

## INTRODUCTORY

1. The definition of “disability” in Section 6(1) includes: “(d)The presence in the body of organisms capable of causing disease or illness.” This would include HIV which means it would be an offence to discriminate against a person on the basis of his/her HIV status. Yet it raises serious issues in relation to individual and public health and safety.
2. The definition of “gender identity” in Section 6(1) is - The identification by a person of one sex as a member of the other sex (or by a person of indeterminate sex as a member of a particular sex) by assuming the characteristics of the other sex or by living or seeking to live as a member of the other sex (see Section 6(1)(a)(i) and (ii) and (b)(i) and (ii)). This would mean that a person choosing to assume the characteristics of the other sex or seeking to live as a member of the other sex, whether or not that choice was permanent , would have to be treated as a member of that other sex. This raises serious issues in regards to those working with children and young people; about the use of public toilets and change rooms for example. In Washington in early November 2012 a 45 year old male student who dresses as a woman was allowed to use the women’s locker and change rooms at a school and walked around naked in front of girls as young as six years old. Legal counsel for a group of outraged parents of the girls said: “What Americans are seeing here is the poisoned fruit of so-called “non-discrimination” laws and policies.” (see <http://radio.foxnews.com/toddstarnes/top-stories/college-allows-transgender-man-to-expose-himself-to-young-girls.html>) So this is a very real issue.
3. The constitutional basis for the proposed bill is questionable. Section 13 appears to be a very complicated saving clause to salvage as much of operation of the proposed bill as possible if any challenge were made in a particular case. Have the states ceded the power to the federal government to regulate the conduct of their residents across the board and not just in those areas that would come within the reserve powers or have already been ceded to the Commonwealth?
4. Further the proposed use of the external affairs power as the main constitutional basis to govern behaviour between individual citizens of Australia is an inappropriate if not invalid use of that power (Section 11). The external affairs power is not meant to be used “give effect to” international human rights instruments. It is under that power that Australia can become a signatory to those instruments but that is not a basis to implement them into Australian law in a manner that is not consistent with Australia’s federal constitutional structure.
5. The purpose of the reserve powers sought to be used as a constitutional basis for the proposed bill (Section 12 - Corporations, Trade or Commerce, Banking and Insurance) is not to regulate the conduct of or relations between individual citizens within states or territories. The power is in relation to the business or operations of the head of power ie trade, commerce, banking, insurance or relations between the Commonwealth and a state or territory.
6. Proposed Section 14 provides that the proposed bill is not intended to prevail over a state or territory law to the extent the state or territory law is capable of operating concurrently. But it is not clear where the proposed bill would operate in order to work out where there would be a need to work out the extent of federal and state coverage.

7. The whole scheme of constitutional basis for the proposed bill seems to be a cobbling together of a blanket or umbrella federal (as opposed to state or joint federal/state) coverage across the board, in all areas, in relation to “discrimination.” The extent of the operation of the proposed bill is not clear.

#### DISCRIMINATION

8. Proposed Section 19(1) provides that “A person ....discriminates against another ....if the ... person treats, or proposes to treat, ... (another) person unfavourably...” because of a “protected attribute.” Merely “proposing” to treat another person unfavourably constitutes discrimination and therefore grounds for complaint. The complainant only has to make out a prima facie case that the defendant proposed to treat him/her unfavourably because of a protected attribute and the defendant would then have to prove he/she did not propose to treat the other unfavourably because of the protected attribute. The onus of proof is reversed (see proposed Section 124).
9. It is not clear what “proposes” means. Does it mean that merely to intend treating another unfavourably would amount to discrimination? Further, proposed Section 20 provides that the question of whether conduct amounts to discrimination where the conduct consists of *proposing* to treat another unfavourably would be determined as if the defendant had *actually treated* the other person unfavourably. The law does not normally deal with intent before the fact, but only after an offence has occurred if intention has to be proved to establish the offence. Proposed Sections 19 and 20 would make “unlawful” the mere intention to do something that might amount to unlawful conduct.
10. Unfavourable treatment is a vague and subjective term. Section 19 (2) provides that it includes, “but is not limited to”, harassing another or “other conduct that offends, insults or intimidates...”
11. There is no definition of harass. The only other place in the proposed bill where harassment occurs is in proposed Sections 49 and 50 in the context of sexual harassment which is defined in Section 49. It is not clear whether what the meaning of harassing is in proposed Section 19(2).
12. Proposed Section 22(2)(b) would extend the definition of discrimination to “conduct that offends or insults” for all purposes. Presently none of the federal discrimination Acts, except the Racial Discrimination Act in relation to racial vilification, extend the definition of discrimination so widely as to include offending or insulting another.
13. Conduct that “offends” or “insults” is a subjective definition. There is no objective test to prove whether in fact a complainant was offended or insulted such as that normally used in law in these circumstances ie that of the “reasonable man.” Further, the defendant has to bear the burden of proving that the conduct complained of was not engaged in because of the complainant’s protected attribute(s). This would operate in a discriminatory way against the defendant.
14. Proposed Section 19 (3) provides that imposing a policy that “has or is *likely to have*, the effect of disadvantaging people who have a particular protected attribute...” amounts to discrimination. The words “likely to have” introduce uncertainty as to when discrimination would be found to have occurred. Further there is no indication of what would amount to conduct “disadvantaging” another person. Would it have to mean something measurable ie

material or financial disadvantage or not getting a job or a promotion? Or would conduct that made a person feel less important than another or not feeling part of the group be sufficient? Again this introduces uncertainty as to when conduct would be found to amount to discrimination.

15. Proposed Section 19(4) extends discrimination to treating another person unfavourably because an associate of that other person has a protected attribute or, in the past, had a protected attribute or possibly in the future may have a protected attribute or because the first person assumed an associate of the other person had, has or may in the future have a protected attribute. This would mean a person could make a complaint of discrimination against another person even if he/she does not have a protected attribute on the grounds the discrimination against him/her was because an associate has, had or may in the future have a protected attribute. This is extending discrimination beyond what is reasonable.
16. "Associate" is defined as not only immediate family but also "another relative" and anyone with whom a complainant has a "care, business or social" relationship. This is wide enough to include anyone a complainant knows. A complainant effectively only has to allege that he/she has been discriminated against because an "associate" has, had or may have in the future have, a protected attribute, or that the defendant has assumed so. The onus is then on the defendant to prove that that was not the reason for his/her conduct.
17. The effect of proposed Section 19 would be that any conduct that treats another person unfavourably, which includes offending, insulting or intimidating someone, would be "discrimination." This would have a revolutionary impact on freedom of thought, speech, action, belief, on everything that Australians would think, do or say as, if another person complains that it offended, insulted or intimidated him/her then it would be "discrimination."

#### "UNLAWFUL" DISCRIMINATION

18. Proposed Section 22 then sets out what discrimination would be "unlawful" discrimination. To work out whether what he/she was going to say or do did not amount to "unlawful" discrimination a person would have to study proposed Section 22 and decide whether it would be "connected with any area of public life." Section 22(2) sets out what are "areas of public life" but the list is not exclusive. It covers all the areas of life except exclusively home life. It includes social and community areas of clubs and membership of associations and sport. It would make every Australian have to think and think again and then err on the side of caution and refrain from saying or doing anything that might offend or insult anyone else in any area of life apart from home life, lest he/she would be guilty of "unlawful" discrimination. This would be a highly oppressive law.
19. Proposed Section 22 also raises anomalies. In relation to discrimination on the ground of "political opinion" it is only "unlawful" to discriminate on this ground in connection with work and work-related areas (Section 22(3)). This would appear to mean that for a political party or a politician to discriminate against an applicant for a position on the staff of the party or the politician because of the opposing political opinion of the applicant would be 'unlawful' discrimination. On the other hand it would appear *not* to be "unlawful" to discriminate on the ground of political opinion to bar someone from membership of the local cricket club (Section 22(2)(g)) or from a motel or guest house (Section 22(2)(e)) or from an education or training facility or program (Section 22(2)(b)).

20. Similarly the protected attributes of nationality, social origin, religion are also only protected in connection with work or work-related areas. So it would not be “unlawful” to discriminate on these grounds in relation to the provision of accommodation, access to public places, education or training for example – or in any of the other “areas of public life set out in Section 22(2).

#### FREEDOM OF SPEECH

21. The definition of discrimination would seriously undermine freedom of speech. The law of defamation and the laws prohibiting incitement to violence presently govern the limits of free speech encouraging people to exercise the right responsibly. Freedom of speech is a right guaranteed by the ICCPR to which Australia is a signatory and therefore has an obligation to protect. There is no recognised legal right in any international instrument not to be offended or insulted. Australia’s international treaty obligations do not therefore require Australian law to protect persons from being offended or insulted. However the proposed bill may put Australia in breach of international treaty obligations to protect freedom of speech.
22. The undermining of freedom of speech would include in all publications (Section 53). The exception in Section 53(2) only extends to “a fair and accurate report of any event or matter of public interest.” Any analysis or opinion on the matter could amount to unlawful conduct if it was not considered “fair.” What would be “fair” is not a clear test. It is also only a fair and accurate “report” that is allowed. Opinion or comment would be taking a risk of a complaint of unlawful conduct. This would be a serious restriction on public comment and freedom of speech in the media. A free press is a hallmark of a free society.
23. The effect of the proposed Bill on freedom of speech for everyone would be oppressive. Before expressing any opinion by conduct, word or speech, Australians would have to check whether it would involve a protected attribute(s) listed in Section 17, then consider whether it would be “unfavourable to” (Section 19(1)) or would amount to “harassing” anyone (Section 19(2)(a)) or would “offend or insult” anyone (Section 19(2)(b)). This would require Australians to censor anything they think of doing or saying to ensure they will not be “unlawfully” discriminating.

#### FREEDOM OF THOUGHT, CONSCIENCE, RELIGION AND BELIEF

24. The definition of discrimination would also undermine the right to freedom of thought, conscience, religion and belief. The right to these freedoms is guaranteed by Article 18 of the ICCPR and therefore Australia is under an obligation to protect them in Australian law.
25. The addition of “sexual orientation” and “gender identity” to the list of “protected attributes” in proposed Section 17 is an expansion of the attributes protected under current anti-discrimination laws and raises issues of discrimination against persons who have sincere and deeply held views or convictions around sexual identity and expression. The currently protected attributes (disability, age, race and sex) do not raise such issues. Freedom of speech and of thought, conscience, religion and belief of those persons are guaranteed under the International Covenant on Civil and Political Rights (the ICCPR) to which Australia is a signatory and is therefore has an obligation to protect. The proposed bill may put Australia in breach of international treaty obligations.

## EXCEPTIONS

26. Proposed Sections 32 and 33 provides for exceptions “related to religion.” These are very narrow exceptions.
27. Proposed Section 32(2)(a) only makes an exception to “unlawful discrimination” in relation to the ordination or appointment, and the education or training , of persons seeking ordination or appointment to the priesthood or ministry and the appointment of persons to perform duties connected with religious observance or practice. These are only part of the activities of the churches that constitute their very reason for being, their mission and identity.
28. Further, proposed Section 32(2)(b) only makes an exception to “unlawful discrimination” in relation to on the grounds of the “protected attributes” set out in Section 32 (1). This limits the already limited exception even more. Even in relation to the selection and education of persons for ordination to the priesthood or ministry or to assist in religious ceremonies, churches are only to be allowed to discriminate on the grounds the proposed bill allows. There should be no restriction on the churches in regard to the internal regulation of specifically religious observance and practice.
29. Proposed Section 33 is described as providing exceptions for “religious bodies and educational institutional institutions.” Again the exceptions proposed are very narrow and would not apply to all areas of church activities.
30. Section 33(2) only provides an exception for “a body established for religious purposes” *and* which conforms to the doctrines, tenets or beliefs of that religion” *and* “is necessary to avoid injury to the religious sensitivities of the adherents of that religion.” Many organisations, services and facilities set up by the churches would not necessarily be found to have been set up specifically “for religious purposes.” Church schools, adoption agencies, hospitals, hospices providing palliative care for the dying, homes for the intellectually disabled would not necessarily be excepted from unlawful discrimination under this provision.
31. Proposed Section 33 would only provide an exception, even for a “body established for religious purposes”, if the behaviour was engaged in “in good faith” (Section 33(2)(b)), “conforms to the doctrines, tenets or beliefs of that religion” (Section 33(2)(b)(i)) and was “necessary to avoid injury to the religious sensitivities of adherents of that religion” (Section 33(2)(b)(ii)). The onus of proving all this rests on the defendant. And experience has shown how difficult it is to argue doctrinal matters and prove “religious sensitivities ”(see for example *Cobaw Community Health Services v Christian Youth Camps & Anor (Anti-Discrimination) [2010] VCAT 1613*). The exceptions supposedly offered by Section 33 are absurdly narrow and restrictive, would be impractical in operation or impose onerous and time consuming examination of many decisions that have to be made on a regular basis in the running of such bodies.
32. Further, proposed Section 33(3) excludes religious run aged care facilities from the already very narrow exception provided. It has been reported the basis for this exclusion from the exceptions for religious bodies is that it is in “recognition that aged care services become a person’s home.” But it is also the home of all the other residents. And in aged care facilities run by religious organisations many of those residents would be adherents of that religion.
33. Subject to the criminal and civil law, a body established for religious purposes should be free to make any decisions it is so minded in relation to the business of that body. Bodies

established for a religious purpose obviously and openly hold particular beliefs. Any person having dealings with such a body would be aware of its openly held beliefs. Persons who are offended or insulted by those beliefs are free to not approach that body to seek its assistance or attend its services. They are also free to approach that body to seek assistance (eg accommodation, medical care, money for food or utilities) but should not be able to complain it is “unlawful” discrimination for that body to act on or to express its beliefs or thoughts about conduct that is contrary to sincerely and deeply held beliefs and which in conscience it cannot condone.

34. Proposed Section 33(4) is described as an “exception for conduct of (an) educational institution conducted in accordance with the (doctrines), tenets, (beliefs or teachings) of a religion.” Not all churches would be able to prove what specific doctrines, tenets, beliefs or teachings their members adhere to. There may be some variation of doctrinal views within a denomination. Also some Christian church schools are run within a framework of general Judeo-Christian ethos and values rather than in accordance with specific doctrines or beliefs and may not therefore have the benefit of the exception proposed.
35. Proposed Section 33(4) could be interpreted to apply only to church educational institutions set up solely for the purpose of teaching the beliefs or tenets of the particular religion. This would mean the exception would only apply to such educational institutions as bible colleges and seminaries and not to schools set up to teach the broad curriculum.
36. Proposed Section 33(4) only provides a very narrowly defined exception in relation to religious educational institutions or schools for conduct “engaged in in good faith” and which “conforms to the doctrines, tenets or beliefs of th(e)religion” or “is necessary to avoid injury to the religious sensitivities of adherents of that religion.” For the Catholic church these tests may not be impossible to meet. But for churches or faiths that do not have a central core of beliefs clearly spelt out it would be much more difficult. There could be differences of opinion as to what a church teaching or belief is. “Religious sensitivities” could also vary from church to church within a denomination depending on how clearly and authoritatively a particular belief is adhered to. There is also the fact of dissent from church teaching within a church or school community.
37. If proposed Section 33(4) would not apply to a church or faith-based school, then only the general exception proposed by proposed Section 24 would be available. Proposed Section 24(2) only provides an exception if a person is unable to carry out the “inherent requirements” of the particular work because he or she has a protected attribute. This would not protect the right to freedom of thought, religion, conscience and belief for Christian schools for example because it fails to recognise that Christianity is ‘whole of life.’ Although a science teacher needs academic qualifications to teach science a Christian school also needs that teacher to also conform to the moral teachings of the Christian religion or to at least not openly live a life obviously contrary to those moral teachings. Christian understanding is that example is stronger than words. A teacher who is not teaching religious education is nevertheless ‘teaching’ beliefs and values by his/her very life style. Church schools must be protected from having to employ staff in contravention of the beliefs, tenets of the religion and in violation of conscience in relation to the Christian witness required of all Christians in how they live their lives. For a church school to have to employ, in any capacity, someone openly living in contravention of Christian morals or values would be a violation of the right to freedom of conscience. The inherent

requirements exception is inadequate protection of this right which Australia is obligated to protect.

38. The protection of thought, conscience, religion and belief offered by the proposed bill is very restrictive. It only applies for specifically religious purposes or by way of proving “justifiable conduct” which is an onerous process for a defendant. This amounts to inadequate and grudging protection of rights Australia is obligated to protect under the ICCPR. The proposed bill should have the object of protecting those rights and should not contain a definition of discrimination that would make the exercise of those rights “unlawful” discrimination.

#### SPECIAL MEASURES

39. Proposed Section 21 provides that “a special measure to achieve equality” is not discrimination. It is not that “a special measure” would be an exception to unlawful discrimination.” If it is “a special measure” it is per se not discrimination but has a protected status.
40. The only definition of “special measure” is a law, policy, or program or conduct that has as the sole or dominant purpose advancing or achieving “substantive equality” for people or a class of people with a protected attribute. There is no definition of or indication of what would amount to “substantive equality”. The problem is with the vagueness of the term. It is unclear what effect the operation of such a provision would have.
41. The “Special measures” proposal is probably directed to affirmative action programs or policies. Such policies or programs if they merely seek to achieve an artificial equality of outcome, should not be protected from the being discrimination. A clearer definition of “special measures” is needed. Such definition should clearly state what a “special measure” needs to be seeking to achieve to be excepted from “discrimination”.

#### JUSTIFIABLE CONDUCT

42. The other exception available is a general exception of “justifiable conduct”. Proposed Section 23 provides that conduct will not be “unlawful” discrimination if it is “justifiable.”
43. Proposed section 23(3) sets out when conduct would be “justifiable.” It would require a person, before engaging in any conduct that might be “discrimination” (for example that might offend, insult or intimidate another) to consider whether he/she could prove all of the following: that he/she engaged in the conduct in good faith to achieve a particular aim (Section 23(3)(a)); that the aim was “legitimate”(Section 23(3)(b)); that he/she considered engaging in the conduct would achieve the aim (Section 23(3)(c)); that a reasonable person in the circumstances of the defendant would have considered engaging in the conduct would achieve the aim (Section 23(3)(c)); and that the conduct was a proportionate means of achieving that aim (Section 23(3)(d)).
44. In making the examination of conduct required by Section 23(3) to decide whether his/her conduct would be ‘justifiable” a person would still not be sure whether it would be “justifiable” or not. There is no definition or indication what would constitute a “legitimate” aim. He/she could not be certain whether a reasonable person in his/her circumstances would consider engaging in the conduct would achieve that aim.
45. Further to Section 23(3), proposed Section 23(4) sets out matters to be taken into account in determining whether conduct is “justifiable”; the objects of the Act; the nature and extent of

the discriminatory effect of the conduct; whether the person could have engaged in other conduct that would have had no or a lesser discriminatory effect; and the cost and feasibility of engaging in that other conduct.

46. The tests required by proposed Section 23(3) and (4) for conduct to be “justifiable” are onerous and would not provide a satisfactory degree of certainty for citizens going about their everyday life making decisions relating to running of their businesses, exercising their freedom of speech – in many areas of their lives. Proposed Section 23(5) then would create even further uncertainty by providing that “*Any other matter that it is reasonable to take into account may also be taken into account*” in determining whether conduct is “justifiable.” Such a test is completely discretionary and would leave a person trying to work out if his/her conduct would be “justifiable” without reasonable certainty. The effect would be to bring the law into disrepute as oppressive and prohibitive of Australians exercising freedoms they have always enjoyed as a free and open society. It would operate to intimidate citizens into erring on the side of caution – if in doubt, don’t do or say anything that might be found to be, or that you can’t prove is not, “unlawful” discrimination. This is not the way a free society functions.

#### OTHER EXCEPTIONS

47. Other anomalies are raised by the specific exceptions. For example, proposed Section 39(2) provides an exception for insurance. The exception does not allow discrimination on the grounds of the protected attribute of “medical history” even though it may be highly relevant to the provision or the terms of provision of insurance. Proposed Section 43(2) provides an exception in relation to “employment to perform domestic duties on premises in which ...(a) person resides.” Why should the exception be restricted to domestic duties? Surely it should extend to *any* employment “on premises in which (a) person resides” ie in the person’s home. In employing a nanny to look after one’s children, or a tutor for a child, or a care giver for an elderly relative, surely a citizen should be free to choose who he/she will trust with such a sensitive position without any threat of the choice amounting to “unlawful” discrimination.
48. All the proposed exceptions would effectively operate as *defences* to complaint made rather than as true *exceptions*. It would be a complaint that would trigger an examination of whether an exception would apply in a given instance and the onus of proof would be on the defendant under proposed Section 124. This further weakens the level of protection the exceptions would provide.
49. Furthermore, proposed Section 47 provides that the exceptions are to be reviewed within three years of the commencement of the Act if the bill is passed. Whatever level of protection the exceptions would provide, Section 47 indicates they would not be permanent. In a review exceptions could be repealed or amended. So there is no certainty for citizens to ascertain what would constitute “unlawful discrimination.” This is inimical to the free exercise of basic rights in an open society.

#### OTHER UNLAWFUL CONDUCT

50. The proposed Bill as well as dealing with “unlawful” discrimination also deals with “Other unlawful conduct.” This Part includes racial vilification. Proposed Section 51(2)(a) defines racial vilification as “...conduct that is reasonably likely ... to offend, insult, humiliate or

intimidate another person or group of people.” This would incorporate the same low threshold for complaint to be made as is provided in proposed Section 19. The concept of “vilification” is flawed. Something more than causing offence or insult should be required to constitute unlawful conduct. The law already prohibits incitement to violence.

51. The case of *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* {2006} VSCA 284 3751 of 2005 was pursued under the Victorian Racial and Religious Tolerance Act. The Victorian Act makes “inciting hatred, contempt or severe ridicule” grounds for complaint. In contrast to the proposed definition in Section 51, this is a higher threshold for a complaint to be made and at least provides an objective test for what amounts to “vilification.” Even so, that case dragged out for five years, cost the accused an estimated hundreds of thousands of dollars in legal fees as well as the time and stress of defending the matter, was dismissed by the Victorian Supreme court in scathing terms, and ended in a mediated agreement.
52. It is noted that the proposed Bill does not make religious vilification unlawful even though “religion” is a protected attribute.”
53. Further in relation to Section 51, if the complainant is a member of a “group of people” who were offended or insulted by comments made about a particular race, the complainant him/herself would not necessarily have to be a member of the particular race in question – Section 51(2)(b)(ii).
54. Proposed Section 52 makes “Requesting or requiring information for a discriminatory purpose” unlawful. This proposal is highly restrictive of freedom of choice. It would be relevant to a decision whether to employ someone or to offer insurance or the terms on which insurance would be offered to request or require information about the medical history of the applicant. Or, for example HIV status or a history of drug abuse would be very relevant to a decision as to whether a person should be employed as a nurse or an anaesthetist in an operating theatre.
55. Proposed Section 56 would extend liability for “unlawful” conduct to any person who “permits” another person to engage in that conduct. The person permitting what could be unlawful conduct would be taken to have engaged in that conduct for the same reasons or for the same purposes as the other person. At least Sections 57 and 58, which also extend liability for unlawful conduct to other persons, only extend liability to persons in a legal or employment relationship to the person engaging in the conduct eg an agent or employee or a business partner or trustee. Section 56 would extend liability for unlawful conduct to a person who had no control over another person actually engaging in the unlawful conduct “permitting” that other person to engage in the conduct. Does it impose an obligation on everyone to prevent “unlawful” conduct by others?

#### ASSISTANCE WITH COMPLIANCE

56. The Australian Human Rights Commission (the Commission) can prepare guidelines under proposed Section 62 to assist people to avoid engaging in conduct that would amount to unlawful conduct. However, even if a person or body has followed guidelines prepared by the Commission that will not give rise to any defence against a complaint (see proposed Section 63(1)(b)) unless the court or the Commission considers it “appropriate” to “have regard to it”. Following Commission guidelines would not necessarily be protection against a complaint of “unlawful” discrimination.

57. Even if a person or body developed an “action plan” under proposed Section 67 to avoid engaging in unlawful conduct, that would not give rise to any defence to a complaint (see proposed Section 69(1)(b)) unless the court or the Commission considers it “appropriate” to “have regard to it” (see proposed Section 69(2)).

#### EXEMPTIONS

58. Apart from the exceptions the Bill makes provision for “Exemptions” for particular conduct from being “unlawful” discrimination - proposed Section 83. Exemptions are only temporary. Proposed Section 83(2)(b) provides that exemptions must be expressed to have effect for the period specified in the exemption. That period must not exceed 5 years.
59. Temporary exemptions have to be applied for to the Commission and Proposed Section 84 sets out the procedure to do so specifying what has to be included in an application – the conduct to be exempted and the body/persons to be covered by the exemption. The granting of an exemption is at the discretion of the Commission and the only indication of the basis for a decision is in proposed Section 84(2) which provides that the Commission may grant an exemption if it “is satisfied that the exemption is consistent with the objects of the Act.” Even if an applicant could have some idea of whether the exemption applied for was “consistent with the objects of the Act” (and why would he/she apply if it obviously wasn’t) granting it is at the discretion of the Commission and there doesn’t appear to be any appeal. If granted, an exemption is operative for no more than 5 years and then would have to be applied for again. Exemptions are not a real or effective protection of freedom from complaint of unlawful discrimination. The application process would be prohibitive of a person applying for an exemption; is at the discretion of the Commission even if consistent with the objects of the Act; is only temporary; and has to be reapplied for on the expiration.

#### ONUS OF PROOF

60. Proposed Section 124 reverses the onus of proof. If a complainant makes application to the Federal Court or the Federal Magistrate’s Court pursuant to Section 120 then, as long as he/she makes out a prima facie case (Section 124(1)(b)) as to the reason the defendant has engaged in the conduct complained of, then that will be presumed to be the reason or purpose for the conduct “unless the contrary is proved.” ie unless the defendant can prove otherwise. The reason or purpose of the conduct is what under the Bill would make the conduct “unlawful.” This is not a mere shifting of the burden of proof. It is turning the law on its head and setting aside the 800 year old common law presumption of innocence. It would represent a fundamental change in the culture of justice in Australia. The onus of proof should remain on the party making the complaint.
61. Further the reversal of the onus of proof would allow claims to be made more easily. A result could be that a greater number of complaints would be made and the concern here is that it would also allow vexatious complaints to be made more easily.

#### OFFENCES AND PENALTIES

62. Proposed Sections 201 and 202 create offences of strict liability to comply with a notice of the Commission requiring provision of information or to attend a conference in relation to a complaint and penalties of 10 penalty units are provided. This contrasts with the protection given to complainants (proposed Section 205) and to the Commission (proposed Section

204) from civil liability for any loss, damage or injury of any kind suffered by any person (probably in most instances the defendant) adversely affected by the Commission dealing with the complaint.

#### GENERAL COMMENT

63. The very concept of “discrimination” in the proposed bill as any “unfavourable treatment” of another person is flawed. If the proposed bill were to become law then the rights of Australian citizens to freedom of speech, freedom of association, freedom of thought, conscience, religion, belief, freedom to choose how to conduct their businesses, and in employment decisions would all be seriously restricted. Under the proposed bill Australian citizens would not be allowed this freedom of choice but would always have to go about their business testing whether any conduct they might be mindful to engage in were not “unlawful.” It is not the function of the law, nor is the law able, to make people nice to each other, to prevent people offending or insulting each other. The attempt by this draft bill to do so has resulted in a draconian piece of legislation that would deny to Australian citizens those human rights to freedom of speech, thought, conscience, belief, religion and association we have til now enjoyed as citizens of a free country and which Australia is obligated to protect under its international treaty obligations. On behalf of the Australian Family Association, I urge the Committee to recommend the proposed bill not be proceeded with.