable international concern on the question of discrimination against gay men and lesbians.

I would point out to the committee that the level of international concern required does not have to reach the level of customary international law. It does not have to be a universal concern manifested by every state in the world. It is sufficient that a significant number of states demonstrate a concern about these issues to reach the level of international concern that the High Court has mentioned in its judgments.

In relation to sexuality discrimination, I think it is particularly clear that western states such as European states, Canada, the US, have manifested a degree of international concern about sexuality discrimination, and it is those states with which Australia is associated in the international arena. We are part of what is called the 'western European and others' group of states when it comes to regional groupings in the international arena.

We accept that grouping ourselves and the international community accepts that we are part of that grouping. Given that it is those particular states that manifest international concern about sexuality issues, that to me indicates that we have reached a point where there is sufficient international concern about sexuality discrimination to activate the external affairs power.

The final point that I would like to make is not a point about constitutional power but is, in fact, directed to the provision in the bill that is intended to provide some degree of recognition for same-sex relationships. As Anna mentioned, we have some concerns with that provision, and I agree with Anna that it really should be deleted from the bill. I say that because it does not offer equality to gay men and lesbians. It seems to me that a sexuality discrimination bill is intended to achieve equality for a group that has not been

offered equality previously. Clause 107 does not offer equality. What it offers is some limited form of recognition for same-sex relationships, but only at the Commonwealth level.

Most discrimination against same-sex couples, in fact, occurs at the state level in areas such as adoption, child custody, property division, wills and intestacy, access to one's partner in hospital, et cetera. So all of those areas will, in fact, not be affected by this bill, which is directed only to altering or recognising same-sex relationships within Commonwealth legislation. That legislation is confined primarily to areas of welfare benefits and superannuation. In those particular areas, the bill will have a very negative effect on people who are already economically less well off and, in many cases, that will include lesbians.

So this bill actually, far from offering equality, offers significant disadvantages to lesbians and to some gay men without offering full equality in return. It would be one thing to say, 'Well, you've got to take the good with the bad,' but this bill does not offer the good with the bad. It offers quite a lot of bad and really does not address the areas of same-sex relationship recognition at the state level, which is very significant. So, I submit, those are the reasons that that clause be completely revamped so it would affect state legislation, or it should be removed altogether. Thank you.

CHAIR—I thank everyone for their contributions. I have certainly got a number of questions I want to address, and then I will invite my colleagues to ask questions. Mr Morgan, in relation to the Human Rights Committee and their decision, it was argued to us on Tuesday in Canberra that, in actual fact, the Human Rights Committee ducked the issue of sexuality. You are saying that they have made findings on it in the Toonen decision.

Mr Morgan—It certainly did. It explicitly addressed the issue. It is certainly true to say that the major grounds for decision in the Toonen case was on the basis of the privacy right in article 17, and they used that as the basis to state that the Tasmanian criminal laws were in breach of the convention. But they had been specifically asked by the Commonwealth whether the general equality clauses, article 2.1 and article 26, meant that we had an obligation to protect people on the basis of their sexuality.

The committee, in their decision, noted that the Commonwealth had asked that question. They said that, in their view—which is the technical term to indicate a decision that they have made; they give views on the nature of obligations under the covenant—article 2.1 and article 26 did cover sexual orientation. Those words are in the decision. I do not have a copy of the decision in front of me, but I could certainly give you the paragraph number at a later date.

CHAIR—I think we can get it. But feel free to choose to on that. I refer to the Human Rights Committee for a moment. The second paragraph on page 3 of your submission states:

Although the HRC has never addressed the issue of transgender identity, their views in past cases (particularly Toonen) lead to the conclusion that they would see it as protected under the ICCPR.

What leads you to that view, and why do you talk about previous past cases when the issue of sexuality has only ever been addressed in one case before the Human Rights Committee?

Mr Morgan—The reason why I mentioned past cases is in reference to the broad interpretation which the Human Rights Committee has given to articles 2.1 and 26 of the convention in past cases. In past cases, for instance, they have said that whether you go to a private school or a public school would come under other status of those articles in the convention. In other words, they give a very broad interpretation of what is covered under article 2.1 and article 26.

If you are talking about whether somebody goes to a public school or a private school and whether that can be regarded as a status—there has been a decision saying, 'Yes, it can'—if those are to be regarded as statuses under those two articles, sexuality, as Toonen itself made clear, is also to be regarded as a status. Therefore, from that broad interpretation and the explicit inclusion of sexuality in Toonen, I am extrapolating to say that it is a very small step for the committee to regard transgender as also being protected. That is the basis for my conclusion.

CHAIR—On Tuesday the Attorney-General's Department advised the committee that parts of the bill would not be constitutional in their view. They referred to matters such as the provision of goods, services, facilities and superannuation. The vilification provisions were also mentioned, which they said were definitely not constitutional. Do you have any comments on that?

Mr Morgan—Firstly, I will address the international obligations. Once again, it is my submission that article 26 of the international covenant on civil and political rights would support discrimination legislation which covered goods, services, et cetera, and, further, would also support vilification laws. Article 26 says, explicitly—

CHAIR—You will be addressing the issue of constitutionality as well, won't you?

Mr Morgan—The issue of whether we have an international obligation then leads on to the question of whether it activates the external affairs power. I am saying that our international obligation under article 26 of the international covenant would support legislation dealing with goods and services and legislation dealing with vilification. Therefore, under the external affairs power, the Commonwealth would have power to enact such legislation.

I refer the committee to the words of article 26, which states that the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground. Given that article 26 says that, it would clearly

include discrimination in the areas of goods, service provision, et cetera. Therefore, under the external affairs power—I might hand over to Kris if she wants to add any comment—the legislation would be supported.

Ms Walker—I would agree with that. As soon as you can identify an international obligation, which I agree can be identified under article 26 of the ICCPR, the external affairs power will justify legislation, so it will justify legislation in the area of goods, services and superannuation.

There are, of course, some limitations on power—for example, Commonwealth legislation cannot discriminate against a state or be directed at a state in such a way as to prevent that state from continuing to function effectively as a state. That doctrine, which is really the only doctrine I can think of that could be invoked once the external affairs power is activated, would have very limited impact on this bill. Once the external affairs power is activated there is really nothing I can think of in the constitution that would suggest that legislation that is within power would for some other reason be invalid. It seems that it would clearly be within power because of the effect of article 26 of the ICCPR.

CHAIR—Would you be expecting or anticipating a high court challenge in the event of the bill being enacted?

Ms Walker—That is quite an interesting question. If a case was to go through the adjudication processes and then perhaps go to the Federal Court for enforcement, it would be possible, I suppose, for a defendant to seek to argue the constitutionality of the bill as a defence. It would be difficult to imagine some sort of abstract challenge being accepted by the High Court. We would actually have to wait for a case to occur.

It certainly cannot be ruled out but on the other hand that has never really been a reason for the Commonwealth not to enact legislation. The Tasmanian dams case is a classic example where of course there was a High Court challenge and the challenge was resolved in favour of the Commonwealth. I would anticipate that any challenge to this legislation would also be resolved in favour of the Commonwealth.

CHAIR—With the removal of the word 'heterosexual' in the definitions, it has been argued to us that the bill in its current form is actually positively discriminatory towards gay, lesbian and transgender people and anti-discriminatory to heterosexuals, or what is colloquially put forward as 'normal people'. If the committee were to accept your recommendation and the bill were to go through in that form, would that not lend credence to such claims that have been expressed to the committee already?

Ms Chapman—No, I do not think so in the sense that, if people were to actually look at who is suffering inequality, it is actually lesbians and gay men, not heterosexual people. So I do think people need to think about what anti-discrimination legislation is for.

It is actually to redress an inequality, and the inequality is fairly clear here. So I think people will say what they like about legislation but I do not think you can listen to other people's views in terms of framing legislation. I am not sure that really answers the question.

CHAIR—What we are doing is listening to other people's views all around Australia.

Ms Chapman—Yes, I suppose I mean that people can read into legislation what they like but I think the idea of anti-discrimination is to redress a wrong, and I think it is important that it is specific to that. Also, I do not think it is always appropriate to treat everybody the same, which is essentially what anti-discrimination is about, but the concept of direct discrimination is that everybody is treated the same. If there is inequality sometimes treating people the same just exaggerates it and makes it worse, increases the inequality.

CHAIR—Thank you.

Senator STOTT DESPOJA—I wanted to address the issue of exemptions. Ms Chapman, you referred to some of the exemptions as being ambiguous, and I certainly take your point about perhaps examining discrimination and anti-discrimination laws in this country. We know of cases, and I am sure many people would argue there have been cases where affirmative action laws or equal opportunity laws have been used against those very people they were designed to protect. So I am conscious of that.

Perhaps you could elaborate on what you meant by 'ambiguity'. Also, Mr Morgan, in your submission I note you argue quite strongly that the religious exemptions should be deleted. Could you elaborate on the reasons for that so I can get an idea of what you consider appropriate exemptions in the bill, if any?

Ms Chapman—Does your question just relate to the special measures and temporary exemptions?

Senator STOTT DESPOJA—Whatever you consider appropriate. I was not sure specifically what you were referring to. I thought you were ranging quite widely.

Ms Chapman—I think I was referring to special measures and temporary exemptions as not being sufficient in themselves to get over this problem of including heterosexuality, because there does seem to be an enormous amount of doubt, particularly in terms of what a special measure is and what it is not. There was certainly, I think, quite a lot of doubt expressed to the Senate inquiry into a Sex Discrimination Amendment Act. There were even concerns expressed by one of the equal opportunity commissioners that perhaps this is not appropriate because it actually sets up a scheme where, if there is a measure to bring about substantive equality—that is, equality in outcome—it is actually

worded as an exemption. That is an inadequate framework in which to address these sorts of issues. That was my concern about special measures.

My concern about temporary exemptions is really that, obviously, people need to have sufficient information, understanding and perhaps financial resources to seek and obtain a temporary exemption. I think there are some problems with that scheme as well.

In terms of other exemptions, such as working with children, religious beliefs and religious institutions, I think a lot of those are worded fairly ambiguously. They use words that have actually not been interpreted, so there is still some doubt as to how they would be interpreted.

The other effect of those exemptions, though, is to actually probably discourage people from lodging complaints, which then in effect would mean that the legislation is not actually an effective mechanism of redress. There does seem to be some evidence of that.

Mr Morgan—On the religious exemption, I think what we need to bear in mind is that discrimination is not something which just occurs in terms of one individual acting against another individual. Discrimination is systemic. In other words, there are certain groups within society that, within the structures and institutions of society, are regularly given a lesser status. In my opinion, discrimination law should not only attempt to redress the acts of individuals against other individuals but also attempt to address these issues of systemic discrimination.

Senator STOTT DESPOJA—Do you see these current exemptions as in some way perpetuating that systemic discrimination?

Mr Morgan—Yes, I do. I think it is clear that religious organisations are one of the primary areas where gay men, lesbians and transgendered people are discriminated against. If that sort of systemic discrimination is to be allowed to continue by granting exemptions to these bodies, which still hold a great deal of power in our society to define what is right and what is wrong, then that is only going to impact more in furthering the inequality of gay men and lesbians.

I wanted to make the further point: this is not a question about religious belief. Nobody is saying that the Commonwealth should legislate what religions can believe. It is only a question of the practices that they engage in and the way they make people suffer because of those practices. Religious belief can be what it likes, but when it comes to a question of how religious institutions and bodies are to treat individuals, there is no reason religion should not be subject to the laws of the land in the same way that everybody else is.

In that context, religious exemptions, in my opinion, should not exist at all. If they

do exist, they should be kept to the absolute minimum; for instance, only to do with exemptions for the clergy. At all costs, the sort of exemption that is contained in the Victorian legislation, which justifies discrimination for anybody on the basis of a religious belief, should be avoided at all costs. My reasons are to try and address systemic discrimination.

Ms Walker—I notice—and I am afraid I have not got my copy of the bill with me so I cannot remember the exact clause—there is a particular exemption granted in relation to religious schools. The question of an exemption for religious schools is particularly important. I will just see if I can find the provision. It is clause 10(4), which does permit discrimination in relation to:

... employment as a member of the staff of an educational institution that is conducted in accordance with the doctrines ... of a particular religion or creed ...

I will not quote any further. That kind of exemption, I think, goes beyond what Mr Morgan was discussing, which is the actual religious institution, the church itself, and extends into the area of education. I would submit that is really quite unacceptable and amounts, ultimately, to having a considerable negative impact on gay and lesbian students, in addition to the particular teacher who might be excluded from an educational institution.

Gay and lesbian adolescents in our society already have considerable difficulty coming to terms with their sexuality. Youth suicide is a considerable problem within the gay and lesbian community, and the absence of role models is already one significant problem. If teachers are to be excluded from schools on the basis of their gay or lesbian sexual preference, then students in those institutions are going to be not only deprived of role models but also sent an active message that their sexual preference is unacceptable and is something that could result in dismissal from employment. That makes the whole sexuality issue for adolescents even more difficult and, given that it already is a problem, that kind of exemption will exacerbate that problem.

Senator STOTT DESPOJA—Thank you for that response. Just another query I have in relation to a point Ms Chapman brought up regarding the definition. This is actually something that we have discussed a couple of times this morning. In fact, I asked Mr Spindler about his reasons for not perhaps being more explicit or specific in his definition of sexuality. He advised us that that was the legal advice—the advice of the clerks and those people who assisted in drafting the bill—that homosexuality in a legal sense certainly encompassed gays and lesbians. We also discussed the fact that, yes, there is not only a legal case but also a visibility argument. I accept the visibility rationale but I am just wondering from your legal perspective: do you not see the case that has been put forward by the clerks and the draftsman?

Ms Chapman—The advice that homosexuality includes lesbians?

Senator STOTT DESPOJA—Yes.

Ms Chapman—Yes, I am sure it does but if we are talking about legislation that is going to be used by lesbians then it is important to actually take into account the views of lesbians, which actually seems to be quite clear. The New South Wales board looked at this I think first in 1987 and then more recently in 1994 and did note those issues about terminology. So I think that they are very real issues.

If you look at the number of complaints lodged under the New South Wales act, which only includes the word 'homosexuality' and is therefore probably a fairly good indication of how lesbians perceive that word, in no year since it was enacted in New South Wales have lesbians lodged more than 35 per cent of the complaints. So I think that might well be a factor in that.

I take the point that legally homosexuality includes lesbians but I am not sure that that sort of distinction is very useful when you are talking about legislation which is aimed at providing an informal dispute resolution mechanism, something that can be initiated by people by themselves, perhaps with some help from a member of the commission or the appropriate body. But generally it is supposed to be an accessible piece of legislation.

Senator STOTT DESPOJA—I do not know if the committee has access to those figures, the number of complaints. Perhaps if there is some way that we could get those figures, I would find that of assistance.

Ms Chapman—They are certainly available from the New South Wales board.

Senator STOTT DESPOJA—Ms Walker, just in regard to your last comment about section 107, same-sex couples, again that was another issue that was raised this morning in Mr Spindler's submission. He pointed out—correct me if I am wrong—that he had had extensive consultations about the inclusion of that particular clause and it was something like three to one in favour of including that level of recognition. But your argument, as I understand it, is that you do not think it is a case of good with the bad: you do not think that that sets a precedent for changes, at least in other Commonwealth laws, that affect everything from Commonwealth superannuation right through? Is it not a start?

Ms Walker—It obviously would be a start but it does not affect very much. My point would also be in respect of the attitude of the gay and lesbian community: it is not something on which the gay and lesbian community is united in terms of relationship recognition. I would also suggest that certainly people I have spoken to who support the clause were often not aware of its limited scope. They thought that they were getting full de facto recognition from this clause and they are not. They are simply getting some benefits under superannuation, some removal of benefits under welfare legislation and perhaps some benefits under tax legislation. I cannot think of anything more than those three areas where this will alter Commonwealth legislative regimes of any significance.

My response I suppose then is twofold: there is not a consistent view within the

gay and lesbian community; and people who support it actually do want full de facto recognition and they are not getting it.

Senator STOTT DESPOJA—So you would prefer deletion as opposed to amendment or changes to that? I am not sure how wide ranging it can be but I really get the impression from Sid Spindler's second reading speech as well as from the evidence presented today that it is obviously an incredibly difficult area. There are divided responses even on the idea of how do you define a same-sex relationship anyway—all these issues. I am just wondering what is a preferred outcome.

Ms Walker—That is really quite a difficult question. I suppose my preferred outcome would be full equality for gay and lesbian couples, and that would include marriage. Quite frankly, I suspect that is not going to be very palatable to the Commonwealth parliament. Until the parliament is willing to accord gay men and lesbians full equality, I do not think that we should be offered something less than full equality, particularly where it will have a significant negative impact on a number of gays and lesbians.

Senator COONEY—This is an advance, isn't it?

Ms Walker—I do not think it is an advance, Senator, because it seems to me that what it offers is superannuation access to people who are already financially well off. It then takes away welfare benefits from those who are not well off and offers them nothing in return.

Senator COONEY—I will come back to that question. What I was going to suggest was that that perhaps was a problem with the social security legislation, the fact that benefits were dependent upon sexual relationships.

Ms Walker—I would entirely agree but, again, given that the current structure of social security is not likely to change, I do not really see why gay men and lesbians should be financially disadvantaged when they are not even offered full equality in return. It is not a question of taking the good with the bad.

CHAIR—Earlier in your presentation to us, you gave an option of the removal of section 107 or of making it applicable to all states.

Ms Walker—I think my preferred option at this point would be removal, but the alternative would be absolute full equality and that includes marriage.

CHAIR—Would it be constitutional if we went down that track?

Ms Walker—It would be constitutional. Again there is the discrimination question that Australia does have the power and, indeed, the obligation to protect people from

discrimination on the basis of their sexual preference. Section 51(29) will permit comprehensive anti-discrimination laws that are designed to achieve full equality for all people within Australian society—equality before the law being a key right guaranteed by the ICCPR.

In addition, there is the marriage power. I am aware that the Attorney-General's Department does not consider that the marriage power extends to permitting same-sex marriages. I would suggest that that is not necessarily the case. We do not really know how the High Court would interpret the marriage power but there is a very good argument that the marriage power would extend to the marriage of same-sex couples.

Senator COONEY—If there is constitutional power over marriage, which there is, why would it not enable you to say—

Ms Walker—You are asking me to argue against my own views. I believe the argument that is put is that marriage as at 1900 was the union between a man and a woman. It remains so and there is no power for the Commonwealth to go beyond that definition as at 1900. In response to that I point out Justice Dawson's approach to the interpretation of section 51 of the constitution, which is not the most radical approach to interpretation that one can find on the High Court. Justice Dawson distinguishes between the denotation and the connotation of a term. The denotation remains the same over time but the connotation may change according to changing circumstances.

In addition, it is clear that other members of the court have adopted a far more liberal approach to constitutional interpretation, seeing the document as a living tree, a blueprint for our society that does not necessarily leave us in the moral and social era of 1900 but that does permit change with time. My view is that the marriage power would permit the Commonwealth to legislate, but there are certainly those who disagree with that view.

Senator COONEY—Not just 607 but the bill as a whole. Can we give any comfort to Mr Spindler? Is this an advance?

Ms Walker—The rest of the bill is excellent. The relationship recognition thing can be dealt with quite separately. I also mentioned the exemptions in clause 10 that I have a problem with. But the principle of anti-discrimination law is extremely important. I commend Mr Spindler for introducing it into the Senate and the Democrats for supporting it. I certainly hope that I will be able to commend this committee for supporting it also.

Senator COONEY—On the constitutionality of the bill, in the present High Court how would that go? Would it be any different from the other one? When I say the other one I mean the more recent one.

Ms Walker—The Mason court, as it has been termed. It is most unlikely that the

current court would, for example, overturn the Tasmanian dams case. That case has been affirmed and applied in at least five cases since Tasmanian dams. I know that there was some suggestion that Tasmanian dams might be re-opened in the case concerning the industrial relations legislation last year in the High Court. That was not pressed even by the parties because it is thought that there is really no chance of the court resiling from its interpretation of the external affairs power. It is very well established.

Senator COONEY—What about discrimination on the grounds of age. Have you any thoughts on that?

Ms Walker—It is an important principle—

Senator COONEY—Is the constitution itself discriminatory when it makes people resign at the age of 70?

Ms Walker—Yes, it is in a sense, except that, of course, the constitution is the overriding blueprint for our governmental structure. So the constitution cannot be unconstitutional. It may be discriminatory. It was discriminatory against Aboriginal people, for example, for a long time, and international law can have no impact on the constitution if the constitution discriminates.

Senator COONEY—I am getting more and more interested in this issue of age.

Mr Morgan—Under the International Covenant on Civil and Political Rights, once again under article 2.1 and 26, I think that age would be a status which is covered by those articles and, therefore, activate the external affairs power, et cetera.

Senator ABETZ—You finally get some status.

CHAIR—Like you, I do not have all my papers here, but I can recall a High Court decision which stated that unless the international convention had been placed in Australian law, it really did not have a great deal of status at all. That was a decision of the High Court. I do not have it with me.

Ms Walker—I think you might be referring to Teoh's case where the High Court did affirm the principle that treaties have no legal effect in domestic law until they are implemented by legislation. That is precisely, really, what this legislation is intended to do, that is, to implement Australia's international obligations so that they become part of domestic law. Other than that, until the ICCPR is implemented, for example, we cannot actually address discrimination on the grounds of sexuality at a Commonwealth level; we have to wait for legislation. That is why this legislation is so important: it does implement Australia's international obligation.

CHAIR—Thank you for that explanation.

Senator COONEY—Did you see that article in the *Age* earlier this week where somebody was granted—

Ms Walker—Are you referring to the refugee status article?

Senator COONEY—Yes.

Ms Walker—Yes, I did.

Senator COONEY—What was that all about? Could you just explain that to us so that we have it on the record in a formal sort of way?

Ms Walker—It is not an unusual case actually. There has been a series of cases where men—on the whole, as far as I am aware, all have been gay men—have claimed refugee status on the basis that they have been persecuted in their home country because of their sexuality. The particular case that you are referring to involved a Polish man who had been arrested, harassed by police, never charged with anything, but nonetheless—

Senator COONEY—Was that in Poland?

Ms Walker—In Poland, that is right. He had been bashed up because of his sexual preference and he claimed that that constituted persecution sufficient to entitle him to claim refugee status.

Senator COONEY—So he had come from Poland to where, to Australia?

Ms Walker—That is right.

Senator COONEY—What as? Can you remember?

Ms Walker—I do not know the precise circumstances of his arrival in Australia. There have been, for example, two cases from China, a case from Iran and a case from Zimbabwe where that refugee status has been extended to gay men and Australia is not the only country. That is another aspect that leads to the conclusion that there is international concern about discrimination against gay men and lesbians.

Senator COONEY—Did they decide that he is a refugee just because of this?

Ms Walker—That is right, yes.

CHAIR—Who decided?

Senator COONEY—The High Court.

Ms Walker—No, it was the Refugee Review Tribunal.

Senator COONEY—But it went to the High Court, I thought.

Ms Walker—Not the case of sexual preference.

Senator COONEY—I got it wrong. So that was just the Refugee—

Ms Walker—Refugee Review Tribunal.

Senator COONEY—Is there any appeal, do you know? What happened?

Ms Walker—There could be an appeal. There obviously will not be an appeal by the Polish gay man concerned. It is possible that the department would appeal but, as I say, there have been at least another eight cases in Australia where that has been allowed. It follows very closely the reasoning of the Federal Court in a case called Morato's case and it is pretty unlikely that that decision would be overturned on legal grounds on appeal.

Senator COONEY—Has there been any Federal Court case or High Court case where refugee status has been given on the grounds of a person's treatment as a homosexual?

Ms Walker—No, not that I am aware of and I am pretty convinced that there are not any.

Senator COONEY—And what about overseas?

Ms Walker—Overseas there is the Canadian Supreme Court decision of Ward where the Supreme Court of Canada referred in obiter dicta to sexual preference as a basis for refugee status, and there are lower court decisions in Canada that have dealt with it. There is a West German case and a couple of Dutch court cases. So there are court cases in other jurisdictions.

Senator COONEY—Is it worth our while looking at those later if you gave us references?

Ms Walker—I certainly think they would be worthwhile in terms of demonstrating international concern about sexuality discrimination.

Senator COONEY—Can we give you a line at some stage?

Ms Walker—Certainly, I can do that.

CHAIR—Yesterday in Sydney we had a set of witnesses in front of us, one of

whom was a person of the cloth, a churchman. He said that he would rather have the bill if the exemptions from the church were deleted. If they had to remain in there, he would prefer that the bill was rejected. Today we have had contrary evidence, where a particular church group is arguing very strongly that there ought to be a much wider exemption granted to church organisations. So the committee has a dilemma to face in adjudicating and reaching its conclusions and recommendations for the parliament. Were you here, Mr Morgan, when the previous set of witnesses from the church organisation were speaking?

Mr Morgan—I did not hear the discussions of exemptions. No, I was not here.

CHAIR—Their conclusion in the finish was that, if there was a wider exemption granted, similar to what is contained in Victorian law, they too could live with the principles of the bill.

Mr Morgan—I am not surprised that that would be their submission. I am sorry; is there a question?

CHAIR—The question was how would you react to the views of the previous set of witnesses, but unfortunately you had left the room and it is an unfair question.

Mr Morgan—Generally I could repeat what I said earlier. I think the power of religious institutions and the way they engage in discrimination is something that needs to be addressed. In that context I think exemptions need to be kept to a minimum.

CHAIR—Mr Morgan, Ms Walker, Ms Chapman, thank you for your attendance here this afternoon and your assistance to the committee. We thank you in anticipation of what you have promised to forward on to us as well.

Luncheon adjournment

[1.36 p.m.]

KENNEDY, Dr Trudy, Director, Gender Dysphoria Clinic, Monash Medical Centre, Clayton Road, Clayton Victoria 3168

LANGLEY, Ms Jane Anna, Member, Transgender Law Reform Association, 12 John Street, Fitzroy, Victoria 3065

PETERS, Ms Julie Elizabeth, Convenor, Transgender Law Reform Association, 12 John Street, Fitzroy, Victoria 3065

CHAIR—I welcome Dr Trudy Kennedy, a representative of the Gender Dysphoria Clinic, and representatives of the Transgender Law Reform Association.

Senator ABETZ—Can I just ask out of ignorance what 'dysphoria' means?

Dr Kennedy—Discomfort.

CHAIR—I thank you for obliging the committee and appearing earlier than was scheduled for you. There is a particular reason for that which we do not need to dwell on, but we do appreciate your cooperation.

Dr Kennedy, I invite you to help the committee gain an understanding of the transgender change—the change from one gender to another, the processes that are gone through, particularly from your perspective as a medical practitioner.

Dr Kennedy—Transgenderism or transexualism, as it has always been called in the past, is the persistent desire of somebody to be the gender other than the biological gender that they were born in. We have run a clinic for people who have had problems with their gender identity since 1975, originally at the Queen Victoria Hospital and then at the Monash Medical Centre. We see a number of people with various degrees of dysphoria, discomfort, with their gender identity. Only a small proportion of these people are transsexual or transgender people. We help these people to undergo psychological assessment and eventual surgical reassignment so that they are able to live in the gender to which they wish to be reassigned.

Before we contemplate surgery, we try to do as much as we can from the point of view of psychological, psychiatric assessment, not because we see it as a psychiatric illness but in order to exclude any other psychiatric illness. We also ask for what we call a two-year real life test.

Senator ABETZ—I am sorry, what did you call it?

Dr Kennedy—A two-year real life test, in which somebody lives full-time in the

gender to which they wish to be reassigned and that they find themselves comfortable, happy and better adjusted in this gender. They are regularly supervised by all the members of the team during this time. They adapt and do whatever they need to do to make it easier for them to live in the gender to which they wish to be reassigned. So then the surgery is just the last step of a decision that has been made some time before.

CHAIR—A question was put to us earlier in the week about which we were not knowledgeable. In the event of a person going through a reassignment, is it possible to change back at a later time?

Dr Kennedy—At any time?

CHAIR—At a later time.

Dr Kennedy—During the two years—which is the minimum, it may be longer than that—in which we are expecting people to live in the gender to which they wish to be reassigned, at any time they may say, 'This is not appropriate for me and I wish to change.' They will have been having hormone therapy, they can stop the hormone therapy and they can go back to their original situation.

Senator ABETZ—How many do that?

Dr Kennedy—A lot of people do that. Quite a significant number of people do that. Following the surgery, you cannot go back again.

CHAIR—That was the question. Once the surgery has been done, that brings a finality to it and there is no going back after that; it is not reversible?

Dr Kennedy—No, it is not reversible. Would you like me to tell you what occurs in the surgery?

CHAIR—I think if it would help the committee's understanding, it would be beneficial, yes.

Dr Kennedy—Gender reassignment can go both ways—male to female or female to male. There are, in Australia, more male to female people who ask for the surgery and we have done a whole lot more people in this situation. In the male to female surgery, the testes and penis are removed and an artificial vagina is made. This is what I mean—it is irreversible and once that has happened, there is nothing you can do to reverse it.

Senator ABETZ—If you are switching from female to male, what artificial adjustments are made to the body then? Can they be made to a person who has switched from being male to female? Can those adjustments then be made to the reassigned female who may wish to become a male again, if that in fact occurs in practice?

Dr Kennedy—From female to male, we do a bilateral mastectomy to remove the breasts, a hysterectomy is done and the ovaries are also removed. Until now, it has not been possible to produce an artificial phallus but it has been done quite a lot in Europe. Our surgeons have been to Amsterdam to see how it is done and are now going to be doing this. They will produce an artificial phallus which will be functioning. It is quite a difficult operation, taking four or five operations to do. I suppose, in theory, it would be possible to reverse the outward appearance, but you could not really reverse it because you cannot put back the gonads, the ovaries or the testes once they have been removed. Also, it would be such a lot of surgery, I do not think anyone would contemplate embarking on such an activity.

Senator ABETZ—Why is there the two-year period of—what did you call it—real life?

Dr Kennedy—Real life.

Senator ABETZ—Prior to surgery?

Dr Kennedy—We do not actually think the surgery is the most significant aspect of it. The aspect that is most significant is one's ability to adjust successfully in the life one wishes to lead. This is what that two years is about. It is about becoming comfortable, stable, established in some sort of community with a social support network, hopefully with a job and with acceptance from one's family and one's friends. For example, if one had been a man and one is a woman in everything except for just the anatomical thing, so that one is indistinguishable apart from this one anatomical feature, then, to do the surgery, it is just what you might call the icing on the cake. You must have a firm foundation, otherwise there is no point. It is extremely destructive to try to do surgery on people who have not been assessed and have not had that period of adjustment. That has been done in various places like Cairo and Casablanca. It usually does not end up very well.

Senator ABETZ—Can you tell us how many people have been through your clinic?

Dr Kennedy—You mean how many people have been seen initially or how many people have come to surgery?

Senator ABETZ—That is a good question. How many people have embarked upon this two-year period, have started out saying, 'Yes, we'll go through this two-year period in the lead-up to the operation'? How many people have you dealt with who have embarked upon that and then, out of that number, how many have said, let us say six months into it, 'No, this really isn't for me and I want to get out'?

Dr Kennedy—I could not tell you that figure. A great many people come to the clinic. We only operate on about 10 per cent of the people who come to the clinic in the

long run. But people come not because they are necessarily transsexual but because they are unsure of whether they are or whether they are not. They are therefore able to discuss the issues and have support in other areas as well. Out of the X number of people who come, about 15 per cent will embark on the two years and about 10 per cent will complete the two years. We have done over 200 operations since 1975.

Senator ABETZ—So one-third that embark upon the two years would drop out?

Dr Kennedy—Yes.

Senator ABETZ—At what stage do they drop out? Is it six months, 12 months or 18 months?

Dr Kennedy—It is usually within the first year.

Senator ABETZ—There is one matter that has been exercising my mind. When should you, through legislation or whatever, start saying that somebody is a female? When do you say that they have made that switch, taking a male example? Is it the very next day that they decide or should you require a certificate of some sort? Should you require that they have an operation? For example, I understand that the Australian defence forces only deal with transgender people.

CHAIR—I am going to let the question go. I was trying to get their medical questions on the record. It is a more general thing. The question has been asked, but I think for the moment, if we stick to the medical side of things, it would be better.

Dr Kennedy—That is actually something that did exercise our minds for some time because with regard to hospital statistics, people had to be classified as male or female one way or another for the hospital's record system. When people change their Medicare card to their new identity, that is when we categorise them as having changed their gender.

Senator ABETZ—Are you able to tell us—possibly we should ask the health department—how people get to change their Medicare card?

Dr Kennedy—They just go along and do it. They go along and say, 'I don't want to be called Michael Smith now; I want to be called—'

Senator ABETZ—Let us say, 'Michelle Smith.'

Dr Kennedy—Yes, or Francis Adams.

Senator ABETZ—And Medicare just change the card on that basis?

Dr Kennedy—I think that is right, isn't it?

Ms Peters—Yes. They change the card, but they do not actually change gender on the database.

Ms Langley—They will change it on production of a change of name certificate. In various states, that can be obtained in different ways. They will actually change the gender designation if you have a letter from a psychiatrist or some evidence that you have sought some medical treatment to change your gender.

CHAIR—Dr Kennedy, I was surprised to hear you say that you did not see the operation as being the most important part. Previous to you saying that, I would have thought that that was by far and away the most important part.

Dr Kennedy—No.

CHAIR—Please develop. You are all welcome to join if you like.

Ms Peters—The big change is the cultural change. How many people ever see you naked when you are walking down the street, when you are catching a tram or going to the movies? It is that cultural relationship and having a job. Your day-to-day existence is far more important. That is the big change. The big change is when you decide to start living as a woman. I agree that the operation is totally the icing on the cake. For some people, I think it is important. But for most transgenders, that is the minor aspect. It is the cultural way of relating to everybody they meet every day.

Ms Langley—I think it should also be noted that there are a significant number of transsexuals who may well drop out of the program because they decide that changing over culturally is sufficient for them. That enables them to conduct their lives the way they wish to and they have no desire for any further surgery for whatever reason. There may be religious reasons or there may be issues concerning the fact that they do not want to tamper with an otherwise healthy body. It could be for a number of reasons. There are indeed a number of transsexuals of our acquaintance who have sought surgery, simply because it was required, for instance, to get a passport issued with a female gender designation. They have done that simply because they wanted to work overseas, for instance, and they wanted to do so without embarrassment.

CHAIR—You mention 200 operations in 20 years. It is an average of only 10 per year. Is that at your clinic or is that a Victoria-wide figure? Do you know what the national figures are?

Dr Kennedy—Apart from Sydney, where there is a surgeon who does the surgery, there is not really an established clinic. We do all the surgery, more or less, for Australia. It is the only clinic. There are a lot of people in New South Wales who do achieve

surgery. They do see a couple of psychiatrists. They do not have the same sort of assessment program that we have and they do not have a designated clinic as such. South Australia, Queensland and Western Australia all work very closely with us, as does Tasmania. During most of those 20 years, we have been the only state with surgeons operating in this field. South Australia had someone for a very short time. New South Wales has someone who does it all in private, and that is all.

Senator ABETZ—Is your doctorate a medical doctorate?

Dr Kennedy—Yes, I am a doctor of medicine. I am a psychiatrist.

Senator ABETZ—A doctor of medicine, a psychiatrist and based at Monash University?

Dr Kennedy—Yes, at Monash Medical Centre. This clinic was originally set up by a Professor Walters, who was a professor of obstetrics and gynaecology.

CHAIR—I will proceed to ask Ms Peters and Ms Langley to give an opening statement, then the committee can direct questions to all three. Thank you for your cooperation.

Ms Langley—Just to introduce myself, I am a post-operative transsexual. I have been through Dr Kennedy's program at the Monash Gender Dysphoria Clinic. Julie Peters and I made a submission to the committee because we, particularly myself, have experienced discrimination in the work force based on our transgendered status. We feel that there needs to be some legal protection for people in our situation and some form of redress should we experience this sort of situation.

I have experienced a number of episodes of discrimination, particularly at the time I was undergoing the real life test. It is a time when most transgendered people are particularly vulnerable. I had been fortunate to be born in South Australia and I could change my birth certificate, but a number of transsexuals cannot do that. You have this minimum two-year period where all of your documentation says, in my case, that you are male, whereas you are presenting to the world as female and you have no documentation to back that up.

If you apply for a job, as I did on a number of occasions, I was very smartly shown the door once my situation was known. In other cases where I got a job—there was one particular job as a receptionist for a finance company soon after I 'changed over', so to speak—I was considered the golden girl for the first week I was there. Then at the end of the week, as part of their normal procedures for new staff, I was asked to present my birth certificate. When I did, I was no longer the golden girl but a problem to be dealt with as quickly as possible. Soon after, I was put in a very impossible situation from which the only real way out was to resign.

I also had been working freelance before and had an outstanding invoice with a particular group that I had worked for. The matter was going to court and I was trying to recover my money and I was advised by my solicitor that, if it were to go to court, I would most likely be looked on very dimly because of my lifestyle and would not really have a chance of recovering my pay. I guess that is really all I have to say there.

Ms Peters—There are main points in addition to our submission. I worked for the one organisation for quite a number of years and when I changed I still stayed with that organisation. Management were very good, but I found that I was daily vilified particularly by a lot of males. I was vilified by the minute for the first three months particularly and I gave you some examples there in my submission of the type of vilification I received on a daily basis. It was very good for me, I suppose. It strengthened my resolve and I came out a very strong person. But I think the majority of transgendered cannot deal with that sort of pressure on a day by day basis, where they are very highly vilified minute by minute.

There are a couple of points I would like to make in addition to our submission. One is that part of what this bill will do for transgendered is that it will get people out of welfare. It just happens so many times, time and time again. People get a job, they have found out that they are transgendered and then they are asked to leave or they are forced to leave because of the vilification or discrimination. I actually like the definition of 'transgender' in the bill, because we are talking about discrimination here. We are not talking about other areas of legislation that may be appropriate for transgendered at a later time. But I believe that the definition is good because it means that somebody who is even in the slightest way transgendered, or seen or believed to be transgendered, even if that person is unaware of it, it would be illegal to discriminate against them on those grounds.

I believe that by enacting that legislation people can actually get and keep jobs because we are losing so many jobs so often. It is one way of keeping people in employment. I submitted this, too. This is from the *Woman's Day*. I wanted to submit that because it showed the consequences of the present legislation. Somebody like me can marry a woman, any woman who is single. I am allowed to legally marry them. I think that is not exactly the consequences that the Australian people necessarily would like of the current legislation. I submitted this because it showed that it does actually happen and to show that *Woman's Day* thinks it is quite funny and quite a story.

The main areas which are issues for transgendered, and the most important one—which is the one being covered by this bill—is in fact protection from discrimination against vilification and equal opportunity. I do not think the legal identity thing really comes under the compass of this act, but I feel it is important to put it in, because it is an important issue for transgendered. That is one of the means by which we are discriminated against, because as in Jane's case, as soon as she was found out to be transgendered, she was forced into a situation where she was sacked.

One of the things I remember from that period was that the women who were born

women and who worked there sometimes wore slacks and sometimes wore skirts. The management insisted that Jane always wear skirts; she was not allowed to wear slacks. Special rules became important for her. She was not able to behave in a normal sort of way. That is my submission really.

CHAIR—Thank you very much.

Dr Kennedy—Could I emphasise that being transgendered is not a matter of choice. In our clinic all of us have a strong feeling that this is probably a genetic abnormality. The fact is that we have not been able to find out what genetic abnormality it is and we have tried a few things with various gene probes, none of which has come to anything. Nevertheless, people seem to be more or less born with the need to be transgendered. It is not something that people can choose—'I think I will be a man today' or 'I think I will be a woman tomorrow'—that sort of thing. It is not an issue in which one can say, 'I can do this or I can't do that.' The urge to change one's gender has to be extremely strong, otherwise no-one would do it. It is very, very difficult and it causes a lot of chaos throughout the entire family. Really and truly, there has to be a massive incentive otherwise no-one in their right minds would do it.

CHAIR—The document that Ms Peters was quoting from is an extract from *Woman's Day* magazine dated 3 July 1995. The article is entitled, 'Wedding with two brides and one is a man'. That is for the record.

Dr Kennedy—May I make a note of that? I do not think either of those people are transgendered people.

CHAIR—Could you develop that?

Dr Kennedy—They have both been brief attenders at our clinic and the consensus was that neither of them were appropriate for our two-year program.

CHAIR—The article states that she had sex change surgery seven years ago.

Dr Kennedy—Yes, that may well be so, but not here she has not. She may have gone to Sydney, as I say. There is surgery available there without having the assessment that we expect here.

Senator STOTT DESPOJA—If someone does not fulfil the assessment or the requirements of one particular state or clinic, they can actually go to a different state—is that what you are saying—and they can fulfil criteria there?

Dr Kennedy—They cannot go to any other states, because we all work together and we have a sort of interchange. They can go to Sydney if they have the money. If they can afford to pay for it, then they can go to Sydney. They just need to get two

psychiatrists from wherever to say, 'Yes', and they can go ahead with it. I do not necessarily know that this is so. People do say, 'I have had the surgery' when they have not. I do not think that means anything if one says one has.

Senator ABETZ—When should the community at large or an employer or whatever be required to take into account the person's desired change of gender? Your case, or the examples that you gave us, is somewhat different to a situation where, let's say, you roll up as a male, apply as a male for a job, and then during the life of your employment you say to the supervisor or boss, 'Look, Monday morning instead of coming along as Paul I am going to come along as Pauline.' That may require certain changes or alterations in the workplace, et cetera, if there had not been, up until that point, one would assume any awareness of that by the supervisor or the employer. Should there be a period of adjustment? Under the legislation it is basically if the person adopts the lifestyle—

Ms Langley—I think that is the most significant change. I really believe that is the only change that is of any consequence to anybody else. I guess to put it in more absolute terms, I do not think there are very many jobs, particularly in more enlightened times, that really require you to be a specific gender for any particular role.

Senator ABETZ—Whilst I agree with that, the provision of facilities, potential change of letterhead signs or whatever may all be an expense. The other aspect, I suppose, is what about in sporting situations, if somebody were to say, 'As of today I'm a female. I want to compete in female tennis, win the \$200,000 prize', and then say, 'Well, I've had my six months stint of this. I've decided to become a male again.' We have had submissions that that would discriminate in certain sports. I think Sid Spindler used the example of snooker this morning. The chances are it would not apply to snooker, but it might apply to tennis where brute force in serving the ball and things like that can be an important determinant in the outcome of the match.

Ms Langley—Indeed, I think that is true. As Dr Kennedy has pointed out, this is not something that one undertakes lightly.

Senator ABETZ—In the genuine situation, I would accept that. I do not know how realistic this is, but seeing a pot of gold for a sporting prize may determine that it is worth while doing it simply for the prize. How can sporting organisations be protected against that potential fraud without running into the problem of being accused of discriminating against the genuine case?

Ms Peters—I think that particular instance is actually just fraud and can be dealt with as fraud rather than as an exemption to this particular bill. In the case of the genuine transsexual, for a start from male to female, I have taken a lot of female hormones. That gives the total anti-effect to steroids. My muscular strength has been amazingly reduced by taking female hormones. That does not happen in one day, but it happens over a period of a number of years. So it is effectively taking anti-steroids when you are changing from

male to female. Changing from female to male you are taking male hormones, which increases your muscular strength. But that is changing from female to male, which is theoretically going into a more difficult situation rather than an easier situation.

There is another aspect, too. If someone is genuinely transgendered, you are not really brought up as a male. When you are growing up you are not brought up in the same culture as most males. Even though you might be surrounded by it, you do not react to it in the same way. For example, when playing football you have not been imbued with that male culture of win, win, win for the football's sake. So there is a cultural aspect and there is a hormonal aspect. I really don't think the number of people wanting to do that from a fraud point of view would be very many, particularly with all the cultural disadvantages that go with being transgendered. I think that could easily be dealt with as fraud.

Senator ELLISON—Maybe the transgender process should be reversible or allowed to be reversible so that you change from man to woman and then you can decide to go back to being a man again.

Ms Peters—The operation itself cannot be—

Senator ABETZ—You see, under this legislation you do not need an operation. All you have to do is adopt the lifestyle. You don't have to take hormones or anything.

Ms Peters—If somebody has changed over for a day or so and they still have that male muscular strength, it should be based on male muscular strength, not based on being transgendered. If that does give an unfair advantage in a sporting event it should be based on the reality of the situation. The thing is most transgendered are not interested in sport at all.

Senator ABETZ—So we were told.

CHAIR—I want to get a definition of transgender. The doctor's comment in regard to this article somewhat confused me on the definition. I understood the definition to be that persons can be transgendered even without medical intervention, but if there is a medical intervention, as has been illustrated in this—and I do not want to talk about the individuals who are mentioned in the article—doesn't that bring a certainty to the definition?

Dr Kennedy—There are a variety of psychiatric conditions, which include dysphoria, where people feel that certain parts of their body are incorrect and they have the delusional thinking which allows them to be perfectly convinced, in the face of all evidence to the contrary about this, this does not make someone transgendered. This is why it seems to me that your concern about people in sporting engagements could easily be alleviated by saying that if someone were being assessed by a clinic that has some

specialist knowledge of this they would be able to give you some assessment as to whether this is someone who is transgendered or who is not before they embark on this pot of gold in the tennis.

Ms Peters—An objection I have to using transsexual, that is the post-operative definition, is that it puts a huge pressure on certain people who are quite happy to live culturally as women, for example, to have the operation and that might not be the best thing for them, psychologically or culturally. I do know of at least one person who had the operation because they wanted their papers changed, not because they particularly wanted the operation. I think that transgendered people—again we are only talking about protection from discrimination here, we are not talking about any of these other things—even in the first day of changing over, should not be discriminated against, should not be vilified. This is about being a reasonable, civil society.

CHAIR—Could you now address the question Senator Ellison asked about changing over and changing back?

Ms Peters—I think they should be able to change back, obviously before the operation. Sometimes it is really hard to know. You have these dreams about where you believe is going to be the best place for you to be. You do not actually know that until you start this real life test. That is why the real life test is so important. It is about making sure this is right for you rather than being something you imagine will be right for you. You actually do find out.

Ms Langley—I think there is a common assumption, based on the absence of any examples to the contrary, that one's gender or sex is cast in stone and unchangeable over time. I think the existence and the growing awareness of transgendered people is challenging that assumption. I do not really see any reason why someone should be, for instance, expected to be male all their life or female all their life. Most people will be one thing or the other all their life. I do not necessarily see any reason why they should not change perhaps at will, if the mood takes them.

Senator ELLISON—I was looking at the issue of accepting the one change because a person was born a male in a woman's body, if that is the case, and their making the change to what they feel their true sex is. I am dealing with the situation of them changing back as a choice, not as a biological imperative.

Ms Langley—I think that is something that would be quite rare. There may be people who think changing over will be of benefit to them and for one reason or another they realise or they choose that that is not appropriate for them. It might be that it was not what they really wanted after all and after a time of exploration and trying it they discover that it was not. Or it may be that they cannot get acceptance from their family and that may be an issue for them.

Ms Peters—They might also find that they are discriminated against so much that they just cannot cope with that pressure so that they actually change back for that reason.

Ms Langley—For one reason or other they cannot make their life work in that role.

Senator ELLISON—What we are looking at is the legal rights that are afforded to people, and marriage is mentioned in your paper. I am not looking at the question of whether you can physically do it or whether by sanction you are prohibited from doing it. I am looking at whether the legal rights afforded to you travel with your sexual identity. That is, the law accepts that if you are a man born in a woman's body you can change over and you are afforded the legal rights as such. But if you change back again, do you believe the legal rights should then follow you back to your former sex? There is relevance here because I am looking at the marriage power under the constitution, which is given to the Commonwealth. That is one of the problems stated by the Attorney-General's department. I am looking at the legal aspect. Do you have any comment on that?

Ms Peters—I think most transgenders would believe that they should only be able to marry once they have had the operation.

Ms Langley—I would not presume to speak for other people in that regard. My personal preference—I think this goes way beyond the legislation that is being looked at—would be for the removal of gender designation from any kind of document or any kind of identification. I would rather see birth certificates issued without it because I think it becomes an instrument of discrimination.

It is much like the example in the United States of institutionalised discrimination against people of different races. Race was recorded on birth certificates and that was found to be unconstitutional. We have a society which is at least officially against the notion of discrimination on the grounds of sex and we still record sex in almost every possible place. I think we should cease doing that. I think that would solve a lot of other issues for the gay and lesbian community—for instance surrounding marriage, if marriage was just a union with two people regardless of their genders.

Senator ELLISON—Do you believe that the power to marry legally should be allowed only after an operation?

Ms Langley—No, I do not. I believe any two people of any gender should be allowed to marry legally.

Senator ELLISON—Flowing from that, they would have all the remedies of the Family Law Act available to them?

Ms Langley—Yes.

Senator STOTT DESPOJA—Thank you for outlining your thoughts on the definition. I gauge that you are pretty supportive of the current wording of the definition of 'transgender'.

Ms Langley—Very.

Senator STOTT DESPOJA—In one of the written submissions someone suggested that the issue of transsexuals and transgender identities should be separate from the issue of discrimination on the basis of sexuality. I asked Sid that question this morning and he said that, basically, he saw no reason to separate the two and that it would only necessitate two bills. Do you think it is appropriate that the parameters of discrimination are dealt with in the same bill?

Ms Langley—I am quite happy that they are dealt with in the same bill. It is a very difficult area and it seems that many people have differing opinions on whether transgender or transsexuality is a form of sexuality. I am undecided about that, but I certainly have no personal or moral objections to it being included under the same roof, so to speak.

Ms Peters—I see it simply as a discrimination bill. It deals with discrimination against different groups so why should they not be included in the one bill? Other discrimination bills often have seven or eight grounds for discrimination listed, so why should this one not have a couple?

Senator STOTT DESPOJA—Are there any changes or suggestions that you would make about the bill? Are there any deficiencies that you perceive? One submission suggests that there is a need for protection of employment, which should be in the content of division 1 in part 2. Do you believe that this bill in its current form provides protection for transgender people in employment?

Ms Langley—Yes, I think it does.

Senator STOTT DESPOJA—So you are satisfied?

Ms Peters—Yes, I am.

Senator STOTT DESPOJA—You were here earlier for some of the discussion with the law lecturers about section 107—Senator Ellison got onto the element of defining couples and marriage. I am just curious about your thoughts on section 107 regarding defining same-sex couples. Would you care to comment on that?

Ms Langley—I think I already have.

Senator STOTT DESPOJA—Yes, but in terms of whether or not that section

should be contained in the bill. It seemed rather a controversial issue earlier about whether it was simply a case of taking the bad with the good or getting enough benefits in that there was some degree or some limited recognition of same-sex couples.

Ms Peters—I can see the bad and the good. I feel, personally, a dilemma about that. As we have stated in our submission, I agree with Jane that the way to deal with relationships is to take gender off all identification. If it is illegal to discriminate on the grounds of gender, why is it on all identification? It has been argued that it helps identify somebody, but really it changes from one in nine million to one in 18 million by removing it. I believe that, if identification is so important, we should all have genetic fingerprints on our ID, but not gender.

Senator STOTT DESPOJA—Thank you.

Senator ELLISON—Just on that point. Instead of wiping out all references to sex on the birth certificate, would it help you if the birth certificate were altered to male or female at the point when there is a legal change in the gender? It could be like when you change your name on the entry of names—and some states are different to others—by going to the register. Then legally you have changed your name, so the name is then changed. There may be a number of reasons for the good of the community why sex is recorded on the birth certificate, but couldn't that assist your case?

Ms Peters—As Dr Kennedy pointed out, that would help 10 per cent of the people who come to her clinic. The other 90 per cent would not be helped because they would not get to that stage, with the law as it is in other states, where you would have to have the operation to have your gender changed on birth certificates. I believe it is the same in New South Wales, Australian Capital Territory and Western Australia, but it does not exist in Victoria. If it helps 10 per cent, I think that is good. The thing I am worried about is that it does put pressure on people to become part of that 10 per cent who would not otherwise have that pressure on them. It encourages people to have the operation for the legal recognition.

A birth certificate is very important in employment, and this is one of the things that we see as the major issues. It is about getting your transgender issues over and done with, getting on with your life and going to get a job. So many transgendered cannot get a job because of their birth certificate. My birth certificate says male; my passport says female. I would show my passport if I went for a job, but it really makes it very difficult to get a job.

Ms Langley—There is a bit of a trap that can happen there. It is not so much in Australia, where there is some limited public funding of surgery under the present circumstances, but it is where people who are in that real life test or in the transition find it very difficult to get a job because their papers are not in order, and in order to get their papers fixed up they need to have the surgery but they cannot afford the surgery because

they cannot get a job. So there is a trap that happens there which can start out being the difficulty with the paperwork.

What happens to these people's self-esteem when they have difficulty getting employment in the first place is that it lowers their expectations of being able to get work. They eventually stop looking. There is a cycle for a number of transgendered people where one thing goes wrong and they just go downhill from there and they get trapped in poverty.

CHAIR—I have a couple of questions about birth certificates. You mentioned it is possible to change in the ACT and Western Australia as well as South Australia and New South Wales.

Dr Kennedy—It has only just changed. It has been like that in South Australia for a long time. The South Australian birth certificate is only valid in South Australia. You cannot actually get married using your South Australian birth certificate change in another state. You have to get married in South Australia.

Ms Peters—I think they cannot get married in South Australia either.

Dr Kennedy—You can; lots of people have done, but it is only valid there. The thing about the passport is that your passport says female, but when they turn it out on the computer it says male. It does not seem quite fair that, after having gone to all the trouble of living a different sort of lifestyle, as soon as you go overseas all your details are there to see. There is no privacy about this.

CHAIR—On the issue of the passport, we will be asking the Department of Foreign Affairs and Trade to appear before the committee to give us clarification on this matter. Can you explain the difficulty again?

Dr Kennedy—Yes. After you have had the surgery, you can get a letter from our clinic signed by me saying that you have had the surgery therefore you are to be considered, for all intents and purposes, as the gender to which you have been reassigned. If you take this along to the passport office, you can get a passport which will say female on it.

However, as you go through the passport control at the airport and they tap it all into the computer and your details come up, the details that you were previously a male, for example, will come up on that. Therefore, you are once again in the situation where the fact that you are transgendered is exposed and can be used, I suppose, by someone unscrupulous. At least it is not your business any more; it is somebody else's.

CHAIR—We will follow that through with the department. Doctor, are you concerned that medicine has moved in front of the law in matters such as this?

Dr Kennedy—I think medicine has moved in front of the law, yes. Medical science recognises there are transgender problems and gender dysphoria problems and has worked out a means to deal with them. They may not be ideal, but at least there is something. The law does not seem to recognise it, and this seems to be the problem. Apparently, there is no real legal recognition of people in the job situation—when they wish to make something of it—who are discriminated against because of their transgender situation. This seems to me to make their lives impossible. You do not have any standing if you do not have any legal recognition, do you?

Ms Langley—In these situations, if you are transsexual in the workplace, you need to be very strong and very persistent over and above what you normally would need to get anywhere.

CHAIR—You have reminded me of another question. Which terminology is favoured—transsexual or transgendered?

Ms Langley—There is a slightly different meaning to them. A transsexual generally refers to someone who seeks or would have a surgical reassignment procedure. Transgender is a much broader term. It seems to be one that has come from the community of transpeople themselves rather than being imposed from the medical community. It is a much broader term which would cover transsexuals, transvestites and virtually anybody who steps outside the bounds of gender, though I believe there is a definition of transgender in the bill.

Dr Kennedy—The term 'transsexual' was coined by Harry Benjamin when he first wrote a book on it called *The Transsexual Phenomena* in the 1950s. Transsexualism is, more or less, the recognised medical term. Transgender is something that has come from the community itself. If I may say so, I do not actually think that transvestism fits into that at all.

CHAIR—I will come in and break it up. I have found it particularly useful to have you here this afternoon to help me get a better understanding of the matter that is before the committee. I still feel somewhat lacking. Dr Kennedy, I am wondering if there is anything further that you have in writing that might be able to assist the committee in examining the reference that we have in front of us.

Dr Kennedy—When Professor Walters was still here, we wrote a clinic book called *Transsexualism and Gender Reassignment*. It is a little book published by the Oxford University Press. Nothing much has changed since then. There are differences in surgical techniques, but otherwise nothing much has changed. It is very informative and very easy to read.

CHAIR—Is it readily available?

Dr Kennedy—I am not quite sure that it is readily available. It is in the libraries. It is in all the medical libraries.

CHAIR—If we have difficulty getting that, we might come back to you and get a reference.

Dr Kennedy—I do have a copy, but since it is my only copy I will only lend it to you with guarantees.

CHAIR—We will try the Parliamentary Library first and foremost. It has a broader access than just a library itself. But, if we need to, we might need the reference number.

Dr Kennedy—I would think it would be in the state library. If it isn't, I know that it is in the Monash Medical Centre library, unless someone has pinched it.

Senator ELLISON—Looking at your submission and this area, which is somewhat complex, there seems to be two discrete parts to the problem. Would you agree that it could be looked at in two parts? The first is discrimination and how people of transgender are treated in the community. The other is the legal rights afforded to them and the legal obligations imposed on them which in turn affect other people—for instance, whether a man who changes to a woman can then be legally entitled to go into a female toilet or be legally married. Would you agree that this issue could be divided into those two parts?

Ms Peters—Yes, that sounds fair to me. As I said earlier, I think this is a bill about discrimination. I think it is appropriate that this bill cover just the discrimination component of it and that the other aspects of it probably need a broader bill. I take up the example of toilets. I do not know whether you have male and female toilets in your house, but I do not think many people do.

Senator ELLISON—I am talking about public.

Ms Peters—This was a consideration for a few people at work because I actually did work there as a male and then I changed to female. There were one or two people who were a little bit stressed. I have to say that they were all men; they were not women. The agreement we worked out was that there were two or three toilets I would not use and the people who were worried would go to those ones. As it turned out, nobody presented as being worried at all. It is a total non-issue. One of our managers did a survey of women around the building. Almost invariably they said, 'Why worry about that? They are all private cubicles.' It was not an issue to the women where I worked.

Senator STOTT DESPOJA—One of the submissions actually recommends extending the legal acceptance provisions in section 24 and 25 to official documents: formalisation of rights of access to appropriate toilets and the behaviour of government and semi-government employees and instrumentalities, including members of the police

force—actually specifying that this has to be taken into account regarding those particular bodies. I do not know whether it is worth specifying or whether the wording is such that it covers those things anyway.

Ms Peters—I actually do think that is a good idea, because it is actually often through the documentation that you are discriminated against. To that extent, that would be a very good idea. We did not really consider that earlier.

CHAIR—Ms Langley and Ms Peters, thank you very much for your attendance here this afternoon and for the assistance you have given the committee.

[2.40 p.m.]

CONNOR, Ms Louise Mary, Industrial Officer, Australian Council of Trade Unions, 393 Swanston Street, Melbourne, Victoria

KEENAN, Mr Tony, Affiliate Representative, Australian Council of Trade Unions, 393 Swanston Street, Melbourne, Victoria

RYAN, Ms Caroline, Affiliate Representative, Australian Council of Trade Unions, 393 Swanston Street, Melbourne, Victoria

CHAIR—I call the committee to order and welcome representatives of the ACTU. The committee has received the submission from the ACTU. It has been formally received and approved for publication as No. 161. It has been released for public scrutiny and now forms part of the public debate on the issue that is before the committee.

I invite you to give an overview of the content of this submission and then I will invite members of the committee to address questions to you. We do have a time problem—just be aware of that—because we have a number of other witnesses coming behind you.

Ms Connor—The Australian Council of Trade Unions is the peak council of Australia's union movement. It comprises around 55 registered organisations and about 2.5 million members. The ACTU's 1995 congress supported a number of principles regarding equal employment opportunity. Specifically, congress endorsed the principle that:

... all workers are entitled to equal employment opportunity and in particular there should be no discrimination in wages and employment on the basis of sex, race, religion, disability, sexual preference, pregnancy, marital status or family responsibilities.

We appear before you today in support of these principles.

The ACTU's submission focuses on discrimination on the grounds of sexuality in employment and the related matter of superannuation. It outlines aspects of discrimination occurring in employment and superannuation, and makes recommendations about how to proceed. Concerning term of reference one of this inquiry, the ACTU recommends:

The ACTU supports the Commonwealth's enactment of national discrimination legislation making discrimination unlawful on the grounds of sexuality and transgender status. The Human Rights and Equal Opportunity Act 1986 does not make discrimination on the grounds of 'sexual preference' unlawful; the Sex Discrimination Act 1984 does not attempt to specifically make discrimination on the grounds of 'homosexuality' or 'sexual preference' unlawful.

The Sexuality Discrimination Act will ensure that such discrimination is unlawful and ensure Australia meets its international obligations.

Concerning term of reference two of this inquiry, the ACTU recommends the following:

The ACTU specifically supports Clause 10(5) of the Sexuality Discrimination Bill which makes it unlawful for superannuation trustees who exercise a discretion about payment of a superannuation benefit to/or for a member of a superannuation fund, to discriminate on the ground of sexuality or transgender identity.

The ACTU supports section 29 of the Sexuality Discrimination Bill which sets a sunset period of six months on exemptions based on discriminatory acts done under statutory authority . . .

... The ACTU recommends that superannuation schemes set up under government legislation (Commonwealth & State) should also be amended to ensure that lesbians and gay men can provide benefits to their same sex partners and children in the same way that heterosexual workers can provide for their families.

Term of reference 3 deals with the extent to which there should be consistency across states and federally. We would like to draw your attention specifically to page 19 of our submission and make some comments here before you on the effect of the Workplace Reform Bill which is now before the Senate.

Subclauses 152(2) and 152(3) of the proposed Workplace Reform Bill establish a supremacy of state employment agreements over federal awards in certain circumstances. It is our contention that, if those two clauses should be presented within that bill, this reduces the protections that are currently awarded by the federal Industrial Relations Act and, indeed, by the proposed Workplace Reform Bill for gay, lesbian and transgender employees, particularly in the states of Tasmania and Western Australia whose state laws do not prohibit discrimination on the basis of sexual orientation. So we would like to bring to your attention the relationship between the bill that we are discussing here before you today and another proposed bill.

In relation to term of reference 3, we make the following recommendations:

The ACTU believes that Commonwealth legislation making discrimination unlawful on the grounds of sexuality and transgender status is necessary to provide protection for all Australian workers. This protection is not currently provided by all states and the ACTU believes such legislation is necessary for Australia to meet its international obligations.

The ACTU believes that S152 of the Workplace Reform Bill should not be supported as it will have the effect of reducing current anti-discrimination protection or proposed protections for lesbian and gay workers, particularly those who work in Tasmania and Western Australia.

In regard to term of reference 4 the ACTU recommends:

... that public funds be specifically allocated to run public education programs alerting employers and employees to the nature of discrimination on the grounds of sexuality and transgender identity and measures necessary in the workplace to adequately address discrimination. Successful implementation of the legislation requires that it be understood fully by employers and employees in all sectors of the Australian economy. Programs should be specifically funded by the Commonwealth and implemented as part of the functions of the office of the Commissioner for Sexuality Discrimination.

The ACTU does not support the exemptions relating to employment in the education area—

as are proposed by the bill—

... The ACTU believes these exemptions are unnecessary as dismissal laws already allow for an employer to dismiss an employee who undermines the basic operation of that employer. Workers in private education should enjoy the same fundamental human rights as workers in the public education sector.

The ACTU supports the availability of class actions under the legislation.

Regarding the review of legislation, the ACTU supports a review of legislation as a function of the Commissioner for Sexuality Discrimination. In regard to term of reference 5:

The ACTU believes that Division 1—Discrimination in Work needs to include specific protection against harassment on the basis of sexuality or transgender identity in the workplace. This is the most common form of discrimination in the workplace against lesbians and gay men and specific measures need to be taken to help eliminate work based harassment.

That is a summary of our submissions to you today.

CHAIR—Do your colleagues wish to make any opening comment?

Ms Ryan—I think we might just respond to questions from the committee.

CHAIR—I have a couple of questions related to superannuation. Does the ACTU run its own superannuation fund?

Ms Connor—No, the ACTU has members of the staff and officials of the ACTU as trustees on several industry superannuation funds.

CHAIR—Are there any of your affiliates who run their own superannuation funds?

Ms Connor—There may be affiliates that run superannuation funds for their own employees, but the affiliates of the ACTU and ACTU officers are participants in—and in fact actively established—most of the major industry funds that are operating today. That includes the Superannuation Trust of Australia—all of those industry funds that deal generally, across employers, in various industries.

CHAIR—Thank you. The extension of payments, the amendment of the SIS Act to extend payments, remove the bar from the trustees in paying same-sex partners—the ACTU are supporting that proposition?

Ms Connor—Yes, that is exactly right. And in fact affiliates of the ACTU, as well as the ACTU, in their capacity as trustees of superannuation funds have been very vocal supporters of the removal of what we would perceive as those discriminations.

Ms Ryan—You can see in our submission the guidelines issued by the insurance

commissioner caused quite a bit of dissension amongst trustees that our affiliates were involved in, and a lot of correspondence and resolutions have come from a number of those. A number of those boards have raised problems with the insurance commissioner because of the interpretation which the insurance commissioner placed on the sole purpose test, and the fact that 'spouse' could not include partners of the same sex. So a number of trustees of funds wished to, as part of their policies and their trust deeds, include same-sex partners along with other spouses and de facto spouses but, because of the interpretation of the law given by the insurance commissioner, they have had to either seek exemption from that or battle it out legally. The current situation is so unclear that it has caused quite a few problems for trustees.

CHAIR—Was there an ability or is there an ability to get the benefits that have accrued if their financial dependence could have been proved?

Ms Ryan—Yes, but that is the basis of the discrimination. Anyone can show financial dependence as a particular ground, but that is a separate ground from showing that you are a spouse. So what the ACTU is arguing for, and what our affiliates have argued for on their superannuation boards, is that all people in de facto relationships or in marriages should get access to their partner's superannuation benefits on the same level playing field, that there should not be a special test for those that are married and a different test, financial dependency, for other people. The usual ground for financial dependency would be children.

CHAIR—Yes.

Ms Ryan—And I might also say that heterosexual couples today would find it quite difficult to pass a financial dependence test, but heterosexual couples are not required to meet that test under the sole purpose test.

Mr Keenan—There is also a difference in pension-based schemes and the lump sum schemes. If you have the adequate knowledge and go to a solicitor, you can ensure that your benefit goes via your estate, but there are taxation problems with that. But there is no way you can do that under any pension-based scheme. And pension-based schemes, by and large, are still awarded on the basis of marital status, not dependency.

CHAIR—With new schemes or schemes that have come up in the past few years as opposed to longstanding superannuation schemes, are there dramatic or radical differences between them? There are some superannuation schemes that continue but no new members are allowed into them. I am thinking of, particularly, one Commonwealth one—the Commonwealth government employees one.

Ms Connor—In the newer schemes such as the accumulation funds, which is the hallmark of the new industry superannuation schemes, trustees still come up against this problem of having to have a different test for dependency if you are a partner in a

heterosexual couple or you are a partner in a homosexual couple. That is still a barrier to equality, to the treatment of all members of the fund equally. That barrier exists, even with the very new schemes.

It is part of our submission, in fact, that the interpretation of 'spouse' and 'dependency' that operates is actually contrary to the intent of the SIS Act, which is an act which sets out how trustees should operate and ensures that trustees are operating to the benefit of all members of the scheme. It is our submission that trustees, in fact, cannot act in an egalitarian fashion when it comes to homosexual members of their scheme who are in permanent relationships, and that is actually contrary to the SIS Act.

CHAIR—Anything further on superannuation?

Senator ELLISON—Yes. What is the position with de facto relationships and superannuation?

Ms Ryan—There was a recent changes in regard to de facto relationships to add de facto relationships to the definition of spouse recognised under the SIS Act. So that is a recent change that superannuation schemes have included in their trust deeds now. It is reasonably recent that de facto spouses now have the same rights as married.

Ms Connor—In a heterosexual relationship, yes.

Senator ELLISON—Sure. But they would still have the aspect of proving the relationship, wouldn't they?

Ms Ryan—Yes, you must prove the relationship but you do not need to prove financial dependence.

Senator ELLISON—No. But you have really got three tiers, as I see it: you have got one as being married and you just have to produce the marriage certificate; two is a de facto situation where you just have to prove the relationship; and then three is the financial dependence, which is perhaps the most complex—or perhaps equally complex when you consider the questions that could be asked about a de facto relationship. How do you prove it? Say you want to claim on the superannuation and they say, 'This is a dodgy relationship'—much like Social Security has mentioned in its submission—you could have to go into sleeping arrangements and things like that to prove the relationship.

Mr Keenan—There are fairly standard tests in whole areas of law now that establish de facto relationships and, as this is an anti-discrimination bill, it would just be seeking to apply those tests equally.

Senator ELLISON—You would say that same-sex relationships should be on a par with the de facto relationship; is that right?

Ms Ryan—Yes.

Mr Keenan—For the test of superannuation.

Senator ELLISON—And so there would still be a proof aspect to it because the person claiming would still have to show that there was a genuine relationship in existence.

Mr Keenan—Providing it is provided on the same basis as heterosexual.

Senator ELLISON—Yes.

Mr Keenan—We are not asking for better treatment; we are asking for equal.

Senator ELLISON—Yes. But I just want to clarify what standard it has to be—and that is the same standard as a de facto heterosexual relationship?

Ms Ryan—Yes, that is right.

Mr Keenan—That is what we have submitted.

Senator ELLISON—Okay. And that would then take away the financial dependence aspect.

Ms Ryan—Yes. There may still be arguments about financial dependence but we are saying that, in a de facto relationship between a man and a woman, that is not a test. Financial dependence is not a requirement. It makes the rules the same for same-sex couples.

Senator ELLISON—How much easier is it—the test for a de facto relationship—as opposed to financial dependence?

Mr Keenan—You just have to establish the relationship.

Ms Connor—For example, I am in a de facto relationship myself. If my partner dies, I would prove a relationship, but I am a working woman and earning my own wage. I still have a right to claim, at the preferential tax rates, his superannuation. If my partner was a woman, I would have to prove my financial dependence upon her to be able to claim, at preferential tax rates, her superannuation.

Senator ELLISON—I can see the merit in equalising the tests, but what I am saying is that there is still a test involved. No mean test, if I could put that way—not a means test, but no mean test—involved in some cases in showing a de facto relationship in a heterosexual sense.

Ms Ryan—That is true. I might say that for trustees of superannuation funds this is quite a common experience, even with married spouses. There are often disputes as to which married spouse, which de facto spouse—

Senator ELLISON—And you would have to show you were not separated at the time?

Ms Ryan—Yes.

Senator ELLISON—So it is not exactly cut and dried if you are married either?

Ms Ryan—Trustees have to involve themselves in many investigations.

Mr Keenan—Can I add one other thing on that. HIV AIDS is not an academic question. As you would probably be aware through the epidemiology of AIDS in Australia, 85 per cent of people affected are gay men. By and large, early thirties is the average age of death, or early to mid-30s; they are all in the work force, many are in relationships and significant numbers have been denied the superannuation benefit.

This is particularly the case where you have two people in a relationship, who are both positive and one certainly has financial dependency on the other. They may, if they get legal advice, try to challenge the decision not to grant it on the basis of the status of their relationship. But that takes time and they then have to prove financial dependency. If they were a heterosexual couple in the same situation, they would just simply get the money.

It is not actually an academic question. These are people who are quite young and in the work force, do not have a work history and have not built up assets. So for many people, it is not academic, it is not a case of people living to 75 or 80 or whatever. For these people, it is a very real issue.

Senator STOTT DESPOJA—I do not have any questions on superannuation, but I was going to ask you to address the issue of exemptions. Obviously, you specified your opposition to the section regarding educational bodies. Do you have further queries or problems with other exemptions in the bill? Would you elaborate your concerns about the education bodies?

Mr Keenan—I work in the sector where obviously it applies, which is private education. To my knowledge, the exemptions have only ever been used twice: once in Queensland and once in a Victorian case. The reason they are not used is that they so hard to show anyway, because they are used in religious schools and they are often a matter of theological interpretation—I am sure both sides could produce as many theologians to present one view against another.

We believe that the current dismissal laws provide adequate protection in those situations. Obviously if an employer is doing things in the job to undermine the operations of the employer, that is grounds for dismissal. But the exemptions often end up as an invitation for discrimination and the test is applied differently.

For example, it is applied differently in the 800-plus independent schools in Victoria and it depends on the views of the individual employer or the principal as to what constitutes a breach of church teaching. You may have one teacher who might determine that gross displays of wealth by a teacher contradict church teaching and move to dismiss the person. In other schools, it goes to issues of private morality.

We think the exemptions are confusing and are often an invitation to discrimination. We believe that current laws adequately protect those employers.

Senator STOTT DESPOJA—So you would not necessarily change that section, you would just get rid of it?

Ms Connor—Yes. Also what often happens in these circumstances, too, is that it becomes a prohibition on people to move into that area of employment altogether. The problem with it is it generates an expectation or a belief within the community that homosexual people should not work in private schools. That is obviously not the intent of the act, or of the exemption of that part of the act; but that is often the common wisdom that develops if that exemption is upheld.

Senator ELLISON—Who has the onus of proof in undermining the basic operation of the employer? Does that rest with the employer? Does the employer have to show that the basic operation of the organisation or the school has been undermined by the teacher or the employee?

Mr Keenan—Under the current laws?

Senator ELLISON—Yes, under unfair dismissal.

Mr Keenan—Currently it would be but it would vary also in different states.

Senator ELLISON—There is adequate protection but it is quite nebulous to prove that someone is undermining the basic operation of your school or your religious institution. It might be easy in a commercial outfit to show they undermined the operation because they had been selling secrets to your competitor. It is more difficult where the person's behaviour in class or the playground or general demeanour, you believe, is undermining the church's teaching, but it is hard to prove when you go to dismiss them.

Ms Connor—I do not know that that is necessarily the case actually. Obviously in any dismissal situation there are various requirements—people should have been

approached about this, it should have been explained to them, the policies of the school should be explained.

Say we remove it from this question of sexuality to a question of someone who is employed in a religious school who is an atheist, or someone who is employed in a Catholic school who is actually a Baptist. In all of those situations, you may say that it is difficult to establish that as a Baptist I am undermining catholicism or as a Protestant I am undermining catholicism or whatever.

It is a requirement of every employer that they have clear guidelines that are well understood by their employees and by the clients who are using, in this case, that educational institution that, 'These are the policies of this school, this is its philosophy, this is what we are seeking to inculcate in our students.'

Whether it is sexuality or religious belief or personal or political philosophies, you can make the rules and procedures very clear for ensuring that if someone seems to be putting a position that is contrary to the school's position there is a procedure where they are reminded of their responsibilities to that institution and so on and so forth. So I do not believe that it is as onerous as some people may think.

Mr Keenan—This is about discrimination in private life. I do not think that there is any question that someone living in a homosexual relationship at home has very little bearing on undermining the activities in the classroom.

Senator ELLISON—No, I did not raise that. I referred to what they were doing in the playground, not at home.

Mr Keenan—Yes, but these exemptions do allow for that to occur.

Senator ELLISON—You are saying the exemptions are wider than that?

Mr Keenan—They are.

Senator ELLISON—What about if the exemptions were perhaps narrower and related to activities which were in the course of employment only? Would the exemptions then be more palatable to you?

Mr Keenan—We think the current laws have that exemption and we are talking here about proof and standards of proof which is the issue with any law. There are similar issues about how you actually prove discrimination and that is also difficult. We are talking here about standards of proof and how something is proved.

Senator ELLISON—In page 18 of your submission you mention the Queensland and Victoria legislation providing limited protection for lesbian and gay workers. Has it

only provided protection against discrimination on the basis of lawful sexual activity? This means that it is unclear whether legislation would provide protection to a worker who is dismissed because they were seen attending a gay and lesbian social event. I would have thought that was lawful sexual activity and that they would be protected, because there is nothing which bans those social events, is there? There is nothing which outlaws them?

Mr Keenan—I think attending a meeting is not a sexual activity.

Senator ELLISON—No, but I am saying that even if you did deem it that way, you would be battling to say it was an unlawful one. You see what I am saying: I am saying that your workplace situation, even in the state regime, might enjoy more protection than you are saying here. If you say you cannot be discriminated at work because of any lawful sexual activity, that is a pretty wide protection.

For instance, it means that you can engage in any sexual activity with a consenting adult of the required age. That is fine; you can do it at home. As long as you do it within the bounds of the law, that is fine. Heterosexual activity is the same as well. You cannot go doing it in a public place, with a person who is not consenting or below a certain age.

Mr Keenan—Having sex and being gay are two separate issues, though. Lawful sexual activity refers to the sex act, not to identity or belonging to a group. If, for example, I was teaching in a Catholic school and was seen attending the gay and lesbian mardi gras and was then dismissed for attending the mardi gras, my attendance at the mardi gras was not the sex act—it is not sexual activity. It is about my identity with a group.

Senator ELLISON—And you are saying that that phrase would not extend to protecting the worker in that instance?

Mr Keenan—No.

Ms Connor—If the discrimination was on the grounds of sexuality and private religious schools are exempted from it, yes, that is our contention. You could not rely on the sexuality discrimination act.

Senator ELLISON—You would have to fall back on unfair dismissal?

Ms Connor—Yes.

Mr Keenan—If I move on to the Catholic schools—it is generally agreed that it is okay to be a homosexual Catholic teacher but it is not okay to have homosexual sex. This actually goes the other way around—it protects against discrimination for having sex but not for being homosexual.

Senator ELLISON—If the exemption was framed in such a way that it tightened up the activity that the exemption related to, that could still arrive at the same result without having the onus of proof resting on the employer via your unfair dismissal. Couldn't you use the avenue of the exemption, rather than relying on your unfair dismissal provision? You are saying that no exemption can be framed which will be effective.

Ms Connor—What we are saying is that the requirements for proper behaviour and so on and so forth for people in public schools should be the same as in private schools. Treating private schools differently is a very untidy way of doing it in our opinion. In our opinion, wherever people work, there are rules and codes that govern them in their employment and they should be applied regardless of what people believe, do or think in their private life.

Mr Keenan—And if someone takes on a position in a religious school, part of that undertaking is to uphold the ethos in employment and do all of that, but we say that these exemptions have nothing to do with that. They provide an invitation for undue interference into your private life. It is not about your employment function.

Senator ELLISON—And you say that the state legislation in Queensland and Victoria has that problem as well?

Ms Connor—Yes.

Mr Keenan—They all do in terms of the exemptions.

Senator STOTT DESPOJA—Victoria has wide ranging exemptions.

Senator ELLISON—But in relation to the other states, South Australia, the Northern Territory and the ACT are okay. Tasmania and WA have nothing. We have covered all the states and territories then, haven't we?

Mr Keenan—New South Wales has the broadest exemption because it just covers all private education.

CHAIR—Equal employment opportunity principles endorsed at the ACTU congress last time included one on sexual preference. Is that a case of the leadership of the ACTU responding to demands by the membership or is it perhaps the leadership showing leadership in adopting principles like that?

Ms Connor—I think it is probably a bit of both. There has been a movement amongst members of unions who are gay or lesbian to ensure that their organisations represent them without fear or favour, as they represent other people. I think that unions have been educated by their members to be more progressive on many of these issues and to take up those issues of concern, discrimination and so on, as much by our members as

by an enlightened leadership. It is probably a bit of both but I think it is really because the gay movement has started to be more organised in the union movement and is demanding that the union movement address the issues that are of concern to them as members of those unions and as workers.

Ms Ryan—From the perspective of an affiliate I would support that. Certainly, whilst our union has progressive policies we are under a lot of pressure from our members to actually ensure that these policies can be implemented in their workplaces.

CHAIR—Your terminology is interesting, as it has been interesting with other sets of witnesses we have talked to. There are some that talk about the gay and lesbian movement and others talk about homosexual, which is inclusive. That is part of the reason why I asked the question that I did ask. The language has changed and is changing?

Ms Connor—Yes.

CHAIR—Unfortunately, time is racing by and we do have some other sets of witnesses to talk to.

Senator ELLISON—That last reference—discrimination, work and sexual harassment. I take it that your view is that sexual harassment is a no-no whichever way it goes. You have recommended here protection against harassment on the basis of sexual or transgender identity, but also you would support the reciprocal, that is, that there be no reverse harassment?

Ms Connor—Absolutely.

Senator STOTT DESPOJA—It should be noted that Mr Spindler this morning pointed out that he should have included harassment in the bill, so I do not think there is any concern over the inclusion of that.

CHAIR—I would like to thank Mr Keenan, Ms Connor and Ms Ryan, the representatives of the ACTU, for your submission and for your time.

Ms Connor—Thank you for hearing from us.

[3.15 p.m.]

LAWRENCE, Ms Kate, Community Lawyer, North Melbourne Legal Service and Federation of Community Legal Centres, 504 Victoria Street, North Melbourne, Victoria

RAY, Mr Darren Charles, Executive Officer, The ALSO Foundation, 1st Floor, 35 Cato Street, Prahran, Victoria

CHAIR—I understand, Mr Ray, that your submission to the committee is being prepared and will be with the committee next week?

Mr Ray—In communicating with the committee's staff, I pointed out that some consultations needed to be finalised and that that submission will be with the committee early next week.

CHAIR—What I would like to do now is invite you to make an opening statement, both of you in turn, at the conclusion of which I will invite members of the committee, including Senator Cooney, to address questions to you. I will remind you, as I reminded the previous set of witnesses, as I remind committee members, including myself, that we do have a time problem in the sense that there is another set of witnesses after you and we do have aircraft to catch later on in the evening.

Mr Ray—I want to address terms of reference (1) to (3) and Kate will address terms of reference (4) and (5), although, obviously, there will be some crossover in light of some of the evidence and perhaps some more startling evidence given today that we both feel we need to respond to in the context of our submissions.

CHAIR—I would not feel too keen on responding to what you have heard today. This is one day in a large inquiry. There has been evidence earlier, and undoubtedly there will be more evidence tomorrow.

Mr Ray—I am sure they are recurring themes in terms of a lot of the exemptions that have been discussed today. With regard to terms of reference (1) and (2), I do not propose to go into any great detail about those, because I believe they have been adequately covered by submissions, particularly from Anna Chapman, Kris Walker and Wayne Morgan, from the University of Melbourne.

In terms of Australia's human rights obligations and instruments, the ICCPR and other instruments, obviously, our submission is that there is ample scope, if not moral obligation, by the federal government to act in this regard. Certainly, in terms of the constitutional power to act, in terms of overriding existing state laws, where they exist—obviously not in Western Australia and Tasmania—I believe that Kris Walker, in a previous submission, outlined that there was ample scope for that to occur.

In terms of the need for this legislation, obviously, the GLAD report, Gays and Lesbians Against Discrimination, is extremely thorough in terms of the Victorian experience of approximately 1,000 respondents and goes into a lot of detail about, if you like, 'at the ground' experience of gays and lesbians.

In terms of my position at the ALSO Foundation, I have been involved with the gay and lesbian community in various capacities now for over six years; indeed, starting off in Western Australia, Mr Chairman, as you would be aware. But a lot of the evidence presented to me has clearly pointed to the fact that people, gays and lesbians, do not feel that they have had adequate recourse before the law. In fact, that situation has not improved at all in any of the states, perhaps with the exception of New South Wales, although as other people have presented evidence earlier today, there is a fairly slow take-up of complaints under the New South Wales act.

In particular, what I wanted to say about term of reference (3) is that the state equivalents are inadequate in addressing the discrimination against gays and lesbians and other people, obviously, as mentioned in this bill.

It has become quite clear that—and, given my contemporary experience, I will draw a reference to the Victorian legislation—the Victorian legislation along with the FOS amendments in Western Australia have two purposes: they seek to calm down the more conservative elements in conservative political ranks and, more importantly, they basically act as an extreme weight on the community. The FOS amendments in Western Australia talk about the promotion and encouragement or proselytising of homosexuality. I am sure Senator Ellison would be aware of those.

In terms of the Victorian legislation there are so many exemptions. The mythology is enshrined about basically all gay men being paedophiles. The exemptions in terms of the care of children and the other substantive exemptions in the Victorian act basically enshrine certain mythologies about gay and lesbian experience—mythologies that I would suggest have not necessarily been dispelled by some of the submissions from church organisations earlier today.

The big problem with the exemptions that I have noticed not only in today's hearings but in the community debates surrounding this issue is that exemptions or exceptions are seen to, if you like, appease the more conservative elements in society. The sport one, obviously, is fairly controversial, although I believe Julie Peters adequately addressed that in her submission this afternoon.

One that worries me more particularly—and after today's hearing I believe that one of the committee members is particularly keen on this—is the small business exemption. That concerns me greatly because, whilst there are some situations where family businesses want to make use of religious exemptions—and Mr Stokes and Mr Muehlenberg mentioned those earlier today—it seems to me that either you have human

rights in totality or you do not. By looking at one industry—small business—I must say that I personally find that the whole exemption with small business quite repugnant.

Interestingly, in Victoria when the legislation was being discussed—it has not happened—the idea was that, rather than setting the number of employees at five, it could have been set higher. Although the exemption for small business applies to all other attributes in the Victorian act, there was a possibility when the legislation was being discussed that that number would be lifted. Obviously, some Liberal and National backbenchers wanted certain concessions from the Premier and the Attorney-General, so that exemption along with the care of children and some of the other, in my and the ALSO Foundation's opinion, repugnant exemptions in the Victoria act, were going to be increased purely because concessions needed to be made or because they needed to be seen to be made to the conservative elements.

I wanted to talk about the Victorian exemptions in particular because I am wanting to submit to the committee that we do not believe that the committee should go down any road approaching the Victorian act whatsoever. We believe that the Victorian act still judges us and still enshrines certain mythologies about gay men in particular in terms of the care of children and the fact that we are all supposedly promiscuous with a thousand sexual partners, yet we have time for some political conspiracies to take over the world.

I want to read to the committee a very pertinent document that backs up my views. This letter is dated August 1995 and is from Mr Kevin O'Connor, who was at the time the Acting Human Rights Commissioner of HREOC. The letter is written to Gay Men and Lesbians Against Discrimination. Mr O'Connor says:

There is, I believe, potential for some of these provisions—

that is, the Victorian act—

to operate in a way that facilitates unjustified discrimination against various groups in society, including gay men and lesbians.

In terms of the exemption of standards of dress and behaviour, which I still have trouble getting my head around, the implication is that all gay men wear frocks and that all lesbians wear overalls and that in certain employment settings that is not appropriate. I do not quite know how that one really applies to the present day. The Acting Human Rights Commissioner very aptly points this out: the fact that an employee dresses or behaves in a certain way that is taken to suggest a particular sexual orientation and has no material effect on their performance—and I want to stress that—in the context of that employment, should not under any circumstances invoke the application of section 24, exemption. Such an interpretation would be, without doubt, contrary to Australia's international human rights obligations as described above. I am not going to go in and read all of—

CHAIR—Could you table a copy of that letter for the committee?

Mr Ray—Absolutely. I had intended to put it in a submission as well. I do want to mention perhaps one more that the Acting Human Rights Commissioner commented on, and that was the care of children exemption, section 25, in which Mr O'Connor says this to Mr Davey, who is from GLAD:

I share your concern that it may be used to perpetuate discrimination against homosexuals, including the erroneous and stereotyped portrayal of homosexuals as paedophiles. I note that the exemption requires that the employer "genuinely" believes that discrimination is necessary to protect the children and that there must be a "rational basis" for that belief.

This is a very important point. The reason I am making it is that I am really recommending to the committee that it does not enter this very dangerous debate in some vain belief that the committee is compensating to more conservative elements in the parliament. Mr O'Connor says:

These provisions create a test which is both vague and allows the introduction of irrelevant information. There is no requirement to prove that the belief is reasonable or even whether there is any actual risk.

So the whole issue of whether it is a rational basis for belief or a reasonable basis for belief is a very difficult area. The effect of this exemption is, I think, quite deliberate.

I can quote two personal examples that I have been involved with through the ALSO Foundation. There are two teachers—one is 38 and the other is 25. In the first case the 38-year-old man has been in the education department for over 13 years. He basically came to see me to see whether he had a case to take under the new legislation, and the 25-year-old did likewise. These were quite blatant cases of discrimination. Both, interestingly, involved a case that you were discussing with the ACT, in terms of being spotted at a social event. Because they were seen by a work colleague, a school colleague, they were basically outed by their work colleagues. Obviously, the work environment was made very difficult for them.

Senator ELLISON—What were the work colleagues doing there?

Mr Ray—Apparently the view expressed was that they were just passing. But, in terms of those two workers, they both said similar things. This quote really haunts me. These are not the exact words that I heard from both of them but, basically, it was to the extent that, 'We now have to look at completely changing our career path.' You are talking about two people who have undertaken considerable training.

The 25-year-old was previously a street worker, a sex worker, and had been through some terribly difficult times in his earlier years. Basically, he had buckled down and, under considerable duress, completed his studies. Now you have these two individuals who have said that they are having to completely reassess their career paths.

Both are very capable teachers. I saw references from previous principals as well as

existing principals. They are very capable teachers and certainly not, which is what you would presume from some of the evidence given to us by the church groups, people who would, excuse the terminology, ram their sexuality down their students' throats. They are very calm, collected, quiet men. Suddenly, because of being seen at a community event, they are having to totally change their career paths. That is really what the effect is on the ground of the Victorian legislation. It is not adequate. If you look at lawful sexual activity from the Queensland legislation in 1990, it is nothing more than an attempt to appease more conservative elements.

That takes me onto the next ground that I wanted to talk about, and that is bipartisan support for a lot of these changes. I think it is important for the committee to understand that support for anti-discrimination legislation is across-the-board. If you look at the Queensland situation in November 1990, Denver Beanland, who was the leader of the Liberal Party at that time, said:

The Liberal Party has long maintained the tradition that on moral issues individuals should maintain the right to hold, express and vote in accordance with their individual views.

The classic libertarian John Stuart Mill point of view which one still has confidence the majority of Liberal members of parliament share. Both Mr Beanland and the current parliamentary Liberal leader, Joan Sheldon, supported the legislation and indeed voted with the Goss Labor government. Obviously I have made the point that the Queensland legislation is by no means perfect. I would commend the Sexuality Discrimination Bill terminology in terms of sexuality and transgender identity. I think it is the most responsible way to go.

One final comment I wanted to mention in terms of bipartisan support was that when commenting on the 1990 Queensland legislation and inquiry, former Liberal New South Wales Senator Peter Baume wrote to the Queensland Attorney-General expressing support for the reforms of the Queensland criminal code. He said:

My only hope is that the debate on this area of reform does not degenerate into a cheap political football match.

Which, let us face it, on difficult social issues is all too easy to occur. It continued:

It is time for us, irrespective of state boundaries and political affiliations, to rectify the injustices that have been inflicted on homosexual members of our community.

It is very interesting, because it does not matter whether you are a Labor, Liberal, National or Democrat voter, discrimination can happen to you. It can certainly happen to you regardless of which state you reside in.

That takes me to the second most important point—this legislation at a federal level is absolutely essential to breathe some consistency into Australia's laws. It is ridiculous that, for example, I can expect different treatment in every one of the states and territories.

It seems to me—and it is a view I have long held—that human rights override states' rights, and I believe that certain inalienable rights should not be subject to state boundaries. I wanted to move on, before handing over to Kate, to the religious exemption.

CHAIR—I will just draw your attention to the time. We do have a problem.

Mr Ray—I will be very quick. Kate will be making the point that, whilst we in our joint submission are not terribly enamoured of the exemption, if it applies to all other grounds, then we begrudgingly accept the exemption. I did want to just say something in terms of the submissions made earlier today. I do not know whether submissions have been made on behalf of the Anglican, Catholic and Uniting Church.

CHAIR—In most cases they have not been released as yet. I made an explanation earlier today.

Mr Ray—I cannot really pre-empt those, but I would be surprised if any of those churches supported discrimination against gays and lesbians. In fact, from my early involvement with the archbishops in Western Australia, they have always maintained a principle of opposing discrimination against gays and lesbians.

I just wanted to say in terms of the submissions made about the religious exemption that, from a community point of view, we have to put up with the consequences of this blatant propaganda every day of our lives. You have quotes in submissions like:

The truth is that homosexuals do not have a good record of committed relationships.

And ex-Senator Spindler's attempts to involve our community in this state in community consultations about clause 107 have been totally rewritten basically as proof that most homosexuals—especially males—live extremely promiscuous lives. Because we do not agree with 107 or the current provisions, we are therefore promiscuous.

It seems to me that there are so many misrepresentations in the less than mainstream church submissions that I did not want it to go without comment because there are gay and lesbian Christians, certainly committed gay and lesbian Christians. I would just like to say that a lot of them, including heterosexual people out in the community in churches, would be horrified by some of the hatred that has been perpetrated through some of these submissions.

Ms Lawrence—I am going to go through a few points in the actual bill. The first one is around the definition of de facto spouse. It could be interpreted in a much broader fashion because it basically says that it is just on a genuine domestic basis. So I would suggest something like a bona fide intimate domestic relationship or a bona fide domestic partnership.

In terms of my points about the bill, I will just state that we agree mostly with the points raised by the lecturers from Melbourne University. On the definition of sexuality, we tend to agree with them about excluding heterosexuality from the definition for the same reasons that they have raised. I was aware that asexuality is not included and it would seem to me that that would not detract from the bill and would at least give an opportunity for complaints to be made on that basis.

CHAIR—You would see that as a change?

Ms Lawrence—Yes. If you are going to cover the field and include heterosexuality, then I would include asexuality as well. The definition of discrimination is the same as in the Sex Discrimination Act and the other discrimination laws, so we do not have any problem with that. I did have some misgivings about the inciting hatred section in terms of the definition of public act, but I would argue strongly, as I believe was mentioned by Mr Spindler and the ACTU submission, that there be harassment provisions very similar to the sexual harassment provisions in the Sex Discrimination Act and that would, to my mind, relieve what I see as a possible failing in the incitement provisions.

So I suggest that there be a sexuality and transgender harassment provision. I would draw your attention to the GLAD report. In harassment at work, 32 per cent of people said that they were harassed at work and that is not going to be covered by this act unless you have a harassment provision in there. In terms of public violence, 35 per cent and 38 per cent men and women respectively stated that they experienced public harassment. Verbal abuse was around 70 per cent.

Turning to the exemptions, I note the superannuation exemption is different from the insurance section in the Sex Discrimination Act in that the Sex Discrimination Act provides that the person trying to make an exclusion must provide the statistical and actuarial data to a client. That is not in this bill. I think in terms of consistency it should be and also seems a fundamental right that if you are going to be excluded from superannuation on actuarial data that you be given access to that information.

We oppose the religious exemption around education for many of the reasons that have already been stated about promoting stereotypes. I note that section 28 does not apply to incitement—that is the general provision of religion—and hope that that will prevent some sort of pulpit privilege happening where you have extremely inciting sermons.

With the general provisions around inquiries, I suggest that there might be—it is probably not appropriate in the bill or the act—a greater need for people using the sexuality discrimination provisions for privacy protection. For example, there may be greater use of in-camera proceedings because of their vulnerable position. Sexuality is not self-evident and there is such widespread discrimination within society that people attempting to use the discrimination provisions should be able to have that done in-camera or at least have their anonymity protected.

In terms of same-sex couples, we are aware of the diverging views within the gay and lesbian community about that being included in the bill. You will read in our submission our understanding of the different arguments. In our submission we do not necessarily promote, but at least accept, the argument that recognition of same-sex defacto relationships accords them a legal status and equality that we believe is important. We are basically accepting clause 107, although our preferred position would be an amendment of the Marriage Act to include that. Also across the board we accept some of the arguments raised by the Melbourne University lecturers that there is very little benefit from clause 107, but we see it as symbolically extremely significant and paving the way for further future changes.

I think clause 107(3), which allows for regulations to be exempt, is a little disturbing in that there are no guidelines as to how a regulation may be made exempt and it makes an administrative decision. We think that if there is going to be an exemption, that should be specifically debated and legislated against in parliament.

The last point was simply about public education. There obviously needs to be funding and resources to go with the bill as it is passed.

CHAIR—Thank you very much. I have a question on the definitions issues. I understand from what you have had to say that the definition of sexuality would now read—not necessarily in this order—homosexuality, bisexuality and asexuality.

Ms Lawrence—Yes.

CHAIR—Two questions arise from that. Other submissions were put to us that we really need to break down the homosexuality definition; it should read 'lesbian and gay' or whatever words. But there is a feeling, particularly from the lesbian community, that the term 'homosexuality' is not reflective or recognising of lesbians.

Ms Lawrence—I noted that today. I support Anna Chapman's submission in that the invisibility of lesbians is quite widespread and the legislation goes some way to addressing that invisibility.

CHAIR—Is part of your reason for deleting 'heterosexuality' the argument that heterosexuals are not now discriminated against in our society?

Ms Lawrence—Initially I thought that because the Sex Discrimination Act has the same issue when it comes to men and women and the same ability to be abused by a group that really was not being discriminated against, keeping heterosexuality was okay on that same sort of argument. Having listened today, I thought that because heterosexuals are a majority, you have a greater potential for the legislation to be abused. When you are looking at the Sex Discrimination Act, the difference between men and women is that there are about 50 per cent each. It is not a very well thought out argument at this stage.

But my argument for excluding heterosexuality in this bill is that because heterosexuals are such a big and powerful group—they are a majority—they have much more ability to abuse this kind of legislation. That is my main argument.

Senator ELLISON—What about a hotel that says, 'Only gay men need enter here'? Then a heterosexual cannot fall back on the legislation.

Ms Lawrence—Sorry; can you explain the question?

Senator ELLISON—You are saying take heterosexual out of sexuality. If you do that then a heterosexual can be discriminated against by an institution which is perhaps gay.

Ms Lawrence—The whole area of special measures is meant to address that. In nearly all the discrimination legislation there is an ability to utilise the legislation so as not to prevent a group that is seeking to redress the imbalance.

Senator ELLISON—But why should it not cut both ways when you are dealing with sexual preference?

Mr Ray—I strongly believe that excluding heterosexuals from our venues is a non-issue. The issue is excluding violent, sexually abusive bogans from our venues.

Senator ELLISON—I understand that. But the fact is—

Mr Ray—It is not the status, it is not the attribute.

Senator ELLISON—But the sign does not say 'Violent, abusive bogans', does it?

Mr Ray—No.

Ms Lawrence—It goes back to the whole concept that heterosexuals are everywhere in this society, they are not a marginalised group, whereas gays, lesbians and transgenders are a very marginalised group. Heterosexuality is on display wherever you go. Whereas the discrimination that a gay person would experience by displaying their sexuality is so enormous that you allow them to provide safe spaces for them to be able to express that.

Senator COONEY—I must confess I have a lot of sympathy for the thrust of Senator Ellison's questions and I know that you are only trying to think your way through now and that you have not developed your argument as well as you might. You said, 'I want to add asexuals as well as the others', and I thought that seems fair enough, you want to cover the whole field—discrimination no matter at what level or against whom is bad. That is the thrust of what you are saying. Then you suddenly say, 'No, we are going

to take out a particular group from that.' That seems to be sending the message, 'If you are the majority, if you are the most powerful, you can look after yourself.' If you are doing that, you are making a distinction. Why do you want to go down that path?

Ms Lawrence—At this stage there is a distinction. You are putting in place legislation that is meant to protect minorities and otherwise oppressed groups. Heterosexuals do not experience that.

Senator COONEY—Do you say by putting that in it lessens the protection this bill gives to the other groups? If so, is there any evidence of that? I cannot see why there is this readiness on your part to exclude them, other than to say, 'Look, you're big and strong, therefore you don't need any help'.

Ms Lawrence—It allows for heterosexuals to justify all sorts of things that happen anyway, that have happened forever and use that to, in effect, discriminate. Say they want an event that they decide is going to be heterosexual only and they want to argue, on the basis of this bill, that they should be allowed to do that because it promotes the welfare of heterosexuals. We would argue that that is not the intent of the bill at all.

CHAIR—Are you aware of a series of litigation an individual male took in regard to the Sex Discrimination Act?

Mr Ray—Obviously there are even local examples—the Brunswick pool.

Ms Lawrence—Men objected to a women-only swimming night and took that to the Equal Opportunity Commission.

Mr Ray—I think it is appropriate that the commissioner have some flexibility in interpreting special measures and several other issues. But to give you my opinion of the question, Senator Cooney, I think Anna Chapman's answer earlier this afternoon pretty much summed it up: heterosexual people are not discriminated against on the basis of their sexuality, so it seems silly to be including them. It may be politically easier.

Senator COONEY—What you say, as a matter of evidence, is that there is no need for this. Therefore, it ought to be excluded. But what do you say if there suddenly is some evidence or the suggestion is that perhaps there may be? Why do you seem to be wanting—you might not be—to go to the barricades on this when there does not seem to be a great need to do it?

Mr Ray—To be honest with you, my opinion of that is that, as with any reasonable community, we would, of course, weigh up new evidence if that came to hand. But then, to be quite frank with you, I do not believe that there is any onus of proof or test of proof which substantiates the religious exemption.

Senator COONEY—I can follow that. It seems to me that you are arguing why have a religious exemption? The thrust of your argument seemed to be why should there be need for exemptions? Why shouldn't this be an all inclusive bill? Just as a matter of intellectual balance, you suddenly say, 'We won't exempt religion, but we will exempt a particular sexual group simply because it is mainstream.'

Ms Lawrence—It seems by including them in, if you cannot fit under a religious exemption, you might just open a Pandora's box arguing on a heterosexuality exemption.

Senator COONEY—Are you saying, if we put that in, it is going to be a trojan horse?

Ms Lawrence—Absolutely. It has the potential to be and I do not think it is going to be a non-contentious bill. If you put that in, yes, you are providing a venue for people who cannot fit in under other exemptions to justify their discrimination on the basis of heterosexuality—we are promoting heterosexuality and we are promoting the family.

Senator COONEY—What set me off was that you said, 'Look, we'll put in asexuals' and I was wondering what evidence there is that asexual people are discriminated against.

Ms Lawrence—It is not something that I have heard of a lot. It was more, I guess, the potential to be discriminated against on your not being interested in sexual activity, on your not taking a stand. I do not know how prevalent it is. It was at least providing the option rather than to have it missed and to become an issue that should have been included.

Senator ELLISON—With the special measures argument, are you saying that this bill should be treated as a special measure and that that special measure flows from the international instrument that we are a party to?

Ms Lawrence—No.

Senator ELLISON—You see, provisions of the Native Title Act were regarded as a special measure under the Racial Discrimination Act which got its authority, if you like, from the convention Australia signed on racial discrimination. If you are to say that a minority group gets special protection as a result of a special measure—you mentioned special measure—where does that special measure come from?

Ms Lawrence—I was more arguing that heterosexuals would be able to use the special measures to, in effect, defeat the purposes of the act, to discriminate.

Senator ELLISON—Yes, but you are admitting that these are special measures in the bill by saying that, because you are saying, if they are included in the bill, then they

can use these special measures and abuse them. I am just asking where you get the authority for a special measure? A special measure allows pro-active action and you can be positively discriminative, in a way, under a special measure. That is what is allowed under the Racial Discrimination Act. Where is the authority which says that you can have a special measure which allows you to protect one sector of the community in relation to sexual discrimination and not the other?

Ms Lawrence—You argue that they are a minority. It is the same with the Racial Discrimination Act. The Sex Discrimination Act is slightly different—you are not talking about a minority; you are talking about on the basis of historic oppression of women and that is why you have a Sex Discrimination Act.

Senator ELLISON—But the Racial Discrimination Act has a special section—I think it is section 10—which talks about special measures.

Ms Lawrence—Oh, it is in here, is it? Section 27 has special measures in this bill.

Senator ELLISON—Yes, but you say that section 27 has the special measure. Where does that come from? Which convention? The Racial Discrimination Act has a special measure which flows specifically—

CHAIR—Is that question not better directed to the author of the bill rather than this set of witnesses?

Senator ELLISON—It is a legal matter.

Senator STOTT DESPOJA—But aren't we creating it?

Senator ELLISON—No, you can't. Section 10 of the Racial Discrimination Act, which creates a special measure, can only do so because special measures are allowed for by virtue of the instrument we signed on racial discrimination. We are talking about sexual discrimination. I agree that this is a good question for the author who is sitting here.

CHAIR—My difficulty with this is that I think the witness at the moment has a little bit of difficulty with it. I understood from the way the question was going that you were having a bit of difficulty understanding the thrust of Senator Ellison's question. I was going to give you the opportunity to take the question on notice, to go away and perhaps consult with some other of your colleagues and then come back to us with an answer. You may even wish to consult with the author of the bill if you so wish. If you feel confident enough to proceed with it, please do so. I am conscious of the time, however, and another set of witnesses has to appear before us.

Senator ELLISON—I think that is a good course of action.

Ms Lawrence—Yes, that is fine. I did eventually understand what he was getting at, but I will take it on notice.

Senator ELLISON—I am sorry that I was not clear.

Ms Lawrence—That is all right.

Senator STOTT DESPOJA—I am just going to leave special measures right alone now. I did want to ask Ms Lawrence to repeat her definition of 'de facto'.

Ms Lawrence—I had two options—one being 'bona fide intimate domestic relationship'. At the moment it is 'bona fide domestic relationship'. The definition in the Sex Discrimination Act talks about bona fide domestic relationship as living as the husband or wife of that person, which is obviously inappropriate. The other one was 'bona fide domestic partnership'. They are just suggestions in terms of trying to make it a bit narrower than just a bona fide domestic relationship, which does not really say anything except that you live together and you are bona fide about going home every night.

Senator STOTT DESPOJA—The other definition is one that the Chair actually asked you about in relation to sexuality. My other question related to section 107. You said that you agreed with the Melbourne University lawyers in regard to their arguments against the same-sex couples clause. However, when you mentioned the importance of the symbolism of that clause, you gave me the impression that whereas they were arguing for the full deletion of that clause, you perhaps did see it as a symbolic start and perhaps would prefer that it was retained or amended in some way.

Ms Lawrence—No. I would accept the wholesale inclusion of it, apart from subsection (3). I do not necessarily agree with the arguments advanced by the Melbourne University lecturers. They go for an opt in, opt out, ability, and I do not agree with that. I do not necessarily agree with all their arguments. They are saying that it does not give us much. I accept that, although I think it probably gives a bit more than they seem to believe that it gives. We accept the inclusion of section 107.

Senator COONEY—I cannot resist asking Mr Ray: why do you have two photos in this?

Mr Ray—That is a good question. I cannot answer it.

CHAIR—The ALSO Foundation has provided us with some items for exhibit to the committee. One is the *ALSO Foundation Annual Report 1995*. There are two pamphlets, *Resourcing the gay and lesbian community*, and the second one is *ALSO grants: Philanthropy at work*. We will receive those as exhibits. Mr Ray and Ms Lawrence, thank you for your attendance this afternoon. We will wait in anticipation for your submission, Mr Ray.

[3.58 p.m.]

COOPER, Mr Dias, Associate Member, Gay Men and Lesbians Against Discrimination, PO Box 240, East Melbourne, Victoria 3002

DAVEY, Mr John Patrick, Legal Officer, Gay Men and Lesbians Against Discrimination, PO Box 240, East Melbourne, Victoria 3002

SHAW, Mr Anthony Linus, Male Co-convenor, Gay Men and Lesbians Against Discrimination, and Convenor, Australian Gay and Lesbian Inter-Faith Federation, PO Box 240, East Melbourne, Victoria 3002

CHAIR—Welcome. The committee has received the submissions from Gay Men and Lesbians Against Discrimination. It has been approved for publication under the number 144 and is now a public document. It is a very short submission. I assume that you will be extending it by way of executive summary. Might I remind you, as I have reminded all previous witnesses this afternoon, that we have a time problem. With that in mind, I invite you to make an opening comment.

Mr Davey—With regard to the length of this submission, there is another adjunct to the GLAD submission, that is, a collection of material surrounding the campaign to defeat the amendments to the Victorian Equal Opportunity Act which we found offensive at the time. Also, we got an affirmation of that position from the Acting Human Rights and Equal Opportunity Commissioner, Mr Kevin O'Connor. I would like to offer, as an exhibit to the committee, the letter that we received with regard to the Victorian amendment and perhaps address them as it becomes necessary today.

CHAIR—I will identify it for the record. It is a letter from the Human Rights and Equal Opportunity Commission dated 2 August 1995 under the signature of Kevin O'Connor, Acting Human Rights and Equal Opportunity Commissioner. We will receive that as an exhibit, as we will receive the report which you referred to entitled *GLAD survey into discrimination and violence against lesbians and gay men in Victoria, February 1994*.

Mr Davey—I think I should elaborate on why I am here, why GLAD is making a submission and who GLAD is. I am admitted as a barrister and solicitor in the supreme courts of South Australia and Victoria and I wish to say publicly that I am a gay man. The reason I am doing that is because I have had the benefit of hearing a lot of the submissions here and in my capacity somewhere else. I have heard a lot of things about gay men and not very many of them accord with my experience and my identity. I thought we could perhaps shed a bit of light on what it is like to be a gay man. Some of it has to do with sexual activity; most of it does not. It has to do with an identity.

As you will glean from the GLAD report, the experience of gay men and lesbians

is usually one that is not very pleasant at all. By way of summary, I point to page 5 of the report where it says that 45 per cent of lesbians and 45 per cent of gay men have reported some form of discrimination or harassment, including loss of jobs, because of their sexuality. Twenty-nine per cent of lesbians and 26 per cent of gay men describe problems, especially harassment and being given anti-lesbian and anti-gay course materials when they are in educational institutions. With regard to medical services, inadequate or inappropriate treatment, breach of confidentiality and refusal of treatment were reported by 17 per cent of lesbians and 16 per cent of gay men. The rest of the report has regard to public violence, police and services. I draw your attention to it. By way of opening comments, that is all I would like to say at this stage.

CHAIR—Thank you. Had I known who you were yesterday in Sydney, I would have addressed some of the questions I addressed to different witnesses to you. Mr Shaw, do you wish to make a statement?

Mr Shaw—I will be making an initial statement regarding the Gay and Lesbian Inter-Faith Federation. Supplementary to GLAD, I would mention that I am the education officer with the organisation. In that capacity I visit schools where teachers, under a social studies type of subject, may have a class discussion on the issue. I would like to bring to the committee's attention the extreme level of fear, anger, absolute hatred and despising which comes forth from students regarding the topic. This was my experience even this very morning when I was at a state high school. For 90 minutes there was a total barrage of feelings of resentment coming from the students as to the continued existence of lesbians and gay men in this state.

I also acknowledge to the committee that those children grow up and continue on in our society where positive images of lesbians and gay men are very rare and where the presentment of positive images is met with a great deal of opposition and fear from within the community that this is a recruitment drive which is promoting homosexuality.

So when a person who is lesbian or gay comes forth and wants to take their place within society and openly 'come out', as it were, and declare their sexuality where they feel it to be appropriate to do so, or where that is put upon them, perhaps by their behaviour, perhaps by their style of dress or the way that they speak, where it is attributed to them that they are lesbian or gay, the full force of all those years of momentum of antagonism is put toward that person. It is extremely difficult for the person as an individual, even for a person who is part of a cohesive lesbian and gay community group, to actively fight that on their own in the absence of such comprehensive anti-discrimination legislation as we are supporting today.

CHAIR—What were the circumstances regarding the school that you mentioned on the way through? You mentioned something and did not explain the detail.

Mr Shaw—The circumstances of the school, in terms of why it was there, how it

came about, do you mean?

CHAIR—You made reference to it, but I do not think you explained it fully enough.

Mr Shaw—Basically one of the many activities that we have in the group is we go out to state schools—mainly secondary schools—where we have been invited by the teachers to talk about the topic of homosexuality and my experience today came about as part of that activity. There have been other experiences. It is an ongoing event. Perhaps you were wanting me to talk about something more specific?

CHAIR—No. You made reference to being in a school and being subjected to 90 minutes. I did not know the circumstance and really did not know the meaning and the essence of what you were talking about. That is why I asked the question.

Mr Shaw—It was a class of mainly 14-year-old children and it was reasonably representative of the attitudes of young people in our society with regard to the issue of the existence of lesbians and gay men in our society. The nature of it was, as I mentioned, quite a barrage of extremely negative feeling towards the existence of lesbians and gays. The fear, the absolute fear and the virulent hatred toward the existence was quite overwhelming. When I mentioned a barrage before, I think most people could understand what a lively classroom situation is like. But the level of such feeling from young people is quite arresting when you realise—how many state schools are there throughout the community?—the level of such feeling that people have.

CHAIR—There are not so many in Victoria nowadays, though, are there?

Mr Shaw—It was a very large class. Perhaps they had been brought from other schools, but in absolute numbers of students—

CHAIR—Sorry, I do not mean to divert you from your theme. I do have an affinity with you because I experience the same thing as a politician. Going out into the community we get quite forceful questions and whatever we do is wrong. Mr Cooper, do you have an opening statement to make?

Mr Cooper—No, I am basically here in a support role. I am one of the original researchers for the report *Not a day goes by* and also one of the co-authors.

CHAIR—How do you wish to handle this, Mr Shaw? Do you want to speak on behalf of the other organisation, the Gay and Lesbian Inter-faith Federation?

Mr Shaw—That is correct. Basically, on the issue of religious exemptions, all I want to say is that whilst we would not advocate a position where the state would direct to established religious bodies which they may or may not ordain—in employment in

organisations run by such religious bodies—we would point out that the dismissal or the refusal for promotion, or the refusal to employ people because of their sexual identity, is a major concern. It greatly affects the parties on both sides, that is, the established religious body plus the person who is being refused employment, promotion or whatever.

With the whole question of exemptions, we acknowledge the political reality of the existence of exemptions for religious bodies. However, we would strongly advocate, in the granting of such exemptions, that there should be the opportunity for an airing of the concerns. We would point out to the committee that when a person declares that they are lesbian or gay, often what that person is saying is greatly at variance to the understanding, particularly of the religious body, as to exactly what it means.

We would put it to the committee that often when a person declares themselves to be lesbian or gay, in accordance with what John said before, it is very much a statement of personal identity, almost akin to a statement of one person's particular culture. Very often the recipient party, upon hearing such a thing, takes it as something like a simple statement of sexual desire or, in the case of religious bodies, an intention not to follow certain rules or to be out of step with traditions—considerations such as this. And often when a person is dismissed from or refused a position within a religious body there are enormous levels of negative feeling because, rather than just being simply a job, it can be like exclusion from the whole religion. Often you have places where people are very greatly aggrieved by it. We look for some process wherein these considerations can be discussed so that a more just outcome either way can be achieved.

Mr Davey—I was just going to say, Mr Chairman, I think it is really important to point out that when somebody says that they are gay, what they mean by that and what somebody hears when they say that are quite often two different things because the person's identity is informed by their experience. A person who is not gay, lesbian, bisexual or transgender is informed by what they know about a particular issue. And the fact of the matter is that in the greater society there is a paucity of information about the real experiences of gay men and lesbians.

To a certain extent, the Mardi Gras parade that appears on the ABC does us some disservice because the only exposure that the general heterosexual population get are of men in skimpy shorts, women painted and whatever other images there. That is one event in the year but, for a great majority of people, that is the perception that they have of gay men and lesbians. I can assure you, I have a very conservative wardrobe, particularly for my employment. But occasionally, for example if I go to Mardi Gras, I would dress up as well.

Look at the Moomba parade that used to occur here in Melbourne. People used to dress up there, too, but nobody would think for one moment that all heterosexuals go dressed up as clowns. It is a very difficult situation for us because we do not get the exposure and the discussion about our real life experiences; we get a media interpretation

of it—and we often get a very distorted view.

Put in context, too, we have to see where people's perceptions of homosexuality have come from. As we all know, in some places it is still a criminal offence. It has come from an origin of criminality, but that has only been since Queen Victoria's reign—and she did not include lesbians in that bill that criminalised homosexuality because it did not quite get around her mind-set on how lesbians, or women, could have sex together. And that is why lesbianism has very rarely been criminalised.

As recently as the Second World War, gay men were imprisoned by the Nazis. The pink triangle which has emerged as a symbol of gay pride had its origins from those concentration camps. Jews were forced to wear yellow Stars of David and gay men were forced to wear pink triangles. There is some evidence to suggest that lesbians wore a black triangle. And we wear that in memory of those people who were actually murdered in the Holocaust.

It is interesting to note that at some of the camps that were liberated the gay men were actually re-interred by the allies to serve out their sentences and that the only law that was maintained from the Nazi regime after the Second World War was the law criminalising male sex. So that is the history that we are coming from.

CHAIR—I am trying to handle the present, and the future and the terminology sometimes have me baffled. We had a suggestion yesterday in Sydney that the name of the bill ought to be changed to Sexuality and Transgender Bill. You have not used the word 'transgender'. How would your organisation view a recommendation in that light—to change the name? I am asking the question: where does the term 'transgender' fit in from where you are coming from?

Mr Shaw—Perhaps we would defer our consideration of that to the transgender lobby with whom we stand in support.

Mr Davey—I would be a bit more equivocal than that. GLAD has since moved on to incorporate in its mission statement the protection of transgender rights. As far as the importance of having 'transgender' in the title of a bill, I think that would have very important symbolic value in as far as it would make the issue of transgender discrimination very plain and on the front of the legislative cover. However, ultimately it is the substance of the bill providing the discrimination provisions which are more important—and I think Julie Peters alluded to that earlier today—and that people find redress for the discrimination that they experience. That is why I do not particularly have any problem with 'transgender' being included in what is essentially a sexuality bill.

Senator STOTT DESPOJA—Mr Davey, could you outline your concerns with the Victorian legislation that you referred to? Can you just give us a brief overview?

Mr Davey—Sure. I will try to be as brief as possible. The Victorian legislation brought in a ground known as lawful sexual activity—and Senator Ellison mentioned that earlier. As I said before, the enactment of the Victorian legislation illustrates my point of the difference between what people hear when we say ‘gay’ and what we actually know and feel by saying it ourselves. The thing is that with the activity ground it has left a huge legislative gap over the experiences of gay men and lesbians because it talks about only what you do in bed. I do not know very many people who have actually been burst in on in the privacy of their bedrooms and been discriminated against. But when they are walking around in the street they are ridiculed; when they are in their jobs or when they pay their superannuation contributions they are discriminated against—and that has absolutely nothing to do with the sexual activity they may or may not engage in. What it has to do with is people’s perceptions of the sexual activity that they engage in.

That legislation exists as a further gloss and lays a bit of fuel to the myth that gay men and lesbians are actually unsafe near children and should not be in or around or near children’s institutions or where children are taught. The exemption in the Victorian legislation stereotypes gay men and lesbians as being unsafe around children. In the Victorian government’s wisdom they actually did not put the exemption from working with children right next to the lawful sexual activity ground, as is the case in Queensland. They actually made it broad enough, the working with children issue, to cover all the grounds. So we have a very ludicrous situation in Victoria where if somebody held a religious—I am speaking now of the religious exemption—belief that black people should not teach their children and they held that because they came from the Dutch Reformist Church in South Africa and supported apartheid then they could make out a rational argument that their religious beliefs would not allow that. That is the situation that we have in Victoria. In their attempt to try to perpetuate the myth that gay men and lesbians are not safe around children they have expanded the exemption so that they could literally allow racism of that kind.

I would like to put on the record that the equal opportunity commission, as they stated that we still have certain reservations about the bill, have been exemplary in their efforts to try to make the bill work and they have worked in very well with the gay and lesbian community. I think most of my colleagues would agree with that. But it is also an excellent illustration in as far as all the literature that the equal opportunity commission use talks about sexual orientation, despite the fact that the act talks about lawful sexual activity. I think that is a tacit acknowledgment by the commission that the term ‘lawful sexual activity’, first, has dubious connotations and, second, most people are not too sure what it means. There is an inference that the sexual activity gay men and lesbians participate in is in some way illegal. If you look at the fact that it was not decriminalised until 1981 in Victoria and 1984 in Sydney—it is still a criminal act in Tasmania—then it has sinister connotations about how we conduct our lives.

Senator ELLISON—Is heterosexuality protected in the Victorian legislation?

Mr Davey—To the extent that heterosexuality is a lawful sexual activity, one would suggest.

Senator ELLISON—So the lawful sexual activity applies to heterosexuals as well?

Mr Davey—It is not defined and that is the problem.

Senator ELLISON—You would be in agreement, I presume, if I said that you could not extend protection against discrimination to illegal sexual activity of any description?

Mr Davey—I am in total agreement. I think you will find a section in this present bill that says—it was discussed yesterday—that the bill in no way makes lawful any activity that is currently unlawful under state legislation. For my Tasmanian colleagues that is quite problematic because their sexual activity is definitely not lawful.

In Western Australia in 1990 it was still on the books that gay men could be imprisoned for 14 years with or without whipping for any sexual activity between men. Some of the experiences that my colleague Mr Shaw would have had is in part informed by words that are left on statutes that stigmatise a community. We know that the laws in Tasmania are not going to be used—they have been tested; they have been taken to the brink and nobody has used them—but as the Tasmanian government has said over and over again, it has an educative effect. Never a truer word has been spoken. It educates people into bigotry and discrimination.

Senator STOTT DESPOJA—Are there aspects of the bill that you would like changed or that need to be amended, that you would like deleted or are not happy with? You seem generally in support of the entire provisions.

Mr Davey—I would echo the sentiments of my other colleagues, particularly Anna Chapman. I think it would be an improvement on the bill to make the lesbian experience visible by having them listed in the bill. I am sure that the term homosexuality would cover them, but for a community that has traditionally been ignored, even within the gay community, lesbian invisibility—

Senator STOTT DESPOJA—So would you specify gays, lesbians, transgendered, bisexuals? Would you actually run the whole gamut of specific words?

Mr Davey—Yes. Let us call a spade a spade. With regard to the heterosexual provision—I heard with some note what you were saying, Senator Ellison—I would like to echo what Mr Ray said. Heterosexuals are not discriminated against in the community. However, it would be my position that nobody should be discriminated against on the grounds of their sexuality. I think we have to be very careful when we are creating legislation such as this to not give the illusion that there is a level playing field. The

majority, the rich and the powerful have never needed, really, in the history of humanity, the protection of laws.

Senator COONEY—That is a dangerous comment to make.

Mr Davey—It may be, but I think of the class struggles of the 19th century and other examples in history. I will qualify that and say that all people should be equal under the law.

Senator ELLISON—Exactly.

Mr Davey—The experience we have had in this country, and overseas too, is that not all people are treated equally under the law. This legislation actually seeks to address that issue.

Senator ELLISON—The legal principles there are of equal application and this is a legal principle, is it not?

Mr Davey—I would suggest that they are not. Maybe when I can make the same percentage contribution to my superannuation fund as you do. I am not entitled to the same benefits and I do not know how we justify that.

Senator ELLISON—That is what I am saying. This bill has a legal principle which seeks to remedy that situation and say, 'Look, no matter who you are or where you come from, your sexual preference—whether it be by choice or not—matters not a jot as to how you are to be treated in the community and before the law; therefore you are all to be treated equally.' That is why I raised the question about the suggestion that heterosexuality be excluded. I think that is what Senator Cooney might have been driving at as well.

Senator COONEY—I will put it in the positive way, shouldn't you be saying that everybody should be treated equally before the law because they are a human being?

Mr Shaw—If I may answer that: of course we agree with that, but legislation has to mirror and acknowledge the social reality where, in a lot of places where lesbians and gay men seek to—as was referred to earlier—come together in a safe place. Sometimes it is the only opportunity in any given week where they can relax and be themselves knowing that at no time will they have to suddenly adopt a defensive posture and perhaps have to say, 'I am straight. I may be taken as being homosexual and I may suffer because of that.'

It is so important for the social cohesion for the communities of these people. Community is so important for such marginalised individuals who feel themselves to be just the one against the whole world. There needs to be those places. If we have gay clubs,

lesbian clubs wherein people can then come along and say, 'You are discriminating against us because we are heterosexual, and we want to come in here,' and so on, you are destroying the absolutely necessary social infrastructure of such a community by means of the legislation which was designed to protect them.

Mr Davey—The point was made yesterday—I think it was by Jenni Millbank, in what was a rather heated exchange with Senator Abetz—that most people respect the cultural integrity of other people, a certain multiculturalism, and that we should be able to be free to celebrate our diversity. We would not seriously entertain the idea of forcing the women's health centre to accept male patients. But the Sex Discrimination Act was contested on just that ground.

We would not seriously suggest that non-indigenous people should be able to force their way through with legislation to cultural events of Aboriginal people. But somehow we are actually saying that, in those few places where lesbian and gay activities go on—we mentioned bars and pubs, but there are also other activities—that heterosexual people should have equal rights of access.

I must point out too that there are lots of gay and lesbian events where heterosexual people come along and celebrate with us and are welcome. I go to gay bars with my straight friends as well, and they are welcome. It is not the person's sexuality that is an issue; it is the person's behaviour in a given context. We have seen lots of examples, I mean, Jenni Millbank pointed out to us yesterday that most gay men would not want to go anywhere near a lesbian bar because they are not interested in it. Straight men should perhaps respect the fact that lesbians want to congregate in that one bar in that one place in the city.

CHAIR—It is probably not fair to describe yesterday as a heated exchange between Senator Abetz and Miss Millbank. I think it was certainly a little bit forceful but I do not think it got to the point where it could be described as being heated at all.

Mr Shaw—I will take that point, Senator, I am sorry.

Senator COONEY—The only thing is that once you start, you say, 'Right, there has to be a distinction.' Based on the evidence, these people are a special case, but there are real problems with that. For example, you may say that people should not be subject to the criminal law because they make a big contribution to business law.

Mr Davey—That may very well be true, Senator Cooney.

Senator COONEY—You should not comment on that, Mr Davey. What do you say about that? I think you face a philosophical problem and I think you will face it in the best way possible, where you say that, as a matter of reality, you need this to get to some sort of level playing field. There is a real philosophical difficulty. You are saying that

there should be exceptions. Once you say that there should be exceptions, you have to go through this exercise. Then you might say that that is really an exemption in some way, which it is. Then you say, 'Well, why not for religious groups and what have you?' How do you get over that?

Mr Davey—I agree that that is a difficult one on the face argument to make out. By the same token, I qualify that by saying that in those events where heterosexual people have been able to mingle with members of my community, that has been a very educative and informative process. The people who are most virulent against gay men and lesbians and transgenders, by my experience, do not know very many of them. They have read a lot of literature from the United States, but they have not actually sat down and talked to a person and said, 'What is it like to be a lesbian?' or 'What is it like to be a gay man?'

Senator ELLISON—Do you think a group of men should be able to have a male club where they can go and have a drink, where females are not allowed, because they just want to have some sort of partake in strong liquor and risque discussion, or whatever gentlemen's clubs do? What about that? Isn't that the same principle that you are talking about?

Mr Shaw—All of these considerations cannot be truly appreciated properly when seen merely in isolation and as if it is like a mathematical exercise in consistency. They have to be seen in the broader social context from which they come. If there is a men's group and those particular men represent a group in society who have an overwhelming advantage within society, that consideration must be seen in that light. It is almost coming back to the whole question of positive discrimination. We do not come out and say that all discrimination in every instance is wrong if the discrimination—for example, positive discrimination—is attempting to remedy a situation or remedy a disadvantage where a group already suffers.

If we have legislation that says that no-one should discriminate anywhere, that would only apply in a world where there was no pre-existing discrimination and where there was no pre-existing suffering, and that is clearly not the situation. If we have this purely normative situation where we have legislation that says that no-one shall discriminate in any way at all and we apply that in a situation where people are suffering extremely through the structural imbalances, the legislation will try to have us living in this fantasy land basically. We need to protect the people who are being discriminated against but also at the same time there needs to be positive discrimination in order to protect those people in the few pockets of community which they do have.

Senator ELLISON—There are a lot of men who feel they are being discriminated against in the family law system.

Mr Shaw—Certainly.

Senator ELLISON—That is a feeling that they have. Others might not share that view; they might think that that law applies equally. So it is a judgemental definition.

Mr Shaw—Absolutely. As I said right at the beginning, each of these instances has to be judged within its particular context. Family law is a different area altogether and needs to be addressed in that light. When we are talking about discrimination of lesbians and gays, we cannot immediately refer to discrimination of men in the Family Court, because the context is so extraordinarily different.

Senator COONEY—When the United Nations was formed in the 1940s—you probably would not have been around then, but I can remember it—the small nations had this saying which, when translated into English went, 'It's just as unjust to treat unequals as equals as it is to treat equals as unequals.' Does that help you at all?

Mr Shaw—Perhaps with a pen and paper. I will take it on notice. Actually, I feel that my position is quite clear. I would be looking for areas to help you.

CHAIR—I inadvertently forgot in opening this section to mention that a submission had been received from the Australian Gay and Lesbian Inter-Faith Federation. That, too, has been published as submission No. 132, and we thank you for that. Are there any further questions?

Senator COONEY—Yes, I thought Mr Davey made a pretty good point, just in passing, about the gay mardi gras, where a lot of the publicity depicts the gay and lesbian community as bizarre, in a way. I was just looking at this picture here. The publicity is put out in such a way as to show that the mardi gras is somewhat bizarre. Have you got any thoughts about whether legislation could cure that, or is that a matter of education? What do you think?

Mr Davey—The question was asked yesterday—I think by you, Senator McKiernan—on whether we should go down the educative road or whether we should go down the legislative road. I would accord with the answer that was given—that education and legislation are both needed. Part of the education is making visible the experiences of gay men and lesbians. I would prefer school students to be able to read what it is like to be gay and lesbians from the *Not a day goes by* report, rather than to get their entire world perception of us from the mardi gras—not that the mardi gras is a bad thing, but it is only one dimension.

The problem that we have is that we are faced with enormous objection to getting into schools to speak to people, and the only avenue that we have is to actually try and do it through the media. So I would be very much in support of a broader perspective on the existence of gay men and lesbians in all parts of life, and I am wanting it.

CHAIR—Mr Davey, Mr Shaw and Mr Cooper, thank you for your attendance here this afternoon and for the assistance you have given to the committee in deliberating on its difficult inquiry. The committee stands adjourned until 9.30 a.m. tomorrow in Hobart, Tasmania.

Committee adjourned at 4.36 p.m.