16 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

Exposure Draft of Freedom of Speech (Repeal of section 18C) Bill 2014 (the Exposure Draft)

The Australian Multicultural Council (AMC) was established, amongst other things, to "advise the government on multicultural affairs" and "act as an independent champion of our multicultural nation". More recently, upon advising of the Prime Minister's extension of the term of the Council, Minister Andrews requested the AMC to focus on social cohesion issues, including the potential to improve interfaith and intercultural dialogue, and opportunities to work with local government to foster cohesion and community resilience.

We take the view that the impact of racial hatred on our multicultural nation, and the role that government should play in counteracting racial hatred in order to maintain the integrity and cohesiveness of our nation, are matters about which the AMC is uniquely charged to advise government.

For example, the AMC has had an input into the formulation and ongoing implementation of the National Anti-Racism Partnership and Strategy. Further, as an independent champion of our multicultural nation, the AMC has made recommendations for addressing racism through public education and in school curricula.

Because measures for counteracting behaviour based on racial hatred fall squarely within the AMC's remit, we would also have been pleased to provide advice concerning the Exposure Draft prior to it being released.

The Exposure Draft was officially released by the Federal Attorney-General on 25 March 2014. It proposes that ss 18B, 18C, 18D and 18E of the *Racial Discrimination Act* ('the RDA') be repealed and that a replacement section in the terms announced (the proposed replacement section) be enacted. Sections 18B, 18C,

18D and 18E are found in Part IIA of the RDA which is headed "PROHIBITION OF OFFENSIVE BEHAVIOUR BASED ON RACIAL HATRED". The proposed replacement section also addresses behaviour based on racial hatred, albeit in a very different way.

Rationale for Part IIA of the RDA

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:

- the *National Inquiry into Racist Violence* conducted by the Human Rights and Equality Opportunity Commission (1991)
- the *Royal Commission into Aboriginal Deaths in Custody* report (1991)
- the *Law Reform Commission Multiculturalism and the Law* report (1992).

The ***National Inquiry into Racist Violence*** was established in response to a series of violent attacks against church and community leaders in the 1980's, including the slashing of car tyres, graffiti attacks on homes and workplaces, bricks being thrown through windows, and death threats. The Inquiry's Racist Violence Report concluded that: [1]

> Racist violence, intimidation and harassment against Aboriginal and Torres Strait Islander people are social problems resulting from racism in our society, rather than isolated acts of maladjusted individuals, [and that] the existence of a threatening environment is the most prevalent form of racist violence confronting people of non-English speaking background.

It recommended that the RDA be amended to prohibit racist harassment and incitement to racial hostility, with civil remedies similar to those for racial discrimination.[2] These protections, it stated, should not extend to mere "*hurt feelings or injured sensibilities*", but only to public "*conduct with adverse effects on the quality of life and well-being of individuals or groups who have been targeted because of their race*".[3]

The ***Royal Commission into Aboriginal Deaths in Custody*** (Royal Commission) recommended legislating to "proscribe racial vilification and to provide a conciliation mechanism for dealing with complaints of racial vilification".[4] The Royal Commission concluded that there was a clear nexus between racist language and

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[1] Human Rights and Equal Opportunity Commission, *Report of National Inquiry into Racist Violence in Australia* (1991), pp 387 – 388. At http://www.humanrights.gov.au/publications/racist-violence-1991 (viewed 9 April 2014).
[2] *Ibid*, pp 301-302.
[3] *Ibid*.
[4] Royal Commission into Aboriginal Deaths in Custody, National Report Volume 4 (1991), ch 28.3 recommendation 213. At http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol4/26.html (viewed 29 April 2014).

violence.[5] The Royal Commission's report recommended that governments that had not already done so should legislate to proscribe racial vilification and provide a conciliation mechanism for complaints. It noted that "*conciliation and education are likely to be more effective than making of martyrs; particularly when it is words, not acts, which are in issue*".[6] In doing so, it emphasised that vilification legislation has an important educative role, dissuading people from performing racist acts and changing attitudes over time. It also recommended that the legislation should exclude "*demonstrations against the behaviour of particular countries, publication or performance of works of art and the serious and non-inflammatory discussion of issues of public policy*".[7]

The Australian Law Reform Commission (ALRC), in its ***Multiculturalism and the Law*** report, recommended that incitement to racist hatred be made unlawful.[8] In supporting this recommendation, the ALRC characterised incitement of hatred as damaging to the whole community, not only minority groups, undermining the tolerance required for Australia to survive as a multicultural society.[9] Furthermore, the ALRC noted that such laws protect the inherent dignity of the human person, indicate a commitment to tolerance, prevent the harm caused by the spread of racism and support harmonious social relations.[10] In common with the Royal Commission's report, the ALRC recommended conciliation, backed up by civil remedies when conciliation fails, as an appropriate approach to dealing with conduct amounting to racial hatred.[11]

These three reports were the subject of extensive public debate. The civil remedy provisions now comprising Part IIA of the RDA were ultimately enacted in 1995. In the second reading speech introducing the legislation to the Parliament the previous year, the then Attorney-General directly referred to all three reports and highlighted the findings of a causal nexus between racial vilification and racist violence. Commenting on the specific words of the legislation, the Attorney-General stated:

> The format of the civil provision is similar to the model used in other Commonwealth human rights legislation such as the Sex Discrimination Act. It is—
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> - based upon the availability of a remedy in specified circumstances,
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> - judged against the objective criteria of what is reasonably likely in all the circumstances to give rise to a valid complaint, and

[5] *Ibid*, para 28.3.34.
[6] *Ibid*, para 28.3.44.
[7] *Ibid*, para 28.3.49.
[8] Australian Law Reform Commission, *Multiculturalism and the Law, Report No 57* (1992), p 133. At http://www.austlii.edu.au/au/other/alrc/publications/reports/57/ (viewed 9 April 2014).
[9] *Ibid*, p134.
[10] *Ibid*.
[11] *Ibid*.

- limited and targeted through the use of exemptions.

> The requirement that the behaviour complained about should `offend, insult, humiliate or intimidate' is the same as that used to establish sexual harassment in the Sex Discrimination Act. The commission is familiar with the scope of such language and has applied it in a way that deals with serious incidents only.
>
> **The bill requires an objective test to be applied by the commission so that community standards to behaviour rather than the subjective views of the complainant are taken into account**."[12] (emphasis added).

The second reading speech also commented on the need for the law to balance protection of freedom of speech with freedom from racial hatred:

> Few … would argue that free expression should be absolute and unfettered. Throughout Australia, at all levels of government, free expression has had some limits placed on it when there is a countervailing public interest.
>
> It needs to be recognised that racial hatred does not exist in a vacuum or for the intellectual satisfaction of those feeling it. Racial hatred provides a climate in which people of a particular race or ethnic origin live in fear and in which discrimination can thrive. It provides the climate in which violence may take place. It is of itself a threat to the wellbeing of the whole community as well as to individuals or groups in the community …
>
> We are fortunate in that Australia has a significant degree of social cohesion and racial harmony. This bill is an appropriate and measured response to closing the identified gap in the legal protection of all Australians from extreme racist behaviour. It strikes a balance between the right of free speech and the other rights and interests of Australia and Australians. It provides a safety net for racial harmony in Australia and sends a clear warning to those who might attack the principle of tolerance. And importantly this bill provides Australians who are the victims of racial hatred or violence with protection.[13]

Background to the Exposure Draft

The AMC notes that the legislative proposals specified in the Exposure Draft do not proceed from an identifiable body of research and evidence comparable in any way to the three reports that provided the evidentiary basis for the existing legislation. Nor does the Exposure Draft arise from any formal process of consultation with the Australian people.

There seems to be little dispute that the sole reason why, after nearly twenty years of operation, there has been a move to change the existing law is as a reaction to the

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[12] Commonwealth of Australia, Parliamentary Debates, House of Representatives, Tuesday 15 November 1994, p 3336, (The Hon Michael Lavarch MP, Attorney-General).
[13] *Ibid*.

judgment in one controversial case.[14] For example, Human Rights Commissioner, Tim Wilson, who has been a proponent of full repeal of the existing law, has stated:

> I think the attention has only come about because of the Bolt case. I don't think anyone's really in dispute about it.[15]

Without going into a detailed analysis of the facts and the judgment in *Eatock v Bolt*, the concerns about its outcome which have been expressed by critics of the existing law were summarised by Commissioner Wilson thus:

> What we have seen with the way [the existing law] was interpreted with the Bolt case is that…it set an unnecessarily low bar now around how it limits free speech to deal with issues around racial vilification. This isn't a debate about whether racial vilification is socially acceptable or not. It's about where the law sits. And part of the problem is that it fuses the idea of social acceptability as speech and the law, when there should always be a reasonable separation between the two.[16]

Nobody should doubt the fundamental importance of freedom of expression as a necessary condition for human progress. As is the case with all freedoms, however, the proper limits of freedom of expression are reached when it is exercised in a way that causes harm to others. What Commissioner Wilson's argument omits is a consideration of the seriousness of the harms to individuals and to society more broadly which three national inquiries and reports have found to be caused by racist hate-speech. As already noted, these were found not to be light or trivial harms akin to hurt feelings or injured sensibilities but rather harms that cause people real damage in the way their working, personal and social lives are affected and in the way their freedoms – to move and participate in society and to speak and be heard – are limited.

These harms can be especially insidious if the targets of racist hate speech and conduct lack the skills and resources to defend themselves by means other than the lodgement of a complaint with the Australian Human Rights Commission, which is the avenue the law currently makes available to them. The existing complaints resolution framework has proved to be an inexpensive, just and efficient way of resolving complaints. But for its existence, 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.

It is neither practically possible nor appropriate in all circumstances for the targets of racist hate speech to "answer back". There can be a risk that the situation will escalate into violence. Alternatively, targets of such behaviour might reasonably feel that they would be compromising their dignity by engaging verbally with their tormentors.

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[14] Namely the judgment of Bromberg J in *Eatock v Bolt* [2011] FCA 1103.
[15] Sky News Channel, PVO News Hour, 12 March 2014.
[16] *Ibid*.

There is thus a need, when "answering back" is not a practical or appropriate option, for the law to continue to provide victims with remedies as a last resort, as it does in many other areas of life, in order to fulfil government's most fundamental obligation, which is to protect citizens from real and measurable harm.

The law is ultimately an expression of society's values. Australia long ago made a choice, with support from across the political parties, to be a multicultural society, a choice which has benefited us greatly as a nation, and not only materially. In the 2013 *Mapping Social Cohesion* National Report positive responses were consistently high across demographics and suggest that multiculturalism is established as a strong and supported 'brand' that resonates with the Australian people. For example, 84 per cent of respondents agreed that 'multiculturalism has been good for Australia'.[17] The values of a multicultural society which the law should reflect, and not undermine, are the values of tolerance, mutual respect and decency.

This view seems to be supported by a significant majority of Australians. The landmark Challenging Racism Research Project, headed by the University of Western Sydney (UWS), has surveyed more than 12,500 Australians to provide a national picture of racism, ethnic relations and cultural diversity. In one of its recent surveys, 2100 respondents were asked whether it should be unlawful to humiliate, insult, offend or intimidate others by reason of their race, adopting the terminology of existing s 18C of the RDA. The results were as follows:[18]

- Offend - 66% of participants agreed or strongly agreed it should be unlawful.
- Insult - 72% of participants agreed or strongly agreed it should be unlawful.
- Humiliate - 74% of participants agreed or strongly agreed it should be unlawful.
- Intimidate - 79% of participants agreed or strongly agreed it should be unlawful.

The lead researcher of the Challenging Racism Project, Professor Kevin Dunn, Dean of the UWS School of Social Sciences and Psychology observed:

> The public is very clear on this - they strongly believe the existing protections should remain in place. Only a handful of Australians oppose these legal protections, with only 10 per cent disagreeing with laws that prohibit the causing of offense on the basis of

[17] Mapping Social Cohesion 2013: National report, Scanlon Foundation, Monash University, p.34: http://www.scanlonfoundation.org.au/docs/2013_SocC_report_final.pdf (viewed on 9 April 2014).

[18] http://www.uws.edu.au/newscentre/news_centre/feature_story/australias_largest_study_on_racism_shows_public_supports_existing_racial_discrimination_act (viewed on 9 April 2014).

> race, culture or religion, and fewer still, only 6 per cent, opposing humiliation on this basis.[19]

Professor Dunn said the Challenging Racism Project found 27 per cent of Australians have experienced racist talk and concluded:

> We can't expect the law to protect each and every victim of racist talk as it simply isn't possible. What is possible is to establish laws with a symbolic role to set norms for us all, which encourage us to speak out and speak up when we hear people using uncivil language. Racism fades and flourishes over time according to political contexts, leadership and the nature of debate, and the laws around racial vilification send an important message about what is considered to be legal and civil, and what is uncivil.[20]

The AMC is not aware of any other systematic research into the level of public acceptance of the specific wording of the existing legislation, although we note that a Nielsen poll published 14 April 2014 found that 88 per cent of respondents believe it should be unlawful to offend, insult or humiliate based on race.

The terms of the Exposure draft

The main proposed changes concern the removal of the current ss 18C and 18D of the RDA and the introduction of the proposed replacement section.

Section 18C makes unlawful an act done in public that is reasonably likely to offend, insult, humiliate or intimidate another person or group of persons on the grounds of race. As already noted, the arguments for removing this section are based on a mischaracterisation of its legal effect. Section 18C does not operate to enforce the subjective, and possibly capricious, perspectives of complainants about perceived harm, nor does it apply to "mere slights" or trivial offence. Instead, the courts have consistently interpreted s 18C as applying an objective test based on a community standard[21] and prohibiting offence, insult, humiliation and intimidation that has "profound and serious effects, not to be likened to mere slights".[22]

Given these limitations on the way s 18C has operated, the AMC submits that no case has been made for repealing or altering the section. The way the courts have construed s 18C makes it clear that the section is directed only at conduct which, as objectively assessed by a court, causes real harm to a complainant. The proposed removal of "humiliate" is especially unfortunate because its ordinary dictionary definition, even in the absence of the judicial interpretation referred to earlier, makes

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[19] *Ibid*.
[20] *Ibid*.
[21] *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615 at [15]; *Creek v Cairns Post Pty Ltd* [2001] FCA 1007 at [12]*; Jones v Scully* [2002] FCA 1080 at [98]-[101].
[22] *Creek v Cairns Post Pty Ltd* [2001] FCA 1007 at [16] per Kieffel, J.

it clear that humiliation involves the objective reality of harm and not merely subjective perceptions.[23]

The proposed replacement section would, amongst other things, substitute the word "vilify" for the words offend, insult, humiliate". "Vilify" is defined in the Exposure Draft as the incitement of racial hatred, as opposed to its more ordinary meaning which is to degrade or denigrate, and may or may not involve a consideration of the reaction of third parties. The artificially narrow definition of "vilify" in the Exposure Draft, if adopted, would mean that the law would no longer be concerned with the harm that racist behaviour inflicts on its target. Instead, the consideration would be on the effect on a third party or public audience. Many severe forms of vilification involving the degradation of a target person or group may involve no incitement of third parties to hatred at all. The AMC therefore believes that if the word "vilify" is to be adopted it should be given its ordinary dictionary meaning, so that a target of egregious vilification that does not involve incitement of third parties would not be left without an avenue for seeking redress.

Legislation in most States and the ACT already prohibits incitement of "hatred, contempt or severe ridicule" on the basis of race, but there is no uniformity across different jurisdictions in the meaning ascribed to "incite". As the Exposure Draft presently stands, the precise meaning of "vilify" in the proposed replacement section would only be known with certainty after it is judicially interpreted.

The AMC believes that the definition of "intimidate" in the proposed replacement section – "to cause fear of physical harm" – is also artificially narrow. The ordinary dictionary definition of "intimidate" is "to make timid, or inspire with fear; overawe; cow."[24] The fear need not necessarily be of "physical harm". In reality, intimidation can also extend to other compelling sources of fear, such as fear of loss of employment, fear of loss of friends, fear of loss of reputation and fear of psychological injury. The AMC therefore believes that the word "intimidate" should be restored to its ordinary dictionary meaning, which is also the meaning that has been given to it by the courts, rather than being given the meaning ascribed to it in the proposed replacement section.

Overall, the proposed:

(i) removal of the words "offend", "insult" and, especially, "humiliate", and their replacement with a narrowly defined concept of "vilify"; and
(ii) artificial narrowing of the meaning of "intimidate"

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[23] The definition of "humiliate" in the *Macquarie Dictionary* (The Macquarie Library Pty Ltd, 4th ed, 2005) includes "cause a painful loss of dignity to".
[24] *Macquarie Dictionary* (The Macquarie Library Pty Ltd, 4th ed, 2005).

would leave severe gaps in the protections provided by the legislation. One obvious gap would be conduct that has the objective effect of humiliating its target or targets on the grounds of race. Another would be that victims of repeated instances of racist verbal abuse amounting to harassment, but falling short of causing fear of physical harm or inciting third parties to hatred, would be left without a remedy.

Subsection (3) of the proposed replacement section would require a court to determine whether conduct is in contravention of that section "*by the standards of an ordinary reasonable member of the Australian community, not by the standards of any particular group within the Australian community*". At first blush, this may seem unobjectionable. Justice requires that the applicable community standard be defined in a way that does not skew the test in favour of either a complainant or a defendant.

The difficulty we have with ss (3) of the proposed replacement section is that it could potentially be skewed in favour of a Defendant. A reasonable member of the Australian community in certain times and contexts might be a person who harbours racial prejudice against a complainant or that complainant's racial group. For example during World War II a reasonable member of the Australian community might plausibly be said to be someone who was racially prejudiced against the Japanese and Germans.

Professor Simon Rice of the Australian National University, a leading authority on anti-discrimination law, has described this new proposed test as "a double whammy to a victim of vilifying conduct", as it potentially involves a "blithe assertion of a dominant cultural perspective".[25] The AMC believes that the risk of this happening could be reduced by adding to proposed ss (3) a proviso defining a reasonable member of the Australian community as someone whose judgment is not affected by bias or prejudice either in favour of, or against, any racial or ethnic group in the community.

The AMC believes that the most disturbing deficiency of the proposed replacement section concerns its remarkably broad category of exception. This exception is contained in proposed ss (4). It would cover any conduct that is done in the course of participating in the public discussion of virtually any political, social, cultural, religious, artistic, academic or scientific matter. Significantly, the draft changes would remove the current requirements in s 18D for protected speech to be conducted with reasonableness and in good faith.

The effect of removing these requirements would likely be profound. Even the narrow range of protections that would otherwise be conferred under the artificially-defined rubric of "vilify" or "intimidate" would not apply if the conduct of an alleged

[25] Rice, S. 'Race act changes are what you get when you champion bigotry', *The Conversation***,** 26 March 2014, at http://theconversation.com/race-act-changes-are-what-you-get-when-you-champion-bigotry-24782

contravenor occurred in the course of participating in a public discussion. Contravenors themselves may be the initiators of such a public "discussion", possibly with a view to using such a "discussion" as a forum for expressing abuse of a person or group on the grounds of race, or inciting third parties to race-based hatred of the person or group or causing them to fear physical harm. In the view of the AMC, such obviously harmful conduct - which under State law may even rise to the level of a criminal offence - should not be exempted merely because it occurs in the course of participating in a public discussion.

Such a broad exemption would remove the dividing line between free speech and hate speech. There would be no distinction between venting racial hostility and conducting legitimate public debate about ideas. In the view of the AMC, racial epithets or slurs directed at harming individuals or groups in any public context can **never** contribute to the ends of public debate that free speech in a liberal democracy should serve.

Another problem with the Exposure Draft is its proposed deletion of s 18B of the RDA. This provision says that if an act is done for two or more reasons, and one of those reasons is the race, colour or national or ethnic origin of a person (whether or not it is the dominant reason or a substantial reason for doing the act), then, for the purposes of Part IIA, the act is taken to be done because of the person's race, colour or national or ethnic origin. All human action may be said to occur for more than one reason. The removal of s 18B would open up the question of whether a complainant would be required to prove that the complainant's race, colour, or national or ethnic origin was the sole, or dominant, or substantial reason for an alleged contravenor's behaviour. If s 18B is removed, this question would have to be decided by judicial interpretation in actual cases. Until that were to occur, this aspect of the law would be left in a state of uncertainty, which in the AMC's view would be undesirable for both parties to a complaint, and for the Australian Human Rights Commission as conciliator.

Finally, there is the proposed deletion of s 18E, the vicarious liability provision which presently applies to employers and principals of agents. If s 18E is removed, the question of the liability of employers and principals would also have to be decided by judicial interpretation, case by case, leaving this aspect of the law also in a state of uncertainty. This too would be a retrograde development in the view of the AMC.

Conclusion

Given the powerful evidentiary basis for introducing Part IIA of the RDA in 1995, the AMC maintains that, at the very least, a systematic public inquiry into the operation of s 18C would need to be undertaken, of similar gravity to the three national inquiries referred to earlier, in order to properly ground any proposals for reform.

Another common misconception about Part IIA of the RDA is that its provisions only protect minority groups and their special interests. What is overlooked is that the

existing law operates equally against the introduction into Australia of racial hatreds from overseas conflicts and the proliferation of home-grown sources of racism.

Before he became Prime Minister, The Hon Tony Abbott stated that "*newcomers to this country are not expected to surrender their heritage, but they are expected to surrender their hatreds.*"[26] He also observed that "*except for Aboriginal people, every single Australian is an immigrant or the descendent of immigrants*." [27] It follows that all Australians, whether newcomers or not, are under an obligation as citizens of a multicultural nation to "surrender their hatreds". Of course they cannot be compelled to do so. By the same token no-one should be compelled to suffer demonstrable harm as a result of being made a target of hatred on the basis of race without having a legal and peaceful avenue for redress. A legal system that protects the disadvantaged, the unpopular, and the disempowered is the hallmark of what we understand to be a civilised society.

It is imperative, in the view of the AMC, that the modest protections against racially-motivated hate speech and conduct which have operated successfully, and without significant controversy, in resolving complaints since 1995, not be weakened in any way. We urge the government to abandon the current Exposure 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.

Yours faithfully

Rauf Soulio
Chair
Australian Multicultural Council

This submission is made by the independent members of the Australian Multicultural Council.

[26] Vote of Thanks by the then Leader of the Opposition, the Hon Tony Abbott MHR, Inaugural Lecture on Multiculturalism, 19 September 2012: http://www.amc.gov.au/speech/amc-lecture-4/ (viewed 9 April 2014)

[27] The Hon Tony Abbott MP, then Leader of the Opposition: Introduction AMSA 2013 Lifetime Achievement Award http://www.migrationcouncil.org.au/awards/amsa-2013/amsa-2013-guest-speakers/the-hon-tony-abbott-mp-speech/