Comment an "exposure draft" of the new federal Human Rights and Anti-Discrimination Bill 2012 from:

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The following points have been made by a trusted colleague who sought legal opinion. I endorse them for your consideration, as they throw doubt on the integrity of the proposed bill.

1. Discrimination is defined to simply mean "unfavourable treatment" of a person because he/she has a "protected attribute" (S.19(1)). The definition of "unfavourable treatment" includes "conduct that offends, insults or intimidates" (S.19(2)). This is a very low threshold to constitute "unlawful conduct" that can be grounds for complaint and legal action.

2. The proposed definition of "discrimination" includes "conduct that offends, insults or intimidates". This would seriously undermine freedom of speech in all areas of public life, including in publications (proposed Section 53). Subject to the limits of the law of defamation and the prohibition on inciting violence, freedom to offend or insult is, as ABC chairman Jim Spigelman says, integral to freedom of speech. On the other hand there is no recognised legal right not to be offended or insulted. The proposed bill would make it unlawful to offend. Freedom of speech is a fundamental right guaranteed by Australian law and by the International Covenant on Civil and Political Rights.

3. Proposed Section 124 is seriously oppressive in that it would reverse the onus of proof – ie. the complainant only has to allege that another person's conduct has offended, insulted or intimidated him/her and how is the accused to prove that it did not? There is no objective basis on which to judge whether the complainant was offended or insulted. The proposed bill only requires a complainant to make out a prima facie case and then the onus is on the defendant to prove his/her conduct was not "unlawful discrimination". This is not a mere "streamlined complaints system". It would be a reversal and complete undermining of a fundamental principle of our legal system, derived from 800 years of common law, that an accused is innocent until proved guilty. The onus of proof should remain on the party making a complaint to prove that the conduct amounts to "unlawful discrimination".

4. The new "protected attributes" introduced by S.17, "sexual orientation" and "gender identity", raise issues about discrimination against citizens or

organisations/institutions with sincerely and deeply held beliefs or values in relation to the nature of sexual identity and expression. The currently protected attributes of disability, age, race and sex (as in marital, parental and breast-feeding status) do not raise such issues.

5. In particular, it should not be "unlawful discrimination" to discriminate in relation to "sexual orientation" or "gender identity" in aged care as per proposed Section 33(3). Freedom of thought, conscience, religion and belief in relation to these matters must be properly protected as guaranteed by Australian law and international treaties and instruments.

6. The right to freedom of thought, conscience, religion and belief is guaranteed by the International Covenant on Civil and Political Rights to which Australia is a signatory. To meet Australia's obligations under the Covenant the proposed bill should have the object of protecting those rights and should not adopt a concept of discrimination that would make the exercise of those rights unlawful discrimination. Merely making a concession to those rights for very restrictive "religious purposes" (as proposed by Sections 32 and 33) or under the general "justifiable conduct" defence (proposed Section 24) is a grudging and inadequate protection of those rights that Australia is obligated to protect under the ICCPR.

7. Exceptions are to be reviewed in three years (Section 47) and all exemptions are only temporary (Section 85).This is inadequate protection of rights guaranteed under the ICCPR which Australia as a signatory has an obligation to protect. In the Senate Inquiry into the 2012 Marriage Equality Bill seven Labor senators gave a dissenting opinion in opposition to the proposed bill. In relation to the promised exemptions for the churches not to have to celebrate same-sex marriages they said "The re-assurance ….is hollow and tactical in nature rather than a matter of substance."

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2010-13/marriage_equality_2012/report/d03.htm. The same can be said of the reviewable exceptions and the temporary exemptions proposed under the bill.

8. The proposed bill expands the prohibition of discrimination into the social life of citizens. Clubs and member-based associations and competitive sporting activities are restricted to the exceptions proposed by Sections 35 and 36. This seriously undermines the right to freedom of association Australians have long enjoyed and which is guaranteed by the ICCPR.