

Punishment as Prevention 5.0

The Ethnic Communities' Council of Victoria's (ECCV) consulted with culturally diverse communities, parents, teachers and legal experts on lowering the age of control orders for children aged 14 in the Counter-Terrorism Legislation Amendment Bill (No.1) 2015. ECCV found that culturally diverse families have not been consulted on the 5th Counter-Terrorism law 'reboot' in just 12 months.

ECCV is the peak advocacy organisation for ethnic and multicultural groups in Victoria and consults with communities when their voices are not heard in the policy process. The Inquiry into the Counter-Terrorism Legislation Amendment Bill (No.1) 2015 (the Bill) by the Australian Parliamentary Joint Committee on Intelligence and Security has moved swiftly through the legislative process without significant community consultation and debate. Despite concerns raised by appointed monitors of national security legislation, such as the Independent National Security Legislation Monitor (INSLM) Bret Walker SC and his successor Roger Gyles, the Bill will lower the age of control orders to children aged 14.

Definition

Control orders are a set of powers under counter-terrorism legislation that can be enacted without arrest and with less evidence than that required under criminal law. They give rise to civil and not criminal proceedings and those under these powers are called 'controlees'. Australia currently has some of the highest number of counter terrorism laws of any country in the world and the Bill is the fifth rewrite of national security legislation since July 2014. The Federal Parliament's Inquiry into the Bill has proposed much change without effective community consultation. While the Parliamentary Joint Committee on Intelligence and Security was dissolved before

Australia's general election on July 2, 2016, the Bill is likely to be passed this year when reintroduced. Due to the speed of the Inquiry community submissions were largely absent and ECCV conducted the roundtable to understand how the Bill will affect parenting styles and the rights of children in culturally diverse Victorian families.

It is vital for culturally diverse communities to have access to sound legal understanding about the Bill. The Law Council of Australia (LCA) kindly accepted ECCV's invitation to attend to answer questions and explain the Bill to people who had not heard of it and found it difficult to understand. ECCV asked the LCA based on their submission in which they advised the Government that the amendments must urgently consider the "best interests of the child as a primary consideration". ECCV requested the participation of the LCA at our roundtable discussion as the nation's peak representative organisation for the legal profession with close working relationships with its constituent members across all States. They also brought a member of LCA's National Criminal Law Committee willing to answer questions from the community which made the roundtable possible. ECCV commend their willingness to fly to Melbourne especially to engage with culturally diverse Victorians.

Also in attendance were the executive and staff from the Islamic Council of Victoria (ICV), staff from the Commission for Children and Young People Victoria (CCYP), and ethno-specific service providers which included parents and teachers.

The Bill

Our Roundtable focused on the chapters of the Bill (the Schedules) that lower the age of control orders to 14. The Schedules outline the processes for how authorities can identify a child, subject them to a control order and then monitor their compliance. The LCA explained selected Schedules within the Bill to attendees. Many of the 17 formal submissions to the Inquiry suggested that the Explanatory Memorandum (EM) to the Bill had not satisfied their concerns.

The LCA's answers to questions about the Schedules and the EM enabled community members to demystify the complexity of the Bill and explain its impact on culturally and ethnically diverse children and their parents. The Schedules themselves are described in terms sufficient only to provide a context to the participants' stories.

The process of making new laws (legislation) can be very difficult to understand for culturally diverse communities in Victoria. Legislation with the power to significantly change our lives for the better or worse deserves nothing less than rigorous consultation and debate between the government making the laws and the communities who are affected.

This has not been the case with this Bill which is not well understood by the communities who will be most affected. Recent INSLM advice to the Committee has focused on safeguards to protect the best interests of the child in line with a 2013 Commonwealth of Australian Governments (COAG) Review (COAG Review) which mirrors similar policy efforts in the United Kingdom (UK) to ensure that a system of advocates will have the legal capability to challenge closed evidence on behalf of the controlee (the child).

ECCV is publishing excerpts from this discussion to educate affected families and community organisations about the Bill, which has not been properly explained to them by the Government. More broadly, culturally diverse Victorians join senior officials from intergovernmental branches in every Australian State, the peak organisation for Australia's legal expertise, peak civil rights groups, a coalition of the country's largest media companies, university faculty of law academics, and their own community leaders in voicing their concern about this Bill.

Impact on Social Cohesion

The roundtable discussion evoked expressions of deep concern. It also provided insights into limiting potential damage to Victoria's social cohesion. An appreciation was born for the need for ethno-specific community organisations to work closely with all state governments and peak legal organisations to reduce the Bill's unintended consequences. These include poor safeguards for authorising and managing control orders of children aged 14; and permitting unprecedented intrusion and surveillance of Victorian families, children, friends, schools and employers.

The discussion revealed that particular faith communities would shoulder a heavier burden of proof and endure more intrusion than others. Valued government stakeholders expressed dismay at the lack of consultation and compensation or resourcing to cope from a community backlash from the Bill. All participants understood the

need to confront youth radicalisation, but described how the new powers could easily become counter-productive. Many noted the absence of support to families and the children (the controlees) should they be proven innocent after losing their reputation with peers, schools, employers and within their own family.

Multicultural communities agree with lawyer Brett Walker's 2015 ABC interview where he said that investigation should not be lost but that, "[a] control order in itself is likely to impede investigation rather than actually enhance it."

Court Appointed Advocates

The inclusion in the Bill of Court Appointed Advocates (CAA) looks similar to advocates provided under Australia's Family Law Act, but they are very different. For the first time in Australia, through the CAA, a judge can use evidence that is not disclosed to the child, their parents or their legal representative when deciding to issue a control order. Many think including a judge in a closed (or secret) court may not always lead to a fair hearing, especially when the law makes it harder for accused citizens to challenge evidence against them. A recent article in *The Conversation* has described how the UK Government as far back as 2011 found such "secret evidence" alarming. To address this unfairness, the UK created a special advocates system with the power to challenge such evidence on an accused's behalf. Such safeguards are absent in the Bill despite COAG recommending that a person be given a "guaranteed minimum standard" of information to defend themselves.

The current INSLM Roger Gyles, AO QC, and the Parliamentary Joint Committee on Intelligence and Security have recommended that the COAG Review recommendations be implemented by the end of 2016. The Government has accepted these recommendations.

In the 2016 INSLM report, Roger Gyles raises issues which may affect the final Bill:

- "the advocate is not the young person's representative and is not obliged to act on the instructions of the young person –"
- "The advocate may even disclose information communicated by the young person to the court against the wishes of the young person."
- "...evidence from the child could be used to support that outcome [imposing a control order]."
- "It is a large step to move from that context [Family Law Act procedures] to one where the proceeding is against the child and the choice is whether or not to impose an intrusive control order with criminal liability for breach."
- It is odd, to say the least, that the parents who ordinarily would have the custody and control of the young person have no responsibilities in relation to control orders."
- "...reading these schedules brings home forcibly the extent of intrusion into life and liberty by the making of a control order."
- "...the court is expressly authorised to consider information that has not been disclosed to the target of a control order request or [their] legal representative..."
- "The objection in principle to special advocates is that they give a veneer of fairness to an inherently unfair and unnecessary process."
- [Recommendations] That the recommendation of the COAG Review as to the introduction of a system of special advocates into the control order regime be accepted and implemented,..."

The Schedules

ECCV welcome culturally diverse parents and organisations to use our paper to assist them when reading the Bill and the Inquiry submissions online. We include select submissions relevant to our Roundtable discussion in the references. Of concern to parents are Schedules 2, 3, 4 and 7 (Lowering the age of control orders to 14); Schedule 15 (Courts to consider information not disclosed to the Child or their representative), Schedule 5 (redefining when a terrorist attack is considered "imminent"), and finally Schedules 5, 6 and 7 (changes to the threshold for imposing detention orders).

Key Consultation Feedback

Key points

The lack of consultation with culturally diverse communities was of concern to roundtable attendees. The Bill's amendment on control orders to include children aged 14 was the main focus of discussion. A lack of safeguards for children aged 14 overlap across a Bill that increases powers of surveillance to include children and their families, friends, employers and schools. Participants saw imprisonment for 5 years for tampering with tracking devices as extremely harsh given the capacity of 14 year olds to comprehend their situation. Mental health, youth suicide and unintended radicalisation were all potential 'blowbacks' to the new Bill.

Participants' insights

18 roundtable participants representing faith groups, multicultural peak organisations, ethno-specific service providers, representative lawyers of national peak legal associations, staff from a state government agency, a university lecturer, parents, grandparents and community members.

The Bill

- A general legal explanation of the Bill was given at the start of the discussion: "The Bill is designed to strengthen powers with agencies with regard to counter terrorism. It allows for greater powers to intercept communications, control movement of controlees, monitor people using tracking devices and seeks to enforce the law against people, including young people, suspected of terrorist activities."
- A legal expert explained, "Control orders are a civil law issue relying on a balance of probabilities test. That is, for a person to receive a control order the court need only be satisfied that there is sufficient evidence to a balance of probabilities standard. This requires a lower threshold of evidence than that required for a criminal charge and arrest (which is a standard of "beyond a reasonable doubt") and is enacted through the federal court. It doesn't follow that criminal activity follows control orders. It is meant as a preventative measure to prevent, for example, someone training for a terrorist event or preparing to travel to a foreign country to engage in terrorist acts."
- In Schedule 2 young people to 14 years old are included in control orders, but a lawyer explained to community members that, "preventative

detention orders do not include 14 year olds in this Bill."

- "A Schedule is a section of legislation. The Bill includes a range of Schedules which includes amendments to the current law. There are already strong counter terrorism powers by government. However, these measures have been justified on the basis that young people are becoming more radicalised down to 14 year olds. Agencies also claim that operational impediments justify the Bill's amendments."
- Culturally diverse organisations admitted that, "We are all struggling to comprehend the key issues and the complexity of the legal argument here."
- Many people agreed that, "Control orders are an absolute over-reaction and are harder because they are civil action".
- The LCA explained its interest in the Bill: "[We are] the national peak for the Australian legal profession with 60,000 members nationwide. We advise governments and courts and federal agencies on how the law and justice system can be improved for the community. We work closely examining counter terrorism laws to ensure that they do not disproportionately infringe the rights and liberties of others. This legislation is likely to be passed by the new Parliament. It will be amended and improved on the basis of the Parliamentary Committee on Intelligence and Security's recommendations. We expect to see changes with the re-elected government in the coming months."
- As a cautionary amendment, it was suggested that a 'sunset clause' for the legislation could balance a lack of safeguards.

The Child

- Several people clearly expressed that 14 years olds are not mature enough to defend themselves under a control order. A legal expert said, "The initial proposed control order scheme in the Bill, glossed over what is in the best interest of the child. Placing a 14 year old child on a control order does not necessarily import all rights of the child on the international obligations that we signed up to."

- A community organisation raised the issue of adolescent mental health. She said, “There is an alarming increase in mental health problems among young people in our communities. With our world, young people have experienced trauma or time in detention. This trauma may lead them to act out behaviour which may be perceived to be linked with terrorism. If they are treated in this way we may see the level of youth suicide increase. This needs to be looked at from all angles. This is really serious and we don't want to see such control orders leading to a risk of suicide or self-harming among children.
- A person working with diverse youth and families explained said, “We need to put on our child welfare hats...Is the identity of the person going to be kept confidential? How will the media make it worse? There is no protection built into the bill to protect the child”.
- A person raised the issue that control orders lack details about different types of children. “What is taken into account for a 14 year old child is the real question. This Bill imports some of the Family Law Act by the government but not all of them such as considering a child’s disability or sexual orientation, only general things such as welfare and health, but it does not go as far as the international obligations we signed up to.”
- One person specifically asked, “Will this in any way contravene the international charter of the child?”, to which a lawyer explained, “Yes, we think there is the potential for the initial Bill to do so, as it does not require the best interests of a child to be a primary consideration of the Court in issuing a control order, and in Schedule 2, the language is around the best interests of ‘the person’ rather than ‘the child’. This language may be particularly designed to avoid international obligations.”
- There was confusion how the Bill would affect each state’s own legislation. They had a concern about children in their own state that are offending. While the Bill appeared quite separate from state laws that talk about what’s ‘in the best interest of the child’, contravening international charters would pose problems between states and this federal law.
- One comment was, “Let the parents pay rather than punish the children.”

Tracking Devices

- The Bill has a requirement for “...a person to keep the tracking device in good operational order and we believe that is unreasonable for such young teenagers. It is not working by putting so much pressure on a young person who has no understanding of consequences. They won't even bring a pencil to class.”
- “Tracking devices will be placed on the young people, and there is 5 years imprisonment for breaking or interfering with the device. They are attached around your ankle. We say it is unreasonable and they breach the provisions.”
- “I’m a grandmother with young people, and they will take things apart, technology, like these devices. I’m saying that the thing that’s really missing in the Bill is that we do no harm. The work that we’re doing with other young people in our community, we think that’s important, and it’s not in here.”
- Another person said, “This would impact on educational institutions too. For children, the authorities can have surveillance on school computers for instance.”

The Surveillance

- Broadening the scope for authorities to get a search warrant to check on a child’s tracking device could be seen as a “slippery slope”. One man said, “Tracking devices. This legislation could become a ‘Trojan horse’ that unleashes a connection among friends, which intrudes into wider social life, so the social ramifications are there.”
- A man asked a lawyer, “If I’m talking with the 14 year old will I be monitored?” and was told, “The proposed monitoring for compliance with a control order regime would be an extensive intrusion. The parent’s communication will be captured if they send messages to the child. The intercepts and warrants can be done with family and friends and even [the child’s] legal representative.”
- A typical comment was, “Privacy issues could be a problem for everyone. Australians in general are still very reticent about that kind of authority and government departments are going to keep an eye on the community.”
- It was noted that information sharing among agencies is a strong part of the Bill and there was

concern about the intrusions into the privacy of families.

- Several community members commented, “The legislation is isolating a particular threat but how far can this intrude into that child's friends and their families? How can it affect other parties and relatives?” They were told that any communication is “included in the monitoring from siblings, relatives and friends. The AFP can come into the family home to check on the device.”
- One comment was, “The surveillance could be on the school computer so it will include other communication too.” This was seen as leading to further isolation and disengagement of youth with one person adding, “With regard to the schools, a 14 year old identified under suspicion, often we don't want to have anything to do with them because that child is blacklisted. Even within that school or that community. This happens now.”
- Another person added, “At my university, I find that listening devices are already there in all classrooms such as cameras.”
- A typical remark was, “There have been quite a few legislations leading to this. This is the most intrusive legislation, such as the people around the child including classrooms or the peers of that student being monitored.”

Court Appointed Child Advocates

- Many people assumed that the language in the Bill referring to a court appointed advocate for a child would represent the child, but did not immediately understand that the proposed advocate would report to the court, including in cases where the child did not wish the advocate to relay information.
- A legal expert explained: “There's no counterbalance in the Bill. We thought the government would appoint a representative, but at the end of the day that Court representative for the child really has a duty to the Court over and above that of the child. The Court appointed advocate always, really, should be acting in the ‘best interests of the child’ if they take the language from the Family Law Act across to this Bill.”
- The affordability of legal advice for parents was raised several times. A community organisation noted that, “There should be a special regime of

advocates and that they should be government funded as many parents can't afford that.”

- Lawyers were concerned with the cost of justice on families. They said: “Generally families just can't afford this type of legal representation. First they need a team of lawyers acting in the interests of the child not curtailed by the Bill. Secondly, the Bill, as initially drafted, would allow national security agencies to submit evidence before a Court that can be used against a child, but the child and his/her legal representative will not have access to the information. This will lead to inequality. It's also going to cost families money – a sorry feature.”
- Another lawyer noted that the INSLM had recommended a special advocate regime be introduced to counter-balance some of this inequality.
- Someone suggested, “If it's an under 17 year old there should be some sort of right or claim to privacy and not be splashed out on the media and the family destroyed. We're talking about families and kids.”

Bipartisan Support

- At one point in the discussion, the bipartisan support for the Bill was raised. This was a surprise to many participants. One person said, “The problem is that this (Bill) is bipartisan. It's all about not being seen to be ‘soft’ on terrorism, especially on the Labor side where they have copped a lot from being soft on crime. That's why Labor is very keen to support those measures.”
- The bipartisan agreement on the Bill reflected a lack of diverse views. A man said, “The difficulty is that it is bipartisan, and there is a lack of scrutiny of the details.”
- Concerned that the Bill could be counterproductive, people in the room questioned if there was anything that culturally diverse communities could still do as the Bill's passing seemed to be fated.
- Faith communities felt dismay that they had not been consulted earlier. One person explained, “And with messages from the government, it says we want to be inclusive and then on the other hand there will be this punitive legislation without support for us.”

Social Cohesion

- A typical comment was, “There needs to be a proper narrative to deal with terrorism and counter- terrorism because what has been happening has not been working.”
- A man talking about stories in the media added, “It is therefore the narrative that comes out that should be clear on targeting terrorism...It can lead to a community under siege mentality; young people under siege, rather than reducing the risk. One comment I wanted to make. Justice needs to be ‘seen to be done’ and felt by the community and seen as being fair. If not, this Bill will have a ripple effect or the youth, the “newspaper teen, will feel targeted”. He thinks he is being targeted and undermined with, possibly... increasing civil unrest. The motivation for other young people to retaliate in different ways and be dragged in is there too. Reducing it [fairness] will increase the number of angry people who will talk and think in terms of retribution out there.”
- One teacher commented, “I’ve been involved with teaching also and this issue did come up a lot of times. What do we do with these kinds of students and when we get some evidence that they may be involved in certain activities and we give advice that they can’t be involved in school activities or even enrolment? They get labelled once and that’s it.”
- Several people said, “If we see the story of the [suburb identified] boy who was expelled from the school and ... became radicalized... I know the use of kids or small boys for the use of terrorism is becoming common and sometimes as young as 9 years to go to the war, and they target young kids to brainwash kids for their own purpose. At that age they are very vulnerable. In this Bill is there any provision to know if they have been brainwashed in such a way? Such as if the child did have intent that is a criminal intent. I mean such as bragging. Is bragging an intent if they are brainwashed?”
- A typical reply to questions about funding for legal support or counselling for controlees was, “I can’t see anything of a rehabilitative aspect in the legislation. No.”
- Some people thought that even if only a few kids might come under the spot light, the damage the legislation could do is enormous to the multicultural and multi-faith communities. A

leader from a faith-based organisation said, “[We] are not resourced to handle a niche market of 14-18 year olds. 46% of the Muslim population is under 25. That will create a siege mentality. It’s important that the narrative from this Bill is about that nobody wants terrorists to carry out these plans. If that isn’t so, then it becomes a young community under siege. It’s like a chess game, the next move, and then Pauline Hanson will say something and then a redneck and it will get out of hand.”

- The same man added, “There are all these organisations, but there is no consultation. If the Muslim community is the target group why are we not being informed? It took the ECCV to bring this to our attention. There is no consultation. It is a big concern to us. Why we were not consulted. And yet 5 [reckless] politicians who will just pass this through and the only reason it was not passed already was because of the early election.

The Muslim community, we are not prepared, we are not resourced. I give you some stats. We have 46% of Muslims under the age of 14, a third of them children. We are a very young community. 14-25 are called "youth", more than 17 % of Muslims are in this age group, out of 500,000, that is 85,000 young people who will possibly be under the spotlight with this Bill. This will create a siege mentality. Being felt like “the other” will be exacerbated. So much for all your other law enforcement work. They will just say sorry, this is legislation.¹

- A woman said, “The Race Discrimination Commissioner talked about political correctness working against us. He said we should be having a dialogue. Hate speech vs free speech.”
- Isolation could occur if schools rejected a student on a control order. One man said, “They can ostracise him, when [in fact] with maturing with age the children turn out to be completely normal. But there is no education for such children who get labelled like that. There are employment implications too. It will interfere with kids’ ability to get employment and to get an education.”
- Isolating children was seen as a bad outcome. One person said, “A boy drops out and does an online

¹ The participant provided more precise statistics which were not significantly different to their original quotation from the transcript and ECCV staff agreed to replace those figures in this particular comment.

course and then he is more in danger of being radicalised.”

- The loss of employment prospects was mentioned several times, especially for children who were later proved innocent or never charged but publically identified and not supported through the experience. They said, “They would never be able to study any role in the human service area, because they need a police check to do a placement in the services area. The lack of employment opportunity, the rates of unemployment are already really high. Real career opportunities for our communities are needed. They are not good now and we need to help them.”
- Someone asked, “Is there any defence, apart from the courts. Is there any way that kids can be defended? Are they able to defend themselves? Are the police allowed to bait them to bring more out of them?”

Prevention/Recommendations

- One comment was, “We need some counselling or case worker support? How can we ensure that we do no harm? What about young people who are in strife? This needs really good case workers to work with the family and the young person. Where are the counsellors to help them with the stress on the young person? Maybe there should be a team of reputable [multicultural] organisations to help?”
- Another person said, “What is the plan to support these 14 year olds and their families? We could also bring in FECCA (Federation of Ethnic Communities Councils of Australia) and every state Commissioner for young people to talk about planning for the future, especially if this legislation is going to go through like we think it is. We need a plan for the future is what I’m saying.”
- As a result of the conversation one person suggested that ECCV should convene a meeting with Victoria’s Community Resilience Unit (CRU) at The Department of Premier and Cabinet, the Commission for Children and Young People and FECCA about protecting these 14 year olds.
- A key multicultural service provider said, “We also have some jurisdiction state and federal conflicts about where to go from here. COAG recommended certain safeguards which the federal government has ignored. Could we achieve some progress with the Commission for Children and Guardians? Children and Guardians meet

twice a year and look at issues of national importance as well.”

- “There are infrastructures out there for these kids. They’re part of the Victorian community,...there are support structures for young people that could work. I’m not saying mainstreaming this particular problem but give them care and support.”

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Counter-terrorism laws: INSLM recommends special advocates be appointed in control order cases
<http://www.abc.net.au/news/2016-02-05/advocates-should-be-appointed-in-control-order-cases:-inslm/7144976>

Australian Broadcasting Corporation Broadcast: 13 October 2015, Reporter: Emma Alberici
Interview: Lawyer Bret Walker SC, the first independent monitor of national security legislation
<http://www.abc.net.au/lateline/content/2015/s4331116.htm>

Tamara Tulich & Jessie Blackbourne in The Conversation
National security bill opens the door to expanded control orders and secret evidence, November 13, 2015 2.26pm AEDT
<https://theconversation.com/national-security-bill-opens-the-door-to-expanded-control-orders-and-secret-evidence-49361>

Select Submissions from the Inquiry

For a full list visit:
http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/CT_Amendment_Bill_2015/Submissions

Submission 2

The NSW Faculty of Law, Gilbert and Tobin Centre of Public Law, Counter-Terrorism Legislation Amendment Bill (No.1) 2015, Submission 2
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Submission 5

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Supplementary to Submission

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Submission 7

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Submission 16

Queensland Government's Submission to the Submission to the Commonwealth Parliamentary Joint Committee on Intelligence and Security, Inquiry into the Counter---Terrorism Legislation Amendment Bill (No. 1) 2015

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Submission 17

Joint Councils for Civil Liberties (Victoria, Queensland, South Australia, Australian), *PJCIS Inquiry into the Counter Terrorism Legislation Amendment Bill*, (No. 1) 2015 16 December 2015

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Key Report

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Council of Australian Governments Review of Counter-Terrorism Legislation

<https://www.ag.gov.au/Consultations/Documents/COAGCTReview/Final%20Report.PDF>

Photo: Creative Commons adjusted:

<https://www.flickr.com/photos/photonerdmle/543192856/>

About ECCV Social Cohesion Policy Briefs

ECCV's social cohesion policy briefs are short snapshots from our roundtable discussions on social cohesion issues. They are not forums or education events. Culturally diverse community members, leaders and service providers are invited to attend both open and closed discussions on what is an evolving and complex issue.

To respond to the increasing rate of social change and also government policies on social cohesion, ECCV has developed a new way of consulting, analysing and sharing insights from each roundtable that give a voice to multicultural Victoria on issues that matter. We post our briefs online within two weeks.

The information is a combination of direct quotes from participants, policy analysis and human observation grounded in ECCV's 41 years of consultation with multicultural Victorians.

To receive future ECCV Social Cohesion Policy Briefs please subscribe by emailing eccv@eccv.org.au with the subject 'Subscribe to Social Cohesion PB'.

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