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SENATE

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL
AFFAIRS

Reference: Effectiveness of the Commonwealth Sex Discrimination Act 1984

WEDNESDAY, 10 SEPTEMBER 2008

MELBOURNE

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**SENATE STANDING COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS**

Wednesday, 10 September 2008

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

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

Senators in attendance: Senators Crossin, Barnett, Feeney and Kroger

Terms of reference for the inquiry:

To inquire into and report on:

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

- a. the scope of the Act, and the manner in which key terms and concepts are defined;
- b. the extent to which the Act implements the non-discrimination obligations of the Convention of the Elimination of All Forms of Discrimination against Women and the International Labour Organization or under other international instruments, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights;
- c. the powers and capacity of the Human Rights and Equal Opportunity Commission and the Sex Discrimination Commissioner, particularly in initiating inquiries into systemic discrimination and to monitor progress towards equality;
- d. consistency of the Act with other Commonwealth and state and territory discrimination legislation, including options for harmonisation;
- e. significant judicial rulings on the interpretation of the Act and their consequences;
- f. impact on state and territory laws;
- g. preventing discrimination, including by educative means;
- h. providing effective remedies, including the effectiveness, efficiency and fairness of the complaints process;
- i. addressing discrimination on the ground of family responsibilities;
- j. impact on the economy, productivity and employment (including recruitment processes);
- k. sexual harassment;
- l. effectiveness in addressing intersecting forms of discrimination;
- m. any procedural or technical issues;
- n. scope of existing exemptions; and
- o. other matters relating and incidental to the Act.

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Committee met at 9.00 am**BALL, Ms Rachel, Lawyer, Human Rights Law Resource Centre****SCHLEIGER, Ms Melanie, Lawyer, Human Rights Law Resource Centre**

CHAIR (Senator Crossin)—I officially open this meeting of the Senate Standing Committee on Legal and Constitutional Affairs. This is the second hearing for this committee's inquiry into the effectiveness of the Commonwealth Sex Discrimination Act 1984. This inquiry was referred to the committee by the Senate on 26 June for report by 12 November 2008. We have received 70 submissions for this inquiry. Most of those have been authorised for publication and are available on the committee's website. I want to remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to the committee and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee. We would prefer all evidence to be given in public but under the Senate's resolutions witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to give evidence in camera. I remind you that 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 on which it is claimed. If the committee determines to insist on an answer a witness may request that the answer be given in camera. Such a request, of course, may also be made at any other time, as I have said previously. I remind people in the hearing room to turn off their mobile phones or switch them to silent so they do not interrupt our proceedings. There may be a need for witnesses to stay behind once you have given evidence in case Hansard needs to clarify anything for their records.

I welcome our first witnesses from the Human Rights Law Resource Centre. You have sent us quite a comprehensive submission. Thank you very much for the work and the effort that you have put into that. Before I ask you to make an opening statement, do you want to make any changes or amendments to that submission, which we have numbered 20?

Ms Ball—No.

CHAIR—If you would like to make an opening statement for us that would be appreciated and then we will go to questions.

Ms Ball—Firstly, thank you for the opportunity to appear before you today. Our submission is made on behalf of the Human Rights Law Resource Centre. The HRLRC is an organisation that aims to contribute to the development of Australian law and policy consistently with human rights norms and standards. This organisational mandate has informed our submission. Our position is that measurement against human rights standards is an appropriate and useful way of identifying gaps and opportunities for reform in the Sex Discrimination Act. Some of the advantages of taking a human rights approach are that it utilises internationally accepted principles. It draws on advanced and sophisticated understandings of equality and discrimination and it focuses the debate on the rights of individuals and the community to live in a society that is free from discrimination and promotes substantive equality.

The adoption of a human rights approach would require a number of amendments to the SDA. The two main amendments that we would like to discuss before we get started on questions are broadening the scope of the act and tackling systemic discrimination. The SDA should aim to eliminate all forms of discrimination. This requires that the scope of the act be broadened. Currently the SDA is limited in the activities it covers and the types of conduct to which it applies. This limits the effectiveness of the act and allows discrimination in Australia to go unidentified and unaddressed. For example, discrimination that does not occur between individuals, such as discriminatory depictions of women in the media, is not currently captured under the SDA. Ways to remedy this problem would include introducing a general prohibition on discrimination as defined in article 1 of the Convention on the Elimination of All Forms of Discrimination against Women. Another way would be the elimination of the permanent exemptions contained in CEDAW. Ms Schleiger will say a few words about the exemptions before I speak about systemic discrimination.

Ms Schleiger—The current exemptions and exceptions in the SDA are not consistent with Australia's obligations under CEDAW and other international human rights instruments or even with contemporary Australian values, such as the value that selection of sporting teams be based on merit. The current blanket exemptions are arbitrary, unreasonable, based on gender stereotypes and unquestioning. An automatic exemption enables certain rights and interests to trump the right to freedom from discrimination without requiring any consideration of how competing rights should be balanced. We submit that the automatic exemptions and exceptions should be removed from the SDA. This does not mean that there would be an absolute right to gender equality. This right could still be restricted in accordance with human rights limitation principles that require that the limitation be proportionate and appropriate. The removal of the permanent exemptions would not affect the differential treatment of men and women, which aims to correct gender inequality. Such special measures are not discriminatory. To the contrary, special measures that aim to correct historic disadvantage and combat systemic discrimination are essential to ensure the substantive equality of men and women.

Ms Ball—The second point that we wanted to make before we take questions is that compliance with human rights standards requires that the SDA be strengthened so that it is better able to deal with systemic discrimination. The human rights framework recognises that discrimination is a social, structural and cultural problem, and the SDA should recognise this. An illustration would be where an HR manager discriminates against a female worker. The HR manager is unlikely to be acting arbitrarily or as a result of purely personal prejudices. Such discrimination is not just an event between individuals. The HR manager discriminates in a broader context where discriminatory attitudes are tolerated, where women are stereotyped and where discrimination goes unremedied. The SDA needs to address the attitudes and the stereotypes and provide appropriate remedies. Our submission emphasises the fact that discrimination is an institutionalised and systemic problem and that a human rights approach requires consideration of this fact.

CHAIR—Yesterday in Sydney we had a bit of a roundtable discussion among those of us who were there, so it might be a bit free flowing as well today. We did take evidence yesterday from quite a range of witnesses who had suggested that currently the SDA only reflects CEDAW and even then not very well, which tends to be a bias towards discrimination against women. I do not know whether you have had a chance to have a look at the Human Rights Commission's submission to us. It has put a suggestion that the SDA should be extended to include the other

international conventions that we sign so that men and women are protected under the act. Can you make a comment about that? Is your line of thinking that we should just better protect women by making it more reflective and comprehensive of CEDAW or should the act in fact reflect all of our international obligations?

Ms Ball—There are two points that I would like to address. The first is a sort of subsidiary point about whether the SDA should encompass equality for men and women. It is our position that it should deal with equality for both men and women. That is partly because that obligation is actually in line with CEDAW even though CEDAW is directed towards equality for women. To achieve that sort of equality you need to also address inequality that men experience. The example that is often given is of the stereotype that women are mainly responsible for the care and responsibilities of children and that men are responsible for going to work, and if that stereotype is perpetuated to the detriment of both men and women the result is that women generally will be the ones who end up needing to give up the opportunity to participate more fully in public and economic life. The first point is that to effectively address discrimination against women the SDA also needs to address discrimination against men. As to the second point, are you referring to the Human Rights Commission's suggestion that there be an equality act that deals with all the different heads of discrimination?

CHAIR—No, I will get to that in a minute. Their suggestion that we should extend the objects of the act to pick up the—

Senator BARNETT—The International Covenant on Civil and Political Rights.

Ms Ball—Yes, we would definitely agree that the act should aim to implement Australia's obligations under all the international human rights instruments and that, in fact, those obligations are complementary and support one another. I do not think that by taking on, for example, the obligations under the ICCPR in addition to CEDAW you would be substantially changing what the aims of the act should be.

Senator BARNETT—The view was that there was no constitutional head of power to protect and provide laws vis-a-vis equality for men, because CEDAW talks only about equality for women and discrimination vis-a-vis women. The Human Rights Commission said that another convention was needed and they used the International Covenant on Civil and Political Rights as an example, where that would be used in terms of the external affairs power, sections 51 and 29—

Ms Ball—Article 26 of the ICCPR guarantees equality for both men and women.

Senator BARNETT—Yes. They said, if you draw that in, that gives you coverage for protecting both men and women. Otherwise, if you only rely on CEDAW you are only protecting women. That was their view and I think it is a reasonably sound view with respect to the constitutional powers of the Commonwealth to legislate in this area. You otherwise have to rely on the Corporations Law or other heads of power under the constitution and there are quite a few areas that are missing. For example, unincorporated associations, sporting bodies, church groups, charities, and so on.

Ms Ball—I am not a constitutional lawyer but that seems right to me.

Ms Schleiger—I think that is true. It is also worth pointing out that it is obviously very important to acknowledge those human rights instruments and that is the benefit of a human rights framework. Applying the human rights framework to this area allows you to balance those competing rights and interests with the right to freedom from discrimination.

CHAIR—The Human Rights Commission have put to us there should be a two-stage process in undertaking some reform of the SDA. One allows for some immediate changes. The second stage is a consultation period that would pick up whether or not there should be one equality act for this country based along the lines that have been adopted in the UK. Secondly, they are suggesting that the consultation period could also look at the exemptions and whether or not the exemptions should go, or whether they should be re-examined or even whether organisations or bodies should be given an exemption for a period of time and that is reviewed every now and then. You have made a recommendation 8 in your submission that you thought that exemptions ought to be repealed and also any exceptions. Is it your view that the SDA should have no exemptions or should we have a period of consultation before we make such a decision?

Ms Schleiger—Our view is that the exemptions should be repealed. We feel that there has been very lengthy or in-depth discussion already about the exemptions and there has already been consultation about the exemptions not only in this forum but also in previous considerations of the SDA by the Australian Law Reform Commission and inquiries into the SDA. We think there has already been quite considerable time for discussing the exemptions. We are advocating that the exemptions be replaced with a provision that outlines the human rights limitation principles. The removal of the exemptions would not mean that the right to freedom of discrimination wins out every time or that you could no longer discriminate against women in all circumstances. The situation would be similar to occupational health and safety legislation, which similarly does not have any permanent exemptions to a worker's right to safety. Instead, there is a provision that outlines in what circumstances it will not be reasonably practicable for an employer to ensure the worker's right to safety or what other considerations might be taken into account. I can go into the provision and how that would operate in further detail if that would assist the committee.

Senator BARNETT—I am very interested in that, but I do not want to distract you from your line of questioning.

CHAIR—I think you just did, but that is okay. Are you suggesting that there be a positive move in the act? There have been representations in submissions to us that there should be a positive focus on the act whereby organisations, businesses or groups be asked to have equity plans, as you would have OH&S plans, in a workplace. I did not want to get into that sort of discussion. I wanted to know why you believe there should be no exemptions at all. Of course, religious groups would put to us very strongly that they believe they should still be there. What is the benefit in still protecting the sanctity, I suppose, of what a religious organisation or educational institution provides versus your view that no exception should be in the act?

Ms Schleiger—The removal of the exemptions and the protection of freedom of religion are not mutually exclusive options. Under international human rights law there is not a hierarchy of rights. Freedom of religion does not always trump freedom from discrimination and vice-versa. You have to look at it in a contextual way. To answer part of that question, our major concern with the current blanket exemptions is that they do not require any justification for favouring the

right to freedom of religion over equality in certain circumstances. It is just a given that that will occur even if that is not necessarily a reasonable and proportionate outcome. We are advocating that, rather than having blanket permanent exemptions, you have a list of considerations that you look at for each circumstance. Take, for example, if a church wanted to exclude women from a particular role in the church. You would look first at the nature of the right being limited, which would be the right to equality. Then you would look at the reason for restricting women from that role, which would possibly be freedom of religion. You would then look to the connection between the restriction on the right to equality and the purpose of that restriction and you would then consider whether that is a proportionate and reasonable restriction. You would also look to whether it is the least restrictive way of achieving the purpose of freedom of religion. It involves a detailed and very considered approach to balancing those human rights.

One thing that really came out from the submissions that I looked at from certain religious groups, and particularly the submissions from women from the Anglican church and the Catholic church and the Islamic community, was that they were very concerned that their religious organisations have used religion to justify the exclusion of women even where that is not part of their religious doctrine. With the current permanent exemptions it is a major concern that it does not require that detailed analysis. Obviously, there will be circumstances where, in order to ensure a group's freedom of religion, it may be necessary to discriminate against a person on the basis of their sex, but that is something that should not be a given. It should be a considered and appropriate decision.

Senator BARNETT—I notice that is outlined on page 37 of your submission, or point 125 regarding the limitations. We have just followed through your comments. I just want to drill down a little bit further in terms of how we actually assess what is reasonable and proportionate, using your words. Could you expand on that? Also, are there any models that you are aware of, either overseas or elsewhere, that you are familiar with that we could look at to learn how they undertake this assessment where they do not use exemptions but they use limitations or words such as 'proportionate' and 'reasonable'. I am not sure whether you can point to any overseas models or any other models to help us in that assessment.

Ms Schleiger—I will answer the second part of the question first. There are overseas models. There is a local model as well that we advocate, being section 7 of the Victorian Charter of Human Rights and Responsibilities Act. That is referred to on page 34 of our submission. We think that is a very good model and a very clear model that often looks to commonsense ideas in determining what is proportionate and reasonable. The Victorian model does not use that phrase. That is really just another way of summarising some of those ideas in the limitations analysis, the list of principles that we have outlined. In determining what is proportionate you need to look at specific evidence for each case. You might look at whether there has been consultation and whether there has been a review of the situation. In the case of freedom of religion you might look to the religious doctrine and whether there is a sound basis for the position accepted amongst experts in the field and whether the community's values are consistent with that view. When you are considering whether it is proportionate you look to the effect that the restriction has on the individuals involved. Is it limiting their right to work? Is it impacting their right to privacy or the right to protection of families and children? You would really take a thorough approach and consider all of the issues and not take for granted assertions made by any individual or group. It requires a considered analysis.

Senator BARNETT—Are there any overseas examples that you are familiar with?

Ms Schleiger—In Canada they take an approach similar to this. Also, the Victorian provision is based largely on the Canadian limitations provision and also the provision in the South African Bill of Rights. There are examples, but I might need to take your question on notice.

Senator BARNETT—If you are happy to do so I would be interested. In terms of the assessment as to who decides, who is best to decide what is reasonable and proportionate? Is it going to end up in the courts and that is up to the courts to decide? Those are words, I think we would all agree, that can be interpreted in different ways by different people.

Ms Schleiger—I agree that there is scope for interpretation and using values to come to conclusions of what is reasonable and proportionate. However, there is a list of other considerations generally to take into account that is more specific. It is also a term about which there is significant overseas jurisprudence. There are examples. One example is the case of Muslim female students in the UK who had issues regarding their school uniform. There was a girl who wanted to wear the full head to toe uniform and the school did not allow that. That was held to be a reasonable decision on behalf of the school, because the school had consulted extensively with the community. They had come up with a range of options. They had considered the views of the local mosque and the views of the female students at the school. There are definitely examples of that phrase being considered and implemented in a very commonsense way.

Senator BARNETT—But what about in terms of who decides?

Ms Ball—One of our other recommendations in relation to the operation of the limitations analysis was that the Human Rights Commission be able to publish guidelines on how that analysis would work to increase the certainty of the organisations. We would expect that there would be a fairly robust framework in place that the Human Rights Commission could set out to assist organisations in gaining some sort of certainty over what was a reasonable, proportionate limitation.

Senator BARNETT—The accepted concerns about the charter of rights are that it sets up rights but in doing so it also infringes the rights of others in different areas, whether it be freedom of religion in this instance or in whatever respect. When I ask ‘Who is to determine it?’, you are making a suggestion that the guidelines be prepared by the Human Rights Commission, and at the end of the day I guess it will end up in the courts and with, some might say, ambiguous wording but certainly wording that is open to interpretation. As a legislator that at least raises concerns, because people like to be sure exactly what the law means. This is an issue that we have to grapple with. The automatic abolition of the exemptions is a pretty bold recommendation that would cause us to consider very carefully the consequences.

Ms Schleiger—Ultimately decisions would be made by courts about these terms and the flow-on effect would be that they would influence how the provision would play out. But what we are advocating is no more than what already exists in relation to OH&S legislation and courts already play a role in determining that. That was something that also initially created some concern, because it was seen to be an onerous obligation perhaps. What we are saying is that the right to freedom from discrimination is very important, similar to the right to be safe in the

workplace, and it is something that is worthy of being given due consideration. In applying a human rights approach the idea is not to always give freedom from discrimination the benefit over all other human rights. The idea is to consider those competing human rights and to come to an appropriate resolution.

Senator KROGER—Being Victorian and observing the introduction of the Victorian charter of the bill of rights, my observation has been that it has created a very litigious environment. In many ways it has greyed the area of interpretation. I was going to follow up in relation to, for instance, sporting clubs, where you have very specific male and female dominated sports. Whether it is a male or female dominated sports arena individuals would be able to challenge those. I would suggest this process would encourage more referrals to the courts as opposed to diminishing those.

Ms Schleiger—We probably both have something to say about that. Ms Ball's point about the Human Rights Commission guidelines is very important. The idea of the codes of conduct is to give certainty to sporting clubs and individuals about their obligations. I do not necessarily envisage there being an increase in litigation. In fact, the opposite could be true. In Victoria there is the case of the 15-year-old girl who wanted to continue to play AFL football. She was actually relying on quite an obscure argument, because she does not have a right to make a claim on the basis of sex at all. Probably the AFL policy would be very different if this approach were adopted, and she would not need to litigate at all. That sort of litigation would, in fact, probably go away. I think that if there is a period of education then sporting clubs can have the opportunity to change their discriminatory policies and there would not necessarily be an increase in litigation. I think the idea of it is to encourage sporting clubs to not take a discriminatory approach rather than to encourage individuals to litigate more. That might be an outcome initially.

Ms Ball—As you know, the Victorian charter is a fairly new piece of legislation, so it is difficult to say what the effects of it are going to be. Similar legislation was introduced into the UK over six years ago now and they have done a study on the impact of that legislation on the length and cost of litigation and found that, in fact, it has not increased the length or cost of litigation. That indicates that perhaps creating a more litigious society will not necessarily be the effect of bringing a human rights framework into our legislation. That is the first point. The second point is—and I suppose this just repeats what we have said before—that, if discrimination is, in fact, unfair and unreasonable, Australia has an obligation to allow women and men to challenge those policies, and that is really what we are advocating. Does that answer your question?

Senator KROGER—Yes, it does. Then it comes down to, I guess, the interpretation of what is considered to be discriminatory, which comes back to whether or not these exemptions are discriminatory in their nature by virtue of being in there and whether it is appropriate or not to have those included in it.

Ms Schleiger—Australia has an obligation under article 5 of CEDAW to actively address social and cultural patterns of conduct that discriminate against women on the basis of the notions of the inferiority or superiority of men or women. Also, under CEDAW and the general comments of the CEDAW committee Australia has an obligation to ensure that women can actively participate in sport. I do not see taking on the definition of discrimination in CEDAW or

eliminating the exemptions as meaning the end of women's-only sporting competitions. I think there will still be a need for those competitions.

CHAIR—As to the research you just quoted about the UK example of not increasing litigation, is there a paper or a research document you could provide the committee with?

Ms Ball—Yes, of course. I am happy to send that through.

CHAIR—You are suggesting the act should contain a general prohibition on all forms of sex discrimination. How do you believe this would improve the effectiveness of the act?

Ms Ball—Currently, the SDA only covers, as you know, some forms of discrimination, and Australia's obligation under international human rights conventions is to address all forms of discrimination. We believe that there are currently types of discrimination that are left out of the scope of the act. The definition that we have suggested is the one that is used in article 1 of CEDAW. I am happy to go into that in more detail if you would like.

CHAIR—I think it probably goes back to the discussion we had earlier about reflecting on other international conventions—

Ms Ball—There are a few advantages of that definition in that it looks to the effect and the purpose of discrimination, that it capture systemic discrimination. We would also advocate that it be altered so that it would incorporate discrimination against men and women. But it has been accepted as a functional and effective definition of 'discrimination' not only by the CEDAW committee but by other human rights committees in the UN system.

Senator BARNETT—You are still only referring to sex discrimination. Do you think this should be consistent with the Racial Discrimination Act and the Disability Discrimination Act and should there be an overarching act to deal with all forms of discrimination or are you simply recommending amending the Sex Discrimination Act?

Ms Ball—We have addressed our submissions to the terms of reference, which were the ways in which we thought the Sex Discrimination Act should be amended to make it more effective. There would definitely be advantages to having some sort of overall equality act. One of those would be an enhanced ability to address compounded discrimination, which is discrimination which occurs on more than one ground of discrimination, such as sex and race or sex and age. This review is an opportunity for Australia to road test a more robust and effective way of addressing discrimination. We do not necessarily think that amendments to the SDA that we suggest should be stalled in favour of a long-term review. Creating a new equality act, or something like that, would we imagine be a fairly lengthy process and one that would require substantial consultation. We think that while that could be undertaken in tandem with these sorts of amendments to the SDA it should not happen instead of these amendments that we are suggesting.

CHAIR—Finally, in relation to the powers of the human rights commissioner, particularly, the sex discrimination commissioner, we had evidence yesterday that you might get a number of individual complainants about a particular issue in the same workplace that may or may not see through the end stages of finalisation, but the act is limiting because it does not then give the

commissioner the right to actually have a look at systemic discrimination, nor does it give her the power to actually initiate any investigation into systemic discrimination. You are suggesting that there should be additional investigative and enforcement powers for the Human Rights Commission. Is that to reflect some of the examples we have in our submissions to date?

Ms Ball—Yes, I think that is one of the focuses of our submission. Broadly, the problem is that discrimination does not just exist between individuals but is a product of more systemic issues. Giving the commissioner of the Human Rights Commission the powers to look into that, conduct investigations and come up with recommendations would be a really important way of promoting substantive equality in Australia. In fact, without some sort of mechanism that could achieve those results the effectiveness of any legislation to promote equality is severely limited.

Ms Schleiger—I agree completely. If you look to overseas examples, such as Canada and the UK, their commissions also have powers not only to investigate breaches but to conduct equality audits and to require the production of documents. Their powers are quite extensive.

Senator BARNETT—Are you based in Melbourne at the university? Where is your base? I have had a look in the submission and I may have missed it, but can you tell me some more about your organisation?

Ms Ball—The Human Rights LawResource Centre is an independent community legal centre that specialises in human rights law.

Senator BARNETT—Are you linked up with the community legal centres?

Ms Ball—We are a community legal centre.

Senator BARNETT—We heard from them yesterday.

Ms Ball—We are one of the number of community legal centres that exist in Australia. I imagine they have different submissions because we have a specific focus, and that is on human rights law.

Senator BARNETT—I seem to recall their submission yesterday was slightly different from yours in that you are recommending elimination immediately of the exemptions. I thought they wanted to phase it out, more consistent with the Human Rights Commission, which was to review over the next three years and then have some sort of sunset clause, but I might be wrong on that.

Ms Ball—You heard from the National Association of Community Legal Centres? That is a different body from us.

Senator BARNETT—Are you a member of that association?

Ms Ball—Yes.

Senator BARNETT—Are they familiar with your submission and are you familiar with their submission?

Ms Ball—I do not know whether they have had a look at our submission. I have not seen their submission.

Senator BARNETT—Have you looked at theirs?

Ms Ball—No.

Senator BARNETT—You have not signed off on theirs? Did you have any input into their submissions?

Ms Ball—No.

Senator BARNETT—Did you ask for input?

Ms Ball—No.

CHAIR—Would their client base be more individuals who are seeking access and action through the SDA? Do you deal with individuals in that sense?

Ms Ball—Much less than they do. The focus of our organisation is that we perform some case work but we also do work on a lot of policy issues both domestically and internationally.

CHAIR—Their submission may well have come from a hands-on day-to-day interaction with members of the public who are actually applicants to the SDA whereas yours is more a policy research based submission; would that be a way to explain the differences? When I read their little introduction in their submission about who they are and what they do, compared with yours that was the difference I saw between the two.

Ms Ball—Yes, that is what I would expect.

Senator BARNETT—How are you funded?

Ms Ball—We have a variety of sources of funding. We get some money from foundations and we get some funding from government grants and private bodies.

Senator BARNETT—State and federal governments?

Ms Ball—Just the state government. The state funding, I understand, is directed towards specific projects that we work on.

CHAIR—Thank you both this morning for your time and for your submission. It is much appreciated.

[9.47 am]

BARKLAMB, Mr Scott Cameron, Director, Workplace Policy, Australian Chamber of Commerce and Industry

MAMMONE, Mr Daniel, Senior Advisor, Legal and Industrial Affairs, Australian Chamber of Commerce and Industry

CHAIR—We have received your submission and for our purposes and for the purposes of Hansard the submission is No. 25. Before I ask you to make an opening statement, do you want to make any changes or amendments to that submission?

Mr Mammone—No, thank you.

CHAIR—If you want you can make a short opening statement to outline a summary of your submission—I am sure you know the process—and from there we will go to questions.

Mr Mammone—The Australian Chamber of Commerce and Industry welcomes the opportunity to appear and make submissions on an issue of significance to Australian employers. We understand that the committee has received a range of submissions from all sections of the community. It is thus equally important that this committee hears another compelling voice in this inquiry, that of business, who must ultimately comply with the myriad anti-discrimination laws on a daily basis.

The Sex Discrimination Act is an important part of the overall framework of Commonwealth anti-discrimination laws which, taken as a whole, imposes significant legal obligations on industry and which have contributed to significant changes in human resource practice within industry over the last 20 years. The underlying objectives and assumptions of anti-discrimination law that employees deserve equal treatment in employment enjoy an extremely high level of support within Australian industry. Human resource practices within Australian firms provide numerous examples of businesses providing leadership on EEO and diversity management issues and in introducing practices to minimise the risk of discrimination and harassment within their workplaces. Industry is committed to minimising discrimination and harassment. ACCI supports efforts to share this innovation and provide additional support to assist businesses in managing their equal opportunity and anti-discrimination obligations. There are numerous examples of innovation within industry that arise from the particular circumstances of each business. Greater information sharing will assist in providing more businesses, particularly small and medium sized, with the tools to show leadership and to consider innovative solutions that may suit their particular conditions.

Industry also recognises that balanced regulation has a role to play in combating discrimination and harassment. In our submission, we have constructively engaged with some of the legal and practical challenges employers face in complying with the current framework. Clearly, consideration should be given to increased harmonisation. We do have a framework of laws where there are multiple federal acts and generally a single omnibus act at the state and territory level. There are differences between these acts and, of course, each is subject to review

or amendment independently of the other. In this circumstance, greater coordination and possible harmonisation may result in a regulatory environment that is easier for industry to navigate. At page 5 of our submission, we note that the Standing Committee of Attorneys-General has placed this on the agenda, and we welcome the opportunity to provide input into that process.

However, the content of any set of laws is crucial. Industry's commitment to anti-discrimination principles requires laws that are clear, practical and balanced. In particular, employers require capacity to implement and make decisions that protect their employees from discrimination and harassment. At pages 13, 14 and 28 of our submission we have sought to highlight the continuing problem of double jeopardy employers face with examples of cases that highlight how difficult it is to comply with anti-discrimination laws and OH&S laws whilst not breaching unfair dismissal laws. With that opening, we are happy to assist the committee by answering any questions that you may have, including issues raised by other parties.

Senator BARNETT—Thank you for your submission and expressing your views. In terms of your submission, you referred to the SCAG inquiry and the importance of harmonisation. Firstly, can you describe the SCAG process to us as far as you know it and whether you are aware of the time frames in terms of report? I asked this question yesterday and we have not got an answer yet in terms of a reporting timeframe under the SCAG review. Secondly, as a key industry body and a key stakeholder, have you been consulted during the SCAG review?

Mr Mammone—I am not sure who the witnesses were prior to us, but obviously the state and territory governments as well as the federal government have convened the SCAG process. We are only aware of the latest communique. We noted the previous communiqués. But the one of 25 July basically agreed to a course of action with an anti-discrimination law harmonisation working group, as they called it, to identify options for harmonisation in the short, medium and longer term. Taking into account Commonwealth, state and territory policy initiatives, we were aware that some states have looked at reform in their own anti-discrimination framework. However, we are not sure of the timeframes that SCAG has set. But as we noted at page 6 of our submission, we have urged that any review of anti-discrimination legislation by SCAG not disenfranchise other stakeholders outside of government. We understand SCAG is predominantly a government body. In relation to your second question, ACCI has not been formally invited. We are not aware of any open or public consultation process that SCAG has initiated to date.

Mr Barklamb—I think it would be useful for the external non-governmental interests in this area, be they those representing employees, ourselves, or those representing others with a broad interest in anti-discrimination law, to know exactly the things you raise about the SCAG process and to have open avenues to have input to the attorneys-general. I think you raise a significant concern. SCAG would assist all those with an interest in this area if the process and timeframes were clearer.

CHAIR—We did hear yesterday though that people were perhaps unsure of the SCAG process and had thought at this stage only one or two states had come on board in the harmonisation of the discrimination laws. That is a question we will ask the AG's department tomorrow, but it does not seem as if it is up and running at all, let alone in full swing, or at a public consultation stage. I am not quite sure, in fact, that it has progressed very far given what we heard yesterday.

Mr Barklamb—We would be interested to see the progress of that further. We made the point here that there was some opportunity. The senior law officers were talking about options for harmonisation. We have the two processes running in parallel with this committee and the efforts of the attorneys, both of which offer some opportunities to look at the fundamental opportunities for harmonisation and restructuring.

Senator BARNETT—You have referred to the communique on 25 July, which is nearly two months ago. As far as you are concerned, you have not as yet been consulted. Is it your view that it is a necessity that, as a key stakeholder, you be consulted in the harmonisation process review that is being undertaken, and not only yourself but other key stakeholders? Can you confirm that?

Mr Barklamb—We would think that was very important not only for SCAG but also for the variety of COAG things where government is dealing with the states that the complying interests, be they business as in this case, and the protected interests, be they employees and individual claimants, have an opportunity to input processes and that there is a proper role for exchanges between attorneys and senior public officials but also of the direct interests that comply and use laws.

Senator BARNETT—We are meeting with the Attorney-General's Department tomorrow. We will be able to ask them as to their views and their plans for the future. I appreciate your response in terms of the importance of being part of that process. In your submission you have referred to what some people call 'go away money'. Under the section 'problem areas' with the SDA on page 11, you referred to spurious claims and, on page 12, to forum shopping. Could you expand on the problems as you see them under the section 'spurious claims' and how that impacts upon your members? Secondly, there is the forum shopping issue. Can further expand on those problems with the SDA as you see them?

Mr Mammone—I welcome the question, because it is a very relevant concern for all businesses whether you are small, medium or large. The main problems that employers face is that they may have a set of circumstances that will give rise to a possible multiple legal action, one part of which could be a possible breach of the SDA. Others could be breaches of contract agreements. It is very difficult for the employers to know in advance what law they have actually breached, whether they have breached a state law, federal law or any other law, until it actually goes to formal determination proceedings. The same set of circumstances can give a claimant the possible opportunity to take action, say, in Victoria at the Victorian Equal Opportunity Commission under the Victorian act or under the SDA perhaps. If they have been dismissed they may also take proceedings, in some cases, to the AIRC for unfair dismissal proceedings or commence proceedings at the Federal Magistrates Court or the Federal Court for unlawful termination proceedings depending on the factual matrix. But it is concerning that an employer has to navigate through that legal minefield. It goes without saying that some are more resourced than others. We have particular concerns for the small and medium sized sector, which are not equipped with perhaps the human resources capacities and recourse to legal advice to manage that. We have had experience in the unfair dismissal system for over a decade where employers faced with a claim will simply pay at conciliation stage to make the matter go away whether the claimant has a strong case or not.

Senator BARNETT—You are talking about ‘go away money’ as it has publicly been described and in other forums?

Mr Barklamb—Absolutely. There is another dimension to this that I might add to before Mr Mammone finishes. A lot of very major companies make very significant efforts and investments in this area. There are quite sophisticated internal processes to deal with complaints and grievances, and quite clear communications about avenues to address equal opportunity and Sex Discrimination Act harassment-type complaints. They take their reputational efforts in this area very seriously. When claims emerge, often speculatively, as we have said, as part of a dismissal or performance management-type processes, there is an extra effort to settle. They are not necessarily about making solely a financial calculation. There is a reputational calculation involved. Even if the company believes its processes were entirely compliant and would navigate the litigation successfully there is an extra incentive to settle.

Mr Mammone—I think those were the main concerns.

Senator BARNETT—Can we just drill down a little bit in terms of the detail? You referred to the issue of double jeopardy as well. I presume this relates to unfair dismissals or termination arrangements, where you have the industrial relations concerns of a hearing and then you have a hearing regarding the Sex Discrimination Act? Is that what you mean by double jeopardy?

Mr Mammone—There is double jeopardy in that sense, and there is forum shopping in the sense of the claimant choosing in which jurisdiction to take their case. With regards to double jeopardy, on pages 13 and 14 we have alluded to a number of recent cases. There are many cases, but these are some of the more pertinent ones that come to mind, where there are clear policies in place in a company and the employer has legitimately tried to enforce a policy that prevents discrimination or sexual harassment and in doing so has then been subject to unfair unlawful termination proceedings in another jurisdiction. This is a real concern because employers are trying to comply with their anti-discrimination legal obligations but at the same time they do not know whether they will be made subject to further litigation down the track. Though the three cases are probably at the extreme end, they are cases nonetheless.

CHAIR—I have read those three cases. In fact, I am familiar with one of them. You have an example of where, if the woman had taken action, it would clearly have been in breach of the SDA, but in this case the man has taken action and was found to be unfairly dismissed and so the commission has ordered reinstatement of his employment. In that sense, are you saying the SDA or the Workplace Relations Act somehow need to be better harmonised so that if you want to take action under one act, or are seen to be complying with one act, the other act should actually complement or support you?

That leads me on to the next question. We have seen in some of the submissions, particularly from the Human Rights Commission, that there should be a more positive role, which probably does not answer the question about double jeopardy. If, in fact, businesses were asked to have a gender equity plan, and I see what you are saying: you may well have the gender equity plan and you may well say, ‘We won’t discriminate against women, men, and we won’t tolerate sexual harassment,’ but then, on the other hand, in the commission you are being ordered to reinstate people who may have clearly breached those policies. How do we get over that? Is there a need to strengthen the Workplace Relations Act?

Mr Barklamb—I think it is clear in the cases we are talking about that when the unfair dismissal is being taken by what you might call the alleged harasser, the person who is causing us concern with our compliance in the other area, and our protective duties in law are morally to protect people from hazard and harm and harassment and exposure and the like. I will leave the second part of the question to be answered by Mr Mammone about the positive duty and positive role. This harmonisation matter is not one I have thought through fully and it is good that we are having the committee teasing out these matters out. It would be useful to us if action were taken in direct response to formal complaints for harassment or actions that are being taken by us in furtherance of compliance with other areas of law had some presumption towards fairness in dismissal or were matters that any determining body was directed to take into account. It is exactly these situations we have on the page here. The other one, obviously, is a little off our brief today, which is where somebody is breaching safety guidelines. We are very concerned about our OH&S compliance and our duties in that area. What do you do with an employee who will not observe safe work, observe the need for personal protective equipment or who even endangers others? But these are precisely the—

CHAIR—But there is a difference there, isn't there, because under my knowledge of work safety acts the liability is equally on the employer and the employees. If the employee fails to take safety precautions as well, they are equally liable, aren't they, and can be fined and penalised as can the employer?

Mr Barklamb—I am not sure that is necessarily a difference because, as I understand it, there are some personal liabilities for harassment and discrimination in some areas as well.

CHAIR—Only if a case is taken through the SDA and is found to be proven; is that not the case?

Mr Barklamb—Perhaps we might come back to that. Perhaps we can clarify what the actions against the individual harasser are as well as the company that is said to owe a broader duty. But to go to that OH&S point very briefly, as I understand it, rarely are prosecutions taken against what you might call employee peers. But in the way that was expressed, it is a shared responsibility between the employee and employer and the employee who is potentially not observing the safe behaviour. The employer still has a safety duty there that they cannot absolve themselves of that they are trying to control and ensure in the workplace. I apologise if I have made that point in a slightly roundabout way to the question you have asked. The second part of your question was about the notion of a positive role or duty.

Mr Mammone—As I understand it—and I hope I have got the question correctly—positive duty is in the sense of something different from what is now prohibited direct discrimination. The difficulty for employers is knowing exactly what their legal obligation is and how to comply with it. If there is a general amorphous obligation on employers, particularly vicarious liability, it would be very difficult for the employer to ensure that they comply with it. We have tried to put in our submission some of those practical and legal challenges. One is the issue of policies. Employers support putting in place clear, well structured policies to prevent discrimination and sexual harassment.

Unfortunately, in recent cases in the Federal Court—and we have quoted two: Riverwood International and McCormick and Goldman Sachs JB Were Services, on page 27 of our

submission in the footnote—we have a situation that, although we have a policy in place, we may be as employers subject ourselves to potential litigation for breach of contract if we express it in a way that it becomes a term of a person's contract. It is a worry because now employers are re-looking at their policies to—I do not want to say water down—make sure that they are not expressed in such a way that they will expose themselves to potentially massive claims in the Federal Court jurisdiction, which is another concern. It relates to that double jeopardy challenge that we have.

CHAIR—There are two issues really, aren't there? The ACTU yesterday suggested that there should be a role for an equal opportunity workplace agency, for example, to maybe not enforce but suggest businesses had equity plans or sexual harassment policies. I guess some businesses do. Let us say, for example, the act stipulated that you had to do that. You are saying that would be very hard to do unless there was an education opportunity for businesses; businesses were better informed about their obligations. There is a whole notion of compliance and information needed. But is not the second issue the real issue, that you can have a very strong sexual harassment policy in your workplace, but there can be instances of where that policy has been breached—even if you had zero tolerance—and the Industrial Relations Commission has ordered the person reinstated to the workplace? How do you get over that problem as well unless you strengthen the Workplace Relations Act? Shouldn't the Workplace Relations Act complement the SDA in some ways to strengthen your position here?

Mr Barklamb—There is certainly a sensitivity to compliance with other areas of law. I think that was the way I put it before. We think it would be a material consideration in termination claims. We need to think further about whether there was an express direction in the act, but we think where we are taking action in furtherance of our compliance with other areas of law or obligations upon us that should be presumed to be fair or carry extra weight—

CHAIR—And currently it is not?

Mr Barklamb—There are various notions in the industrial relations legislation relating to a fair go all around. The way it is expressed is that there is a fairly general duty not to dismiss harshly, unjustly or unfairly, but you would still see developments in certain cases. The three we have put are at the extreme from the New South Wales jurisdiction, which yields cases of a certain character of outcome on occasion. But there is certainly an enduring concern for the people who are clearly within the federal system for their termination claims. As to the question about the incorporation of policies and the use of policies, as I understand it policies are at once best practice and a material consideration where litigation does emerge in discrimination cases, so it is a consideration as to whether you have a policy. That does carry some understanding of the extent of the formality of the workplace and the size of the workplace and the like. Perhaps I am speaking a little off the cuff, but policies have to be a function of the workplace concerned. To be more than a piece of paper, they have to be a living part of the culture of the workplace. A sort of uniform obligation to have a policy probably would lead to pro formas or really to their not being as effective an instrument or tool in discrimination compliance and cultural change as they could be. That is one concern we would have.

The concern that Mr Mammone was going to was in the Nikolich pattern of cases and the incorporation of policy documents into someone's contract of employment, and damages arising from that. That is making employers very shy of policies. The proposal from the ACTU

yesterday would raise very significant concerns in corporate Australia about this very recent passage of cases. I think it would be prudent for companies in those circumstances to have every word of those policies tortured by lawyers. A very legalistic, almost contract style document is probably not going to be of a great deal of assistance in the actual outcomes you want in discrimination and harassment compliance.

Senator KROGER—One of the phrases that has been used—and I put it this way for reasons that will become self-evident—is ‘systemic discrimination’. Further to what you have just said, is it possible that in the approach that has been taken to compliance because of essentially a total conflict in complying with different acts and jurisdictions that the so-called systemic discrimination is being furthered by virtue of the fact that employers are actually having to respond in a defensive position to situations they cannot in any reasonable sense be able to comply with? For instance, with your double jeopardy, which I have read, if you dismiss someone on the basis of sexual discrimination you are actually being whacked over the head for doing that, and so an employer’s response to that will be a potentially narrow way of further employment to protect their current employees. The so-called system discrimination is not a material thing that is created by the employers, it is actually as a result of the practices and trying to comply with conflicting practices?

Mr Mammone—We take your point. We are curious as to what happens in a workplace where the commission has reinstated someone who has been found within that jurisdiction to have committed acts that could be described as discriminatory or sexually harassing in nature. What happens to that workplace culture when that person goes back to work on Monday with the same people? What happens to the colleagues or the victims in the case? What happens to them? I do not think there is any data or information on that. It is just anecdotal. But we can only imagine that it is not good for anyone in that situation.

Mr Barklamb—I am not quite sure what systemic discrimination is. It is another way of—

Senator KROGER—I have heard it this morning. Neither am I. I am throwing it out there, which is why I used the phrase, not necessarily as a description—

Mr Barklamb—Thank you. If it means indirect discrimination or something like that, that is a different debate. I would not want to overcook the point we made earlier about a too-narrow compliance focus from employers. We think the existing legal structure allows employers, with concerns from particular cases that may emerge, to make policies live, to allow people to construct policies within workplaces that reflect their cultures, the actual ways they work, et cetera, but a more universal obligation to policy. More universal obligations to structure policies are going to lead into ticking the box; to a narrow compliance focus. To the extent that systemic discrimination or systematic discrimination might mean something in that context it might be that employers become robbed of their ability to creatively address cultural change in their workplace.

Senator KROGER—I think the application of the phrase ‘systemic discrimination’ certainly this morning has been on the basis that there is a cultural problem or issue within an organisation. For what it is worth, my observation is that most employers want to do the right thing because it is ultimate in their interests. It is certainly in their employees’ interests. But it is in their interests in terms of running the most profitable business. It is actually in their interests

to have the best practices that support employees. From your observations this morning, am I right in suggesting that your belief through your submission is that the best way that we can strengthen the current practices to support employees and further support the act is in terms of the harmonisation of the different acts and to ensure that one does not work against the other?

Mr Barklamb—Indeed. I think the key things are—and we have a number of them up the front of the submission—harmonisation, clarity for the complying party, the employer, about what actions they can take to address discrimination, giving them positive powers to deal with matters and concerns that do emerge. It is not a trite point. We have had 20 years of a litigation focus of this. The legislation has done quite a deal of work concurrently with generational change, cultural change in management. It is a time to further promote, encourage, educate and start to think about distilling down quite important and major work in big businesses on diversity, on cultural change and the like, and thinking about how to spread those lessons to the small and medium sized enterprises.

Mr Mammone—You could have a business that has all the best policies, practices and seminars in place. They have spent a lot of money and resources in trying to be a model employer in this regard, yet you cannot stop an employee engaging in unlawful conduct. With the best will in place you cannot stop that from happening. What we tend to see is that the employer ultimately does have the biggest pockets, and that the complainant will commence action against the employer under vicarious liability provisions instead of the actual offender. Perhaps there is some strengthening that could be done where it is not there. We have not quite addressed this in our submission. It is apparent to us as we have been listening to the questions from senators this morning that there needs to be an emphasis across-the-board. Employees, the public as well as employers need to have the best systems in place, and the culture will change. That will only filter through at the top and bottom level once those are addressed.

Senator KROGER—In your experience, what size company is most exposed? Is it larger employers, over a couple of hundred? Is it medium sized businesses or smaller businesses? Who do you think are most exposed in terms of complying and being exposed through that compliance?

Mr Barklamb—I do not think there is a single profile of businesses. Particularly if you are thinking about sexual harassment, it is often a one-to-one interaction. It can be a one-to-one interaction in Australia's largest company or Australia's smallest that can lead to harassing behaviours. Mr Mammone expressed it before, that in terms of a person or individual in our society in their capacity as an employee harassing another, that subset of people prone to that behaviour is found throughout the strata of our society and throughout our workplaces.

As to the non-harassment elements of discrimination, such as negative preferences in employment, failures to promote, failures to remunerate, et cetera, I think big businesses are well aware of those things. They are not only aware in a compliance sense; I do not come to you today and say that the diversity movement in large businesses in Australia is a very significant one. I think it is quite genuine in terms of cultural change. There is a commitment to the best workforce possible in a tight labour market. I mentioned before that I think there has been both generational change and attitudinal change in different profiles of management. Indeed, we are standing in the building with someone today who educates managers in a range of ways as do our members. The bigger businesses are better set up to understand the various dimensions—and

they are spreading—of discrimination law obligations and of promoting cultural change. They have the most efficient internal systems. By the same token, the smallest of businesses often can be quite direct. A proprietor can lay down the law effectively about how things are going to be here. You can lay down the law very positively about how work is going to be undertaken. At a guess, I would probably say it is the small to medium-sized enterprises that would have the most exposure and lack of familiarity and so on in this area. Small to medium sized enterprises are not subject to different damages or different obligations in these areas. The damages can be quite significant for them.

Mr Mammone—We would also be concerned about this: we noticed that our colleagues at the ACTU and others have raised this notion that the HREOC or a body should be ‘beefed up’, for want of a better word, with cohesive powers. The ACTU basically said that HREOC should have powers akin to the ACCC, with coercive information-gathering powers and so on. On a sidenote, we find it quite trite that the ABCC should not have those powers but a body like HREOC should.

We do not think that would assist small- to medium-size businesses in having that cultural change or complying with obligations in this area, particularly if the obligations are changed to some sort of amorphous positive duty. As I was saying before, it is very difficult to know what those exact legal duties are. If a body walks around with a big stick behind its back with those powers, we believe that is not a positive step forward.

Senator BARNETT—Yesterday we had some witnesses who said to us that businesses should compulsorily maintain a plan and a program for acting in a non-discriminatory manner. I am not sure whether you are aware of the ACTU submission that supported that view and which they presented to the committee yesterday. You touched on it earlier. I would like to get your response to that. I would be particularly concerned about small and micro businesses and the impact that may have on them. In supporting their view they referred to the occupational health and safety laws and how that applies across the country and if it can happen for occupational health and safety then surely it can happen in terms of sex discrimination matters. Can you respond to that?

Mr Barklamb—I do not want to use the word ‘compliance’. Surely sound, equitable treatment in workplaces has to be able to be navigated with commonsense, decent treatment and the sorts of values that are exhibited on the street? You should only be getting into trouble with these laws with poor behaviours, attitudes, deficiencies or the like. There is a complete contrast, in our view, to safety. There are inherently risky activities in manufacturing, transport—any number of things—that need a positive plan to be undertaken safely. Work inherently does not need a positive plan to be undertaken in a non-discriminatory manner. A number of companies may have plans or processes or policies in place. That may be how they address or they believe it is necessary to address cultural, anti-discrimination and avoidance of harassment style issues, particularly large, complex companies with multiple management or co-employee interactions on a daily basis. For example, if I am roofing on a city building site, there are safety concerns and I need some policies and plans and practices around it. If I am roofing on a local building and I am a two-person builder, I still need policies, plans and practices to do it safely. If I am a major company that goes into that building in the city I may well need quite sophisticated approaches to discrimination, management, EEO, and the like. If I am a small builder I might just be able to make some commonsense patterning of how to do things. I might be able to make

some cultural changes that are quite personally led. As I think we mentioned earlier, we would be very concerned that any compulsory plans and the like are simply additional costs to small businesses, additional regulatory burdens. Quite frankly, I mentioned tick-the-box style things before. They will simply become an exercise in compliance and will not contribute to further cultural change and awareness and diversity and the like, but will also be potentially resented because they cost money or will be quite narrowly complied with and put away. I think it is a far more powerful notion to see a more diverse workplace, to see a more diverse ranges of people in work and the benefits they provide in your company and in your peer companies and to hear personal stories of successes. A number of our members promote the employment of young women in non-traditional trades. I would have thought those lessons are far more powerful in small- to medium-sized enterprises than being forced to deal with compliance plans and fill in forms.

Senator BARNETT—Thank you for the three examples that you gave, which are deeply disturbing. They are obviously on the public record. I do not know whether you have had any feedback from those organisations in terms of how the organisation was affected by the fact that these people had to be reinstated notwithstanding their behaviour. If there is any further evidence that you can provide we would welcome that.

Mr Barklamb—I have not, but I have often thought if I ever had a spare six months or long service leave, I would like to get on the phone and ring a number of these companies in these high-profile cases and ask for the people concerned six months later and see if they are still there. There is another dimension to ‘go away money’. I say this completely without prejudice to the three cases here, but even where cases have been lost and reinstatement has been ordered I wonder whether ultimately accommodations are reached and people do leave, say, months or years down the track.

Senator BARNETT—That is a good point. Finally, you have talked about the importance of harmonisation of federal and state laws. Do you have any particular concerns about any particular state legislation? We had reference this morning to the Victorian charter of rights, which Senator Kroger referred to and was discussed by an earlier witness. The question was raised about the very broad definitions used and the potential for increasing litigation rather than decreasing litigation. Do you have any particular concerns about any particular state law that you want to draw our attention to in regard to the importance of harmonisation and perhaps smoothing off the rough edges?

Mr Barklamb—We might actually have to think about that a little further. But whatever happens, the harmonised model has to be clear, concise, communicable to business and able to be complied with. The charter of rights I had not put my mind to. Perhaps my colleague might want to mention it. There is a recent change in Victorian anti-discrimination law—positive duties towards persons with family responsibilities. We note that that comes in a fairly open-ended manner in Victorian law. There were a number of duties already around gender and family responsibilities that did not need the additional graft on, arguably. This has only come in in recent months. We might perhaps forward to the committee the amending legislation that put this on. That might be useful to you.

The other thing is that that amending legislation in Victoria comes in the context of the planned national employment standards, which the government is planning to put in around

family responsibilities and rights to request. Just as an example—and this is not solely coming out of the sorts of laws we deal with here—on page 47 of our submission we have put in the quotes from the Forward with Fairness policy of the government. One of the new national employment standards that is intended is a right to request flexible work for parents. What we are potentially facing in Victoria is—

Senator BARNETT—Is that No. 3?

Mr Barklamb—That is No. 3. Subsequent to this there has been a release of the more detailed legislative proposals around these, but they are in fairly plain English. They are not expressed in a lot more detail than this. The problem potentially for people in Victoria is that you are going to have a new obligation in the national employment standards and you are going to have this new extra anti-discrimination obligation in Victoria. We are again concerned about double jeopardy there. In terms of your question about a specific state that has concerns for us, you have mentioned the charter. We had not turned our mind to that but the changes to the Victorian Equal Opportunity Act are potentially in some collision with this new national employment standard.

Senator BARNETT—That is a good point.

Mr Mammone—The human rights charter in Victoria, as I understand it, applies to the government and government agencies in implementing their work. There is an obligation on the court to interpret laws consistent with that. But the issue that my colleague has raised is very pertinent. The new national employment standard that will come into effect in 2010 has a positive obligation on an employer to refuse a request for flexible work on reasonable business grounds. The problem that we have alluded to before will come up again. If an employer refuses on reasonable business grounds within the letter of this law, what will stop an employer from commencing an action for anti-discrimination? Once again, if that is not addressed legislatively, there is no confidence that an employer acting within this law is not exposed to another law.

Senator BARNETT—Can I draw your attention to page 34 and 35 of the Human Rights Law Centre submission 9.3, where they refer to the Victorian charter. They specifically referred to section 7 of the Victorian charter in terms of guiding their objective, which was to remove exemptions that applied under the SDA currently and to remove them and to apply the principles set out in section 7 of the Victorian charter. It was their recommendation to this committee that we go down that track. I just draw that to your attention in terms of the relevance of the Victorian charter and the Victorian framework.

Mr Barklamb—Thank you. We will have a look at that. That brings up a whole other debate about bills of rights and consequences for various legislation of the parliament.

Senator KROGER—I have to say that what I have got from your submission is actually quite simple: it is the need for positive reinforcement not compliance in our whole approach.

Mr Barklamb—I think that is exactly right. We believe that there is a fairly adequate web of compliance obligations in the law as it stands. It is fulfilling a changing role over time. It had a highly remedial focus when it first came in. We have had cultural and generational change, as I have mentioned. It now has a safety net focus to address concerns when they emerge. We think it

still carried some quite harsh consequences for employers that do not make cultural change and do not manage situations correctly. We think there are a couple of things to address potentially within the existing framework rather than fundamentally extending it, and that is options for harmonisation and thinking about our practical capacity to address concerns when they emerge.

CHAIR—You are also saying to us and giving as evidence that even where there are those plans the industrial relations regime does not necessarily back those plans and the enforcement of those plans or policies?

Mr Barklamb—It is a generalisation. A lot of things are generalisations in these areas. But emerging generations of management are quite familiar with, firstly, their own life experience; secondly, the moral imperatives towards diversity and opportunity and fair treatment; and, thirdly, the legal risks of not properly managing this area. Faced with harassment, the idea of closing ranks around people is probably a lot of the time a thing of the past. People really want to take action when the alarm bells are rung on sexual harassment or discrimination. That is the sort of demand we hear about quite regularly. It is just about empowering employers properly to be able to do so.

CHAIR—Thank you both for your time. I think it has been a very valuable discussion and we appreciate that.

Proceedings suspended from 10.36 am to 10.55 am

PANAYI, Ms Michelle Claire, Manager of the Law Institute of Victoria Legal Assistance Scheme, Public Interest Law Clearing House

TINKLER, Mr Mathew, Acting Executive Director, Public Interest Law Clearing House

CHAIR—Welcome. Thank you for your time this morning. You have lodged a submission with us that, for our purposes, has been marked No. 31. Before I ask you to make a short opening statement, do you want to make any changes or amendments to that submission?

Mr Tinkler—There were a couple of minor typographical errors but nothing substantive.

CHAIR—We will let those go through to the keeper. I invite you to make an opening statement and then we will go to question.

Ms Panayi—Thank you for your time this morning.

Mr Tinkler—Thank you for having us here. We are very pleased to have the opportunity to appear today. I will make a very brief opening statement about PILCH. Our role is to consider and refer applications for pro bono legal assistance. People who cannot afford legal representation or legal aid come to us and we then refer, to barristers and members of private legal practices and law firms, work that is in the public interest and where representation otherwise would be unable to be acquired. In doing so, we see quite a lot of cases where people ostensibly, normally, would not be in a position to afford legal assistance—particularly, for example, with sex discrimination. They might have a strong legal claim but they will not qualify for Legal Aid, because there is quite strict means testing and merit requirements. Nonetheless, they will have a valid legal claim and need assistance in negotiating the legal system. That is basically our role.

Our submission and our experience relate mainly to sexual harassment. However, having said that, many of our observations can apply to other forms of sex discrimination. Our submission concludes that the Sex Discrimination Act, although well intentioned and having made some very positive steps, really fails to prevent and eliminate sex discrimination in Australia and, in doing so, Australia fails to meet some of its human rights obligations. In particular, we have focussed on the nature of the complaints based system. The HREOC Act and the Sex Discrimination Act establish a complaints-based model, as you would be aware, where a complaint will be lodged with HREOC and might be settled with conciliation. In the event that it is not settled, it will proceed to the courts, where it most likely will be listed for mediation or conciliation again. So our submission focuses on this two-tiered complaints model.

Before either HREOC or the courts, the outcome of conciliation will usually remain confidential between the parties. Often, the terms of confidentiality agreements are quite onerous and prevent discussion of the matter; we say they also prevent the development of jurisprudence in this area of the law. We think that this two-tiered complaints model is really hampering progress in eliminating sex discrimination.

We have listed in our submission a number of factors, which we think are limiting the effectiveness of this model. The regime is adversarial and confronting. Essentially, it treats discriminatory conduct as a personal dispute between two parties rather than as an unacceptable act. Also, it relies upon the ability of an individual, in particular, to understand a fairly complex area of law, to elect to make a complaint and then to pursue a remedy, while also assuming that the individual has the resources and the capacity to do that. Particularly with sexual harassment, we say that often there is an inherent power imbalance in the relationship between the complainant and the organisation or the person who has committed the act and people who are often in positions of power or seniority over victims of sexual harassment.

We also note that, while conciliation is intended to reduce the need for legal representation, it is often the case that representation will be required. In our experience, very few victims of sex discrimination and sexual harassment have the means to afford representation and even fewer qualify for a grant of Legal Aid. We also say that the sensitive nature of sexual harassment and its impact upon a complainant mean that the formality of legal representation is often desirable for many victims.

We have noted also that the complaints based process can be very traumatic for victims. Often it is associated with adverse publicity; it is prolonged. If an outcome is not achieved at HREOC—and often it is not—they will be forced to go through a very similar process again in the courts and, unless it proceeds to a formal hearing, there is very little prospect of a binding decision. Victims also face the prospect of leaving their workplace due to factors such as inappropriate handling of the case and lack of rehabilitation and support for victims. We note some figures by HREOC that say only seven per cent of complainants—people who have made a complaint—still work for their employer.

As a result we see a lot of people coming through who have been advised or who elect not to pursue a complaint. We think this leads to underreporting of sexual harassment, in particular, and a failure to identify the systemic issues that are occurring. In addition, many employers use internal grievance policies. Such policies may be well intentioned, but often they are unregulated and lack quality control. Also, there is potential for conflict of interest, if an employer conducts a procedure and later is party to a conciliation or a legal proceeding; and there is not necessarily development of the complex theories that are involved in these cases. We also note that, in our experience, the 12-month limitation period is far too short and does not take into account the complex factors of these cases.

We have submitted a number of recommendations to try to address these issues. Our primary submission is that we think the complaints based model should be rethought. I note some of the other submissions and evidence before the committee has been that HREOC, for example, should have the power to investigate in systemic cases of discrimination. Our proposal is that HREOC should have that power for individual complaints as well. While we agree that systemic issues are a problem, we think that, if the power is limited to systemic issues, it really elevates several instances of sexual harassment to a level above a single instance of sexual harassment. So, if you are a victim of sexual harassment in a workplace, you cannot have HREOC investigate your complaint; but, if three people are harassed or if it is industry wide, you can. We see that as a double standard that is not really desirable.

I noted discussion was had this morning that the act should have regard to the need to eliminate sexual harassment and should promote equality of opportunity by creating positive obligations for employers to report serious instance of sexual harassment and take reasonable steps to ensure the reintegration or rehabilitation of victims into the workplace. We have also noted that HREOC could be authorised to make binding codes of conduct for certain industries.

We have made some other submissions. The primary one of those, as far as PILCH is concerned, would be that community legal centres and specialist legal centres be adequately resourced to assist complainants in negotiating with HREOC in a complaints based or investigative process. Ms Panayi and I are happy to take questions. Ms Panayi has particular experience with victims of sexual harassment and the complaints process.

CHAIR—I am particularly interested in problems you have encountered with the complaints based system. Would you take us through the main difficulties that victims encounter with this system and where you think improvements should be made?

Ms Panayi—Can we go right to the very beginning of when a person experiences sexual harassment?

CHAIR—Sure.

Ms Panayi—This is from victims, councillors and also legal experts in the field. From the very beginning, when an individual experiences sexual harassment, reports have been made that they do not know who to talk to, they do not know who the organisation's contact person is and they have had no sexual harassment training. It has reached a point where there has been an escalation in the sexual harassment because they did not even know at the very beginning that what they had experienced was unlawful conduct.

I will talk about the external complaints process and then about the internal investigation procedures within organisations. Victims have said that going through the external complaints based process is too traumatising. It is extremely stressful to have to embark on legal litigation to have their case looked at in trying to resolve the issues, enforce their rights and feel as though they are standing up for themselves. It is extremely problematic. Our advice is that you will need representation in going to conciliation because of the unequal bargaining power that is involved. Often the other parties have access to legal representation and, in some cases, high-powered representation. Given the mental health state of the complainant at the very beginning—often they are suffering from depression, post-traumatic stress disorders and/or anxiety adjustment disorders—you cannot expect someone in that condition to go without legal representation. However, on top of that, even if they have legal representation, to expect them to go through the external complaints process is a big ask.

We cite in our submission a situation where a victim went through the external complaints process and was vindicated at hearing but, due to the trauma of the sexual harassment that took place and from undergoing the hearing process, she ended up having to be detained in a psychiatric unit. This is not difficult for us to understand. A lot of victims talk about it when they are going through sexual harassment, and this is at all levels. With some, it involves going to the point of sexual assault. With others, it has been consistent sexual propositioning to the point where complainants have gone on interstate business trips with partners in the organisation,

business or even law firm and have been pressured to have sex. In one situation a victim had her work colleague knocking on her door at night, wanting to have sex with her. So it is quite widespread in terms of what is taking place and it is very difficult for them to speak out.

The other reason that it is very difficult for victims to go through the external complaints process is that they fear they will lose their jobs. They fear the publicity that the case attracts. They feel that no one will want them if they know this has happened to them or they have spoken out about it. Victims of sexual harassment can be likened to whistleblowers where they can be seen as troublemakers. They are concerned about the impact that their going through this process will have on their future career. In effect, going through the external complaint process also puts their life on hold. That is because they are dealing with the stress of going through litigation in addition to the stress of dealing with what has happened to them, from which they may not have recovered yet. Certainly, in some cases, it puts their recovery in jeopardy. That is with the external complaints process. Also we know that sexual harassment cases attract publicity. Certainly, when these cases go to hearing, the names are not suppressed. Details of the evidence being given are out there for the public to see. They are also considerations to keep in mind.

CHAIR—Can you request that the evidence be suppressed or remained confidential to the courts?

Ms Panayi—My understanding is that, under the Federal Magistrates Court Act, an application can be made to a federal magistrate seeking that the identity of a witness or a party to the litigation be suppressed. However, from the information I have received from experts in the field, that is not easy to obtain. From the very beginning, a person who is going through this is extremely traumatised and extremely anxious. They need legal advice at the beginning to the effect that, ‘If you go through this process, it will be okay; you will be de-identified.’ The psychological impact of being identified is huge, so that needs to be taken into consideration. I was going to put to you for discussion that, where matters are going to hearing, the complainant should be de-identified and they should know that straight up in the process. The publicity and being identified is also putting people off from going to hearing. Given the sensitive nature of what we are dealing with and the added issue of it being in the public arena, the public sphere of their life is being affected. I am concerned that this issue has not been raised before. I am concerned that these complainants are being identified. In one case we have in our submission, *Lee v Smith and Ors.* the sexual harassment was across the board, with the display of pornographic images and inappropriate propositioning right through to a rape taking place. That victim has been identified, and I have concerns about that.

Also, at the other end of the sliding scale, they should still be de-identified. When I talk to victims about this, I find that, even where it has not got to the level of, say, sexual assault or offences under the Crimes Act, the psychological impact being had by the victim is, in many respects, the same as if it had—feeling traumatised, having a sense of isolation and alienation, suffering from and being impacted by the depression that is involved. Victims have told me to tell you that it is not only the impact it is having on them but also the impact it is having on their children. When they are going through this, they are not in a position to be as loving, as caring and as attentive to their children. There is the impact it is having on their partners, their relationships and their parents, particularly where their parents are elderly. There is also the

impact that occurs later on in life for a complainant, which affects their ability to sustain intimate relationships and to go into future work places and feel safe.

There is also a problem in that they know confidentiality agreements might be used as a means of settling, and they are concerned about that. This is a real concern also because it has been used a lot with internal grievance procedures. With the confidentiality agreement issue, you have medical professionals on one side and lawyers on the other doing whatever they can to try and settle the matter. The medical professionals are saying that, for a victim to recover, they need to be able to speak to people about what has happened to them when the need arises and in appropriate circumstances Confidentiality agreements used to settle matters can be quite wide-reaching as well, and that is a concern for individuals embarking on the external complaints process.

That is also a concern with internal grievance procedures. From anecdotal evidence, I think a lot of the matters are being dealt with internally. Not much is getting to the commission and not much is going to hearing. There are concerns about the way it is being dealt with internally because there are no set standards in relation to the way the investigative process is being undertaken and ensuring that the person has the requisite skills and knowledge to be able to undertake a thorough investigation, what weight is to be given to certain evidence and how to speak to victims of sexual harassment in order to elicit the information that you need.

Senator KROGER—Do you mean within an organisation?

Ms Panayi—That is right.

Mr Tinkler—Often organisations will appoint an external investigator, but that person is not necessarily trained or equipped to deal with these sorts of cases.

CHAIR—But often inside organisations, if you are being harassed, the first point of contact is usually your supervisor or a person at the next level, in terms of management.

Mr Tinkler—Yes, that is right. Under most policies that would be the case.

CHAIR—I have experienced that often those people are mates of the person who is doing the harassing, so that is very hard and complicated as well.

Mr Tinkler—That is right. We want to emphasise that informal resolution of these matters via approaching colleagues and managers is desirable, but there needs to be another option for people who are victims, because it is not always appropriate.

CHAIR—How should the SDA be changed to accommodate the problems that you are seeing?

Ms Panayi—The people working in the area with the victims and the victims themselves are saying that, right from the very beginning, they want someone external coming in and taking the lead with the investigation. They want that to be someone who has the requisite experience, expertise and knowledge. That is why we are looking at investigatory powers with the commission—but it needs to be people who are highly trained to get this evidence.

CHAIR—Would they take evidence from both sides, though?

Ms Panayi—Yes. It would work in the same way as the investigation process within organisations works now. The role of the investigator will be to question the complainant, the respondent—or alleged perpetrator—and the employer about what their workplace practices are: whether they have sexual harassment policies and training. This is to identify what exactly is happening within the work culture as well. Then they will also be interviewing witnesses for both sides, which would be work colleagues, family members and friends. It is a huge process to undertake. Because of the stress and trauma experienced by a complainant in undergoing this process, we would also recommend that they be referred to independent counselling for assistance.

CHAIR—You say that at the moment, going through the process under the SDA, the complainant has the onus—

Ms Panayi—That is right.

CHAIR—and that there are barriers rather than passage of assistance.

Ms Panayi—Absolutely.

Mr Tinkler—Earlier this morning the occupational health and safety laws were mentioned this morning, and I think that is a good comparison for two reasons. Under the OH&S laws, WorkSafe Victoria, for example, can go into a workplace, investigate a breach of the act, make a determination, issue compliance notices and so forth. We think that is a very good approach. We think the absence of a similar approach reflects a situation where we have one level of intervention and seriousness for physical injuries but a completely different approach for sexual harassment and sex discrimination—which often carries very serious mental health consequences—where the emphasis is on the individual to take action to enforce their rights.

Ms Panayi—In relation to that, we need people with the requisite expertise in order to conduct the investigations—in favour of both the complainant and the respondent—to make sure a fair quasi-hearing is undertaken with the investigation. I know of one case where, in the conduct of the investigation, the private investigator—this was someone who was high profile and who seemed to be across issues of sexual harassment—questioned the victim over the telephone, asking for more detail about the sexual assault that had taken place. The victim was deeply distressed at the time and found it very difficult to talk over the phone about what had happened. The victim in that situation was still in shock from what had taken place, was in harm minimisation mode and was still trying to talk in adult terms about what had taken place. They had also been referred to inappropriate counselling. Really, she should have been referred to a centre against sexual assault or someone with relevant expertise to deal with what had happened to her. That is in relation to the internal investigation process.

These cases are happening across the board. They are happening in small and large businesses, in law firms, in the medical profession and so on. I heard the people representing business, who appeared before you previously, talking about how it is no longer the case of partners in businesses getting together and trying to protect each other or not taking it seriously. I know of that still happening. It is even happening in the legal profession. Partners in large law firms are

protecting other partners who are engaging in sexual harassment. Victims are left with no choice in a lot of situations but to leave the workplace. That should not be the case. Basically, that is what we are faced with. The victims are really saying that, unless you do something more in terms of getting external people with the requisite experience coming into the workplace and conducting these investigations, they feel that the legislation, even looking at how to improve it, means nothing unless you take it to this level.

In order to identify systemic levels of discrimination, you rely on individuals coming forward and speaking about what is happening to them. That gives you an understanding about systemic discrimination. You then are able to look and see, ‘Well, this has happened in this workplace. Is there anymore of it happening in this workplace that other individuals do not know about? Is it happening in particular industries?’ You need to be able to speak to individuals. That is why we are extending it to looking at individual complaints, in order to be aided in addressing systemic complaints or systemic issues. We are finding that the individuals are coming up with very similar stories. There are similar patterns of behaviour amongst perpetrators. Many are in positions of trust. They are very popular, likeable people; they are charismatic. As I have said, perpetrators are partners of firms and they are sexual harassment officers. Perpetrators can be found even in areas of access to justice—social justice—and human rights advocacy. It is across the board. It is very difficult for the victims to speak out because of all the issues there. Then they are saying to me: ‘If it happens to me again, I do not know what I will do. Maybe I’ll keep quiet and just leave.’ They do not know what to do. So we now have the situation in the workforce where perpetrators of sexual harassment are able to keep continuing with that harassment. They are moving from workplace to workplace and, from the reports that we are getting, the harassment is continuing. That clearly is unacceptable.

Senator KROGER—Is PILCH a not-for-profit organisation?

Mr Tinkler—Yes.

Senator KROGER—Are you funded by interest groups who help to pick up the pieces?

Mr Tinkler—We are funded primarily through membership fees from law firms, so law firms are our members. We run a number of different schemes. We run things like the Homeless Persons Legal Clinic and Seniors Rights Victoria, which deals with elder abuse. But our primary function is a series of referral schemes, and they are funded mainly through membership fees from law firms. In return for that, we vet applications for pro bono legal assistance and determine whether a client can afford it or should be getting Legal Aid, whether an issue has merit and, in some cases, whether it is in the public interest. Once we have done that, we accept an application and refer it to a firm, and they will then take it on pro bono.

Senator KROGER—So you really are very much a middle-man there, in that you refer cases on.

Mr Tinkler—That is right. We do not generally act ourselves, but we do undertake a degree of legal analysis of every claim. We are in a position, therefore, because we see a number of cases, to observe a lot of these systemic issues coming through. We do not necessarily act on all those cases, but we refer them to firms that do and that report back to us.

Senator KROGER—What number of cases are we looking at here? How many would go to mediation before becoming public in one way or another? Also, with those that go to mediation, I was struck by your comments about the implications that arise from personal identification. How many of those who take action choose then to return to the workplace? One gentleman whose presentation was before yours said that, because of unfair dismissal, it is very difficult to dismiss individuals in these circumstances, so they may well remain in the workplace. What would be the attrition rate of people who do not even take on charging for harassment but who leave the workplace and move on?

Ms Panayi—I base my answer on the inquiries that we get for direct assistance, from discussions with member firms that also do employment law about the cases that they are getting and from accessing and speaking to victims. Not many of those cases even go through the external complaints process to mediation. Most are being settled internally with confidentiality agreements. That means that it is going against the public interest, in terms of being able to monitor sexual harassment and whether it has been dealt with appropriately internally. Then the problem of the confidentiality agreements arises.

A few matters go to mediation in an attempt to settle. None of the matters that we have assisted with have gone to hearing. That is because going to hearing has been too much for the complainant to deal with, as well as the issues around publicity.

Senator KROGER—I know this certainly is not an empirical way of doing it, but do not think we are talking of hundreds or thousands of potential cases? I am trying to get my head around the size of the issue. I appreciate that this is not being given scientifically.

Ms Panayi—This is where it is really hard, because so much of it is being dealt with behind closed doors. If we go by the information that we are getting from counsellors—they will be assisting a lot of people who are not going through a complaints process—legal experts, people coming to us from inquiries and those with whom we liaise in other services, whether they be Victoria Legal Aid or other groups, the amount taking place is a large problem. I cannot put a figure on it, but I would say that it is a large problem that needs to be addressed.

Mr Tinkler—I would add a couple of quick points. A 2002 survey by HREOC suggested that, of all of the complaints under the SDA, only seven per cent of people who had made a complaint had returned to the employer to which the complaint related to. In terms of business, 93 per cent of people who experience a form of sex discrimination are leaving the business. So there is a real commercial and business imperative to improve the way we handle this. It is not in business's interest to lose its well-trained employees.

Our proposal is to have a HREOC or trained expert to make a determination about whether a breach of the act has occurred and whether sexual harassment, in particular, has been made out. In terms of the ability to dismiss an employee who has carried out the act, we think it would be very useful for the employer to establish a case warranting dismissal. And perhaps then, if the Industrial Relations Commission had a determination by a body like HREOC or the Sex Discrimination Commissioner saying, 'This employee has committed a breach of the act', it would be much harder for the commission to then reinstate the employee and say that they had been unfairly dismissed.

Ms Panayi—The discussion paper from the Equal Opportunity Review that took place in Victoria—a paper which was provided to all organisations that wanted to put in a submission—outlined sexual harassment as being a form of systemic discrimination with a major problem of under-reporting and it also provided statistical information in relation to sexual harassment. But it certainly identified it as being a major problem with sex discrimination.

Senator KROGER—It would be good if you could provide that, just so we can have an appreciation of what sort of scale we are looking at here.

Ms Panayi—Yes.

Senator KROGER—I am certainly not aware of that.

Ms Panayi—I have the discussion paper here. I just cannot find the section right now where they talk about sexual harassment being a systemic form of discrimination. I would add that a lot of victims that we spoke to did not want to leave the workplace. They wanted to be able to continue in their area of employment, particularly where they were in specialised areas and it was hard to get work in those areas. One victim and her family ended up having to move interstate because she could not find like employment in Victoria. That meant uprooting and taking interstate her children and her husband; he also had difficulties in finding work interstate, so he then ended up suffering from depression. These are the sorts of issues to keep in mind. For some victims, it just means that they cannot return in that area and have to go into another area of employment.

Another thing to keep in mind is where it takes place. It is an ongoing issue. The victims are also saying that, no matter where they go in the future, they have to be mindful of making sure that the perpetrator or the perpetrator's supporters are not going to go to that workplace also. They speak of how confronting it would be for them to deal with that in the future as well.

Senator FEENEY—I am interested in a couple of aspects of your submission; one of those is the conciliation role. As I understand it, essentially you see the conciliation role disappearing as you aspire to our moving towards an investigative model rather than a complaints-based system. Have I understood that correctly? In the event that we move to an investigative model—for example, the OH&S regime to which you have referred—would you see the conciliation role disappearing entirely?

Mr Tinkler—I do not think we need to see it disappear altogether. We do say that the role of the Sex Discrimination Commissioner, for example, should move towards an investigative rather than conciliatory role. There should still be an option, particularly early in an investigation. If a preliminary investigation by the commissioner reveals that it may have been a misunderstanding and would probably benefit from conciliation, it should not be a compulsory option but one that is put to the parties. The parties, particularly the victim, should be able to elect to continue and have a determination made by the relevant authority. If we do maintain a conciliation role, it is probably appropriate that it be external and that an independent third party conduct the mediation or conciliation; if that is unsuccessful, then it should come back to the investigator.

Senator FEENEY—The investigator or at least the agency that investigates could also be the conciliator.

Mr Tinkler—They could, but it could be a conflict of interest. If you have undertaken an investigation and have a factual knowledge of the circumstances, your role as conciliator could be jeopardised in the sense that you do not take an impartial view. We would be open to exploring that option as well.

Senator FEENEY—Some of the examples you touch upon in your submission are dramatic and striking. It occurs to me that they are not simply matters for the SDA but in some cases are clearly criminal matters. I wonder what you might be able to tell us about these cases and the interface between criminal proceedings and the alleged victims and alleged perpetrators.

Ms Panayi—In cases where matters that have gone through to criminal proceedings have been handled by the employer, advice in relation to whether police should also be brought in has not been given to victims. Certainly the issue of whether a victim wanted to make a report to have a matter dealt with by the police would be raised with the victim by councillors. The consideration for victims there—and it is the same consideration with victims of sexual assault generally—relates to whether they are willing to undergo the stress and trauma of going through criminal proceedings. Criminal proceedings begin not only with the investigation process but also with it having to go to a committal hearing for a prima-facie case to be established and then having it go on to the county court for a hearing. That again can be a delaying process. We are dealing with people who, in going through this process, are putting their life on hold and they speak of feeling as though they are being ripped open in going through it. It is quite traumatising. Also, the standard of proof in criminal matters is beyond all reasonable doubt. Certainly in this state it is not easy to get a conviction in relation to these matters, which is another reason why some victims do not come forward and go through the process.

Mr Tinkler—There could be a legitimate role for an investigator to refer a matter to the police, if they have a reasonable belief, for example, that an indictable offence has been committed. That is a role, for example, that the coroner takes when investigating a death. They will refer a matter to the police in those circumstances. That could be something that the committee considers.

Senator FEENEY—To me, that would seem to be a logical way forward.

Ms Panayi—And certainly to advise the victim. At the end of the day, the victim must be the one to decide whether they go through with it; but at least they are being fully informed of their options, which they are not being informed of at the moment.

Senator FEENEY—You make the point that criminal proceedings are lengthy, traumatic and subject to delays and long lead times. We have also heard evidence that that is the case with respect to complaints made under the system established by the SDA. Can you tell us anything about that?

Ms Panayi—Certainly. One of the reasons for some complainants not going through the external complaints process and also for their getting legal advice not to go through the external complaints process is the delays and the length of time involved. It adds to the trauma. It takes too long. Again, by putting their life on hold further by going through that, they risk their later-stage recovery. In our submission, we have even identified one of the cases where getting from

initial application to final determination in the Federal Magistrates Court took about three years. That is definitely a concern for people.

I can put to you what has been put to me to help me understand more about these issues: it is bad enough when something like this happens to you in your private world; but, when it happens to you in your public world, the victims are saying that there is no relief in their life. They can go to no aspect of their life to get relief or distraction from the trauma of what has taken place. It permeates everything. That also needs to be considered when looking at the length of time that is taken up in trying to resolve the matter. It is with them and they are dealing with it every minute of the day.

Speaking with some of these people, I have been quite concerned with the lack of awareness about sexual harassment. They speak of it still being joked about in offices and of people not seeming to take it seriously or of saying, 'Oh, you just say no in that situation', and that is it. People are quite judgemental of victims. It is very easy to say what you would do in a situation unless you are in it. There is also a lack of understanding about the processes that occur in the mind and how they impact on how a person reacts. They are going into survival mode. They have to do whatever they can to survive in that workplace, and they are becoming unwell from the conduct that is taking place.

Senator FEENEY—All of that forms a nice segue into my next question, which is of damages. You make the point in your submission that you believe damages are inadequate, but you do not nominate an alternative regime or scale. Do you have any thoughts with respect to damages? I accept that you say the existing regime is adequate. Do you have a view about where it should be going to?

Ms Panayi—It certainly should be a lot higher than it is, given the impact that it has on the victim and what is involved in pursuing any form of legal process. You might think that, for it to be worthwhile to undertake that process, the damages should also be higher; it should also be higher, given its impact on all aspects of a person's life.

In terms of an analogy currently with a like system, with physical injury cases, the personal injury damages awarded can be quite high. We are dealing with internal injuries but ones that are, in many respects, life threatening for victims. That needs to be taken into consideration. Just off the top of my head, maybe we should be looking at what is being awarded at the personal injury level.

Senator FEENEY—Yes, although I understand that the AMA scale that applies in personal injury cases is notoriously difficult with respect to non-physical injuries—stress, mental harm and so forth.

Mr Tinkler—That is one of the difficulties in quantifying what is an appropriate level, because it is hard to quantify what damage has occurred through mental illness. It also comes back to our point in terms of the hierarchy of how these issues are dealt with. It seems that there is one regime that deals with physical injuries through either the OH&S laws or personal injury, which put quite a high premium on physical injury, and another regime that puts mental illness very low on the spectrum.

Senator FEENEY—Or at least the system does not have a proper capacity for diagnosing and assessing.

Mr Tinkler—That is right. One of our points with rethinking how we approach sexual harassment and investigations is that, if an expert is tasked with investigating, they are in a position to observe the level of damage of individuals across a whole range of cases. It can be de-identified, but then it can be analysed so that we can build our knowledge in terms of the effect it is having on people's lives and the severity of these sorts of outcomes.

CHAIR—I would like to thank you both for your submission and your evidence. It has given us another angle on the way in which the act can be further improved and on the restrictions under the act. Certainly, it is evidence we did not hear yesterday.

Ms Panayi—I have just a couple of points. I know it has been said to you that having best practice and doing everything you can within a workplace will not necessarily stop the unlawful conduct. People are saying that they have not had the training. There have been other incidences in workplaces where the sexual harassment victim has also noticed other conduct not being appropriately dealt with. If you had best practices, it would be a warning to people that such unlawful conduct is not tolerated. It makes people more informed. It makes them take it much more seriously. That is important.

It would also like to say that it is important for victims to be able to go back into the workplace. They may feel, 'Things will probably be too much for me to stay in that workplace long term, but my being able to go back in and receive the supports, the re-integration and the rehabilitation I need assists me then to look for a job elsewhere.' It is very hard for them. They are faced with a lot of difficulties after having left their workplace suddenly and then go to employers who ask, 'Why did you leave that job?' In one case, a recruitment agency dropped a person off their list because they knew that the person had had a problem with someone in the workplace. They are just some additional points I wanted to make. Thank you for your consideration.

Mr Tinkler—I would like to comment on the compliance point. I noticed a witness before talking about having a common sense duty, particularly for smaller employers to maintain a good standard of practice. We say that is all well and good but, if that is not occurring in practice, there needs to be some sort of stick approach in terms of positive duty upon employers to maintain best practice. That does not necessarily mean that that positive duty should not embrace a commonsense approach. If you are small employer, say, a builder, you might not have documented policies that you can give to every employee; but, if you observe instances of sexual harassment, you would have steps in place to reduce that, prevent it and report it.

CHAIR—Thank you both very much.

[11.42 am]

SCOTT, Mr Ian Edward, Lawyer, Job Watch Inc.

CHAIR—Welcome We appreciate your having given us a submission which, for our purposes, we have numbered 62. Do you need to make any amendments or alterations, before you start your presentation this morning?

Mr Scott—No, I do not need to. On re-reading it, I note that a few things that could have been improved; but, as to its substance, no. However, I might note that HREOC is now called the Australian Human Rights Commission.

CHAIR—The Australian Human Rights Commission, yes. I am sure your evidence before us will eminently improve your submission today. Please start with a short opening statement, if you want to, and we will then go to questions.

Mr Scott—Job Watch is funded by the state government of Victoria, but it is an independent body; it is not affiliated with any political party or unions. We have been in existence for nearly 30 years. Job Watch's main activities include running a telephone information service that employees can call. We provide free and confidential information and a referral service regarding workplace issues. That service gets approximately 20,000 calls per year, a significant proportion of which relates to discrimination issues. Job Watch also has a small legal practice, of which I am one of the lawyers. We take on matters on behalf of disadvantaged workers—that is, workers who cannot afford lawyers, and those workers have usually lost their job as well. Many of those matters relate to unlawful termination and discrimination based claims.

Job Watch's submission is based on the experience of its callers, clients and the views of its legal practice. In our submission, as you can see, there are a lot of statistics at its start. Job Watch keeps a database of all calls received. Over the last five years, Job Watch has received approximately 850 calls per year in relation to sex based discrimination, and about 90 per cent of those callers were women.

Senator BARNETT—How many?

Mr Scott—We receive approximately 850 calls per year in relation to sex based discrimination. The statistics at the start of the submission relate to categories under the State Equal Opportunity Act here in Victoria, which I can explain later, if you would like. Approximately 90 per cent of those callers were women. We say that sex based discrimination is still a problem and a problem that mainly relates to women.

One of the underlying principles of Job Watch's submission is that the Sex Discrimination Act should be as expansive as possible so that different classes of people or people with certain sex based attributes are not excluded from being protected against sex based discrimination. The act should also be as simple or as user-friendly as possible to remove barriers to making a complaint. This approach is based on an acknowledgement of human rights, such as equality before the law and the concept of social inclusion.

We have just heard from PILCH; Job Watch's submission is more concerned with a broader brush stroke approach rather than tinkering with the act as it stands. However, I have been a practitioner in this area for about five years and I have taken on many discrimination cases, so I am happy to attempt to answer any questions in relation to those sorts of personal difficulties that complainants or clients have in dealing with sexual harassment and sex based discrimination.

As you can see, our submission talks about how the external affairs power and international conventions at this time possibly work to limit the potential scope of the act. Job Watch talks about using the Corporations power to redraft and improve the act. Job Watch has made 22 recommendations including and flowing on from this idea. Those recommendations could be summarised under three broad headings as expanding and simplifying the act, removing barriers to making a complaint and addressing systemic discrimination.

CHAIR—The statistics at the front of your submission are very useful. You are one of the very few organisations, other than the Human Rights Commission, that has provided statistics to us. As you are based in Victoria, do you have to decide whether to use the federal act or the Victorian Act, or do you use the Victorian Act predominantly?

Mr Scott—As a practitioner taking on a case at Job Watch, I will describe what happens. Someone will ring up; often it will be soon after they have gone home and talked to a friend or family member who has said, 'Why don't you call Job Watch?' They will call our information line. If the information worker thinks this person would qualify for legal assistance, they will refer them to our small legal practice. We take on as many cases as possible, but by the end of the week we sometimes have a pile of cases that is huge, which is an impossible task for the four lawyers there. But, yes, we do have to choose which jurisdiction in which to make the complaint, if the client wants to do that. Often, in our experience, we use our state act because of some of the drawbacks of the federal jurisdiction. The statistics are based on our state act's attributes. We have the Equal Opportunity Act in Victoria, which covers everything from impairment discrimination through to sex based discrimination, sexual harassment, industrial activity and everything like that.

CHAIR—We have had evidence yesterday about some of the issues you have raised in your submission. For example, we have had evidence about the definition of spouse and de facto spouse. We have had evidence about updating the definition of 'family responsibilities'. Perhaps you might expand on volunteer workers. The Human Rights Commission has given evidence that the act should take in volunteer workers. Do you find you are getting calls about that area?

Mr Scott—I do not have statistics on that. Off the top of my head, I do not think we would get a lot of calls in relation to volunteers compared with those we get from workers. Even if we are only getting a small percentage of calls from volunteers, it is still a problem. We are talking about sex discrimination and sexual harassment. If only five per cent of our calls come from volunteers, we would say that is still a problem.

CHAIR—Is it the same with subcontractors?

Mr Scott—The difference between an employee worker and a contract worker is only a legal one. The fact is that they can both be discriminated against.

CHAIR—HREOC put to us that, when the SDA was formulated, which now is nearly 24 years ago, perhaps these areas were not considered to be the main ones of influence in the first drafting of the act. But they are of the view that now, time having moved on, whether you are a volunteer, a contractor or subcontractor, the act should be amended to target the elimination of discrimination despite what you are doing in the community or in the workforce. Would that be consistent with what you are getting as calls or queries?

Mr Scott—Absolutely. Job Watch would agree with that. Under our state act, contract workers have a right not to be discriminated against, as I am sure HREOC has said. One of the objects of the act is to eliminate sex based discrimination as far as possible. So we would ask that the act be expanded to cover contract workers and volunteers. Another submission, I think, even talks about students; I am not sure how that fits in exactly. The nature of work is changing. We are getting more and more independent contractors out there. Anecdotally, you hear of someone being called in to the Australian Management Institute as a contractor to fix photocopiers or something like that and someone there might sexually harass them. Why should they not be protected?

CHAIR—On the issue with students, we heard from Elizabeth Broderick yesterday that you cannot make a complaint if you are under the age of 16 and you cannot make a complaint against a person at another institution. So, if you are on a school camp with teachers from another school, you cannot make a complaint; it has got to be within your own institution.

Mr Scott—Yes, I understand what you are saying.

CHAIR—They put to us that those barriers now need to be removed and revisited.

Mr Scott—Job Watch would agree with that as well.

CHAIR—In your experience of handling people who have come to you, what do you see the restrictions being when it comes to a complaint process? You have here a suggestion that, like the Workplace Relations Act, perhaps the onus of proof should be reversed. As well as that, from your point of view, are there problems with the complaints process?

Mr Scott—In my experience of HREOC—which is limited because I often go to the state jurisdiction—I have found their conciliators to be very professional, very good at their job, and willing to go maybe beyond duty to help the parties come to an agreement. From that perspective, it is very good. But there are limitations in the complaints process. One is difficulties for the client personally or individually. Then there are legal difficulties which their legal adviser might tell them about, such as whether to go to the state or the federal jurisdiction. In the federal jurisdiction, costs follow the event once the matter goes to the Federal Court. I think you may have heard about that already. If it was what we would call a test case, which might relate to systemic discrimination or whether someone is covered by the act, our advice to our client might be, ‘We’ll go through the state jurisdiction because your case is risky and, generally speaking, if you lose in the Victorian system, each party bears its own costs.’ So a barrier to or a problem with bringing cases of systemic discrimination is that trying to change the law through precedent is risky and hard, and possibly some individuals have to take that risk.

Senator KROGER—I think you were self-deprecating; your submission is terrific, on the basis that you provide a great breakdown. I commend you on the way in which you record your phone calls. It is very helpful. It provides real data, which I feel to date I perhaps have not had. My question is more one of clarification so that I can understand your raw data better. Can you give an example of what you have down as ‘parental and carer status discrimination’? What would be a so-called normal example of that concern? Secondly, of the calls that you have—I presume that some would be where they are trying to assess their individual situation—how many would you consider to be cases that require further action? I am not putting it too well. How many of those calls do you think would require further formal consideration as opposed to perhaps recommending to the person making the call that perhaps they should just go back and liaise with their employer about the matter and further explain their circumstances or whatever?

Mr Scott—The beauty about this type of employment law or discrimination law is that each case is different. It depends on the person who is calling and their employer. One scenario like that that comes to mind would be, if it were a medium to large enterprise and the caller was calling at lunchtime to say, ‘This incident happened this morning.’ In a case like that, you might say, ‘Okay, you need to go and talk to HR, find out what their internal complaint process is and call us back if you have got any problems.’ We would also ask the person whether they wanted to speak to HREOC or our Victorian Human Rights and Equal Opportunity Commission and, if they did, we would refer them there. That person might go and make that internal complaint, with the matter being resolved internally never to be heard of again.

I was listening to the end of PILCH’s oral submission. That reminded me that just this morning I settled a matter internally that was started by another Job Watch solicitor who is currently away—so I will not take all the credit for it. Our client was paid a significant amount of money and no complaint was filed externally. I believe that the employer made a commercial decision to keep their reputation and the cost of legal fees in defending such a claim. Although our client received a large amount of money, she left the workplace. She could not go back, as she was and still is very emotionally affected by it, although she has got a new job now, which is good.

Anything can happen. For example, the sexual harassment might be so heinous that, constructively, they have been dismissed. They have left the workplace and are never going back. They have called the police. They are doing everything they can. They are ringing every single agency they can to find out what they can possibly do. They want to do something. I am sorry; you asked about parental—

CHAIR—More, what would be an example of parental? You have noted maternity as a separate line issue, which is really helpful. What would you consider to be parental carer status, as in having sick children, a parent or something of that nature?

Mr Scott—As I said before, these categories are based on our state Equal Opportunity Act, which breaks sex based discrimination down into different attributes. You are correct: a common example of parental and carer status discrimination would be where you say, ‘I have a sick child and I have to stay home this week,’ and your employer—in our case it is always employers—terminates your employment and says you have left or resigned, or when the person comes back they have been replaced and demoted. Unfortunately, that is a common occurrence.

Senator KROGER—Firstly, how do people know about you? How do they know to pick up the phone and ring you?

Mr Scott—As I said at the start, Job Watch has been around for 30 years, so there is good community awareness of it. Friends and family or their local community legal centre, obviously, will refer them to us. There is PILCH. Job Watch and PILCH have a relationship. HREOC, our state body and the Australian Industrial Relations Commission will refer people to us. We also somehow manage to get free advertising in papers and occasionally on television.

Senator KROGER—Well done. We would like free advertising in papers.

Mr Scott—I think our ad appears during *Days of our Lives*.

Senator FEENEY—Some publications do that for you permanently, Senator Kroger.

Mr Scott—We do our best to spread the message far and wide using all of those community based mechanisms.

Senator KROGER—Drilling down into the raw data that I have finally seen and got my hands on, I presume this is for the calendar year. Is it for the calendar year or the financial year?

Mr Scott—I am not 100 per cent sure. It is probably in a footnote there somewhere.

Senator KROGER—It does not matter, anyway. It does not change the numbers. In 2007-08-09 there were 25 people. Of those, would a minority be calling up in relation to, 'Look I have a real problem because I have a sick child and my employer will not give me the day off. I have to deal with this, so what do I do?' Such an issue might be resolved if there were some understanding from the employer, so some real dialogue is needed with an issue like that. I can see how you have broken it down, of course, and I am using that as an example of where we need to encourage the employer to understand they have to be a bit more flexible in their arrangements. Alternatively, are they real complaints where there was no way my employer would have given me a day off to support my family? I know I am using an isolated example, but I am just trying to get my head around of how many you would put in the category of really serious things that should be formally investigated because there would be no other resolution.

Mr Scott—That is the next level of analysing this data, which we do not have the resources to be able to do. We get the callers' details when they call; therefore, in theory, it would be possible to go back, say, over the last year and put them into further categories; but we have not done that.

Senator KROGER—I understand that it is taking a personal assessment.

Mr Scott—Yes. My personal experience is that a lot of our callers work for small to medium enterprises. They are the more-disadvantaged workers who will not go to their family solicitor who did their conveyancing or whatever or they may never have spoken to a lawyer before. I think you are right in saying that a lot of these smaller employers just do not know what their obligations are. They are strapped for cash occasionally and cannot get legal advice or a lawyer to help them out with policies and procedures. I think we have spoken in our submission about

HREOC—or maybe I am thinking of something else—but HREOC would be able to help employers out with policies and procedures. But this type of employer is often the owner or director of the company and is often working as hard as their employees, so they do not have the time or the resource to do that.

I think that much of the time the employer just does not know what their obligations are, especially at the moment. At present, I think there is a perception out there—which may be partly right—that small employers cannot be sued for unfair dismissal anymore and, in that sense, they have the upper hand. Smaller employers are not aware of discrimination issues and unlawful termination issues. I think a large percentage of calls are coming from workers who work for those employers who have said: ‘You’ve been off for two weeks now. I can’t keep the job open forever. I know you’re sick and I hope you get better, but I’ve got to hire someone else.’ It is things like that. That was an example of disability or impairment discrimination, but—

Senator KROGER—Yes.

Senator BARNETT—Your recommendations 14 and 15 regard costs. Could you outline your understanding of the costs involved in litigating, firstly, under the state legislation and, secondly, under the federal legislation? Your recommendation 14 encourages costs to be fair and reasonable so that people are not discouraged from making complaints, and your recommendation 15 is that each party must bear their own costs in any claim under the SDA.

Mr Scott—Yes. I think I understand your concern about those two recommendations. Under the state act, as you have probably heard, once a matter does not settle at conciliation at the Victorian Equal Opportunity and Human Rights Commission, the complainant has the option to refer it to VCAT, which is a tribunal here; therefore, it falls under the VCAT Act and rules. Under those rules, each party bears their own legal costs. There is a list of things that VCAT can take into account when considering to make a cost order ordering the losing party to contribute to the winning party’s costs. It is usually things like: frivolous or vexation complaint; no reasonable prospect of success; and unnecessary delays, such as not attending hearings and things like that. There are a few other things to be considered, but I cannot remember them all at present. I am sorry; I do remember one other thing; that is where the employer or the complainant makes an offer of settlement. The employer is willing to offer X-amount or the employee is willing to accept X-amount and then the matter may go to hearing. It may turn out that the offer was good and should have been accepted, no matter whether the case succeeds or fails; if what VCAT orders to the complainant is less than what the employer offered at some stage, then the complainant should have accepted that offer and VCAT will say that the complainant has to pay the costs incurred after that offer was made. That is because the employer’s offer was better than what has been ordered by VCAT. That is, generally speaking, how offers of compromise work in legal cases. That same thing would apply in the federal jurisdiction. But my understanding is that in the federal jurisdiction, under the Sex Discrimination Act, costs follow the event. As I was saying earlier, that could be a barrier to people making complaints, especially in test cases involving maybe systemic discrimination or something else.

Recommendation 14 in our submission is an option to say that, if a complaint is made to HREOC, HREOC investigates and/or conciliates, the investigator believes there is a case of systemic discrimination that the complainant is going to find very difficult to prove—and they

may need to pay for a lawyer or a team of lawyers, which they will not be able to afford at the end of day—there can be some sort of immunity for a costs order if they are unsuccessful, or there can be a certificate from HREOC saying, ‘This case has merit for certain reasons.’ That is not making a determination about the decision; they are just saying there is an arguable case on the information provided to HREOC. In the event that case is unsuccessful due to the difficulties of proving systemic discrimination in winning these cases—unless the onus of proof is reversed, as we have discussed—the court must take into account HREOC’s recommendation to say that this person should be immune from a costs order in the event that they lose the case. So there is no barrier to making a complaint in a case where there may be difficulties of proof or it is a test case of systemic discrimination.

Senator BARNETT—You have also said that compensation should be higher. Recommendation 17 states that orders for compensation need to be high enough to discourage discrimination. Can we assume that you do not think they are high enough at the moment? How can we gauge an understanding of where you are coming from there?

Mr Scott—I think there is an appendix that talks about some recent outcomes.

Senator FEENEY—Pages 33 and 34.

Mr Scott—My understanding is that, since the act came in, the amounts of compensation being awarded are decreasing. I am guessing that, when the act came in, it was, ‘Okay, there’s a new act. We need to support this act. It’s beneficial legislation and we need to deter people from breaching it’, but maybe over time it has become a bit of a—

Senator BARNETT—Do you think the orders are too low?

Mr Scott—They have been getting lower and we think they are too low now to deter sex discrimination. We are saying that employers need to be aware that it may cost \$5,000 to see a lawyer to get policies in place and to know and understand your obligations, but that \$5,000 might save you \$100,000. Just to add to that point—that was one of the recommendations in the submission that I thought could be improved—I do not know whether it is possible for the legislature to make laws about amounts of compensation, but a potential way to add an extra deterrent would be to put into the act what is referred to in the Workplace Relations Act as a ‘civil penalty order’. For example, if someone is unlawfully terminated under the Workplace Relations Act, say for being on maternity leave, they can make their claim for unlawful termination and lost wages and the court can order a civil penalty of up to \$10,000 for breaching the act. Someone might make a claim and they might get an outcome of \$10,000 in lost wages as compensation for sex discrimination. Then the court can say, ‘Now I’m going to order that the employer be fined.’ Usually it is paid into the Consolidated Revenue. In our case, that sends out a warning, I guess, to other employers that they also might be fined for breaching the act.

Senator BARNETT—As legislators, we are looking at the Sex Discrimination Act, but we have to try to see the big picture, where we have a Race Discrimination Act, a Disability Discrimination Act and other legislation. We then have the framework of the state and territory laws within which they try to meet the objectives under these laws. Do you have any advice for us as to how this can fit together with those laws? A SCAG process is going on at the moment, and I assume that you are aware of that in terms of the review. I am interested if you have been

consulted about that, by the way. How can we learn and make sure that what we do in the recommendations to this act are relevant and not inconsistent with the other legislation at a federal level and then at the state level?

Mr Scott—Obviously, there is a great chance at the moment for harmonisation of state and federal laws. As Job Watch says in its submission, the Corporations power at the moment is almost all-powerful. I did not want to be too over the top, but there is a little footnote in my submission saying that potentially the Corporations power could be used to amalgamate the four federal discrimination acts into one act so that they have the same tests, the same criteria—the same everything,

Senator BARNETT—Where is that footnote?

Mr Scott—It would be not too different from Victoria's Equal Opportunity Act.

Senator BARNETT—Now that you have said it, we want to identify it. I would like to concur with Senator Kroger and others to say that the information in your report is very useful. The statistical information in it is very much appreciated.

Mr Scott—Thank you.

Senator BARNETT—Where is that footnote?

Mr Scott—It is footnote 17 on page 13.

Senator BARNETT—The Corporations Law obviously has its merits, but it does not apply to unincorporated entities and associations, as you would be aware, such as charitable groups and churches. Do you have a view as to how they would get covered? Would you necessarily apply for that to be done through the External Affairs power?

Mr Scott—In doing this submission, I was thinking about it being done as in the Sex Discrimination Act at the moment. In that, you have your External Affairs power and the Convention for the Elimination of Discrimination Against Women as the main part and then the Corporations power comes in and covers the other part. That is how I look at it. I stand to be corrected. We are talking about flipping it over so that the Corporations power covers as much as possible. Then you have the External Affairs power and all the other relevant international conventions coming in and trying to fill up the other gaps. In an ideal world, through cooperative federalism and the SCAG process, the harmonisation of laws could mean that the federal act has the corporations and any international conventions all covered and the state act could cover all the rest. If they mirror each other, then everyone is covered.

Senator BARNETT—So you think there is merit in combining legislation so that it applies to sex, race, disability and so on.

Mr Scott—I think there is for the community at large. If all the laws effectively are using the same tests, the same processes and the same everything, then it is simplified. That is one of the objectives of lawmakers, hopefully.

Senator BARNETT—Thank you for that challenge that we have before us.

Senator FEENEY—Just to clarify your exchange there with Senator Barnett, I note that a proposition was put to us by previous witnesses that we should move towards an equality act that would bring together the provisions of several of the pieces of legislation that Senator Barnett has referred to. Would that, in principle, be something you would support or do you prefer the present approach where there are different acts for each, whether it be the SDA, disability or whatever?

Mr Scott—Speaking as a legal practitioner, I think it is difficult at the moment, as you might have cases under the Sex Discrimination Act and have to learn the tests, sections and level of proof and so on in that act, but then you come across another one and, once again, it is a whole separate area unto itself.

Senator FEENEY—Do you have a preference for that specialisation?

Mr Scott—No. I would rather that the acts came together and that there was only one thing that you had to learn that covered every area. That is from a practitioner's point of view. Obviously, we would hope that, if the acts were amalgamated, so to speak, the beneficial parts of each act would come in as well. That is the quality part, I guess. Even if the legislation is amalgamated and simplified, it still has to be beneficial for complainants, applicants and the community.

Senator FEENEY—I echo the sentiments of Senators Kroger and Barnett and congratulate you on your submission. The statistics are very helpful.

Mr Scott—Thank you.

Senator FEENEY—I want to ask in particular about some of those. I really just want to clarify my own comprehension of your submission. You received 22,022 calls in the financial year 2007-08. Is it fair for me to assume then that, roughly speaking, about 20,000 calls a year is the kind of flow of Job Watch? Is that roughly correct?

Mr Scott—Yes. We receive roughly about 20,000 calls a year and have done for many years now. But, having said that, we have unmet demand. A lot of people ring up, wait on the line and never ring back. We also have a call-back system where people can leave their names and workers then have to be diverted from answering calls in order to call people back. In a nutshell, there is unmet demand, so there could be a lot more calls.

Senator FEENEY—As I understand it—this is on page 6 of your submission—of those 20,000 calls a year, roughly speaking, 800 or 900 pertain to sex discrimination.

Mr Scott—That is how I understand the statistics. Roughly, there have been 850 over the last five years. I am not 100 per cent sure, though, how that is broken down into these different categories, but I can get back to you about that, if you would like.

Senator FEENEY—No, that is fine. Let me take you to figure 1 on page 7. That shows the incidence of those categories of call over a time sequence. Do you see the figure I am talking about?

Mr Scott—I do.

Senator FEENEY—Something that struck me about that was that it appears the incidence of sex discrimination, in particular, could be best described as constant and, as a percentage of the calls you receive, may even be described as being on an upward trajectory. That is a serious indicator that the SDA is failing in its mission—that is to say, in eliminating discrimination, particularly sex discrimination, which is one of the objects of the act. Do you have any remarks about that evidence and generally as to the effectiveness of the SDA?

Mr Scott—As I said earlier, the statistics are broken up into different categories, which, under our state act in Victoria, we call attributes—and I am sure you have heard all about them.

Senator FEENEY—I have the privilege of being a Victorian senator, so I know a little of the law that you speak of.

Mr Scott—Under the SDA, there is sex discrimination and then you have to have something else to make a claim. If a woman is discriminated against because she wants to breastfeed, she would have to claim that as sex discrimination and, under the SDA, that would not come through. I think that only partly answers your question.

Senator FEENEY—We heard evidence previously about the incidence of this discrimination and about the arguably high levels of unreported discrimination. I guess that I am interested in the fact that, for you and your service, the level of inquiry is constant and not diminishing. This is not something that is disappearing from the Victorian community.

Mr Scott—I would say that is right. Job Watch is uniquely placed in one sense. People will call Job Watch straight off the bat. They will go home and tell their husband about what has happened. He will say, 'I've heard about Job Watch,' and ring up. They will just talk to Job Watch about their rights and entitlements. Sometimes the role of the telephone workers at Job Watch is one of almost part-counsellor. That is not what they are hired to do, but they have this role of just listening in addition to giving information and referral services. That might be the end of that matter, as that person might not go off and do anything else. So I guess that Job Watch is uniquely placed to capture the fact that sex discrimination is still happening, regardless of whether that person goes off and makes a formal complaint to HREOC or the state body. Obviously, it is still happening; it is being recorded.

Senator KROGER—You have said that you are a lawyer. What do you call those workers on the other end of the phone?

Mr Scott—Telephone information workers.

Senator KROGER—Are they counsellors or social workers?

Mr Scott—They have a wide variety of backgrounds. Some are law students. Some are lawyers who, for whatever reason—often family responsibilities—just want to come and work at Job Watch; they just want to take the calls and have flexible working arrangements. Some have a counselling background.

Senator FEENEY—How many are there?

Senator KROGER—Is it a 24-hour service?

Mr Scott—I think the lines are open 24 hours a day so that people can leave a message to be called back, but it is nine until five, five days a week.

Senator FEENEY—I turn to your statistical analysis and the sex discrimination callers to Job Watch by age group, which is at table 4. When I read this together with table 3, the evidence appeared to underline what we might intuitively have suspected. That is that the overwhelming majority of callers are women and, when we look at sexual harassment, that is 80 per cent. With other issues it is obviously higher. Young women are the most highly represented group, being those in the 25-to-34 age bracket. Is that a fair conclusion for me to draw?

Mr Scott—Yes. I do not think those statistics lie and that would be my working experience as well.

Senator FEENEY—Going on to table 5—and bearing in mind that evidence then of young people, particularly young women—I noticed that, when you tried to adduce what industries the calls came from, it was reasonably representative of the economy as a whole, excepting for the health and community services industry. When I read that evidence, I speculated whether that might be because such persons work in larger institutions that have better established sexual harassment provisions or perhaps they work in an environment where there is a better level of knowledge and awareness. Is it fair to draw that conclusion?

Mr Scott—Yes. Off the top of my head, I would agree with you. I would also say that there is probably a larger number of women working in those areas.

Senator FEENEY—And younger women. With respect to the table you have provided on varying rates of judgements, do you have an alternative model in mind for how damages might be awarded? You will have heard the previous witnesses suggesting something akin to an OH&S model and perhaps workers compensation models in terms of how it should be structured. Do you have any thoughts on those issues?

Mr Scott—The way it works at the moment is that someone gets to court and wins their case, and the judge or the tribunal member will heard submissions about compensation. You have got your special damages or specific damages, which can be quantified.

Senator FEENEY—Because of the economic loss?

Mr Scott—Yes, economic loss. Because of the constructive dismissal due to the discrimination or because of the termination due to the discrimination, I did not get another job

for eight months; I got Centrelink. So what I would have received if I had been working minus Centrelink adds up to my economic loss.

Senator FEENEY—Non-economic loss?

Mr Scott—It is a lucky dip. The court would hear submissions or evidence from counsellors, psychologists, psychiatrists and doctors and I presume, to some extent, judges would be swayed by previous decisions of amounts that had been awarded. Recently, to my knowledge, in Victoria, we had a case in the news about the biggest award in Victoria ever. A young female doctor got \$100,000; that was the biggest award. Hopefully, that will be a deterrent and/or set a benchmark. But, remembering that each party bears its own costs, that person spent \$250,000 on that case. So, as I understand it, she came out with a loss.

Senator FEENEY—The deterrent then might be in making a complaint rather than in getting a judgement.

Mr Scott—It might be. The respondent perpetrator still had to pay out the money and pay his legal costs as well, so he would have been worse off.

Senator FEENEY—So the virtue for a complainant is in knowing that, while they are beggaring themselves, they may perhaps be beggaring their adversary.

Mr Scott—Sometimes.

Senator FEENEY—That is hardly a satisfactory process.

Mr Scott—No, but that might be a deterrent to potential respondents, at least here in Victoria, if that becomes the benchmark at VCAT. As I was saying before, I am not even sure that the legislature can make orders about compensation. A common-law claim for serious injury in Victoria is not an area that I know very much about but, if you lose a finger or something, there are the American—I cannot remember the name of it now.

Senator FEENEY—The AMA standards.

Mr Scott—Yes.

Senator FEENEY—I think there is a 10 per cent threshold before a claim can be made.

Mr Scott—It is very hard to get a common-law serious injury claim up these days but, to see how much that is worth, there is a book that you can go to.

Senator FEENEY—The AMA standards.

Mr Scott—Yes. I would have to think about it. I am not sure that I would go down that road.

Senator FEENEY—That system recognises physical as opposed to mental.

Mr Scott—Yes, that is what I am saying. I am not sure whether it is applicable in this case. However, as I said before, I would be in favour of a civil penalty provision. If an employer or a respondent is found to have breached of the act, regardless of what the compensation payment is to the applicant-complainant, they can also be slapped with a penalty for breaching the act. That would be a deterrent in the sense that it would make employers think, ‘We need to get policies and procedures in place to prevent discrimination.’ That is what it is all about. That is why we are talking about orders of compensation. Employers would be aware that there may be an order for compensation and there may be a fine; even if the sexual harassment or discrimination is low on the scale, there can still be a fine for breaching the act.

CHAIR—Thank you. We have probably taken up quite a lot of your time, but it has been very useful.

Mr Scott—You are very welcome.

CHAIR—Thank you for your submission and for your time before the committee today; it is appreciated.

Mr Scott—Thank you very much.

Proceedings suspended from 12.36 pm to 1.24 pm

EASTMAN, Ms Kate, Counsel, Law Council of Australia; and the New South Wales Bar Association

MOULDS, Ms Sarah Petronella, Policy Lawyer, Law Council of Australia

THEW, Ms Penny, Counsel, Law Council of Australia

CHAIR—Thank you for your submission, which for our purposes we have numbered 59. Before you make a short opening statement, do you have any amendments or changes you wish to make to that submission?

Ms Eastman—No, we do not.

CHAIR—Do you have any comments to make on the capacity in which you appear?

Ms Eastman—I am a member of the New South Wales Bar's equality opportunity committee. I am one of the co-author's of the Law Council's submission.

Ms Thew—I am also from the New South Wales Bar and I am one of the co-authors of the Law Council's submission as well.

CHAIR—If you would like to provide us with a brief opening statement we will go to questions after that.

Ms Eastman—On behalf of the Law Council and the New South Wales Bar Association, we are very happy to have this opportunity to address the committee, because we think the issue of the Sex Discrimination Act is an important issue. As members of the committee may be aware, the Law Council is the peak body for Australian lawyers, representing over 50,000 members. The Law Council has had a very strong and longstanding commitment to removing discrimination in the legal profession. Likewise, so too has the New South Wales Bar Association.

In preparing our submission, we have received input from a number of the committees of the Law Council and also the New South Wales Bar Association and we hope that our submission is comprehensive on a range of issues. You will see from our submission that we have looked not only at the technical issues behind the Sex Discrimination Act but we have also tried to focus on some of the practical issues in the context of the legal profession. We have tried to blend in our submission both the technical aspects and also some of the practical application to the legal profession.

As you will have seen from our submission, our central issue is really twofold. Firstly, the current Sex Discrimination Act is burdened by some complexity in terms of the language and the provisions in the act. Our submission highlights the need for there to be simplicity and clarity in the terms of the Sex Discrimination Act. Secondly, we have focused on the need to have effective laws that eliminate discrimination in the field of public life and life generally. We looked at aspects of the Sex Discrimination Act that really impair the opportunity for full

equality. The focus of our submission is very much on the concept of substantive equality. Having said that and against that background, there are a couple of focal points that we thought it would be helpful for the committee to focus on which really lift from our submission what we thought the key issues were. I will ask Ms Thew to comment on those matters.

Ms Thew—The focal points for legislative change flow from my learned friend Ms Eastman’s submissions in opening. I will address a core of 11 of those. Primarily, in addressing the definitional issues, the Law Council and Bar Association recommend that the definition of both direct discrimination and indirect discrimination under the act ought to be repealed and replaced with the definition of discrimination against women contained in article 1 of CEDAW. We say this will also address some of the complexities that currently exist in the Sex Discrimination Act. Secondly, there are two reservations on the ratification of CEDAW. Primarily the reservation on article 11(2), and the reservation on altering Defence Force policy that excludes women from combat and combat related duties ought to be removed. As a third focal point, the Australian government ought to become a party to the optional protocol to CEDAW. Fourthly, the Sex Discrimination Commissioner’s powers ought to be widened so that she is able to investigate systemic and/or pervasive discriminatory practices at her own initiative and without needing to rely upon a formal individual complaint and also without requiring the consent of the . Fifthly, those powers should be widened so that she can report to the Attorney-General on any organisation that fails to implement any recommendations that she makes pursuant to such an investigation of any particular organisation. Further to the submission in opening on the need for industry guidelines and protocols to be developed in line with key industry bodies, we say the Sex Discrimination Commissioner ought to be empowered to develop such partnerships with key industry bodies to identify barriers to equality and develop industry specific guidelines in order to address those barriers. In particular, we had in mind the barriers that are systemically present to women in the legal profession. As a model to inform such industry standards, the model EO briefing policy adopted by the Bar Association in 2004 could be used.

CHAIR—I see that you have attached that to your submission.

Ms Thew—Yes, we have attached that to our submission.

Senator BARNETT—Do you use it for all businesses?

Ms Thew—Not necessarily all businesses. It could be used as a standard to inform in relation to the format. There are particularly unique circumstances endemic in the legal profession. Those are not going to be applicable across all industries. Other model policies are going to require different issues to be addressed.

Seventhly, the Sex Discrimination Act could be amended to make provision for accommodation of special needs in a similar manner to section 24 of Northern Territory Anti-Discrimination Act. In an alternative to having article 1 of CEDAW adopted in place of indirect and direct discrimination, the ‘unlawful direct discrimination’ definition could be based on that contained in the ACT Discrimination Act, which bases its definition on unfavourable treatment rather than less favourable treatment and equality principles as opposed to requiring a comparator.

Ninthly, sections 4A and 7A of the Sex Discrimination Act ought to be replaced with a definition of and prohibition against carers' responsibilities discrimination not dissimilar to sections 49S and T of the New South Wales Anti-Discrimination Act.

Tenthly, part 2 division 3 of the Sex Discrimination Act, which deals with the prohibition and definition of 'sexual harassment' ought to be replaced with provisions which are similar to sections 118 to 120 of the Queensland Anti-Discrimination Act, which has a broader definition of 'sexual harassment' and deals with reasonableness in a more objective and differently worded way.

Finally, the Law Council and Bar Association submit that the remedies in Section 46P(4) of the act can be addressed and amended to include legislative guidance to the court to the effect that common law principles that are ordinarily used to determine awards of compensation in termination of employment cases can be applied in cases where unlawful discrimination results in termination of employment. Those are the 11 focal points for legislative change that the Bar Association and Law Council recommend. We are happy to talk further on those or address any questions that you may have.

CHAIR—You have criticised the act in terms of its scope and limitations. We have had quite a lot of evidence about changing the objects of the act to reflect article 1 of CEDAW, so I do not really want to go there. I think you will have a view that is similar to those of other witnesses. As to expanding the powers of the Sex Discrimination Commissioner, what do you believe that person ought to be able to do that they currently cannot?

Ms Eastman—I think the focus was to say what is the purpose and operation of the Sex Discrimination Act. Essentially, it is an act that provides remedies for people who believe they have been the victims of discrimination. That is its primary focus and the part of the machinery to give effect to that is the establishment of the office of the Sex Discrimination Commissioner and some identification of what his or her functions might be. They do not use 'his' or 'her'; the commissioner has always been a woman. It seemed to us that if one looks at the development of the Sex Discrimination Act over its life there is now a much more heavy focus on concepts of systemic discrimination and the need to just move from the individual experience of a victim who suffers discrimination to look at what was happening across workplaces or in particular industries. In that sense, we see that there is a very important role for the Sex Discrimination Commissioner, who in a sense can oversee the way in which workplaces operate or work with industries to look at particular practices. In that respect, and giving the Sex Discrimination Commissioner some powers that allow her to deal with the systemic issues, which you generally do not find when an individual wants to bring a complaint about what has happened to them. The powers for the Sex Discrimination Commissioner, we think, need to focus on her ability to get into workplaces, get into industry and start to work with those bodies to look at addressing systemic practices, be they pay equity issues, be they the way in which workplaces are organised, be they the adoption of particular policies that deal with anti-discrimination and sexual harassment. We saw that there was a need for a very practical focus on what the Sex Discrimination Commissioner could do and we felt that given the powers that are presently in the act they were perhaps not sufficient to allow the commissioner to engage in those types of tasks.

CHAIR—HREOC put to us in their submission that they believe the review of the act should be a two-stage process, that there are some immediate amendments that could be made within the next year or so to address some of the major concerns that have been raised with us but, secondly, a consultation process held nationally that might look at an equality act rather than three separate discrimination acts and also to totally review the exemption provisions in the act. I do not know whether you have seen their submission, but do you have a view about whether that two-stage process should be something we should recommend as a committee?

Ms Eastman—Ms Thew has had an opportunity to review that submission in far greater depth than I, so I might ask her to comment on that. I think in general we would be supportive of a two-stage process if the first stage was to look at issues that could be the subject of immediate amendment and immediate application in terms of the operation of the act.

Ms Thew—I think the HREOC's basis for suggesting a two-stage process is that the second of its suggested stages needs to be informed by further consultation. From the review that we have had the opportunity to make of the submissions, that does seem to be a very sensible approach and on that we support. Further consultation can be, as we have already said, with industry bodies such as employer groups, union groups and across industries.

CHAIR—What are some of the practical restrictions you see in the act that we should pay attention to?

Ms Eastman—Do you mean practical in the sense of actually litigating under the Sex Discrimination Act or practical in terms of its current application?

CHAIR—A lot of people have put to us that the complaints process is too restrictive and too onerous, that it is taking too long to process, and that there is not a capacity to look at systemic discrimination. In the Law Council's day-to-day experiences, what informs the suggestions in your submission?

Ms Eastman—For both Ms Thew and I it is because we practice in this area. I think between us we have been involved in a very significant number of cases brought under the Sex Discrimination Act, for my part initially at the Human Rights Commission, and then more recently in the Federal Court and the Federal Magistrates Court since the amendments occurred to the Sex Discrimination Act to move the hearings into the court process. From a litigation perspective the difficulties are often the time it takes in terms of having complaints initially being processed through the Human Rights Commission and then a decision having to be made as to whether to commence in the Federal Court or the Federal Magistrates Court. And then there is the period it takes once the proceedings are commenced in the court until completion. There is a real heavy burden on an applicant to bear the costs of that entire process. But the tension really is between the need for there to be an informal mechanism for resolving complaints of discrimination. The commission does that very well. If, for example, you said, 'We could shortcut the time frames by allowing people to just commence immediately in the court and bypass the commission process', you would lose an opportunity for conciliation by the expert conciliators who work very effectively in the commission and you would then place that burden on the court and the court staff or the court registrars to take up that conciliation function. There is that tension there.

Based on my experience over the last 15 to 18 years, I think the other difficulty is that all the very strong discrimination complaints—and by that I mean complaints that have merit in them—are generally settled at the Australian Human Rights Commission. There is a need to look carefully at the types of cases that are then commenced in the Federal Court or the Federal Magistrates Court because often those are not the stronger complaints. It might be that those cases are commenced because there has been obstruction on both an applicant's or respondent's side to try to settle matters. Or alternatively it will be a case that really does not have strong merit but somebody nevertheless wants to continue in the face of that. You do not see a lot of cases getting to the Federal Court or the Federal Magistrates Court that really raise significant issues. In my experience, where a respondent is exposed in a discrimination matter, they are far more likely to settle at an early stage. I think that has a significant impact in their assessing the overall process. I think we underestimate the value of good and appropriate conciliation at the commission. But there is certainly a tension there between a courts based process or a conciliation/commission based process. I am not sure that there really is an easy answer to that, because depending on whether you look at it from a respondent's perspective or an applicant's perspective you would probably get different views about that.

Ms Thew—In relation to the systemic issue, I think you probably heard from most people making submissions that the act is very limited in its ability to address systemic discrimination while its operations are primarily triggered by individual complaints. This goes back to our earlier submission, which is that really one of the key ways of addressing systemic discrimination within the confines of the Sex Discrimination Act is by empowering the Sex Discrimination Commissioner and/or the to develop industry standards and develop other educative means as well to address that. In terms of the limitation you were talking about, yes, we agree that is a very significant limitation and really the only way of addressing that in the immediate future is by having industry standards to assist in eradicating specific types of discrimination across entire industries and educate entire industries.

Senator BARNETT—In relation to the issue of harmonisation of the various laws across the country—and not just the Commonwealth's but the states' and territories'—there is a process going on at the moment, the SCAG review. I assume you would be familiar with that. Are you having any input into that or have you been consulted on that process to date?

Ms Moulds—The Law Council has been watching this with interest and we have had a liaison meeting with the Attorney-General's Department. We were advised that, when a consultation paper is ready, we will be involved in that process. We are beginning within our own secretariat and specialist committees to think about that.

Senator BARNETT—When did you meet with the Attorney-General's office? When you say a consultation paper is being prepared, who is preparing the paper and what is the substance of the paper?

Ms Moulds—We have not been able to get those details as yet from the department, but we have been provided with a few contact details there, so we have to pursue that further with the department.

Senator BARNETT—Have they asked you for input into the paper or are they preparing a draft which you will then comment on and respond to?

Ms Moulds—As far as we understand, we were just informed that it is a matter on the SCAG agenda. We understand the Attorney-General's Department is also looking into it, and we will be involved in any consultation that they proceed with. Beyond that we have no further details.

Senator BARNETT—When were you advised of that?

Ms Moulds—I will give you the exact date later, but I understand about a month ago.

Senator BARNETT—I assume the Law Council supports harmonisation. Can you clarify that for the record? In what respect do you support harmonisation? Do you have any policy with respect to harmonisation?

Ms Moulds—I understand our Law Council president, Mr Ross Ray, QC, has been involved in the harmonisation forum that has occurred I think possibly this week. The Law Council is very interested in harmonisation across a number of areas. We have a particularly strong interest in harmonisation of legal profession regulations in that area but also in other areas. We have provided some input into statutory declaration harmonisation and other laws in the area of anti-discrimination. I think we would be in favour of harmonisation in that area too provided it is in line with the best practice.

Senator BARNETT—We have to see it from the big picture. At the moment we are looking at the Sex Discrimination Act but, of course, there is the Racial Discrimination Act and the Disability Discrimination Act and other relevant laws obviously at the federal level and also state and territory levels. Do you have any advice for this committee with respect to how we integrate recommendations we make here with the other relevant legislation at a federal and state level?

Ms Eastman—I do not think I answered Senator Crossin's question about an equality act. I think from a practical perspective—and I speak from a practitioner's perspective—to have all of the relevant anti-discrimination provisions in one act at a federal level would certainly make the process much easier for applicants, respondents and practitioners because there is not a consistency in the terms of all of the federal acts, which is race, age, sex and disability, although each of those areas have their own special considerations. But there is certainly a real benefit in having some clear national standards. Likewise, in terms of then harmonisation with the state provisions, I think one concern is that some of the state provisions go much further than the Commonwealth provisions. I think that the states would probably be concerned about losing those provisions that work effectively and appropriately in their jurisdictions. I have particularly in mind the Northern Territory act, which of course has special provisions to deal with its Indigenous community. Much consideration has been given to ensuring that the Northern Territory act is responsive to those particular issues in the territory. I think this process of harmonisation needs to look at the best features of all of the legislation, not just a lowest common denominator approach to harmonisation. That would be my view from a practical perspective.

Senator BARNETT—Your submission touches on the exemptions. We have had a number of submissions that have recommended removing the exemptions. We have had submissions, including from the Australian Human Rights Commission, recommending a sunset clause after three years and having a review during that time. We have had others that have recommended they must remain to protect, for example, freedom of religion. Can you expand on your views

with respect to the exemptions? I have read what you have said in your submission, but it is not clear whether you have a policy with respect to the retention or otherwise of the exemptions and your position on issues such as freedom of religion.

Ms Eastman—I think from the perspective of exemptions, it is always going to be difficult area because this is essentially human rights legislation and one starts from the premise that with the exceptions of a few human rights no human rights are absolute. There will always be appropriate circumstances for there to be limitations or restrictions on the relevant human right. The hard issue is how you work out what those limitations are and when those limitations will apply. Our submission is very much focused on ensuring the Commonwealth's Sex Discrimination Act operates in harmony with the relevant international law provisions, being CEDAW, but also as you will see not only in our submission but also in some of the other submissions there has been a reference to the International Covenant on Civil and Political Rights. If one looks at those international instruments, you see a process for determining when and how rights in relation to discrimination are to be limited and balanced against other sets of rights. For example, in the area of religion and sex discrimination you have competing sets of rights. International law helps you work out how to strike that balance. It is not to say that one right prevails over another but that you recognise that both sets of rights can operate together, but sometimes the rights have to be balanced and the balance might tip in favour of discrimination or anti-discrimination or the balance might tip in favour of religion. But what you need is some clarity and a process to determine how that balance is to be struck in any given case.

Senator BARNETT—Under the current legislation there are exemptions that provide in some respects a balance where you are weighing up one with the other, but there are proposals to remove those and set up some other formula that would assess balancing between those two rights, for example. Do you have a particular view as to which way we should be looking at this?

Ms Eastman—I think there are probably two approaches. One is to just have a general-type exemption, a bit like the operation in international law that any discrimination can be justified if there is a legitimate or appropriate end. But that is vague and it is difficult to work out on a case-by-case basis. The other is to say that you identify the areas where the Sex Discrimination Act will operate—and primarily it operates in the employment area—and you then look at having particular exemptions to meet the employment concerns, or particular exemptions that deal with education or the provision of services. That is the way the act currently operates. There is always a need to keep reviewing those exemptions to determine whether they are appropriate—

Senator BARNETT—What exemptions—

Ms Eastman—I think that is the difficulty. What might have been an appropriate exemption 25 years ago does not necessarily reflect current standards or expectations either of employers, employees or more generally in the areas where the Sex Discrimination Act operates. There is that difficulty about having specific exemptions to deal with particular issues, meaning that the act might operate inflexibly or inappropriately and not be able to adapt to ever-changing conditions. That is the benefit of having a general exemption clause. I do not think we have tried to fudge the issue. I think in our submission we have identified the need for these exemptions to be reviewed carefully, but I do not think we are in a position to say this is the best possible outcome in terms of a legislative means of dealing with the exemptions. We have recommended

that the commissioner still retain a capacity to deal with temporary exemptions, to deal with the very particular cases as they might arise.

Senator BARNETT—Moving to another topic, you recommended that the government sign the optional protocol for CEDAW. My understanding of the impact of that—and I am seeking your advice and response—is that individual people who feel aggrieved and discriminated against can appeal to the relevant United Nations committee. I will go further and say, as the devil’s advocate as it were, that some people would say that those committees are unelected and unaccountable to the Australian people and as such would be standing in judgment on matters that are actually pertinent to Australia and therefore not relevant to them. Is that your understanding of the impact of the optional protocol and how would you respond to people who express that view in terms of accountability?

Ms Eastman—It is a view that I recall was very much at the fore when Australia ratified the first optional protocol to the International Covenant on Civil and Political Rights, and I think when I have given evidence in committees before I have had to address that issue. There are a number of different parts to it. The first part is the extent to which signing the optional protocol gives, for the most part, Australian women an avenue to lodge a complaint at a UN level or at an international level. It is important to remember that, before you get to that point, you have to have exhausted all local remedies. If one looks at the practice not only of the CEDAW committee but some of the other committees, such as the committee against torture, the human rights committee and the committee dealing with racial discrimination, they certainly make clear in their procedures the need to exhaust local remedies and very much focus on the importance of a state, in this case Australia, to have effective remedies. It would be incumbent upon any woman who wanted to bring a complaint to the CEDAW committee to have shown that she has exhausted her remedies under the Sex Discrimination Act. That is an onerous process.

Senator BARNETT—I am with you there. But if they have exhausted all those remedies why would we give them a further option to appeal to some other international entity of the UN?

Ms Eastman—Because sometimes the way in which the Sex Discrimination Act might be interpreted might be wrong or it might not be able to deal with the broader systemic issues that an individual case might show.

Senator BARNETT—Reflecting on the Australian arrangements, why do we not fix the Australian arrangements?

Ms Eastman—I agree entirely. The stronger the domestic remedies, the better. Your ultimate aim is really to say no-one would need to use the optional protocol process because our process domestically is fine. Clearly, in the area of sex discrimination we do have strong laws, but we also have in the area of race opportunity to bring our complaints to the CERD committee notwithstanding the Racial Discrimination Act. If you look at the number of complaints that have gone from Australia to the CERD committee, they are relatively small. Often what people seek to do by taking their complaint to that committee is to highlight a broader and more general issue. The Human Rights Committee is a bit different because we do not really have legislation in Australia that gives full effect to the ICCPR, which is why you see many more complaints going to the Human Rights Committee as opposed to, for example, the torture committee or the race committee. It is important to note that, when one gets to the committee level, the committees themselves say: we are not a court of appeal, we are not the fourth level of appeal

from the domestic jurisdiction; we are here to focus solely on the international perspective, which brings in not only law but also policy issues. The CEDAW committee has been very effective in the looking at the broader policy issues that might occur.

I am thinking, for example, of a case that went up in the early stages against Hungary. The issue there was an individual complaint of a woman who had experienced domestic violence. By the time the matter got to the CEDAW committee, the committee was not so interested in what the particular legal process had been in the courts in Hungary but in looking at the issue of the state's responsibility to protect women from violence. The complaint gave the committee a vehicle to explore with the state the extent to which states had positive policies to protect women from domestic violence. I think that is a real benefit of that committee process. It in a sense draws out from a person's individual experience issues that might reflect more generally on the state's responsibilities. I see it as not just a fourth court of appeal but as a way of highlighting the international law and human rights framework behind complaints.

Senator BARNETT—If you take it as looking at it as a fourth court of appeal—at least in one respect that is the way I think you and others see it—if we get the law right in Australia you do not need the fourth court of appeal. That is my understanding of what you have said earlier and that is my understanding of how it would work. If we get it right here, you do not need a fourth court of appeal?

Ms Eastman—I do not see the committee as being a fourth court of appeal. I see it as a very different function. It is not just a matter of appealing from a Federal Court decision to the committee or a High Court decision to the committee. The committee itself says, 'We are not a fourth court of appeal.' Once somebody gets to that stage it is a slight change of focus in the complaint.

Senator BARNETT—Yes, but I am referring to what you said earlier, that it is a further court of appeal, whether it is a fourth court or whatever. It is a further court of appeal and if we get the law right in Australia you do not need a further court of appeal; is that correct?

Ms Eastman—I think if we get the law right people will not need to lodge complaints to the committee—

Senator BARNETT—That is where I am coming from. I am sure there are other benefits that you might perceive that it has. In terms of the Court of Appeal, this is an important issue for Australia.

Ms Eastman—I do not see that the way in which the committee approaches the complaints is that the committee sees itself as having an oversight role in the way in which the Australian judicial system operates. The committee never expresses its decisions in that way. I do not see the committee as that appellate-type process. I see the committee's focus being quite different. The process of bringing those complaints also takes a very long time. For example, a woman is not going to go all the way to the CEDAW committee if she wants to be reinstated back to a position, because it might be four, five or six years down the track.

Senator BARNETT—She is doing it for other reasons?

Ms Eastman—Precisely. That is highlighting those broader systemic issues. I see there is a benefit there. Answering your question about the nature and the composition of the committees, of course they are unelected from the Australian public's perspective, but they certainly are elected in terms of being nominated by their states to serve on the committees. The rules are quite strict. They must be 18 members of high standing and repute—

Senator BARNETT—With respect, although I would not necessarily refer to them as rogue states, some of these states are perhaps not of the quality or status that we would wish them to be. You can go through and name them or identify them and let us know in due course who they are. I do not have a list of them in front of me but I have seen some of them before.

Ms Eastman—On the other hand, though, the CEDAW committee, for example, had as a longstanding member Elizabeth Evatt after she retired as the Chief Justice of the Family Court. The UN Human Rights Committee had as its longstanding member Dame Rosalyn Higgins. She is now the president of the International Court of Justice. When you go through those committees they often have very eminent jurists and very senior jurists.

Senator BARNETT—I am sure they do, but they do not necessarily hold the same values and beliefs, faiths or philosophies and policies that we hold dear to us here in Australia.

Ms Eastman—I would probably disagree with you on that because I would say their function is to give effect to the international human rights standards. The international human rights standards by their nature are intended to be universal, indivisible and interdependent. That is the language of international law. We share those universal standards regardless of whether we come from the bar in the UK or whether we come from a developing country. This is a debate that often occurs at the UN level as well.

Senator BARNETT—We could probably go on at some length.

Ms Eastman—You have hit upon one of my more favourite topics.

Senator BARNETT—I will conclude with one final question. We have been talking about CEDAW and discrimination against women. What about men? I refer to the submission of the Dads on the Air. I am not sure whether you have had a chance to glance at it?

Ms Eastman—No, I have not.

Senator BARNETT—In any event, they were not fortunate enough to appear as witnesses, but they make a number of observations. I want to address three of the ways they feel discriminated against. This is their view in their submission at page 2. They say that males have much higher illness, injury, accident and death rates and die five years earlier than females. They say that male suicide is at almost four times the rate of female suicide. They state that boys in Australia are much more like to drop out of school than girls and they list quite a few other factors. How do we address discrimination against men or boys and address some of their concerns/grievances that they are not being adequately catered for?

Ms Eastman—I cannot comment on the particular submission, because I have not read it. I can comment on the general issue of sex discrimination applying equally to men and women. It

really is a function of the constitutional arrangements. While the Commonwealth relies on its external affairs power for the most part in supporting the Sex Discrimination Act, it is inherent that it has to be by giving effect to a Convention on the Elimination of Discrimination against Women. The Commonwealth sought to overcome that in section 9 of the act by using a number of other heads of power under section 51. My own view is that that is very convoluted. It was, of course, open to the Commonwealth to adopt the provision in article 26 of the International Covenant on Civil and Political Rights. It does not make a distinction between men and women. It simply deals with sex discrimination. We think that is a very simple option for the Commonwealth to remedy, and that is to look to international law, in addition to CEDAW, to bolster the effect of the Sex Discrimination Act. You will see in our submission we have also referred to the International Labour Organization conventions and recommendations, which also would give the Commonwealth in terms of using the external affairs power, as the relevant head of power, a capacity to broaden out those grounds. We would generally be very supportive of an inclusive discrimination act.

Senator BARNETT—The Human Rights Commission referred to both those international treaties that you referred to as well in their submission. Do you also believe that the government would need to refer to the Corporations Law and use it in terms of the applicability and constitutionality of the law?

Ms Eastman—It does already. I cannot remember the precise subsection of section 9. One of the subsections of section 9 uses the Corporations power to give extended coverage to men. Men are covered in that way at the present time. We think rather than use the sort of patchwork or cocktail approach to constitutional heads of power, it should be kept simple, and the external affairs power is broad enough to support an inclusive discrimination scheme and not just sectoral based on women, race or what have you.

Senator KROGER—I read your observations on women in the legal profession. Having been involved in trying to actively encourage participation at various levels within the legal fraternity, have you any observations that you think could be introduced to further the education process to continue to advance the change within legal professions and the number of women at various levels?

Ms Thew—Probably from partnership level down, or the other up, it has been some time now that we have had more female graduates than male graduates. My observation is that the workplace is becoming more flexible to provide for different circumstances, but there still seems to be very much a bit of a glass ceiling in terms of engagement at senior level.

Ms Moulds—At the Law Council we have equalising opportunities and the law committee looks at a number of these issues. They have also been involved in the production of the model equal opportunity briefing policy we attached to our submission. They are currently undergoing a review of that, both from a principle position and implementation position, and we are hoping to get some further data in that area. The other committee that we have is a committee looking at the retention and recruitment of lawyers, which also looks at those educational aspects. One of the focus areas will be female lawyers as well as people working in rural areas and young lawyers.

Ms Thew—Further to what you were saying a moment ago, the legal industry faces particular issues in that, even though there has been the model EEO briefing policy in place now since 2004 and it has had some very positive results, both anecdotally and on the limited research that we have available to us it appears that those positive results have been in very limited areas of the law. In areas of the law that women traditionally work, in any event, so areas of the law dealing with children and youth, family law and those particular types of areas, briefing of women has increased and I understand the statistic is approximately 10 per cent in the last 12 to 18 months. Those particular areas of law have seen an increase in the briefing of women of 10 per cent, but the attrition of women from the legal industry appears to be the same. Even though the number of women entering the bar in particular has increased in the very recent past, the level of women at the bar remains fairly static over the last five to seven years in any event. That is in New South Wales, and I understand it is the same in relation to the legal industry generally in New South Wales. In terms of your question about what types of mechanisms need to be in place to address that, we have submitted that the bar association and the territory and state law societies and the Law Council need to operate in tandem with each other to develop mechanisms to educate both the legal practitioners and the judiciary where necessary within each of the jurisdictions. Education is probably the primary mechanism by which we see change being promoted, probably through CPD; at the most fundamental level through CLEs and CPDs and incorporated as a mandatory process in each of the educational functions.

Senator KROGER—Can I suggest by way of observation that a successful way to put a different picture on this rather than doing it on the basis of an equal opportunity or gender analysis has been a cost-benefit analysis. When you put it in terms of the financial cost to the firm losing X number of staff and then you do the breakdown of how many of these are women or men and so on, it translates into the cost of training and developing them that can be as persuasive if not more persuasive and then it puts some authority and ownership with different people who see the need to try to retain staff perhaps in different ways.

Ms Thew—I agree with that approach entirely. From my experience for at least the last 10 or 15 years I think the firms have been getting that input themselves, that the cost to them of losing female employees at the five, or seven or nine-year mark and continually replacing them, as many of the firms around edge of the cities do, is very high. There is the cost of losing the relationships that those solicitors had with the clients. However, it still continues to happen. Financial costs are recognised and they are recognised by people who care about financial costs and who want to remedy the situation. I think the problem remains, and how to remedy the situation is the question. I think industry standards that educate people who actually can make the difference are really the primary issue. Even though the will to retain or keep in the industry women lawyers, or women in other industries, is there, I think the know-how to do that is simply non-existent in a lot of ways. The reasons women are leaving the industry are also not properly understood. It is very often put down to having a family, which is simply—

Senator KROGER—That is the core issue, the reasons why, and then dealing with them. I read somewhere, which surprised me, in terms of the mean income of male and female solicitors there is a difference between practitioners. I think that was in New South Wales. I actually thought it would have been standard, ex-university articled clerks would have the same entry—

Ms Moulds—As to equalising opportunities, the law committee is currently preparing a submission into the pay equity inquiry. I think they are going to explore disparities in income

both from the point of view of the financial figures and also from the more structural causes of pay and equity in that area.

Senator KROGER—But is there a standard articulated clerk first-year salary?

Ms Thew—Perhaps, in the first year, the articulated clerks do tend to get a standard rate. But then when you jump from articulated clerk—and it is only a matter of months when you cease to become an articulated clerk—to when you become a first-year solicitor, from that point on each individual is negotiating individually their salary with their partners, or as ordinarily happens it is not a matter of negotiation; a partner simply decides unilaterally and it is entirely at the discretion of each of the partners as to how much each solicitor gets paid. I think that is where the differential comes from. The differential is surprising, I must admit.

Senator KROGER—I am quite surprised that it is there.

Ms Eastman—It is also not just the large commercial law firms, but looking at where women find themselves across the practice range. It is looking at smaller, medium sized firms, in-house positions and also government positions. You find women in different places within the profession. If one looks at the overall figure, that might explain why there is that disparity as well.

Senator KROGER—There is a differential in terms of the income spread by virtue of where they are employed?

Ms Eastman—Not just in one firm.

CHAIR—Thank you very much for your time today in appearing before the committee and also for the work that you have done in putting the submission together. It is very beneficial.

Ms Eastman—Thank you very much.

[2.16 pm]

DAVIS, Ms Catherine, Federal Women's Officer, Australian Education Union

GAVRIELATOS, Mr Angelo, Federal President, Australian Education Union

CHAIR—Good afternoon and welcome to you both. I officially welcome representatives from the Australian Education Union. Thank you for your submission. We have numbered it 17 for our purposes. Before I ask you to make a short opening statement, do you wish to make any amendments or changes to that submission?

Mr Gavrielatos—No.

CHAIR—Please begin with an opening statement and then we will go to questions from there.

Mr Gavrielatos—In essence, we certainly support the fundamental objectives of the act and believe that through any review we should be looking as a nation to strengthen the act to ensure that we can deal effectively with issues of gender inequality. We believe certain measures can be put in place and should be put in place to strengthen the act, all of which would contribute towards ensuring that we eradicate barriers to participation, wellbeing and economic and physical security of women in our society.

The Australian Education Union represents 175,000 teachers in public schools and TAFE colleges across Australia, of whom 120,000-plus are women. Therefore, issues concerning the eradication of barriers to full participation of women, issues concerning the safety and wellbeing of women, and issues concerning the safety and wellbeing and full participation of girls in our care in their future is something that we consider very important.

With respect to our submission, I would like to draw attention to a number of the recommendations that we have made therein. These highlight the areas of concern or the direction that we would like to be considered in your deliberations. We certainly believe the act should be amended to allow the Sex Discrimination Commissioner and to be given statutory responsibility to be able to independently monitor and to report to parliament on issues of gender equality. We also believe that the Sex Discrimination Commissioner should have the power and resources to investigate systemic and indeed structural discrimination and that should be able to be achieved without the need for a complaint to trigger any investigation and, of course, to be able to report to parliament with recommendations for appropriate policy changes.

Given our fundamental belief in the power of education, we also believe in the importance of prevention over the cure, and for that reason we would support the Sexual Discrimination Act being amended to give greater capacity for to engage in an educative role, perform an educative function and also to conduct test cases.

Finally, we think the act should be amended to be able to include set standards, as does the Disability Discrimination Act, that provide positive encouragement for compliance with those

standards so as a society we move forward in such a way that we do, I repeat, eradicate barriers to the full participation of women in facets of life, the wellbeing and safety of women and the girls in our care every single day in our schools.

CHAIR—Ms Davis, did you have anything you wanted to say?

Ms Davis—I would like to just add to and strengthen the notion of why we are looking at those resources to further investigate gender inequality. In a profession such as ours, where there are about 70 per cent women, as a profession there is still an under-valuation of the work that women do, and in that sense the best avenues for us to be able to bring those levels of equality up is not on an individual basis. It is the ability to look at a structural level and a broader level to be able to have society value the work of women, and that would certainly benefit our members. I would use the examples we found during the pay equity inquiries, for example, and what is happening at the moment. The only changes to gender pay equity are where those things are able to be addressed through test cases and on a broader level rather than an individual basis. For us and our members, HREOC and the Sex Discrimination Commissioner being able to investigate areas such as our own work would be of preference to us.

Senator KROGER—I would like to follow that up, because I do not understand this. How do you tie the two in together, that is, suggesting that by strengthening the SDA that in turn could assist with pay equity inquiries? I would have thought the two were quite separate?

Mr Gavrielatos—Other than to say that it will provide the capacity to engage in investigation, and investigation in terms of not only systemic but rather structural discrimination that exists in many industries. With respect to structural discrimination or an institutional discrimination, if I can put it in those terms, within our own industry, whilst 70 per cent-plus of our workforce are women they are underrepresented in terms of the higher earning rungs of our profession. Those people who went to fields of administration or principalship, et cetera; women are underrepresented in those higher rungs of the profession and certainly overrepresented, if you like, in the lower paid rungs of our industry. That is something that we would call a structural impediment to earning greater remuneration, and it is those structural issues that we need to continue to look at as a society, and we certainly do as a union, in order to look at issues of pay equity.

Senator KROGER—Is it a fairly static movement for those at the senior level of administration or principalships?

Mr Gavrielatos—There has been movement over recent times that has seen an increase in the representation of women in those positions, but women as a total proportion of the teaching service still remain significantly underrepresented in those senior positions. It is a reflection of societal expectations and responsibilities that in the main fall on women and therefore there are lost opportunities to pursue those kinds of careers, and barriers associated with pay, remuneration and career.

Senator KROGER—The reason I asked whether that was static is that a large number of people in those senior positions have been in those jobs for a significant time, and it is a reflection as well on old-fashioned, if you like, traditional views. I would have suggested the

teaching profession has probably moved on significantly, but given the block of number of positions there that has not translated through yet.

Mr Gavrielatos—There is no doubt over recent times the level of representation has grown, but it still remains well below the total number of women in the teaching service. One would hope that over time and as we continue to tackle issues of structural and cultural impediments we will see our members appropriately represented in those senior positions as well.

CHAIR—Do you have any figures on the number of your members who would have made a complaint under the SDA or who could potentially have made a complaint but did not?

Ms Davis—Not actual figures but an example that was described in our submission in a more broad term was the example that, where any discrimination was occurring, what the union would prefer to do or had the avenue to do was to use unfair dismissal laws, and in fact when those laws were not available to the union anymore there was the opportunity to have a look at the other avenues to deal with discrimination, and the decision was, more often than not, that those cost barriers using anti-discrimination law were far more prohibitive than using the avenues we used to use through industrial law. I would say there are probably not a lot of teachers who have used those laws in comparison with other avenues that we have previously used.

CHAIR—We had interesting evidence this morning from ACCI, the Australian Chamber of Commerce and Industry, that where a sexual harasser has been warned and even sacked them because they have breached a policy or a code of conduct, that person has in fact taken remedy through the unfair dismissal laws and has in fact been reinstated and the victim has basically had no justice out of that. Why would unfair dismissal laws have been an option for people? Do you find that members get sacked because they have blown the whistle on people who have harassed them?

Ms Davis—No. It is more in the sense of, for example, if you are taking a dispute regarding pregnancy discrimination or duties that are being asked that cannot be fulfilled; that that was an avenue that was being used, or there may have been multiple reasons for the discrimination.

CHAIR—Is that because the action under the SDA is long and protracted?

Ms Davis—Yes.

CHAIR—That is a barrier?

Ms Davis—Yes, and more costly.

CHAIR—We have had extensive evidence similar to your recommendations, such as amending the objects of the act to better reflect CEDAW and to provide the Sex Discrimination Commission with more responsibility. Can you give me some background to your recommendation 4, which is about strengthening HREOC's education role and ability to conduct test cases? Why is that beneficial in, say, the education industry or in the industry that you represent?

Ms Davis—Obviously we believe in the power of education and from our experience in terms of students and their understanding of human rights issues to do with discrimination and acceptance—I do not want to use the ‘tolerance’ word, but issues around discrimination in the Australian community—we certainly have found that it is very much the role of us but also of the leaders within this country to make sure that people understand their human rights and people are aware of their position so as to prevent those things happening to them. Also, in terms of HREOC’s role, the education section within HREOC has a smaller role than their complaints process and the judicial side of their role. Certainly, they are doing some fantastic things in terms of their education packages and going out to schools, but it could be increased and strengthened.

The other example that we put in our submission was our experience of issues to do with sex discrimination in the teaching workforce, and that there was a fundamental lack of understanding at the time of the public debate and at the time of debate within parliament, for example, around how sex discrimination does actually work in our country and how gender discrimination is not just about removing barriers for all people; that there are other things that operate to disadvantage particular genders. We found at that time that the community debate was misunderstanding some of those issues, and with a greater understanding we would be able to move forward in this country as a whole. There is certainly a role for Human Rights and Equality Opportunity Commissions to ensure that the community is brought forward together.

Mr Gavrielatos—In essence, we respect the role that HREOC plays and the enhanced role they can play in addressing issues of discrimination in our society. Regrettably, discrimination still exists, it is alive and well, and an agency, if I may call it that, such as HREOC could play a leading role in the dissemination of information and the development of a discourse, if you like, within schools, beyond schools, within all workplaces and in the broader community to address these issues.

Senator KROGER—In that role do you see it as being more of an educative one as opposed to a stick approach or a compliance approach?

Mr Gavrielatos—We believe that there would be a dual function. I do not think it is mutually exclusive the proposition that they perform an educative role and also have a capacity to conduct test cases and take appropriate action as considered necessary at any time. It is an important institution and we should recognise that and give it the capacity along with the Sex Discrimination Commissioner to engage in proactive action. It seems to us that their capacity is very much a reactive capacity and one reliant on complaints rather than being proactive to shape and inform our community and society consistent with community standards at present.

CHAIR—I would like to ask you about recommendation 7. It is probably the most controversial area we have had evidence about being, and the exemptions for educational institutions. A number of witnesses have said to us that these exemptions should not be abolished; that in fact they should stay without question. HREOC have put to us that the exemptions should be reviewed and that there be a national debate occurring over the next couple of years. The third evidence we have had is that perhaps exemptions should be given for only a limited period of time. I take it that you are saying that you believe that educational institutions have run their course now in the last 20 years and no exemptions should be made for these at all. Can you give us an understanding of why that is your position?

Mr Gavrielatos—Fundamentally, we believe educational institutions, which are predominantly government funded, must comply with industrial legislation and industrial rights available for all people. Our colleagues in the Independent Education Union would be better placed to provide evidence of examples of discrimination as we would consider it within educational institutions in terms of industrial and employment rights. Fundamentally, we believe that in this day and age it has run its course well and truly, and those exemptions should no longer apply with respect to employment functions.

Ultimately one is employed to do a job. You can teach effectively delivering the content and subject matter that you are charged to do consistent with curricula that apply to all schools. There is no differentiation between curricula in a government school and a private school. Therefore, it is the discharge of your duties and the capacity to deliver your curriculum in your classroom that should be the key determinant in this area. That is the view that we take. We note the HREOC submission that it should be phased out and, as I understand it, that there should be a sunset clause. We would be of the view that it has taken its course and there are employment functions and industrial rights that should prevail in these areas.

CHAIR—It was put to us this morning that there is a belief that freedom of religion is quite separate to but could work with the Sex Discrimination Act. Whether you are in a Muslim school, Anglican school, Catholic school or a public school, your rights to be treated equally as a man or a woman should be same no matter what the basis of the school is.

Mr Gavrielatos—Absolutely. We have a situation in Australia where most private schools are almost entirely government funded, and therefore they should accept the responsibilities and the determinations as they apply with respect to discrimination, in this case sex discrimination. It is the discharge of your function in the classroom that is the primary object of one's employment as a teacher. Again, that is a matter for my colleagues in the Independent Education Union to further expand upon.

Senator KROGER—And what about single-sex schools?

Mr Gavrielatos—We are now entering an interesting debate about the organisation of education, which we are happy to discuss. No, it is not an extension of that, but we take the view that the school is a microcosm of society and, as such, we argue that our schools should be comprehensive in terms of student demographic being socially representative of the community in which it is located. 'Socially representative' means the full student demographic, both boys and girls. It is an ongoing debate with respect to the continued existence in some of our cities of single-sex schools, and that debate will continue.

Senator KROGER—I am not suggesting we have the argument as to whether or not we have single sex-schools. What I am saying is, by extension of what you just said, that it could be interpreted that it was discriminatory to still have a single-sex school.

Mr Gavrielatos—Except that I was referring to the employment rights of individuals in schools and not the structural organisation of schools. I am happy to have a discussion about that as well.

CHAIR—We were talking about exemptions for religious purposes.

Mr Gavrielatos—Around employment.

Senator KROGER—Yes.

Mr Gavrielatos—I would like us to go there. Believe you me, we could have a nice discussion about the structure and organisation of schools across Australia.

CHAIR—Senator Barnett, I have finished my questioning. I do not know if you wanted to ask any questions.

Senator BARNETT—Have you covered the views on exemptions?

CHAIR—Yes, we did.

Senator BARNETT—Mr Gavrielatos, did you have a look at the submission of the Christian Schools?

Mr Gavrielatos—No. Unfortunately I have not had an opportunity to do so.

Senator BARNETT—I will not go over ground that you have already discussed.

CHAIR—No. There is an answer on transcript for you to look at.

Senator BARNETT—I will look at that.

CHAIR—I do not have any other questions. I think a lot of the recommendations you put before us have been picked up law bodies, by HREOC themselves and other witnesses.

Senator BARNETT—Have you been involved in the SCAG process or have you been consulted in any way in terms of the SCAG review of the state and territory laws?

Ms Davis—No, we have not.

CHAIR—I am not entirely convinced it is out of the public consultation stage.

Senator BARNETT—We will find out tomorrow.

CHAIR—The Standing Committee of Attorneys-General, which is the AGs from each state and territory, in conjunction with the federal, certainly in July have now put up a recommendation that they would look at harmonising discrimination laws across states and territories. We have had evidence in the last 24 hours that so far only one or two states have come on board. I am not entirely convinced the process is working under the federal system yet, let alone gone outside for public consultation.

Mr Gavrielatos—We would be very interested in engaging in a public discussion about the harmonisation of discrimination laws.

Senator BARNETT—I draw your attention to the communiqué of 25 July.

Mr Gavrielatos—Thank you.

CHAIR—We have A-G's appearing before us tomorrow so we will ask them that as well. Our report might go some way to informing them about that process as well.

Senator BARNETT—I have one question. In terms of the employment of male teachers—you have obviously come across this issue before—and the importance of boys in schools having good role models, as in not just women but men, and the difficulty in the past, I am not sure what the current arrangements are in terms of accessing and attracting male teachers into the profession, but can you give an update/status report on the gender balance in terms of the teaching profession and, secondly, the challenges currently being faced in terms of attracting male teachers?

Mr Gavrielatos—I will do my best in terms of the figures as I understand them. I hope you appreciate that I do not have the figures in front of me, but approximately 70 per cent of the teaching workforce is female and 30 per cent is male. That figure varies slightly in terms of secondary schools. In secondary schools it is 60 per cent female and 40 per cent male. Of course, if you go into the early childhood sector it is even higher in terms of female versus male.

There have been a number of inquiries conducted in Australia about male teacher numbers and they all conclude that the solution to attracting a larger number of male teachers in the profession is by way of improving the working conditions and the remuneration for all teachers. It is not about identifying and not discriminating, if you like, along the lines of gender for the purposes of remuneration. There was a very good report commissioned and concluded some years ago by the New South Wales government following an inquiry into male teachers. That is one of the recommendations made therein, namely, the working conditions of all should be improved. The findings of that report—and this has been found elsewhere as well—is that one of the reasons why men are not entering the service, apart from the conditions, is over what occurred some years ago around the whole question of child protection and the very unfortunate public perception with respect to men in teaching and in particular the younger the children get. It is a regrettable indictment on our society that these perceptions exist, but it is one of the reasons why men do not go into teaching.

What we say with respect to males in teaching is that in the first instance as parents what we would hope for is a highly qualified teacher in the front of the classroom. That is the first thing you want. We are certainly in an era in Australian educational history where it may not very well matter what the gender of the teacher is in front of the classroom but whether there is a teacher at all, because we are in a period of a massive teacher shortage. There is a massive teacher shortage where a qualified teacher is preferable to male or female. That said, one cannot dispute the fact that, just as I said in answering the question of Senator Kroger, we believe that our local public schools should be a microcosm of the broader society and therefore should be socially representative of the broader society.

Senator BARNETT—Does that mean that you would prefer a fifty-fifty proportion in terms of teachers?

Mr Gavrielatos—What I would prefer is a recognition and a valuing of the role of teachers rather than a denigration of teachers from our political leaders and opinion makers. Once that occurs and once we construct and achieve the preconditions that make education and teaching much more attractive, we will see the numbers of males increasing. Can I please stress and caution that when we have this discussion we should not create the impression that our predominantly female teaching service is doing anything but an incredibly good job.

Senator BARNETT—I appreciate what you are saying. I am not having a debate on that ground at all. I am just asking the question in terms of the male-female breakdown. At the moment it is seventy-thirty. Would you prefer it to be closer to fifty-fifty?

Mr Gavrielatos—Yes, that is one way of putting it. As I said, we believe that our schools should be socially representative. Of course we do. But we also want to ensure that the people entering teaching do so because they want to teach.

Senator BARNETT—My supplementary question is: do you support or would you consent to advertising/marketing efforts to attract male teachers to bolster the percentage, which is roughly 70-30 at the moment? Would you support arrangements where we can target more males to be teachers?

Mr Gavrielatos—What we would support are arrangements and recruitment strategies that promote the profession of teaching for all, and in doing so you will attract those who want to teach. If you raise the status of the profession through those necessary preconditions you will find that the balance will change. We were highly critical of the exercise that was embarked upon some years ago by twice-removed Minister for Education Nelson, who argued that there should be exemptions under the act to allow for male scholarships. We consider that to be more headline grabbing than of substance, because even if scholarships were created for a limited number of males to enter teaching, let us say 100, it would not be any more than what would otherwise enter teaching, anyway. It was found to be flawed, and thankfully so, when it was put before the appropriate bodies. Let us lift the status of the entire profession. Let us attract and respect the profession and that way we will see through that process.

Senator BARNETT—I do not have all the details of that arrangement—and you are probably more familiar with exactly what happened—but my understanding is that there was an infringement on the Racial Discrimination Act purportedly and that particular breach, as it were, did not allow them to actually offer scholarships or special arrangements for male teachers. Is that your understanding?

Mr Gavrielatos—I do not believe it had anything to do with the Racial Discrimination Act.

Senator BARNETT—I am sorry, the Sex Discrimination Act. Did I say ‘racial’?

Mr Gavrielatos—Yes, you did.

Senator BARNETT—The Sex Discrimination Act. It has been a long day.

Mr Gavrielatos—It was ruled out because it was considered not to be of substance and worthy of further consideration and it was seen for what it was, as far as we are concerned, as a

political stunt. At the time there was no argument to seek an amendment to the Sex Discrimination Act to ensure a greater representation of women in the position of principal or assistant principal where they continue to be underrepresented. If you want to talk about role models, where has the action been taken to have more women in leadership positions in schools to act as role models for the young women in our care to want to become teachers? They are the practical measures that we put in place in order to turn things around. It needs to be looked at comprehensively. As I said, we believe measures can be taken and there have been inquiries that offer us a direction that we need to take to increase the status of the profession. By doing so will increase the total number of male teachers as well.

Senator BARNETT—I will do some more investigation in terms of that scenario as it occurred some years ago regarding the scholarships and what arrangements they had in place to attract male teachers. Thank you for your feedback.

Ms Davis—At the time we put in a significant submission to the inquiry. You will find that online still.

Senator BARNETT—Which inquiry?

Ms Davis—The inquiry into male teacher scholarships.

Senator BARNETT—Thank you.

CHAIR—We do not have any other questions. Thank you very much for your submission and perspective and making your time available to come and appear before the committee today.

Mr Gavrielatos—Thank you very much.

CHAIR—In closing, I would like to thank all witnesses who have given evidence before the committee today and declare this meeting of the Legal and Constitutional Committee adjourned until tomorrow morning in Canberra at nine o'clock.

Committee adjourned at 2.46 pm