

Human Rights and Equal Opportunity Commission

**Report of Inquiry into a
Complaint of Discrimination
in Employment and Occupation**

Discrimination on the ground of sexual preference

HRC Report No. 6

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The Hon Daryl Williams AM QC
Attorney-General
House of Representatives
Parliament House
CANBERRA ACT 2600

Dear Attorney,

Pursuant to my responsibilities under s. 31(b) of the *Human Rights and Equal Opportunity Commission Act 1986* I attach my report of my inquiry into a complaint of discrimination in employment and occupation concerning discrimination on the ground of sexual preference.

Yours sincerely,

Chris Sidoti
Human Rights Commissioner
March 1998

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Introduction

This report to the Attorney-General arises from an inquiry by the Human Rights and Equal Opportunity Commission (the Commission) into a complaint of discrimination in employment based on sexual preference under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (the Act).

The complaint concerns the refusal of the Catholic Education Office (CEO) of the Archdiocese of Sydney of an application by Ms Jacqui Griffin for classification as a teacher in Catholic schools in the Archdiocese. As a result of the refusal she cannot be employed in schools administered by the CEO. The principal reason for the refusal advanced by CEO was Ms Griffin's "high profile as a co-convenor of the Gay and Lesbian Teachers and Students Association and her public statements on lesbian lifestyles". In fact the evidence indicates that the CEO knew nothing of Ms Griffin's personal lifestyle and that none of her reported public statements promoted or advocated a lifestyle or conduct contrary to the teaching of the Catholic Church. I therefore found that she suffered discrimination within the terms of the Act.

Homosexual men and women as a class have suffered considerable disadvantage and discrimination in employment, access to services and benefits and in the application of laws which distinguish between same sex and different sex couples. Some have experienced public harassment, verbal abuse and crimes of violence. These practices are not things of the past but continue to be part of the lives of many people in Australia today.¹

There is no uniformity among Australian States and Territories in relation to the prohibition of discrimination based on sexual orientation. There is legislation in New South Wales, Victoria, South Australia, Queensland, the Australian Capital Territory and the Northern Territory. However, there are significant differences in the laws in what exactly is proscribed,² in the areas in which discrimination is outlawed and in the range of exceptions and exemptions.

Under the federal Act, discrimination on the grounds of sexual preference is not unlawful and there is no enforceable remedy. Complaints may be made to the Commission which

¹ See Human Rights and Equal Opportunity Commission Human Rights for Australia's Gays and Lesbians Occasional Paper 5, February 1997.

² The New South Wales Anti-Discrimination Act 1977 prohibits discrimination based on 'homosexuality'. The South Australian Equal Opportunity Act 1984, the ACT Discrimination Act 1991 and the NT Anti-Discrimination Act 1992 prohibit discrimination based on sexuality broadly defined to include homosexuality, heterosexuality and bisexuality. The Victorian Equal Opportunity Act 1995 and the Queensland Anti-Discrimination Act 1991 prohibit discrimination based on 'lawful sexual activity'. Although the ground of 'lawful sexual activity' has been interpreted to include homosexual activity, there is no precise definition of the term in either Act. In WA, the Equal Opportunity Amendment Bill 1997 sought to amend the Equal Opportunity Act 1984 by including sexuality as a ground of discrimination. A similar Bill was introduced unsuccessfully in 1996. The 1997 Bill is currently being considered by a Parliamentary Committee.

will attempt to conciliate them. If these attempts are unsuccessful and discrimination is found, the Commission may recommend compensation and changes to policies and practices but there is no mechanism for enforcement. The only step is to report to the Attorney-General who is required to table the report in parliament. That is the basis of this report.

The *Sexuality Discrimination Bill 1995* (the Bill) was introduced to the Senate on 29 November 1995. The Senate Legal and Constitutional Committee's report on the Bill *Inquiry into Sexuality Discrimination* was tabled in December 1997. One of the purposes of the Bill is to prohibit discrimination and vilification on the grounds of sexuality (or transgender status).³

The Senate Legal and Constitutional Committee's report discussed employment as an area of complaint. Its comments in relation to educational institutions reflect the countervailing tensions which underlie the present complaint.

Educational bodies were adversely commented on by a number of witnesses possibly because private education (much of it provided by religious bodies) was exempted from the discrimination provisions of State legislation. Employment in such education bodies appeared limited.

The report also acknowledged

Some educational authorities may also be influenced by the existing social and religious structure which perceives the in loco parentis authority to be within a heterosexual context. 'What we are interested in is the fact that teachers are in loco parentis. Therefore they need to act in accordance with parents' rights and requirements on this matter':

'The myth that offering legislative protection will pose a challenge to a particular religious set of beliefs or practices is just that. Religious schools have always employed and taught lesbian gay bisexual and transgender people and will always do so, and in spite of this religious beliefs are very evident and will continue to be'.⁴

The report on this complaint discusses these tensions. It recognises that it may be necessary to balance the right to freedom of religion and belief and the right to freedom from discrimination. It proceeds on the basis that a religious institution 'that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed' is entitled to apply those doctrines, tenets, beliefs or teachings but that it is not entitled to discriminate where there is no offence to those doctrines, tenets, beliefs or

³ The Inquiry recommended that discrimination be defined so as to include harassment: see Recommendation 1 of chapter 2.

⁴ Report of the Senate Legal and Constitutional Committee Inquiry into Sexuality Discrimination December 1997, pp. 20-21; Submission, Context, Vol 1, p. 213

teachings or to adherents of the particular religion or creed. This distinction in fact is the basis of the findings in this complaint.

Religious institutions are given absolute exemptions from the application of some anti-discrimination laws. They do not have such an exemption under the Act, however. They are subject to the same provisions as other employers. A distinction based on a prescribed ground will be discriminatory unless it a distinction

- (a) in respect of a particular job based on the inherent requirements of the job; or
- (b) in connection with employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, being a distinction, exclusion or preference made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or that creed.⁵

I am greatly concerned by the attitude of the CEO that seeks to claim a wider entitlement for itself. In submissions to the Commission and in correspondence the CEO asserted what amounts to a right to discriminate on any basis it sees fit, even if the discrimination is not required by or is inconsistent with the institution's doctrines, tenets, beliefs or teachings. It said that 'the Churches including the Catholic Church have the right to maintain autonomous educational institutions'. In response to the findings and recommendation in this report the CEO said

We are ... currently considering whether we should approach the Attorney-General in relation to the role of the (Human Rights and Equal Opportunity) Commission and the provisions of the Act in respect of Catholic schools.⁶

In my view religious institutions are not entitled to and cannot legitimately seek exemption from the requirements of human rights law beyond that necessary to uphold the doctrines, tenets, beliefs or teachings of the particular religion or creed, as presently provided in the Act.

More broadly the present state of federal law in relation to discrimination based on sexual orientation remains inadequate to ensure protection of human rights. I recommend again the enactment of a comprehensive national law to prohibit this kind of discrimination and to provide enforceable remedies similar to those provided in the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth) and the *Disability Discrimination Act 1992* (Cth). The need for this legislation extends not only to sexual orientation discrimination but to all grounds in relation to which the Commission has jurisdiction that are not already the subject of effective federal legislation.⁷ In addition to sexual orientation

⁵ Human Rights and Equal Opportunity Commission Act 1986 (Cth) s 3(1).

⁶ Letter from Br Kelvin Canavan, Executive Director of Schools, CEO, to the Human Rights Commissioner 2 February 1998.

⁷ See the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth) and the *Disability Discrimination Act 1992* (Cth).

the grounds include religion, political opinion, social origin, medical record, criminal record, age and trade union activity.

The complaint:

Jacqui Griffin v. The Catholic Education Office

Summary

Outline of complaint

On 30 April 1993 the Commission received a complaint from Ms Jacqui Griffin which, pursuant to s. 32(1)(b) of the *Human Rights and Equal Opportunity Commission Act 1986*, initiated the Commission's inquiry into the complaint pursuant to s.31(b) of the Act. The Commissions' functions to inquire into acts and practices that may be inconsistent with or contrary to any human right or that may constitute discrimination are described in Appendix A.

Ms Griffin alleged that the decision of the Catholic Education Office to refuse her application for classification as a teacher in Catholic schools in the Archdiocese of Sydney was discriminatory on the grounds of sexual preference. As a result of the refusal she cannot be employed in schools administered by the respondent, the Catholic Education Office of the Archdiocese of Sydney (the CEO). In its response to the Commission the solicitors for the CEO provided the following reasons for rejecting Ms Griffin's application.

In considering her application, our client was aware of Ms Griffin's high profile as a co-convenor of the Gay and Lesbian Teachers and Students Association and her public statements on lesbian lifestyles.

It is an inherent requirement that teachers within the Sydney Catholic School System strive by their teaching and personal example to develop in students an appreciation and acceptance of Catholic teaching and values.

Ms Griffin's prominent public stance on the question of homosexual rights and behaviour is contrary to the teachings and values of the Catholic Church.

Our client took the view that the employment of Ms Griffin within the Catholic School System would be likely to injure the religious susceptibility of adherents to the Catholic faith and in particular students within that system who are generally at an impressionable age.⁸

The complaint was unable to be conciliated and the Commission took written and oral submissions from each of the parties.

The complainant submitted, in summary, that her sexual preference was improperly taken into account by the CEO in assessing her application for classification as a teacher in Catholic schools in the Archdiocese of Sydney.

The respondent submitted, in summary, that its decision to refuse the complainant's application for classification as a teacher in Catholic schools in the Archdiocese of Sydney was based on her inability to meet the inherent requirements of the job.

Conciliation

The complaint was unable to be conciliated.

Submissions and evidence

Pursuant to sections 33 and 27(a) of the Act, I invited Ms Griffin and the CEO to make submissions orally or in writing or both in relation to that act or practice. Both parties elected to make written submissions after the preliminary finding. On considering those written submissions I requested both parties to attend an oral hearing before me. I was concerned with the complexity of some of the legal issues, to which I have already referred, and wished the parties to elaborate upon the matters raised in their written submissions. This hearing occurred on 7 August 1997. At the close of the hearing the parties were invited to make further submissions in relation to the issues discussed. Further written submissions were subsequently received from both parties. In addition, arrangements were made for Ms Griffin to lodge with the Commission, for inspection by the CEO and me, her collection of newspaper clippings which describe her public stance in relation to homosexuality

Findings and recommendation

On 7 November 1997 I issued notice of my findings and recommendations in relation to the complaint under s. 35(2) of the Act.

⁸ Letter from Makinson and d'Apice Solicitors to the Commission dated 10 September 1993.

I found that the complainant, Ms Griffin, suffered discrimination in employment within the terms of the Act because the Catholic Education Office rejected her application for classification to teach in Catholic schools it administers on the ground of her sexual preference. I found therefore that the acts and practices complained of by the complainant constituted discrimination in employment based on sexual preference within the meaning and operation of the Act.

I recommended that the Catholic Education Office approve Ms Griffin's application for classification to teach in the Catholic schools it administers in the Archdiocese of Sydney.

The respondent's reply

Under s. 35(e) of the Act I am required to state in my report to the Attorney General whether the respondent has taken or is taking any action as a result of the findings and recommendations.

In response to my recommendations the CEO made a lengthy submission that goes primarily to the findings of fact and the interpretation of law contained in the report. Although it requested that this submission be attached to my findings I am declining to do so. Were I to accede to this request I consider that for the purposes of natural justice I would have to provide the complainant with a similar opportunity and that as a consequence there would be no end to further argument by the parties to the complaint.

In its response the Catholic Education Office advises

We have come to the conclusion that we are unable to adopt your recommendation ...

Reasons for the decision

Issues to be determined

In deciding whether the act complained of is discriminatory under the Act I must consider four main elements:

1. whether the act or practice arose in employment or occupation
2. whether there was a distinction based on sexual preference
3. whether the distinction nullified or impaired equality of opportunity and
4. whether the distinction was based on a distinction, exclusion or preference

- (a) in respect of a particular job based on the inherent requirements of the job or
- (b) in connection with employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, being a distinction, exclusion or preference made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or that creed.

The parties agreed on most of the facts. I therefore have no difficulty in deciding the first three issues. At the time of the act, Ms Griffin was seeking approval to be employed by the CEO. The refusal of her application to teach in schools administered by the CEO was an act in relation to employment for the purpose of s.31(b) of the Act. The parties agree that the refusal was based on Ms Griffin's sexual preference. They do not dispute that the refusal resulted in Ms Griffin being deemed ineligible for a teaching position in CEO schools in Sydney, thereby nullifying or impairing her equality of opportunity or treatment in employment.

The inherent requirements of the job

The respondent's submissions

In defending its action the CEO argued that its decision was based on the inherent requirements of the particular job. In its written submissions dated 5 December 1996, it stated that the inherent requirements of the job are best enunciated in the Principles of Employment which accompany the application form for classification with the CEO. The application form states that

... the Catholic school is more than an educational institution: it is a key part of the Catholic Church's mission. Thus, the teacher in the Catholic school is more than an employee: he or she ministers in the name of the Catholic Church.⁹

At the hearing the CEO referred to three documents of the Sacred Congregation for Catholic Education, *Lay and Catholic Schools: Witness to Faith*, *The Religious Dimension of Education in the Catholic School* and *The Catholic School*, which provide the basis on which all Catholic schools 'in New South Wales, indeed Australia, indeed the world' have to operate. The statement in the application form was said to reflect the requirements of these documents.

The relevant sections of the Principles of Employment at the time of Ms Griffin's application in 1993 were

⁹ Letter from Makinson and d'Apice Solicitors to the Commission dated 5 December 1996 at p.2.

Teachers in the Catholic school have an indispensable role to play in supporting and promoting the mission and goals of the Catholic School. It is expected therefore, of all teachers in a Catholic school that:

...

2. they will strive, by their teaching and personal example, to develop in students an appreciation and acceptance of Catholic teaching and values;
3. they will avoid, whether by word, action or public life-style, any influence upon students that is contrary to the teaching and values of the Catholic community in whose name they act ...

A year after, in 1994, principle 3 was amended by replacing 'public life-style' with 'known life-style' and 'Catholic community' with 'Catholic Church'. The CEO did not argue that the changes affected Ms Griffin's position and generally referred in its arguments to 'public/known life-style'. While these changes do have broader significance I accept that in this case nothing turns on them.

The CEO presented six arguments to support its assertion that Ms Griffin does not meet the inherent requirements of the job.

- (a) The Complainant's (known or public) lifestyle is totally at variance with the role model of a teacher which is regarded as so essential in a Catholic school seeking to inculcate specifically Catholic values (that is, it flies in the face of the Principles of Employment and Catholic teachings).
- (b) By reason of this variance, the Complainant will be unable to manifest a commitment to the ideals of the Catholic school which is so paramount to the teacher's role.
- (c) Even if the Complainant is able, through the spoken word, to fulfil the characteristics of a teacher in a Catholic school, pupils will of necessity be aware of an inconsistency between what the teacher says and what the teacher does. It must be assumed that this inconsistency will cause confusion and hence put at risk the authenticity of the teaching enterprise. Where this inconsistency involves something that is relevant to the character of the Catholic school then the obligations of the teacher to act in a way that is consistent with that character have not been fulfilled.
- (d) The Complainant's high profile within the gay and lesbian community and her public statements on lesbian lifestyles are well known. She has been widely quoted in the press ... and is an outspoken advocate of the rights of gays and lesbians. She has appeared on the television program 'Attitude'. She was a co-convenor of GaLTaS for many years and was well known by those in the

teaching profession as an activist in this area. The fact that she resigned a few months ago as co-convenor of GaLTaS is not relevant – what is relevant is her longstanding and continuing public espousal of her chosen lifestyle.

- (e) Catholic parents would be outraged and offended by the prospect of the CEO permitting a high profile lesbian activist who engages in what the Catholic Church teaches to be immoral homosexual activity to stand in loco parentis to their children.
- (f) It is submitted, using the classic phrase ‘actions speak louder than words’, that the Complainant’s actions or known/public lifestyle cannot avoid making an indelible impression on students under her care and thereby influence them contrary to the teachings and values of the Catholic Church.

The reference in paragraph (d) to GaLTaS is a reference to the Gay and Lesbian Teachers and Students Association. Ms Griffin was co-convenor of GaLTaS from approximately March 1992 to November 1993 and a member until March 1994 and co-convenor again from December 1995 until June 1996 (the latter period post-dating her complaint to the Commission).

The factual assumption upon which the CEO’s submission is based is that Ms Griffin has a ‘known or public lifestyle’ that is at variance with Catholic values. During the hearing the respondent described the ‘known or public lifestyle’ of Ms Griffin as being that she ‘is an activist of the homosexual cause’ and that ‘she advocates the proposition that there should be no discrimination against people of homosexual lifestyle or background’.¹⁰

The CEO’s argument has two inter-related bases. They are first Ms Griffin’s association with GaLTaS and second Ms Griffin’s own public profile. These issues were explored at the hearing.

The complainant’s association with GaLTaS

At the hearing the respondent stated

We would respectfully suggest that what is also before you is the fact that Ms Griffin is an office-holder in GaLTaS, the objectives of which are to promote the homosexual lifestyle as a co-equal lifestyle and that’s where the principles and purposes of GaLTaS run counter to the principles and purposes of Catholic schools.

....

I think we would take the view that it’s a matter of public record what the principles and purposes of GaLTaS are, that the principles and purposes of GaLTaS are to promote and to advocate homosexual practice and that homosexual practice should be recognised as co-equal, for argument’s sake, with respect to marriage, civil marriage and that these positions

¹⁰ Transcript of proceedings 7 August 1997 on p.8.

are inconsistent with the teachings of the Catholic Church and that Catholic schools are established to promote the teachings of the Catholic Church.¹¹

The CEO has produced no evidence to support the proposition that GaLTaS promotes and advocates 'homosexual practice' at all or as a co-equal lifestyle with civil marriage. According to the Application for Incorporation of Association made on behalf of GaLTaS dated 16 September 1992 the principal activities of GaLTaS are to be 'advocacy and support; counselling; lobbying on behalf of students and teachers; to eradicate homophobia within the education system'. Its objects are 'to do all things possible to provide advocacy and support for gay and lesbian teachers and students within the education system to remove homophobia from the education system'. Its co-convenor, Mr Derek Williams, told the hearing

The aims of GaLTaS are not to promote homosexual activity or indeed any sort of activity.

In 1996, three years after Ms Griffin's application was rejected, a 'Manifesto' by GaLTaS described its primary aims as

- (i) to provide support networks for bisexual, transgender, gay and lesbian students and teachers
- (ii) to campaign for civil rights for bisexual, transgender, gay and lesbian students and teachers
- (iii) to provide information to the general population.

In the same year the GaLTaS Constitution was amended to make explicit the code of behaviour that GaLTaS members should follow. The most that can be said is that GaLTaS at that time condoned consensual adult relationships, not that it advocated for or supported them. The new paragraph 10(3) states:

Major power imbalances within relationships create the potential for abuse and exploitation. The association:

- (a) condones and supports mutually consensual, positive relationships, which exhibit mutual care, respect and dignity, and which observe the statutory age of consent; and
- (b) will not tolerate the use of manipulation, where power differences exist, to coerce others into an emotional, physical or sexual relationship.
- (c) does not condone teacher/student sexual relationships.

In any event these documents were produced and adopted three years after Ms Griffin's application was rejected by the CEO and generally coincided with her resignation from the organisation.

¹¹ Transcript of proceedings 7 August 1997 on p.9.

The extensive collection of newspaper clippings that Ms Griffin produced following the hearing confirms that the publicly reported concerns of GaLTaS are consistent with its statement of its activities and aims in its 1992 Application for Incorporation. It has paid particular attention to supporting homosexual teachers and students who face ostracism and the threat of violence to the point that some become suicidal. There is no indication in the material provided by Ms Griffin that GaLTaS promoted homosexual practices.

The respondent did not produce any evidence whatsoever to support its contention that GaLTaS promotes homosexual practice. Nonetheless it said that there was

a huge gulf, arguably unbridgeable, between the view which the Catholic Church takes and which Catholic schools are required to take of homosexuality in a moral sense and ... the position that GaLTaS takes. There's an unbridgeable gulf.

The principal argument the CEO then advanced was that Ms Griffin's association with GaLTaS and her position as an office-holder in GaLTaS gave her a 'known or public life-style' at variance with the teaching of the Catholic Church. That is not necessarily so. Indeed many dioceses of the Catholic Church accord official recognition to organisations of gay and lesbian Catholics established with aims similar to those of GaLTaS, the support of their members and opposition to discrimination and violence based on sexual orientation. Many Catholic bishops appoint official chaplains to these organisations. Clearly more is necessary to establish an 'unbridgeable gulf' than mere association with a homosexual support group.

The public profile of the complainant

When she was co-convenor of GaLTaS Ms Griffin's views and activities were the subject of media attention. In 1993 she was instrumental in obtaining a Federal Government grant to set up a New South Wales 'Gay and Lesbian Hotline' to offer support and information to homosexual students. In March 1993 she appeared on the television program 'Attitude' in an edition which focussed 'on gay and lesbian teenagers, examining the pressures they face, both in coming to terms with their sexuality and coping with the various discriminations prevailing in school and the community at large'.¹² Her appearance on this program was specifically mentioned in the refusal by the CEO to accept her application for classification.

During the hearing Ms Griffin described herself as particularly concerned about the issue of violence against homosexual students. At the hearing she stated, in response to a claim by the respondent that she advocated homosexual practice,

During my time in GaLTaS I have spoken on the issue of violence against young gay and lesbian students in Catholic schools as well as state schools and I have spoken on only those issues basically so I don't know where that proposition has been taken from. There's

¹² Description of the program in the television guide in the Sydney Morning Herald newspaper dated 22 March 1993.

no evidence in any of the newspaper clippings to support that proposition and while you say it's on public record in New South Wales, you haven't brought any examples to support that assertion.¹³

Going through Ms Griffin's comprehensive collection of newspaper clippings covering many years I could find no indication whatsoever that Ms Griffin advocates homosexual practice. The CEO was unable to provide any evidence of its own that she did. Its representatives referred frequently and repeatedly to her 'known/public lifestyle' and to her 'public advocacy of the homosexual cause' but could not point to anything that even implied a known or public position at odds with the official teaching of the Catholic Church.

The evidence establishes overwhelmingly and I find that the known or public stance of Ms Griffin is in support of homosexual students and teachers in dealing with the discrimination and violence they encounter as a result of their homosexuality. In particular, she is concerned with combatting homophobia.

At the hearing the representative of the CEO responded to the evidence of Ms Griffin's public position by asserting that there was a public perception that she and GaLTaS were

conducting themselves in a way that implicitly or explicitly can be seen to be endorsing lifestyles which are contrary to the purposes of the school. So I think ... public perception is relevant.

However, when I asked whether it would be legitimate to discriminate on the basis of a wrong perception that may or may not exist, the representative said no. Yet the CEO continued to attach significance to what it claimed to be the public perception of Ms Griffin's position, in the light of her association with GaLTaS, even though there was no evidence whatsoever to support the accuracy of what the public perception was said to be.

Does the complainant meet the inherent requirements of the job?

The CEO argued that Ms Griffin's public stance in relation to homosexuality led it to conclude that she could not meet the inherent requirements of being a teacher in a Catholic school within the Archdiocese of Sydney.

The CEO argued that the role of a teacher in the Catholic school system is different from that of a teacher in the government school system, that the inherent requirements of the position of teacher in the two systems vary and that the Principles of Employment set out in the application for classification are a guide to the inherent requirements of a teacher in the Catholic system. It referred to a decision of the Supreme Court of Canada to support its propositions.¹⁴ It submitted

¹³ Transcript of proceedings 7 August 1997 on p. 11.

¹⁴ Re Caldwell and Stuart (1985) 15 DLR (4th) 1. This case concerned the phrase 'bona fide qualification' in the British Columbia Human Rights Code. That phrase does not have the same meaning as 'inherent requirement' used in the Act. However the discussion of the nature of Catholic schools was relevant for this complaint.

The principle of witness is fundamental to the nature of religious instruction and the total religious dimension of the Catholic School. This principle involves the concept of a person's actions and image as being of fundamental importance.¹⁵

These propositions have been the subject of debate inside and outside the Catholic education system and their meaning and application in practice are not certain. However, I need not consider those arguments in this case. For the purposes of this decision I accept these submissions of the CEO.

Applying these principles to Ms Griffin's situation requires consideration of the Catholic position on homosexuality. Ms Griffin rightly pointed out that there are many views on homosexuality within the Catholic Church. The official position, generally stated in documents produced by Vatican agencies with papal approval, is much discussed. It is also carefully nuanced. Put simply, it draws a clear distinction between being homosexual and engaging in sexual activity with a person of the same sex. Official teaching unequivocally condemns this homosexual activity.

The Church, obedient to the Lord who founded her and gave to her the sacramental life, celebrates the divine plan of their loving and life-giving union of men and women in the sacrament of marriage. It is only in the marital relationship that the use of the sexual faculty can be morally good. A person engaging in homosexual behaviour therefore acts immorally. To choose someone of the same sex for one's sexual activity is to annul the rich symbolism and meaning, not to mention the goals, of the Creator's sexual design. Homosexual activity is not a complementary union, able to transmit life; and so it thwarts the call to a life of that form of self-giving which the Gospel says is the essence of Christian living. This does not mean that homosexual persons are not often generous and giving of themselves; but when they engage in homosexual activity they confirm within themselves a disordered sexual inclination which is essentially self-indulgent.¹⁶

More authoritatively, the *Catechism of the Catholic Church* states

Basing itself on Sacred Scripture, which presents homosexual acts as acts of grave depravity, tradition has always declared that 'homosexual acts are intrinsically disordered'. They are contrary to the natural law. They close the sexual act to the gift of life. They do not proceed from a genuine affective and sexual complementarity. Under no circumstances can they be approved.¹⁷

In her submissions Ms Griffin takes issue with this official view of the Catholic hierarchy towards homosexual activity and points out that within the Catholic tradition of Christianity there are those who do not hold the view that all homosexual activity is

¹⁵ Letter from Makinson and d'Apice Solicitors to the Commission dated 22 August 1996 at p.1.

¹⁶ Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons Prefect of the Congregation for the Doctrine of the Faith, Vatican City, 1 October 1986.

¹⁷ Catechism of the Catholic Church 1994 para. 2357.

immoral. Although theologians and psychologists argue about the views expressed in the *Catechism of the Catholic Church* and elsewhere in official Catholic teaching I need not concern myself with these arguments here. My decision does not depend on this issue and so for the purposes of this complaint I can accept the CEO's submissions on it.

While condemning homosexual activity official Catholic teaching also expresses pastoral concern for homosexual persons and condemns discrimination and violence against them. Again the *Catechism of the Catholic Church* states

[Homosexual men and women] must be accepted with respect, compassion and sensitivity. Every sign of unjust discrimination in their regard should be avoided.¹⁸

There was discussion at the hearing of the phrase 'unjust discrimination' and its application to Ms Griffin's situation. The CEO agreed in essence that 'the distinction between just and unjust discrimination goes to this issue of advocacy of a position that is contrary to the teaching of the Catholic Church'.

Elsewhere official teaching provides

It is deplorable that homosexual persons have been and are the object of violent malice in speech or in action. Such treatment deserves condemnation from the Church's pastors wherever it occurs.¹⁹

This view is reflected in a teaching resource developed by the CEO where tolerance of people's sexual orientation is emphasised. The resource states

Regardless of sexual orientation we are people made in the image and likeness of God. Each of us reflects the love of God and as such deserves to be treated with dignity, respect and understanding.

'God created man in his own image, in the image of God he created him; male and female he created them.' (Genesis 1:27)

'You shall love your neighbour as yourself.' (Mt 19:19)²⁰

As I have indicated the issue of the status of homosexual activity does not arise on the facts of this complaint in relation to the inherent requirements issue. There is no evidence that Ms Griffin has advocated homosexual practices contrary to the official teaching of the Catholic Church. Rather the positions she has advocated publicly and consistently are fully consistent with the Catholic Church's official teaching against discrimination and

¹⁸ Catechism of the Catholic Church 1994 para. 2358.

¹⁹ Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons Prefect of the Congregation for the Doctrine of the Faith, Vatican City, 1 October 1986.

²⁰ HIV/AIDS Education in Catholic Schools K-12: Ideas for Implementation within a Personal Development, Health and Physical Education Program Catholic Education Office, Sydney, 1992.

violence against homosexuals. She supports students and teachers who are subjected to violence and vilification on the basis of their sexual orientation. She cannot be considered to be in a position that the CEO agrees would justify the 'just discrimination' permitted by Catholic teaching, that is, 'advocacy of a position that is contrary to the teaching of the Catholic Church'.

The evidence then clearly answers each of the points presented by the CEO to support its contention that Ms Griffin cannot meet the inherent requirements of the position of teacher in a Catholic school. The CEO said that her '(known or public) lifestyle is totally at variance with the role model of a teacher which is regarded as so essential in a Catholic school seeking to inculcate specifically Catholic values'. It is not at variance with that role model. The CEO described her as 'a high profile lesbian activist who engages in what the Catholic Church teaches to be immoral homosexual activity' but it admitted that it knew nothing whatsoever about her personal sexual activities. In view of that admission this description can only be seen as gratuitous and scurrilous. The CEO said that her 'actions or known/public lifestyle cannot avoid making an indelible impression on students under her care and thereby influence them contrary to the teachings and values of the Catholic Church'. In fact if her 'known/public lifestyle' were to make such 'an indelible impression on students', then it could only influence them consistently with the teachings and values of the Catholic Church because her advocacy is against discrimination and violence.

The CEO did not argue that Ms Griffin cannot meet the inherent requirements of the job of teacher in Catholic schools for any reason other than her sexual preference. It did not dispute her qualifications in any other respect. I find no evidence therefore that Ms Griffin cannot fulfill the inherent requirements of being a teacher in the Catholic education system in the Archdiocese of Sydney in accordance with the Principles of Employment.

The religious institutions exception

The respondent's submission

In addition to its argument on the inherent requirements of the job the CEO defended its refusal of Ms Griffin's application on the basis of the religious institutions exception in the Act. That exception permits a distinction, exclusion or preference 'in connection with employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, being a distinction, exclusion or preference made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or that creed'.

I have already indicated that there are many complexities in this exception that have not been the subject of judicial or Commission consideration and resolution and that it is not necessary to resolve these complexities in deciding this complaint. For that reason, even though Ms Griffin presented a great deal of argument and supporting statements on Catholic attitudes towards homosexual activity, I need not deal with that issue. I can decide the complaint on the basis of the CEO's statement of the official Catholic position.

The CEO submitted that the Catholic schools it conducts in the Archdiocese of Sydney are institutions ‘conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed’. Ms Griffin did not contest this.

The principal argument put by the CEO in relation to the religious institutions exception is that approving Ms Griffin to teach in the Catholic school system would cause injury to the religious susceptibilities of adherents of Catholic Christianity.

Since the Catholic Church considers homosexual activity to be immoral, Catholic parents would be outraged at the prospect of the CEO permitting a person who engages in immoral homosexual activities to be in loco parentis with their children. Parents and other Catholics in the community would regard that as grossly offensive and inconsistent with Catholic teachings and beliefs. They are entitled to expect that Catholic schools, with their special character and faith commitment, will be conducted consistently with the teachings of the Catholic Church and will not advocate behaviour or lifestyles unacceptable to the Church.

The employment as a member of staff of a Catholic institution who is unable to fulfill the doctrines, tenets, beliefs or teachings of the Catholic Church is necessarily an act which would cause injury to the adherents of the Catholic faith. The inconsistency between the Complainant's lifestyle (which is well-known and public) and those teachings, particularly considering the influence (consciously or unconsciously) over children must result in the teachings of the Church not being fulfilled and therefore cause injury to adherents of the Catholic faith.

...

Injury may include an unacceptable influence of a homosexual in a position of a role model which not only implies acceptance of his or her lifestyle but may well influence a student to follow that model and engage in a similar lifestyle, which is contrary to the teachings of the Catholic Church.²¹

Ms Griffin does not accept the respondent's contentions.

The complainant's sexual orientation and lifestyle

The CEO's submissions on this section of the Act again appear to be premised on the notion that Ms Griffin advocates or undertakes homosexual activity. As I have already indicated, there is no evidence to support this and the CEO's assertions that she is ‘a person who engages in immoral homosexual activities’ is gratuitous and scurrilous. There is no evidence that she ‘is unable to fulfill the doctrines, tenets, beliefs or teachings of the Catholic Church’. The assertion that the mere employment of a homosexual teacher ‘may

²¹ Dated 5 December 1996 p.7.

well influence a student to follow that model and engage in a similar lifestyle' is contrary to all research of which I am aware. The CEO itself admitted to Ms Griffin late in the hearing

... we have never suggested that your employment or the employment of any homosexual person in and of itself put any students in physical or psychological danger ...

If the employment of Ms Griffin would cause injury to adherents of Catholic Christianity, that injury could not stem from any actual conflict between Ms Griffin's public advocacy and Catholic teachings. It could arise only from an assumption in the minds of adherents that, because Ms Griffin has publicly acknowledged her homosexuality and is a public advocate against discrimination and violence against homosexuals, she is advocating and engaging in homosexual activity. Yet there is nothing in the facts of this case to justify this assumption. This assumption in fact is at the centre of this complaint. The CEO itself has clearly adopted it in rejecting her application. It assumed that the mere fact of Ms Griffin's public acknowledgement of her lesbianism makes her a sexually active homosexual and advocate.

The official teachings of the Catholic Church recognise that homosexuality does not equate with homosexual activity. Even while condemning this activity the Church calls homosexuals to celibacy, recognising that this moral choice is possible.

What is at all cost to be avoided is the unfounded and demeaning assumption that the sexual behaviour of homosexual persons is always and totally compulsive and therefore inculpable. What is essential is that the fundamental liberty which characterizes the human person and gives him his dignity be recognized as belonging to the homosexual person as well. As in every conversion from evil, the abandonment of homosexual activity will require a profound collaboration of the individual with God's liberating grace.²²

This view explains the Church's acceptance of celibate homosexual men and women among its clergy and religious and as its employees, including as teachers. The CEO said at the hearing

A gay and lesbian teacher who is celibate and who doesn't advocate homosexuality, all other things being equal, would be teaching in our schools.

At the end of the hearing it said

We judge people by their actions. So we have no knowledge and no need to know about what everybody's private circumstances are. You posed a question: could a chaste homosexual person be teaching in our schools? I answered yes because we are only interested in the public manifestation of their behaviour, not just from a legalistic point of view but because witness is the basis of how faith is manifested ...

²² Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons Prefect of the Congregation for the Doctrine of the Faith, Vatican City, 1 October 1986 para 11.

To assume that a person who acknowledges his or her homosexual orientation is sexually active, as the CEO has done in relation to Ms Griffin, is contrary to Catholic teaching.

Students and their parents may speculate that Ms Griffin engages in homosexual activity but mere speculation of students and their parents is not a basis for allowing the respondent to discriminate in employment against Ms Griffin. If the employment of Ms Griffin would injure the religious susceptibilities of these students and their parents, the injury would be founded on a misconception. Indeed it would be not an injury to their religious susceptibilities but an injury to their prejudices. These injuries do not come within the terms of exception and are not a permissible reason for discriminating on the ground of sexual preference. In applying for classification with the CEO Ms Griffin asserts that she will act in accordance with its Principles of Employment. If she fails to adhere to those Principles then the CEO can take action in relation to her classification.

A subjective test only or an objective element too?

The only significant issue of legal interpretation to be decided in this complaint relates to the nature of the test to be applied in relation to the religious institutions exception. The Act provides that the distinction must be ‘made in good faith’. Clearly that requires an subjective test. A distinction made in bad faith, however justifiable otherwise, does not gain the protection of the exception. However, is there an objective element too? There was no evidence that the CEO acted other than in good faith. Is this sufficient to give it the protection of the exception? I consider that it is not sufficient.

The respondent first argued that the test was purely subjective. At the hearing the representative of the CEO said

What we contend is that we’re acting in good faith. Clause (d) [the religious institutions exception] as it stands, as we all know, does not include a requirement for reasonableness. ... the clause that we’re dealing with at the moment actually doesn’t go to reasonableness. It goes to the good faith and our argument is that we have at all times acted in good faith ...

However later in the hearing the representative agreed that the decision could not be taken ‘on the basis of a whim or a misconception’.

THE COMMISSIONER: So it must have some objective factual basis?

MR BAKER (CEO): Yes, we would agree with that and the decisions must be made objectively ...

‘Objective’ is the key word. Each case has to be decided objectively in its own circumstances. We certainly do not think or argue that we have the right to act capriciously or randomly ...

I agree. The Act does not provide that the exception applies whenever the distinction is made in good faith. The distinction must also be made ‘in order to avoid injury to the

religious susceptibilities of adherents of that religion or that creed'. That introduces an objective element.

Religious institutions can claim quite properly a margin of appreciation or discretion in making distinctions under this exception. Religious believers have the right to determine what are or are not the doctrines, tenets, beliefs or teachings of their religion. The state and state institutions have no entitlement or authority in human rights law or domestic law to define those. But in applying laws that recognise the doctrines, tenets, beliefs or teachings of a religion the state and state institutions are entitled to rely upon what religious believers say are their doctrines, tenets, beliefs and teachings. Indeed they have no option but to do so.

In this case I have received and accepted evidence of the Catholic Church's relevant doctrines, tenets, beliefs and teachings. I have found that the CEO's action in rejecting Ms Griffin's application was not founded on those doctrines, tenets, beliefs and teachings but that it was in fact inconsistent with them. I have found that it depended upon unproven assumptions about Ms Griffin. Therefore the distinction cannot have been made 'in order to avoid injury to the religious susceptibilities of adherents of that religion or that creed'. In these circumstances the fact that the CEO acted in good faith is not sufficient to excuse its action or to give it the benefit of the exception in the Act for religious institutions.

Conclusion

For these reasons I am satisfied that the CEO rejected Ms Griffin's application for classification as a teacher in Catholic schools in the Archdiocese of Sydney on the basis of her sexual preference. I do not find that Ms Griffin is unable to fulfill the inherent requirements of the job of being a teacher in Catholic schools administered by the respondent. Nor do I find that the CEO's refusal of Ms Griffin's application was protected by the religious institutions exception in the Act.

Notice of findings of the Commission

The Commission finds that the acts and practices complained of by the complainant constitute discrimination in employment based on sexual preference within the meaning and operation of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

Reasons for findings

1. The CEO rejected Ms Griffin's application for classification to teach in Catholic schools it administers on the ground of her sexual preference.
2. As a result of the rejection of Ms Griffin's application she is excluded from teaching in Catholic schools administered by the CEO.
3. There is no evidence that Ms Griffin is unable to comply with the inherent requirement of being a teacher in the Catholic education system that teachers support the official teachings of the Catholic Church and demonstrate that support by their known or public behaviour. The known or public stance of Ms Griffin in relation to homosexuality does not conflict with the official teachings of the Catholic Church.
4. The rejection of Ms Griffin's application for classification was made in connection with her employment as a member of the staff Catholic schools administered by the CEO which are conducted in accordance with the official doctrines, tenets, beliefs or teachings of the Catholic tradition. While Ms Griffin's exclusion from employment was made in good faith, it was not necessary to avoid injury to the susceptibilities of adherents of the official teachings of the Catholic Church.
5. The CEO's action is not protected by the religious institutions exception in s 3(1) of the Act.

The Commission recommends that the Catholic Education Office approve Ms Griffin's application for classification to teach in Catholic schools it administers in the Archdiocese of Sydney.

Appendix A

Functions of the Human Rights and Equal Opportunity Commission

The Commission's functions

The long title of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) is “an Act to establish the Human Rights and Equal Opportunity Commission (and) to make provision in relation to human rights and in relation to equal opportunity in employment ...”

Part II Division 4 of the Act confers functions on the Human Rights and Equal Opportunity Commission (“the Commission”) in relation to equal opportunity in employment in pursuance of Australia’s international obligations under the International Labour Organisation *Discrimination (Employment and Occupation) Convention 1958* (ILO 111).²³ Section 8(6) of the Act provides that the Human Rights Commissioner (“the Commissioner”) shall perform the Commission’s function of inquiring into any act or practice that may constitute discrimination as defined by the Act. Under s.31(b) of the Act the Commissioner is to inquire into any act or practice that may constitute discrimination and:

- (i) where the Commission(er) considers it appropriate to do so – to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry; and
- (ii) where the Commission(er) is of the opinion that the act or practice constitutes discrimination, and the Commission(er) has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect such a settlement – to report to the Minister in relation to the inquiry.²⁴

²³ Ratified by Australia in 1973.

²⁴ s.31(b).

Discrimination

Under the Act discrimination means

- (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
- (b) any other distinction, exclusion or preference that:
 - (i) has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
 - (ii) has been declared by the regulations to constitute discrimination for the purposes of this Act;
 but does not include any distinction, exclusion or preference:
- (c) in respect of a particular job based on the inherent requirements of the job;...”.²⁵

ILO 111 prohibits discrimination on certain specified grounds.²⁶ Those grounds are contained in the Act in subparagraph (a) of the definition of discrimination. ILO 111 also provides that ratifying States may address discrimination on additional grounds.²⁷ The Act provides in subparagraph (b)(ii) of the definition of discrimination for the adoption of regulations to declare additional grounds in accordance with this provision in ILO 111. Under this power the *Human Rights and Equal Opportunity Commission Regulations* in 1989 declared sexual preference as a ground of discrimination for the purposes of the Act with effect from 1 January 1990.²⁸

It is an accepted principle in domestic law that where a statute contains language that derives directly from an international instrument, such as the HREOC Act, it should be interpreted in accordance with the meaning it has been given at the international level.²⁹ The comments of the International Labour Conference Committee of Experts on the Application of Conventions and Recommendations (“the Committee of Experts”) are relevant to the interpretation of the Act’s definition of discrimination.

According to the Committee of Experts there are essentially three elements to the definition of discrimination in ILO 111:

²⁵ s.3(1).

²⁶ Art 1(1)(a).

²⁷ Art 1(1)(b).

²⁸ Notified in the Commonwealth of Australia Gazette on 21 December 1989.

²⁹ *Koowarta v Bjelke-Petersen & Others* (1981) 153 CLR 168 at 265 (Brennan J); *Minister for Foreign Affairs and Trade & Ors v Magno and Another* (1992) 112 ALR 529 at 535-6 (Gummow J).

1. an objective factual element, being the existence of a distinction, exclusion or preference which effects a difference in treatment in comparison with another in the same situation;
2. a ground on which the difference of treatment is based that is declared or prescribed;
3. the objective result of this treatment, that is, a nullification or impairment of equality of opportunity or treatment in employment or occupation.

Further the Committee of Experts has expressed the view that “the adoption of impersonal standards based on forbidden grounds” and “apparently neutral regulations and practices [that] result in inequalities in respect of persons with certain characteristics” also constitute discrimination.³⁰

The Committee of Experts has also commented on the ILO 111 provision of “any distinction, exclusion or preference in respect of a particular job based on inherent requirements of the job”. To be an inherent requirement the condition imposed must be proportionate to the aim being pursued and must be necessary because of the very nature of the job in question. The Committee stated for example that the exception “refers to a specific and definable job, function or task. Any limitation within the context of this exception must be required by characteristics of the particular job, and be in proportion to its inherent requirements.”³¹

In addition the Committee of Experts has agreed that an intention to discriminate is not necessary for a finding of discrimination under ILO 111.³²

³⁰ International Labour Conference, *Equality in Employment and Occupation: General Survey by the Committee of Experts on the Application of Conventions and Recommendations* ILO, Geneva, 1988, at 23.

³¹ *ibid*, at 138.

³² *ibid*, at 22.