19 December 2012

Senate Standing Committee on Legal
And Constitutional Affairs
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Parliament House
CANBERRA ACT 2600

Attention: Ms Julie Dennett
Committee Secretary

By email: LegCon.Sen@aph.gov.au

SUBMISSION TO THE PARLIAMENTARY INQUIRY INTO THE EXPOSURE DRAFT OF THE *HUMAN RIGHTS AND ANTI-DISCRIMINATION BILL 2012*

Thank you for the opportunity to comment on the exposure draft of the *Human Rights and Anti – Discrimination Bill 2012* (the **Bill**).

In 2010, the Australian Government released its Australian Human Rights Framework (the **Framework**). In the foreword to the Framework, the then Attorney General made it clear that a Human Rights Charter or Human Rights Act was not to form part of the Framework (see: p1 of the Framework). The Framework adopts an approach of community education and reaffirmation through a commitment to promoting human rights and obligations in Australia. For the Framework to operate properly Australia needs to be a rights minded nation and seek to uphold human rights wherever possible to ensure that our human rights record remains strong.

Whilst those who argue for a Human Rights Charter maintain that human rights can be expressed in absolute terms, the truth is they cannot. It is incumbent upon us all to discern where the outer limits of a given human right may lie and identify potentially unacceptable limits on liberties we normally take for granted.

In Australia, whilst the right to freedom of expression is not guaranteed in any federal law and there is a limited right of freedom of political communication recognised by the High Court as being implied in the Constitution, the fact is the right to free speech is very wide indeed. As Lord Bingham expressed in his book *The Rule of Law*, the right to freedom of expression "means that in practice everyone [is] free to write and say whatever they wish, provided it [is] not forbidden" (at page 79). The circumstances in which that right is proscribed under Australian law is quite limited. However, the Bill does seek to restrict that freedom further by some of its provisions. These matters were drawn to the attention of the public most recently by the retired Chief Justice of New South Wales, the Hon. JJ Spigelman AC QC. In a speech that

was widely reported, Mr Spigelman made the very valid point that the Bill makes "offending" or "insulting" unlawful for the purposes of establishing racial vilification (see: clause 51(2)). Further, discrimination by unfavourable treatment as defined is clause 19 also embraces conduct that "offends" or "insults".

In both cases, the use of the words "offend" or "insult" place unreasonable limits on freedom of expression in Australia as we presently understand it. The Parliament has sought to deal with this in part under clause 51 (4) covering artistic works, genuine debate or other genuine purpose in the public interest or fair or accurate comment or reporting. This will not be sufficient. Argument will ensue as to whether a given performance by a stand up comedian is "artistic" or not. Comments by certain columnists or "shock jocks" will be questioned as to whether they are part of some "genuine debate" or whether their comments are either fair or accurate. Endless hours of court time will be wasted arguing over these points when those genuinely in need of justice from our court system are made to wait. All the present wording seems to suggest, as Mr Spigelman points out, is that there is some right not be offended when no such right exists.

The Bill states that one of its objectives is to "eliminate discrimination….. and racial vilification, consistently with Australia's obligations under the human rights instruments and the ILO instruments" that are listed in the Bill. In none of these instruments is any mention made of a right not to be offended (or insulted for that matter). The references in the Bill to offence and insult pander to a form of political correctness that the Parliament should eschew. By allowing the words about offence and insult to remain in the Bill, the Parliament will not be properly giving effect to one of its major objectives and placing an unreasonable limit on freedom of expression. Freedom of expression is clearly stated in the some of the human rights instruments referred to as a right to be upheld.

The New South Wales *Anti Discrimination Act* deals with racial vilification in a different way. It states that racial vilification must "incite hatred towards, serious contempt for, or severe ridicule" of someone on the grounds of race (see: section 20C). These are strong words and similar if not identical word should be adopted in the Bill. With respect to unfavourable conduct as defined in the Bill, the words "offends" and "insults" should be removed. That may beg the question can offence or insult never be grounds for discrimination. Whilst on the whole the answer must be "No", the fact that conduct is not limited by the words in clause 19(2), a court may on a given occasion determine certain words to be so offensive or insulting as to constitute discrimination.

I urge the committee to make these small but important changes to the Bill to uphold our freedom of expression.

Yours faithfully

R P ROGERSON