



27 March 2016

Inquiry into *Human Rights Legislation Amendment 2017*

The Federation of Ethnic Communities' Councils of Australia (FECCA) is the national peak body representing Australia's culturally and linguistically diverse (CALD) communities and their organisations. FECCA provides advocacy, develops policy and promotes issues on behalf of its constituency to Government and the broader community. FECCA supports multiculturalism, community harmony, social justice and the rejection of all forms of discrimination and racism so as to build a productive and culturally rich Australian society. FECCA's policies are developed around the concepts of empowerment and inclusion and are formulated with the common good of all Australians in mind.

FECCA welcomes the opportunity to make a submission to the Parliamentary Joint Committee on Human Rights.

FECCA and its State and Territory constituents have been advocating against any changes to the racial vilification provisions in the *Racial Discrimination Act* (RDA). Section 18C of the RDA provides important protection against racially motivated attacks targeting members of Australia's CALD communities. This submission draws on ongoing consultation with FECCA's members and constituents about Section 18C and protections from racial vilification.

The overwhelming community response opposed changes to the RDA, with thousands of community members and their organisations expressing alarm that the then proposed repeal of 18C would strip protection from the most marginalised members of our society and threaten social cohesion in Australia.

FECCA believes that by replacing the words "insult" "humiliate" and "offend" in Section 18C with "harass", the Government sends a message to the community that racism is acceptable and that Australia condones insulting and offensive speech on the basis of race and ethnicity.

Racism in Australia

Research by a range of organisations has indicated that racism is still prevalent in our society, and that racial discrimination and vilification have serious harmful effects on the health and wellbeing of individuals and communities. Racial hatred and vilification can lead

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to emotional and psychological harm. It also reinforces other forms of discrimination and isolation¹.

FECCA has conducted its own consultations with various sectors of Australia's ethnic communities. From these consultations have come many stories of traumatic verbal abuse. FECCA received evidence from a young woman who related her sister's experience wearing a headscarf at the shop where she was employed. A customer demanded of the manager 'why are you hiring terrorists? Why are you hiring terrorists in your shop?' There are many other examples of CALD Australians being subjected to racially motivated insults. Media reports reveal incidents where public abuse has been levelled at CALD Australians without provocation. This often occurs in situations, for example on public transport, which intensifies the level of fear experienced due to the confined space in which it occurs. In one incident on a Sydney train, a woman launched a tirade of abuse at the boyfriend of a young Asian woman: 'You can't even get an Aussie girl, you have to get a gook!'² On another train, a passenger was confronted by someone screaming 'My grandfather fought in the war to keep you black bastards out!' In an emergency department waiting room at an Ipswich hospital, a woman screamed abuse at students of Spanish and Nigerian origin, saying 'we are paying taxes for you arseholes.'³

Rather than isolated incidents these examples of insulting and offensive speech levelled at culturally and linguistically diverse Australians are representative of a broader trend towards an increasingly vocal minority, emboldened by what it perceives as a weakened commitment to racial harmony in Australia. The proposed amendments to the legislation symbolic of that commitment are a notice to the vocal minority that Australia condones their views and the expression of those views.

The Scanlon Foundation has found that the reported experience of discrimination on the basis of 'skin colour, ethnic origin or religion' has significantly increased from 15 percent in 2015 to 20 percent in 2016. This is the highest recorded rate over the nine Scanlon Foundation surveys.⁴ Experience of discrimination was reported most frequently by respondents from a non-English speaking background. Of those who reported discrimination in 2016, 17 percent indicated that they experienced racial discrimination of some form 'about once a month' and 14 percent indicated that it occurred 'often – most weeks in a year'. Other recent research has highlighted particularly high levels of discrimination experienced by Indigenous Australians, Muslim women and migrants from South Sudan.⁵

Mission Australia's Annual Youth Survey found that just over one quarter of young people had experienced unfair treatment or discrimination in the past twelve months. Race or cultural background was reported by over 30 percent of these respondents as the reason that they were unfairly treated or discriminated against. About half of the young people surveyed had witnessed someone else suffering unfair treatment or discrimination in the last twelve months, and the discrimination that they witnessed was most commonly on the basis of race or cultural background (58 percent).⁶

¹ <https://www.humanrights.gov.au/glance-racial-vilification-under-sections-18c-and-18d-racial-discrimination-act-1975-cth>

² Lee, S. Racist Ranter call Asian woman Gook on Sydney Train *The Daily Mail* 3 July 2014 <http://www.dailymail.co.uk/news/article-2678667/Racist-ranter-calls-Asian-woman-gook-Sydney-train.html>

³ Shocking Racist Rant of Woman Against Foreign Students in Ipswich NHS Hospital Waiting Room Feb 4, 2013 <https://www.youtube.com/watch?v=0FFzeY4Hmq8>

⁴ Scanlon Foundation, *Mapping Social Cohesion: The Scanlon Foundation surveys 2016* (2016).

⁵ Scanlon Foundation, *Australians Today* (2016), 71.

⁶ Mission Australia, *Annual Youth Survey* (2016), 10.

We should conclude from this evidence, and the experiences of many of our members, that racial discrimination in Australia is at unacceptable levels. Further weakening of protections will lead to increased incidents of racism and may cause racial attacks to be more virulent and violent⁷. Strong legislation is required to protect communities affected by racial discrimination and vilification.

Importance of Section 18C

FECCA believes that the current racial vilification provisions in the RDA set clear limits and establish accountability under the law for racist remarks and speech inciting racial hatred. This is critical to ensuring equality and the elimination of intolerance in Australia's culturally diverse society. Further, the existing provisions are balanced, adequate and do not create unreasonable limitations for free speech.

Section 18D sets out exemptions to ensure that conduct will not be unlawful where done reasonably and in good faith (that is, in the performance, exhibition, artistic work; for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest).

Establishing a balance between the right to freedom of speech and the right to protection from racial insults and offense requires consideration of the needs of vulnerable groups who require additional protections. Section 18C of the RDA, in its current form, provides that protection for vulnerable groups; Section 18D protects freedom of speech.

The right to place restrictions on speech for the purposes of protecting minority communities is recognised in international law. Article 19 of the *International Covenant on Civil and Political Rights*, to which Australia is a party, protects the rights to the freedom of expression. However, it clearly states that the exercise of the right "carries with it special duties and responsibilities", and it is subject to certain restrictions. Article 20 explicitly states that any advocacy of racial hatred shall be prohibited by law. It is important in this regard to note that speech which can be deeply harmful and traumatic will not always meet the definition of harassment. Its effects are, however, no less damaging.

The importance of 18C in Australia's domestic legislation has been reinforced by international authorities. Following his recent visit to Australia, the Special Rapporteur on the Human Rights of Migrants spoke about the need to maintain Section 18C:

Australia must work to fight xenophobia, discrimination and violence against migrants, in acts and speech. Maintaining Section 18C of the Racial Discrimination Act sets the tone of an inclusive Australia committed to implementing its multicultural policies and programmes and respecting, protecting and promoting the human rights of all: if issues arise as to its interpretation, it should be for the judiciary to resolve the issue.⁸

The Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance also addressed this issue following his recent visit to Australia:

⁷ <https://www.humanrights.gov.au/glance-racial-vilification-under-sections-18c-and-18d-racial-discrimination-act-1975-cth>

⁸ End mission statement by the UN Special Rapporteur on the human rights of migrants on his official visit to Australia (1-18 November 2016), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20885&LangID=E>

While I understand there is debate within society at large about removing, amending or maintaining this provision, Section 18C sets the tone of an open, inclusive and multicultural Australia which respects and values the diversity of its peoples and protects indigenous and migrants against bigots and extremists who have become more vocal in Australia and other parts of the world. Removing this provision would undermine the efforts undertaken by the various levels of Governments for an inclusive Australia and open the door to racist and xenophobic hate speech which has been quite limited thanks to this provision. In my conversations with civil society, community and indigenous organizations, as well with State Governments, I found unambiguous support for this section and therefore call upon for this section to remain so that the Human Rights Commission, as well as the Courts, can continue to play their role in interpreting its provisions.⁹

History of Section 18C

The racial vilification provisions of the RDA were included to address the situations of escalating racial violence against both Australia's First Peoples and more recent immigrants by bridging the gaps in the racial discrimination legislation.¹⁰

Part IIA – the prohibition of offensive behaviour based on racial hatred (including sections 18C and 18D) - was inserted into the RDA by the *Racial Hatred Act 1995*. The explanatory memorandum to the Bill notes:

While it is highly valued, the right to free speech must... be balanced against other rights and interests.

The Bill is not intended to limit public debate about issues that are in the public interest. It is not intended to prohibit people from having and expressing idea. The Bill does not apply to statements made during a private conversation or within the confines of a private home.

The Bill maintains a balance between the right to free speech and the protection of individuals and groups from harassment and fear because of their race, colour or national or ethnic origin. The Bill is intended to prevent people from seriously undermining tolerance within society by inciting racial hatred or threatening violence against individuals or groups because of their race, colour or national or ethnic origin.¹¹

The explanatory memorandum also explains that Section 18C "is analogous to that applying to sexual harassment under the *Sex Discrimination Act 1984* in which unwelcome acts are done in circumstances in which a reasonable person would be offended, intimidated or humiliated".¹²

In recommending the Bill to the Parliament, the then Attorney-General said:

This Bill has been mainly criticised on the grounds that it limits free expression and that to enact such legislation undermines one of the most fundamental principles of our democratic society. Yet few of these critics would argue that free expression

⁹ Full text of the press statement delivered by the United National Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance Mr. Mutuma Ruteere on 5 May 2016 in Canberra, Australia, <https://un.org.au/tag/australia/>

¹⁰ Mr Lavarch (Attorney-General), Second reading speech to *Racial Hatred Bill 1994*, Hansard Tuesday 15 November 1994, 3336 – 3337.

¹¹ Explanatory memorandum to *Racial Hatred Bill 1994*, 1.

¹² Scanlon Foundation, *Australians Today* (2016), 10.

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...

The Bill places no new limits on genuine public debate. Australians must be free to speak their minds, to criticise actions and policies of others and to share a joke. The bill does not prohibit people from expressing ideas or having beliefs, no matter how unpopular the views may be to many other people. The law has no application p private conversations...

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. It needs to be confronted.¹³

Section 18C and Australia's international obligations

Australia ratified the *International Convention on Civil and Political Rights* (ICCPR) in 1980. Article 20 (2) of the Convention provides that “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”.

Further, the preamble of the RDA stipulates that the *Act* makes provision for giving effect to the *International Convention on the Elimination of all forms of Racial Discrimination* (CERD). Under article 4(a) of the Convention, State parties are obligated to declare dissemination of ideas that promote racial hatred, incitement to racial discrimination and the like offenses punishable by law. Australia made a reservation in relation to article 4(a) at the time of ratification stating:

The Government of Australia ... declares that Australia is not at present in a position specifically to treat as offences all the matters covered by article 4(a) of the Convention.

In 2010, the UN Committee for the Elimination of Racial Discrimination has explicitly requested Australia remove the reservation in relation to article 4(a):

In light of the Committee's general recommendations No. 7 (1985) and No. 15 (1993), according to which article 4 is of mandatory nature, the Committee recommends the State party to remedy the absence of legislation to give full effect to the provisions against racial discrimination under article 4 and withdraw its reservation to article 4(a) relating to criminalizing the dissemination of racist ideas, incitement to racial hatred or discrimination, and the provision of any assistance to racist activities. The Committee reiterates its request for information on complaints, prosecutions and sentences regarding acts of racial hatred or incitement to racial hatred in States and Territories with legislation specifying such offenses.¹⁴

The intention of the RDA and the recommendations by the UN CERD committee to Australia to withdraw its reservations to article 4(a) demonstrate the need for Australia to *strengthen*

¹³ Mr Lavarch (Attorney-General), Second reading speech to *Racial Hatred Bill 1994*, Hansard Tuesday 15 November 1994, 3336 – 3340.

¹⁴ Concluding observations of the UN Committee on the Elimination of all forms of Discrimination, 77th Session (2- 17 August 2010).

laws regarding racial discrimination and vilification as opposed to weaken existing legislation.

Section 18C of the RDA, as it currently stands, should be considered the minimum legal prohibition on racial discrimination and vilification in meeting Australia's international obligations, particularly given the provision of safeguards under Section 18D.

The Reasonable Person Vs the Reasonable Member of the Impugned Community

The proposed amendments to the Racial Discrimination Act include reference to determining complaints according to "a reasonable member of the Australian community." The purpose of this, according to the Attorney-General, is to "ensure that the subjective sensitivities of particular groups do not make unlawful conduct which a reasonable member of the Australian community would not judge to be likely to harass or intimidate another person or group"

FECCA asserts that the subjective offense felt, or insult suffered, or humiliation experienced by a person who identifies with a particular group and is targeted because of identification with that group is the legitimate purpose of the legislation. The type of conduct the legislation renders unlawful is intentionally targeted at a person's subjective sensibilities. It exists only because a person's subjective sensitivities are what make them vulnerable to the very abuse the RDA prohibits. It may not be understood, much less felt by a reasonable member of the broader community, because only persons from the impugned community carry the trauma which the insult is designed to revisit. This element is particularly prescient in the context of shifting trends in intolerance. The community most vulnerable, and most liable to suffer abuse, will vary as public sentiments evolve and as local and global events unfold. These communities ought be reassured that they will be afforded the full protections of the law regardless.

FECCA submits that to allow the wider community to judge the level of harm caused by an insult, an offence and a humiliation they do not experience is contrary to the terms of the Act and is contrary to the spirit with which it was drafted. The RDA recognises that whether abuse is visible to the community at large is not determinative of whether it in fact exists.

Amendments to the Process for Resolving Complaints through the Australian Human Rights Commission (AHRC)

FECCA supports attempts to streamline the process for complaints resolution through the AHRC. However FECCA asserts that the details of those amendments should be enacted on the advice of the Commission itself. It is the view of FECCA that as the body most involved in resolving disputes arising under the Act, any refinement to the process will be best directed by the Commission.

Conclusion

FECCA submits that the operation of Part IIA of the RDA 1975 (Cth) does not impose unreasonable restrictions upon freedom of speech and should not be reformed.

FECCA's vision for Australia is that of a country free from racism and discrimination at all levels, and a healthy and productive society in which individuals are respectful of each other.

FECCA urges the Government to show leadership on issue of racism to ensure that there is no tolerance for racial discrimination and vilification.