

ECCV Submission
On
Parliamentary Inquiry into Freedom of Speech
December 2016

- I took my daughter for a drive in the car and we had to stop at a red light but the car behind us kept tooting the horn. The driver wound the window down and shouted f- words about Muslims and migrants. My daughter said let's go from another side street. However our boys and sons wouldn't react so calmly. When it happens with them they want to get out and fight especially if there's an attack on their mothers.

- In summer they turn on their motorbikes close to our cars. When we walk the children to school they drive towards us in their cars and try to hit us. I thought the car would hit me with my little boy. There was a bystander who told them that they nearly hit the little boy and not to do that. My husband called the police. When a male police officer arrived the other driver was so calm and cool. The police didn't do anything.

- One day I had a headache and went for a walk to get some fresh air. A car passed me and the woman driver screamed at me and drove the car fast over the nature strip towards me. I was so scared I thought I was going to die and after that I decided not to go out for walks anymore.

Muslim women speaking to ECCV staff about their lives in Melbourne's *outer suburbs*
(August 2015)

The Ethnic Communities' Council of Victoria Inc. (ECCV) is the voice of multicultural Victoria and the peak policy advocacy body for eight regional ethnic community councils and up to 220 members including ethnic and multicultural organisations across Victoria since 1974. For over 40 years, we have been the link between multicultural communities, government and the wider community. ECCV has a strong history in advocating for the rights of Victoria's multicultural communities.

ECCV welcomes the opportunity to provide a submission to the Government's Inquiry into Freedom of Speech by the Parliamentary Joint Committee on Human Rights; however, we are concerned by the terms of reference of this inquiry which has the potential to conflate the hate speech illustrated by the above quotes, with freedom of speech. ECCV does not consider that section 18C or 18D of the *The Racial Discrimination Act 1975 (Cth) (the Act)* imposes unreasonable restrictions on freedom of speech. In a November 9th 2016 ECCV media release we re-stated that those freedoms are very adequately provided for in section 18D of *the Act*.

With almost half of Victoria's population born overseas or with one or two parents born overseas, ECCV believe that *the Act* needs strengthening. ECCV is open to discussion on how to strengthen *the Act*, but considers the current terms of reference for this Inquiry to be inadequate to do so.

ECCV has also joined with 60 multicultural, faith and community organisations and the Victorian State Government to endorse the document *Submission to the Parliamentary Inquiry into Freedom of Speech From Victorian Multicultural, Faith and Community Organisations on behalf of our communities 22 November 2016*. We have also worked with the Federation of Ethnic Communities Councils of Australia (FECCA) and the Victorian State Government to explain why we are concerned with the continuing targeting of both Section 18C and 18D as well as *the Australian Human Rights Commission Act 1986 (Cth)*.

ECCV supports FECCA's position that strong and effective racial vilification laws are needed to stop the spread of racial hatred which contributed to the attacks on Muslim mothers documented in ECCV's community consultations. Apart from ECCV's ongoing community consultations on social cohesion, we draw the Committee's attention to a recent article in *The Age* newspaper explaining the international ramifications of removing core values such as 18C from Australian public life.

"As reported by "The United Nations' special rapporteur on racism has condemned Australian politicians from major and minor parties whose statements are contributing to an increase in "xenophobic hate speech" and negative views about migrants. Mutuma Ruteere has also warned that political leaders who do not denounce such views are tacitly contributing to the normalisation of hard-right and racist opinions." (The Age, 5 December 2016)

Apart from its damaging effects on culturally diverse Victorian communities, ECCV sees the Inquiry's terms of reference potentially leading to negative impressions of Australia's social cohesion not only among multicultural and faith vulnerable communities in Victoria, but with our regional and global trading partners and international investors that see Victoria and Australia as a vibrant destination for qualified migrants, innovation and creativity. The Inquiry is, in ECCV's view, a backward step for an innovative, cohesive and multicultural country like Australia.

ECCV is therefore pleased to make recommendations on the terms of reference for this Inquiry:

1. Whether the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) imposes unreasonable restrictions upon freedom of speech, and in particular whether, and if so how, ss. 18C and 18D should be reformed. In this reference, "freedom of speech" includes, but is not limited to, freedom of public discussion, freedom of conscience, academic freedom, artistic freedom, freedom of religious worship and freedom of the press.

Culturally diverse individuals and communities need protection from racial vilification which requires strong legislative safeguards and protections. Within a culturally diverse society, like Australia, the promotion and maintenance of social cohesion can be a challenging task.

An important protection against hate speech

ECCV does not support the proposed reform of ss. 18C or 18D of *the Act* and is particularly concerned about a potential watering down of the racial vilification provisions in *the Act* as considered by the Inquiry. Section 18C of *the Act* provides important protection against racially motivated attacks, including hate speech, against members of Australia's migrant, refugee and culturally and linguistically diverse communities. The 2014 debate on this issue was extensive and should not be re-opened at this point in time. There was an overwhelming community response against changes to *the Act* and the proposed reforms to ss. 18C and 18D would have adverse effects on Victoria's social cohesion which is a complex group of pressures on communities.

The reopening of the debate about s. 18C risks sending a message to the community that racial or religious vilification, abuse and intolerance is again more acceptable in our society.

ECCV is particularly concerned about the increase of hostility toward Muslims and other minority groups in Australia. In recent years there has been a rise in anti-multiculturalism rallies and racist attacks, which promote feelings of exclusion and fear in the community. In a recent Social Cohesion Policy Brief *On the Road with Australian Muslim Mothers*¹ (**Attachment 1**), ECCV consulted with Australian Muslim mothers in the south eastern suburban area of Melbourne. Our consultation found that many local residents, in particular Australian Muslim mothers and daughters, are distressed by high levels of discrimination towards them. This includes hostile behaviours where they live, in parks and shopping centres and on roads with vehicles, including through physical attacks and verbal abuse, like hate speech.

Further, through ECCV's gender equality consultations, African mothers spoke of the fear they have for their daughters if they are to travel at night due to racial taunts and threats that their daughters experience for wearing their headscarves.² The impact of 'insulting and offending' cannot be underestimated in these instances, particularly as it leads to isolation and impacts on their participation in social and civic life, including employment, education and mental health.

The current Government must be consistent in legislating against hate speech

ECCV supports the principle of free speech as something that all democratic societies are based on and contrary to the contention that s. 18C is a 'threat to Australia's liberal democracy'³. Section 18D of *the Act* provides powerful and detailed protections for freedom of speech. It sets out a series of exemptions where conduct will not be deemed to be unlawful if it is done 'reasonably' and in 'good faith', such as in artistic, scientific or academic purposes that are of genuine public interest. However, while freedom of speech is a very important right, it is not and should never be an unconditional and absolute right if it risks damaging our social cohesion. ECCV draws the Committee's attention to the recent passing of the *Counter-Terrorism Legislation Amendment Bill (No. 1) 2016*. This bill introduced a new offence of advocating genocide in its Schedule 11. ECCV therefore notes that the current Government acknowledges that hate speech can have devastating consequences for society and that there is a precedent to legislate against it as recently as November 2016.

¹ ECCV Social Cohesion Policy Snapshot [On the Road with Australian Muslim Mothers](#), August 2015.

² [ECCV Response to The Victorian Government's Gender Equality Consultations on the Development of Victoria's Gender Equality Strategy](#), October 2016. Page 3.

³ <http://www.abc.net.au/news/2016-09-01/what-is-section-18c-and-why-do-some-politicians-want-it-changed/7806240> (viewed 14/12/16)

Maintaining International Standards of Humans Rights

Freedom of speech principles have been limited in many countries, including Western democracies, in areas such as discrimination, hatred and vilification. It is imperative that freedom of speech does not come at the expense of these protections and the right balance needs to be met to safeguard the rights of all community members.

Further, as a signatory to the United Nations (UN) Human Rights Council and a participant in the Universal Periodic Review (UPR), the Government has signed up to protecting the standard and upholding the principles of human rights. In its own submission to the UPR process, the Commission recommended that *'Government affirm its commitment to an inclusive society by continuing to support the National Anti-Racism Strategy and programs building social cohesion and community harmony'* and; that *'Government ensure all counter-terrorism laws remain under constant review to ensure that any infringement of human rights is legitimate and proportionate.'*⁴

Introducing an amendment to weaken s. 18C legislation undermines the Government's commitment to these universal human rights principles. ECCV does not support any hurried modifications using the current terms of reference. We believe existing federal racial discrimination laws need to be maintained and strengthened to support the vast social cohesion initiatives currently active across jurisdictions. For example, by explicitly adding religion into the protections, ECCV believes that multicultural and faith communities will feel better protected, valued and respected as members of society.

Recommendation 1

ECCV recommends that existing federal racial discrimination laws, including 18C and 18D of the Racial Discrimination Act, are maintained and further strengthened by explicitly adding religion into the protections to ensure the protection of diverse individuals and communities from religious intolerance, vilification and abuse as documented in ECCV's social cohesion policy briefs.

2. Whether the handling of complaints made to the Australian Human Rights Commission ("the Commission") under the Australian Human Rights Commission Act 1986 (Cth) should be reformed, in particular, in relation to:

- a. **the appropriate treatment of:**
 - i. **trivial or vexatious complaints; and**
 - ii. **complaints which have no reasonable prospect of ultimate success;**

What the Commission's data tells us

ECCV reviews of the Commission's published data found that in 2015 – 2016 the Commission

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http://www.humanrights.gov.au/sites/default/files/document/publication/WEB_Australias_Second_UPR_Review_2015.pdf p. 9 (viewed 8/12/16)

handled 16 836 enquiries of which only 7% related to racial discrimination including racial hatred.⁵ Of these enquiries, only 422 cases of racial discrimination were processed through the complaints process.

The data also showed that approximately half of the complaints made on racial discrimination grounds originated from people who do not identify as Indigenous. The salient point being that the racial discrimination bill serves Australia's first people as much as it serves all who arrived thereafter. In this way, any amendment to s. 18C affects the whole of Australian society and not just a segment therein.

The Commission's data also illustrates that whilst the provision for racial discrimination exists in *the Act*, only a very small proportion proceed through the complaints process with even a smaller proportion proceeding beyond conciliation to court. In the 2015 – 2016 period, only 3% of all discrimination complaint cases proceeded to court.⁶ The Shadow Attorney General, the Honorable Mark Dreyfus MP, in his community consultation speech in south eastern Melbourne, stated that "over the previous 20 years since the institution of the racial vilification Bill, only 96 cases have proceeded to court".⁷ This data reflects the Commission's ability to vet enquiries for vexatious complaints and make sound decisions in referring genuine complaints onto the complaint resolution process.

The evidence suggests that s. 18C is being appropriately applied and is not 'jamming up' the Commission's complaints and conciliation process or the Federal Court of Federal Circuit Court as the terms of reference implies.

Moreover, the number of complaints received by the Commission has remained reasonably consistent over the past five years with highest complaint number received by the Commission in 2011 – 2012 of 2610 and the lowest in 2015 – 2016 recording 2013 cases.⁸ This indicates that over time there has not been an escalation of reporting of instances of racial discrimination despite the change in political climate with the rise of more right wing political view both locally and globally. ECCV would like to see the Government use its processes more efficiently to reduce confusion over the Commission's role and capacity, and therefore manage expectations in the terms of reference.

Recommendation

ECCV recommends that the Committee considers the factual data provided by the Commission and applies a reasonable business case comparable with evaluating other similar government agencies with compliance responsibilities.

⁵ <http://www.humanrights.gov.au/sites/default/files/AHRC%202015%20%202016%20Complaint%20Statistics.pdf>

⁶ Ibid

⁷ Direct quote, Mark Dreyfus MP, Changes to Australia's Racial Discrimination Act, with Mark Dreyfus QC MP, Shadow Attorney-General Community Consultation, The Castle Dandenong, 8/12/2016.

⁸ Ibid 5

b. ensuring that persons who are the subject of such complaints are afforded natural justice;

The Commission's role is to afford individuals (and organisations) the right to be heard and equally, provide opportunity to parties to respond to allegations. The Commission also has the power 'to terminate complaints that are vexatious, trivial, misconceived or lacking in substance' with 'about 46% of matters ... withdrawn ... or terminated' on various grounds.⁹ Whilst the hurdle set for registering complaints with the Commission is considered to be low¹⁰ the bar for the court for the application of 18C is much higher in as much as to apply 18C 'the speech must have profound and serious effects, not to be likened to mere slights'¹¹.

The Commission's complaints process is published on its web site in multiple languages, ECCV notes however, that the information is difficult to find. An extensive search of the Commission's website found that information about the complaints process can be found through a link which is in fine print at the bottom of its web page.

The Commission also offers an interpreter service for its conciliation process and provides opportunity for complainants to bring a support person to the conciliation process. ECCV supports improvements for people to find the link to translated material online and in print material.

Despite these obvious shortcomings, the Commission's processes have proven to be, in the main, satisfactory to complainants and respondents alike with 82% of complainants and 93% of respondents feeling that they were treated fairly with only one complaint about its service under the complaint process provided in the Charter.¹² ECCV sees improvements to community education as beneficial to subjects of complaints as much as to those who make complaints by managing the expectations that may lead to complaints without merit.

Recommendation 2

ECCV recommends that the Commission must play a much stronger role in community education to ensure that the community understand the limitations of free speech, and in so doing, make clear the distinction between community education and compliance and solicitation.

Recommendation 3

ECCV recommends that the Commission makes its translation and interpreter services on its website especially the fine print at the bottom of its home page, more accessible.

⁹ <http://www.humanrights.gov.au/news/stories/parliamentary-inquiry-freedom-speech> viewed 14/12/16

¹⁰ Ibid 9

¹¹ <http://www.abc.net.au/news/2016-09-01/what-is-section-18c-and-why-do-some-politicians-want-it-changed/7806240> viewed 14/12/16

¹² Ibid 5

c. ensuring that such complaints are dealt with in an open and transparent manner;

The Commission maintains a public Conciliation Register of the complaints and outcomes it has handled, it also publishes an annual report including statistics. This provides the public with the operation and decision making process transparency of the Commission. ECCV commends the Commission for its transparent practices while encouraging them to improving their communication education with culturally diverse communities in all states.

d. ensuring that such complaints are dealt with without unreasonable delay;

ECCV is sensitive to the needs of people engaged in disputes which can disadvantage people from culturally diverse communities. The Commission publishes the timeliness of its complaints handling within its annual reporting process. Survey conducted by the Commission in 2015 – 2016 on the satisfaction on timeliness showed that 75% of complainants and 83% of respondents felt that the Commission dealt with the complaint in a timely manner. This is a reasonably high customer satisfaction rate and is dependent on the volume and complexities of enquiries, and the ability of the Commission to dial up or down its response.

e. ensuring that such complaints are dealt with fairly and without unreasonable cost being incurred either by the Commission or by persons who are the subject of such complaints;

Sections 18C and 18D provide a balance between prevention of racial vilification and freedom of speech. They are civil regulations which do not have provision for prosecution or a jail term. The Commission therefore offers a free conciliation service for the handling of complaints raised on the grounds of racial discrimination. It does not offer the services of a lawyer. As such, the cost to complainants, respondents and the Commission are kept to a minimum. ECCV sees these as vital to culturally diverse communities without the resources to seek this support.

The majority of complaints cases are successfully mediated by the Commission with the outcome being an apology, training attendance or a very modest compensation in acknowledgement of fault. It is important to note that conciliation is a voluntary process and any outcome cannot be enforced by the Commission as that is not their function. In addition, conciliation does not prohibit either party from taking the matter to court.

ECCV supports the Commission's process and note that only 3% of the total complaints received in 2015 – 2016 have proceeded to court ensuring that every effort is made to settle complaints at minimal cost to all.

f. the relationship between the Commission's complaint handling processes and applications to the Court arising from the same facts.

The Commission is governed by a set of rules in working with the court. According to the code of practice, the Commission can intervene to provide specialist advice in discrimination cases and can intervene in cases when it is important to make a human rights argument. Though this is the case, the Commission has only intervened in three matters over the 2014 – 2015 year, of which two were by invitation of the Court. ECCV sees this provision as an important tool to protect the interests and rights of people at risk of racial discrimination and the role of the Commission in protecting broader matters of human rights. We see the Commission's interaction with the Courts as a valuable opportunity to refine their internal processes.

Recommendation 2

ECCV recommends further resources to be allocated for culturally appropriate community education, interpreter and services to ensure that community expectations are appropriately managed throughout the Commission's complaints process.

3. Whether the practice of soliciting complaints to the Commission (whether by officers of the Commission or by third parties) has had an adverse impact upon freedom of speech or constituted an abuse of the powers and functions of the Commission, and whether any such practice should be prohibited or limited.

It remains unclear what is meant by the practice of 'soliciting complaints to the Commission' in the terms of reference. ECCV believes that people should be allowed to speak about the Commission's functions and encourage those who believe their rights have been infringed to seek the Commission's support.

Indeed, it is the Commissioner's role to engage individuals and organisations in public conversations about the work of the Commission and human rights more broadly. ECCV supports community education for any agency with a requirement to ensure that the public, business and all sectors understand their rights and responsibilities. ECCV's joint submission with Victorian Multicultural, Faith and Community Organisations encourages victims of racist speech to seek legal assistance and protection. At no point does ECCV consider this advice to have adverse impacts upon freedom of speech if s. 18D is followed in good faith.

Recommendation 3

ECCV recommends that the Commission strengthens its education and communication strategies to make its process clearer to for culturally diverse communities.

4. Whether the operation of the Commission should be otherwise reformed in order better to protect freedom of speech and, if so, what those reforms should be.

The Commission, as the instrument of implementing the freedom of speech and racial vilification bills, has been operating effectively in striking the right balance between free speech and risk of racial discrimination as evidenced by the low conversion rates of enquiries to actual complaints cases raised. Further, the small numbers of cases which actually move through to Federal Court have "consistently interpreted sections 18C and 18D as maintaining a balance between freedom of speech and freedom from racial vilification"¹³, indicates that the bill is "operating effectively and interpreted sensibly".¹⁴

The Scanlon Foundation's *Mapping Social Cohesion Report* found that the majority of Australians (83%-86% in the 2013-2016 surveys points) feel that 'multiculturalism has been good for Australia'. Though this is the case, it is important to note that there are signs of increased pessimism, negativity towards Muslims and an increase in the proportion of people experiencing discrimination on the

¹³ <https://www.humanrights.gov.au/our-work/race-discrimination/projects/glance-racial-vilification-under-sections-18c-and-18d-racial> (viewed 8/12/16).

¹⁴ Direct quote: Hugh de Kretser, Changes to Australia's Racial Discrimination Act, with Mark Dreyfus QC MP, Shadow Attorney-General, The Castle, Hemmings Park Princes Highway Dandenong, 8/12/2016.

basis of skin colour, ethnicity or religion.¹⁵ The Scanlon report found that these sentiments were connected to a level of concern in the political system and trust levels in politicians.¹⁶

This is reflected in recent community feedback on the Inquiry into Freedom of Speech in which 21 multicultural and multi-faith community members shared their experiences, stories of concern and fears for their safety, employability, housing security, being able to secure a loan from a bank.¹⁷

*- Reporting in the media is discriminatory towards black and Muslim people. The media generalise, they call us APEX and we are attacked. It is stigmatising and causing issues. It affects us in renting a house, in getting a job. Our young people are singled out. Our young people are mainly raised by single mothers; it makes it hard for them ... My son goes to school and no-one wants to play with him...
Tell me, what is the future of black and Muslim people in Australia?*

African community member feedback to ECCV consultation, 2016

The detrimental health impacts of racism have been long recognised and reported in literature and is widely known to make people sick.¹⁸ A community member relayed her experience¹⁹:

*- Have all the pollies forgotten what happened in South Africa? I am feeling so blessed to be in Australia, but still have experienced discrimination. My case went to court and it was successfully trialled, but I was sick for six months afterwards.
Pollies please consider what happened in South Africa and
let us live in peace in Australia.*

Female community member feedback to ECCV consultation, 2016

ECCV's policy and advocacy work with culturally diverse communities has revealed the real harm that racist speech causes and is dismayed to regularly hear stories that link hate speech to racial violence. Across all our policy work and especially within social cohesion, ECCV is convinced that 'watering down' 18C will have the effect of giving permission for racist attacks.

There are many laws that restrict freedom of speech, for example, laws related to defamation, advertising and national security laws. These laws are not under review, yet section 18C, which 'fills

¹⁵ <http://scanlonfoundation.org.au/wp-content/uploads/2016/11/2016-Mapping-Social-Cohesion-Report-FINAL-with-covers.pdf> page 2. Viewed 2/12/16.

¹⁶ Ibid 13

¹⁷ Community member's feedback: Changes to Australia's Racial Discrimination Act, with Mark Dreyfus QC MP, Shadow Attorney-General, The Castle, Hemmings Park Princes Highway Dandenong, 8/12/2016.

¹⁸ Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities
https://www.lowitja.org.au/sites/default/files/docs/LEAD%20Report-WEB_0.pdf

¹⁹ Ibid 14

an important gap in legal protections for those affected by racial hatred and vilification²⁰ is under review.

This is an important juncture in Australian history and ECCV implores all Parliamentarians to take full responsibility for the wording in terms of reference and in their public comments. Section 18C underpins the basic principle of human respect in an Australian society which largely supports multiculturalism. It speaks out against racism and 'protects against intolerance in a multicultural society... in its objectives tolerance for and acceptance of racial and ethnic diversity. At the core of multiculturalism is the idea that people may identify with and express their racial or ethnic heritage free from pressure not to do so.

People should be free to fully identify with their race without fear of public disdain or loss of esteem for so identifying. Disparagement directed at the legitimacy of the racial identification of a group of people is likely to be destructive of racial tolerance, just as disparagement directed at the real or imagined practices or traits of those people is also destructive of racial tolerance.²¹ ECCV is not alone in concluding that there is a call for s. 18C to be strengthened to include faith based vilification²².

Conclusion

ECCV is clear that the Australian Government has a unique opportunity to set a standard for what we tolerate as 'right' and 'good' in Australian society. At this particular point in time, however, diluting 18C risks endorsing racist behaviour and damaging our social cohesion. Together, ECCV considers 18C and 18D to be powerful incentives for balancing free speech with hate speech. We think it can be strengthened by adding protections for people to practice their faith and that the benefits of *the Act* as it now stands can be enjoyed by all Australians regardless of their race, ethnicity or religion.

For further information contact Carl Gopalkrishnan, Senior Policy Officer at email: cgopalkrishnan@eccv.org.au and telephone: (03) 9354 9555.

²⁰ <https://www.humanrights.gov.au/our-work/race-discrimination/projects/glance-racial-vilification-under-sections-18c-and-18d-racial> (viewed 8/12/16)

²¹ Eatock v Bolt [2011] FCA 1103, <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2011/1103.html?stem=0&synonyms=0&query=andrew%20bolt> (viewed 12/12/16).

²² Ibid 14