



**ethnic
communities'
council of
victoria**

Patron

The Right Hon Malcolm Fraser AC, CH,
former Prime Minister of Australia

Tuesday 29 April 2014

Human Rights Policy Branch
Attorney-General's Department
3-5 National Circuit
Barton ACT 2600
Email: s18cconsulation@ag.gov.au

Dear Attorney-General

On behalf of Ethnic Communities' Council of Victoria (ECCV) I am pleased to present the attached submission representing the views of Victoria's multicultural community regarding the amendments proposed in the Exposure Draft Bill to the Racial Discrimination Act 1975.

ECCV is the statewide peak advocacy body with over 200 members representing ethnic and multicultural organisations in Victoria that lobbies all levels of government. For 40 years ECCV has remained the principal liaison point between ethnic communities, government and the wider community and has been a key player in building Victoria as a successful, harmonious and multicultural society.

ECCV proudly supports the submission made by FECCA (Federation of Ethnic Communities Councils of Australia).

ECCV believes that the current Racial Discrimination Act provides an effective balance between freedom of speech and freedom from racial vilification. The recommendations in our submission focus on retaining the vital elements in the current Act to minimise race hatred and promote a harmonious society.

For more information please contact Ross Barnett, Executive Officer at email rbarnett@eccv.org.au and on Telephone 03 9349 4122

Sincerely

Eddie Micallef
Chairperson

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ECCV Submission
on the
Amendments to the Racial Discrimination Act 1975
to the
Human Rights Policy Branch
Attorney-General's Department
Australian Government

April 2014

ECCV is the Voice of Multicultural Victoria. As the peak body for over 200 ethnic and multicultural organisations in Victoria, we are proud to be the key advocate for culturally diverse communities in Victoria. For 40 years we have been the link between multicultural communities, government and the wider community.

We aim for a culturally diverse and harmonious society that is just, fair and inclusive where all people have the opportunity to participate in and contribute to, community life. We advocate for freedom, respect, equality and dignity for multicultural communities and strive with others, to build a strong, vibrant Victorian community.

ECCV appreciates the Attorney-General's call for submissions in response to the Exposure Draft Bill on the proposed amendments to the *Racial Discrimination Act 1975* (the Act).

1. ECCV believes that no change to the Act would strengthen the protection of Victorians and Australians from culturally diverse backgrounds against racism and offense.
2. ECCV supports freedom of speech however not at the expense of permitted offensive, insulting and humiliating behaviour based on race and directed at people from culturally, and linguistically and spiritually diverse backgrounds.
3. ECCV is an affiliated member of the Federation of Ethnic Communities' Councils of Australia's (FECCA's) and supports the submission made by FECCA against the changes in the Act. FECCA is of the view that the Exposure Draft fails to achieve an appropriate and reasonable balance between the protection from racial vilification and the protection of free speech. Furthermore, FECCA believes it provides hardly any restrictions on free speech, while reducing the racial vilification protections to naught.



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4. ECCV shares the expressed concerns of ANTaR about the Government's proposed changes to the Act, that such changes could lead to a less tolerant and harmonious country. ECCV proudly supports the stance on no changes to the Act, by ANTaR, a national advocacy movement for justice, rights and respect for Australia's First Peoples, as stated in its media release dated 26 March 2014.
5. ECCV community feedback indicates that immigrants and refugees from non-English speaking and culturally diverse backgrounds have experienced low self-esteem, mental illness and adverse health outcomes due to racial discrimination. ECCV acknowledges that ANTaR has seen the adverse impacts of racial discrimination on the health and wellbeing of Aboriginal and Torres Strait Islander people, and the negative flow on effect it can have on employment, education and other opportunities.
6. ECCV supports the views of the Australian Human Rights Commission that while many laws restrict freedom of speech, such as laws applying to defamation, advertising and national security, section 18C in the current Act succeeds in filling an important gap in legal protections for those affected by racial hatred and vilification.

About the Racial Discrimination Act 1975 (the Act)

7. Currently section 18C of the Act makes it unlawful for someone to do an act that is reasonably likely to "offend, insult, humiliate or intimidate" someone because of their race or ethnicity. Under the proposed amendments in the Exposure Draft Bill, the current test for vilification will be replaced with "conduct that is reasonably likely to vilify [which means incite hatred] or to intimidate"

Section 18D of the Act contains exemptions which protect freedom of speech. These ensure that artistic works, scientific debate and fair comment on matters of public interest are exempt from section 18C, providing they are said or done reasonably and in good faith.

Restrictions of changes to the Act

8. With regards to the removal of section 18B and section 18C and the insertion of paragraphs 1 and 2 recommended in the Exposure Draft, ECCV raises the following specific legal concerns. Currently under sections 18B and C there must only be two reasons for doing an offensive act:
 - One reason not specified; and
 - One reason needs to be because of race, colour, national or ethnic origin of a person; but does not have to be the dominant reason; and this can be considered offensive if it was likely to offend, insult, humiliate or intimidate another person or group.

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9. ECCV believes that tightening the definition of what constitutes offensive behaviour under the Act, through the repeal of sections 18C, 18B, 18D and 18E and the insertion of paragraphs 1 and 2 as recommended in the government's Exposure Draft will seriously restrict a person's protection against racial hatred.

Effectively, if someone or a group is offended, insulted or humiliated because of their race, colour, national or ethnic origin and another unspecified reason they will not be able to make an application under the proposed changes. In fact, the onus will be on that person to prove that the respondent has incited hatred against them or fear of physical harm. ECCV believes the definition of 'intimidate' to only mean physical harm is too narrow.

ECCV notes that the threshold for the reasons to appeal is thereby significantly increased, whereby it will be more difficult for an applicant to make a case under the Act.

10. ECCV emphasises that the Act as it stands has been successful. It has not led to vexatious or frivolous claims. In fact there have been fewer than thirty complaints that were successfully upheld over the years. Defining the criteria so tightly under the proposed Exposure Draft insertions will mean fewer cases will be heard, further reducing the opportunity for cases to be upheld.

A case in point, to illustrate this point practically, the neighbour of Mrs Campbell, an Aboriginal woman, was ordered to apologise and pay the complainant \$7,500 after multiple incidents over a two year period. Federal Magistrate Toni Lucev said at paragraph 32 of his judgment in favour of an 'ordinary Aboriginal woman':

In relation to the general derogatory comments made between late 2005 and Australia Day 2007 the use of the words... [details of derogatory terms used have been deleted]... has, as its thrust, the race or colour of the person to whom it is directed. Again, viewed objectively, the use of those terms over a period of time, is reasonably likely to offend or insult a person, and in particular, a person in Mrs Campbell's circumstances, which, on the evidence, appears to be those of an Aboriginal woman trying to lead an ordinary family life with her husband, children and extended family. (*Campbell v Kirstenfeldt* [2008] FMCA 1356).

11. Under the proposed amendment, 'offend' and 'insult' would no longer constitute an offensive behaviour under the Act, resulting in cases such as these not being heard or upheld, and leaving cases like Ms Campbell's without any legal remedy.

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Recommendation 1

ECCV recommends that the Government maintains the racial vilification provisions in the Racial Discrimination Act 1975 as a minimum standard.

Recommendation 2

ECCV recommends that the Racial Discrimination Act 1975 retains the wording to “offend, insult, humiliate or intimidate” someone because of their race or ethnicity

Adverse effects of limits on public places and forums under the Act

12. ECCV acknowledges that the private sphere is not included in the Act or the proposed changes. Under section 18C & 18D of the current Act, however, a public place is defined as including any place to which the public have access including communications (words, sounds, images, or writing). The following are exceptions to this rule so long as they are said or done reasonably and in good faith: academic, artistic, or scientific purpose; or the public interest. In the proposed changes the exceptions do not have to be ‘reasonable’ or in ‘good faith’ and have been extended to include political, social, cultural and religious purposes.
13. ECCV expresses concern about the limitations of the practical application of the proposed Exposure Draft changes due to the restricted definition of what is deemed ‘public’. According to the existing Act, for example, a successfully upheld court case was made in favour of a community from a culturally and religious background under the judgment of the Honorable Justice Hely in the case of *Jones v Scully [2002] FCA 1080*. In that case, a woman had engaged in conduct rendered unlawful by the Act by having distributed leaflets in letterboxes in Launceston, Tasmania and by selling or offering to sell such leaflets, at a public market in Launceston. The leaflets included anti-Semitic and Holocaust denial literature.
14. ECCV notes that under the proposed changes to the Act as set out in the Exposure Draft, cultural and religious purposes will be exceptions in public places diminishing the rights of offended people from culturally diverse backgrounds that have been discriminated against.

Recommendation 3

ECCV recommends that sections 18C and 18D of the Racial Discrimination Act 1975 retain provision to protect people against ordinary public offensive and race hate behaviour.



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Removal of vicarious liability of employers under the Act

15. ECCV believes that changes to section 18E in the Act has serious implications for the rights of people from culturally diverse backgrounds regarding racially offensive and hateful behaviour in the workplace. Employers will no longer be vicariously liable for actions deemed unlawful by the Act if they have not taken reasonable steps to prevent an employee from doing an offensive act in accordance with section 18E.

Under the current Act at least four cases were successfully upheld, where in the course of their work, employees were subjected to racial discrimination. One example is a French national of Ugandan descent who received \$55,000 in damages after it was found his workplace supervisor had used the abusive terms... [...and ...]. Under section 18E, Mr Rugema's employer was found vicariously liable for the acts of Mr Derkes as they failed to take reasonable steps to prevent Mr Derkes from racially abusing Mr Rugema (*Rugema v Gadsten Pty Ltd & Derkes [1997] HREOCA 34*).

16. Informal ECCV feedback, substantiated by ABS statistics (2011), indicates that many young people from culturally diverse backgrounds, especially from new and emerging communities, have experienced racial discrimination. The workforce is at risk of losing talent where such offensive behaviour leads to low self-esteem, depression and absenteeism of those discriminated against.

ECCV therefore believes it is important to preserve provision to make it unlawful to "offend, insult or humiliate" a person because of their race or ethnicity in the workplace and in public places. The current Act provides important protection against racial hatred, in formal and informal settings, without restricting freedom of speech that is not defamatory.

Recommendation 4

ECCV recommends that vicarious liability of employers be preserved under the Racial Discrimination Act 1975

17. ECCV believes the proposed changes to the Act in the Exposure Draft restrict rather than improve the quality of life of Victorians and Australians in our liberal democracy by reducing the racial vilification protections.
18. ECCV points out that section 18C and section 18D were originally introduced into the Act in response to the recommendations of major inquiries including the *National Inquiry into Racist Violence* and the *Royal Commission into Aboriginal Deaths in Custody*. Those inquiries found that racial hatred and vilification caused emotional and psychological harm to people and even reinforced other forms exclusion. Furthermore, those inquiries found that seemingly low-level and ordinary offensive behaviour



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could lead to for more severe acts of harassment, intimidation or violence by impliedly condoning such acts with weak laws.

Recommendation 5

ECCV recommends that the Racial Discrimination Act 1975 be strengthened to protect Australian citizens against all formal and informal race hatred.

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