



Victorian Equal Opportunity  
& Human Rights Commission

# Freedom of Speech

> Inquiry of the Parliamentary Joint  
Committee on Human Rights  
December 2016

Submission by the Victorian Equal Opportunity  
and Human Rights Commission

## Executive Summary

Victoria is a proudly multicultural community. It strongly values its Aboriginal communities and people from diverse ethnic groups<sup>1</sup>. This diversity enriches the community, however, for many, there is still a considerable way to go in achieving these objectives on the ground.

Indigenous people and people from diverse cultural backgrounds still experience significant levels of racism and racial vilification in Victoria. The harms of this behaviour on the individual, the group targeted, and the broader community can be profound. Despite this, formal complaints about such behaviour are relatively rare. This is due to the many barriers that vulnerable communities face in accessing complaint channels – barriers that must be addressed rather than increased.

At the moment, people in Victoria have access to two layers of protection from such speech, one at the state level – the *Racial and Religious Tolerance Act 2001* (RRTA) which applies to vilification by inciting hatred – and one at the federal level – the *Racial Discrimination Act 1975* (RDA), which applies to conduct reasonably likely to offend, insult, humiliate or intimidate another person (section 18C). Recent concern has been expressed in relation to the threshold set by section 18C.

The placement of section 18C in Part IIA—Prohibition of Offensive Behaviour Based On Racial Hatred, implies that it refers to behaviour of a relatively serious nature. This is in line with the courts' interpretation of the provision which suggests that it relates to 'conduct which has "profound and serious effects, not to be likened to mere slights"'.<sup>2</sup> The Victorian Equal Opportunity and Human Rights Commission considers that the problem is not the wording or interpretation of 18C by the courts, but the lack of community understanding and awareness of the provision. We need to focus on building awareness and understanding about the corrosive impact of racism, and on developing strategies for building more connected communities.

Every member of our community has the right to equality of opportunity and protection from serious racist speech and behaviour which can create barriers to participation in public life. The federal laws strike an appropriate balance between freedom of speech and protection from racial vilification. Any actual or perceived 'watering down' of these legal protections will send a clear message to minority groups that they are not valued, and it will negatively impact not just on individuals and minority communities but on broader social cohesion and harmony.

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<sup>1</sup> The 2011 census found that 26 per cent of Victorians were born overseas in more than 200 countries, nearly 47 per cent were either born overseas or had at least one parent born overseas, 23 per cent of Victorians spoke a language other than English at home, and 67.7 per cent followed 135 faiths.

<sup>2</sup> *Creek* at [16] (Kiefel J); *Bropho* at [70] (French J); *Scully* at [102] (Hely J); cited in *Eatock v Bolt* at [268] (Bromberg J).

## Introduction

The Victorian Equal Opportunity and Human Rights Commission (the Commission) is an independent statutory authority with responsibilities under three state laws: the *Equal Opportunity Act 2010* (Vic), the *Charter of Human Rights and Responsibilities Act 2006* (Vic), and the RRTA.

The Commission welcomes the Inquiry of the Parliamentary Joint Committee on Human Rights (the Inquiry) into freedom of speech. The issues raised by this Inquiry are significant for the community and warrant detailed consideration. The Commission is a signatory to the Australian Council of Human Rights Agencies (ACHRA) submission in relation to the full terms of reference for this Inquiry.

This submission aims to inform the Committee of the Victorian context and, specifically, about the prevalence and impact of racism and barriers to access to justice for people subject to racial vilification. Further to the Inquiry Terms of Reference, this response focuses on whether the operation of Part IIA of the RDA imposes unreasonable restrictions upon freedom of speech.

## Experiences of racism in Victoria

Although multiculturalism is an important Victorian value, many Victorian studies illustrate how experiences of racist speech and behaviour can be frequent for particular groups.

One survey found that 97 per cent of Aboriginal Victorians surveyed had experienced racism in the previous 12 months and more than 70 per cent had experienced eight or more racist incidents. Forty-four per cent reported seeing people being treated unfairly because of their race, ethnicity, culture or religion at least once a week<sup>3</sup>. Disappointingly, this recent finding echoes the findings of the National Inquiry into Racist Violence, one of the reports which was seen to trigger the introduction of the *Racial Hatred Act 1995* (Cth). That Inquiry found that racist violence against Aboriginal Australians was severe, endemic and nation-wide. Further, it found that racist attitudes and practices were ingrained in many institutions.<sup>4</sup>

Many Victorians from culturally and linguistically diverse backgrounds also experience significant levels of racism. A survey undertaken on behalf of VicHealth found that nearly two-thirds of those surveyed had reported at least one racist experience in the previous 12 months.<sup>5</sup> Of these, around 40 per cent reported six or more experiences in the preceding 12 months. Over half of the incidents reported (55.3 per cent) included being called racist names, being the target of racist jokes or teasing and/or comments that relied on racial, ethnic, cultural or religious stereotypes of one form or another.

In 2013, the Commission conducted research into experiences of racism in Victoria. This included conducting an online survey, interviews and paper-based research, culminating in the publication of the report *Reporting Racism: What you say matters*. Although based on a smaller sample size, this report found that racism is a daily

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<sup>3</sup> A Ferdinand, Y Paradies and M Kelaher, *Mental health impacts of racial discrimination in Victorian Aboriginal communities: the Localities Embracing and Accepting Diversity (LEAD) experiences of racism survey* (the Lowitja Institute, Melbourne 2012).

<sup>4</sup> Human Rights and Equal Opportunities Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia* (AGPS, Canberra, 1991).

<sup>5</sup> A Ferdinand, M Kelaher and Y Paradies, *Mental health impacts of racial discrimination in Victorian culturally and linguistically diverse communities: Full Report* (Victorian Health Promotion Foundation, Melbourne 2013) 17.

event in the lives of many Victorians. Of the 227 survey responses received from the general Victorian community, 123 reported racist incidents that happened to them personally (54 per cent), 102 had witnessed racism (44 per cent), and 40 people had seen or received racist materials (18 per cent). Respondents had experienced racism in a range of settings, commonly in the workplace, on public transport on the street and online<sup>6</sup>.

### **The harms of racist hate speech**

The research cited above also suggests that the consequences of racism can be profound.<sup>7</sup> Language itself can be a form of violence<sup>8</sup> that strikes fear into the target group that they will be subjected to violence, not randomly but because of their membership of a particular group.<sup>9</sup>

Racial vilification is a harm in and of itself, both through one off incidents but also through a cumulative impact on targets.<sup>10</sup> In addition, this can create a climate in which more serious racist acts can occur. We have only to look at history to see clear examples of this. This is something considered by Carr J in *Toben v Jones* where His Honour states that:

*In my opinion it is clearly consistent with the provisions of the [International] Convention [on the Elimination of all Forms of Racial Discrimination] and the ICCPR that State Party should legislate to 'nip in the bud' the doing of offensive, insulting, humiliating or intimidating public acts which are done because of race, colour or national or ethnic origin before such acts can grow into incitement or promotion of racial hatred or discrimination ...*<sup>11</sup>

There does not need to be a fear of physical harm for real damage to be done. Experiences of racism can undermine an individual's sense of self-worth, leave them feeling vulnerable and isolated, and affect their physical and mental health. Members of communities targeted by racism can feel anxious, unwelcome and less confident to participate in public life and debate. Racism and race-based discrimination are associated with poorer health outcomes, particularly poor mental health and reduced quality of life, for both Indigenous Australians and Culturally and Linguistically Diverse Victorians.<sup>12</sup> The Commission notes that the strong association between

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<sup>6</sup> Victorian Equal Opportunity and Human Rights Commission, *Reporting racism: what you say matters* (VEOHRC May 2013)

<sup>7</sup> See for example Victorian Equal Opportunity and Human Rights Commission, *Reporting racism: what you say matters* (VEOHRC May 2013) and A Ferdinand, Y Paradies and M Kelaher, *Mental health impacts of racial discrimination in Victorian Aboriginal communities: the Localities Embracing and Accepting Diversity* (LEAD) experiences of racism survey (the Lowitja Institute, Melbourne 2012); A Ferdinand, M Kelaher and Y Paradies, *Mental health impacts of racial discrimination in Victorian culturally and linguistically diverse communities: Full Report* (Victorian Health Promotion Foundation, Melbourne 2013)

<sup>8</sup> Royal Commission into Aboriginal Deaths in Custody, *National Report*, Vol 1-5 (AGPS, Canberra, 1988–1991).

<sup>9</sup> Australian Law Reform Commission, *Multiculturalism and the Law* (ALRC Report 57, 1992).

<sup>10</sup> See for example A Ferdinand, M Kelaher and Y Paradies, *Mental health impacts of racial discrimination in Victorian culturally and linguistically diverse communities: Full Report* (Victorian Health Promotion Foundation, Melbourne 2013) 17.

<sup>11</sup> *Toben v Jones* [2003] FCAFC 137 (27 June 2003) at [20].

<sup>12</sup> A Ferdinand, Y Paradies and M Kelaher, *Mental health impacts of racial discrimination in Victorian Aboriginal communities: the Localities Embracing and Accepting Diversity* (LEAD) experiences of racism survey (the Lowitja Institute, Melbourne 2012) 2.

negative health outcomes and racism for Indigenous Australians has also been recognised by the Close the Gap Campaign.<sup>13</sup>

The Australian Human Rights Commission also conducted research in 2012, which found that respondents reported that racism made them feel divided, like second-class citizens, insecure, angry and less connected to Australia.<sup>14</sup> It is important to note that the expression of racial hatred can also be a form of harassment that limits some people's rights to freedom of speech and participation in public life. As commented by the Committee on the Elimination of Racial Discrimination in 2013, '[r]acist hate speech potentially silences the free speech of its victims'.<sup>15</sup>

It is essential for there to be serious consideration of this silencing effect of unlimited free speech on the victims of racist hate speech and the implications of any legislative amendments on this broader understanding of freedom of expression.

### **Lack of reporting of racist hate speech**

Despite the significant experiences of racism in the community detailed in *Reporting Racism*, the findings of this report included that most people do not report this behaviour. Most commonly, this was because they did not believe that anything would be done about it, were afraid of victimisation, did not know where to report an incident, distrusted authorities and had limited awareness of their rights.<sup>16</sup>

Following the findings of *Reporting Racism*, a further project was established to trial a third party reporting system. The project, known as Report Racism, involved a collaboration between Victoria Police and the Victorian Aboriginal Legal Service (VALS) and enabled individuals to report racial vilification or discrimination to a community organisation, rather than directly to police or a regulator. The project aimed to build community confidence to report racism, which can lead to resolution of disputes or crimes, and to increase data collection that allows agencies to improve responses to discrimination and racially motivated crime and to prevent future incidents.<sup>17</sup>

Despite extensive efforts to raise awareness among Aboriginal communities of rights and current legal protections and to facilitate an easier reporting process, Report Racism received only 54 reports between 21 August 2014 and 31 December 2015. Given the research about the prevalence of racism, the project partners had expected to receive a much higher number of reports of racist behaviour. This significant disparity demonstrates major and entrenched barriers to reporting racism for Aboriginal communities in Victoria.

In order to better understand barriers to reporting racism, a series of regular discussions were held with local partners including Victoria Police, the Victorian Aboriginal Legal Service (VALS), Regional Aboriginal Justice Advisory Committees and a range of other community partners. Some of the feedback from this group included that people do not report racism because:

- there is a general belief that nothing will be done
- the process of reporting can be traumatic

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<sup>13</sup> <http://www.humanrights.gov.au/news/stories/close-gap-warns-impact-rda-changes>

<sup>14</sup> Australian Human Rights Commission, *National Anti Racism Strategy – Consultation Report*, 2012, pp 3–5.

<sup>15</sup> Committee on the Elimination of Racial Discrimination *General recommendation No 35 – Combating racist hate speech* (CERD/C/GC/35), September 2013, para 26-28.

<sup>16</sup> Victorian Equal Opportunity and Human Rights Commission, *Reporting racism: what you say matters* (VEOHRC May 2013)

<sup>17</sup> VEOHRC, *Report Racism trial: Outcomes report* (2016) 3

- racism is often covert and difficult to name and people feel a report of covert racism will not be taken seriously
- racism is an everyday occurrence for many people, and therefore one experience does not necessarily 'trigger' a report
- people fear repercussions of reporting, particularly if it is about police or about a person that they will need to continue to interact with, such as their child's teacher
- Aboriginal communities are likely to distrust government bodies and particularly police
- there is a high threshold for police to charge someone under the RRTA . This also means that crimes that may have been racially motivated are often not recorded as such, which masks the underlying issue.<sup>18</sup>

## Changes to the federal protections from racial hatred – the threshold of section 18C

In considering whether the section 18C of the RDA imposes unreasonable restrictions upon freedom of speech, it is important to read this section in context. The provision is located within Part IIA of the RDA, namely, Prohibition of Offensive Behaviour Based On Racial Hatred, and is limited to where the act is:

- done otherwise than in private;
- is reasonably likely to offend, insult, humiliate or intimidate; and
- is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

Further, section 18D establishes a number of exemptions. It makes it clear that section 18C does not render unlawful anything said or done reasonably and in good faith:

- in the performance, exhibition or distribution of an artistic work; or
- in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
- in making or publishing a fair and accurate report of any event or matter of public interest; or
- a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

The conduct prohibited by section 18C(1)(a) has been interpreted by the courts to mean 'conduct which has "profound and serious effects, not to be likened to mere slights"'.<sup>19</sup> It does not protect against conduct that causes nothing more than hurt feelings. Bromberg J considered the meaning of the words 'offend, insult, humiliate or intimidate' in *Eatock v Bolt*. He acknowledge that although the ordinary meaning of the words was 'potentially quite broad', the section is directed towards public, not private purposes.<sup>20</sup>

*... It seems to me that s 18C is concerned with ... mischief that is not merely injurious to the individual, but is injurious to the public interest and relevantly, the public's interest in a socially cohesive society.*

<sup>18</sup> VEOHRC, *Report Racism trial: Outcomes report* (2016) 6-7

<sup>19</sup> 'Creek at [16] (Kiefel J); *Bropho* at [70] (French J); *Scully* at [102] (Hely J); cited in *Eatock v Bolt* at [268] (Bromberg J).

<sup>20</sup> *Eatock v Bolt* [2011] FCA 1103 [263]-[264] (Bromberg J).

*... Where racially based disparagement is communicated publicly it has the capacity to hurt more than the private interests of those targeted. That capacity includes injury to the standing or social acceptance of the person or group of people attacked. Social cohesion is dependent upon harmonious interactions between members of a society.*

Protection from hate speech needs to consider any potential conflict with freedom of speech. There is no free-standing right to freedom of speech in Australia, other than an implied Constitutional protection for freedom of political communication. Nevertheless, freedom of speech is generally seen as a cornerstone of free and democratic societies and a right protected in international law that most Australians, rightly, value. In international law, freedom of expression may legitimately be limited, but only to protect the rights or reputations of others or for the protection of national security, public order, public health or morality.

Notably, in *Jones v Scully*, Hely J held that the racial hatred provisions of the RDA did not unreasonably limit the right to freedom of communication and that the provisions were 'reasonably appropriate and adapted' to the legitimate purpose of eliminating racial discrimination, including the fulfilment of Australia's obligations under the *Convention for the Elimination of Racial Discrimination*. Section 18D of the RDA recognises the importance of protecting freedom of speech to the extent possible while also protecting people from racial hatred. Bromberg J succinctly summarised the balance that Parliament had decided to strike between the competing rights:

*... Parliament intended a balancing of the competing rights and not the subjugation of one over the other ... neither of the competing rights is supreme or unbending.*<sup>21</sup>

## Conclusion

We can all take steps to remove the authorising environment for racism in our community. However, effective legal protection is a foundation of this work as we continue to build a community where every Australian can enjoy their right to live freely, and with dignity and as equals. In the Commission's view, the current provisions contained in sections 18C and 18D of the RDA do not pose unreasonable restrictions on freedom of speech.

There is work to be done at the individual, community and organisational levels. The focus should include better community education about the frequency and harm of racism in Australia and the importance of legal protections as one of the mechanisms by which this might be addressed.

Any actual or perceived 'watering down' of the legal protections available to address racist hate speech will increase the barriers to complaint channels for culturally diverse and Aboriginal communities, both substantively and symbolically. It will also send a clear message to minority groups that they are not valued and will ultimately negatively impact not just on individuals and minority communities but on broader social and economic participation and racial harmony in Australia.

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<sup>21</sup> *Eatock v Bolt* [350].

**Contact us**

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