



COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCES
COMMITTEE

**Legislative exemptions that allow faith based educational institutions to
discriminate against students, teachers and staff**

(Public)

MONDAY, 19 NOVEMBER 2018

MELBOURNE

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SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCES COMMITTEE

Monday, 19 November 2018

Members in attendance: Senators Fierravanti-Wells, Hume, Kitching, Pratt, Rice, Watt.

Terms of Reference for the Inquiry:

To inquire into and report on:

Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff, including on the basis of sexual orientation and gender identity and other attributes covered by the *Sex Discrimination Act 1984*, with particular reference to proposals for amendments to current legislation, and any related matters.

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GREENWICH, Mr Alex, Co-Chair, Equality Campaign

Evidence from Mr Black, Mr Comensoli, Mr Croome and Mr Greenwich was taken via teleconference—

Committee met at 08:37

CHAIR (Senator Pratt): I open this hearing of the Senate Legal and Constitutional Affairs References Committee inquiry into legislative exemptions that allow faith based educational institutions to discriminate against students, teachers and staff. This is a public hearing and a *Hansard* transcript of proceedings is being made. I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence. The committee prefers to take evidence in public; however, the Senate's resolutions provide that witnesses have the right to request to be heard in camera. It's important that witnesses give the committee notice if they intend to ask to do this. The committee may also determine that proceedings take place in camera. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. The committee has agreed that answers to questions taken on notice at today's hearing should be returned by this Wednesday.

I'd ask you to begin with a very, very short opening statement. We have an absolutely jam-packed day, so, if you could keep your opening statements down to three minutes or so, that will allow us time to ask questions. Mr Croome, would you like to go first?

Mr Croome: Thanks, Chair. I'm appearing today with two hats on. The first one is from Equality Tasmania, and the second one is from just.equal. I'll begin—talking with my Tasmanian hat on—by pointing to the Tasmanian Anti-Discrimination Act, which I assume most committee members are aware of in part at least. The act in Tasmania doesn't allow discrimination in faith based schools against students, teachers or other staff on the grounds of sexual orientation, gender identity or relationship status. That's been the case in Tasmania since that act was put in place, which was almost exactly 20 years ago, in 1998. The act does allow discrimination on the grounds of religious belief upon first enrolment for students and against teachers. But there we're talking about the religious beliefs of the students or the teachers concerned and not necessarily the school's religious beliefs. When those provisions were enacted, and they've been enacted since the act has been in place in 1998, our legislators made it very clear that it shouldn't be used as a justification for discrimination on the grounds of sexual orientation or gender identity.

I think the major point I want to make about those provisions today is that they have been immensely successful. In many Tasmanian faith based schools, particularly in the Catholic system, over the last 20 years, there has been a great deal of activity when it comes to challenging prejudice on the grounds of gender identity or sexual orientation in schools. There have been a number of programs run, including the Pride and Prejudice program, which originated in Victoria, and the 'affirming diversity, challenging homophobia' program, which is native to Tasmania. There has been quite a lot of professional learning for teachers in the Catholic and independent school systems on LGBTI issues, and the consensus I have from teachers and students who are LGBTI in the Tasmanian Catholic and independent schools systems is that the culture of those schools has changed immensely over the 20 years in no small part due to the fact that our Anti-Discrimination Act doesn't allow discrimination.

Another piece of evidence on that change is that, according to the Equality Opportunity Tasmania office, there have been no claims of discrimination by staff or students in Catholic or independent schools in that entire time. You'd expect over a 20-year period, if there was continuing discrimination and grievous examples of people being disadvantaged, that there would be such complaints, but there haven't been. At the same time, I'm not aware—and I keep a very close gaze on this, as you can imagine—that any Catholic or independent school or any religious based education authority has found the provisions in Tasmanian to be onerous. There have been no complaints, there has been no public debate and there has been no public airing of any grievance from any independent or Catholic school authority on the Tasmanian laws. In short, we can say that they work very well. It's certainly my

view, and the view of many of the people I work with in Tasmania, that this is the model that should be adopted nationally.

Just to finish off, I'll take my Tasmanian hat off and put on my just.equal hat. Just.equal is a national advocacy body, and we have a tradition of seeking the views of the LGBTI community on key issues such as this one, particularly when there are what would be considered by many LGBTI to be compromises on the table for us to consider.

In this case, we have conducted, since 4 November, a survey within the LGBTI community. It hasn't finished yet, but I have the interim report. So far there have been almost 2,000 respondents, broadly representative of the different demographics that you would expect, age-wise and geographically and in terms of gender. The survey asks questions related to the leaked legislation that has been in the media that the government is said to be considering, in relation to preventing discrimination on the grounds of sexual orientation and gender identity for students in faith based schools and also allowing indirect discrimination on the grounds of a school's religious ethos. We've asked respondents whether they would accept removing discrimination on those direct grounds but allowing it on the indirect ground, and 94.5 per cent so far have said no—they would not accept those conditions. We've asked them whether they would accept delaying legislation to ensure that there weren't those kinds of conditions allowing discrimination on the grounds of religious ethos, and more than 95 per cent said that they would be willing to wait. We've asked whether teachers and other staff should be included within the legislation so that discrimination against them is prevented, and almost 93 per cent agreed with that. There was also a very strong response—96 per cent—in terms of ensuring that students aren't discriminated against because their parents may be L, G, B, T or I. Many of the respondents to the survey have also made comments at the end; one of the most common was that faith based organisations, including schools, should not be allowed to discriminate and should be governed by the same rules as everyone else, particularly given that they are taxpayer funded. Quite a few people also described their experience as students in faith based schools and the discrimination that they experienced. We will finalise that survey in the next day and send the committee, obviously, the final results.

The final point is that I think it's important in today's hearings and when considering this issue that we return to the basic reasons we have antidiscrimination laws in Australia. These laws are there to provide the same opportunities in life to everyone. They are there so that we can all be chosen according to our capacity and, to quote Martin Luther King, the content of our character, not irrelevant factors such as our sexual orientation or gender identity. In this context, for students, I think that means having the same opportunities to contribute to and to gain from school life, including if that school life is at a faith based school. For teachers, it means being judged according to their abilities as teachers, not according to irrelevant factors, and I think that is what most parents who send their children to faith based schools will want. They'll want the best teachers—teachers who are selected and retained on the basis of their capacity, not judged according to factors that are irrelevant to their teaching capacity.

CHAIR: Thank you, Mr Croome. The committee looks forward to receiving that submission with those survey details. I'd now like to invite Daniel Comensoli from the National LGBTI Health Alliance to make an opening statement, but I will ask you to keep your statement down to just a few minutes. While we hear from Daniel, I'm also going to ask Jamie Gardiner from Liberty Victoria to come forward so he can give his evidence shortly as well. Mr Comensoli, over to you.

Mr Comensoli: Thank you, Senator, and thank you to the committee members for inviting the alliance to participate in the inquiry today. Firstly, for those of you who may be unfamiliar with the alliance and our work, we are the national peak health organisation in Australia for organisations and individuals that provide health related programs, services and research focused on lesbian, gay, bisexual, trans and intersex people, and we recognise that people's genders, bodies, relationships and sexuality affect their health and wellbeing in every domain of their life.

Although most LGBTI Australians live happy and healthy lives, we know that an overwhelming amount of evidence has consistently demonstrated that a disproportionate number experience poorer mental health outcomes and have a higher risk of suicidal behaviours than their non-LGBTI counterparts. Young trans people are particularly vulnerable. Four out of five young trans people have engaged in self-harm, almost one in two have attempted suicide and around three in four have experienced anxiety or depression. Overall, 61 per cent of same-gender-attracted and gender-diverse young people have experienced verbal abuse and 18 per cent have experienced physical abuse. It's important to note that these poorer mental health outcomes are not due to an individual's sexual orientation, gender identity or sex characteristics. Rather, they are due to experiences of discrimination, harassment and violence, as key social determinants of health. The exemptions currently in federal antidiscrimination law that allow faith based schools to discriminate against staff and students on the grounds of

their sexual orientation and gender identity exacerbate and, to some extent, legitimate discriminatory conduct against LGBTI teachers, staff and students, and this will continue to have a detrimental impact on their overall health and wellbeing. That is why the exemptions need to be repealed.

The alliance recognises that freedom of religion is a fundamental human right and is an essential part of a liberal democratic society. The internal or private dimension of this right is absolute; however, the public dimension—the freedom to manifest one's religious beliefs in worship, observance, practice or teaching—may be constrained in order to protect the public safety, order, health or morals or the fundamental rights of others, and this includes the right that all people are equal before the law and are entitled to the equal protection of the law, without any discrimination. These rights need to be protected and balanced in a coherent legal framework. However, we believe that this balance is currently unfairly skewed to privilege religious bodies, in this case religious schools, in their right to exercise freedom of religion over the rights of LGBTI people to be free from discrimination. Teachers who uphold the ethos and values of the school at which they are employed and who just so happen to be sexuality- or gender-diverse should not be discriminated against in these contexts. A person's innate attributes, such as their sexual orientation or gender identity, should not be grounds for discrimination, and no-one should be fired from their job or denied an education simply because of who they are.

Mr Black: As you know, last year Australians voted for fairness and equality, not to entrench discrimination against LGBTI people and their families. LGBTI people have, time and time again, shown strength and resilience in the face of adversity, though the discrimination continues to have a devastating impact on the health of our communities, as the National LGBTI Health Alliance just demonstrated. That's why these outdated laws which entrench discrimination need to change.

Following the leaks of the religious freedom review, many Australians were surprised and, indeed, outraged to learn that, under current antidiscrimination laws, schools and other services run by religious bodies are legally able to discriminate against LGBTI children, clients and staff. This is when kids in schools should be focusing on classes, homework and building friendships, not living in fear of mistreatment because of who they are or who their families are. Children have been asked to leave their school because they have come out or because of their parents being part of LGBTI communities. Similarly, teachers should be focusing on educating their students, not worrying about losing their job. No employee should face discrimination, when the reason has nothing to do with their job.

Following the religious freedom review leaks, the Equality Campaign, the Human Rights Law Centre and Rainbow Families Victoria asked LGBTI people to share their experiences of discrimination in schools, and in 48 hours we received more than 800 responses from people across Australia sharing stories of being bullied, threatened or expelled because of their sexuality or gender identity. We will share some of those stories in our written submissions to this inquiry. The basic position, though, of the Equality Campaign is simple: we want equality for all children to learn, and equality for all people to do their job.

Jamie Gardiner: Liberty Victoria is perhaps Victoria's oldest human rights body. It traces its origins back to 1936 with the first Australian council for civil liberties. Liberty supports and promotes the adoption of human rights standards in compliance with international law. One of the very important principles of international human rights law is equality. For a long time Liberty has promoted the human right to equality—equality before the law and equality under the law. Liberty has made significant submissions to several different Commonwealth parliamentary inquiries on these issues, and I'd particularly like to incorporate Liberty's submission of 14 February last year—or maybe it was this year; I forget—to the religious freedom inquiry as covering much of what we want to say on the current issue.

The human right to equality is, like all human rights, subject to some competition from other human rights. But, when it comes to schools, for example, and the teaching of children, the best interests of the children must always come first. In looking at the leaked proposal of the government, which I've seen through the Law Council of Australia's material, there is an attempt to undermine the public view on these issues. It seems clear to Liberty Victoria that the religious exemptions, except in relation to the training of religious officials and their appointment, should simply be abolished. Liberty would absolutely urge the committee to recommend following Tasmania's example, as outlined by Rodney Croome, where there is actually no problem. Liberty is also very aware that, in recent days, senior officials of major Christian religious bodies have said that they don't want to discriminate and they don't want religious exemptions. We thoroughly endorse that view and are always delighted to welcome strayed sheep back to the fold of reason.

This inquiry began on the anniversary of the 'yes' vote. A year ago that marked a tipping point. It revealed for the first time, beyond any doubt, that the Australian public have accepted that equality for LGBTI people is the norm, and that was reinforced by the outraged reaction of the public to some of the remarks accompanying the

leak of the Ruddock review recommendations and the astonishment of the public that discrimination against children, teachers and others by religious schools was so clearly permitted by the laws of the Commonwealth.

Our proposal to this committee is that that public view, that tipping point, should be acknowledged. There is no reason for religious schools, religious bodies or anyone to be exempted from the ordinary laws that govern conduct in this country—anti-discrimination laws that seek to promote the human right to equality in a balanced and reasonable way.

Religious exemptions place one small group above the law. This is wrong. Not only is it wrong in principle and contrary to international law and to all decency but, in our view, following the writings of Professor Luke Beck of Monash University, which we commend to the committee—I hope you have him coming to talk to you later—religious exemptions in Commonwealth legislation are in themselves a violation of section 116 of the Constitution. They amount to giving a privilege, a benefit, to religious bodies that is not available to non-religious bodies—and should not be available to anyone, of course. That amounts to a preference and in many ways an establishment of one class of religious thinking against the rest of the country's other class. So, for a whole range of reasons—fundamental human rights, public opinion and the Constitution—Liberty Victoria urges this committee to recommend that the religious exemptions be removed.

I have one further point. In the leaked material circulated by the Law Council of Australia to its constituent bodies, there appears to be a proposal, which perhaps should be rejected, to meddle with the definition of 'indirect discrimination'. The distinction between direct and indirect discrimination is enshrined in legislation, and it is really a rather unreal one. Indirect discrimination, as a category, was invented simply to make it obvious and clear and beyond doubt that conduct that has the effect of discriminating is unlawful, even though it doesn't say so on its face, because, after all, people who engage in discriminatory conduct often do not announce: 'Hello. We are going to discriminate on this attribute that we shouldn't, but we are going to disguise it.' The notion of including a huge new attempt to get around and undermine that concept is itself objectionable. So we would certainly oppose that.

In summary, Liberty Victoria asks the committee to recommend full equality, without religious exemptions, not only in schools but in the architecture of discrimination law in the Commonwealth sphere entirely, which means not only the Sex Discrimination Act, which is your reference, but the Fair Work Act and the Age Discrimination Act, among others no doubt. Thank you for the opportunity to appear.

Senator RICE: Thank you to everyone appearing before us this morning, particularly at such short notice. It is clearly something that everyone is very fired up about. Mr Croome, who has the survey that just.equal has undertaken been conducted with?

Mr Croome: Do you mean: who are the respondents?

Senator RICE: Yes.

Mr Croome: You will be provided with a demographic breakdown in the final report. The respondents all identify as lesbian, gay, bisexual, transgender, intersex or queer. I think I mentioned that the spread of those respondents demographically, in terms of their gender, sex, age and geographical location, corresponds fairly closely to the general population. That is the best indication that we have that it is a representative sample.

In the methodology that we use for these surveys, we also do our best to ensure that we go beyond those who are most connected to the LGBTI to reach as broad a sample as possible. We do that through a variety of different survey methods, including targeting people on social media—as I said, beyond those people who might be most closely connected to the LGBTI community. So, it's as representative as it can be at this time. It's always hard to reach a representative sample in the LGBTI community. The only way to be absolutely certain that you've done that is to survey right across the board in the community and just sort of pluck out those LGBTI people you reach, but that's far too expensive for any survey. This technique that we use—of going out and finding as broad a range as possible and making sure that the demographics respond to the broader community—is the best way you can be certain that you've got a representative sample.

Senator RICE: In the interests of time, I'll ask just one question. We heard the Prime Minister say that he was supportive of removing discrimination against students and that it should have occurred by the end of October. He wasn't talking about teachers, and I want you to respond as to whether you see that there is any rationale or justification as to why there should be a difference between students and teachers in terms of discrimination in our religious schools. Anybody who would like to answer that question, jump in.

Mr Comensoli: Australian professional standards for teaching mandate that teachers must support students from a range of background—students with disabilities, Aboriginal and Torres Strait Islander students—but there are no standards for supporting students who are sexuality and gender diverse. Proficient teachers must be able to

work with or engage with parents about their child's learning and wellbeing—if this standard could not be adhered to at the school or a teacher was trying to expel a student on the basis of their sexual orientation or gender identity. So, amending laws for students but not teachers is unjustifiable. Teachers facing discrimination at faith based schools on the basis of their sexual orientation or gender identity can't support students.

I would also add, on Rodney's point, that even when these exemptions aren't used against teachers, even when they're not exercised, teachers know that they exist, that they're there. That hovers over employees in religious schools, and that means that there's an extra burden of threat hanging over these people. When teachers or staff want to go to their employer to complain about wages or conditions, they know that the school could terminate their employment on some unrelated ground, and there's no justification for that at all.

Mr Croome: I understand that there is going to be a survey by the University of Tasmania looking at the experiences of LGBTI staff in religious faith based organisations. That survey isn't completed yet, but the anecdotal evidence that the survey is collecting is that, in Tasmanian faith based organisations, LGBTI staff feel a greater level of security and certainty about their positions and feel more able to contribute to school life because of the Tasmanian law. They feel protected and they feel safer and therefore are able to give their all to the organisation that they're a part of.

Jamie Gardiner: I agree with what's just been said by both speakers, but I would just say that, in a way, discriminating or holding the sword of Damocles over the heads of teachers and staff is itself indirect discrimination against LGBTI students. You cannot possibly have safe and equal education in a school where your teachers have to hide part of themselves and cannot support you, as was said before. It is essential that teachers and other staff be covered by the same equal opportunity protections and antidiscrimination protections as the students and everyone. It's an extension of an existing right. To split the two makes no logical sense.

Mr Greenwich: Is it appropriate if I add something?

CHAIR: Yes, please do.

Mr Greenwich: Thank you. I would reinforce what the other presenters have said, but also say that it's important to realise that LGBTI people can be devout people of faith. They are part of faith communities. Whether they are a student or a teacher in a school, we should also consider the negative impact of the discrimination, particularly on that cohort. I think it's also important to know that there is nothing in the fundamental ethos of a faith-based school that says anything about LGBTI people being poor teachers or suggests that they should be targeted in discrimination. When we get into this topic about students and teachers, it's about targeting discrimination against LGBTI people. It's not about protecting religion or belief. These teachers are teaching geography, arithmetic and science, and they're much loved and much appreciated. We have got big stories, and we will share them with the inquiry. To Senator Rice's question: there should be no difference. Schools should be places that are free from discrimination. We shouldn't be legalising bullying against either students or teachers.

Senator RICE: Thank you.

Senator FIERRAVANTI-WELLS: In the interests of time, could you each take this question on notice, please. Could each of the organisations provide to the committee actual formal complaints where the religious exemptions have been involved or invoked, whether in relation to students, staff or contractors? It's probably easier if that question is taken on notice.

Can I also ask each of you: given the recognition of religious freedom under international law, could you give me your views as to why that right shouldn't sit alongside other human rights with appropriate protections?

Senator KITCHING: Chair, could I just clarify what Senator Fierravanti-Wells has asked for. Given that some schools may well have their own employment contracts and that they may well have a mediation or a resolution clause within those employment contracts, if organisations are able to furnish us with those complaints, could we also have regard to any mediation or resolution clauses within those contracts?

Senator FIERRAVANTI-WELLS: I'm happy with that.

Senator KITCHING: I think that might clarify—

CHAIR: I'm very happy for our witnesses to take that on notice. I expect that the Independent Education Union will have more of that detail, whereas the Equality Campaign, I think, has said it has collected some of those examples of discrimination, which might be as much of the level of detail as it's able to drill down into.

Senator KITCHING: Could I just ask: would it be helpful for the government, for this inquiry which we are undertaking, to furnish the entire Ruddock report in order to ensure, perhaps, a more complete response? Is that something that would be helpful to organisations?

Jamie Gardiner: It could be.

Senator KITCHING: The reason I ask, Jamie, is that we have the leaked recommendations but not the entire report. It's very difficult even to reverse-engineer—I know, because I've tried—from the recommendations back to the submissions to that, in order to arrive at what the report maybe looks like. That's very difficult. My view would be that it would be really useful to see the entirety of that report.

Mr Gardiner: I agree. Liberty Victoria is absolutely fascinated to see in the leaked recommendations what appear to be clear references to one of the halfway houses that we propose, having said that religious exemption should go altogether. We also proposed to that review that an intermediate step might be to make religious bodies publicly open and transparent about which attributes, doctrines and circumstances, in some detail, they would use to claim their religious exemption; otherwise, if they don't do that, they don't. To my astonishment and pleasure—and maybe someone more important than us did it—that is, effectively, reflected in the Ruddock recommendations, and it would be fascinating to see how they got to that. No doubt, at some stage or other, the rest of the report will be released or leaked. That would be a good thing. I and no doubt others are busily trying to get hold of a copy but haven't succeeded yet.

Mr Croome: It would be wonderful to see the Ruddock report released, particularly to inform the broader debate about religious freedom. At the risk of being facetious, in terms of the schools issue that we're talking about today, it's only one document we really need and that is the Tasmanian Anti-Discrimination Act. It's worked well for 20 years, and I really don't understand why it simply can't be adopted nationally. If it works in Tasmania it will work in every other state.

CHAIR: Thank you. Anybody else? No? Okay. Jamie, whilst it would be helpful to have the Ruddock review, we wouldn't need it to repeal the clauses in the Sex Discrimination Act.

Jamie Gardiner: Sure, it wouldn't be needed at all. It would merely be interesting for academic purposes. But I'm sure you're hearing quite enough to do everything you need to do now.

CHAIR: Thank you, everybody. I'm sorry we don't have time for more questions. I look forward to your written submissions if there's anything further you want to place on the record for the committee.

APPLETON, Ms Brenda, Chair, Transgender Victoria

MACDONALD, Ms Megan, Co-Founder, Parents of Gender Diverse Children

MARLOWE, Ms Felicity, Executive Director, Rainbow Families Victoria

WALKER, Ms Karyn, Co-Founder, Parents of Gender Diverse Children

[09:18]

CHAIR: Good morning, everybody, and thank you for appearing as witnesses this morning. I understand you've been provided information about parliament privilege and the protection of witnesses. Do you have any comments to make on the capacity in which you appear?

Ms Appleton: I'm also the co-chair of the Victorian LGBTI Taskforce.

Ms Marlowe: I'm also providing a joint statement from Rainbow Families New South Wales and Rainbow Families Queensland.

CHAIR: Thank you. I'll start with Ms Marlowe.

Ms Marlowe: Thank you for the opportunity to present today at the hearing. This is a joint statement that's been prepared by Rainbow Families Victoria, Rainbow Families New South Wales and Rainbow Families Queensland. For the benefit of senators: rainbow families are families where one or more parent or carer is lesbian, gay, bisexual, trans, gender-diverse, nonbinary, intersex or queer. We support the removal of the existing exemptions in the Commonwealth Sex Discrimination Act that allow students and staff to be discriminated against in faith based schools because of their sexual orientation, gender identity or relationship status. The removal of these exemptions should occur with no additions or grey areas and no exceptions; just remove the exemptions.

We also strongly urge you to consider that our children should not be and should never be discriminated against because of who they are or how their family has been formed. We also wish to state that we strongly believe that any educational institution receiving government funding should not be allowed to discriminate due to a person's sexuality, gender diversity, family structure or relationship status, be they a child, young person, family member, parent, carer or school staff member.

At this time of the year many of us are thinking about sending our little ones off to primary school for their first day, and many of us, including me, have 12-year-olds who are about to head off to year 7 and make that exciting move to secondary school. Starting at a new school is always a stressful time for many families, and many of us are making educational decisions for our children that will have a lasting impact on their lives. We choose the schools our kids go to based on a range of reasons: it's the closest school, it has a good sports programs or we like the wellbeing support that's provided. But some of us also choose a school for our children because we went there ourselves or because it's a faith based school—the faith we follow as a family. Choosing a school as a rainbow family does also mean that some of us hear things like, 'Maybe your family is not best fit for our school,' or it's implied that you can't talk about your family form once you're enrolled. Many families report this kind of indirect or implied discrimination when they're looking for schools for their children.

We want to make it clear that we all live very intersectional lives. Yes, we are parents and carers, but we're also multicultural and multifait. We live in rural and regional communities and in metro areas. Some of us work in schools. Some of us are foster carers or sole parents, or we live in blended families. We want our children to grow up in communities that love and cherish them, and some of these communities are also our faith or religious communities.

We believe that the current exemptions under the SD Act are discriminatory, unnecessary and out of step with modern Australia. We have several key messages today. We believe that schools must not be allowed to judge a child on the basis of the family they come from. Enrolments should be accepted from children and young people from diverse families: from sole parents, from people who use IVF, from divorced parents and from rainbow families. There needs to be an inclusive, whole-of-school approach to ensuring that LGBTI children and young people are welcomed, embraced, encouraged and respected for who they are and who they may become as they grow and change across their adolescence. We also believe that school staff should not be discriminated against either.

We do not want to see a situation where additions to the existing legislation make it harder for young people to be their true, authentic selves, for parents and carers to care for our children or for people with a real passion for education to be refused employment or to have to do their jobs with fear. We'd like them to be able to do their jobs without fear. Currently, if our children are at a faith based school that supports them and their family, we

worry that we could be just one new principal or one new school board member away from those exemptions being exercised. No matter how many schools might tell you they no longer or they do not actually exercise the exemptions, we believe and understand—and many of us have experience on school councils—that things can change with one school council election or one new employment in principal or leadership positions. We think that situation is unsustainable for our children and families.

I wish to share with you three quotes I have from families. These were collected across New South Wales, Queensland and Victoria. From a trans man who is married to another man, with two children at a public school and one at a private school: 'I worry about the impact on my eldest son, as he is in a private school that is currently supportive of us as queer parents and him as a queer child. If the principal or school changed, this may not be the case.' From a lesbian who has a child in a rural independent religious school that he got into under a scholarship program: 'I'm worried that my son is under scrutiny as he's in year 10 and it is the time when young people start expressing their sexual orientation and dating. He may be singled out as a child who may be gay because he has a lesbian mum. I'm concerned that he won't be open or can't be open about his family at school. The school should be employing a diversity of staff to reflect the diversity of our community.'

This is another one from a lesbian couple, who are foster parents, who have cared for eight children over the last couple of years and expect to care for many more: 'As foster carers, we often don't have control over which school our children go to. It is usually best to try and keep them in a school they're used to, so we'd be reluctant to have to change them if we have a child attending a religious school. It would be very detrimental to an already disadvantaged child to hear that there's something wrong with the people looking after them and that the school could kick them out if they happen to be gay like us.'

Then there is one from a lesbian and gay-dad led family, who say they suffered emotional distress during the ongoing marriage debate of the last couple of years and through the postal survey and who are now I worried about this. They're parents of six children aged seven to 17. Five of those children are in private schools—two in Anglican grammar schools, two at a Uniting Church private school, one in a Christian college and another in a select-entry arts school: 'I worry my children will grow up feeling ashamed of us, of their family and maybe of themselves. Shame destroys mental health, kills joy, and shame kills people. I worry that stereotypes will alert schools to nonconforming children, who will be bullied by teachers and administrators.'

Finally, there is one comment from a lesbian parent who is about to become a stepmother to five children: 'I teach at a conservative Catholic primary school and am constantly afraid that someone will find out and that I will lose my job. I'm the main income earner, and my employment is incredibly important. I worry that I'll lose my job. I worry that my employer won't give me a good reference if she finds out. This could affect my future employment possibilities. I feel like a criminal, and I've done nothing wrong.' Thank you.

CHAIR: Thank you, Ms Marlow. Who would like to go next? Ms Walker?

Ms Walker: Thank you for giving me the opportunity to speak today. Parents of Gender Diverse Children is a not-for-profit organisation founded by myself and my co-founder, Meagan Macdonald, in 2016. We exist to provide peer support to parents and those parenting trans and gender diverse children of any age. We speak to each and every one of the families that comes to us for support. We know in detail the story of their journey with their trans and gender diverse child. At present we actively support upwards of 600 families around Australia, and between 10 and 20 new families approach us each week for support. These families are drawn from many cultures, faiths and varying social and economic backgrounds. There is no set age that a child will identify as gender diverse. Every day we speak to families, and most of the time their child is already in school, already part of a friendship group, already part of a school community.

The most important and vital thing for trans and gender diverse young people is to be supported. The support needs to come from their home, their social circle and their school—ideally all three. All young people need to feel safe and included at school, and school should be an environment that is free of fear. In faith based schools that are able to discriminate based on gender identity, trans and gender diverse students live with fear every day. It is the fear of discovery, of people finding out, of being outed to others and of needing to ask those in power to approve and give permission to live authentically, and the fear that they may withhold that permission. It is the fear that you'll be excluded from your school because your identity makes you an outcast, that bullying won't be policed, that harmful attitudes will be allowed to prevail and to cause lasting pain and harm, and that you can't stay in a place that is meant to be safe. Staying in the closet is not an option. Trans and gender diverse young people are already in a high risk group for self-harm, suicide or ideation, school refusal and finally dropping out of school. Forcing a student to live a lie every single day in order to choose an education over their gender identity is not acceptable.

Families choose schools for a wide variety of reasons. It may be that it aligns with their faith. It may be family tradition. It may be the belief that a particular school offers better academic outcomes, caters to the pastoral needs of a student or has a program or scholarship opportunity that is best suited to that child. Many families have all of their children in the same school, and school life and the school community is an integral part of their family identity. Changing school is not a simple option for many families, and the impacts of a change of school can damage a student's entire school career. We wish to see this avenue for discrimination removed completely. We know that inclusion and positive moves to accept diversity have to come from the leadership of a school. Schools need to be confident to make the decision to be inclusive without being undermined by legislative exemption. With legislation retained or included, just in case, we believe that students may find themselves one board member, a change of leadership or a new headmaster away from a shift in the way diversity is viewed in that school. We also know that that small but vocal faction can apply pressure on school boards, committees and leadership teams to use what is available to them to discriminate against students and staff.

We've worked with a number of faith based schools, and they've done an amazing job to adapt and change in order to provide an inclusive environment for all students. We hear again and again from parents and schools that they do not wish to discriminate, that it is their firm belief that all students should be cared for equally and that they support the individual rights of the child to be supported in faith. I'd now like to hand over to Meagan, my co-founder, who is going to tell her family story. Thank you for your time.

Ms Macdonald: I'm the mother of four children: two girls and two boys. When my first child was old enough, we moved to be closer to a school that we wanted all of our kids to go to. We gave a lot of thought to choosing this prep-to-year-12 Christian college. It had an excellent reputation for its academic, sport, music and arts programs and a holistic approach to pastoral care for all students. The school's motto is 'Grow in love'. Our eldest child was there in prep, Evie followed her three years later, and, three years after that, the third child went there too. We were firmly embedded in the school and its community. At the time, I remember, with my fourth child, thinking to myself that this was going to be a 25-year commitment to paying school fees. But I'm here today to talk about my second child, Evie.

Evie is an amazing kid. She is smart, funny, dramatic, caring, well liked and a good student. She is also transgender. She transitioned socially and affirmed her gender when she was nine years old. Evie's dad and I struggled with her emerging gender identity, and we spent a great deal of time seeking professional help and input into the questions and decisions that faced us. We were reluctant to accept her, but over time, with education and support, we were able to do it. In the beginning we just assumed that we needed to teach her how to be a boy, but, as Evie's discomfort increased and her mental health deteriorated to a point of suicidal ideation, we knew that there wasn't any time to waste. None of this was known to us when we enrolled Evie into the private Christian college. At the time Evie began her social transition, we had three children at the school, and Evie was in grade 4. After months of visits to the Royal Children's Hospital, we knew it was time to speak to the school. We'd accepted that it was in Evie's best interest to transition her both at home and at school.

At this time we'd been involved with the school for eight years and we really felt part of the school community. My children were happy, engaged and had strong social connections. Our eldest was in year 7 and our youngest in grade 1. We approached the campus principal about Evie. He was shocked but resolved to get back to us. Three weeks later they did come back to us, after speaking with their board and leadership committee, to say that they would support Evie, and we were greatly relieved. We couldn't have foreseen what was to come. Within days, it was our turn to be shocked. A parent at the school alerted us that they had seen Evie going to and from chaplaincy house and wondered what might be going on. We had no knowledge of any chaplaincy counselling. We were to learn that, during the three weeks that the school had been seeking advice and information, the school's chaplain had been counselling Evie on her choices and coaching her in what amounted to conversion therapy. In the following days Evie came home distressed and upset after an incident where she was physically assaulted by a teacher intent on making her line up with the boys rather than the girls. Another teacher forced her to rub out her chosen name and replace it with her old name or face failing a test. Finally, as her hair began to grow, the school began harassing her about the length of her hair and the dress code that she was violating.

As a family we were distraught and conflicted. We had been part of the school community for eight years. We had many friends there. Our children were previously happy and loved their school, yet we couldn't leave Evie in an environment that would not accept her for who she was. After much soul-searching it was obvious that we had to find a new school for Evie, but it wasn't that simple. So much of what happened to Evie was public and known to the wider school community. Our other children began to suffer. The questions, the teasing, the glances, the exclusion became too much. We had to remove them too.

That school was a part of us, a part of who we were as a family and an important part of our lives, and we had nothing. It is difficult to understand how providing a safe and inclusive educational environment for my child, where she was promised the value of growing love, was lost because the school chose to discriminate against my child and chose to exercise their right to not be accepting and to not provide a safe and inclusive environment. Our family lost so much.

CHAIR: Thank you, Ms Macdonald, for sharing that story. It certainly highlights the core issues before the committee today. I know it's not always easy to speak publicly from such a personal point of view. The committee thanks you. Ms Appleton?

Ms Appleton: I think we all have a responsibility to get our children safely and successfully through school, and this is the single biggest thing we can do for their future success. I know of many trans and gender diverse people who have not succeeded at school and have struggled to optimise their opportunities in life. This causes a huge loss of potential for the Australian economy and our society. Imagine the benefits if we harnessed that potential.

Anecdotal evidence suggests that transgender people experience more than 20 per cent unemployment, with gender diverse and non-binary people at about double that rate, or eight times the current national average. Much of this is after struggling at school due to the discrimination and stigma they face in society. This is often exacerbated by their treatment in a private, faith based school.

I think it is somewhat easier than it was 20 years ago for trans and gender diverse people. But we know from the Trans Pathways research, which you'll hear more about later this morning, that 48 per cent of 14- to 25-year-olds who participated in that research had attempted suicide by age 25. Nearly 80 per cent had experienced issues at school, university or TAFE. Other Australian and international research reiterates these findings. Most of us are not born with mental health issues, but our mental health struggles are a result of the discrimination and the stigma we face in society, especially during the important and formative years of school.

You've heard about the impact on young people in our schools, so I'll focus on the concerns for employment security for LGBTI teachers employed in faith based schools. I have a friend who is a gay male maths and IT teacher who'd been working at a Christian college in Melbourne but was not 'out' at school. He lived in fear of being outed and, to reduce the risk of being found out, did not move in with his partner. After several years of fear and guilt, he started to seek alternative employment, but he is left with the scars of living in fear and under stress for so long.

Another friend is a science teacher with a physics doctorate who had been assigned male at birth and was working in a Catholic boys school in Melbourne. After many years working through her gender identity issues, she approached the school to request their support to enable her to transition at school. They refused, and she was forced to resign. This was at a very vulnerable stage in her life and career. She then needed to seek employment post her transition, which was not easy and required her again to conceal her journey. The employment decision should be based on their ability to meet teaching standards and never their sexuality or gender identity. I'm concerned that successful teachers face discrimination because of being a member of the LGBTI communities.

At Transgender Victoria we work hard for a fairer, more inclusive society based on treating everyone with dignity and respect. The current exemptions for faith based schools which enable discrimination against students, teachers and staff are unjust and unfairly penalise vulnerable people in our society. The impact of this discrimination on students in particular can cause lifelong issues and prevent that person optimising their opportunities in life. Thank you.

CHAIR: Thank you.

Senator RICE: Thank you, all of you, for sharing your stories, which really underline the importance of what we're doing today and the importance, from your perspective, of removing these exemptions. It seems to be the situation that the exemptions are there because of lack of acceptance of LGBTIQ people in some religious communities. If these exemptions were removed, how much of a difference do you think that would make in these religious schools?

Ms Walker: I think it would be significant. We have numerous families who have students who go to faith based schools. They grapple with various issues, and most of them centre around either a student's status as a trans or gender diverse young person or being a trans and gender diverse young person whose status is not known and the issues around people finding out, being outed, being bullied, not being supported. I think, if that was removed, the notion that a student could go to school and not have to worry would make an enormous impact, because it is that concept of direct and indirect discrimination. They never said to Meagan, 'You can't have Evie here because we don't support her.' It was much more indirect than that, but it was still discrimination.

Ms Appleton: I think having the exemptions in place teaches young people at a young age that it's all right to discriminate, and I think, for many, that entrenches perhaps what they're learning at home and it means that they often continue to have those beliefs through their later life. So I think removing it removes that early message to young people that it's all right to discriminate. It also removes a huge amount of fear and stress that students, teachers and staff experience if they are not out or if they fear being found out.

Ms Marlowe: I would absolutely agree and I've reflected on my experience of 13 years of Catholic school education in Victoria. I wrote recently to my principal at that school and it made me think a lot about the fact that there was a great deal of fear of being different at a Catholic girls school. If you were at all seen to be different, there was also a slur based on whether or not that was based on your sexuality, and it didn't make a very easy time for a lot of students. I know that in some ways we hear about suicide and self-harm, but, in my case and in the case of my contemporaries, that led to things like an excess of risk-taking behaviours in early adolescence and perhaps some forms of arrested development in terms of being satisfied and happy with myself and others. I think that the most impactful thing that could occur as part of removing these exemptions is the lifting of the fear and of the daily fear that a child or a young person or a staff member would have going to work or school every day and not being able to be their authentic self.

Senator RICE: Do you think that there is any justification for differentiating between students and teachers, as our current government seems to think could be a possible way forward?

Ms Marlowe: I would absolutely say there is none. I think there was an excellent quote by, potentially, an Anglican bishop not that long ago which said, 'If it's okay to not discriminate against children, at what point does it become okay to discriminate against adults?' I think that's a really good point because I don't think, no matter what people's age or experience or profession or attendance at a school, there should be any differentiation between when it's okay to discriminate or not, and it would be a whole school community and a whole school culture that would benefit with both staff and students having the exemptions removed.

Ms Appleton: I think, adding to that, we've got the experience in Tasmania where it's been a positive not to discriminate against anybody in a private school, a faith based school. I see no justification for any discrimination.

Senator FIERRAVANTI-WELLS: I'm conscious of the time, so please do feel free to take these questions on notice. Can I ask each of your organisations to provide the committee with actual formal complaints, if you have them, where religious exemptions have been involved—obviously particularly, in your case, in relation to students, staff and contractors? Also, in the recommendations as they have been published, there is the distinction between students, staff and contractors. I appreciate the public comments that have been made in relation to students and the views across the political divide in relation to them. I ask my question particularly in relation to teachers and contractors. As a compromise position, I would appreciate your views in relation to the parameters, if I can put it that way, that have been set out in that recommendation—and you'll see them at recommendations 5 or 7 or other parts—in relation to these catch-all phrases that have been put there in relation to staff and contractors. I would really appreciate your comments in relation to that. Thirdly, can you provide the committee with any views that you may have in relation to, under international law, recognition of religious freedoms and why that right of religious freedom shouldn't sit alongside other human rights with appropriate protections? I appreciate they're complicated questions but, if you could take those on notice and provide the committee with your thoughts, I'd be most grateful.

CHAIR: Just for clarity, those are the Ruddock review recommendations that you're referring to?

Senator FIERRAVANTI-WELLS: Yes, of course. For completeness, can we refer to those as the catch-all parameters that have been set out in those recommendations to allow the exemption but at the same time with a series of parameters.

CHAIR: Thank you. Senator Kitching.

Senator KITCHING: Thank you very much for your time today. Given Victoria has implemented a Safe Schools program, are there now fewer incidences of bullying in state schools than there were before it was introduced? Are you keeping track of that? Are there still complaints coming in from state schools?

Ms Appleton: My experience has been that the Safe Schools program has been very helpful in creating a safer space for LGBTI students, staff and teachers in the government schools. My understanding is that all government secondary schools have now undertaken the Safe Schools program, and, certainly, from a trans and gender-diverse point of view, we see it has been very beneficial.

Senator KITCHING: The secretariat can write to the department of education here and see if there are. Anecdotally, you would say that, but I'm interested not just in whether there has been the creation of a safe space but whether there are actually now fewer incidences of bullying because of that program. And, if those programs

were implemented in religious schools, what would happen in that instance? I'm aware that, in fact, some of the Islamic schools in Melbourne, for example, are still segregating by gender in their playgrounds, yet they have very good academic results. If that program were to flow through into religious schools, would there be a change that would come through?

Ms Marlowe: In some respects, I feel like that's conflating two specific issues. We are talking about the removal of exemptions for the benefit of LGBTIQ students and also their siblings—

Senator KITCHING: It doesn't actually specify under section 38(3) LGBTIQ students. It's much broader than that, so it's not really a conflation. Sorry, keep going.

Ms Marlowe: whereas the Safe Schools program as now conducted by the Victorian education department undertook to train all state secondary schools in terms of getting them to sign a document like Brenda had indicated, and I understand all schools have had that contact and/or signed that document as of the beginning of the caretaker period. If schools were, as religious and faith based schools, able to know that those exemptions weren't there, it would possibly lead to a much more open and inclusive school community where the issues related to supporting people based on their sexuality and their gender would be welcomed and opened up. This could mean a less fear based application of working, in terms of social justice or human rights groups, where, say, the local amnesty group in the school could feel like they could do things around sexuality or gender discrimination. Or there could be a gay-straight alliance, as they are colloquially called, like a support group, that says, 'We're going to work together to look at issues in community and society that discriminate against people based on their sexuality, their gender or their relationship status.' I think that it's not necessarily just about an antibullying program. Absolutely, bullying programs should always include when children and young people are potentially being bullied about attributes such as their sexuality, gender identity or relationship status—or that of their families. That's really important to my constituency.

But it could also mean a broadening of the curriculum that can be taught. A curriculum has particular outcomes that need to be met, but maybe there would be an opportunity in some curricula to discuss the benefits of people like Alan Turing or other people who have contributed to society in general—to history, to geography, to computing, to science—but who also are gay, lesbian, bi, trans or gender diverse. It's an opportunity to broaden those experiences for students and an ability to open the curriculum and the whole school community to be much more welcoming and inclusive across the board. It isn't just about the students and it isn't just about the teachers; it's about the whole school community—their families, their siblings, the people in their lives. It would lift that fear and it would open up those opportunities. It's not necessarily about it being a Safe Schools program, but it is actually about saying that those schools would know that they could talk about these things without any fear of retribution, and that they would take it on board. I hope that answers the question to some degree.

Ms Walker: At the risk of not answering in full, anecdotally we have seen that bullying and bullying behaviours have been reduced. When we go into faith based schools what we believe—and what we are able to do, because we're not Safe Schools; we're Parents of Gender Diverse Children, so we're an independent body—is that the benefits of any of these programs, whatever you want to call them, are around equipping schools, teachers and staff with the language and understanding they need to nip bullying in the bud and to stop harmful language. When someone sits at the back of the class and says, 'That's so gay,' or whatever, it gives them the language to stand up and say, 'Do you know what? That's actually not okay,' and to have that discussion in an open way. What we find is that when schools have that knowledge and information and when they're equipped, they are then confident to put their best foot forward to be inclusive: to include diversity and to celebrate it. It flows on to all students, not just trans and gender diverse students.

Senator KITCHING: I think your organisation would be very well placed to know about this: a few months ago I met with organisations where parents are trying to implement programs because their children have been bullied on social media—on Snapchat, for example—and they said that the incidence of those cases is rising. Let's say section 38 is removed, but is there a covert discrimination that increases? Let's say you remove the discrimination provision in the Sex Discrimination Act. Does the rising incidence of bullying in social media for a increase?

Ms Walker: I think that's a good question, but it's one of those chicken and the egg things. I think we're seeing a convergence of kids who have greater access to a wider variety of media to interact in, and those forums are being taken up and used. So, if you're saying that stamping it out in one area just causes it to pop up somewhere else—

Senator KITCHING: That's not really what I'm saying. I'm saying that you could remove things and have everything looking beautiful on the surface, but in fact there is discrimination occurring in a more insidious way. I

don't think we should be legislating or amending legislation in a way that causes people to disobey legislation. There's no point in doing that.

Ms Marlowe: I actually worked as a wellbeing coordinator in schools, so I am very aware of how Snapchat, Instagram and all those things work. I'd point you to research by the Alannah and Madeline Foundation. It was with either KPMG or PwC. It was about the economic costs of bullying and it referred specifically to the cost of cyberbullying and the incidence of discrimination. That report was released this year.

I think it would be unrealistic to say that there is any school in Australia or even the world, regardless of its religious affiliation or state base, that has no bullying or discrimination. Children bring a range of things to that environment. The experiences of the teachers, young people and their families mean that sometimes people do come to school in certain instances where they relay comments or make judgements that may be sexist, racist, homophobic or transphobic. It is a role of the school to also think about the way in which they can mediate those conversations, use respectful relationships, have restorative programs and talk to those students about the impact of those words, comments and bullying behaviours. And I don't think you'd find any schools that didn't say that that was part of their role.

I don't think that I can necessarily answer your question specifically, but I do absolutely think that, since the Prime Minister made a comment—and there were the leaked recommendations in mid-October—to say that he would remove discrimination faced by students based on their sexuality and gender identity, we now have a raised consciousness and awareness of the fact that those exemptions actually exist, and there are parents, children and staff who now know that their school communities know that these exemptions exist. That has created a heightened awareness, anecdotally—and I'm sure other people can say that as well. So the cat is out of the bag. People may not have known that before, but 74 per cent of people on 15 October said in a poll that they believed that those exemptions should be removed. I think it is really important to not legislate for but to legislate to free people from discrimination.

CHAIR: Thank you.

Senator WATT: The primary argument I think that is advanced by people who support retaining their exemptions is that religious schools should be able to operate consistent with their faith, and I suspect we probably will be hearing that argument put by some witnesses later in the day. In general terms, what do you say to that argument?

Ms Appleton: I think it's important for everyone to be able to be themselves. Most of the children that I know about have gone to faith based schools on the basis of following family, being geographically convenient or the school having a good reputation. If they have siblings at the same school, I struggle to identify how it can be appropriate to discriminate against some and put their siblings in a difficult situation. Many parents follow the same faith, and, therefore, they are there for that reason as well. I don't see that it needs to be an either/or.

CHAIR: I have a brief question. The Sex Discrimination Act doesn't protect people on the basis of association; it only protects you on the basis of your individual attribute. I am interested, Ms Marlowe, in terms of discrimination that children might experience because of the family status of their parents rather than their own family status and what needs to happen within our anti-discrimination law to provide that protection. Indeed, Ms Macdonald, your own family experience shows that that can be the status of the sibling rather than the status of a parent. If you might both make a comment on that, that would be terrific.

Ms Marlowe: I can't speak on behalf of the other states I'm representing today, but in Victoria under our Equal Opportunity Act there is a provision around association and that's also based on all of the attributes under that act. If there were, that is an important addition to consider. Anecdotally, we do hear that children are asked not to comment about their family form or are having side discussions about how they might talk about how their family was created. I know that many families talk to their children about how they were created, and many children are very well versed in the idea of assisted reproductive treatment and donors. On the use of sperm and eggs, they're very up with the lingo. In some Catholic or faith based schools, they find that it is difficult to have those conversations openly. We would definitely consider additional provisions that ensured that family forms and the way families are created being introduced.

CHAIR: In effect, that's not just discrimination via association; it could be discrimination about the nature of your own origins. Historically, it might've been so-called bastard children being discriminated against in schools and today the circumstances of your conception might also create that kind of debate. Is that what you're saying?

Ms Marlowe: Yes, absolutely, and we know that many more people are created through IVF than people know about and that it's one of the leading areas of assisted reproductive treatment. We also know that there are particular religious concerns about that, but no-one is asked on employment or enrolment how their family was

created. Therefore, when we're thinking about discrimination, one of the attributes should potentially be that someone's belief or religious doctrine would be included. But it's not asked, so why particularly are we focused on sexuality and gender identity only? Thank you.

Ms Macdonald: I'll provide a comment in my written submission, thank you.

CHAIR: That's terrific.

Senator RICE: I have one last question, Ms Macdonald—and thank you again for sharing your story. I'm just wondering, in the discrimination that your family and Evie experienced at the school, if there was any justification of that discrimination on the basis of religious belief, or do you feel that it actually reflected some deeply embedded transphobia?

Ms Macdonald: There was a discussion with the principal at the time who said that teachers who were active in the discrimination needed some extra time to wrap their heads around what was happening. They had to come to terms with it. I think a lot of it probably was deeply embedded, but it did conflict with their faith and they found that they needed more time to understand and to be educated around the issue of Evie being trans.

Senator RICE: So it wasn't that being trans was in conflict with their faith and yet that's how it played out.

ACTING CHAIR (Senator Watt): Senator Pratt just asked me to take the chair while she pops outside for a moment.

Ms Appleton: I'd just like to bring to the committee's notice that we don't have a lot of cases of discrimination that are out and published where action has been taken. To take action is actually a very outing thing, and for most teachers and for some students we find that they are reluctant to take action because it's going to have an impact on their future career or if they go to another school. I hear the request from the senator, but it's very difficult.

I've been an advocate for trans and gender-diverse people in Victoria for 20 years and have been aware of more than 100 cases of apparent discrimination. Very few of them get developed and taken to court or have action taken because of the outing process involved, so it's very difficult and I find it very frustrating.

ACTING CHAIR: Thanks for that. We're just running a few minutes over time, so we might need to wrap this session up. Thank you all very much for providing your perspectives on this topic.

LIN, Dr Ashleigh, National Health and Medical Research Council Career Development Fellow; and Program Head, Mental Health and Youth, Telethon Kids Institute

MITCHELL, Ms Megan, National Children's Commissioner, Australian Human Rights Commission

STRAUSS, Ms Penelope, PhD Candidate, Telethon Kids Institute

Evidence was taken via teleconference—

[10:04]

ACTING CHAIR: In Senator Pratt's brief absence, I now call our next witnesses, all of whom are appearing by teleconference. I will now hand back to Senator Pratt.

CHAIR: Thank you very much. Good morning and welcome. I appreciate it's still pretty early in Perth, so thank you, Dr Lin and Ms Strauss, for joining us. I understand that information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. Is that correct?

Dr Lin: Yes, everything's been provided to us.

CHAIR: Do you have any comments on the capacities in which you appear?

Dr Lin: I'm the senior and supervising author of the *Trans pathways* report that was released in 2017.

Ms Strauss: I'm a PhD student at the Telethon Kids Institute, working on the mental health of trans and gender-diverse young people. I'm the lead author of the *Trans pathways* report.

CHAIR: I'm going to ask Ms Mitchell to begin with an opening statement.

Ms Mitchell: Thank you. I'm particularly coming into this inquiry from the perspective of young parents and their children. In 2017 I conducted a project investigating the rights and needs of young parents and their children. The aim of the project was to identify gaps in knowledge about the experiences and trajectories of young parents. I analysed good practice in early intervention, education and support services that lead to better outcomes for these young parents and their children. This included identifying the education and employment pathways most likely to lead to long-term stability and security, and it also looked at the barriers to education in particular, including the current state of laws.

Dr Lin: Trans Pathways was the largest study of the mental health and care pathways of trans and gender-diverse young people ever conducted in Australia. It was also the first to survey parents of trans and gender-diverse youth. The survey was completed by 859 trans young people. Respondents were asked about their experiences that may be drivers of poor mental health. We know that this is a very highly vulnerable group. Approximately three-quarters of the Trans Pathways participants have been diagnosed with anxiety and/or depression, 48.1 per cent have ever attempted suicide, and 78.9 per cent of the participants experienced issues at school, university or TAFE.

We analysed how issues within educational environments were related to mental health outcomes. From the research we know that there is a relationship between experiencing issues within educational settings and poor mental health. Specifically, trans young people who attempted suicide were 3.89 times more likely to have experienced educational issues, trans young people who self-harmed were 3.53 times more likely to experience these issues, those who were diagnosed with depression were 3.6 times more likely to have experienced educational issues, and trans young people who were diagnosed with anxiety were 3.16 times more likely to have experienced these issues than those who hadn't had anxiety. The research also shows that school can be a protective factor for good mental health.

CHAIR: Thank you. Ms Mitchell, I know you're the Children's Commissioner, not the Sex Discrimination Commissioner, but in effect what we're talking about here is the attributes of pregnancy and marital status and the religious freedom to discriminate on those grounds and how that might impact on young people's educational experiences. Are you able to comment in general terms about the kind of interruption and discrimination that young people might experience to their education if they happen to get pregnant at school?

Ms Mitchell: Yes, I can. I just note that, as a result of that investigation that I conducted in 2017, I made a recommendation that the Australian government, through the Council of Australian Governments, work with states and territories to review all the laws, policies and practices so that discrimination against a child or young person on the grounds of their pregnancy, breastfeeding or parental status and responsibility is prohibited. The reason for that is that the young people that I talked to—and I talked to 77 pregnant young people face to face, and another 89 were surveyed through that project—certainly reported discrimination in educational settings.

Some of the things they said included: 'I was scared the school was going to kick me out because I was pregnant.' That comment was particularly from somebody who attended a religious school. Another young person

reported: 'The school told me to leave when I got pregnant.' A common feature was getting hate and being bullied by other students. Another comment was: 'I was at school, but, by the time I was 20 weeks, I left because I was in and out of hospital. I asked the school for homework, but they didn't provide any support.' Some of the things that they said that would be helpful or were helpful to them included: If schools were flexible with scheduled breaks, including for breastfeeding, feeding, appointments, homework and exams; if schools could provide outreach, like a home visit from a teacher; if they had a creche on the site, allowed children in the school or helped to access external early childhood education and care services; if they supplied larger uniforms for young people who were pregnant; or they could provide keys to an accessible lift. These are just some of the comments of the young people who have experienced discrimination in a school setting.

I will give you a few statistics. Of the young mothers who completed the survey, 64 per cent were not regularly attending school when they became pregnant, and so the school was not particularly proactive in encouraging them to stay on. The young people said that others judged them, gossiped about them and pried into their affairs, and they were really keen for schools and teachers to address bullying, in particular, to help them to continue to go to school and gain an education. Those are just some of the things the young people said.

CHAIR: I'm assuming that in some of those instances those students went to schools that would have had the capacity to discriminate on those grounds, using the exemptions in the Sex Discrimination Act. Is that correct?

Ms Mitchell: Some of them would, but it wasn't something I looked at in particular. I think there was as much of that kind of indirect or direct discrimination in both government and non-government schools, and I think it would be very difficult for a young person in this situation to think about challenging any decision by the school in that regard.

CHAIR: I've certainly seen experiences of that kind of discrimination right across the community when it comes to young parents, but it's true to say that the stories you highlight go to other attributes within the Sex Discrimination Act, other than the LGBTI attributes.

Ms Mitchell: Yes. There is the additional exemption for parental status in there that I would like to see removed.

CHAIR: Thank you. On that note, the Sex Discrimination Act also covers breastfeeding and discrimination against pregnancy. You gave an example of a young woman at school being denied the right to use the lift. Is that correct?

Ms Mitchell: Yes. In some cases that was not something that young people were able to do. In some cases they were. It's all up to individual schools and individual principals. Most education laws, in principle, support every child having an education, but they are not required to provide that education.

CHAIR: As a general policy people don't use the lift if they're able to use the stairs, but in a workplace it would be against the Sex Discrimination Act to deny someone the right to use a lift, would it not?

Ms Mitchell: That's my understanding.

Senator RICE: I have some questions for Dr Lin and Ms Strauss. Thank you for appearing today and thank you for your work with the research that you have done for young trans people. I'm interested in whether your survey, in terms of experience at school, has data as to which students went to religious schools and which went to public schools? Is that available? Is the data able to be interrogated in that way?

Dr Lin: No, we're not able to look at the data in that way. We have a few quotes from some people who specifically said they went to all-girls schools or Catholic schools, but we don't know, in terms of percentages, anything about the kind of school that a young person went to.

Senator RICE: You talked about the correlation between poor mental health outcomes and experiencing educational issues, whether through the data or the examples given in your research. Expand on what the educational issues were.

Ms Strauss: There is a range of issues that people talked about through quotes. They were things like feeling stressed about trying to be themselves without the unsupportive environments. Young people also said they missed school because it was not a welcoming environment, so they were afraid to go to school. Young people also talked about the social aspects of school making it difficult for them, including things like getting along with peers and engaging in sport. There was also entrapment and bullying from other students and staff. What we know from other research in the UK, from the Stonewall report, is that two in three trans students in the UK were bullied for being LGBT in school and, also, 33 per cent of trans students in the UK don't feel safe in school. So we imagine it's likely to be similar here. The issues that young people talked about covered a real range. We also

have information from parents and they said similar things—that their children were afraid to go to school or they felt that it was not a safe place.

Senator RICE: In contrast, did you get evidence in that, sadly, a minority of trans students are being supported at schools and what it looks like to be supported in their school communities?

Dr Lin: We had a question asking about positive experiences in terms of mental health and 35.3 per cent of participants said that the educational settings had made them feel better about themselves, but we don't have any specific quotes about that from the data.

Senator RICE: From the research that you've done and the discrimination that trans kids are experiencing at schools, what difference do you think it would make if the exemptions under our Anti-Discrimination Act that enable religious schools to discriminate against trans kids on the basis of religion were removed?

Dr Lin: It's difficult to say. We can't make any assumptions from the data based on that, except to say that we would likely have fewer people saying that they felt unsupported in schools. But that's really all we can say from the evidence.

Senator RICE: Thank you.

Senator FIERRAVANTI-WELLS: Most particularly to you, Ms Mitchell, from the Human Rights Commission: I'd be interested to know whether you have or can assist the committee with the provision of actual formal complaints where the religious exemptions have been invoked. That's in relation to all three of those categories: the students, the staff and the contractors. I appreciate that you're here in your capacity as National Children's Commissioner, but I wonder whether you could assist us particularly from the perspective of the Australian Human Rights Commission?

Ms Mitchell: I would need to take that on notice.

Senator FIERRAVANTI-WELLS: Absolutely. I am giving you these questions—

Ms Mitchell: Obviously, all the complaints are confidential as well, but there may be some trend data. As I said before, young people in these situations are very unlikely to understand what the law says or to have the capacity or resources to take the complaint to us. They also, of course, could take complaints to the state based human rights commissions as well. I will take that on notice and get back to you as soon as we can.

Senator FIERRAVANTI-WELLS: Thank you. Dr Lin and Ms Strauss, if you do have some information or can provide the committee with any formal complaints that you're aware of through your organisation, particularly in relation to students, staff and contractors, that would be helpful, but please do take that on notice. Ms Mitchell, on notice could you look at the issue of international law as a recognition of religious freedom and why that right shouldn't sit alongside other human rights with the appropriate protections?

Ms Mitchell: From the point of view of the Human Rights Commission, we do support the removal of section 38(3) in its entirety, but we also support other changes needing to be considered in light of protections, such as the protected attributes for freedom of religion and belief.

Senator FIERRAVANTI-WELLS: In relation to this whole issue of religious freedom, clearly under existing legislation it is dealt with by way of exemption rather than an individual right sitting on its own. Do you think that it would be appropriate, therefore, to have legislation that would recognise religious freedom in its own right—again, with the appropriate protections and balances so that it sits, effectively, alongside other human rights?

Ms Mitchell: The position of the commission is that there should be alternatives to the current system of religious exemptions to antidiscrimination laws that do recognise a protected attribute for freedom of religion and belief.

Senator FIERRAVANTI-WELLS: Dr Lin and Ms Strauss, if you do have any thoughts in relation to the questions that I asked of Ms Mitchell, please do feel free to come back to the committee with those, particularly in relation to any views that you may have regarding the catch-all provisions or parameters that have been set out, particularly in the recommendations pertinent here, whether they're 5 or 7.

Dr Lin: Our institute is a health research institute, so no formal complaints have ever come to our institution. I would not like to comment on my view particularly. I would prefer to present the evidence from our research.

Senator FIERRAVANTI-WELLS: Sure.

Dr Lin: The institute doesn't have an official policy or stand on this.

Senator FIERRAVANTI-WELLS: Thank you.

Senator WATT: Ms Mitchell, I'm not sure if you're able to help me with this. I should have asked this question to one of our earlier witnesses. What we've been told is that, essentially, Tasmania does not allow educational institutions to discriminate against either students or staff on the basis of sexuality, but, from having read the briefing pack we've been provided, that's not my interpretation of the Tasmanian legislation. Do you know anything about this?

Ms Mitchell: No, it's something I'd need to look into. I'm happy to do so.

Senator WATT: That's okay. We've got other witnesses later who probably can explain that a bit, so I'll ask them.

Senator FIERRAVANTI-WELLS: I think that's right. I think we need to clarify that, because previous witnesses said that Tasmania's seems to be the ideal situation, but it's very clear from the information that we've been provided that there are exemptions, and so therefore I think that needs to be—

Senator KITCHING: And the Queensland legislation as well.

Senator FIERRAVANTI-WELLS: Yes. To those people who made those assertions earlier in relation to the Tasmanian legislation, could you please go back and have a look at what you've said and take into account—

CHAIR: Sorry, Senator Fierravanti-Wells: that was Rodney Croome this morning. He may not be on the line, but we can follow that up with him as a question on notice.

Senator FIERRAVANTI-WELLS: Yes. I think we should, in fairness, afford them the opportunity.

CHAIR: Also to clarify: Ms Robin Banks, who is the former Tasmanian Anti-Discrimination Commissioner, is appearing this afternoon at 2.30.

Senator FIERRAVANTI-WELLS: Good. Thanks.

CHAIR: This is to the Telethon Kids Institute. In relation to discrimination against people who are transgender, it is my understanding that some Catholic hospitals use the antidiscrimination exemptions to refuse hormonal treatment within particular health settings. Is this an issue that you've come across at all?

Dr Lin: No, we have no evidence of that and can't speak to that, unfortunately.

CHAIR: That's fine.

Senator KITCHING: Ms Mitchell, could you outline the process by which a complaint comes to your attention?

Ms Mitchell: Complaints can be made on the grounds of discrimination that are set out in the various national antidiscrimination laws. If it meets the threshold for that—

Senator KITCHING: What test do you use?

Ms Mitchell: I could provide that information to you. We do have information that sets that out. It's not in front of me at the moment, but I can easily provide that information to you.

Senator KITCHING: But, essentially there's a threshold if—

Ms Mitchell: We don't have anything to do with the handling of complaints. It's in a separate area. We don't directly get involved with that.

Senator KITCHING: Under the National Children's Commissioner's role, is there a regulatory part of it as well? Is that how it's set up?

Ms Mitchell: No, I have no role in dealing with individual matters. The role is set out in the Australian Human Rights Commission Act, and my role is to determine to what extent Australia is meeting its obligations under various international treaties, including the Convention on the Rights of the Child, which clearly states that all children have a right to education.

Senator KITCHING: Do you base the analysis of whether we are meeting those obligations on the cases that come to the Human Rights Commission? Is that the process?

Ms Mitchell: To some extent, the trend data from those complaints is helpful in determining whether there is a systemic issue or not, but I also base the analysis on research, expert opinion and what I find out from children and young people themselves.

Senator KITCHING: So you're able to go across the states and, for example, interview children who may have suffered discrimination?

Ms Mitchell: Absolutely. For instance, in the project on teen parents and their children, I was able to access a number of young parents through services and supports. I was able to survey 89 young parents or pregnant young

people, and I talked directly in workshops to 77 young parents. So access was gained through various services that were helping those young people.

Senator KITCHING: In relation to the women who are pregnant, are you interviewing their partners as well?

Ms Mitchell: Yes, where their partners were around.

Senator KITCHING: If you're able to furnish the committee with that information, that would be very useful.

Ms Mitchell: You want information on the complaints process, and you also want information about how thresholds are determined?

Senator KITCHING: Yes, I do. I think that would be very interesting. Thank you.

CHAIR: Commissioner Mitchell, could you also take something on notice for me, and you might need to direct this to other parts of the commission. Senator Fierravanti-Wells asked about the number of complaints received in this area. Can you also ask whether it would be usual to receive complaints in this area in relation to the Sex Discrimination Act exemptions and their application to schools because of the exemptions. It would seem unusual that you would receive those complaints, because the exemptions exist, so it would be helpful if the commission could take on notice the kinds of complaints they can take and the kinds of complaints that either don't meet the threshold test or are unlikely to make it forward because people don't bring them forward, because they don't meet that threshold test.

Ms Mitchell: I understand.

Senator KITCHING: Ms Mitchell, the chair's question prompted me to think of this: given the rights of a child to have an education, do you ever receive complaints where, for example, a child in an Abrahamic faith school may say, 'I am not of such a strict religious belief, and I feel I am being discriminated against'? For example, a child may go to a school which may be much stricter than their home life. Do you ever receive complaints about that?

Ms Mitchell: Again, I'd have to—

Senator KITCHING: Take that on notice?

Ms Mitchell: ask people in the complaints area.

Senator KITCHING: Lovely. Thank you.

Senator PRATT: I have a couple of other questions for the Telethon Kids Institute. Your evidence points very directly to educational issues being experienced at school correlating with higher rates of self-harm. Can you characterise what range of experiences are included in educational issues for trans young people.

Ms Strauss: We have a range of issues. We allowed young people to explain these in their own words. There are a range of experiences that affect mental health, and one of the main things was young people felt like they couldn't be themselves within these educational settings. Young people missed school because it wasn't welcoming or it wasn't safe. There are challenges relating to social aspects of school, including peers and sport—things like uniforms and splitting into sports teams that are male or female. Trans students also had harassment and bullying from other students as well as school staff. To add to that, I think one of the important things that came through from the survey was that, because this group of young people have high rates of poor mental health, that really did affect their ability to engage in school. That extra support was really needed. A lot of people told us about stories of disengaging from school because their mental health was poor, and then that creates problems re-engaging at a later time.

CHAIR: To put that into context, it would include things like a school policing someone's appearance in a way that meant they weren't allowed to transition at school. How would you characterise some of those educational issues?

Dr Lin: It's difficult to say from the data because we can only go on the quotes that people provided for us. Some issues were related to school uniforms, because there was no unisex uniform at school for somebody who was gender questioning or non-binary. There were people having to leave all-female schools after coming out, because they were now identifying as male. They were having to drop out because they were bullied by the staff or being forced to wear—one trans male told us about being sent home after wearing the boys uniform on photo day and then dropping out of school because of not being supported.

CHAIR: That's a good example. Thank you. Before we close, Senator Rice has a final question.

Senator RICE: Yes, I have a follow-up question for Commissioner Mitchell. You mentioned in one of your previous answers that you supported the removal of section 38(3) in its entirety but would be supportive of

positive protections for religious freedom. Have you looked at what those positive protections for religious freedom would look like?

Ms Mitchell: The Human Rights Commission has provided a submission to this inquiry which sets out the position in regards to balancing those rights. In part, the answer is taking care to accommodate human rights wherever they come into detention. That includes the right to freedom of religion and the right to be free from discrimination on the basis of sex, sexual orientation, gender identity and, of course, parenting status, as we have discussed. What we are noting is that we would support a general limitations clause that will clarify that conduct which is necessary to achieve a legitimate objective, including freedom of religion, and that a proportionate means of achieving that objective is not discrimination. We have also said—and I think this is pretty important—that any general limitations clause would need to be carefully worded in order to avoid allowing discriminatory acts that are currently unlawful. So it is a matter of very careful and sophisticated wording.

Senator RICE: Would you see that, in protecting religious freedom, that would in some instances continue to entail discrimination against LGBTI people?

Ms Mitchell: I think it would be important to look at the particular set of words when a bill were available to review to make that determination. I don't think I can do that in a hypothetical way.

Senator RICE: I know this is beyond your role as the Children's Commissioner, and I'm sorry I haven't yet had a chance to read the Human Rights Commission's submission as to whether the Human Rights Commission also has something to say about the other parts of section 38 with regard to teachers and staff at schools.

Ms Mitchell: In a sense the submission generally addresses the provisions of the Sex Discrimination Act and also points to previous submissions that the commission has made on this issue, noting that the existing exemptions in the SDA were originally intended to be temporary in nature. We note that they should be reviewed with regard to Australia's international human rights obligations, to ensure that any restriction on the exercise of other human rights is strictly necessary and results in the minimal interference possible. So our comments around the provisions of the Sex Discrimination Act are of a general nature, but I have made particular representations and recommendations regarding those elements that would currently discriminate against teen parents.

Senator RICE: Thank you.

CHAIR: Thank you, all. That was terrific evidence this morning. We will now break for morning tea.

Proceedings suspended from 10:41 to 11:02

COLLINS, Mr Ray, Acting Executive Director, National Catholic Education Commission

COMENSOLI, Archbishop Peter Andrew, Delegate, Australian Catholic Bishops Conference

MOORE, Mr Francis, Executive Director Administration, Catholic Archdiocese of Melbourne

STUPARICH, Mr Jeremy, Public Policy Director, Australian Catholic Bishops Conference

CHAIR: Good morning and thank you for your attendance today. I would now like to welcome the Australian Catholic Bishops Conference and the National Catholic Education Commission. I understand that information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. Archbishop Comensoli, I understand that you have a short opening statement?

Archbishop Comensoli: If that's okay, that would be great.

CHAIR: Did you have one for the National Catholic Education Commission?

Mr Collins: No.

Archbishop Comensoli: I am the Archbishop of Melbourne. I'm here in my responsibility for the Australian Catholic Bishops Conference as the one responsible for public engagement matters. Thank you for the opportunity today. As you would know, more than 60 per cent of Australians hold religious beliefs. More than 50 per cent of Australians call themselves Christian. One in five Australian students attends a Catholic school around the country. The affirmation of religious freedom as a fundamental right in our society is not a fringe matter.

The mission of Catholic schools is not just to educate students in all the elements of the Australian curriculum, as important as that is, but also to help educate our students in how to live Christian lives, from a Christian perspective. Parents and carers choose our schools for their children because they value what those schools have to offer, which is an education that is consistent with the gospel of Jesus Christ and the teachings of the Catholic Church.

Catholic schools have a long tradition of enrolling staff and students from a broad spectrum of personal circumstances, identities and lifestyles, whether they are Catholic or not. But we expect that they will support the identity and mission of the school as it is stated. Our schools treat all of their students and staff with the greatest respect, as we regard each human being as made in the image and likeness of God. Every person has an inherent human dignity and no person can be reduced to some aspect of their make up, whether it is by race, by gender or in some other way.

The freedom of Catholic schools to employ staff who support our mission, both inside and outside employment, is essential to ensure the schools are educational communities that demonstrate Christianity to their students both in word and in practice. Catholic schools are upfront in advising anyone applying for a position of the mission and identity of the school and the expectation that all staff will be supportive of this mission and ethos. Workplace relations issues arise from time to time, as you would expect, in our schools, as they do in any workplace. Those issues may be related to important religious beliefs at times, which is why we think the current exemptions are important. School principals work to resolve such issues pastorally—and the acting director of the NCEC can describe lots of examples of that—but sometimes there is a breakdown in the relationship, as can happen in any workplace relationship, and then schools need to rely on the protections of the law to undertake their work.

Antidiscrimination laws rightly protects people from being treated unjustly simply on the basis of a personal characteristics such as race, gender or sexual orientation. When antidiscrimination laws were introduced in Australia, 'exemptions'—and that word is in inverted commas—were provided in the case of religious institutions to ensure that the laws did not have the perverse effect of curtailing religious freedoms. For example, while it would be unjust in most situations to exclude a person on the basis of their religious or ethical beliefs, it would be equally unjust to insist that a religious organisation employ a person who was opposed to its religious and ethical beliefs.

Catholic schools do not discriminate unjustly against students or staff. Our schools would not expel a student just because of their sexual orientation. But we want to maintain laws that would protect our capacity to teach a Christian understanding of sexual ethics and marriage according to our own faith tradition, as is the choice of parents in that regard. We propose that there might be a recognition in the law of religious freedom in a positive way to allow religious groups to continue to run their schools according to their faith, but we want to retain the exemptions because they have the benefit of established acceptance and meaning in law. The affirmation of religious freedom as a fundamental right of citizens is perhaps unfinished business in the Australian legal

framework. We would hope that the federal parliament would now take positive steps to rectify this. Thank you for listening. We are open to questions.

CHAIR: I have just had a media query come in. The media camera would like to be able to attend the hearing this morning. It is usual to allow that to happen, subject to the committee's agreement and the agreement of witnesses. I am very relaxed either way about what you might choose in that regard. I think everybody is happy to invite them in. We are now ready to jump into some questions. Senator Fierravanti-Wells, did you want to go first?

Senator FIERRAVANTI-WELLS: I will just ask about a couple of things if I can. Obviously you have seen the release of the recommendations of the Ruddock committee that have been published. Firstly, obviously you would be keen to see the Ruddock committee report released. Secondly, do you have some thoughts in relation to those recommendations, particularly those that we are talking about today—which I think are five, six, seven and eight?

Archbishop Comensoli: I might start off and then open it up to others. Firstly, we would certainly welcome the immediate release of the Ruddock report so that everyone knows in fact what is being said in the report rather than just what is being mentioned in the media. We would very much the welcome the immediate release of the report so that everyone can work on this in an effective way rather than in this somewhat rushed and quick way that it is happening at the moment.

On your second point, we—the Australian Catholic Bishops Conference—have in fact on three occasions that I am aware of already put positive proposals of possible legal frameworks that both are on the level of the Anti-Discrimination Act and on the level of more positive affirmation of religious freedom. We put that to the Ruddock review and we also did that for a joint parliamentary committee on, I think, foreign affairs that was chaired by the Hon. Kevin Andrews. I can't remember the name of that particular body, but we put forward our actual proposals to that committee, and I know that other proposals that we supported have also been put forward. Does anybody else want to comment on that?

Mr Moore: I agree with the archbishop. I think we need to see the full report to understand the context of the recommendations that have been leaked. It is a bit hard to comment on the recommendations in isolation from the full report. I think our bottom line would be that when we see the full report we will be able to comment fully in relation to the recommendations that have been made.

Mr Collins: That would certainly be the position of the National Catholic Education Commission. The recommendations usually are accompanied by the findings which led to those recommendations, and it makes it more difficult for us to comment when we don't know what those findings are and what has influenced those findings that led to those recommendations. So, again, I would endorse what the archbishop and Francis have said regarding the need for the publication of the full report and then the analysis of that in a measured way.

Senator FIERRAVANTI-WELLS: Do you have a comment?

Mr Stuparich: No, I'm right.

Senator FIERRAVANTI-WELLS: One of the questions I have asked of other witnesses is: can each of the organisations—if you are able—provide to the committee actual circumstances where there have been formal complaints against the churches or the educational institutions by students, staff and contractors where those provisions, the exemptions, have actually been invoked?

Archbishop Comensoli: I might invite Ray to comment on that. He will know the specific examples.

Senator FIERRAVANTI-WELLS: I am happy for you to take it on notice, Mr Collins, if you want to. Perhaps you could give us a general outline and then take the specifics of it on notice.

Mr Collins: Firstly, it is difficult for me from a National Catholic Education Commission perspective. I have only been in the role for a matter of months and I am only acting until the end of the year, so my deep knowledge of a national perspective is limited in that regard. In my own experience as a director of schools of the diocese for nine years, I don't recall any complaint being lodged by a principal or by parents in relation to the actions of a teacher who might be gay. So I have not dealt with those situations at all.

Senator FIERRAVANTI-WELLS: From a practical perspective, how many people does the system—particularly the Catholic system—employ around Australia?

Mr Collins: I can tell you we've got 1,741 schools across Australia and 766,000 students, but I don't have a number for the staff. But there are tens of thousands, I think, in that regard.

Mr Stuparich: There are 94,000 staff.

Senator FIERRAVANTI-WELLS: Clearly, with that number of staff—if I can put it this way: the exemption was put in for specific purposes; was anyone around at the time in relation to when the exemption was originally inserted into the decision? I think, Mr Collins, you probably—

Mr Collins: I was certainly around, but in a fairly minor role at that point.

Senator FIERRAVANTI-WELLS: Okay. Clearly there was background, Mr Moore, in relation to its insertion. Perhaps you'd like to share with us your thoughts in relation to why it was deemed necessary for those exemptions to be placed in the first place.

Mr Moore: I have had more direct experience with the provisions in the Victorian Equal Opportunity Act than the reasons for their introduction into the Commonwealth Sex Discrimination Act. It's true to say that the Victorian provisions go back some considerable time. The concern has generally been having a proper framework to deal with issues that might emerge out of these subject areas but become disciplinary areas and issues of cohesion in the school. Having said that, in my 10 years or more on the archdiocese, I'm not aware of an occasion where the provisions have had to be invoked either in relation to a student or a staff member, but my experience is more Melbourne based rather than nationally based.

Senator FIERRAVANTI-WELLS: Obviously, from an international legal perspective, the religious freedom is protected by way of exemption rather than a stand-alone protection of it as an individual human right alongside other human rights. Obviously, the view of your organisation is that it's appropriate to have a stand-alone recognition of that right.

Mr Moore: Yes. I think the fact that they are recognised as exemptions rather than as rights can give rise to the perception they are less significant as rights because they are framed as exemptions rather than rights. We understand that rights need to be balanced. But I think the challenge that we have is: why are our rights recognised as exemptions when others are recognised in terms of rights?

Archbishop Comensoli: For this reason, our proposal is both in terms of what might be sustained under the current piece of legislation and as something positive, affirmative. We've taken that up with both sides of the federal parliament in this regard—finding ways in which the fundamental right to religious freedom might be protected under law, just as other fundamental rights are protected, and then the balancing can happen in a way that is recognised in Commonwealth legislation.

Senator FIERRAVANTI-WELLS: Thank you.

CHAIR: I might just ask a couple of questions as chair now. I have in front of me *Good Works: The Catholic Church as an Employer in Australia*, and it has a provision in it around discrimination and harassment within the section about the right to a supportive workplace. I would expect that's a document most of you are familiar with. It says, with respect to exemptions from any antidiscrimination legislation, that the church organisations need to be 'positive and precise in their approach to employment practices'. It says:

... some positions, while not requiring the employee to be a practising Catholic, will still require a commitment not to offend the religious susceptibilities of the organisation by the maintenance of a manner of life and stated beliefs which are in keeping with the teachings of the Catholic Church (e.g. all staff in educational institutions) ...

Could you please give me an example of what you mean by 'manner of life and stated beliefs' with respect to the teachings of the Catholic Church?

Mr Collins: An example would be of a teacher who was not supportive of the teachings of the church in relation to a range of matters and who voiced that belief with students or with other staff in a fairly public manner. That would be an issue which would be of concern to the employer—being inconsistent with what you've just read out.

CHAIR: Okay. But you could be a married Catholic teacher making statements contradictory to the teachings of the Catholic Church or you could be a gay teacher not making such statements or you could be a gay teacher that was making such statements. Where do the exemptions apply, and where does the contract law of managing your contract with your teacher apply? For example, with a married teacher making those kinds of statements, you can't rely on the exemptions in the Sex Discrimination Act to manage the conduct of that teacher.

Mr Collins: But you would still be required to manage the conduct of that teacher—

CHAIR: Yes, that's right. You would need to do that within—

Mr Collins: so they're not exempt from being—

CHAIR: the context of the Fair Work Act and your employment contract, not the exemptions in the antidiscrimination law.

Mr Moore: I could perhaps have a shot at that question. The Sex Discrimination Act and the Equal Opportunity Act in Victoria protect attributes. So, when issues go to attributes, that's what triggers those provisions. If we are talking about a difference in view that is not covered by one of those attributes but is nevertheless covered by the employment contract then that might give rise to opportunities for a discussion around the terms of employment. The point that we're making is that, when a person applies for a job in a Catholic school, they know the setting into which they're coming, they know the commitment of the school to upholding Catholic teachings and principles—that would typically be a requirement of an employment contract for a teacher—and, if they're not complying with the requirements of the contract, that gives the employer an opportunity to engage with them about their performance, consistent with that contract.

CHAIR: Does that include attributes such as sexual orientation and marital status et cetera, in terms of that inherent requirement?

Mr Moore: Those are some of the attributes that are covered in the Victorian Equal Opportunity Act, and some of those attributes are, I believe, currently addressed in relation to the Sex Discrimination Act.

CHAIR: Okay. So your documentation says:

- It is critical that Church organisations clearly articulate the inherent requirements of each position with respect to the mission of the organisation when it seeks to use an exemption from anti-discrimination legislation.

So when you talk about needing to refer to exemptions and, therefore, manner-of-life attributes in performance-managing someone, is it the mere fact of that attribute or is it their advocacy around not upholding that Catholic mission and religious belief within the school community that is at issue?

Archbishop Comensoli: I might comment on that and will open it up to others as well. It's the public nature of what someone might say or do in that regard, just as in any workplace if someone is saying or doing something that is not conforming with the identity and mission as it's particularly stated. A very common reality would be that businesses or companies are meant to follow and uphold the rights of the shareholders and that political parties employ people according to who might uphold their policies. So all of that is much the same in this regard.

CHAIR: Okay. So I certainly know of many gay teachers that work in Catholic schools, and you would acknowledge that that is the case.

Unidentified speaker: Yes.

CHAIR: So can I return to the example that I gave you. If you have to manage, for example, a teacher who is Catholic but married and publicly argued in favour of marriage equality within the school community versus a gay teacher that might do the same or a gay teacher that in all ways and in every public attribute within the school never says anything against the ethos of the school, what is the need for these exemptions?

Why do you need the exemptions—specifically, that 'manner of life' exemption—to uphold the public nature of the Catholic teaching within the school?

Mr Moore: The answer to that is that, absent those provisions, if action were to be taken, it could be taken on the basis that the school is discriminating against the person based on other rights. I see these provisions as, in fact, providing an overlapping of legal protection in terms of both discrimination law and employment law. Those don't completely overlap, but they do overlap in part.

CHAIR: Okay, but, Archbishop Comensoli, you just said that you don't need to discriminate on the attribute; you only need to discriminate on the behaviour. So I'm just trying to come to grips with what seems to be a contradiction here. You're saying, Mr Moore, that you could be left vulnerable to the argument that it was because of the attribute and not the behaviour, but how can we rule out that you are discriminating on the basis of the attribute, which you're saying you don't want to do, if you end up relying on that exemption?

Archbishop Comensoli: Again, I'm not a legal mind, so I'll defer to Francis on that. But, as a general principle here, again I'd use the example of any organisation that operates from a particular mission and identity that staff, particularly those at the leadership level, are more significantly required to hold within their positions. For those perhaps at lesser levels in terms of their roles, it plays out in a different manner. The example I keep coming back to is one that you'd know yourself, a political party. Ministers or shadow ministers are required to hold public policy. Lower members would be expected to follow that. At times they may express something a little bit different, but everyone within that context would have their circumstances considered in terms of their position within the organisation.

Senator KITCHING: Sometimes Your Grace would say that it's a broad church!

CHAIR: That's right.

Archbishop Comensoli: Yes.

CHAIR: Just as a way of trying to drill down into this, if a teacher entered a same-sex marriage, would that be regarded as a public breaching of the church's teaching on marriage if it weren't visible inside the school community in any way? How do you manage those kinds of issues?

Archbishop Comensoli: You might remember that in the opening statement I talked about how pastoral processes enter into discussions of circumstances of people, if something comes to light. To use a hypothetical example—just as a hypothetical—suppose someone lives in one part of Melbourne, up in the north, and they might be a maths teacher in the southern part of Melbourne. There's no connection in terms of relationships of location and so on. They have made it known privately to the principal that they're in a same-sex relationship, but the person is quite willing to speak and act publicly, within the school context, according to the mission identity. There would be no question asked there, I think. It's when it becomes an act—

CHAIR: An act of advocacy that affects the school community.

Archbishop Comensoli: Yes.

Senator RICE: I want to continue discussing these sorts of situations. Let's follow on with Senator Pratt's example of somebody entering into a same-sex marriage. You're talking about where they live a long way away and their private relationship isn't likely to be known within the school community. How about if they are open about their relationship and, in discussions with students—as often happens—they talk about their partner and what they do on the weekend and they say they are married to somebody of the same sex? Would that be of concern to the school?

Archbishop Comensoli: Are they also saying, in this school context, 'I understand that the school holds a particular position and I, as an employee, accept the advocacy of that particular position within the school environment'? It's not just a matter of one's attribute—I don't know the legal word—but what one does with it that makes a difference.

Senator RICE: So you're saying that, if, in the classroom or in the school community, they said, 'Yes, I'm married to my same-sex partner,' as long as they were saying that they acknowledged that the church doesn't support those marriages, it would be okay?

Archbishop Comensoli: What is the mission and identity under their employment contract? Are they following that?

Senator RICE: What does that mean in that circumstance?

Archbishop Comensoli: It depends on which particular state we are in, for instance. Employment law is different in every state. That's not an easy one to answer state by state.

Senator RICE: Say they come along to the school speech night at the end of the year with their same-sex partner.

Mr Moore: I'll have a go at this. I think that the church's teaching on marriage is well known and it will be well known to anybody who applies for a position within a Catholic school and anybody who wishes to continue their employment within a Catholic school. I don't think there will be any doubt about what the church's teaching on marriage might be. That's a view that people within the church are entitled to hold, just as people in other settings are entitled to hold a different view. If the situation emerged—and I haven't heard it emerge in the way in which you put it—in a way that had the teacher advocating within the school, within the classroom, a view that was contrary to the church's teaching, then I think there are two avenues at the moment that give the employer a right to engage with the teacher on that basis. One is under the Equal Opportunity Act, in Victoria, or the Sex Discrimination Act, Commonwealth. The other would be according to the terms of the employment contract. I suspect that in most, if not all, of those situations the issue can be resolved in a discussion between the principal and the teacher concerned.

One of the ways that this is often framed is that you've got one choice but no other choice. One of the ways that these sorts of issues can be dealt with within a classroom context is by not advocating a particular view but opening up the issue for debate between competing views and, in a sense, allowing a debate to occur rather than, necessarily, the advocacy of a particular position. But I think, in the circumstances that you've put, where the teacher has come into the school knowing the church's teaching on marriage, where they've elected to remain in the school knowing the church's teaching on marriage, if they then start advocating a position on marriage which is contrary to the church's teaching, the employer has the opportunities under the employment contract and the act to work out what to do.

Senator RICE: What I want to explore is this. You feel that advocating that should give you the opportunity, through law, to be able to say, 'No, you're advocating for a position that is not consistent with the church's teaching,' and so you would like to be able to remove that teacher. But what if it's not so much advocating as just being—just being in a same-sex marriage and coming along to the school speech night with their same-sex partner and, say, holding hands?

CHAIR: Or being pregnant and unmarried and a teacher at the school, which is another attribute under the Sex Discrimination Act?

Mr Collins: If we use the heterosexual situation of a couple living together and one of them is a member of the teaching staff of a school and they bring their partner along to the speech night, it would be treated exactly the same in relation to a person who is gay and is bringing along their partner to the speech night. The issue would be around whether or not they are going beyond what they have agreed to do when they sign up to be a teacher in a Catholic school in relation to respecting the mission and ethos of the school. If they were then advocating with students demonstrably—

Senator RICE: I'm not talking about advocating.

Senator FIERRAVANTI-WELLS: Can you just not interrupt what Mr Collins is saying?

Mr Collins: If they were seen to be demonstrably stating that they don't believe in what the church's teachings are, then that would be the matter that is raised with the authorities—the principal and the employing authority—in that regard. I can't see that there would be any difference in relation to the two examples of a heterosexual couple and a gay couple. The issue that would then arise—if it was to the point where it was doing damage to the school, in both circumstances, if we did move towards that teacher being removed from the school—is that one would have the right to appeal to the Sex Discrimination Act and the other wouldn't, as far as I'm aware. Therein lies the need for the exemption, in my understanding of it.

CHAIR: Actually, they both do—

Senator RICE: Yes.

CHAIR: because marital status is not just an LGBTI protection; marital status is also covered in the Sex Discrimination Act. Pregnancy is also one of those attributes.

Senator RICE: Essentially your exemptions apply just on the basis of attribute. Are you saying that you don't need the exemptions just on the basis of attribute but on the basis of advocacy? Then the question is, what's advocacy? Is it advocacy to hold the hand of your same-sex partner at the school speech night?

Mr Collins: Well, no. It would depend on the circumstances. It's very difficult to describe a particular act and say, 'That's advocacy,' without knowing the context in which that's occurring. I think it's impossible to say that just the fact that they hold hands is advocacy. You'll have to look at each individual situation, and in those situations I think you'll find that Catholic schools act very pastorally with the staff involved. If that is perceived to be having a negative effect within the school then the principal would work with the teachers involved and come to an understanding in relation to that.

Senator RICE: Okay. Could I also ask, then, about the example of transgender people and transgender staff at Catholic schools? I've had evidence put to me, which will be presented to this inquiry, about a trans teacher at one of your Catholic schools who told the school that she was going to transition, and she was told in no uncertain terms that no, she needed to be on immediate leave and then essentially that she would not be welcome back at the school. She effectively then needed to resign and is now in a position of being not employed. She's in her 50s and has five dependants and is really distraught. This is merely for her existence as a trans person. So I want to ask whether you feel that you need to have these existing exemptions in order to allow those circumstances to continue to occur.

Archbishop Comensoli: I'd be most surprised if, on that pastoral level—the way in which we would handle something like that in our system schools, is for them to maybe not be employed in this particular school or trying to weigh up all the various elements, for instance, parents and their choice around what they want within a school context, to offering employment in one of our other schools or in one of our offices or so on. So, in and of itself the attribute—which is the word I think you used there—that pastoral mechanism is the way in which we try to find a way forward.

Senator RICE: Her experience is that she was told that she was not going to be welcome at any school in any role. But what I hear you saying is that, consistent with your Catholic teachings, the mere attribute of being same-sex attracted or gender diverse should not be enough for someone to be removed from your school communities.

Archbishop Comensoli: We always approach things first from a pastoral perspective.

Senator RICE: But would you agree that that mere attribute is not sufficient for either a student or a teacher to be asked to be removed from your school communities?

Archbishop Comensoli: That 'mere attribute', as you're saying it, is kind of—

Senator RICE: Well, that's right: someone who is same-sex attracted or gender diverse.

Archbishop Comensoli: Yes. The 'mere attribute' is never divorced from action. So, one's life is lived out in terms of this supposed mere attribute. So, we always come back to those questions of, what are the circumstances here? What's the context of what's happening? And so on and so forth. So those are the pastoral ways in which each situation is considered in its own circumstances.

Senator KITCHING: I asked this question of some groups who gave evidence this morning. If section 38 were to be removed—all of its subsections—does it make the potential for discrimination more covert? Therefore, if one isn't able to say in an overt fashion, 'This is our mission,' or 'This is our faith,' but one is then making judgements around someone who may have applied for a job—if there isn't the ability to use section 38 or, indeed, some of the provisions of the Fair Work Act, does it make it more likely that discrimination is there; it just isn't seen?

Archbishop Comensoli: You're looking at me, Senator, but I haven't quite picked up what you—

Senator KITCHING: What I'm thinking is that we don't want to have legislation enacted that entails people not following the legislation. I wonder if there isn't an acknowledgement of the fact that there are educational bodies, not just the Catholic Church but across all faiths—let's say the Abrahamic faiths; obviously there are others—where someone might apply for a job, and I don't want to single out any school, but they might be very limited in who they employ, and they are able to do that currently because of section 38 and because of the provisions of the Fair Work Act. Without those provisions, the discrimination, if we can call it that, would still apply; it's just that there would be no exemption. Mr Moore might know what I'm saying.

Mr Moore: I understand the point. I think you're right. This whole discussion started with the release of the recommendations in the Ruddock review, particularly around the enrolment of students. The view of the Bishops Conference—and I stand to be corrected by those on my left if I articulate this incorrectly—is that section 38 is not needed to protect Catholic schools in relation to the enrolment of students. But section 38 may well be required in relation to the protection of Catholic schools in relation to employment issues on grounds of discrimination. The issue that we have at the base in relation to students is, even though we don't want to employ these attributes in section 38 in determining enrolment policies in our schools, at points in time in the life of a school and the school as a community—and it has to operate harmoniously to operate effectively—if we have students engaging in behaviour linked to some of these issues in section 38 then the schools might need some grounds to allow them to take the appropriate action, whether it's pastoral action or disciplinary action, in relation to those students.

CHAIR: Could you give some example behaviour? Is being a transgender student at a school an example of that behaviour or not?

Mr Moore: I think the answer that we've given is no. But the issue would emerge if a transgender student wants to engage in sexual activity with somebody else; then we've got other disciplinary issues emerging.

CHAIR: I want to take you back to the doctrinal—

Senator KITCHING: Sorry, Chair—

CHAIR: You've got the call, Senator Kitching; I do apologise.

Senator KITCHING: I just want to say that I would assume that, at state and religious schools, if any student wanted to engage in sexual activity there might be some pastoral or some counselling, no matter the school—

Mr Moore: Yes, I think that's a fair comment.

Senator KITCHING: especially if there were underage students involved, for example, because that would be a criminal activity in some instances.

Mr Moore: Yes.

Archbishop Comensoli: I will add to the point, in terms of a principle and something that the inquiry might give active consideration around. There is not only the sense of the Sex Discrimination Act exemptions but also getting a positive statement into legislation around religious freedom as a fundamental right. That might start to enable the possibility of recognising this right in its fullest sense, alongside all the other various rights that we enjoy in Australia, such that there are then mechanisms by which balancing can happen rather than one right trumping another.

Senator KITCHING: Another question occurs to me. Let's say section 38 were removed. I assume there are parental expectations about the education or maybe pastoral care that's in a faith based school. I think you'll have the correct figure, but in Victoria about 38 per cent of students are in the Catholic system. Is that right?

Mr Moore: About 25 per cent.

Archbishop Comensoli: About 25 per cent. I'm three months in the job.

Senator KITCHING: I know. Congratulations. If there were no difference between a state school and the Catholic system, because they couldn't do certain things or they have a certain ethos, if I can put it that way, a parent might think there is no difference and they could go back to the state system. I would imagine a state system would have some trouble coping with the flood of students—an exodus, if you like.

CHAIR: If we were to legislate and—

Senator KITCHING: And I'm happy to have the secretariat write to the Victorian department of education, but I imagine the economic effect of that would be quite significant.

Archbishop Comensoli: We are talking about how many—I don't know. I think this comes back to questions that other senators have raised. An attribute in and of itself is not the issue here; it's the behaviour that's associated with it. We're talking at the moment around students. The attribute—no. I can say, in terms of our schools, that it's not an issue, but behaviours are associated with a particular attribute, one way or another. Anything that ends up in a bullying-like manner needs to be addressed, no matter who's exercising that. There are all the other aspects around the circumstances of one's behaviour and actions in terms of where anyone sits. That is significant here.

Senator KITCHING: How would you see a right being expressed and where?

Archbishop Comensoli: We have put that to the Ruddock panel.

Senator KITCHING: It would be nice if we had the report.

Archbishop Comensoli: Yes. As I said, we've done this three times already that I'm aware of. There are some examples that you can get your hands on fairly easily, I think. There are other ones around already and we would be quite willing to offer something, again, if asked.

Senator KITCHING: Thank you. We appreciate your tolerance.

Senator WATT: Thanks for your evidence today. I'm interested in whether either of your organisations see any distinction between the need for exemptions in relation to students and the need for exemptions in relation to teachers and staff? My perception is that, depending on where you sit on the issue, there are a variety of opinions on these issues. Some people don't want exemptions for either, some people want exemptions for both and some people want exemptions for students but not staff. I'm interested in where your organisation sits on that.

Archbishop Comensoli: Students do not come to a school having signed up to a mission or ethos in an employment contract or any sort of contract. Certainly, their parents are asked to support a particular ethos. I don't think you can treat the situation with students the same as the situation with staffing.

Senator WATT: Does that mean then that you think there is more of a need for exemptions in relation to staff than there is for students?

Archbishop Comensoli: I think there is more of a need for protections generally of religious freedom in our organisations, not only in schools but in any organisation.

Senator WATT: In relation to staff, as opposed to students?

Archbishop Comensoli: Protections—both. Surely protections are something we would want to advocate for all of our citizens.

Senator WATT: But I think I understood the earlier part of your answer as also suggesting that, if you like, exemptions are more justified in relation to teachers and staff than they are for students?

Archbishop Comensoli: There is a difference between staff and students. That is the important thing here to recognise.

Senator WATT: Yes.

Archbishop Comensoli: Perhaps I can put it this way. Staff are employed to be advocates for, in a sense—so, at least to be supportive of a particular identity and mission, stated up-front from the beginning, just as you would in any circumstance. The more senior the role within employment the more that that applies. Students on the other hand are there because their parents have—so, this is a discussion that always involves our parents and where they are sitting in the whole thing. Employment—staff—is not involved in that. So, there are just entirely different circumstances.

Senator WATT: And the Catholic Education Commission?

Mr Collins: In relation to the student, I'm trying to think of a circumstance where the exemption might be required or might be sought. In some cases—and this does not apply to gay students, but it can apply to students of a different religion, in a way—it is possible, highly improbable but possible, that a parent might say: 'My child is gay or my child is of a different religion. Therefore, in seeking enrolment in your school, my expectation is that my child will not have to attend religious education lessons or lessons on human sexuality or lessons on other religions, religious traditions et cetera.' In that context, there would be a conflict between the parent wanting to enrol the child and the school. Then, I would think there may be some requirement for an exemption. That would be a very, very rare case, but it is a possibility.

Senator WATT: But, in general terms, you think there is more of a justification for exemptions in relation to teachers and staff than there is for students?

Mr Collins: I think that exemptions for staff could be quite significant, in relation to the ethos of the school, the impact that it might have in school, probably more so than for a student. The issues around students who may be gay I would expect would be dealt with incredibly pastorally in every Catholic school. But in the unlikely situation of a particular issue arising, there might be some need for an exemption.

Mr Stuparich: We are talking a lot in the structure of the law that is presented to us, whereas the aim of Catholic schools and religious schools more generally is to pursue their mission to teach children, in accordance with their religious tradition, to follow the mission and identity of the school. You can get caught up in how the law is all broken up into bits and pieces, but the general aim is to be able to pursue the religious mission of the school, and that involves elements from all those pieces of section 38.

Senator WATT: I accept what you are saying. The reason I keep focusing on exemptions is that that is obviously the focus of the inquiry.

CHAIR: Do you have further questions, Senator Fierravanti-Wells?

Senator FIERRAVANTI-WELLS: No, but I think we may put some questions on notice to you after the hearing. If you're happy to accept those that would be good.

Senator RICE: I'm just following up on the issue of the difference between the attribute of being lesbian, gay, bisexual, transgender or gender diverse, and whether they're advocating—or the manifestation of that, I suppose, in terms of the Catholic Church's view. If the attribute of being LGBT, from what I hear you saying, isn't the issue, would you be supportive of, basically, laws that allow religious schools to discriminate on the basis of injury to religious beliefs without actually specifying those attributes which are currently specified in our legislation?

Archbishop Comensoli: I'm going to look towards the lawyer on this one!

Mr Moore: That's possible, but it does open up a very wide field for the courts to start interpreting both what religious belief is and what a breach of those religious beliefs is, and I'm not sure that the courts are necessarily going to be the best equipped to undertake that review.

CHAIR: I have a brief last question. You've made some statements about the difference between behaviour and attributes. Some attributes, for which you have an exemption in the Sex Discrimination Act, are in fact behaviours—although they're fairly innate behaviours—one of which is breastfeeding, and I would not expect that you would have a culture that is anti breastfeeding in your schools or a need to exercise a religious exemption in relation to that. But, equally, pregnancy is a personal attribute but a very obvious one—

Archbishop Comensoli: The same as breastfeeding.

CHAIR: Yes, and equally you said you don't want to discriminate against a person because they are trans. But being trans does become a behaviour, in that, in order to meet the mental health needs of that child, they will want to have their name affirmed and their dress code changed and to be treated as their authentic self. How do you manage that from a doctrinal point of view? I know that there are Catholic schools supporting transgender young people.

Mr Collins: I agree with the last part of your question. Catholic schools with transgender students are acting incredibly pastorally, and, I would say, with the support of staff and with the support of families and parents and the rest of the school. So I don't see a situation where that becomes a significant problem in a Catholic school.

CHAIR: So you wouldn't need an exemption? You're not relying on exemptions? You don't want an exemption in relation to those students?

Archbishop Comensoli: We're back to this question of exemptions in terms of just mere attributes and behavioural aspects and intervention, too. As to those sorts of questions: firstly, I would stress again that, in terms

of students, there are definitely conversations with parents around the circumstances, but, if it gets to a point of breakdown of all the opportunities to consider something—if the behaviour itself associated with the attribute is such that it's active and detrimental to the life of the school, in terms of its mission and identity—then that exemption is still needed.

CHAIR: This is where I'm trying to seek some clarity. I'm not a Catholic, but my understanding is that, in the teaching of what is a man and what is a woman, there is not an acceptance at a doctrinal level that it's appropriate to change your gender.

Archbishop Comensoli: No, that's not exactly right. The basic position of our Catholic faith is that we're endowed with a body, and that that body is sexed, either male or female.

CHAIR: Or intersex.

Archbishop Comensoli: Or intersex, yes—in extremely rare examples. Then there is the question of gender identity, which is not an issue in and of itself, again, for intersex—so I'm just holding that as a parenthesis at the moment. Then there are all the aspects around: if someone perhaps wants to act out in a sexually active manner in a school—

CHAIR: That would be inappropriate for anyone, surely?

Archbishop Comensoli: Exactly.

CHAIR: So where is it that you need to rely on the attribute to uphold this? What I'm trying to drill down to is an example where you must rely on the attribute to uphold the school ethos—any example.

Mr Moore: I think we're happy to take that on notice.

Senator FIERRAVANTI-WELLS: Can I put one question on notice to the archbishop—or to all of you?

CHAIR: Yes.

Senator FIERRAVANTI-WELLS: I want to go back to your point that you've made, Archbishop, about the enactment of a form of religious discrimination act or 'protection of religious freedom' legislation as a threshold piece of legislation. Clearly these, of themselves, change the necessity or otherwise of the sorts of circumstances that we've been talking about that are now exemptions—do I understand that to be your point? Because clearly, if you had a religious freedom piece of legislation that put religious freedoms alongside other freedoms or other human rights, then we wouldn't be having some of these discussions. Please take that on notice and come back if you want to comment in any way on that.

Archbishop Comensoli: I'll stress that we have actually done this before.

Senator FIERRAVANTI-WELLS: I know that.

Archbishop Comensoli: On a few occasions.

Senator FIERRAVANTI-WELLS: I appreciate that, but it's good reinforcement.

Senator RICE: Another question on notice, if I may, because I know that we have definitely run out of time: could you give your reflections or any views that you have on the current law as it exists in Tasmania.

Senator KITCHING: Yes, that's a good point.

CHAIR: We might have some further questions on notice, but I want to thank the four of you for your fulsome evidence today. It's been very helpful to the committee. We do appreciate that this inquiry is taking place at quite short notice, so if you've got any further information or written submissions, we're very happy to engage with you further in writing over the course of the next four weeks.

Archbishop Comensoli: We'd like to make a submission in due course, and we can take up some of these questions within that submission if that would be sufficient.

CHAIR: Thanks very much.

BLACKWOOD, Ms Beth, Chief Executive Officer, Association of Heads of Independent Schools of Australia

PEREIRA, Ms Annette, Executive Officer, Australian Association of Christian Schools

SPENCER, Mr Mark, Executive Officer, Policy, Governance and Staff Relations, Christian Schools Australia

Evidence from Ms Blackwood was taken via teleconference—

[12:02]

CHAIR: Good afternoon. I understand that information on parliamentary privilege and protection of witnesses has been provided to you. Would you like to make an opening statement?

Ms Pereira: Yes, thanks. AACCS has more than 110 member schools across Australia, and the vast majority are low-fee schools that were established by parents or churches. Our schools have a great history of working with government and embracing positive cultural expectations about education. They're strong implementers of the Australian curriculum. They have excellent engagement with parents, high rates of students with disabilities and, typically, are known for the safe and caring environments that they provide.

Because of their independence and their values, some of our schools have also been able to pioneer initiatives that have pushed the broader education sector forward. For example, one of our schools in an urban centre on the east coast has been teaching their local Indigenous language for decades—one of the first schools in the country to do so. Another was established specifically for young parents who would otherwise drop out of schooling. A number of our schools exist to cater for special needs children alongside mainstream classes, giving them unique care while also ensuring they remain integrated. Our schools aren't places of prejudice and exclusion but vibrant communities that love and educate the diverse children in their care.

There are also things that make Christian schools unique. Everyone has beliefs and, for a Christian school, Christian beliefs will underpin the activity and teaching of the school. Christian faith is modelled by staff, embedded throughout teaching, and influences the way that schools understand what it means for them to encourage students towards their fulfilment and their flourishing. This doesn't mean that there isn't discussion or disagreement. Schools are places of robust debate, and no student is compelled to agree with the school. But everyone who participates in a Christian school understands it to be just that—a Christian school.

With all that in mind, we're very concerned about the impact that legislative changes may have on the viability of faith based schools and their ability to operate in a way that is consistent with the faith they hold. Hurried legislation in response to the media coverage of false claims about expulsion of students could compromise the ability of our schools to continue being a unique educational option for those who choose to be part of them. The problem is that the exemptions that could theoretically allow a school to exclude a child because of their sexual orientation are also what allow schools to operate in accordance with common Christian beliefs regarding sexuality and relationships. Without adequate protection for the religious beliefs, schools could be forced to teach in ways that contradict what they genuinely believe, to act against their conscience and beliefs in the way they handle behaviour, and to employ staff who don't share in and meaningfully uphold the beliefs of the school.

I do want to acknowledge how challenging the task of this committee is in getting the balance of all these things right. But we are yet to see a proposal that we believe is adequate in the bits that leaked into the news. While we recognise that exemptions may not be the best way to balance the various rights that must be held in tension, if they are removed and adequate protection isn't given to schools to hold a commonly held biblical view of sexuality and relationships in what is taught and in managing school life and in who the school employs, you'll be carving out an area of faith and deeming it impermissible. You'll be deciding that those long-held beliefs of many Christians can't be expressed in education at all—and that's a serious step for a government to take.

Our schools aren't asking for any other schools to hold the beliefs they hold, and they're not even insisting that their students agree with them. But they are asking for that genuine agreement from staff who work at these schools and they are asking that they be allowed to manage their schools in ways that are consistent with their faith and convictions.

Mr Spencer: Christian Schools Australia has 140 schools across Australia and around 65,000 students in our schools. Internationally, we are part of the Association of Christian Schools International, with 5.5 million students in 108 countries across the world. We share the characteristics that my colleague has just described in terms of the nature of our schools, the types of communities we serve and the type of education we provide.

It is our intention today to speak honestly and frankly. In doing that, I think it is important to start by being honest about why we are here. Fundamentally, we are here because of a lie—a claim that faith based schools are

expelling gay students and the government wants to expand that right. This is simply not true. As we've consistently said throughout this debate, our schools have never expelled a student solely on the basis of their same-sex attraction. They never have, they never will and they don't want the right to.

This is not to say that our schools are perfect and not to say that there won't be claims about the nature and conduct of our schools. This morning we've already had a claim around a student called Evie. I got a text earlier on from the principal of that school, who provides a different perspective on some of the claims that were made this morning. I will just read that to you: 'The chaplain met with Evie and her friend as a support a couple of times prior to Evie expressing her desire to transition as she was having social issues. Once Evie flagged with the chaplain that she thought she was transgender, she, the chaplain, told Evie that the catch-ups would need to stop and formal permission would need to be given by the parents in order for support to continue. We as a college were committed to supporting the transition of Evie and were in the process of doing this when her parents became hostile and aggressive towards the school. We sought to partner with the Royal Children's Hospital, but the parents refused to give that permission. The principal even met personally with Roz Ward, as a way of trying to understand and help support Evie. We are an inclusive school and currently have two transgender students in the college. We went through exactly the same process with them as we did with Evie. The difference was the aggressive behaviour and hostility of Evie's parents.' I think it's important that we have that clearly on the record.

Let's also be clear about what's at stake today. Our schools are seeking to teach, employ and ensure behavioural standards consistent with their faith and beliefs. These are rights protected in international law at the highest level. They're rights that the Joint Standing Committee on Foreign Affairs, Defence and Trade, in their interim report in 2017, made clear are not adequately protected in Australia. They're rights that the Expert Panel on Religious Freedom, after reviewing more than 15½ thousand submissions and extensively consulting across the country, indicated should not be removed. What's at risk is a quality of becoming conformity—our friends being eradicated from the public square. Our plea to the committee today is to ensure that doesn't occur.

CHAIR: Thank you. Ms Blackwood?

Ms Blackwood: Thank you for this opportunity to speak with the committee and contribute to its deliberations. AHISA is a national professional association for heads of independent schools. Our members lead schools that collectively account for approximately 11½ per cent of total Australian school enrolments and 20 per cent of Australia's total year 12 enrolments. Some 82 per cent of our members lead schools with a single religious affiliation, including schools for the major Christian denominations and Jewish and Islamic schools. A further 16 per cent lead schools that identify as either non-denominational, inter-denominational or ecumenical.

AHISA's submission to the committee's inquiry calls for the release of the report of the Ruddock review as a matter of urgency. That's probably our most important point. We would like to see the release of the Ruddock review as a platform for informed public debate. Leaks and misreporting of the review's recommendations have caused unnecessary hurt and offence and have served only to demand civil discourse.

Our view is that adequate time must be allowed for consideration of implications that may arise from any proposed changes to legislation. Our submission highlighted some of these. For example, we note that it's important to pay attention to terminology and definitions. The terms 'sex' and 'gender' are now often used interchangeably, but their use and definition in legislation may be critical if schools are to retain their rights to apply for exemptions under antidiscrimination law. For example, at the moment there is the ability to advertise for students of one sex through an indirect enrolment imbalance, particularly in situations where single-sex schools may be moving to co-education. The current legislation allows for applications for exemptions.

We also note the importance of understanding how antidiscrimination laws intersect with employment and workplace laws and the implications of this for employment practices in schools with a religious affiliation. It's important to note that currently schools do not have the right to discriminate against students, teachers and staff on religious grounds. Schools and other organisations with a religious affiliation have the right to apply for exemptions to antidiscrimination laws on religious grounds, and they have to defend actions taken to protect or promote tenets of religious faith under current antidiscrimination law. But there is no guarantee such exemptions will be granted or that the actions they take will be upheld by courts, tribunals and the commission. As such, we see no pressing urgency to change the current law but rather give time for due consideration of the complexity of issues that such changes might raise.

AHISA believes diversity is a strength of the independent sector in that it allows choice for parents according to their particular faith, beliefs, values and culture. How Australia balances such fundamental human rights, including the right of religious belief, will determine not only the breadth and depth of diversity in our society but our freedom to celebrate that diversity. Times have changed that see Australia forging its way between the secular and the religious, and that requires careful and respectful dialogue so that the views and the rights of all parties

are heard and accounted for. A rush to legislate will not self-achieve this. We cannot stress enough the importance of releasing the report of the Ruddock review to inform debate.

CHAIR: I am going to begin by asking all of you a question. The exemptions to state equal-opportunity law on the basis of sex discrimination don't exist in either Queensland or Tasmania. Can you point to any specific problems or issues that have arisen because those exemptions don't exist in those jurisdictions?

Mr Spencer: They exist in a more limited form in those two jurisdictions. So in Tasmania the exemption is limited in relation to staff and in relation to discrimination on the basis of religious conviction. In Queensland, it is limited to a form around inherent requirements—that does still provide a form of exemption. Case law in this area is very scarce on the ground, largely because people coming to our schools know who we are, the nature of our school and what is expected of them. There is a self-selection process up-front, so it is very rarely litigated. When we do find issues in various jurisdictions around the country, it is usually dealt with pastorally. It is usually dealt with in discussion with the staff member and, by and large, they know they are no longer able to work within the constraints of the school and the expectations of the school and they will resign and move on. By and large, that is the way these matters are resolved—through discussion and through honest and open dialogue with the school between the school and the staff member, and everyone moves on for the rest of their lives.

Ms Blackwood: I would endorse those statements. I am not aware of any school that has expelled students or members of staff because of their sexuality. I think every school strives to resolve those issues through dialogue and through respectful conversation with regard to belief of one or the other party.

Ms Pereira: I don't have anything to add. I think that covers it.

CHAIR: Mr Spencer, you said a teacher might decide to move on. Is part of that dialogue not the fact that the exemption sits there as an ultimate tool that the school might choose to use?

Mr Spencer: Absolutely.

CHAIR: Okay. So you don't need the exemption to hold up the ethos of the school?

Mr Spencer: We do need the exemption because, in the absence of an exemption, we have a potential for litigation around those issues—unlawful terminations.

CHAIR: You say you resolve it pastorally, but actually what you're really saying is that you resolve it pastorally because otherwise you would be having litigation?

Mr Spencer: Let's be clear: our aim is to resolve these things pastorally in a constructive manner with the staff member involved, and by and large that is the case. In some cases, we can't find that resolution so, yes, we will terminate staff members who don't share our faith, values and beliefs, and that is a fundamental element of our schools.

CHAIR: I accept that—where they don't share your faith, values and beliefs. Does that come down to an expression of faith, values and beliefs or does it come down to an attribute of an individual person, such as being gay or such as being unmarried?

Mr Spencer: That is where, unfortunately, the law does not allow you to make that separation. The law combines those two. If you look at the decision in Cobaw, in the Supreme Court of Victoria, they conflate those two concepts.

CHAIR: Sorry, which two concepts?

Mr Spencer: The concepts of behaviour and attribute. They actually commingled them, when you look at the decision in Cobaw, and that's part of the problem in this area of law—it's incredibly complex and quite conflicted in the way it operates.

CHAIR: Couldn't we uncommingle them by removing the exemptions? Because then you would be relying on employment law to uphold the ethos of the school in terms of the behaviour of the teachers.

Mr Spencer: Which has exactly the same problem as we had before. We have the potential of litigation on the basis of us merely trying to ensure our staff protect our faith, values and beliefs. I'd be surprised if Australia really wanted Christian schools not to be able to have staff who share their faith, values and beliefs.

CHAIR: But you already have to litigate that because the exemptions don't provide you capacity to remove everyone who doesn't share your particular definition of beliefs as some of those behaviours won't be covered by the attributes in the Sex Discrimination Act, surely?

Mr Spencer: At the moment, around the nation—and there are some slight various jurisdiction to jurisdiction—by and large most of the things that we would consider to be within our faith, values and beliefs are provided for in those exemptions. That why they're there; that's why they were put in there.

CHAIR: But, if you had a married teacher, who was married within your faith, who came to the school and advocated in favour of same sex marriage and did so within the school environment, you wouldn't have recourse to the Sex Discrimination Act exemptions. You could only have recourse to employment law. But that would be a clear breach of employment law because it doesn't uphold the values and ethos of the school. Would that not be the case?

Mr Spencer: At the moment, the Sex Discrimination Act exemptions cover sex, sexual orientation, gender identity, marital or relationship status and pregnancy.

CHAIR: That's right.

Mr Spencer: So at the moment there's an exemption for sex discrimination.

CHAIR: No, I'm asking you about a behaviour, not an attribute. If you had a woman who's married within your faith and a teacher in a school, who comes in and says, 'I'm in favour of same sex marriage,' how do you manage that in your employment law currently?

Mr Spencer: In that situation you've got someone whose attributes—to use that phrase—were consistent with our faith, values and beliefs but who's indicated that their views have changed and that they are effectively not sharing the faith, values and beliefs of our school community anymore, so we would certainly work through with them and try to understand why and how that's going to work in their school practice. Fundamentally, for us, we're looking for staff who can completely and authentically uphold the faith, values and beliefs of our schools in who they are, what they teach and how they live. We want that congruity. Students will pick up very quickly if there's not that congruity, if there's a hypocrisy between saying one thing in school and living another way outside school. So we are actually looking for staff who have that consistency across the whole of their life around what they believe, what they say they believe and how they act and behave.

CHAIR: We'll go to some questions now. Senator Kitching?

Senator KITCHING: I wanted to ask what I asked the other groups this morning, which is: if section 38 was removed, discrimination would still exist, but it wouldn't be lawful to discriminate and therefore wouldn't discrimination become more covert?

Mr Spencer: That's a very interesting question, bearing in mind too that section 38 covers a whole range of things. It covers the employment of staff; it covers the provision of education—that is, not just as some people described the expulsion of students. It covers the provision of education—that is, how we provide education.

Senator KITCHING: I'm aware that—not here in Australia—in some of the madrasas, for example, only Persian mathematicians are taught because they are of the faith. So I'm aware that's how schools around the world decide to teach. I think one of the potential unintended consequences is that, while there are situations that you might handle one way because of the unique circumstances, you would end up having to draw very firm lines in order to behave consistently.

Senator KITCHING: Funnily enough, as a legislator I wouldn't want to encourage legislation to be enacted where we're actually encouraging people to not follow the legislation.

Ms Pereira: Yes.

Mr Spencer: What it would certainly do is make it a lot harder to know where the legislative boundaries were and whether you were following the legislation or not.

Ms Pereira: One of our concerns is that you could potentially end up with quite grey law, where it's quite hard for schools to know what they are and are not permitted to do until it's tested.

CHAIR: In that context, how does a gay teacher know if they are or they aren't accepted in the school community? How do they resolve that sense of greyness from a doctrinal point of view when it seems they're perfectly accepted within the school community and they have a long-term teaching career—nevertheless, this exemption still sits there?

Senator KITCHING: I guess there are millennia of philosophical discussions around this.

Ms Pereira: Nobody is under any illusions about the school's beliefs when they come to the school.

Senator KITCHING: No. That's right.

Senator RICE: When you say no-one is under any illusion about the faith, values and beliefs of the school, do you mean that if a person is same-sex attracted, even if they feel that they are a deeply Christian person—as many are—you would recommend that they did not come and teach at your school?

Mr Spencer: There are a variety of views and questions around that issue. For our schools, we generally take the pretty clear view that there is a biblical truth around sexuality, a biblical truth around sexual conduct. That's a

traditional, historical view. And there's a traditional, historical view around marriage that our schools would generally hold to. We have got staff in our schools who have indicated to the school leadership that they're same-sex attracted, but they take the view that it's not what God's best plan is for them. It's a struggle they have, but they don't accept it, they don't try to live it out, they don't try to be or identify as gay. They're struggling with same-sex attraction. Those teachers are within our schools now, and they're working within the confines of the doctrines of those particular schools. So those situations do exist. It depends on what you mean. We're really getting into the fine nuances, as Senator Kitching alluded to, of millennia of philosophical issues around this. Is this really what the law is trying to do—get us to deal with this things at this sort of level? I'm not sure we're going to solve this problem.

Senator RICE: I've heard a lot of evidence, not just at this inquiry but at a previous inquiry, that, for people who are same-sex attracted who are teachers in your schools—as long as they are struggling with it—having to try to not be same-sex attracted is extremely damaging to their mental health, which is why removing these exemptions, in fact, is an appropriate thing.

Mr Spencer: And we'd say, for those staff, that there are lots of other schools that they can seek employment in. No-one's forcing people to come and work in our schools. We're clear, we're explicit, about our faiths and beliefs and the doctrines and tenets we hold to, and people have choices, whether they come into our schools as parents or staff.

Senator RICE: How about somebody who is a teacher at one of your schools who is married and whose spouse then transitions—someone like me? If I was a teacher at your school and my spouse transitioned after we had been married for 16 years, would I then no longer be acceptable at your school?

Mr Spencer: I don't know. Come and work at our school so we have to work it out.

Senator RICE: It means I now identify as a bisexual person. I'm still the same person that I was, but my partner has transitioned.

Ms Pereira: I think it is worth pointing out that schools will handle situations in a range of ways; we're not a system. We spoke before about member schools; schools are independently governed. They operate differently, and they would hold different views and handle things in different ways. What we are trying to point out is the position that a faith based school is placed in if the government is to define what is and isn't permissible belief. Either we say faith based schools actually aren't legitimate and there isn't a place for them—that is, the doctrine and teaching of that faith is inherently problematic and unacceptable—or we allow schools to continue operating with boundaries around how they teach, operate and employ consistently with what they believe. It is very hard to talk in hypotheticals about a range of schools.

Senator RICE: I'm not talking hypotheticals. I am just talking about the outcomes for people in our society. We have a requirement to be supporting the wellbeing of people in our society. Your schools are supported in our society, as they receive public funding. Having those exemptions would put people in the situation I outlined. For somebody who, after struggling with their sexuality, has to acknowledge that they are same-sex attracted, there is the impact on their mental health of them no longer being welcome at that school and the law supporting your ability to then fire them from the school.

Mr Spencer: What the law has to do in that context is weigh up the rights of that individual staff member against the rights of the community, the parents and the school, to continue to hold their religious beliefs. That's what international law does. They are both equal rights under international law; there is a mechanism under international law to balance those rights.

Senator RICE: At the moment, our laws actually don't balance that. They say that you have the right to fire that staff member whose partner has transitioned and you have the right to expel a student who didn't know that they were same-sex attracted when they came into your school, when they have now understood their sexuality and know they are same-sex attracted.

Mr Spencer: That's why for a number of years now our submissions to government at a state, territory and Commonwealth level have not been in favour of the exemption model, which is a poor model. We are in favour of, firstly, properly defining discrimination so that it recognises that definitional issue of the need to balance rights and to provide adequate protections for religious freedom and for the manifestation of that religious freedom. We have that process in our Australian law rather than this exemption approach, which I think everyone agrees is problematic and far less optimal than we would like in this area.

Senator RICE: Would you support a charter of rights in order to balance the right to religious freedom versus other rights that are upheld in our international obligations?

Mr Spencer: A charter of rights is a long way down that path, and further than I think anyone has actually given much serious thought to. What we have put to the expert panel on religious freedom is a number of things. Firstly, we want to redefine discrimination properly so that we have a better understanding of it and the public has a better understanding of it, and to say that there is a need to balance rights. Secondly, we want to incorporate protections for religious freedom that allow faith communities to live out their faith in a balanced and proportional way.

Senator FIERRAVANTI-WELLS: How much of what we are discussing now would mean a very, very different situation if we did have framework legislation that basically put freedom of religion in the same position as other human rights? It would be a very, very different discussion that we would be having, and there would then need to be an appropriate balance of those different circumstances. I will just go to a couple of things. Can you provide to us whether you do have information going to actual, formal complaints—that have been received or that you are aware of—where the religious exemptions have been invoked, whether it is in relation to students, staff or contractors? Also, can I ask you, Ms Blackwood: your body represents independent schools in Australia and, right at the beginning, you said that includes Muslim schools, is that correct?

Ms Blackwood: Yes.

Senator FIERRAVANTI-WELLS: Therefore, whilst we do not have Islamic schools appearing before us separately—

CHAIR: We do later today. The program has been amended.

Senator FIERRAVANTI-WELLS: Has it? Sorry, I didn't get the amended program. I may have some additional questions to put on notice. I'm conscious of the time, so I will just leave it there.

Ms Blackwood: I'm happy to take questions on notice.

Senator KITCHING: I will just ask you this, and maybe you can take it on notice: do you feel that, for the parents who send their children to your schools, in the main, if there was a removal of your ability to conduct the school in accordance with the religious ethos of the school, there would be disappointment from those parents and perhaps they might vote with their feet?

Mr Spencer: Absolutely.

Ms Blackwood: Absolutely. We believe that a high-quality schooling system in Australia depends on parents having the freedom to exercise their rights and responsibilities in regard to the education of their children, and that includes educating them in schools of a religious faith.

CHAIR: Should that include excluding gay children from the school?

Ms Blackwood: I know of no situations where gay students have been excluded from schools. I think that's an anathema to the general Australian population. It's an anathema to schools where they strive to meet the welfare needs of these students.

CHAIR: We will now need to break for lunch. Thank you all for your evidence.

Proceedings suspended from 12:36 to 13:24

COLYER, Mr Paul, Executive Officer, Australian Catholic Primary Principals' Association

FitzGERALD, Mr Frank, Executive Officer, Catholic Secondary Principals Australia

GAYNOR, Mr Brad, President, Australian Catholic Primary Principals' Association

CHAIR: Welcome. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. I invite you to make opening statements, both from a secondary and primary point of view.

Mr FitzGerald: Thank you. Just a tiny bit of background about myself: this is my 50th year working in Catholic education. Half of those years were as a principal of Catholic secondary schools, and the last five years have been in this role representing our Catholic secondary school principals. It's a professional association as opposed to representing the schools generally.

My statement is as follows, and this has the endorsement of our board. Catholic schools have been an integral part of Australian society since its earliest years. We will celebrate 200 years of Catholic schools in Australia in just over a year's time. While very grateful for government assistance in the building and running of the schools in the recent 50 years, our heritage goes back to times when communities worked extremely hard to fund and build their local Catholic schools in order to promote the values and beliefs of Catholic communities around the country.

I'm here today representing principals of over 500 Catholic secondary schools with an enrolment of just on 360,000 students. It's quite a significant representation of the education community. The ongoing success and popularity of Catholic schools continues to show their relevance and importance to the community. Families across Australia want their children educated at schools that reflect their standards, values and beliefs. This is not a spur-of-the-moment or impulse decision by these families, as they have to find the funds and capacity to support their children's education at Catholic secondary schools.

In my time as a principal, I would hold annual meetings with all those seeking enrolment at the school I was leading and invite parents to complete a survey on why they were going to the trouble and expense of seeking a Catholic secondary education for their children. Every year, without fail—so over 20 years—the item that scored the highest rating on these surveys was the item that said that the school supported and reflected the values of the families who attended the college.

As a country of growing diversity, we appreciate that not everyone may subscribe to the standards, values and beliefs of Catholic schools. We celebrate this diversity in the broader community and are very comfortable encouraging others to follow their own beliefs and values, so long as they do not threaten the wellbeing of others in society. As we grant that right to others, we in turn believe that it's only fair that others show similar tolerance to our community and its Catholic schools.

Our submission today is based on the premise that Catholic schools have a long-established and publicised set of standards and beliefs. No-one is compelled to either seek employment or enrolment at our schools. We believe that it is entirely reasonable to expect that those who freely choose to become part of our school community as employee, student or family come in the understanding that they are accepting these standards and beliefs. In saying this, our school leaders are realistic in their understanding that not all who join our communities may privately agree with all aspects of the entire range of standards and beliefs that we manifest. Our principals respect the individual's privacy in these matters. Again, in return, we simply ask that those with views that may be at variance to ours be equally respectful of the stated policies, practices and values of the school.

As a result of this approach, our schools have in place a process whereby staff are employed under the condition that they will actively uphold the policies, values and ethos of the school. We believe that this an important principle of employment that we would seek to have upheld in the going-forward stages. Similarly, students accept enrolment in our schools under an agreement whereby they accept the policies, values and ethos of the school and will not act in any way that is opposed to these principles. We believe it is important for our schools to be able to continue to enrol students with this undertaking by students and their families. These areas where we seek the support of staff and students involve many aspects of school life such as uniform code, grooming and unsafe or professional behaviours and the like, and hence go beyond the specific aims of the exemption from discrimination legislation that we're looking at today.

Finally, we believe all of our principals—and I would say this with all confidence—are in agreement with Archbishop Coleridge, President of the Australian Catholic Bishops Conference, in his recent statement when he said:

Catholic schools welcome staff and students from all backgrounds who are willing to accept the declared mission and values of the school community.

Thank you.

Mr Gaynor: Thank you for the opportunity to be here today. The Australian Catholic Primary Principals' Association represents over 1,200 primary schools from across all states and territories, and its vision is to advocate and action for Catholic primary school principals. Australian Catholic primary school principals support the role of all schools in striving to meet the needs of our multifaith and multicultural communities. Our principals welcome students, families and staff from all walks of life and of all faiths and those with no identified faith. The reality of our Catholic primary schools is that they reflect their communities. Catholic primary schools are diverse and inclusive communities that strive to welcome all into a Catholic learning community of hope, joy and wonder.

Religious freedom is widely recognised as an important element of Australian culture, and it is so the right of parents to choose a school that is most in tune with their beliefs and meets the needs of their child. As principals in Catholic primary schools, we advocate strongly for this right. It needs to be noted that, until we have had the opportunity to read the whole Ruddock review, we cannot properly consider the ramifications but would be happy to participate in full discussion in the context of the full report.

It is important that the religious freedom of Catholic schools be recognised, and this includes the staff they employ. All staff in Catholic schools have a professional obligation to be supportive of the teachings of the Catholic Church and are expected to support the ethos or refrain from undermining Catholic values and teachings at the school. Employment law and arrangements for staff can be complex, and we think it unwise to rush any changes. Any changes require deep consultation to ensure they achieve their intended outcomes. As principals of Catholic primary schools, we acknowledge that the relationship between employer and employee is primarily the domain of diocesan officers. The Australian Catholic Primary Principals' Association is committed to being open to all who seek a Catholic education and supports the critical role of principals in providing safe learning spaces and non-discriminatory workplaces for our schools.

I'd like to actually provide a personal story which I think personifies the position of many Catholic primary schools. I had a parent in my office one day at one of the schools I was principal at—I'm still a full-time principal in a Catholic school, by the way—and she wanted to enrol her two children. We were having a lovely conversation, and I was asking all the standard enrolment questions. One of the questions we often ask comes down to parenting, custody and anything going on in that legal space, and I could see she was quite hesitant. I said to her: 'Feel free to share. I'm happy to listen.' She indicated that the two children were a result of a same-sex relationship, and I said: 'Wonderful. You are very welcome, and I'd love to meet your partner anytime. She's more than welcome to come down, and I'll give her a tour of the school.' She said to me, 'She's in the car,' and I said: 'Go and get her. I would love to meet her right now, talk to her, answer any questions she has and show her the school.' And we did. That family became a very important part of our school community, and those parents became active members of the community. I just wanted to show you that there is a face to what we're here for today, and certainly I would say that story personifies a lot of what happens in Catholic primary schools in this country, and we're proud to have that. Thank you.

Senator RICE: Starting with that story you just shared with us, Mr Gaynor—which I agree sounds very positive—in terms of being a school principal in Catholic schools, for same-sex attracted couples or partners who have children at your schools or same-sex attracted or transgender students and teachers, do you feel that people who are same-sex attracted and gender diverse can be either students or staff at your schools and that is consistent with upholding the policy values and ethos of the schools?

Mr Gaynor: That would certainly be my experience. Every school I've ever worked at, and I presume the majority of Catholic primary schools, would have all those situations, and all those people are very welcome in our communities. I know, certainly from my own personal experience, that that is absolutely the case in my school.

Senator RICE: Obviously, all three of you have a lot of experience in the Catholic education system. Has that always been the case, or has that changed over time?

Mr Gaynor: It has certainly been my experience.

Mr FitzGerald: I think our school communities are a fair indicator of society. I think that, as society has moved to a better place in understanding people's diverse views on these matters, our schools have moved and even led a little bit, I'd be happy enough to say.

Senator RICE: They have moved with society, essentially, so, as society has been more accepting of same-sex-attracted people and gender-diverse people, the schools have—

Mr Gaynor: Our schools would reflect that.

Senator RICE: Tell me, then, about what your view is on the current exemptions under the Sex Discrimination Act, which allow discrimination on the basis of sexuality and gender identity.

CHAIR: And pregnancy.

Senator RICE: And pregnancy—that's right.

CHAIR: And marital status.

Senator RICE: Particularly on the LGBT attributes, your schools are consistent with the evidence that we heard from the Catholic Church this morning—that you feel the need to maintain those exemptions? Perhaps there's a better way of doing it, but at the moment you feel that those exemptions are necessary?

Mr FitzGerald: I do understand that you're looking at a specific piece of legislation here. I'd answer that question with an invitation to consider a principle. If you can just give me a second here to put it into context, the life of a Catholic secondary principal now is infinitely more complex than it was 20 years ago. As you say, society has changed. Principals find that they can't give time to be leaders of learning and to be involved in a lot of proactive things. A lot of their time is involved in, for want of a better word, dispute resolution over a broad range of areas. Inevitably, those areas get back to somebody having a different view to the school's stated policies and values. If you were to ask me what percentage of that involves issues such as the ones you're looking at today—same-sex relationships, pregnancy or marital status—I would say, 'Very little.' But I suppose this is a plea for understanding that, if we move by whatever means to a place where a Catholic school is just seen as a place where any views can be promoted and tolerated, it gives rise to tension. I guess what we're asking for is an understanding that, while we broadly reflect society, there are some things where we would crave, hope and expect that we could set up a series of practices and policies and, if we can show that they're fair and just, there would be understanding of that. That is not to have to reinvent the wheel on every single issue.

To get back to your particular point, Senator, it would be quite simple to say that, yes, as an item in the daily life of a Catholic secondary principal, it probably comes up very rarely. Could you do away with it? Probably. But, if you take away all of those things, where are we left? A principal then has to justify, in quite a contentious environment, a whole lot of other things that the school's trying to advocate. I'm sorry if I'm being longwinded, but our principals are under the pump. If this legislation is symbolic of a school being able to put a reasonable view forward and say, 'We're asking the community to accept that,' that would be our ultimate aim. We show no disrespect to anybody that's caught up in the current difficulties with the legislation. Sorry I've taken so long, but that would be the thing we'd be trying to say.

Senator RICE: What I hear you say is that you want to have the ability to have people at your schools who uphold the policies, values and ethos of the school.

Mr FitzGerald: Yes.

Senator RICE: So you want to be able to say to someone, 'No, we feel that your behaviour doesn't fit the policies, values and ethos of the school, so we don't think that you should continue to be part of the school community'?

Mr Colyer: If I could add to that, Senator, agreeing with Frank: legislation can be very black and white, and you need to have those policies and guidelines, but, when every single situation that you deal with has to be from the basis of a pastoral outlook, a pastoral relational situation, no one situation can fit all, but it needs to be pastoral. So you need to have those guidelines, but the school and the system need to have the opportunity or the right to deal with that, to address it, when a need arises in regard to going against church teachings, the ethos of the school or the culture of the school.

Mr Gaynor: It's certainly our understanding that we haven't had to use the legislation. I'm unaware of situations where we've actually had to use the legislation.

Senator RICE: What I want to drill down on is this. Given that you want to have that ability to have people at your particular school communities who uphold the policies and values and ethos of the school, what aspects of being lesbian, gay, bisexual, trans or gender diverse do you feel do not uphold the values of the school, given the example that you gave before of welcoming a same-sex-attracted family into your school community? What about a student who is same sex attracted? I will ask you to confirm, but it seems to me that you are saying that, no, you wouldn't expel, you don't want to expel, a student because they are same sex attracted.

Mr Gaynor: Absolutely.

Senator RICE: So what would it be about that student—

Mr FitzGerald: The reality is that, when you drive to school as a principal—and I'm sure that Brad and Paul would both agree with this—you think, 'What is my day going to be like today?' because you just don't know, and

you deal with the unexpected. For us to sit here and postulate a million possibilities—I mean no disrespect—is well-nigh impossible. I suppose we just need some reference point, something to say that we've got a capacity to stand by a set of values.

If I could use one example that happened to me—and Brad used one there—we had a student from a non-Christian religion enrolled in the school. They knew that the grooming policy was to be clean shaven. When the student got to year 11, he came to me and said that, because of his religious beliefs, he wanted to grow a beard. That might seem a trivial thing, but the point there was that we work very hard to try to get the boys looking very smart in their uniforms and being clean shaven. While respecting that student's point of view, to allow that then triggers a whole lot of other students to say, 'Well, can I have that exemption as well?'

They're the things where we want to try to hold the line. Did we know that was going to be a case when we set up that rule? No, it wasn't. I'm just trying to say that the unexpected will always happen.

CHAIR: It's a good example, but not one relevant to the exemptions in the Sex Discrimination Act.

Mr FitzGerald: Sorry, Senator.

CHAIR: If you could search for one that is, that would be great.

Mr Gaynor: The only thing I would say is that the only time we would have some sort of concern, I suppose, is if an individual were openly or provocatively, purposely, trying to undermine the Catholic Church. All these people are part of our community, but I think that's the only time I can picture—and I haven't had the experience where someone was openly trying to thus stir the pot. That would be only point.

Senator RICE: Can I put an example to you. I again don't quite know what you mean by 'provocatively' or 'openly', but say the example of a student wanting to attend the school formal with their same-sex partner. You accept that they're same sex attracted. Whereas the heterosexual students in your school will have girlfriends or boyfriends, say that a girl wants to bring her girlfriend to the school formal.

Mr Gaynor: We're a primary school, so that's unlikely to happen. Frank?

Mr FitzGerald: This might seem a strange answer, but, by the time I got to my last secondary school, we didn't have school formals, because there are a whole range of very complex things—drinking, drug taking; a lot of things. Behaviours, whether they be by heterosexual or same-sex-attracted students, became quite problematical, so that's the way we solved it—by not having formals.

CHAIR: You're not really looking for any of your students to display sexualised behaviour at school, irrespective of their—is that really what you're saying?

Mr FitzGerald: We understand, but—

Senator Rice interjecting—

CHAIR: No, I'm just asking the question.

Senator RICE: What about attending a school camp and holding hands with a girlfriend who also attends the school?

Mr FitzGerald: You could come up with a million scenarios. We're not in a position to be able to answer it just on that. I'm not trying to dodge the question. In every case you've got to, first of all, look at the facts of the situation and the implications of it, and that's what you do on a daily basis as a principal. On the face of it, it's not a problem. Some element of that story may become a problem and escalate, and that's when you'd have to deal with it.

Mr Gaynor: There's another example I can think of. I know students who are in that transition stage of gender transitioning in primary school. There are policies about it, it's accepted, and we actually support the families. In cases I know of, moving into high school is often the transition time, and the schools are working very closely together with the family to support that student in a Catholic school.

Senator RICE: That is great. So, for those trans students, you're saying that they're accepted and that they can transition—

Mr Gaynor: Absolutely.

Senator RICE: at your school, and they will be accepted and supported in the school community.

Mr Gaynor: Yes. We work very much with the high school as well, so, as they're moving and transitioning in, we're supporting them. There are things in place. There are policies. But, importantly, we're also working with the family to support them.

Senator RICE: It seems to me that you wouldn't need an ability to discriminate on the basis of gender identity then.

Mr Gaynor: Not in that situation.

Senator RICE: I want to go back. You must have had this situation at schools across the country. You have teenagers. Is it acceptable for a heterosexual couple, a girlfriend and boyfriend, at your school to be holding hands at the school camp?

Mr FitzGerald: In theory, yes. As I say, the difficulty is in the particular situation and the community. You don't look for trouble. You try and accommodate as broad a range of behaviours as you can. But, if it escalated and there was a huge backlash from parents, you'd have to work through it, and it would become quite complex.

Mr Gaynor: In theory, possibly, but in practice I would say probably not.

Senator RICE: You're saying that it would actually be more difficult for a same-sex teenage couple to hold hands than it would be for a heterosexual couple? Is that what you're saying—that there may be a backlash from the school community? But would the schools want to act on that? Would you want to have that ability to then discriminate against that student?

Senator FIERRAVANTI-WELLS: Sorry, Chair, I don't think that's what Mr FitzGerald or Mr Gaynor said. I don't think that's what they said.

CHAIR: No, it wasn't what they said, but let them clarify that.

Mr Colyer: I think that in reality, though, 20 years ago you didn't have to address some of these issues—others, yes; not these—so principals in schools today are actually learning as well. I would have to congratulate diocesan officers who, as Brad said, are putting in great pastoral, supportive policies and guidelines to assist students and their families and employees to be able to be part of that school community no matter what their sexual bias is.

Senator HUME: I've got a couple of questions. First of all, do you think that there is a distinction between the position amongst the primary schools versus secondary schools? Obviously, in secondary schools, children become far more sexually aware. When they hit adolescence, that's when a lot of things change. Do you think that primary schools can be far more open minded, for want of a better expression, than secondary schools, potentially?

Mr Gaynor: We probably don't have the range of situations that a secondary school does, because often it occurs at puberty and afterwards. So we probably don't have the range in terms of our students' issues with sexuality, but certainly with family dynamics we would. But secondary?

Senator HUME: Mr FitzGerald?

Mr FitzGerald: Yes, welcome to our world! It's not so much even formals. In the playground of a school, whether it's a co-ed or a single-sex school, you want your students to act appropriately. Overt, sexualised behaviour, whether it's between a boy and a girl or a same-sex couple, is something that you'd talk to the students about. You wouldn't make it a huge issue though.

Senator HUME: I'm not necessarily talking about students now. I want to move into the area of teachers. That's okay; I was asking a broader question. I'm wondering—and you don't need to be specific with reference to your own schools—whether you have ever had a situation or heard of a situation in another school, where you had a teacher who might be gay, bi or whatever letter of the alphabet it may well be, that you have found a bit confronting or that the school has found confronting. I'm interested to know how, in your experience, the situation was dealt with and whether you felt that existing laws provided adequate protection.

Mr Gaynor: Certainly, from a primary school perspective, I haven't heard of any issue such as that in primary school settings with teachers. Possibly there is, but certainly, from our representatives across the country, it hasn't been raised as an issue.

Senator HUME: Have you ever had a teacher, Mr Gaynor—and I'm going to go to you in a moment, Mr FitzGerald—in the primary school setting who has not upheld the values and ethos of the school, whom you have had to deal with?

Mr Gaynor: Not in my personal situation, and I cannot recall my colleagues in the national group with those issues, no.

Senator HUME: Mr FitzGerald?

Mr FitzGerald: Is this specifically in relation to this legislation?

Senator HUME: Yes.

Mr FitzGerald: I wouldn't be aware of any.

CHAIR: What about more broadly—a failure to uphold a Catholic ethos in non-personal attributes?

Mr FitzGerald: The one that stands out—and this is even a broader one—was someone who was getting ready for a state election and was using a lot of school time for getting his campaign ready. That was considered unprofessional behaviour, and a robust discussion went on.

CHAIR: That sounds like—

Senator HUME: It depends which party they're from!

Mr FitzGerald: I'm sure you would have sympathy with that situation.

Mr Gaynor: From a primary school perspective, most of our teachers are employed by the system, not necessarily by the principal of the school, so, if there were any issues, it would not necessarily be in the principal's domain. It would be more of a system employer-employee conversation. But, certainly from our end, I haven't heard of any issues either.

Senator HUME: With teachers then, are we addressing a problem that doesn't exist?

Mr Gaynor: I'm sure it exists, but certainly from my experience it hasn't been raised. But it may.

Senator RICE: But what is it that exists? What is it in terms of LGBT that is the problem that exists?

Senator HUME: For teachers specifically.

Mr FitzGerald: I guess I'm just tapping into the discussion you had this morning with Ray and Archbishop Comensoli. You could imagine that, whereas we're all very comfortable with the attribute situation, it's when it escalates into advocacy. There may well be a situation where someone becomes very active in their advocacy, to cause distress in the community.

CHAIR: But could not that advocacy come from someone not with those personal attributes? You could be a Catholic, married parent who starts arguing very vehemently in favour of same-sex marriage. Why do you need the exemption to target a particular attribute?

Mr FitzGerald: Wouldn't that exemption allow for that, whereas somebody—

CHAIR: No. It has to be a person with the characteristic as a personal attribute to apply the exemption.

Mr FitzGerald: You raise a good point there.

Senator FIERRAVANTI-WELLS: Can I just ask, though, on that particular point: has the exemption to some extent offered a degree of protection so that we do have the situation where we are to date, where we haven't had complaints or where these issues have been a nonissue, because people have understood that that exemption is in place? Whilst it may not have been an issue that was as widely understood out in the general public, certainly in your industry, the education industry, it was well and truly understood?

Mr FitzGerald: That's exactly the point I was trying to make before. It's a pity that this looks at particularly the issue of sexual identity, because we would hate that to be the reason for schools to be able to say: 'Yes, there are some things that we do want to stand for. Whether you're employed or enrolled here, we'd like you to subscribe to them.' So I think you're right, Senator, that having that—unfortunately, it focuses on the LGBTI community—

CHAIR: Also, sorry, just to correct that: we're talking about the exemptions in the Sex Discrimination Act that the Sex Discrimination Act provides church organisations for the attributes covered by the Sex Discrimination Act, which include pregnancy, marital status and breastfeeding, as well as LGBTI identity—just to be clear.

Senator FIERRAVANTI-WELLS: Can I ask you to take on notice for your respective organisations to provide to the committee whether you have actual, formal complaints where the religious exemptions have been invoked in relation to students, staff and contractors, please. If you could just take that on notice, that would be good.

Mr FitzGerald: Has that request been made of the Catholic Education Commission?

Senator FIERRAVANTI-WELLS: Yes, I've just made it a blanket request today.

Mr FitzGerald: That would really be handled by them—

Senator FIERRAVANTI-WELLS: Sure, that's fine.

Mr FitzGerald: but I appreciate that it's a belts-and-braces approach. We'll happily forward them to you.

Senator FIERRAVANTI-WELLS: Thank you.

Senator KITCHING: Thank you very much for your time today. If a situation were to arise where someone was advocating for a particular point of view—it may not be an attribute of theirs, but they were advocating—would you deal with that under their employment contract?

Mr Gaynor: I think it would depend on what the issue was. In our case, we'd probably seek advice from the office as to where to go with it.

Senator KITCHING: Do your employment contracts contain a mediation clause or a resolution clause?

Mr Gaynor: The industrial agreement would have some sort of clause, I would imagine.

Senator KITCHING: I think we're hearing from the union shortly, so I'll ask them.

Mr FitzGerald: It's not one EBA; it's a dog's breakfast.

Mr Gaynor: It's complex.

Senator KITCHING: I can imagine. I've worked as a lawyer; it's good to have lots of work! I've asked other witnesses this: if section 38 were to be repealed in toto, would discrimination become more covert because there wasn't an ability to discriminate according to legislation? For example, someone could turn up for a job interview and you wouldn't have the ability to talk about the ethos of the school et cetera. Do you think that that would drive discrimination underground, and how does one enforce people not discriminating?

Mr FitzGerald: It'd be a sad day if it got to that, because when you're sitting down and employing a staff member you want the best possible person for the school, and if that person ticked all the boxes except for this feeling you had that there was some issue, and you didn't employ because of that, you'd be doing your school a disservice. I think most—

Senator KITCHING: But you wouldn't be able to ask in an interview, for example, whether they understood the ethos of the school, and whether they would not—

Mr FitzGerald: You can't ask those things specifically. In the conversation you have with people you explore a broad range of issues, where you get a sense of their world view. Let's put it that way.

Senator KITCHING: Okay.

Mr FitzGerald: And you read into that their values and how they'd fit into your school community, without asking specific questions. As employment law has changed over the years, I think most skilled principals are able to navigate that quite successfully.

Senator KITCHING: Thank you.

Senator RICE: Talking about the ability to discriminate on the basis of being LGBT, what is the current policy or practice of Catholic schools with regard to teachers who are transgender who transition? We talked before about support for trans students in their transitioning.

Mr Gaynor: In my experience, I've only seen policies for students and not necessarily for staff—at primary school level, anyway.

Mr FitzGerald: We're sure it happens, but it hasn't been reported on in our schools, so it must be managed, I guess, appropriately.

Senator RICE: Is it something you feel Catholic schools should have a policy on? Deakin University, for example, now has a policy of providing leave for trans people who are transitioning. Westpac Bank has just done something similar.

Mr Gaynor: Who knows? Five years ago we didn't have policies on transgender students. The Catholic Church is trying to reflect their community, so possibly it will happen in the future. I'm not sure. At the moment, not in my experience.

Senator RICE: If there were a teacher who was transitioning in our hypothetical average Catholic school, do you have a view about how they should be treated?

Mr FitzGerald: As you drive to school each morning, you say to yourself, 'What's going to be on my plate?' I say that seriously. I'm not dismissing that. That would be an absolutely critical issue for that person. But during the day you would have conversations with a number of staff with an infinite range of personal and family challenges. You try and meet those, and a lot aren't covered by policies. I think, so long as you approach it in a pastoral way, you try and support your teachers that way.

Senator RICE: I put the experience that has been told to me about a teacher at one of your Catholic secondary schools. She let the school know that she was transitioning, and she was asked to go on leave immediately. Her

evidence to me was that it was made very clear to her that she wouldn't be welcome teaching at the school or at any other school in the diocese.

Mr FitzGerald: I'm unaware of that, so you have me at a disadvantage there. In situations like that, as I say, the first thing you try and do is understand that there are two sides to every story. For me to answer that, I'd have to get the school's and the principal's view of it.

Senator RICE: There may be all sorts of reasons and issues between her and the school that I might not have heard about, but on the basis of somebody who is having a successful teaching career at your school and then transitions—in the same way that you support transitioning students, do you feel that it would be appropriate for schools to be supporting their staff in transitioning?

Mr FitzGerald: Over the course of the year you get hundreds and hundreds of issues from staff. The first response isn't, 'Sorry, you can't teach here anymore'; you're trying to work with the people, and I'm sure that's what our principals do. Until I have a better sense of that particular situation, I don't think I can do justice to answering.

Senator FIERRAVANTI-WELLS: Senator Rice, you've raised this example. In fairness to the different witnesses that you've raised it with, you've made a series of assertions. I think it's really important that, if you want to do it in camera or in a way that we don't—

Senator RICE: But the evidence will be presented to the committee.

Senator FIERRAVANTI-WELLS: Good. You've asked Mr FitzGerald and the other witnesses an opinion and you've elicited evidence from them going to this issue. I think, in fairness, all the facts of the situation should be put to them, and perhaps Mr FitzGerald and others should be given the opportunity to add or respond in some way to that.

CHAIR: We will need to move on now. I just wanted to briefly ask a question from the chair. I've got the *Good works: the Catholic Church as an employer in Australia* handbook before me. With respect to exemptions from antidiscrimination, it talks about church organisations needing to be 'positive and precise in their approach to employment and practices' and says:

... some positions, while not requiring the employee to be a practising Catholic, will still require a commitment not to offend the religious susceptibilities of the organisation by the maintenance of a manner of life and stated beliefs which are in keeping with the teachings of the Catholic Church (e.g. all staff in educational institutions)

We know that there are many gay teachers in Catholic schools—

Mr Gaynor: And good ones, too.

CHAIR: Yes, which is terrific.

Senator KITCHING: Can I get a percentage?

CHAIR: Probably in line with the general population.

Mr Gaynor: It's not something we're usually asked.

Senator KITCHING: Someone has said this to me prior to today, and I'm just wondering if there's any—

Mr Gaynor: It would be very hard to get those statistics, because it's not a question you can ask.

Senator KITCHING: I understand that, and I'm glad you don't ask it. But it does make me wonder, when we say there are lots of gay teachers, what that actually means.

Mr Gaynor: Of any sector.

CHAIR: How do you apply the question of religious susceptibilities in the context of manner of life, knowing that there are many gay teachers at your schools?

Mr Colyer: I think you've summed it up: that's the diversity of society, and Catholic schools are a reflection of our society; we live within that society. There would be gay teachers at school that you would not know about, who have a manner of life that—they don't share that, and we're not in a position to ask those questions, as in any employee-employer situation.

Mr Gaynor: We just ask them: do you support and accept the ethos of the school?

CHAIR: Yes; so it's the stated beliefs that are in keeping with the teachings of the Catholic Church. This is a statement about the exemptions from antidiscrimination, and you're essentially saying that the stated beliefs within the school context are important but that the individual attribute is not. Is that what you're saying?

Mr Gaynor: 'Individual attribute' meaning—

CHAIR: Of actually being gay or trans, married or unmarried.

Mr Colyer: You can't compartmentalise that and know all of that. What you're asking for people to do in good faith, in respect for the school they're working in, is to support the ethos of the school that they want to work in. And you would not know—

CHAIR: Which is fine. The next part of my question is: you've got the Fair Work Act and the employment law, and you've got three teachers—one is a married Catholic woman, one is an out gay man and one is a closeted lesbian—all working very happily in the school community. Your married Catholic teacher starts advocating in favour of marriage equality, as does one of your other gay staff, but the other staff person does not. How do you go about applying either exemptions or employment law and contract law to uphold your school ethos in that environment?

Mr FitzGerald: Welcome to our world! There are a lot of issues where there are various bits of both federal and state legislation that intersect, oftentimes in harmony, sometimes not. With complex cases like that, if they become protracted, you need to go and get legal advice. You get a very good advocate like Senator Kitching to come and give you advice and work with it. That's what we live with, that sort of complexity.

Mr Gaynor: The primary schools do the same.

CHAIR: I guess the heart of my question is: you've got to deal with two teachers who are actively undermining the ethos of the school, hypothetically. It doesn't necessarily matter on what grounds. It doesn't need to be gay marriage; it could be creationism that doesn't include good teaching practice. Would you single out the gay teacher using an exemption or would you go through the employment practice within the contracts in the same way for both of them?

Mr FitzGerald: We would take legal advice.

Mr Gaynor: I'd probably have a talk to the teacher to get some information about where they're at, and then, if I had any major concerns, I'd have to contact the office, because they're the employer.

CHAIR: But, as you say, you're not aware of any cases where you've used the exemption?

Mr Gaynor: No.

CHAIR: In general terms, it's been the contracts under the Fair Work Act through which you've resolved this, notwithstanding the fact that the exemption hangs over people's heads as a potential tool in any case. I don't have any further questions. I thank all three of you for your evidence today.

Mr FitzGerald: Thanks for the invitation to present.

ODGERS, Mr Anthony, Assistant Federal Secretary, Independent Education Union of Australia

[14:08]

CHAIR: I now welcome the Independent Education Union representative to the table.

Mr Odgers: Prior to my appearance today, I had the opportunity to send a copy of the summary statement that I wish to make to the secretariat, with some accompanying material, and I'm just wondering whether or not I should still read the points of the summary statement into the transcript.

CHAIR: It depends how long it is.

Mr Odgers: Two or three minutes.

CHAIR: Why don't you give us the two- or three-minute highlight of it. Thank you for your in-depth submission.

Mr Odgers: We oppose discrimination based on a person's sexuality, gender identity, marital or relationship status, pregnancy, disability and/or any of the attributes that are set out in discrimination legislation. We believe that the current exemptions should be removed and that discrimination laws operating in faith based schools, indeed in any endeavour conducted for the public by faith based organisations, should reflect community standards and expectations. We further believe that many staff and students in faith based schools, fearing persecution, have suppressed their sexual orientation or gender identity and/or their marital status and have been, and are being, harmed as a result.

All staff and students in schools deserve safe workplaces and learning environments. Staff and students shouldn't be discriminated against on the basis of their private expression of their sexuality. In our view, faith based schools have both the capacity and resilience to continue to operate in the absence of discrimination exemptions. There was widespread community support for the principle that discrimination on the basis of the above attributes, especially and including sexuality or sexual orientation or gender identity, is wrong. We note that several state jurisdictions have more limited religious exemptions for either staff or students. In these jurisdictions not having the right to discriminate has not undermined the capacity of faith based schools to operate. Faith based schools have still flourished and enrolments have continued to grow.

Lastly, our experience is that, in the context of rapidly expanding diversity amongst students and staff in schools, only a small and diminishing minority of employers in non-government schools seek to utilise or do utilise the exemptions from discrimination legislation. The majority of employers, perceiving a conflict of interest involving a breach of an employee's fidelity, treat the issue as a contractual matter.

I would just like to add to that—I just caught the last part of the previous witnesses—that everything we have to say here also goes to the necessity for complementary variations for the Fair Work Act, which provides a more rigorous regimen of exemption than that which exists in the Sex Discrimination Act.

CHAIR: Thank you for taking us through that. You're advocating also for reform of the Fair Work Act.

Mr Odgers: Yes.

CHAIR: Is the Fair Work Act the primary tool schools use to uphold the ethos of their school, in broad terms?

Mr Odgers: No. It isn't. In my experience—

CHAIR: When it comes to employment contract—

Mr Odgers: I should say that I commenced employment with this union in 1997, working as the advocate and industrial officer of the Victorian branch of the union in 1997 and was elected to my position in the federal office in 2012, and I cannot remember a single instance, between 1997 and 2012—and I have taken the opportunity to go back and look at our records prior to this hearing today—where we received a written communication from a Catholic employer in Victoria that relied on or sought to rely upon the exemptions as they exist in the Fair Work Act.

CHAIR: Or in the Sex Discrimination Act?

Mr Odgers: Or, in fact, Victorian discrimination legislation.

Senator KITCHING: What about the Sex Discrimination Act?

Mr Odgers: No.

Senator KITCHING: None of those regimes—

Mr Odgers: Typically, employers—Catholic employers in particular—will not rely on the exemptions such as they are, but rather will rely on policy and the contract of employment. There are standard letters of employment,

for example, that refer to an employee's duty that are given in the same form to virtually every employee in each state, and there is very little difference in them.

CHAIR: Thank you.

Senator KITCHING: Is that because, in fact, what one could have in a letter of engagement or employment contract would be more precise—the terminology would lead to more certainty than that under the legislation. Given there's little jurisprudence—

Mr Odgers: Yes. I think that's certainly the case. That's the short answer. But I think the longer answer is that it's much easier, when communicating the issue you have with your employee, to point to a policy that they will have been required to read and possibly have discussed—a letter of appointment they may have signed—than to try and explain to them what the legitimate susceptibilities of the adherence of the faith are, particularly if they don't have the faith of the school, as is increasingly the case, as part of their own belief system.

Senator KITCHING: On that matter, do you feel that that certainty is fairer? For example, you may have someone who is being engaged as a teacher who may not know of section 38 in the Sex Discrimination Act or the Victorian legislation, but, presented with, perhaps, a bundle of documents to start their work, they can read through those and, therefore, it's fairer on both parties that there is some certainty around an employment contract, just because—

Mr Odgers: Yes, I do. And I think it's a question of common sense.

Senator KITCHING: Yes. That's right.

Mr Odgers: The majority of the time, the employer will want to have a practical discussion with the employee about what they perceive the issue is, and that discussion will be better couched in terms of policy.

Senator KITCHING: Thank you.

CHAIR: Senator Fierravanti-Wells.

Senator FIERRAVANTI-WELLS: Thank you. In terms of your organisation—I've asked this of others appearing today—could you take on notice to provide to the committee actual formal complaints where the religious exemption has been invoked, whether that be for students, staff or contractors.

Mr Odgers: Yes. I will. Appended to the statement are some examples from the union's records in all states and territories over the last two years. They don't identify the individual. Sometime last week we had imagined that we would be able to ask members whether they wished to give evidence of their own experiences before the committee, but it appears as though, in this instance at least, time won't allow them to do so.

Senator FIERRAVANTI-WELLS: Let me ask this threshold question: do you believe that, and do you accept that under international law, there is a right to religious freedom? Why shouldn't that right sit alongside other human rights—obviously, afforded the appropriate protection? How much of what we are discussing at the moment is as a direct consequence of the fact that that right is not recognised independently and it's only in legislation by way of exemption?

Mr Odgers: I don't know whether my answer to the second part of your question would be of great assistance to the committee, but I agree with the first part. On behalf of my organisation, of course we recognise the rights to religious freedom and we believe they're very important.

Senator FIERRAVANTI-WELLS: Can I take you then to a next part. In the absence of seeing the report itself, I refer to the recommendations that have been published in the newspaper and particularly those that go specifically to recommendations 5, 6, 7 and 8. Recommendation 5 in particular contains those three provisions that allow the discrimination but then provide the parameters for that discrimination. Can I just ask you to share your thoughts in relation to that? Would you see that as potentially an appropriate compromise in the absence of, or with, a religious freedom piece of legislation. Do you see the question that I'm asking you?

Mr Odgers: Yes. I see the direction of your question, but I think it's primary to the view that we put forward that we believe that the employer's rights in the employment relationship—I will deal with students separately—

Senator FIERRAVANTI-WELLS: Yes. Thank you. Absolutely.

Mr Odgers: That's not our particular area of expertise. But, in respect of the staff who are employed by faith based schools, our primary position is that all matters relating to the employees' conduct and where it's said to offend the employment contract should be dealt with contractually as opposed to through discrimination legislation.

Senator FIERRAVANTI-WELLS: Therefore, taking your argument a little bit further, on the supposition that we do have a religious discrimination act or religious freedom act or a piece of legislation puts religious

freedom on par with other freedoms, that would then be the right that an employer could then put in that contract and say: 'This is something that we abide by. These are the values and beliefs under which we would like you to be employed.' Do you see that—

Mr Odgers: Yes, Senator, this is what employers do. Every employee of a faith based school will have signed a letter of appointment that commits them contractually to respect the belief system of the school wherein they are employed, without variation, and many will be employed under an industrial instrument, such as an agreement, which contains an extensive mission statement for the school and an obligation on individuals not to do anything that would offend the principles set out in that statement.

Senator FIERRAVANTI-WELLS: Whereas now it's done under an exemption framework—

CHAIR: No, it's done under both, which is exactly what you're saying, Mr Odgers, because you're saying that those contracts are currently—

Mr Odgers: I'm saying that those protections that are provided to the employer and that are enforceable, whether for breach of the agreement or breach of contract, are sitting alongside a legislative regimen in relation to the Sex Discrimination Act and the Fair Work Act. One is utilised weekly—the common law provisions of the contract and/or the agreement; the other is rarely, if ever, utilised in the Catholic system. It's utilised more often, but still quite rarely, by independent schools.

Senator FIERRAVANTI-WELLS: But in any case, whether it's by way of exemption or by way of a more positive, affirmative piece of legislation that protects that freedom—irrespective, that employer would require that protection, if I can put it in that way, so as to not open themselves up to claims of discrimination.

Mr Odgers: What we would say about this is that there is an intersection between the rights of the employee and the rights of the employer, and that employees in themselves need protection in order to be able to express their own gender identity, and, to be able to express their sexuality, they need protection in relation to another full range of attributes—because, as you'd be aware, a lot of state based legislation, imported into the Fair Work Act, for example, simply doesn't confine the exemption to matters relating to gender identity and sexuality but goes to age, to disability, to pregnancy and to marital status. There is a line in there, of course, where employers need protection. We're not really saying anything more than, in our view, sufficient protections already exist. And I believe that there is, amongst our members, quite a good sense of what is permissible within the employment relationship and what is not permissible within the employment relationship.

Senator FIERRAVANTI-WELLS: I have one last question: if you removed the exemptions, and you didn't have an overarching piece of legislation—religious freedom and religious discrimination legislation—aren't the rights and responsibilities on both sides of the equation much weaker for the respective parties, if that were to happen? Please take that on notice if you'd like to.

Mr Odgers: I'm happy to answer it now. We don't believe so. We believe, and I think courts know, that the duty of fidelity that an employee owes to the employer to serve their interest in everything that relates to the work that they do for the employer overrides the employee's interest, and that no duty of fidelity is owed outside the employment relationship. We've spent the best part of about eighty years in courts developing that doctrine of the duty of fidelity, the same duty that employers rely upon in our industry to the exclusion of the specific legislation. It hasn't worked perfectly, I would certainly say that, but it's worked better than some other elements of employment law. There's less disputation.

Senator FIERRAVANTI-WELLS: So, in the absence of having some sort of protection, if a school turns around and says, 'these are the other parameters by which we want our employees to abide', are you saying that there is sufficient protection in law that that school—that may insist on (a), (b), (c) and (d) in its employees—is not going to have some sort of alleged discrimination? Do you understand what my concerns are, Mr Odgers?

Mr Odgers: I understand what your concerns are, and I can only repeat the answer that I've given, Senator, which is to say that I believe that the duty of fidelity that an employee owes to their employer will provide effective protection for—and has provided effective protection for—both parties. There is a line in that employment relationship between personal interest and the employer's interest. It's up to the court to determine where that line lies. I won't go on further, but that, in our view, provides sufficient protection.

Senator RICE: I want to seek clarity as well. In the examples that you've given here, of where teachers have, essentially, lost their jobs because of various aspects of their marital status or their same-sex attraction, are you saying that, in doing that, the schools weren't relying upon the exemptions in the SDA?

Mr Odgers: One thing that's in common with a lot of these examples is that the employer doesn't rely on anything. A lot of the time these people will be part of the same faith based community, so the employer will simply be saying, 'Are you travelling in the same boat as us, or are we going to have a more public conversation

about your conduct?' I should also add, and I think it's very important to understand, that in the industry generally—and it could be known to many of you—the number of contested unfair dismissals—that is to say, matters that proceed to arbitration at a court of competent jurisdiction or tribunal—in non-government education is lower by percentage than in any other industry in Australia. The normal method by which disputes about ongoing employment are settled is that there's a payment by the employer of a maximum that the person would receive under the relevant legislation, irrespective of the merit of the claim.

Senator RICE: And the staff person is under pressure to just go—

Mr Odgers: Yes, and—

Senator RICE: and they don't challenge that.

Mr Odgers: The committee would be aware that it's not good business for schools to have any form of publicity that indicates that those who are responsible for teaching students at the school are in any way unhappy with or that there's any sort of disputation, and that disputation of that sort tends to sit on the front page of daily newspapers for some time.

Senator RICE: Would the contracts that these teachers have signed have said, 'you're not allowed to have an extramarital affair,' or that—

Mr Odgers: No, not at all. What the contract will do is to say that you commit publicly in what you do and say not to offend the ethos of the school. And it may also, in some instances—in relation to particular iterations of Christianity, for example—set out in very great detail what those beliefs are, or it may not. Obviously, in the Catholic Church it won't set out in great detail what those beliefs are, because the church itself defines who an adherent of faith is, if you're looking at the words of the legislation. It's not immediately apparent to those who go to mass whether they're an adherent or not.

Senator RICE: Do any of these contracts set out that you're not allowed to be in a same-sex relationship?

Mr Odgers: No; I should say, not to the best of my knowledge nor those who have assisted me in preparing today's statement.

Senator RICE: So your argument is that if we remove those exemptions, nothing would change. It would be, essentially, because there is a contract that they are deemed to no longer be compliant with, an arrangement would be made for them to be moved on.

Mr Odgers: Yes. Just in terms of the practical understanding of this, I spoke earlier on of the dividing line. That dividing line is about what you say in public; not only in the context of your own sexuality—I'm sure all members of the committee would be aware of the consequences for people who just seek to disparage their employer or any element of their employer's business. That is a basic breach of trust, the fidelity component of the relationship. That is the offence. Perhaps not in these instances, which are controversial, but, in most cases where an employee is forced to accept that they are in breach of their employment contract in respect of the matters that are dealt with by the exemptions, the breach of contract will have occurred around something they've said or done in a public manner. It won't have been as a result of a breach of contract wherein the employer pretends to say, 'You may not be in a single-sex relationship.'

CHAIR: In that context, the primary school and secondary school principals said to us before: 'We want to keep the exemptions because we're worried that, when we do dismiss someone under those circumstances, someone will take an antidiscrimination case against us at that point in time, because the school won't be able to differentiate between what has been that breach of fidelity to the employer and what is in fact a breach of antidiscrimination law.' How do you characterise that?

Mr Odgers: It's hard to understand their anxiety, on the basis of my experience. We could search for quite a long time for the number of actions of that sort that have been commenced. Notwithstanding the exemptions, mostly they'll proceed on the basis that X or Y belief is not held legitimately by the adherents of a faith. In the Tasmanian and South Australian jurisdictions, where the exemptions were smaller, very occasionally people tried to press their case. But, on what you've said to me, I don't understand the basis for that anxiety.

I'd like to add one other thing. In our view, the committee should be wary against a presumption that all employers in faith based schools behave in the same manner. I don't want to beat the drum about this, but Father Bob Maguire either was or still is an employer in Victoria—the employer in a Catholic primary school is the parish priest, not subject to any discipline from Rome or any of the intermediary stages between the Pope and the local priest. There's a big difference between Father Bob Maguire and Cardinal George Pell in terms of their belief as to what would offend the adherents of the faith. There's not a level of consistency. I would suggest, by way of illustrating this point, that less than two per cent of all employers are responsible for 100 per cent of the

issues that we have around discrimination, as a body that represents more than 50 per cent of the people who are working as teachers in non-government education. It's the same employers—

Senator HUME: Can you just clarify that for me? Did you say 'less than two per cent'?

Mr Odgers: Less than two per cent of—

Senator HUME: Of independent schools?

Mr Odgers: If we look at all of the complaints that we deal with as a whole, in both Catholic and independent schools, if we look at the source of those complaints in respect of the identity of the employer, then around two per cent of the individual employers in Australia would be responsible for all of the disputation in the last 20 years.

Senator HUME: So there is a series of recidivism that is involved?

Mr Odgers: There are individuals, in some cases, or there are groups, in some cases, that have what our members would identify as extreme intolerance of behaviours. They're not so much concerned about public statements that might be made by teachers and by other members of staff but as to the person's conduct. Of the examples that are quoted here—which are mostly examples of where an employer has sought to go into a person's private life without that person making any statement that would be necessarily contrary to the employer's beliefs or the beliefs of the employer's faith based group—a lot of these cases come from a very small group of employers.

CHAIR: Do they come from a small group of individuals, or is that sense of wanting to prosecute these issues at a very personal level and know the very personal, private business of your staff very much part of the school ethos?

Mr Odgers: No. I think it's a very small group of individuals. That's a far fairer way of putting it, because, with the exception of one diocese Australia-wide—and you'd be aware there are many—and possibly one faith based group, of the remainder one could name the individuals with some certainty.

CHAIR: So—without naming names or outing people in this context—it hasn't really got anything to do with the religious freedom of that school community and it being upheld?

Mr Odgers: The short answer to your question is yes. Our assertion is that the majority of faith based employers simply have no interest at all in pursuing their staff over these matters.

Senator FIERRAVANTI-WELLS: Mr Odgers, can I ask you a little bit of a hypothetical, bearing in mind what you've said. As a consequence of this debate, there's a much greater public awareness of this issue in relation to the exemptions. Leaving aside the issue for students, let me concentrate on staff and contractors. There's a greater awareness of that out there. At the moment, there are these exemptions. Exemptions can work both ways. They can afford protection, but at the same time they provide the parameters for protection. It's a two-way street. If you have a situation where the exemptions are removed, does that mean that, potentially, employers would then be able to have much wider parameters in the contractual obligations that they can impose on potential staff? Do you see where I'm going? In other words, they'd be able to have a much wider, all-encompassing description—a much more general description—so it would mean that you could catch just about anything. Do you see what I'm asking?

Mr Odgers: Yes, I do. But I—

Senator FIERRAVANTI-WELLS: I'm asking that as a hypothetical, given that now there's a greater awareness of it and there is a potential, I think, for maybe drawing on those exemptions in the future a bit more than perhaps they have been. Do you see where I'm going? The exemptions now give clear parameters. If you abolish those exemptions, does that mean that employers are then going to have the ability to have much broader, catch-all requirements which would mean that you would be able to get rid of somebody for virtually no reason whatsoever?

Mr Odgers: I believe that employers have the ability to draw documents, both in respect of policy and letters of appointment, in this sector on a wider scope now, if they wish, irrespective of the legislation. Those elements of the employment contract already constitute a very large element of the matters to be taken into consideration by anyone accepting employment at a faith based institution. Although, quite clearly, I can't speak for the employers in relation to this, I would not be concerned, were the exemptions to be removed, that employers would then abuse their capacity to redraw the employment relationship on their terms by fundamentally changing the documents that have worked well for them in employment for a long period of time.

Senator FIERRAVANTI-WELLS: And, to take that further, without then offending discrimination legislation. That's really the point, then.

Mr Odgers: I don't believe that the absence of the exemptions would cause further and greater disadvantages for employees when reaching a contractual relationship with their employer. I'll just make one further statement, if I can, and that is that anything in an employment contract at common law would be subject to the test of reasonableness.

Senator RICE: And my follow-up question about that, then, is: if those contracts, subject to reasonableness, were seen to be reasonable, would they still be valid even if these exemptions didn't exist?

Senator KITCHING: Or does their idea of being reasonable depend on the exemptions?

Mr Odgers: No, they don't depend on the exemptions at all. There are plenty of examples where applications have been made for remedy in respect of unfair dismissal and the employer relies on the employee's breach of contract, where that contract has stated that the person won't, by deed or word, publicly offend the ethos of the employing institution, and the commission has found that to be a legitimate term in a contract. I think it's impossible to argue realistically that, in relation to an employer that is simply stating what it is that they do—in the same way that an employer who manufactures light globes would require of someone that they don't say anything that would impugn the integrity of a product—statements of that sort in terms of ethos are not legitimate parts of the contract of employment.

Senator RICE: Even if upholding that ethos and the view of that school meant that you weren't to be in a same-sex relationship—

Mr Odgers: That's an inherently unreasonable term. I don't say so personally or even from the union's point of view; I'm just not aware of any imprecation like that, even in the most severe moral environment.

Senator RICE: So, basically, in upholding the ethos of the school, it wouldn't be reasonable for that to include that you couldn't be in a same-sex relationship—

Mr Odgers: That's right.

Senator RICE: that a transgender person couldn't transition—

Mr Odgers: Questions of practicality arise for employers as well. There are various faith based organisations that have as a binding tenet of their faith that they're opposed to university education for themselves, members of their families and members of the faith. Ergo, all of the teaching staff in the institutions they run are not members of a faith. If one were to further reduce the number of teachers who would be eligible to work in your schools, you could start adding conditions of that sort, I suppose. But we are under the impression that there is high competition in non-government schools for good teachers and that there are no schools that seek to restrict good teachers.

CHAIR: Thank you, Mr Odgers. Your evidence this afternoon has been extremely useful. Please feel free to add anything further in writing, but we do note that your submission is very comprehensive. Is there anything you would like to add before we finish?

Mr Odgers: There's nothing to add, other than to thank the committee again for having provided us with the opportunity to give evidence.

BANKS, Ms Robin, Private capacity

BROWN, Ms Anna, Director of Legal Advocacy, Human Rights Law Centre

CARNIE, Lee, Senior Lawyer, Human Rights Law Centre

HUNYOR, Mr Jonathon, Chief Executive Officer, Public Interest Advocacy Centre

LAWRIE, Mr Alastair, Senior Policy Officer, Public Interest Advocacy Centre

WATSON, Mr Sam, Private capacity

Evidence from Ms Banks, Mr Hunyor, Mr Lawrie and Mr Watson was taken via teleconference—

[14:43]

CHAIR: Welcome. Do you have any comments to make on the capacity in which you appear?

Ms Banks: I am appearing as a private citizen and as former Anti-Discrimination Commissioner for Tasmania.

CHAIR: I might ask the Human Rights Law Centre if they want to kick off with a short statement.

Ms Brown: As most of you are aware, we are an independent non-profit organisation which advocates for the protection and promotion of human rights nationally, including the right to freedom of religion as well as the right to equality and nondiscrimination.

Australia is a diverse, multicultural and multifaith country, and as a nation we strive to ensure that people from different backgrounds can live together in harmony and peace. Currently, the permanent exemptions available to religious schools and other bodies in sections 37 and 38 of the Sex Discrimination Act allow discrimination in a manner that we would say is inconsistent, inappropriate and unjustified under international human rights law. As the panel is no doubt well aware by now and has heard many times, while the right to hold a belief is absolute, the right to manifest that belief in worship, practice, observance and teaching is limited when it conflicts with other rights. So we say the existing permanent exemptions are inappropriate and don't strike the right balance between equality and religious belief.

As you no doubt heard earlier today, these exemptions do harm to the mental health and wellbeing of LGBTI young people and teachers as well as in other areas of life where these exemptions operate. Even though we know that some religious schools and organisations are doing the right thing and providing inclusive services to young people and inclusive work environments, the existence of these exemptions does harm. They provide a barrier to vulnerable people, whether they're single mothers, pregnant women or LGBTI people, accessing these services or being out in the workplace; they act as a barrier to the provision of quality health care or family violence services; and they put kids in harm's way at school. So, ideally, we would say the removal of these exemptions would come as part of a comprehensive modernisation and consolidation of antidiscrimination laws and, we would also say, as part of the introduction of a federal human rights act that protects freedom of religion and belief from government overreach within a robust framework that protects all human rights. However, the task before the panel today is to look at the terms of this specific inquiry.

I'll just outline our position briefly on students and then on teachers. We think it's relatively straightforward in relation to students. In terms of removing discrimination, section 38(3) of the SDA should be struck through, removed. Then it should be clarified that section 37 doesn't apply to educational institutions. We note that it's unnecessary to amend the reasonableness defence in indirect discrimination, under section 7B of the SDA. There was a version of the bill that was released publicly. We worked with PIAC on a letter that explained the reasons why the drafting was insufficient and raised concerns from discrimination law experts. That will be tabled to the inquiry, and we're happy to speak to this, as will, I'm sure, Jonathon and Alastair from PIAC.

In relation to teachers and staff, we believe these exemptions should be removed as well, and this can be achieved by inserting a limitation into section 37. Again relating to employment in educational institutions, we would note that, whilst it's outside the scope of the current inquiry, ideally there would be amendments made to the Fair Work Act as well to limit the operation of the exemptions in that act as well. We don't believe it's necessary to introduce or retain exemptions in relation to the protected attributes that are the subject of this inquiry based on what's been described as upholding the religious ethos or values of a religious school. This is because, as has just been outlined, employment law already allows employers to make employment decisions to uphold a particular ethos within an organisation, and employees already have an obligation of fidelity and loyalty to their employer, which means that they can't act in a way that undermines their employer.

We would, in the future, support an exemption that would allow a religious school to discriminate on the basis of religion in particular circumstances, but we note that this amendment is not required, as religion is not currently a protected attribute under federal discrimination law. I'm happy to go into the terms of what that would look like, if the panel is interested, and it will certainly be in our written submission, but essentially it would only allow discrimination on the basis of religious belief and it would have to be part of the inherent requirements of the position held by the employee and also necessary to conform with the doctrines, tenets and beliefs of that religion.

CHAIR: We might be able to go into more detail in discussion because I think those points will also be relevant to, as you said, PIAC's submission and also perhaps the formation of Tasmanian legislation, so perhaps I might just ask—

Ms Brown: Sorry, Senator. I just might say that Lee is available to give a quick run-through of some comparative research we undertook about like-minded jurisdictions across the world.

CHAIR: That's probably worth including in your opening statement as well. My apologies.

Lee Carnie: The Human Rights Law Centre has conducted comparative research in New Zealand, the United Kingdom, Ireland and Canada. We consider that, where these like-minded countries have managed to strike a balance, it may be helpful for the committee in its current inquiry. In relation to discrimination against students, Australia is a clear outlier. New Zealand, the UK, Ireland and Canada do not have explicit exemptions which allow schools to discriminate against students on the basis of their sexual orientation or gender identity. However, New Zealand, the UK and Ireland do allow exemptions on the basis of sex, similar to Australian exemptions for single-sex schools. These jurisdictions also contain exemptions on the basis of religion, whereas Australia does not currently have federal antidiscrimination protections on the basis of religion.

Canadian laws differ by province. The situation is more complicated in employment. However, Australian laws are still at odds in explicitly singling out LGBT teachers and staff. In New Zealand, legislative exemptions are again limited to sex or religion, not sexual orientation or gender identity. In the UK, there are exemptions which allow religious schools to reserve teaching positions for teachers specifically appointed to teach religious education. There is also a broader exemption for occupational requirements. This is similar to the inherent requirements test under Australia's Fair Work Act but more closely connected to a proportionality analysis.

Ireland does not allow schools which receive government funding to discriminate against teachers and staff on the basis of their sexual orientation or gender identity. Any actions taken by a religious school against a current or prospective employee must be only where a person is actively undermining the religious beliefs of the school. Any action must be rationally and strictly related to the institution's religious ethos, in response to conduct rather than in relation to a protected attribute, and proportionate to the conduct, taking into account other potential actions the employee could take, consequences for the current or prospective employee, their rights to privacy, and actual damage caused to the religious ethos of the institution by the prospective or current employee's conduct.

In Canada, it again depends on the laws of the province, but Ontario, British Columbia, Alberta and Quebec have similar exemptions. The leading case is the Meiorin case, which introduced a bona fide qualification. Again this is similar to Australia's inherent requirements test, instead of an explicit religious exemption on the basis of sexual orientation or gender identity. This does allow discrimination but it must be for a purpose rationally connected to the performance of the job, adopted in an honest and good-faith belief that it was necessary for the fulfilment of the legitimate purpose and reasonably necessary to the accomplishment of the legitimate purpose. Importantly, all of these jurisdictions have overarching frameworks which equally protect all human rights. Australia remains the only jurisdiction in the world that is a Western liberal democracy without a charter of human rights or equivalent legal protection of rights.

CHAIR: Thank you, Ms Carnie, that's extremely helpful. I will ask Mr Jonathan Hunyor, Chief Executive Officer of the Public Interest Advocacy Centre, to speak now.

Mr Hunyor: Thank you. I'm appearing today with my colleague, Alastair Laurie, who is the Senior Policy Officer here. Thank you for the opportunity to give evidence to the committee. In general terms, we agree with the position of the Human Rights Law Centre that our laws don't get the balance right between religious freedom and the right to nondiscrimination and other rights, like the right to privacy and other rights of children in relation to their education and the Convention on the Rights of the Child.

In our brief opening remarks, I really just want to make the case for simplicity. Of course, we accept the issue of discrimination by faith based religious educational institutions is a nuanced one and it raises a range of competing human rights, but, in our view, the legislative response to that issue need not be complex. Unfortunately, the drafting and legal interpretation of discrimination law is notoriously complicated. This is

particularly unhelpful when it comes to Australians understanding their rights and ensuring they're protected and respected. The events of the last month, I think, are instructive. It's clear from the public debate that many people were simply unaware of the exemptions that exist in our law that allow religious schools to discriminate against students and teachers on the basis of sexual orientation, gender and identity and, indeed, a range of other grounds.

We think it is possible to ensure a clear and simple framework that better protects the rights of children and teachers from discrimination on the basis of sexual orientation and gender identity while supporting and respecting the exercise of religious freedom. This can be achieved in the following ways in similar terms to those set out by the Human Rights Law Centre, and we'll expand on them in our written submission—but, again, I make the point that they're reasonably simple and clear. The first thing is to repeal section 38 of the Sex Discrimination Act, which allows religious schools to discriminate against teachers, contract workers and students. The second is to amend section 37 of the SDA, which provides for a general exemption for religious bodies to exclude religious schools from its operation. The third thing is to amend the relevant sections of the Fair Work Act which currently allow a religious body to discriminate on any grounds so that such bodies can discriminate only on the basis of religious belief. This approach provides protection from discrimination against students and teachers while maintaining the ability of schools to impose reasonable conditions to protect the schools' religious character and values.

This approach isn't a novel one. It's the approach that's taken both in Tasmania, where it has operated for many years—and no doubt Ms Banks will have more to say about that—and now in the ACT, which has recently introduced changes to its law. Indeed, you've heard Lee Carnie describe the situation internationally, as there are a number of analogues in other jurisdictions overseas. The ACT regime has an additional requirement for religious schools to publish a policy indicating the circumstances in which they will discriminate, and we would support a similar requirement in the Fair Work Act to ensure prospective students, families and employees are fully aware of a school's approach.

Finally, we think it's vital that a consistent approach is taken to students and staff. We think it is inconsistent with the right of children to an education that allows for their development to their fullest potential to have an environment in which LGBT staff can be discriminated against just because of who they are. We're aware of at least two proposals for amendments to current legislation. Our written submission will examine these in detail, and we're very happy to take questions from the committee on them. For present purposes, I emphasise that we think that simplicity is both possible and essential for effective reform in this area. Thank you very much.

Ms Banks: Firstly, I want to endorse the opening statements of my colleagues so that I don't repeat what they've said, but I certainly take the same approach. What I wanted to reflect on was that the Tasmanian Anti-Discrimination Act does protect against discrimination on the basis of religion, and has done so since it was enacted. It also protects against discrimination on the basis of sexual orientation and gender identity, both of which it has protected since very early in its history.

In relation to schools, there has never been any permission, exemption or defence that provided schools with the opportunity to discriminate on the basis of anything other than religion. There's a general prohibition against discrimination by education providers in relation to all of the protected characteristics, and, while there are exemptions in the act—or defences, as they are for faith based organisations—they relate only to exempting conduct where the discrimination is on the ground of religious belief, affiliation or activity. A school could refuse to employ or decide not to employ a person in a relevant job if the person wasn't a person of the school's faith. It is a narrow exception. The tests in Canada in both the Meiorin case and Grismer—which is an equivalent case in relation to services, which would cover education—really do the same sort of work. It says it has to be relevant to the job.

In relation to enrolment or admission in schools, it wasn't until 2015 that the Tasmanian act had anything to say that would give faith based schools a defence or exception. In 2015, the act was amended to allow faith based schools to discriminate only in relation to admission into a school—that's the first point of enrolment, not later enrolments after the child first enters the school. It would allow a school to discriminate against a prospective student on the ground of that student's religious belief, affiliation or religious activity. It doesn't permit suspension or expulsion on that basis or on any other ground.

I note for the committee's attention that there have not been significant cases brought in relation to education or employment in education in relation to the requirement not to discriminate. Indeed, in my experience I have found that the faith based schools genuinely worked quite hard to ensure that they complied with the non-discriminatory obligations that they had. I was certainly aware of examples of schools where children who were gender-questioning or transgender were being fully included in the school and enabled to go about their day-to-day lives

without being challenged in relation to that gender. I think what we saw in Tasmania was that schools can and will do what is required by the law when the law is as clear as it is in Tasmania.

The other very brief thing I want to say is that the alternative approach that we took in Tasmania before the current exemption came in was to provide for a granted exemption provision. In the case of the federal act that would be an exemption granted by the local commission—the Australian Human Rights Commission—for a school if it were oversubscribed. This is how the issue came up in Tasmania: the Catholic Education Office indicated that from time to time it was forced to make a choice between respective students. In that circumstance it wanted to be able to give preference to a child of faith or of a faith based family. That was the approach we took initially, and then the approach in the current law did the same thing but by way of a dissent under the act. Again, it relates to the faith of the child, or of the child's parents or grandparents. That's all I wanted to say at this stage, thank you.

CHAIR: Thank you. That now brings us to Mr Sam Watson, who I think is coming from the point of view of a student. So we're keen to hear from you, Sam—thank you.

Mr Watson: Thank you, Chair. I'd also like to endorse the statements that we've just heard. For full disclosure, I'll just note that I'm the head boy at the school I am coming from, although I'm not acting in that capacity; I'm acting just as a private citizen and a year 12 student. I'd also note that I am the only year 12 student appearing today. I'm currently completing my final exams and have attended a Christian school, two Catholic schools—both primary and secondary—and recently I joined an independent Quaker school in Hobart.

I came out in year 9 at the Catholic school, which was quite supportive in the nature of its staff and its students. They were all very supportive of my coming out and defining my sexuality. I moved on from this school after the circulation of the *Don't Mess With Marriage* booklet, because it made me and many of my friends feel uncomfortable that I could no longer campaign for equality in that space. In contrast to that, in the school that I'm currently at, the equivalent of the bishops—our Presiding Clerk at the Religious Society of Friends in Australia, Jo Jordan—circulated an open letter to the Prime Minister stating that Quakers support the right of adult couples in loving and committed relationships to marry, regardless of gender.

I give this example not because we're talking about marriage or marriage equality but because we're talking about the impact of schools' decisions and the way schools act upon students. Certainly, the knowledge of exemptions is probably one of the most damaging things to students, staff and teachers—especially for me as a young person and as a student. If I see a staff member discriminated against on the basis of their sexuality or gender orientation, it will have a negative impact on myself and it's certainly something that would make me feel unable to continue at that school and that it certainly wasn't one that I could flourish at. I would also mention that that would have an impact on the teaching quality. If teachers have to question their employment security there will undoubtedly be an impact on their ability to perform.

As a Tasmanian student, I would also refer to the Tasmanian discrimination law. Independent and faith based schools operate under the same rules as state schools, and have done so for the last 20 years. Our school, personally, goes to great lengths to be inclusive, and I would hope that's the case in most schools around the country. You will have had circulated with you the gender equality statement that our school board recently affirmed. That outlines the school's commitment to gender equality and to progressing the school in supporting all students in their gender and sexual identity. I would like to highlight the fact that the legislation in Tasmania doesn't compromise our school's ethos. It doesn't affect its ability to perform; it actually reaffirms it, as demonstrated by our gender equality statement. It upholds our school's ethos of simplicity, peace, integrity, community and equality. Certainly, my past schools had a similar kind of ethos, looking at opening their responsibilities to the community, and those were Catholic schools. We've heard today already from Catholic school principals and bishops.

In closing, I would like to say that the schools set the example for us and, in turn, schools that are influencing students will influence the future of our society. As such, the law should provide a framework for school to lead and that leading should be on ending discrimination on any basis.

CHAIR: Thank you. I will now move to questions.

Senator RICE: Thank you all for your testimony today. We've heard a lot about the impact of discrimination. I thank the Human Rights Law Centre for pointing out how our laws are not in step with laws across similar countries around the world. I want to move to what the legislative response needs to be to change this. Mr Hunyor, you outlined the legislative response that PIAC feel is required: repealing section 38, amending section 37 and amending the relevant sections of the Fair Work Act. All of you would know that the Greens have had

legislation debated in the Senate that basically does that. I want you to reflect upon whether you feel that the Greens legislation would be an appropriate model to achieve the outcomes that you've outlined today.

Mr Hunyor: I will jump in first. We're broadly supportive of the position taken by the Greens' Discrimination Free Schools Bill. There are a couple of technical issues that we'll take up in written submissions about the way that the Fair Work Act provisions are proposed to be amended to bring them in line with what would be the position under the Sex Discrimination Act. This is particularly to ensure that there's consistency about the issue of places of education for ministers of religion, which would retain consistency with section 37(1)(b) of the discrimination act. I think there is also a need for the Fair Work Act to contain an exemption to allow schools to discriminate on the basis of the religion of a potential employee to, again, try to get in line with the Tasmanian approach. As I said, I think a number of technical things need to be tweaked to achieve exactly what we say needs to be achieved and to get the simplicity and consistency.

Senator RICE: Thank you.

Ms Brown: We would echo PIAC's position. We are broadly supportive but agree that there are some technical issues to look at in the drafting.

Senator RICE: Thank you.

Ms Banks: I echo those comments.

Senator FIERRAVANTI-WELLS: Do you agree that, in international law, there is a right of religious freedom? And why shouldn't the right to religious freedom sit alongside other human rights, as we've discussed today? Do you accept that as a fundamental principle?

Ms Brown: Absolutely. Our position is that those rights are not correctly balanced. As I said in my introduction and as I think is very well understood by the panel, the right to manifest one's belief is not unlimited. So, when it conflicts with other rights, that's when the balancing exercise has to take place.

Senator FIERRAVANTI-WELLS: Do you support the introduction of a religious freedom act that recognises that at the Commonwealth level? And if that were to be introduced, what do you think would then be the impact in relation to the sections we are talking about today?

Ms Brown: It is very hard to talk about sections in isolation, and also without drafting—

Senator FIERRAVANTI-WELLS: Of course.

Ms Brown: We support the principle that people should be protected from discrimination on the basis of religious belief, and that is what a religious discrimination act would essentially achieve. It would institute the same protections and the legal architecture that is our antidiscrimination law—five separate acts at the moment. But if we were to add an additional act to protect religious minorities, and indeed other belief systems, from discrimination, then we would definitely support the introduction of that. Having seen the recommendations from Ruddock review, we remain concerned that any attempt to use those recommendations to develop a religious freedom act may not get the balance right, because we really saw in those recommendations that, unfortunately, it seems that LGBT people were singled out for discrimination, in comparison to other groups. But we are yet to see the body of the report, obviously.

Lee Carnie: I would like to add that we obviously do support protecting the right to freedom of thought, conscience, religion and belief in Australian law, but we hope that other human rights which currently aren't fully protected can be protected at the same time, such as the right to be free from discrimination. We would support the introduction of a charter of human rights as the most appropriate vehicle to do so.

Ms Brown: You can't just insert article 18 into Australian law, because one of the important elements of article 18 is the requirement that manifestation of belief be balanced with other human rights. You cannot do that without protecting the other rights in question.

Senator FIERRAVANTI-WELLS: If you look at some of the recommendations, particularly in relation to 5, 6, 7 and 8—5 in particular recognises that there are parameters within which the two freedoms are balanced against each other. In the absence of seeing what a potential religious freedom act would look like, do you have any thoughts in relation to those parameters?

Ms Brown: As outlined in the recommendations?

Senator FIERRAVANTI-WELLS: Yes, as outlined in recommendation 5. I'm not talking about 7, because that is to do with the students. There seems to be a general political acceptance of the need in relation to students—I am putting the students aside and really talking only about staff and contractors.

Ms Brown: On the basis of that wording alone, there are a couple of elements that concern us: first of all, this exceptionalism around sexual orientation and gender identity and relationship status, compared with other attributes. The panel has found that discrimination is somehow justified against those minority groups, as compared to other groups. We would like to see the reasoning for that.

Senator FIERRAVANTI-WELLS: I think everyone for different reasons would like to see the reasons! There must be quite a lot—

Ms Brown: That is a concern—that it singles out and targets LGBT people, and indeed anyone, for discrimination on the basis of relationship status. The publication requirement is something we would absolutely support, as Jonathon from PIAC outlined, because one of the problems at the moment is the lack of transparency in the way the religious exemptions operate. People don't know, when they're applying for a job, whether the religious school could discriminate against them or would seek to discriminate against them.

Senator KITCHING: With the previous witness, and I think you might have been here to hear Mr Odgers, we discussed whether there was greater certainty by having an employment contract rather than relying—I think I said something along the lines that not everyone applying for a job as a teacher might know of section 38 of the Sex Discrimination Act. Therefore, isn't it better that the employment contract or the letter of appointment, and the bundle of documents one often receives when one is about to be employed somewhere, would contain the certainty? Therefore, in relation to what you were asking around that, Senator Fierravanti-Wells, doesn't that lead to greater certainty? Or are you saying that all of the policies—

Ms Brown: We definitely support publication of policies at large, regardless of whether it is in the employment contract—

Senator KITCHING: So if I were, for example, another organisation that could discriminate lawfully on the basis of employment, would I also have to publish my policies around that? I don't really mind, as long as we have some consistency here. For example, if one is able to lawfully discriminate—and one is another group, nothing to do with religion—should one also have to publish those policies?

Ms Brown: At the moment, under law, we have special measures that allow groups that are historically vulnerable to discrimination and disadvantage to proactively take measures that would otherwise be discriminatory. It depends whether you characterise the employment of, say, Aboriginal people over and above non-Aboriginal people in particular circumstances as falling within those criteria—

Senator KITCHING: Or women perhaps?

Ms Brown: Or women. As a principle, transparency is important. If it's a publicly available position description then I think that position description should outline whether preference would be given to a particular background or whether there are particular attributes that would be viewed by the employer as desirable.

Lee Carnie: And, in practice, organisations which seek to hire on the basis of special measures or affirmative action would generally apply for a special exemption from the Equal Opportunity Tribunal, which is publicly advertised, stating the grounds on which they would be seeking to accept only Aboriginal or Torres Strait Islander candidates or women and the reasons why that is in line with the purposes—

Senator KITCHING: And the policies under which they are employed are put online as well?

Ms Brown: Can I answer the question? The problem with recommendation 5 is that it doesn't require the discrimination to be reasonable and necessary in the circumstances. It simply requires, on the wording before us, that it's founded on the precepts of the religion. So we would say two things to that: that, first of all, as to discrimination on religious grounds, the only exemption that's reasonable is on the basis of religious belief or faith, not sexual orientation or gender identity—so that part of it is wrong—but also that the discrimination needs to be necessary, or in conformity with doctrine, tenets and beliefs and also required as part of the inherent requirements of the role. So we would put a number of additional threshold requirements in relation to employment.

Senator FIERRAVANTI-WELLS: Can I step back. To some extent this follows on from what Senator Kitching said. When you start looking at the balancing of different rights and you start putting them all on the same level then obviously that then becomes very much that balancing level. Do you then go into the sphere of the necessity of what is reasonable when you're balancing one against the other? Therefore, potentially, we're talking about a completely different regime, if I can put it that way, in terms of: if you do introduce a new piece of legislation then they're all on the same level, and then you have to start looking at it in terms of reasonableness under the circumstances, and then—and I'm just putting a hypothetical now; I'm asking your point of view—does it not take us within the parameters of the discussion that we had under section 18C?

Lee Carnie: I would just note that the *Guide to Human Rights* published by the Parliamentary Joint Committee on Human Rights already has a guide to lawmakers on introducing limitations, and that requires that any measure that limits a human right must comply with the following four criteria: firstly, that it be prescribed by law; secondly, that it be in pursuit of a legitimate objective; thirdly, that it be rationally connected to its stated objective; and, finally, that it be a proportionate way to achieve that objective. I think that that proportionality analysis is one avenue to consider reasonableness, necessity and proportionality in determining where that balance is struck.

Senator FIERRAVANTI-WELLS: But then, of course, in any consideration of that—and I ask this rhetorically—what's a reasonable belief? Who is going to say that my religious belief is more reasonable than somebody else's religious belief? Who is the arbiter?

Ms Brown: Ultimately a court, and you can have all sorts of religious beliefs that may or may not be out of step with contemporary Australian values. That's why, when we look at the Sex Discrimination Act and what exemptions are appropriate here, we need to draw a line around saying it's not appropriate for people to lose their job or not be hired simply because of their sexuality, their gender or indeed any other—

Senator FIERRAVANTI-WELLS: But then it goes back to the point that Senator Kitching was making about the publication of policy.

Mr Hunyor: I just want to quickly respond to the question that, I think, Senator Fierravanti-Wells asked about the protection of the right to freedom of religion. That's precisely why we have suggested the changes that we have—namely, that the Fair Work Act, which currently does prohibit discrimination on the basis of religion, could achieve a better balance by protecting the right to discriminate on the basis of religious belief in employment decisions, but only that. So it would narrow the basis upon which discrimination in employment can take place, but it would protect that aspect, because we do recognise the need to balance the right of religious freedom with the other rights that we've talked about.

Ms Banks: I certainly endorse the protection of the freedom of belief and religion, and I think that the absolute best way to do it is a charter of human rights, but I also note that, in the International Covenant on Economic, Social and Cultural Rights, there's a provision that deals specifically with the right to education, and it deals with the question of parents being able to choose the school for their children, to ensure that the religious and moral education of their children is in conformity with their own convictions. The provisions that currently exist in discrimination law undermine that protection, because they allow schools to say, 'This child cannot come to this school,' irrespective of the child's religious beliefs, because of, say, their sexual orientation. With the notion of freedom of religion, it's important to understand that it's a highly personal right. The idea that an institution has a right that overrides the individual's rights seems to me somewhat problematic, because parents do want to be able to choose the school their children go to, and that position has been highly supported by governments in this country, and yet we're saying that, under the current law, that can be overturned or undermined by the school choosing to say, 'This child is not entitled to stay at this school,' because of the child's sexual orientation or gender identity. I just wanted to make that point that there are more rights at play here than simply the right to freedom of religion.

Senator WATT: Ms Brown and Ms Carnie, thanks for your evidence today. There's one question that's been bugging me since this morning, and I'm hoping you might be able to answer this for me. Rodney Croome gave evidence earlier in the day that Tasmania was the only state in Australia that did not provide for exemptions in relation to both staff and students. The information that I've read in our briefing pack suggests that in fact those exemptions do exist in Tasmania, albeit maybe in a fairly narrow form. Are you or any of the other witnesses here able to shed any light on this?

CHAIR: I might go to Ms Banks, because she's a former Tasmanian commissioner.

Senator WATT: Sorry. She'd probably know better than anyone.

Ms Banks: There are exceptions which are defences under the act, in a division that deals with exceptions relating to religious belief, affiliation or activity. They permit discrimination against a person on the basis of that person's religious belief, affiliation or activity. I think you'll find that Mr Croome is correct in his assertion that we have the narrowest exceptions and that they don't allow discrimination on the basis of any other ground. It is important to understand that we don't have exceptions that apply in relation to, for example, employment or admission at a school on the basis of a student or a teacher's sexual orientation, relationship status, gender identity or otherwise.

Senator WATT: Do you know then whether there have been instances in Tasmania where the section has been litigated?

Ms Banks: No, I am not aware of cases ever coming. Certainly none came to the commission during my period as commissioner, which was seven years until last year, and now I'm not aware of earlier cases. It is possible but I suspect unlikely that there have been cases or complaints made in the last 18 months or so. I would be very surprised.

Mr Watson: Could I add my experience as a student and a student leader at multiple Catholic and Christian schools and now a Quaker school that there has not been any kind of concern about the effect of the legislation. In fact, it's been more supportive of the legislation. Again, I can't tell you anything about litigation. I would affirm Robin's comments in that regard.

Senator WATT: Again, I know I'm reading this for the first time, but my reading of it is that in Tasmania there are protections on the grounds of sexual orientation, gender identity and intersex status. For argument's sake, a religious school could not discriminate or is prohibited from discriminating in Tasmania but then may make use of the exception if it can argue that its discrimination was based on the grounds of religious belief. Is that correct?

Ms Banks: Yes. It is important to understand what that means though. It doesn't mean the religious belief of the discriminator; it is the religious belief, affiliation or religious activity of the person against whom the discrimination is directed.

Senator WATT: I see. Okay.

Ms Banks: So it is not on the basis of my belief to tell me I should do this or allow me to do this; it is that that person's beliefs are a reason I am going to discriminate against them. It is very important to understand that 'on the ground of' has that meaning: it is about the person who is experiencing the discrimination—their attributes, their characteristics—not the views, beliefs or anything else of the educational institution or the employer.

CHAIR: Thank you for clarifying that.

Lee Carnie: Senator Watt, I would add for completeness that in Queensland as well the specific religious schools exemption for students only applies on the basis of sex or religion as well. And there is a narrower exemption in the Northern Territory and Western Australia which narrows the grounds on which religious schools might discriminate against students.

Senator WATT: Thank you.

Senator RICE: Mr Hunyor or Mr Lawrie, you said previously that it was vital that there was a consistent approach taken between teachers and students. Could you expand on why that is so important. And, Human Rights Law Centre, I want to ask whether you agree that consistency with teachers and students is necessary.

Mr Hunyor: For us, it is a matter of making sure that you have a school environment that is non-discriminatory. In thinking about the message that it sends to students if they are aware that their teachers may be removed or that people will not be able to be employed, we think that creates a very negative environment. It sends a very negative message to LGBT students about just exactly how welcome they are in the school. We also think that sexual orientation, gender identity, sexual characteristics and other attributes are fundamentally irrelevant as to whether people are able to fulfil the requirements of teaching or other roles within the schools—religious or otherwise. We think the important thing is whether or not a teacher can be a good teacher, and that is of course teaching consistent with the values of the school. But their private lives, their identity, shouldn't be relevant to those things, and we think that trying to draw some sort of line between how we treat people under 18 and how we treat people over 18 really doesn't make sense.

Mr Watson: This is not about acting on just being gay or being transgender or something. As a student, having confidence in the staff can be assured by knowing that your teachers and staff members are the best possible for the job, and that is irrelevant to their sexual orientation or gender. Obviously, neither of those things is a choice, so again you shouldn't be discriminated against on that basis.

Senator RICE: Thanks, Mr Watson. And the Human Rights Law Centre?

Ms Brown: Yes, we absolutely agree that there needs to be consistency and that discrimination against both students and staff should be removed, so the exemptions in the SDA should be narrowed. I don't think there's a difference in position at all, but I just point out that, if there is a protection for religious belief and there is a subsequent exemption to allow discrimination on the basis of religious belief in employment, there are considerations around the inherent requirement of the role and what is required for a particular role in a particular case. That obviously won't apply to students. When you're talking about a religious instruction teacher or someone that performs religious services in an organisation where there are particular skills that are required to perform a role, that will be a relevant consideration, and should be.

Senator RICE: And then there should be clarity about that?

Ms Brown: Yes.

Senator KITCHING: I have many questions, but can I just go to that last part. This morning there was evidence given in the first session. I apologise; I can't remember exactly who said it, but I think it was either just.equal and Equality Tasmania, the National LGBTI Health Alliance or the Equality Campaign. There was a discussion of whether, for example, Alan Turing's work should be taught, because of who Alan Turing was—and obviously his work was incredibly important—but also in terms of who he was as a person. I think you've just said that, for example, it would be only for a requirement inherent to the role, so therefore it wouldn't apply to a gardener, for example. I think there have been some examples in the media about gardeners not being relevant. But one might say that it isn't just a religious education instructor but that, in fact, there could also be some basis for applying it to history, literature and many other things from which our society draws conclusions about how we behave et cetera. Rather than just the narrowness of the work, it could be much broader. I can think of many instances in history—to great cost, as we know, in Europe in the Second World War—where, in fact, how history is taught in school actually becomes incredibly relevant to what kind of people one ends up with. So what do you say to that? Should the narrowing of that exemption still apply?

Ms Brown: Whether or not you have an exemption that applies is quite a separate matter to the content that teachers are required or expected to teach in a school.

Senator KITCHING: What I'm saying to you, I guess, is that, for example, we know that in the Middle East the way modern history is taught can differ within 10 kilometres, and there's a religious aspect to that teaching.

Ms Brown: Absolutely. I would expect that a religious ethos is imbued and carried throughout a lot of content in school curricula, not just religious instruction. So I'm not suggesting for a moment that there won't be religious content in other parts of teaching in a religious school. I was just pointing to an example where it would be more likely that an inherent part of filling that role and attracting a good candidate for that role would be their deep knowledge and their own probable personal belief in a particular religious faith.

CHAIR: We've probably run out of time. I've got a question as well.

Ms Brown: I'm more than happy to talk about this offline.

Senator KITCHING: That would be good, because I have some concerns about some of this. I think Mr Odgers, who was a previous witness from the Independent Education Union, said that for teachers and staff it wasn't, in fact, really reliant upon the legislative regime but rather was reliant upon the employment contract. But I think, Ms Carnie, you said the opposite, so I just want to clarify that.

Lee Carnie: Even if it is contained in an employment contract, an employer can't contract out of discrimination law. So, even if there is a preference for the Education Union that it be contained in the terms of an employment contract, if the exemption is removed from the Sex Discrimination Act, schools would be required to comply with that.

Senator KITCHING: Are you talking about the general protections under the Fair Work Act?

Lee Carnie: Yes.

Senator KITCHING: I can't seem to be able to find this out, but are the provisions in the Fair Work Act derivative from the Sex Discrimination Act?

Lee Carnie: Section 351 of the Fair Work Act, which says that an employer must not take adverse action, does not apply to action that is not unlawful under any antidiscrimination law in force in the place where the action is taken. So there is that direct relationship between the Fair Work Act and antidiscrimination laws.

CHAIR: Now we really have run out of time. I will just ask one quick question: would repeal of the exemptions impact on the manifestation of a belief? My understanding is that if the exemptions were repealed it would only impact where your manifestation of your belief is seen to impinge on someone else's rights in some way. I know that Senator Fierravanti-Wells has been talking about: if we do this, where's the balancing of rights in terms of proactive protections for discrimination on a religious basis? But, at this point in time, if we repeal these exemptions, there is nothing in it that impacts on the right of someone to manifest their own personal belief, is there?

Lee Carnie: No.

Senator KITCHING: Just on that: would you consider that, if, say, section 38 was repealed, it would be good balancing to have a religious freedoms provision somewhere or a separate piece of legislation—who knows that that might turn out to look like? Should they be done simultaneously?

Ms Banks: No; I don't think—

Ms Brown: No.

CHAIR: Ms Banks, were you saying something?

Ms Banks: Yes. I would say that the best way to deal with any of the freedoms that exist in our international human rights regime is to implement a charter of rights that recognises and protects all of them at once. Then the balancing work can be done in the way that it is intended to be done under international law. The removal of the exceptions wouldn't interfere with a person manifesting their religious belief as long as they didn't discriminate. That is exactly what the international instrument says—that you can do it to the extent that you don't interfere with other rights. So I don't think that they need to be done together; I think the best way to deal with freedom of religion is to do it in a comprehensive charter of rights.

Mr Hunyor: PIAC agrees with that position. I guess that brings me back to where I started, and that is to make the case for simplicity. A lot of work would need to be done in getting a general religious freedom provision or act up and making it work well, or, alternatively, a charter of rights that would allow us to have a comprehensive regime that would deal with all this together. Something that we think we can do next week is to pass specific, consistent changes that would end the ability of religious schools to discriminate against LGBT students and teachers.

Ms Brown: And there is absolutely nothing to fear from that from the perspective of religious schools, because they have the ability to set a religious ethos and culture within their organisation already. It is only if they are trying to discriminate or hire or fire staff on the basis of sexual orientation, gender identification and other attributes that we are hearing—

Senator KITCHING: Or pregnancy or the risk of—

Ms Brown: Yes, pregnancy. If they are not doing that, there's absolutely nothing to fear.

CHAIR: Thank you. We will have to close there.

GRUTZNER, Mr Philip, Principal, Carey Grammar Baptist School

LAUSSEN, Mr James, Principal, Overnewton Anglican Community College

[15:39]

CHAIR: I'd really like to thank both of you for coming along to give evidence this afternoon. Can you confirm that you have received information on parliamentary privilege and the protection of witnesses?

Mr Grutzner: Yes, I can confirm I've received that information.

Mr Laussen: I can confirm I've received that information as well.

CHAIR: Great. I invite you both to make a short opening statement.

Mr Grutzner: I'll just speak for four minutes, if that's okay, and then I welcome any questions.

Good afternoon. I thank you for the opportunity to meet with you today. The reason I'm here today is to oppose any current federal legislation which allows Christian schools to discriminate against staff or students on the basis of their gender identity or sexual preference. Some quick background about me: I was raised as an Anglican. I went to a local government primary school. My parents sacrificed everything they had to send me to a church based independent secondary school. For the past nine years, I've been principal of Carey, a Christian Baptist school in Kew, Melbourne. Prior to Carey, I was headmaster of St Peter's College, an Anglican Christian school in Adelaide. Before that, I was principal of Braemar College, a low-fee Christian ecumenical school in Woodend, Victoria.

Carey is a co-educational, early learning centre to year 12, independent school in Melbourne. We have an enrolment of 2,500 students, comprising girls, boys and those who don't identify with traditional gender norms or sexual preferences. In my 22 years as a principal of three Christian schools, those schools have never discriminated against any staff member or student on the basis of their gender identity or sexual preference.

In terms of our practices at Carey, we pride ourselves on being an inclusive community. We respect, celebrate and nurture individual, cultural and societal diversity. We embrace the unique qualities and skills of each individual, and welcome students and staff from all backgrounds. These individual differences may be related to race, ethnicity, gender, sexual orientation, socio-economic status, age, physical ability or religious or political beliefs. At Carey, we don't just say that we are inclusive; we live it.

Our staff are aware of the disturbing mental health statistics for those who are transgender or gender diverse. Australian research in 2017, which examined the mental health of trans youth, showed that almost 80 per cent of those aged 14 to 25 had self-harmed, compared to just 11 per cent of adolescents overall. An alarming 48 per cent had attempted suicide, compared with 2.4 per cent of adolescents overall. Transgender young people are also 10 times more likely to suffer from serious depression and anxiety than other young Australians. These aren't just numbers; these are real people who deserve our support, as do their friends and family. As a Christian and a leader of a Christian school, I look to the example of Jesus, who welcomed all people from all backgrounds. Therefore, we should do the same at Carey and in other schools. We believe it is the right thing to do.

At Carey, we actively support three students who have undergone or are about to undergo gender transition, as well as supporting several transgender future students as they prepare to come to our school. For over a decade, we've welcomed same-sex couples at the year 12 school formal. We emphasise equal opportunity employment practices, and would not discriminate against any current or prospective employee. We have policies in place to support that position. We are proud of the diversity of our staff and our inclusive culture at Carey, and we state this on the 'Employment' page of our website.

For the past five years, we've been a member of the Safe Schools Coalition. Since the legal introduction last year of same-sex marriage, we have publicly celebrated the marriage of two same-sex staff couples just as much as we have the marriage of other couples in our school community. Two years ago, we introduced gender-neutral uniform options. Units within our school curriculum educate our schools about sexual diversity and inclusiveness.

For the past two years, we've had a staff and student pride group. This is open to all, irrespective of their gender, identity or sexual preference. It also welcomes allies. This group provides support and educates our community about the challenges facing LGBTIQI+ people, and reviews school activities and policies to make sure they are truly inclusive. Earlier this year, they marched under the Carey banner at the gay pride march in St Kilda.

We have gender-neutral toilets. We continue to work with the Royal Children's Hospital and each family to provide a plan of support for each Carey student who is going through gender transition or those who do not conform to gender norms. We've developed guidelines to support us in enabling all students to feel safe, accepted, valued and included at every step of their educational journey at Carey. More recently, we reviewed our

application and enrolment guidelines; we are changing our documentation that collects personal information so that it's inclusive of gender-diverse individuals.

Despite a very small pocket of resistance from a handful of people in our school, many of whom I suspect would share the views expressed at this inquiry by some outspoken, ultraconservative Christian groups, we promote our diversity and inclusivity. A good example recently is the promotion in our school magazine of our Carey pride group. We've gone wider than that and, through *Educate Plus*, a publication, we've also published our views on thinking diversity at our school. I'll provide copies of those for you.

We are on a journey at Carey. We're not perfect, but we're always willing to lead, learn and change. One thing will never change: Carey will never change its opposition to the current legislation which allows Christian schools to discriminate against staff or students on the basis of their sexual preferences.

CHAIR: Thank you, Mr Grutzner.

Mr Grutzner: I'll also provide a copy of my statement for you.

CHAIR: Thank you, that's very helpful. Mr Laussen.

Mr Laussen: Overnewton Anglican Community College is a dual-campus, independent Anglican school of some 2,100 students, located in the north-west of Melbourne. I've been principal of Overnewton for the last 18 years. Our mission statement opens by stating that Overnewton strives to be an inclusive learning community with a strong Christian foundation. As a community we celebrate the diversity of our families, however they are formed and whatever they look like. We believe that this welcome is an expression of our Christian values and ethos. We acknowledge that all members of our community, whether of faith or no faith, are going to be at different places on different social and ethical issues, and as an educational community we welcome and engage with a great diversity of viewpoints and experiences expressed in a spirit of learning, humility, respect and mutual care.

To the best of my knowledge, the religious exemptions in question have never been used at Overnewton. Indeed, they are absolutely out of step with our deep commitment to be a safe and supportive place for all students, families and staff, regardless of their sexuality, faith position, race or ethnicity, or ability. There is no place for these exemptions in our school.

I do not believe that it is the business of any adult working in a school to know what the sexuality of a student attending that school is. The vast majority of students enter Overnewton in prep and are there over the 13 years of their schooling. It is possible that, in those 13 years, students will question both their sexuality and their gender identification. It is the role of my Christian school to ensure that students have a safe and supportive place in which to work through those questions. The thought of any school excluding a student from their community because they come to an understanding of their own sexuality or transgender is abhorrent to me. I would be happy to talk to you about students that we have supported on that journey—and one in particular, who fully and successfully transitioned to her identified gender—if you wish.

All employees join Overnewton knowing that they're required to support the Christian ethos of the college. We celebrate the marriages of both heterosexual and same-sex couples, as well as the birth of all children in all types of staff families. Our shared Christian ethos and values define the nature of our community. Our school is deeply enriched by the diversity of its community. At Overnewton, we cherish being a faith based school and proudly talk about what that means within the community. This includes the participation of students and staff in the whole life of our schools, in worship, in learning, in community service and in our care for each other. All these are expressions of a deep corporate commitment to our Christian ethos and values. Thank you.

CHAIR: Thank you. Can I perhaps commence with a question with respect to the experiences of your students. Have any of them transferred from other schools where they've had more difficult experiences?

Mr Grutzner: It's pretty common, given the nature of our school, which is welcoming and accepting, and it's probably easier—being a co-educational school—where the gender of the student is uncertain.

Mr Laussen: Yes. Likewise.

CHAIR: For the sake of clarity: if someone wants to stay in a single-sex school, it would strike me that, even if you removed the exemptions, a school could continue to keep a student in, provided they provided a quality environment for them and didn't overtly discriminate, or they could say: 'This is an all-girls school. We uphold your right to be a boy. But, because we're an all-girls school, we rely on exemptions to the Sex Discrimination Act to be a single-sex school.' Does that seem logical to you?

Mr Grutzner: No, it doesn't. I think once you enrol a student you're making a commitment to that student forever.

CHAIR: Continuity—

Mr Grutzner: And we should be embracing them and welcoming them and travelling on that journey with them if they're going to change sex.

CHAIR: Great.

Mr Laussen: And, added to that, it is probably one of the most fragile times they've experienced in their lives up to that point. To then exclude them from the community that's their very support base would be terribly damaging, I believe.

CHAIR: Thank you. Mr Laussen, you spoke of some particular students and their experience. What difference does it make to have a positive environment for your trans students?

Mr Laussen: There is one student in particular that I can talk about. During the course of year 9, we became aware that she no longer wished to be identified in the gender that she was born, but identified as a female. We were aware of that through year 9, so we were able to put some support things into place. During the course of year 10 she decided that she was living as a female in every area of her life except at school, and she said: 'At this point now I wish to live as I am in my school experience.' So we set up a number of things for her.

She had become a school refuser because she hated wearing the boys uniform to school, so we allowed her to wear the sports uniform so that that would encourage her to come to school. But, because of the work that we did with students, with staff, in particular, and with her siblings and the friends of her siblings, she transitioned in a very positive sense. That happened towards the end of year 10. By the end of year 12, she received our divinity prize because of the extraordinary girl she is but because of the supportive environment we created for her as well.

CHAIR: There are some schools that say: 'We don't discriminate, but we don't want you to remove these exemptions. We're feeling anxious about how we might, without these exemptions, go about upholding the wellbeing of our students if we're not coping.' I'm not quite sure how to characterise it. That's not how they expressed it. There are many schools that aren't quite as advanced as yours in addressing this within the ethos of their school. What kind of process has been in play from the inception of the recognition of these issues within your school community?

Mr Grutzner: The first question is the question of: 'We're not going to use the legislation; therefore, it doesn't matter.' My personal opinion is: why have the legislation in the first place if you're not going to use it? So we would be arguing to remove the legislation that allows an opportunity at some time in the future to discriminate.

CHAIR: Thank you.

Senator WATT: You just answered my question, so I'm not going to have anything to ask.

Senator HUME: Has either of you ever dismissed a teacher for not holding up the ethos and values of your school?

Mr Laussen: I have, yes.

Senator HUME: In what circumstances would that have been?

Mr Laussen: That was because, over a long period of time, he was a bully, and we had worked with him. But it had nothing at all to do with sexuality or gender; it was absolutely in terms of the way he was treating other people.

Senator HUME: Say if the fellow that you dismissed on the basis of the fact that he was a bully was gay or something on the LGTBQ+ spectrum, and you had dismissed him for being a bully, do you think he might have been able to interpret that as potentially having been dismissed for another reason? I worry about the warping of this. Do you know what I mean?

Mr Laussen: I do. But I think the HR practices that we use in schools are so stringent and are so well followed that that would never be the case.

Senator HUME: I was looking at the submission from the Independent Education Union of Australia and some of the complaints are really quite confronting. There is a lot here to do with Catholic schools. There was one here that said that a relief teacher at a Baptist school, a former student of the school who had identified as gay, was removed from the relief teacher's roster. I wonder with something like that, if that person had said, 'I was removed because I had identified as gay,' or would there have been another reason? It is a very short one-liner, isn't it? So it is very hard. I know that with each of these things there is a context around what potentially one or two lines doesn't really describe. What sorts of conversations do you have with schools in your peer group, other faith based schools, whether they be Baptist or Anglican or whether they be general Protestant schools—whatever

they might be? I don't want to include the Catholic education system in this—maybe just your own schools. Do you know some schools that are of similar faith groups as you that are much less tolerant? If you do know of those, what conversations do you have with those schools when you have your conferences and things?

Mr Grutzner: To answer your first question, I agree entirely with Mr Laussen's comment—that is, independent schools have and will continue to manage it as a performance based issue if they are not up to the quality and standards that the school expects. However, we would never performance manage somebody on the basis of their sexual identity or sexual preference. That to me is quite—

Senator HUME: But you know as well as I do that if somebody wants to dismiss you, they'll find a reason.

Mr Grutzner: It certainly wouldn't happen at Carey because we find that absolutely abhorrent.

Senator HUME: Tell me about the conversations you have with other schools.

Mr Grutzner: I would find most other schools but not all would be supportive of the stance we are taking today—that is, they wouldn't want to discriminate on the basis of gender or sexual preference of any student or any staff member.

Senator HUME: I think there is a level of consensus about students. I think the contention comes in when we talk about teachers. What about the hiring or firing policies of teachers? What sorts of discussions do you have with other schools about that?

Mr Grutzner: We just want the best teachers and it doesn't matter what sexual preference they have or what gender they have. We just want the best teachers.

Senator HUME: I know what you want but when you are confronted with another school that is your peer school—you might play sport against them or whatever that may be—and they don't have that same approach, is it a discussion that is on the table? Is it something you are aware of—that school is pretty hard-core; they've missed a few teachers that we've taken on or whatever it might be? How do you do school-to-school mentoring and development or isn't there such a thing?

Mr Grutzner: I think those sorts of schools are rare but I would certainly welcome the conversation as to why they are adopting that practice and give an example in terms of Carey—what we do and what a great school it is because we don't have to discriminate on the basis of gender or sexual preference.

Senator HUME: Do you have conversations with other principals, for instance, Mr Laussen?

Mr Laussen: Not often. Actually I can't remember the last time I had a conversation along that sort of line.

Senator HUME: This is one of the things that concern me. The fact that it requires legislation is half of the frustration. As you have both said, you've been on a journey. This has been something that has developed over time. There are some schools that potentially aren't as far along that journey as you are. I wonder whether it isn't something that would be better off being more organic as opposed to rigid and legislative.

Mr Grutzner: It's interesting you say that. As Mr Laussen says, I think that conversation is rare. I think more importantly, though, if you talk to students, overwhelmingly they'd say: 'How dumb is this legislation? Why would we want to discriminate on that basis?' The students are way ahead of the adults, I'm afraid, on this one, and they're way ahead of the current parliamentary approach to this legislation.

Mr Laussen: Agreed.

Senator HUME: The Independent Education Union said that probably about two per cent of schools made up the vast majority of—what was it?

Senator KITCHING: I think it was around 50 per cent of the problematic—

Senator HUME: Two per cent of the schools were 50 per cent of the complaints, or something like that, so there must be a core number of schools that you would identify as the problem ones. I just wonder where the responsibility is between the principals associations and the schools themselves to effect the change, as opposed to using a legislative instrument.

Mr Grutzner: I would be encouraged by those statistics, because it means 98 per cent of the schools are doing the right thing.

Senator HUME: Yes, like you guys.

Mr Grutzner: If two per cent have got 50 per cent of the problems, it actually suggests a cultural and a leadership problem in those schools. I don't think there's a causal link between the legislation that we're discussing today and poor performance at schools. Dare I say it, there'd be other issues in those schools because of poor culture and poor leadership.

Senator HUME: That wasn't what I was asking, but I understand where you're coming from.

Senator RICE: I want to use a bit of a different way of addressing the same issue. Both of you talked about the strong Christian ethos that's the basis of your school communities, yet, within that Christian ethos, you are helping trans kids transition and you are celebrating the same-sex marriages of your staff. We've heard evidence this morning from other Christian schools who clearly are troubled by that and for whom it's almost 'Don't ask, don't tell.' They've got to the stage of accepting that, yes, people are same-sex attracted or gender diverse, as long as they don't show it to anybody. Could you reflect upon your schools' Christian values and beliefs in terms of that acceptance of gender diversity and sexual orientation versus other Christian schools?

Mr Grutzner: It can be quite a divisive argument, on the basis that there is a broad spectrum of views within the Christian schools and Christian schools organisations, and there'll be some schools that will take a far more literal interpretation of the Bible. At Carey, as a progressive independent school that welcomes diversity, our interpretation of the Bible is such that Jesus is a person who welcomed all people and therefore we should be role-modelling his example by welcoming all people into our schools, irrespective of their background, gender or sexual diversity.

Senator RICE: Mr Laussen?

Mr Laussen: I don't think I've got anything to add to that. I think Mr Grutzner has summed that up beautifully.

Senator RICE: How much do you feel that the practices of Christian schools should reflect the practices and beliefs of mainstream Australia now? I asked the Catholics whether they felt that their attitudes had changed, and they acknowledged that they had, that they basically felt that they were reflecting community values. Do you think it's important that schools do reflect community values, while maintaining your particular Christian beliefs?

Mr Laussen: I think that, by the nature of schools, we need to reflect our community values. But, as you've said, by the nature of the types of schools that Carey and Overnewton are—we're both faith based schools—the values that we hope that we instil within the children who come through our schools and the staff who work in them absolutely are Christian based values.

Mr Grutzner: I don't think it matters if you're a Christian school, non-denominational school, government, independent or Catholic school. It shouldn't matter. You should reflect the values of society, in that we are modelling strong values and we're providing great guidance to our young people and those sorts of strong values cross all those different types of schools. Values such as respect, trust, honesty, hard work and good relationships should be applied in all schools.

CHAIR: I've been listening to other schools today say they don't want to discriminate but they do want to keep these exemptions, noting that they did employ a great many gay teachers but they did not encourage the promotion of that lifestyle within their school community. I guess what I'm trying to come to terms with is the idea that they should have the right to continue to discriminate against those teachers and impinge on their own personal human rights within that school context, when the alternative, perhaps, should have been to not offer people a job to start with and pretend to be something that they're not. I'm really just trying to come to grips with some of the contradictions that other schools are juggling because of the tensions between doctrine and the attributes of the staff that they employ, versus schools like yours, which have reconciled that within your own religious belief by being very proactively inclusive.

Mr Laussen: Whenever I'm interviewing someone to come and work at Overnewton, I always talk about the fact that in a school with 320-odd teachers, you can't guarantee, I don't think, that you can employ every single one of those being a practising Anglican or Christian. Therefore, what I say to my staff is that if you come into the school I expect that you'll support the Christian ethos of the college. Once the staff agree that that's what they're prepared to do, everything else about them in relation to their sexuality or their gender becomes irrelevant, because they've agreed to do it. Like Carey, we've already celebrated two same-sex marriages this year and we've got a third one happening later on in the year.

CHAIR: That makes logical sense to me. If someone recruited someone and said, 'We have a very heterosexual paradigm in our school. We see marriage as between a man and a woman, but you're okay to work here provided you celebrate and uphold that ethos,' how we manage to get round that—

Mr Laussen: I know that there is a school in the west of Melbourne, for instance, that has very strict statements about what it expects of its staff in relation to marriage and relationships outside marriage and so on. But they make that up front, so therefore the staff member is making a choice to work in that workplace before they actually go there.

CHAIR: Yes. That is more logical than some of the larger employers who want to hang on to the exemptions, even though they know that they will have many thousands of people in their employment with personal attributes that might have exemptions applicable to them in the Sex Discrimination Act. Thank you both for your evidence this afternoon. That was extremely useful.

SALMAN, Mr Adel, Islamic Schools Association of Australia

[16:09]

CHAIR: Welcome. I understand that you have been provided with information about parliamentary privilege and the protection of witnesses. Is that correct?

Mr Salman: Yes. I have appeared before Senate committees before.

CHAIR: Did you wish to add anything about the capacity in which you are appearing here today?

Mr Salman: I am representing the Islamic Schools Association of Australia. I don't hold any office position or executive position with the association but I have been asked to come and represent them here today. I wouldn't call myself a ring-in, but someone who can faithfully represent their position, which I am quite familiar with. I guess that is why they asked me to come today. They thought it was important to have someone attend.

CHAIR: We are very grateful for that. We understand the diverse nature of Australian society and of the school communities within our nation. We are very grateful that you have been able to come and give evidence. Would you like to make an opening statement?

Mr Salman: I have not prepared a statement. I could emphasise the key points that were the position put forward by the association, but you may already have those, so I'm happy to take questions.

Senator RICE: Could you summarise what the key points of the association are?

Mr Salman: Okay. This is not in the format of a submission. They are literally bullet points of items that are important to the association. In relation to schools, the association believes that schools should be allowed to hold staff to their ethos and values and that staff members would be expected to uphold those. The association is not calling for staff to be hired and fired on the basis of their sexuality, but they are expected to uphold the ethos and values of the school. Likewise, with students, the association is not calling for students to be discriminated against or in fact to be expelled from the school because of their particular sexuality, but by the same token the students and their families need to understand that the school will be teaching the particular values and principles of the religion. So, if families are understanding of that and the students are aware of that, then I think that should be fine.

But issues arise where students may complain of discrimination, may complain of feeling stigmatised, because of what is being taught. Therein is an issue. But, broadly speaking, students should not be discriminated against. If a student has a particular sexuality that may be in contravention to what is being taught in school, they should still be allowed to attend the school and they should not be discriminated against.

CHAIR: Thank you. That is helpful for the deliberations. Does that mean that, in terms of upholding the ethos of the school, provided repeal of the exemptions in the Sex Discrimination Act doesn't impinge in any way on your capacity to teach and preach within the school environment in the way that you see fit, there is no reason that the exemptions can't be repealed from our laws?

Mr Salman: I think the position of the association is that without the current provisions and exemptions they would not be able to hold staff to that level of accountability to adhere to the schools values and ethos. The schools would then potentially be the subject of unfair dismissal claims. This could create a number of issues, as I'm sure you recognise. I think the Islamic Schools Association is calling for the current provisions to be maintained, because they believe that that is a reasonable balance. It allows schools to operate in the way that they would like to, which is to faithfully adhere to their religious principles.

CHAIR: Are you able to distinguish in that between students and teachers?

Mr Salman: Ultimately, I think schools do that. Teachers are role models and are in positions of authority, so the expectations of teachers are different from those of students. Students are often not in a position to express their views in a way that could be viewed as in any way threatening or aggressive or in any way diminishing the rights of others, whereas, if a staff member were to call for certain things in the classroom, that would be viewed quite differently. So I think the power balance is very different, and I think the vulnerabilities of students mean that schools need to tread very carefully in that regard. But again they need to have the right to be able to teach their particular religious principles, and students, and the families of those students, need to understand that that is what will be taught.

Senator HUME: Can I just ask one quick question. I'm not entirely sure whether you have managed to read the Independent Education Union of Australia submission, but it mentioned one case where, at an Islamic school, a lesbian teacher whose partner was pregnant was refused parental leave. That's an interesting one. I wonder where the Islamic Schools Association sits on a situation like that, where it's really not against the values and ethos of the school; it's simply a Fair Work requirement, isn't it? It also said that the school has confirmed with

the union that dismissal will follow. How do we reconcile that with the requirement to hold up the values and the ethos of the school? This wasn't proselytising or overtly flaunting sexuality or anything like that; it was simply a partner who was pregnant.

Mr Salman: There will be situations where the answer will not be obvious, and I think common sense needs to prevail. That's my personal view, and I'm sure that's the view of many schools. In an example such as this, I can understand why the school would take that position, because it would be understood that this particular teacher is taking maternity leave or parent leave because of a child that is not within an accepted marriage as defined by the religious principles. So I can understand that the school might take that position, but again the school needs to show discretion. Schools should not necessarily be intruding into the private lives of teachers, as long as they are the private lives of teachers. So, if a teacher wishes to take leave because they have childcare responsibilities they want to fulfil, I think common sense should prevail. But I can understand why some schools might take that position.

Senator HUME: In the same way that the previous witnesses from Anglican and Baptist schools have associations and there is talk between principals of different schools and there is quite a large variation of attitudes and approaches between those schools, do you find it is the same with the Islamic schools and that there are some that take a far harder line than others?

Mr Salman: I'm not sure whether we have that level of differentiation. I think there will be some, but from my knowledge of Islamic schools—certainly in terms of the members of the Islamic Schools Association—I think most would be supporting those exemptions remaining in place, and most would be asking for their rights to teach their particular religious principles to be protected. I listened to the very interesting discussion that you had with your previous attendees, the principals. I don't think we have that level of differentiation. There's no doubt there would be some, and there would be some schools who might show discretion in a particular way, as opposed to other schools who might take a very literal view of things. But I'm not aware of any Islamic school that would, for example, take the particular positions of the schools that appeared before you just now.

Senator HUME: Thank you.

Senator RICE: Thanks, Mr Salman. To your knowledge, have the Islamic schools in Australia used the exemptions to dismiss staff or to ask a student to leave an Islamic school?

Mr Salman: Not to my knowledge. Certainly in relation to students, no, I don't believe that's the case. With regard to staff, I'm not aware of any specific case where a school has called upon the exemptions to either discipline or sack a staff member.

Senator RICE: You said you don't think that your schools would use these exemptions to sack staff or expel students and essentially you're concerned about the ability of the schools to continue to preach according to your religion. I just want to understand this in terms of the ethos and values of Islamic schools. If you had a same-sex attracted student or teacher, what would offend the values and beliefs as to potentially—and you said haven't got evidence of this having happened—mean that schools would invoke these exemptions?

Mr Salman: That's a very good question to ask, because I think that makes it concrete. For example, if the school teaches the Islamic definition of marriage as only being between a man and woman, and then a member of staff were to say, in a class setting, 'Hold on; Australia has just legislated for same-sex marriage, and that is equivalent to the marriage between a man and a woman,' that would be a major problem. No Islamic school would accept that, because that is in direct contravention of what they teach, which is that the only lawful marriage is between a man and a woman. So I think—and I think this is where the concern has arisen in the first place—that with the changing legislation and the changing environment there is a concern that schools will be placed in a situation where they will not be able to faithfully teach, because they could be the subject of unfair dismissal and other penalties, including impacts on government funding for schools because they're not adhering to certain principles that the government would like taught. I think that's where the rubber hits the road. That's really where the issues will arise, because that is quite possible. That's a real-life scenario. That actually could happen every single day of the teaching year.

I think schools should have that right. The Islamic Schools Association do believe that schools should have the right to say: 'No. Our definition of marriage is such, and if you're going to be teaching in the school either you will be silent or you will teach such.'

Senator RICE: There's the issue of teaching it or being silent or saying: 'This is the Islamic belief of marriage. Australian society has just legalised same-sex marriage. We see these as different things.' But how about the example of that teacher, say, marrying into a same-sex marriage? Would that be a problem for the school?

Mr Salman: That again could be quite problematic. If the teacher were married in a same-sex union and that became something that the staff community, or the school community, became aware of then that would be a direct contradiction of the school's principles. The school on one hand would be teaching such, and then a member of staff would be doing something altogether different. In that case, some schools would actually take the position that that is not in adherence with our principles and might ask the staff member to resign, or they might take action to dismiss the staff member.

Senator RICE: Do you know whether any of those examples have arisen in Islamic schools?

Mr Salman: I'm not aware of any personally, no. I don't think it would happen very often. I think that situation would happen very rarely, but theoretically it's possible.

Senator RICE: And how about for students? If a student becomes aware, at the time they're in your school, that they're same-sex attracted, or indeed that they are transgender and they want to affirm their gender, what would the perspective of the school be?

Senator KITCHING: Senator Rice, could I just add to that? Mr Salman, how would that manifest itself in terms of school uniform? For example, if a student were transitioning, would they wear a hijab if that were part of the school uniform? How would that be dealt with?

Mr Salman: I'll address the issue of gender identity and then address the broader question, if I could. It would be fair to say that Islamic schools—and, I imagine, other religious schools—would have a reasonably clear view of gender identity. If a student were to be transitioning from, say, a boy to a girl or vice versa, then that could potentially create some complexity for the school to address. I'll be very specific here: if a boy were to be transitioning to a girl and it was understood that now that person identifies themselves as a girl then I think the same dress uniform would apply, because the dress uniform for females is such.

Senator KITCHING: And the other way—if a girl was transgenering to be a boy?

Mr Salman: It is very difficult for me to answer that question, because some outward appearance indicates that that person is still a girl. Yes, it's recognised and understood they are transitioning, but outward appearance is still that they are a girl. Ultimately, as to the wearing of dress, this is a broader issue in Islam. As to the wearing of dress, whether male or female, there are certain dress codes, and it's about the physical appearance, the outward appearance, not what is happening in the heart or the head; it's the outward appearance. So that would create, I think, some complexity.

Senator KITCHING: And in some of the other Abrahamic faiths, too, I think.

Mr Salman: Yes.

Senator RICE: Can I go to the general question about how a school treats a student who transitions, or a student who says, 'I'm same-sex attracted.'

Mr Salman: If a student were to come out as being same-sex attracted then, as long as they kept that to themselves and were not advocating for that and were not trying to influence other students in that regard, I think the school would have no issue. It is when a student is advocating for that, even though what is being taught in school is that lawful sexual relations are only between a married man and a married woman—and this applies to sex outside of marriage also; the view is that sex is only lawful between a husband and wife—that that would be a problem. But I don't think that schools would take any steps against that student, as long as the student was generally abiding by the school's values and ethos and was not advocating for a particular view that was in contravention of what was being taught in the school. In fact, I'm sure that would be the case. They would have no interest in making this student an example in that regard and they would have no interest in discriminating against that student.

CHAIR: I'm trying to link to the question about the transitioning students. An issue has arisen in the United Kingdom where Islamic schools have been found guilty of sex discrimination for segregating boys and girls. So it does not even come down to the fact that you won't treat a girl who has transitioned to a boy the same as the boys. There are also issues about whether you treat boys and girls in the same way. How are Islamic schools currently managing that from a doctrinal point of view and on a school culture and ethos basis?

Mr Salman: Islamic schools wouldn't view that as discrimination. I guess they would view that as differentiation. In terms of mixing between boys and girls, as to the prayer sessions, there are certain rules and norms of behaviour that would apply. But the schools would not see that as discrimination, because the girls would not be disadvantaged in any way because of those rules. But, yes, for example, when there is a communal prayer session, then the boys will typically be in one area and the girls in another area.

CHAIR: And that's confined to faith based parts of the school as opposed to the playground or the classroom?

Mr Salman: Correct. Yes.

CHAIR: So there isn't segregation in classrooms or playgrounds that you're aware of?

Mr Salman: No. In schools that I'm familiar with, where it is a mixed school—we're not talking about a single-sex school—then classes will be made up of boys and girls and the playground will have boys and girls.

Senator KITCHING: Can I just clarify something. There's a school in Victoria where I think they are segregating. There was a case where they were segregating on the playground. Girls were playing in one part and boys in another. And there was a suggestion that girls weren't encouraged to play sport because it could interfere with their reproductive—

Mr Salman: Yes. I'm familiar with that account.

Senator KITCHING: So what about that school? I take on point that I think the principal said, 'Well, we're successful at getting 90 per cent plus into tertiary institutions and, therefore, we are a successful school.' How does one—

Mr Salman: I think I'll address the second part of your question in relation to school activities. Boys and girls should be given equal opportunity.

Senator KITCHING: Yes.

Mr Salman: So, when it comes to physical activity, sporting activities, I think both sexes should be given equal opportunity. In relation to segregation in schools, I'm not aware of schools that do segregate. I know the example that you're talking about, but I'm not aware of that in the schools I'm familiar with. In fact, my children go to Islamic schools. I know a number of schools. I'm actually on an Islamic school board as well and I'm not aware of any provisions that actually call for segregation in the school ground. The only segregation I'm aware of is where they separate the uppers from the juniors, because that's an age issue.

CHAIR: So, in a sense, there's nothing you've told us that would make Islamic schools particularly fearful of the removal of exemptions as they pertain to students?

Mr Salman: Not in relation to students. The concerns are more specific to staff.

CHAIR: Okay.

Senator HUME: We spoke a little bit earlier about a lesbian teacher whose partner was pregnant and had been refused parental leave. I know you don't know the specifics of that case, but I wonder if you could switch that around for us and talk about what if it was a teacher that was in a polygamous relationship? I know that is illegal in Australia, but it is one of those things that in the Islamic community we know exists. Is that upholding the values and ethos of the school, potentially? That's an awkward one too. It's funny, isn't it, that something that is illegal might potentially not cause the same amount of disturbance in a school as something that is in fact legal. Do you know what I mean?

Mr Salman: I think that's a broader question that's about Islamic teachings on marriage. Yes, polygamous marriage is allowed in Islamic law. However, Australian law says that's not allowed, and that marriage can only be between a man and a woman, and polygamy is not allowed.

Senator HUME: But the values and ethos of your school would also be upholding the law obviously.

Mr Salman: The school will teach that—because what the school will not do is deny certain teachings in the religion. The school has to faithfully uphold that. For example, it may say: polygamy is allowed in Islam, but, in Australia, Australian law only allows for a man and a woman's marrying.

Senator HUME: So how would it deal with a polygamous teacher?

Mr Salman: Again, in all the schools I have knowledge of, either as a board member or otherwise, I'm not aware of any teacher that is in a polygamous marriage. So that's a very hypothetical situation.

Senator HUME: Are you aware of one in a same-sex marriage?'

Mr Salman: No, I'm not of that either.

Senator HUME: Okay.

CHAIR: Thank you.

Senator KITCHING: In France, as I'm sure you know, they have prohibited the external wearing of certain religious indicators.

Mr Salman: Symbols. Yes.

Senator KITCHING: Yes. If section 38 was removed, and that law was also brought in, would there be an inability, therefore, of an Islamic school not to be able to practice—not to be able to be constituted in the way they are currently?

Mr Salman: Are you asking whether, if a law was—

Senator KITCHING: I'm trying to explore where the parameters are around the exemptions, so I'm looking at other jurisdictions. With other people today we have discussed other jurisdictions around the world. I'm just interested in looking at how Islamic schools, in practising their faith, are able to do that given that there is sometimes a confluence around the wearing of certain religious symbols, for example, or clothing—

Mr Salman: Yes, I understand your question. That goes to the whole point of religious freedom in this country. In France, yes, I am aware of their particular restrictions. If that were ever to be the case here in Australia, I think that would be impinging upon the rights of religious communities to practice their faith. That would be, in my view, quite a serious change in society. I think Islamic schools and, more broadly, the Islamic community—I think I can speak on behalf of the Islamic community because I do play a role in the Islamic community as well; I am involved with the peak body in Victoria—would be looking for a strengthening of religious protections. This is not just about schools.

CHAIR: It's interesting to me that Christian schools, if they are dealing with a transitioning student, in terms of uniforms wouldn't actually have a doctrinal basis on which to justify any ongoing discrimination. I guess the question remains open about the faith based parts of dress within a school and how that might be—

Senator KITCHING: Crucifixes, for example, are something that are also a manifestation and they have been banned as well, like the hijab. So it's not a—

CHAIR: No, but I'm talking about the gendered aspect of that which pertains to the Sex Discrimination Act and not in general terms. Thank you, Mr Salman. Your evidence has been extremely helpful.

Mr Salman: Thank you very much.

CHAIR: That concludes today's proceedings. We've agreed that answers to questions taken on notice should be returned by this Wednesday. I'd like to very sincerely thank all witnesses who have given evidence to the committee today. I thank sincerely Hansard and the secretariat.

Committee adjourned at 16:36