Julie Dennett

PO Box 6100, Canberra ACT 2600

Committee Secretary

Senate Legal and Constitutional Affairs Committee

Parliament House

Email: legcon.sen@aph.gov.au

THE UNIVERSITY OF MELBOURNE

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Dear Committee Secretary

Exposure Draft of Human Rights and Anti-Discrimination Bill 2012

We thank you for the opportunity to make this submission in relation to the exposure draft of the Human Rights and Anti-Discrimination Bill 2012 (hereinafter Draft Bill).

We make this submission in our capacity as academics who specialise in research into freedom of expression and the regulation of hate speech. We have both published widely in this area, and participated in international and comparative discussions relating to these issues. Our submission is concerned directly with these issues, and relates to the proposed s 19(2)(b) and s 51 of the Draft Bill. We are solely responsible for its content.

If you have any questions relating to this submission, or if we can be of any further assistance, please do not hesitate to contact us.

Yours sincerely

Professor Adrienne Stone

Director, Centre for Comparative Constitutional Studies

Professor Katharine Gelber

Australian Research Council Future Fellow

Professor of Political Science and International Studies, University of Queensland

Executive Summary

Submission 1:

We submit that the proposed s 51(2)(a) should be redrafted. Section 51(2)(a) in the Draft Bill currently reads:

> (2) The conduct of a person is racial vilification if:
>
> (a) the conduct is reasonably likely, in all the circumstances, to **offend, insult, humiliate or intimidate** another person or group of people; ...

Section 51(2)(a) should instead read:

> (2) The conduct of a person is racial vilification if:
>
> (a) the conduct is reasonably likely, in all the circumstances, to **incite hatred towards, serious contempt for, or severe ridicule of** another person or group of people.

Submission 2:

Section 19(2)(b) currently reads:

> (2) To avoid doubt, unfavourable treatment of another person includes (but is not limited to) the following:
>
> ...
>
> (b) other conduct that offends insults or intimidates the other person.

We submit that the definition in s 19(2)(b) should be amended either by:

1. deleting paragraph (b) with respect to all grounds; or
2. providing an explicit exception for 'political opinion' so that unfavourable treatment does not include 'conduct that offends' or 'insults' a person on the grounds of political opinion.

SUBMISSION 1

I SECTION 51(2)(A) SETS THE BAR FOR UNLAWFUL CONDUCT TOO LOW

A *The Meaning of 'Offend and Insult'*

The terms 'offend' and 'insult' suggest that conduct can be unlawful purely because of the emotional upset that it causes. The meaning of 'insult' was considered in detail by the High Court in 2004 in *Coleman v Power*.[1] Justice McHugh reviewed the authorities and observed as follows:

> Over a long period, superior courts — including this Court on one occasion — have decided many cases involving statutory offences concerned with using insulting words. Those cases show that insulting words include: 'language calculated to hurt the personal feelings of individuals', 'scornful abuse of a person or the offering of any personal indignity or affront', 'something provocative, something that would be offensive to some person to whose hearing the words would come'.[2]

Judges of the Federal Court have considered the meaning of 'offend' and 'insult' on several occasions in the context of s 18 of the *Racial Discrimination Act*.[3] This line of authorities has held that offensive or insulting conduct must cause more than just private hurt, and must also involve some public consequence. In the most recent of these cases, *Eatock v Bolt*, Justice Bromberg stated that the 'public consequences' of offence or insults 'need not be significant [and] may be slight'.[4] The 'public consequence' requirement is thus easily satisfied. By comparison, equivalent state laws employ the language 'incite hatred towards, serious contempt for, or severe ridicule' in their anti-vilification statues.[5]

B *Freedom of Expression*

The current wording endangers freedom of expression, a central requirement in the liberal political tradition and the freedom on which other political rights — including the right to vote and freedom of assembly — depend.[6] Freedom of

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[1] (2004) 220 CLR 1.

[2] Ibid 18 (citations omitted).

[3] *Racial Discrimination Act 1975* (Cth) ('*RDA*'). The line of cases includes: *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352; *Jones v Scully* (2002) 120 FCR 243; *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105.

[4] (2011) 197 FCR 261, 325.

[5] For provisions from relevant state and territory legislation, see below Appendix A. The Northern Territory has not enacted any anti-vilification legislation.

[6] See, eg, John Stuart Mill, *On Liberty* (Hackett, 1978); Jeremy Waldron, 'Theoretical Foundations of Liberalism' in *Liberal Rights: Collected Papers 1981–1991* (Cambridge University Press, 1993) 35.

expression is protected in virtually every domestic constitution,[7] and has long been recognised as a core human right in international human rights law.[8]

We recognise, of course, that freedom expression is not an absolute right, and limits and restrictions upon it are permissible in certain forms directed at certain ends. For instance, the international human rights law standard, articulated in the United Nations General Assembly's 2011 *General Comment No 34* on freedom of expression, holds that restrictions on that right may be required for reasons relating to 'respect of the rights or reputations of others or to the protection of national security or of public order (*ordre public*) or of public health or morals'.[9] Whilst defining the precise content of 'public order' or 'public morals' has been acknowledged as a difficult exercise,[10] offence alone is not — to our knowledge — accepted anywhere as a legitimate limitation on freedom of expression. Nor can it be said that the current drafting is aimed at preserving 'respect of the rights and reputations of others'. While the right to free expression and the right to not be subject to racial vilification are clearly articulated in human rights law, there is no human right to freedom from offence or insult.[11]

II CONSISTENCY WITH THE *CONSTITUTION*

Respect for freedom of expression is the principal basis on which we make our submission. We note that there are two additional reasons for preferring a 'higher bar' for racial vilification claims.

First, requiring that unlawful conduct be 'reasonably likely, in all the circumstances, to **incite hatred towards, serious contempt for, or severe ridicule of** another person or group of people' may protect the law from constitutional challenge.

A *Treaty Implementation*

Section 51 (like s 18C of the *Racial Discrimination Act*) relies principally upon the Parliament's power to implement obligations assumed under treaties to which

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[7] See, eg, *United States Constitution* amend I; *Canadian Charter of Rights and Freedoms* art 2(b); *Constitution of the Republic of South Africa* art 16; *Constitution of India* art 19(a); *Grundsgesetz für die Bundesrepublik Deutschland* [Basic Law of the Federal Republic of Germany] art 5(1); *European Convention on Human Rights* art 10 ('*ECHR*').

[8] See, eg, *Universal Declaration on Human Rights* art 19; *International Covenant on Civil and Political Rights* art 19.

[9] Human Rights Committee, *General Comment No 34*, UN GAOR, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) [21], on the application of *ICCPR* art 19(3). Restrictions on the right by states parties may not 'put in jeopardy the right itself … [and] the relation between the right and restriction and between norm and exception must not be reversed'.

[10] For example, by the European Court of Justice in interpreting the similarly worded permissible derogations from art 10 of the *ECHR*: see, eg, *Otto-Preminger-Institut v Austria* (1994) 295-A Eur Court HR (ser A), noting the lack of a common standard of 'public morals' even as between western European nations. See also *General Comment No 34*, UN Doc CCPR/C/GC/34.

[11] See Jeremy Waldron, 'Dignity and Defamation' (2010) 123 *Harvard Law Review* 1596, 1613.

Australia is party.[12] In the case of s 51, validity depends on whether the section can be seen as a valid implementation of obligations assumed under the *International Convention on the Elimination of Racial Discrimination* ('*ICERD*') and the *International Convention on Civil and Political Rights* ('*ICCPR*').

In *Toben v Jones*,[13] pt IIA of the *Racial Discrimination Act* (containing s 18C in essentially the same terms as s 51(2)(a) of the Draft Bill) was challenged on the grounds that it was 'substantially inconsistent' with art 4 of the *ICERD* because it did not create a criminal offence, nor was it sufficiently closely directed to 'ideas based on racial superiority or hatred … incitement to racial discrimination ... [or] acts of violence or incitement'.[14]

The Full Federal Court rejected the argument that pt IIA was invalid for inconsistency with the treaty obligations on which it depended and also declined to 'read down' s 18C so that it required the promotion of ideas of 'racial hatred'.[15] Justice Carr held that, consistently with the *ICERD* and the *ICCPR*, it was permissible for the Commonwealth to seek to '"nip in the bud" the doing of offensive, insulting, humiliating or intimidating public acts ... before acts can grow into incitement or promotion of racial hatred or discrimination'.[16] In our opinion, the Full Court's view is preferable, however, because the matter has never been decided by the High Court it therefore remains vulnerable to challenge.

The wording we have suggested would help insulate s 51(2)(a) from any such challenge. Defining racial vilification as conduct that is 'reasonably likely, in all the circumstances, to **incite hatred towards, serious contempt for, or severe ridicule of** another person or group of people' more closely resembles the obligation in art 4 of the *ICERD* to prohibit 'all dissemination of ideas based on racial superiority or hatred' and 'incitement to racial discrimination'.

B *Freedom of Political Communication*

The form of words we have suggested will also help insulate s 51(2)(a) from challenge for inconsistency with the implied freedom of political communication.

To determine whether a law infringes the freedom of political communication, the following test applies:

1. Does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?
2. If the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end and in a manner

[12] Draft Bill s 11: 'Main Constitutional Basis: External Affairs — This Act has effect to the extent that it gives effect to the human rights instruments and the ILO instruments ...' ('the human rights instruments' refers to those instruments listed in s 3(2), which includes the *ICERD* and *ICCPR*).
[13] (2003) 129 FCR 515.
[14] Ibid 523–4 (Carr J).
[15] See ibid 526 (Carr J), 549–50 (Allsop J).
[16] Ibid 525.

> compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment to the *Constitution* to the informed decision of the people?[17]

If the first question is answered 'yes' and the second is answered 'no', the law is invalid.

1 *Does s 51(2) 'Effectively Burden' the Freedom of Political Communication?*

Clearly much of the communication to which s 51(2)(a) would apply has no relation to government or political matters. However, in certain circumstances, s 51(2)(a) may do so. For instance a Member of the Commonwealth Parliament might be abused for his or her public conduct (and hence is this would be communication about government or political matters) in a manner that also contains a racially based insult that is 'reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate [a] person or group of people'.

2 *Is s 51 (2) Reasonably Appropriate and Adapted to Serve a Legitimate End?*

In such a case, a question would arise as to whether s 51(2)(a) was a measure 'reasonably appropriate and adapted to a legitimate end' and enacted 'in a manner compatible with the constitutionally prescribed system of representative and responsible government'.[18] The High Court has never considered a law directed specifically at racist offence or insult. However, it is notable that the High Court in *Coleman v Power* stressed that insult and abuse are part and parcel of Australian political debate. In the words of Justice Kirby:

> Australian politics has regularly included insult and emotion, calumny and invective, in its armoury of persuasion … the *Constitution* addresses the nation's representative government as it is practised.[19]

Once again, we are of the view that s 51(2)(a), even in its present form, should survive constitutional scrutiny. There are ample grounds on which *Coleman* (which considered only a general law against the use of 'insulting words' rather than a racial vilification law) could be distinguished. However, the rewording we have suggested would have the additional benefit of making this outcome more certain.

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[17] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Coleman v Power* (2004) 220 CLR 1.

[18] (2004) 220 CLR 1, 33 (McHugh J).

[19] Ibid 70–1 (citations omitted). See also *Levy v Victoria* (1997) 189 CLR 579, 623 (McHugh J): 'the constitutional implication does more than protect rational argument and peaceful conduct that conveys political or government messages. It also protects false, unreasoned and emotional communications …'.

III RELATIONSHIP WITH STATE LAWS

Finally, we note that the rewording we have suggested would create a common standard in Commonwealth and state laws (see Appendix A). It will clarify a common Australian standard of conduct that constitutes racial vilification by ensuring that decisions of state and federal courts interpreting racial vilification statutes may be easily comparable between jurisdictions.[20]

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[20] Dan Meagher, 'So Far So Good?: A Critical Evaluation of Racial Vilification Laws in Australia' (2004) 32 *Federal Law Review* 225, 227:

> the current laws lack sufficient precision and clarity in key respects. Of particular concern are the amendments made by the [*Racial Hatred Act* to the *RDA* — that is, the offence provisions] and the 'free speech/public interest' exemptions in [the *RDA* and NSW, SA, ACT, Queensland, Victorian and Tasmanian laws]. An incoherent body of case law has developed as a consequence ... [i]t has left the law in a state of unprincipled fluidity.

SUBMISSION 2

We submit that causing offence on the grounds of political opinion should not constitute unlawful discrimination.

We submit therefore that the definition in s 19 be qualified either by:

1 deleting paragraph (b) with respect to all grounds; or
2 providing an explicit exception for 'political opinion' so that unfavourable treatment does not include 'conduct that offends' or 'insults' a person on the grounds of political opinion.

We make this argument for two reasons: first, we consider it inconsistent with core freedom of expression principles and second, we consider that it renders s 19 vulnerable to constitutional challenge on the grounds that it infringes the implied freedom of political communication.

I THE OPERATION OF THE DRAFT BILL IN ITS CURRENT FORM

The Draft Bill includes 'political opinion' as a protected attribute under s 17. Section 19(1) provides that discrimination is 'unfavourable treatment' of another person and s 19(2) provides that unfavourable treatment includes (but is not limited to) 'conduct that offends insults or intimidates the other person'. Section 22 limits the operation of s 19 by providing that discrimination only occurs 'if that discrimination is connected with any area of public life'. The result is that it is unlawful to 'offend or insult' a person on the grounds of their political opinion if that offence or insult occurs in 'any area of public life' which includes 'work and work-related areas' and 'education and training'.

II FREEDOM OF EXPRESSION

We make no submission on s 19 in so far as it applies to the 'protected attributes' other than 'political opinion'. Unlike the acts rendered unlawful by s 51(2)(a), the acts to which s 19 apply occur within confined relationships (such as work relationships and the provision of services). We recognise that there is an argument for protecting persons from offensive and insulting conduct directed at the other protected attributes in s 17(1).

However, we submit that it is a serious breach of freedom of expression to render unlawful conduct that 'offends' and 'insults' a person on the grounds of 'political opinion'.

The causing of offense and insult on the grounds of political opinion will usually be caused by the 'offending' person's own expression of political opinion. Therefore, the effect of these sections is to place a very significant limit on political expression in public life. The role that freedom of expression plays in protecting democratic government is the most commonly recognised — and in our view the strongest — justification for freedom of expression. This argument recognises the role freedom of

expression has in promoting healthy democratic government and therefore protecting all other liberties of the citizen.

On that basis the expression of political opinion should be considered to be at the very core of freedom of expression values and subject to the highest levels of protection. Unless harm caused is greater than offence and insult we can see no grounds for limiting freedom of expression even within the confines of 'public life' as defined in s 22.

III Constitutional Infringement of the Freedom of Political Communication?

Finally we note that the application of s 19 to offense and insult caused on the grounds of political opinion may raise constitutional problems.

As discussed above, the *Constitution* protects 'freedom of political communication' by requiring that a law that 'effectively burdens' political communication must do so in pursuit of a 'legitimate end' and 'in a manner compatible with the constitutionally required system of representative and responsible government'.

'Political communication' as protected by the *Constitution* is not synonymous with 'political opinion'. The *Constitution* protects only communication that is relevant to the proper functioning of the particular aspects of representative and responsible government identified in the 'text and structure' of the *Constitution*: namely that the House of Representatives and the Senate be 'directly chosen by the people' (as required by ss 7 and 24); that Ministers can be properly held responsible to the Parliament (as envisaged by s 64) and the proper operation of the referendum process provided for by s 128.[21]

However certainly much of that which qualifies as 'political opinion' would be within the scope of the freedom of political communication. At the very least, any opinion expressed about the public conduct of members of the Parliament, including the Prime Minister, Ministers and the Leader of the Opposition; the discussion of federal government policy and of criticism of it and the discussion of any political party represented in the Parliament would be within the scope of the freedom of political communication.

In so far as s 19(2)(b) applies to 'political communication' within the scope of the freedom of political communication, it would only be valid if it is held to be 'appropriate and adapted to a legitimate end' and enacted 'in a manner consistent with the constitutionally prescribed system of representative and responsible government'.

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[21] See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. The extent to which the *Constitution* protects the discussion of state political matters remains unclear, though in *Coleman v Power* the High Court applied the freedom of political communication to protect a person who had insulted a state police officer, it did so on the basis of a concession by the parties: see *Coleman v Power* (2004) 220 CLR 1, [75]–[78] 23–4 (McHugh J).

Once again, *Coleman v Power* is the most relevant authority on the point. In that case, the High Court held that a prohibition on insult in s 7(1)(d) of the *Vagrants Gaming and Other Offences Act 1931* (Qld) was invalid under the freedom of political communication unless it is limited to circumstances in which a violent response is either the intended or reasonably likely result.[22]

Once again, there may be grounds on which to distinguish s 19 from the law challenged in *Coleman*. It should be noted, for example, that the law challenged in *Coleman* created a criminal offence and that it applied more broadly to the use of insulting words 'in or near a public place'.[23] We note also the exemptions provided in div 4 of the Draft Bill.

However, given the emphasis in *Coleman* on the protection of even unpleasant and offensive forms of political communication, and the inclusion within the meaning of 'unfavourable treatment' of 'conduct that "offends" or "insults"', a successful constitutional challenge to s 19 (2)(b) in so far as it applies to many forms of political opinion remains a possibility.

[22] *Coleman v Power* (2004) 220 CLR 1, 57–8 [195]–[199], 77–8 [254]–[256], 78–9 [260].
[23] Ibid 34 (McHugh J).

APPENDIX A: RACIAL DISCRIMINATION LEGISLATION IN THE STATES AND TERRITORIES

	Act and Section	**Wording**
VIC	*Racial and Religious Tolerance Act 2001* (Vic) s 7(1).	A person must not, on the ground of the race of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.
SA	*Racial Vilification Act 1996* (SA) s 4 *Civil Liability Act 1936* (SA) s 73(1)	A person must not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of their race by … ***act of racial victimisation*** means a public act inciting hatred, serious contempt or severe ridicule of a person or group of persons on the ground of their race …
NSW	*Anti-Discrimination Act 1977* (NSW) s 20C(1) S 20D(1)	It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group. A person shall not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group by means which include …
TAS	*Anti-Discrimination Act 1998* (Tas) s 19	A person, by a public act, must not incite hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons on the ground of …
QLD	*Anti-Discrimination Act 1991* (Qld) s 124A s 131A	A person must not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race, religion, sexuality or gender identity of the person or members of the group. A person must not, by a public act, knowingly or recklessly incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race, religion, sexuality or gender identity of the person or members of the group in a way that includes …
WA	*Criminal Code 1913* (WA) s 76 s 77	***animosity towards*** means hatred of or serious contempt for … ***harass*** includes to threaten, seriously and substantially abuse or severely ridicule Any person who engages in any conduct, otherwise than in private, by which the person intends to create, promote or increase animosity towards, or harassment of, a racial group, or a person as a member of a racial group, is guilty of a crime and is liable to imprisonment for 14 years.
ACT	*Discrimination Act 1991* (ACT) ss 66–7	It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of people on the ground of any of the following characteristics of the person or members of the group …
NT	No anti-discrimination legislation	