Arab Council Australia
المجلس العربي استراليا

Arab Council Australia Incorporated
ABN 65 538 322 175

30 April 2014

Human Rights Policy Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

Email: s18cconsultation@ag.gov.au

Dear Sir/Madam

Arab Council Australia's Submission in response to the Exposure Draft of *Freedom of Speech (Repeal of s.18C) Bill 2014*

This submission expresses Arab Council Australia's (ACA) position in relation to the purposed amendments to the *Racial Discrimination Act 1975* (Cth) (RDA).

We oppose the Australian government's proposal to amend the RDA. We submit that the current Act already sufficiently establishes a fair balance of upholding freedom of speech while maintaining important protections against racial discrimination.

The ACA is part of a coalition of diverse ethnic community groups and together have expressed concerns in relation to the Government's proposed changes. We have also consulted with our membership, colleagues and other Arab organisations. We collectively believe that the purposed amendments, if enacted, would severely weaken legal protections against racial vilification, will increase the instances of racism within the Australian community and provide no value to public discourse.

We have reviewed the submission made by the Australian Multicultural Council dated 16 April 2014, a copy of which is attached and we support their position in relation to the changes, in particular, for the government to abandon the current draft and "undertake a proper, systematic, public review of the operation of Part IIA of the RDA before formulating any further proposals for reform of this area of the law".[1]

- **The Arab Council Australia**

The ACA is a secular all inclusive and independent peak Arab community organisation with the specific aim of assisting the successful social inclusion of people from Arab backgrounds and promoting their active participation in and contribution to the wider community. It is located in Sydney, where the largest population of Arab Australians live, but works on behalf of all Arab Australians all over Australia.

[1] Australian Multicultural Council Submission to the Attorney-General's Department, *Exposure Draft of Freedom of Speech (Repeal of section 18C) Bill 2014*, April 2014, 11.

ACA plays a pivotal role in capacity and community building. It is active in advocacy, leadership, research and information dissemination. It provides a broad range of welfare services, social support and cultural activities to the community. ACA is steadfast in working inclusively across diversity and in forging strong collaborative practices with community, government and other sectors.

Since our establishment, we have been supporting and assisting Australians of Arabic speaking background [comprising of diverse groups whose origins are from 22 Arab countries] through a range of essential services.[2] We believe in building a safe and secure future for a multicultural Australia and protecting our most vulnerable citizens.

- **What are the purposed changes that will affect the Arab Australian Community?**

FREEDOM OF SPEECH (REPEAL OF S. 18C) BILL 2014 [3]

The *Racial Discrimination Act* 1975 is amended as follows:

1. Section 18C is repealed.
2. Sections 18B, 18D and 18E are also repealed.
3. The following section is inserted:

"

(1) It is unlawful for a person to do an act, otherwise than in private, if:
  (a) the act is reasonably likely:
    (i) to vilify another person or a group of persons; or
    (ii) to intimidate another person or a group of persons, and
  (b) the act is done because of the race, colour or national or ethnic origin of that person or that group of persons

(2) For the purposes of this section:
  (a) vilify means to incite hatred against a person or a group of persons;
  (b) intimidate means to cause fear of physical harm:
    (i) to a person; or
    (ii) to the property of a person; or
    (iii) to the members of a group of persons.

(3) Whether an act is reasonably likely to have the effect specified in sub-section (1)(a) is to be determined by the standards of an ordinary reasonable member of the Australian community, not by the standards of any particular group within the Australian community.

(4) This section does not apply to words, sounds, images or writing spoken, broadcast, published or otherwise communicated in the course of participating in the public discussion of any political, social, cultural, religious, artistic, academic or scientific matter. "

[2] Arab Council Australia, *About Us*, <http://www.arabcouncil.org.au/pages.php?About-Us>.
[3] Australian Government Attorney-General's Department, 'Amendments to the Racial Discrimination Act 1975' (Exposure Draft Bill, 25 March 2014).

- **What will the changes mean to the Arab Australian Community?**

"We view with deep concern the Government's draft legislation to repeal sections 18C and D of the Racial Discrimination Act and to insert other, quite different and much weaker provisions. We believe that the proposed changes are a huge leap backwards for Australia in 2014."[4]

The provisions of Part IIA were introduced in the *Racial Hatred Bill 1994* (Cth) in response to the findings and recommendations of three national inquiries:

1. Human Rights and Equal Opportunity Commission, *Report of National Inquiry into Racist Violence in Australia* (1991);
2. The Royal Commission into Aboriginal Deaths in Custody, National Report (1991); and
3. Australian Law Reform Commission, *Multiculturalism and the Law, Report No 57* (1992).

In essence the government in 1995 wanted to give greater protection against racial vilification, abuse and harassment. We submit that the current government should engage in similar independent enquiries before undertaking any changes to the RDA. We further submit that the proposed changes will increase verbal racial abuse on minority groups including the Arab Australian community.

– Repealing section 18C and removal of the words *"offend, insult and humiliate"*

"Those three words – offend, insult and humiliate – describe what has sometimes been called hurt feelings. It is not in the Government's view the role of the state to ban conduct merely because it might hurt the feelings of others. Our democracy should be robust enough for that."[5]

The legal effect of Section 18C has often been mis-stated in the current discussion. Critics of section 18C have claimed wrongly that offence, insult, humiliation and intimidation are determined according to the subjective feelings or perceptions of complainants. In point of fact, the court makes its own assessment, regardless of any "hurt feelings" or injured sensibilities of the complainant. The court makes this assessment by applying an objective test to decide whether the respondent(s) acted in a way that was 'reasonably likely in all the circumstances to offend, insult, humiliate or intimidate another person or a group of people'[6]. Further, according to the case law, the court must be satisfied that the complainant(s) have suffered "profound and serious effects, not to be likened to mere slights"[7] of an objective "reasonable victim"[8]. The test that the complainant(s) must satisfy

[4] Randa Kattan, CEO Arab Council Australia, 'Community Forum Racial Discrimination Act 23 Apr 2014' (Speech delivered at the Community Forum Racial Discrimination Act 23 Apr 2014, Bankstown Library and Knowledge Centre, 23 April 2014)

[5] Attorney-General for Australia (Cth), 'Racial Discrimination Act' **(**Press Conference, 25 March 2014) http://www.attorneygeneral.gov.au/transcripts/Pages/2014/First%20Quarter/25March2014-PressConference-ParliamentHouse.aspx.

[6] *McGlade v Lightfoot* [2002] FCA 1457; *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615; *Creek v Cairns Post Pty Ltd* [2001] FCA 1007; *Jones v Scully* [2002] FCA 1080.

[7] *Creek v Cairns Post Pty Ltd* [2001] FCA 1007 at [16] *per* Kieffel J

is one of an objective reality. An impartial observer must be readily able to recognise that the complainant(s) suffered "a painful loss of dignity" or was made "low or humble in position, condition or feeling"[9].

Section 18C requires that the offence, insult, humiliation or intimidation must have occurred because of the complainant(s) race, colour, national or ethnic origin not because of their ideas, feelings or opinions.

The behaviour which section 18C makes unlawful goes against the very idea of a harmonious multicultural society. It is behaviour which creates the basis for discrimination by reason of race, colour, national or ethnic origin that causes harm, in particular, to the most vulnerable members of society.

"The word humiliate is also gone, because it's not possible to have a public discussion about a difficult issue about which different people feel strongly without running the risk that somebody who takes a strong contrary point of view might feel that their view is being mocked. Mockery is a legitimate part of public discussion and part of public commentary."[10] We submit that the term "humiliate" encapsulated in the RDA is not simply "mockery" as has been stated. The ordinary meaning of the term to "humiliate" is defined as "to lower the pride or self-respect of; cause a painful loss of dignity to; mortify"[11] in the ordinary use of the term there is an objective reality of harm, that is, the loss of dignity. We submit that the removal of "humiliate" will have a profound effect on the physical and most importantly the mental harm of the victim caused by racial attacks and will not promote positive public discussions.

The removal of section 18C and the words "offend, insult and humiliate" from the RDA will dampen the effect of the legislation, that is, to protect Australians from all ethnic backgrounds, from verbal or written attacks based on unsubstantiated information causing a significant harm to victims.

- Insertion of the word *"vilify"*

"To vilify someone is to incite hatred of them. The absence of a prohibition against vilification has been a gaping hole in Section 18C in its current form."[12]

We agree that Section 18C in its current form does not include the word "vilify. However, the definition adopted by the purposed changes is too narrow because it involves the effect of the action be "determined by the standards of an ordinary reasonable member of the Australian community, not by the standards of any particular group within the Australian community". In effect the purposed changes remove the possible harm that is inflicted on the victims and the focus is given to an uninvolved third party. By doing so, we submit, that

[8] *McLeod v Power* [2003] FMCA 2, [65] per Brown FM
[9] *Jones v Scully* [2002] FCA 1080 at [103]
[10] Attorney-General for Australia, above n 5.
[11] *The Macquarie Library Pty Ltd*, 4th ed, 2005
[12] Attorney-General for Australia, above n 5.

the purposed legislation fails to consider the forms of vilification that may not incite third parties to hatred but does involve an objective level of loss and mental suffering.

– *"Reasonable member of the Australian community"*

We submit that the "reasonable member of the Australian community" is unclear and could have the potential of tying racist ideologies to law and being skewed in favour of one party over another. As we have seen in the past, racist ideologies prevalent in the general community could be imported into the operation of the law. For example, Australia's 'White Australia' immigration policy, active from federation until the latter part of the 20th century, favoured applicants from certain countries.[13] Its origins can be traced to the 1850s when Chinese diggers were resented by white Australian miners.[14] We submit that the "reasonable member of the Australian community", during the time when the policy was most active, would have found no fault in their support of this policy and believed that the racism felt by those who are aggrieved is unsubstantiated. We submit this is the unknown racist potential of the purposed amendments because of the indifference that a "reasonable member of the Australian community" may exhibit towards minority races. Further, we submit that the changes in attitudes exhibited by "a reasonable member of the Australian community" has the potential of continually changing thereby creating an uncertainty in the legislation attributed to changes in the general attitudes of the day. As expressed by commentator Waleed Aly the proposed legislation "trades on all the assumptions about race that you're likely to hold if, in your experience, racism is just something that other people complain about."[15]

– Sections 18D and 18E

Section 18D of the RDA contains exemptions that protect freedom of speech. This exemption ensures that "any words, sounds, images or writing spoken, broadcast, published or otherwise communicated" on matters in the course of participating in public discussion are exempt from Section 18C, providing they are said or done "reasonably" and in "good faith". We submit that the removal of this exemption and standard allows for uncensored and unprovoked racial attacks made in the course of public discussions particularly on topics such as politics, cultural and religious affairs having the potential of inciting racism. As explained by Tim Soutphommasane, Racial Discrimination Commissioner, in relation to the removal of the section "the effect of all this is to remove the protection that currently exists in the law in the form of 18D of the Racial Discrimination Act, which insures that free speech doesn't mean hate speech, that free speech is something that extends protections only for those things that are done in genuine public debate and done with reasonableness and good faith."[16] We submit that the proposed changes would legalise racial attacks if used in

[13] Department of Immigration and Border Protection (Cth), *Fact Sheet 8 – Abolition of the 'White Australia' Policy* (2012) http://www.immi.gov.au/media/fact-sheets/08abolition.htm.
[14] *Ibid.*
[15] Waleed Aly, 'George Brandis' Racial Discrimination Act changes create the whitest piece of proposed legislation I've encountered', *The Sydney Morning Herald* (online), 27 March 2014 http://www.smh.com.au/comment/george-brandis-racial-discrimination-act-changes-create-the-whitest-piece-of-proposed-legislation-ive-encountered-20140327-zqnea.html#ixzz30KXvGifX.
[16] Mark Colvin, Interview with Tim Soutphommasane, Racial Discrimination Commissioner (Television interview, 25 March 2014).

public discussion, even if the subject matter was unrelated to race.

Section 18E of the RDA refers to vicarious liability provisions which apply to employers and principals of agents. However, this section as it currently stands does not apply to an act done by an employee or agent of a person if it is established that the employer or principal took all reasonable steps to prevent the employee or agent from doing the act. We submit that the purposed deletion of this section will remove the duty of employers or principals from ensuring that their employees or agents are kept in check.

We submit that members of the Arab-Australian community are targets of racist hate speech and conduct; however, most lack the skills and resources to publicly defend and protect themselves. In fact, racial hate speech in most cases renders victims powerless and silent. If the proposed changes are implemented then many Australians, particularly members of minority groups who come from socially and economically disadvantaged backgrounds, would have no legal or other means of seeking redress for, or otherwise overcoming, the harm that has been done to them. We submit that the government keep the RDA as it currently stands or strengthen it. This will ensure the protection of our most vulnerable citizens and at the same time continue to build a society that promotes freedom of speech and that advances Australia not hinders it with bigotry and racist ideals.

- **Freedom of Speech and the Australian Multicultural Community – A Case Study**

"Despite the protections we have under the current legislation, our community continues to be the target of racism and racial attacks. We know all too well the impact that bigotry and prejudice has on people of our community. We know all too well what it is like to be offended, insulted and humiliated because of our ethnicity. We are horrified that vulnerable people will be further disenfranchised if the proposed changes were to be adopted."[17]

In the 1980's and 1990's, several national inquiries in Australia concluded that there is a clear nexus between racial vilification and racially-motivated acts of violence.[18] These findings have since been borne out by the experiences of the Arab-Australian community. For decades we have seen an increase in the number of racially motivated attacks on the Arab community in Australia, often in the wake of racially inflammatory commentary in parts of the media.

One of the most highly publicised attacks on the Arab-Australian community, in particular the Lebanese-Australian community, was during the 2005 Cronulla riots. These events were widely reported and condemned by local, state and federal members of parliament, police, local community leaders, and residents of Cronulla and adjacent areas.

[17] Randa Kattan, above n 4.

[18] Human Rights and Equal Opportunity Commission, *Report of National Inquiry into Racist Violence in Australia* (1991), http://www.humanrights.gov.au/publications/racist-violence-1991; Royal Commission into Aboriginal Deaths in Custody, National Report Volume 4 (1991): http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol4/26.html ; Australian Law Reform Commission, *Multiculturalism and the Law, Report No 57* (1992),: http://www.austlii.edu.au/au/other/alrc/publications/reports/57/;

In the aftermath of the riots, there was finding by the Australian Communications and Media Authority (ACMA)[19] that the violence had been triggered by vilificatory comments broadcast on radio[20] and transmitted via text messages. The unedifying spectacle of one group of Australians physically attacking another on the basis of the targets' presumed race greatly damaged Australia's image as a tolerant multicultural society. Internationally the view that Australia is a safe and secure country was downgraded as "authorities in Britain, Canada and Indonesia issued warnings to their citizens to be on guard for possible continuing racial violence at Sydney's beaches"[21]. Foreign citizens were told to be wary during their travels through Sydney.

It is important to note that the ACMA in this matter took the word "to vilify" in the ordinary sense as prescribed by the Macquarie Dictionary because statute law did not define the meaning to "vilify".[22] In essence, "to vilify" means to denigrate or defame, and not necessarily "to incite", which is the artificial definition of "vilify" appearing in the government's Exposure Draft. The primary effect of vilifying a person is on that person, not on third parties. All laws set standards, and the appropriate standard in this case should be one which affirms Australia as an inclusive, tolerant society. Where that standard is breached, and any members of our society are publicly denigrated because of their race, the law must provide them with a fair and peaceful avenue to defend themselves and obtain public vindication.

For decades, we have seen an increase in the number of racially motivated slurs and verbal and physical attacks on members of the Arab community in Australia. The daily reality of people in our community has been about grappling with public opinion; about how we are portrayed in the media, how we are talked about, talked at, how we are positioned, how we are collectively framed and blamed, demonised and criminalised. We know too well the detrimental impact that hate and racist speech has on society, on communities, on individuals' access to education, accommodation, employment and services, on relationships, on people's sense of belonging and on all aspects of people's lives for generations to come. We know this for a fact and we have been talking about it for decades[23].

We submit that persons in positions of persuasion and influence have a higher obligation than others to assist society in upholding the principles of racial tolerance and social harmony. However, as we know from our experiences, this obligation has often been breached. The need for the law to protect the vulnerable is paramount. This protection is not only for minorities or the vulnerable few. It is for everyone and it is also needed to inhibit the importation of hatreds from overseas conflicts into Australia and to sustain the reality of a united multicultural Australia.

---

[19] Australian Communications and Media Authority (Cth), 'Investigation Report No. 1485', File No. PF2006/126.
[20] *Ibid.* See also Alan Jones: I'm the person that's led this charge http://www.theage.com.au/news/national/alan-jones-im-the-person-thats-led-this-charge/2005/12/12/1134236003153.html
[21] 'Man charged over Sydney messages', *BBC News* (online), 22 December 2005 http://news.bbc.co.uk/2/hi/asia-pacific/4551356.stm
[22] Australian Communications and Media Authority (Cth), 'Investigation Report No. 1485', File No. PF2006/126, pp. 6-8.
[23] Randa Kattan, above n4

- **Conclusion**

ACA submits that the government's proposal to water down the few protections we currently enjoy against racial vilification sends entirely the wrong message about the kind of society we want Australia to be. We strongly submit that the government not strip our community of the means to defend ourselves legally and peacefully against individual and collective racist abuse, stereotyping, prejudice and racial bigotry. ACA does support freedom of speech and we do support public discussion in good faith as this is the cornerstone of a democracy. The existing law does not prevent such discussion on any topic. However, we do not support those members in our society who believe that freedom of speech is the freedom to discriminate, slander and vilify Australian citizens based on their race, colour or ethnic background.

The RDA does not and has not restricted freedom of speech. What the RDA has done is imposed modest limits to prohibit gratuitous verbal abuse on the basis of race. The standards contained within the RDA are not overreaching and are reflected in many pieces of legislation and codes of conduct.

We oppose the whole of the government's proposed changes to the RDA. We submit that the RDA and the subsequent case law has helped shape Australia's current stance on racial discrimination and vilification and ensured that vulnerable members of our community have the means to obtain redress and public vindication if and when they are vilified because of their race. Any changes to the RDA should enhance, not diminish, this standard of protection to ensure future generations of Australians will continue to enjoy living in a cohesive, democratic and multicultural society.