

Submission to the Parliamentary Joint Committee on Human Rights regarding the Parliamentary inquiry into freedom of speech

Executive Summary

The Victorian Multicultural Commission (VMC) is the voice of Victoria's culturally, religiously and linguistically diverse (multicultural) communities and the main link between these communities and government. Multicultural Victoria is our state's greatest asset and strength. Diversity enriches our cultural, social and economic landscapes; it is embedded in our way of life and showcased in every suburb, city, and region across the state.

Multiculturalism is the reality and lived experience of Australian society. As a public policy, it encompasses government measures designed to respond to cultural diversity. It is an integral component, the binding force for ensuring a socially cohesive society as our cultural diversity grows. Multicultural policies impose obligations and confer rights, such as the right to express one's own culture and beliefs. The corollary is a reciprocal responsibility to accept the right of others to express their views and values. Freedom of speech is fundamental to democracy and equality before the law.

This submission has been informed by the VMC's extensive community consultations and stakeholder engagement, its regional advisory council (RAC) members¹ and VMC Commissioner feedback, and research projects.

1. The VMC strongly opposes any attempts to weaken sections 18C or 18D of the *Racial Discrimination Act 1975* (Cth) (the Act) which embody important human rights protections for all Australians. Based on extensive community consultations and research, the VMC is of the strong view that any amendments to s.18C or s.18D should only be made where these strengthen the human rights protected by these clauses.
2. Australian society must continue to have strong guards against all forms of verbal and racial abuse, and vilification, while protecting freedom of speech for all Australians. The VMC holds the view that the Australian Human Rights Commission (AHRC) is best equipped to identify any reforms required with respect to the handling of complaints.
3. The VMC considers the AHRC's Complaint Information Service is providing a proactive pathway that both raises awareness and educates potential complainants. This is an entirely appropriate practice and one that provides safeguards for the most vulnerable in our community. This is particularly important for people from migrant and refugee backgrounds,

¹ The VMC's eight regional advisory councils cover the entire state including the metropolitan area and are each comprised of up to 13 members representing the diversity of each area. Members represent 40 different cultures, are age and gender representative, and bring greatly diverse skills and experience e.g.: students; self-employed; volunteers; local, federal and state government employees; service providers; academic and professionals.

who may not be aware of avenues for redress, and may not fully understand their rights and responsibilities in the Australian context. For some in these communities, particularly humanitarian entrants whose pre-settlement experiences include trauma and human rights abuses, there may be a lack of trust in authority and the processes designed to protect them.

4. Based on its own research and input from stakeholders and multicultural communities therefore, the VMC believes that AHRC operations provide appropriate protections and rights under sections 18C and 18D of the Act, as it stands. The VMC suggests that a potential enhancement would be to increase community engagement to improve understanding among multicultural communities of their rights and responsibilities under the Act.

Introduction - Victorian Multicultural Commission and Victorian context

Established in 1983, the Victorian Multicultural Commission (VMC) has provided independent advice to the Victorian Government to inform the development of legislative and policy frameworks, as well as the delivery of services to our culturally, linguistically and religiously diverse society. Our unique multicultural society remains one of our state's greatest assets and strengths.

Of Victoria's 5.3 million people, 26.2 per cent were born overseas in more than 200 countries and nearly half of all Victorians, 46.8 per cent, were born overseas or had at least one parent who was born overseas. These numbers indicate that multiculturalism in Victoria is an every-day successful reality.

In a survey by the Scanlon Foundation (2016), *Australia Today*, the broad finding is that Australia is seen as a good country for migrants. On the whole, Victoria enjoys relatively high levels of community harmony and social cohesion. This is a result of successive government policy and a long standing bi-partisan approach, cooperation between community organisations, and the building of relationships between and among our multicultural communities.

Discrimination against multicultural communities persists however². Overall analysis by the Scanlon Foundation finds that, by country of birth, Australian-born respondents report the lowest level of discrimination, in the range 10-15 per cent, followed by overseas born of English-speaking background. The highest levels of discrimination, in the range 40-50 per cent, were reported by overseas from non-English-speaking backgrounds.³ Among African groups for example, 60 per cent reported experience of discrimination for those born in Ethiopia, 67 per cent for Kenyan-born, 75 per cent for Zimbabwean-born and 77 per cent for those born in South Sudan.⁴

Victoria's deep commitment to multiculturalism is guided by the principles in the *Multicultural Victoria Act 2011* (Vic) (MVA). Victoria's Multicultural Policy acknowledges that 'Diversity makes our

² See list of recent examples from various sources at **Attachment B**.

³ Markus, A. (2016). *Australians Today. The Australia@2015 Scanlon Foundation Survey*. Melbourne: Monash University and the Australian Multicultural Foundation. <http://scanlonfoundation.org.au/wp-content/uploads/2016/08/Australians-Today.pdf>

⁴ Ibid

community stronger'. An objective of the policy is to ensure 'that all Victorians can express their own unique cultural and religious identity with dignity, confidence and safety'.

As it currently stands, Part IIA of the *Racial Discrimination Act 1975* (Cth), and in particular sections 18C and 18D, and their application by the Australian Human Rights Commission (AHRC) and case law, is supportive of such civic responsibility, individual rights and social cohesion, and therefore complements Victoria's multiculturalism.⁵

The Principles of Multiculturalism, Part2, section 4 (3) of the *Multicultural Victoria Act 2011* (Vic), perhaps most relevant to this submission are that:-⁶

- a) *all individuals in Victoria are entitled to mutual respect and understanding regardless of their diverse backgrounds;*
- b) *all individuals and institutions in Victoria should promote and preserve diversity within the context of shared laws, values, aspirations and responsibilities; and*
- g) *all individuals and institutions should recognise Victoria's diversity as an asset and a valuable resource benefiting Australia.*

Mandated by the MVA to provide a link between Victoria's multicultural communities and government, it is within this operational context that the VMC makes this submission.

Inquiry matters and VMC responses

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.

The introduction of sections 18C and 18D followed major inquiries that included the *National Inquiry into Racist Violence* and the *Royal Commission into Aboriginal Deaths in Custody*. These inquiries formulated recommendations from the findings that racial hatred and vilification can cause emotional and psychological harm to individuals, and act to reinforce other forms of discrimination and exclusion. They found that seemingly low-level behaviour can soften the environment for more severe acts of harassment, intimidation or violence by seeming to condone such acts.⁷ These findings are supported by the VMC in its regular community consultations and research work.

The courts have consistently interpreted sections 18C and 18D as maintaining a balance between freedom of speech and freedom from racial vilification.⁸

⁵ Freedom of speech like other freedoms is not absolute and comes with responsibility, the MVA enshrines that sort of responsibility as a prerequisite for multiculturalism and citizenship.

⁶ See [Attachment A](#) for full wording - The Principles of Multiculturalism

⁷ Australian Human Rights Commission (AHRC), At a glance: Racial vilification under sections 18C and 18D of the Racial Discrimination Act 1975 (Cth). Accessed 6 December 2016: <http://www.humanrights.gov.au/our-work/race-discrimination/projects/glance-racial-vilification-under-sections-18c-and-18d-racial>

⁸ Ibid

Section 18C

Section 18C provides a robust safeguard for all Australians in protecting against racial vilification and ensuring equality before the law. Section 18C 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. The courts have held that for conduct to be covered by s.18C, the conduct must involve 'profound and serious' effects, not 'mere slights'.⁹ The courts have also found that s.18C is an appropriate measure to implement Australia's obligations to prohibit racial hatred under the *International Covenant on Civil and Political Rights*, and the *International Convention on the Elimination of All Forms of Racial Discrimination* under which Australia is obligated to implement protections.¹⁰

The VMC regards protection from racial vilification as essential to an inclusive, harmonious, prosperous, vibrant democratic society. Australia's track record of valuing and protecting individual rights and freedoms, regardless of race, creed, language or culture, has been a significant driver for many migrants and refugees who have selected, and are continuing to nominate, Australia as their preferred place to live and call home.

Physical and psychological harm flows from offensive, insulting, humiliating, intimidating or vilifying words or images. Allowing this sort of speech can also breed intolerance towards minorities. In 2015-16, the AHRC was asked to investigate 2,013 complaints of discrimination, 21% of which were lodged under the RDA.¹¹

The impact upon individuals can include mental health, illness, loss of self-esteem, social withdrawal, self-harm, alcohol and drug abuse, anti-social/extreme behaviours, and even suicide. These impacts are socially divisive and create enormous economic and social burdens on families, communities and society as a whole.

A survey conducted by Vic Health (2007), measured psychological distress as indicative of participants' risk of mental illness. The findings included:

- People who experienced the most racism also recorded the most severe psychological distress scores.
- Over 40% of those who experienced nine or more incidents of racism recorded high or very high psychological distress scores.
- Almost 40% worried at least a few times a month that their family and friends would be victims of racism, demonstrating that the impact of racism spreads beyond the person directly targeted.
- People who experienced racism in shops, government and public transport settings were significantly more likely than others to experience high or very high psychological distress.¹²

⁹ AHRC (2016)

¹⁰ Ibid

¹¹ Ibid

¹² VicHealth (2007). Mental health impacts of racial discrimination in Victorian culturally and linguistically diverse communities. Retrieved 6 December 2016: <https://www.vichealth.vic.gov.au/media-and-resources/publications/mental-health-impacts-of-racial-discrimination-in-culturally-and-linguistically-diverse-communities>

Section 18D

Section 18D contains exemptions which protect freedom of speech, and seeks to achieve a satisfactory balance between freedom of speech (in a wide a variety of forms) and freedom from racial vilification. These exemptions also provide for protection that include artistic works, scientific debate and fair comment on matters of public interest, providing they are said or done reasonably and in good faith.

A healthy and vibrant democracy must balance the rights and safety of its citizens with their entitlement to freedom of speech, and responsibilities inherent in that freedom. Freedom of speech is critical for the smooth and inclusive functioning of an open democracy and society. It's a human right we use to defend and ensure our rights and freedoms. Being able to think and speak freely goes to the very heart of individual autonomy and dignity. The VMC considers that s.18D protects freedom of speech and a sense of 'fair go' for all Australians. It's a freedom and concept that Australians have fought for and sought to protect with their lives over the past two centuries.

Together, sections 18C and 18D, promote the exercise of free speech while prohibiting acts and enable minority groups to feel safe to speak in a society that respects diversity and tolerance. The amended Act has been in existence since 1995 and operated effectively in that time. Under the *International Covenant on Civil and Political Rights* and the *International Convention on the Elimination of All Forms of Racial Discrimination*, Australia is obligated to implement protections against racial hatred. Thus there is no demonstrated or justifiable need to reform 18c or 18D, unless such reforms strengthen the protections and rights they currently afford to all Australians.

The application of sections 18C and 18D by the AHRC, are important in creating a sense of safety and security for all Australians, including Australians from multicultural backgrounds.

Response summary

It is the strong view of the VMC, based on its extensive community consultations and engagement, feedback from its RAC members, and its recent research, that there is no case for reforming s.18C and s.18D unless such reforms would strengthen existing rights and protections. Australian society must continue to have strong guards against racial abuse and vilification. The legislation has established a national standard of racial non-discrimination that safeguards freedom of expression with the right to live free from racial discrimination for all Australians.

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;*

The VMC understands that under the provisions of section 46PH of the *Australian Human Rights and Commission Act 1986* (Cth), the President may decide to terminate a complaint on grounds including

satisfaction that the act complained of is not unlawful, that the complaint is misconceived or lacking in substance or that another more appropriate remedy is reasonably available.

The VMC notes that this power to investigate is subject to consideration of principles of common law, that cases need to be individually assessed, and that there is a lack of guidance about what constitutes 'satisfied'. AHRC statistics demonstrate that of complaints resolved by conciliation, 67 per cent were successfully resolved and 33 per cent were not able to be resolved.

Those complainants who disagree with the President's objective consideration, or have their complaint discounted for another reason, have the option of taking the matter to court.

On balance the AHRC consistently conciliates complaints successfully, and makes appropriate use of its complaint termination process. In 2014-15 for example, the AHRC received 561 complaints, of which 405 were successfully conciliated and finalised. Of finalised complaints, 104 were terminated outcomes. Only three complaints (of the 104 terminated) was deemed to be 'trivial, vexatious, frivolous, misconceived, lacking in substance'.¹³

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

It is essential for natural justice to be seen to be consistently applied. A lack of real or perceived natural justice will undermine public confidence in the process and the capability and integrity of the AHRC.

It is considered that the lack of complaints about people not receiving natural justice is, particularly since commencement of the Act, indicate that people subject to complaints feel they have been and are receiving natural justice. The VMC notes that AHRC recent survey results support this view.

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

The VMC strongly endorses the requirement for the handling of complaints in an open and transparent manner. It notes that it has received no evidence or feedback that this has not been the practice of the AHRC.

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

The VMC believes that complaints should be dealt with without unreasonable delay. This is a key requirement with time taken to resolve a matter being critical to the justice experience. However, AHRC's own statistics demonstrates acceptable timelines with the average time from lodgement to finalisation of a complaint being approximately 3.7 months.¹⁴ This is important for people's perceptions of fairness and equality within the justice system.

The VMC suggests that the capacity and resourcing of the AHRC could be reviewed to ensure that unreasonable delays do not occur, and the integrity of the process is protected.

¹³ AHRC (2016).

¹⁴ AHRC (2016)

- 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;*

The VMC supports this matter, especially in terms of unreasonable cost, as cost can act as a barrier in access to justice and redress. The VMC believes the AHRC is best placed in giving objective consideration to which matters require review, and to determine the scope of the review to ensure people engaging with or subject to the process. The VMC can offer assistance to the AHRC in pursuing this matter through engagement with our multicultural communities.

Response summary

The VMC believes that the AHRC is best equipped to identify any reforms required with respect to complaints handling. The VMC suggests that increasing the resources of the AHRC will improve its capacity to respond more quickly to complainants, and ensure the timely resolution of complaints. As to those complaints unlikely to succeed or that are considered trivial or vexatious, the capability of the AHRC can be enhanced through increased resources.

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.

The VMC considers the AHRC's the Commission's Complaint Information Service is providing a proactive pathway that both raises awareness and educates potential complainants. This is an entirely appropriate practice and one that provides safeguards for the most vulnerable in our community. The importance of maintaining such a human rights watchdog is in fact a vital component to upholding freedom of speech, not just in terms of formal equality, but also of substantive equality.

In its consultations and research the VMC has found that people from multicultural backgrounds, and in particular new and emerging communities, are not aware of their rights, responsibilities or avenues of redress. Barriers in accessing services include limited English language skills, lack of understanding of the Australian justice system, lack of confidence in authorities and government agencies (due to pre- arrival and detention/migration experiences), concern about the impact on their families and broader community, and fear of reprisal. It is considered that the soliciting of complaints goes some way to mitigating the barriers people from culturally diverse communities face in raising matters impacting on them.

The seeking complaints is also a means of raising public awareness and educating the public with respect to their rights and obligations under the Act. This finding is supported by the Australian Law Reform Commission (ALRC) in its initial push for sections 18C and 18D to be included. The ALRC took the approach that these sections should have an educative effect on society, and send a message to the community as a whole that public racist speech is both unacceptable and unlawful.

Response Summary

The VMC strongly endorses the AHRC's role as human rights watchdog, and its practice of soliciting complaints as a safeguard. This practice seeks to protect the most vulnerable in the community particularly migrants, refugees and newly arrived communities who typically are not aware of avenues for redress. They may not fully understand their rights or the system and processes, may harbor distrust of authorities due to pre-settlement experiences, including trauma and systemic abuse involving denial of human rights.

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 Act, as it currently stands, has operated successfully for twenty years and is considered to provide a good balance between free speech and the rights and responsibilities of all citizens in relation to hate speech and freedom of expression. Without these safeguards there is potential for significant adverse effects on individual health and wellbeing. The concept of a 'fair go' and respect for everyone in Australian society are critical characteristics of a socially inclusive, harmonious and cohesive society. This has been achieved to a large extent through the operations of the AHRC. The VMC considers that the AHRC is well positioned and qualified to identify operational reform opportunities.

Response Summary

The VMC believes, that based on its own research and input from stakeholders and culturally diverse communities, the operation of the AHRC currently adequately protects freedom of speech for all Australians as required by the Act. The VMC suggests that a potential enhancement would be to increase community engagement to improve the understanding of culturally diverse and other marginalised and vulnerable communities of their rights and responsibilities.

References:

1. 18C: Malcolm Turnbull announces inquiry into Racial Discrimination Act:
<http://www.abc.net.au/news/2016-11-08/malcolm-turnbull-announces-racial-discrimination-act-inquiry/8004640> - accessed on 5 December 2016
2. Australian Human Rights Commission: <https://www.humanrights.gov.au/our-work/race-discrimination/projects/glance-racial-vilification-under-sections-18c-and-18d-racial> and <https://www.humanrights.gov.au/sites/default/files/AHRC%202015%20-%202016%20Complaint%20Statistics.pdf> – accessed 3 December 2016.
3. “Embracing Our Youth Our Future” - Report of Victorian Multicultural Commission’s Young People’s forums 2014-2015.
4. Free Speech 2014 Symposium papers: Australian Human Rights Commission:
<https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/free-speech-2014-symposium-papers> - accessed 3 December 2016.
5. *Justice Delayed is Justice Denied: Tania Sourdin, University of Newcastle (Australia) - Newcastle Law School and Naomi Burstyner, Monash University, January 24, 2016.*
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2721531 – accessed 4 December 2016.
6. The Australian: (<http://www.theaustralian.com.au/opinion/repeal-section-18c-the-andrew-bolt-law-it-stifles-free-speech/news-story/d948a5f36401c7e55fe79f67b50a5f7e>) - accessed 1 December 2016.
7. The Sydney Morning Herald: <http://www.smh.com.au/federal-politics/political-news/tony-abbott-slumps-in-polls-despite-best-week-yet-20140413-zqu9c.html> - accessed 1 December 2016.
8. Social Cohesion in Bendigo: Understanding community attitudes to the Mosque in 2015. Victorian Multicultural Commission research project undertaken by La Trobe University.2016.
9. Understanding Social Cohesion in Shepparton and Mildura research project report. 2015 Victorian Multicultural Commission research project undertaken by La Trobe University.
10. Victorian Multicultural Commission Regional Advisory Council meetings¹⁵ 2013 -2016
11. Victorian Multicultural Commission Commissioner and Regional Advisory Council member responses to Parliamentary Joint Committee on Human Rights’ Terms of Reference.

¹⁵ 72 meetings across three metropolitan and five Victorian regional areas.

Attachment A

The Principles of Multiculturalism

Part 2, section 4 (3) of the *Multicultural Victoria Act 2011* (Vic)

- (a) all individuals in Victoria are entitled to mutual respect and understanding regardless of their diverse backgrounds;
- (b) all individuals and institutions in Victoria should promote and preserve diversity within the context of shared laws, values, aspirations and responsibilities;
- (c) all individuals in Victoria (regardless of background) have shown that they can work together to build a positive and progressive future and this co-operation is to be encouraged so as to enhance Victoria as a great place in which to live;
- (d) all individuals in Victoria are equally entitled to access opportunities and participate in and contribute to the social, cultural, economic and political life of the State;
- (e) all individuals in Victoria have a responsibility to abide by the State's laws and respect the democratic processes under which those laws are made;
- (f) all individuals in Victoria should be united in a shared commitment to Australia and to community service;
- (g) all individuals and institutions should recognise Victoria's diversity as an asset and a valuable resource benefiting Australia.

Attachment B

Recent examples of why Section 18C is necessary¹⁶

Example	Location	Time	Source
Travelling on train to university in Melbourne and reading course book a person was approached and shouted at “you f##king black!”. People on the train moved away from the victim who was subjected to further abusive and language from a very close-up position. There was no assistance or attempts of intervention by fellow travellers	Clayton	2016	Gippsland RAC meeting
Guest attendee advised that she was advised that she rejected for a front of house role in a major fast food outlet as she was wearing a scarf.	Geelong	2016	Geelong RAC meeting
Person entering a store abused with “you’re a f##king terrorist” and other foul language. The person was a male Sikh mistaken to be a Muslim due to his beard and turban.	Morwell	2015	Gippsland RAC member
Names (non-Anglo) on an application can act as a barrier to gaining employment despite qualifications and skills.	Mentone	2016	Southern RAC meeting
Muslim women wearing head scarves frequently threatened and abused on the train and at the train station – spat upon, jostled and bumped, subjected to abusive and foul language “you’re all f##king terrorists! Go back to where you came from”	Broadmeadows	2016	North Western RAC meeting
The VMC was presented with evidence at Metro West, Mill Park, Sunshine, Dandenong and Morwell of hiring biases by employers, especially in regard to ethnic names on applications. ¹⁷ Participants told the VMC that their job applications often did not progress because their ethnic names appeared	Metropolitan Melbourne and regional Victoria	December 2014 to June 2015	VMC Multicultural Forums for Young People. Ten forums were held at metropolitan and regional locations – Metro West (Flemington/Footscray),

¹⁶ This is only an indicative list

¹⁷ This issue was also previously raised at the VMC Regional Advisory Council meetings in 2014 and 2015.

Example	Location	Time	Source
<p>'foreign', making it hard to secure an interview. Incidences were related at all levels, with graduates citing similar experiences to school leavers. Participants at Mill Park advised that some young people changed their names as a result. Citing a friend named 'Ali', one participant, explained that after he changed his name to 'Alex' he suddenly got two interviews.</p> <p>RAC members with Masters degrees and experience in field have related similar stories advising they would get interviews when they anglicised their names.¹⁸</p>			<p>Mill Park, Morwell, Ballarat, Shepparton, Dandenong, Broadmeadows, Truganina, Sunshine and Carrum Downs</p> <p>VMC Service Provider forums held at Melbourne, Casey and Bendigo</p>
<p>African family living in one of Shepparton's most disadvantaged streets experienced racist taunts and abuse, and damage to their house from other locals.</p> <p>A Mildura community member who had been on the Reconciliation Walk had been shocked at comments shouted at Aboriginal marchers by locals standing on the sidelines:</p> <p>Not entirely uncommon to hear of a new arrival family that just gets dropped in a place like that and really struggles. You hear of their kids being hassled or stuff being painted on their fences.</p> <p>He had dark skin, and, even though he was a CEO with a long rental history, he had incredible trouble finding a rental property</p>	Shepparton	2015	VMC research project - Understanding Social Cohesion in Shepparton and Mildura

¹⁸ The VMC was informed of similar experiences by a representative of the Council of International Students.