Response to the proposed repeal of Part IIA of the Racial Discrimination Act 1975 (Cth)

Victorian Multicultural Commission
Summary

1. The Victorian Multicultural Commission (the Commission) is mandated to provide a conduit between Victoria’s culturally and linguistically diverse communities (CALD) and government. It is within this operational context that the Commission, as a voice for the CALD communities, makes its submission. The Commission submits that Part IIA of the Racial Discrimination Act 1975 (Cth) (the Act) should not be repealed nor amended. The repeal of Part IIA is not only unnecessary; it threatens Australia’s cultural harmony and the human rights of its ethnic communities.

The Victorian Context

2. Victoria has a deep commitment to multiculturalism and has set out its principles in the Multicultural Victoria Act 2011 (Vic). Much of the success of Victoria is due to its diverse citizens and the careful management of this diversity by successive governments. Victoria’s 2014 Multicultural Policy acknowledges that ‘Diversity makes our community stronger’. One objective of the policy is to encourage social cohesion by ensuring ‘that all Victorians can express their own unique cultural and religious identity with dignity, confidence and safety’. As it stands, Part IIA of the Racial Discrimination Act 1975 (Cth) is supportive of social cohesion, and thus complements Victoria’s multiculturalism.

3. Victoria enjoys relatively high levels of community harmony and social cohesion. This harmony, in part, is the result of Government policy, cooperation between community organisations, and the building of relationships between and among our culturally and linguistically diverse communities.

Background to Current Law

4. Australia became a nation on 1 January, 1901. The first pieces of legislation, such as the Immigration Restriction Act 1901 (Cth), were part of the ‘White Australia’ policy. The dismantling of this policy and the creation of an inclusive, tolerant, multicultural society is arguably the nation’s finest achievement. Part IIA, introduced by the Racial Hatred Act 1995 (Cth), was included to fulfil Australia’s obligations under the International Convention on the Elimination of all Forms of Racial Discrimination and to foster an inclusive citizenship.

5. In 1989, the Commonwealth Government introduced the National Agenda for a Multicultural Australia. “The Agenda” was designed to build an inclusive nation. Multiculturalism was defined as a policy for ‘managing the consequences of cultural diversity in the interests of the individual and society as a whole’. As part of “the Agenda”, the Australian Law Reform Commission (ALRC) was given a reference to report on the operation of criminal, family and contract law provisions in respect of Australia’s multicultural society. The reference took years to complete and employed a participatory methodology. Public hearings were held in all capital cities and some regional areas. Extensive consultation occurred in line with the terms of reference. Submissions were called for and over 400 written submissions were received. The Commission used ‘the group facilitator program of the Office of Multicultural Affairs’ to
elicit responses from a wide range of migrant and other communities who were ‘able to participate in their own language’. The ALRC would have liked to consult more widely on this submission. However, this was not possible given the period allowed for submissions.

6. The current law has operated successfully for twenty years and is considered to provide an excellent balance between free speech and the rights of all citizens to be free from harmful speech with its adverse effects on health and wellbeing. It ensures that members of minority groups can achieve full citizenship. The repeal of Part IIA, and the parliamentary debate that surrounds it, have the effect of unintentionally sending a message to the community that hate speech is acceptable.

‘Free speech is only what is left over after due weight has been accorded to the laws relating to defamation, blasphemy, copyright, sedition, obscenity, use of insulting words, official secrecy, contempt of court and of parliament, incitement and censorship.’
Justice Lionel Murphy

Legal Issues

7. The exposure draft provides too narrow and vague a definition of harm. Further, the exemptions for those who use hate speech are too broad. The proposed law will be of little use to those who regularly experience racial discrimination. Much physical and psychological harm can flow from offensive, insulting, humiliating or intimidating words or images. Allowing this sort of speech can also increase intolerance towards minorities. There are well documented accounts to provide evidence of such unacceptable consequences in this regard.

8. The exposure draft proposes that the words ‘offend’, ‘insult’ and ‘humiliate’ be removed from Part IIA. The reasoning behind this is that these words set too low a standard and results in personal offence being a cause of action. This is not the case, as the law has been interpreted by the courts to invariably exclude ‘mere slights’. Further, the removal of these words will possibly make it easier for persons to publish untrue and insulting information without redress.

9. Under the current provisions, ‘race’ need be only one of the reasons that may make speech and writing unlawful. However, under the draft Bill, race is the only reason for unlawfulness. This element would be too difficult and onerous for an aggrieved party to establish if the matter went before a court.

10. The words ‘vilification’ and ‘intimidation’ are given very narrow definitions, and not their common meanings. Under the new meanings, it would be very difficult to prove that one had been vilified as this would involve proving ‘inciting hatred’ in a third person who is not necessarily a party to the case.

11. Under the proposed law, publications do not have to be truthful or made in good faith. Further, under the exemption provisions, the proposed law increases a person’s scope to engage in hate speech as it ‘does not apply to words, sounds, images or writing spoken,
broadcast, published or otherwise communicated in the course of participating in the public
discussion of any political, social, cultural, religious, artistic, academic or scientific matter’.

12. The Commission contends that Part IIA of the Racial Discrimination Act 1975 (Cth) should not
be changed. In proposing what is now s 18C and s 18D of the Act, the majority of Australian
Law Reform Commission took the approach that the section should have an educative effect
on society, and send a message to the community as a whole that public racist speech is
unacceptable. Anti-vilification laws, such as those contained within the Racial Discrimination
Act 1975 (Cth), do not exist in Australian law to punish offenders. These civil laws are
overwhelmingly settled at the conciliation level, and have the broad acceptance of the
community. They provide for civil remedies – usually an apology and a small amount of
damages. They have little impact on the exercise of free speech by media commentators as
there is an exemption for those who can prove that they are adding to public debate on a
topic if their contribution is made ‘in good faith’. The existing laws, indeed, promote the
exercise of free speech in allowing minority groups to feel safe to speak in a society that
respects diversity and tolerance. The current law has been in existence since 1995 and there is
no demonstrated or justifiable need to change a law that has been operating effectively since
this time.

Discussion

The Victorian Context

1. The 2011 National Census revealed that Victoria is one of Australia’s fastest growing and most
culturally diverse States. At the 2011 Census, the total population of Victoria was 5,354,039
persons. This is an increase of 8.5 per cent compared to the 2006 Census.

2. Of these 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
reality. Moreover, ours is a most successful brand of multiculturalism.

The Commission

3. Established in 1983, the Commission 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. The
Commission is a voice for Victoria’s culturally and linguistically diverse communities and is the
main link between them and the government. Our unique multicultural society remains one of
our state’s greatest assets and strengths.

The Multicultural Victoria Act 2011

4. The Multicultural Victoria Act 2011 (Vic) (MVA) recognises cultural, religious and linguistic
diversity as one of Victoria’s greatest assets. It also recognises that one of the central tenets of
multiculturalism is citizenship, and that the expression of citizenship is not limited to formal Australian citizenship, but incorporates the rights and responsibilities of all people in a multicultural society. In broad terms, this legislation serves as a formal declaration of Victoria’s commitment to diversity and community harmony.

5. It commits all Victorians to work together to ensure a prosperous and united future in which diversity is respected and cultural heritage preserved, and where all individuals can access opportunities to participate in and contribute to the social, cultural, economic and political life of the State. This is within the overarching framework of abiding by the State's laws and the democratic processes under which those laws are made.

Objectives of the Commission

6. As specified in the MVA the Commission’s first objective is to promote full participation by Victoria’s diverse communities in the social, cultural, economic and political life of Victoria. A key function of the Commission is to provide honest and candid advice to the government on multicultural affairs and citizenship in Victoria.

Multicultural Australia

7. The passage of the MVA arose out of a reality - that of Australia’s multicultural character, and out of Australia’s standing as a global citizen. In a diverse nation, a major challenge for the political and legal system is the management of citizens drawn from different ethnic, religious and cultural backgrounds. Major fault lines could develop if this diversity is not handled practically and sensitively with detrimental effects on the economic, political and social areas.

8. The Commonwealth government is a signatory to the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD).\(^2\) As a signatory, Australia is committed to the passage of laws to promote racial harmony and tolerance. The Racial Discrimination Act 1975 (Cth) was designed to implement the values of the convention and to promote racial harmony. In 1995, the provisions making certain racially motivated speech liable to civil remedy were introduced via the Racial Hatred Act 1995 (Cth).

The Concept of the Multicultural Nation

9. Multicultural Australia policies began to emerge once the ‘White Australia’ policy, a policy which was increasingly resented by peoples living in our region, was jettisoned. The Liberal Party (1978) was a strong defender of the policy of multiculturalism and set up the Galbally

---

\(^1\) One example of the economic effect of racial discrimination on Victoria is in its impact on Victoria's largest export – education. Education-related travel earned Victoria over 4bn dollars in 2012-13. See Department of Foreign Affairs and Trade 'Victoria' at www.dfat.gov.au/geo/fs/vic.pdf Racial vilification of international students contributed to the decline in this export in 2011.

Inquiry which made recommendations designed to increase participation in Australian life for ‘new Australians’- those migrating from non-English speaking backgrounds (NESB.) The policy continues and has bi-partisan political support.

**Australian Law Reform Commission Reference**

10. Policy development was at the heart of “the Agenda”. It was designed to build an inclusive nation with a commitment to shared values. Multiculturalism was defined as a policy for ‘managing the consequences of cultural diversity in the interests of the individual and society as a whole.’ As part of “the Agenda”, the Australian Law Reform Commission was given a reference to report on the operation of the criminal, family and contract law provisions in respect of Australia’s multicultural society.

**Amendment to the Racial Discrimination Act 1975 (Cth)**

11. The *Multiculturalism and the Law* report was handed down in 1992. As part of its brief to examine the operation of the criminal law, the ALRC produced a discussion paper. The paper, inter alia, “…asks if the criminal law should be used to prohibit and punish conduct that threatens religious and cultural freedom and the rights of people who belong to minority cultures and religious groups’ A minority were in favour of criminal sanctions of ‘hate speech’. However the majority recommended only a civil remedy for those who had been harmed by such speech. The report therefore recommended that the *Racial Discrimination Act* be amended to include provisions similar to those now found in s 18C and 18D.

**Community Support for Amendments**

12. The recommendation for legislative change was based on arguments and proposals put by members of diverse communities: these citizens called for a reasonable and responsible limit on free speech of a few in order to protect the welfare and security of many.

**Further Reports in the area of Racial Discrimination**

13. The evidence produced in Reports such as *Racist Violence, Report into the National Inquiry into Racist Violence in Australia,* and the Report of the *Royal Commission on Aboriginal
Deaths in Custody\textsuperscript{9} supported the growing concern that the fabric of society was fragile and fraying due to the failure to eliminate racist acts, including racist speech.

The Current Context

14. The reasons why the relevant section of law was introduced have not diminished. Indeed there may be more need now as the population and cultural diversity increases, and the reports of racial discrimination intensify. A number of recent reports show that racial vilification and perceived threats on a racial basis are increasing rather than decreasing.\textsuperscript{10} The experience of Australia for migrant groups can still be a threatening one. A VicHealth report from 2007 states that racial discrimination ‘is associated with poorer mental health and reduced quality of life for culturally and linguistically diverse (CALD) Victorians.’\textsuperscript{11}

15. Research by the Scanlon Institute at Monash University released on 31 March, 2014 has indicated a sharp increase in racial discrimination in 2013. The Institute has been surveying respondents on social cohesion annually since 2007. The most recent Scanlon-Monash Index of Social Cohesion recorded the lowest level of social cohesion. This low point, the report argues, is due ‘in large part [to] increased reported experience of discrimination’. Fifteen years ago, when asked about the major characteristic of Australian people, recent migrants said they were ‘friendly and hospitable’. Now only a small percentage chooses this characteristic to describe Australians.\textsuperscript{12}

The Concept of Equality

16. In the book \textit{The Liberal Promise: Anti-Discrimination Legislation in Australia}, Professor Margaret Thornton discusses ‘the elusiveness of equality’.\textsuperscript{13} She explores how important the ideal of equality is in a liberal society. However, there is a gap between formal and substantive equality. This is recognised and addressed to some extent with anti-discrimination legislation. Thornton points out that the ‘benchmark man’ is in practice male, Anglo, heterosexual, able bodied and middle class. We are all equal in a formal sense to this person. However if we want to achieve a more practical equality from a human rights perspective, we need to pass laws to enable every person to feel safe in public and protected under the laws that govern our social fabric. Laws such as Part IIA of the \textit{Racial Discrimination Act 1975} (Cth) play an important part in creating this sense of safety and security for vulnerable members of society.

\textsuperscript{9} Australian Government \textit{Royal Commission to Aboriginal Deaths in Custody} 1991


\textsuperscript{11} VicHealth \textit{Mental health impacts of racial discrimination in Victorian culturally and linguistically diverse communities: Experiences of Racism survey 2007}.

\textsuperscript{12} Report author Professor Andrew Markus quoted in Daniel Flitton ‘We're a weird mob of unfriendly racists: Monash University report’ \textit{The Age} March 24. Professor Markus stated ‘the issue for government is the message that will be conveyed by possible changes to the Racial Discrimination Act.’

\textsuperscript{13} Margaret Thornton, \textit{The Liberal Promise: Antidiscrimination Law in Australia} (Oxford University Press 1990).
17. Freedom of speech relies on equality. The ‘reasonable person test’ must include representatives of a diverse range of people. As Waleed Aly, lecturer in Politics at Monash University, writes, ‘only white people have the chance to be neutral because in our society only white is deemed normal; only whiteness is invisible.’\textsuperscript{14} In a climate of fear, many are not able to speak. Jeremy Waldron, a leading legal scholar in the area of hate speech, writes: ‘...hate speech is both a calculated affront to the dignity of vulnerable members of society and a calculated assault on the public good of inclusiveness.’\textsuperscript{15} Persons in society who may be the victims of hate speech must be given the support of government that allows them to participate in a democratic debate as equals. Promotion of this aim is a key purpose of the \textit{Multicultural Victoria Act} (Vic) 2011.

\textbf{Conclusion}

18. The Australian community overwhelmingly supports the protections afforded by the \textit{Racial Discrimination Act 1975} (Cth).\textsuperscript{16} Part IIA as currently drafted provides a good balance between the right to speak freely on sensitive issues dealing with race, ethnicity and religion and the right to be free from hate speech and vilification. A compelling reason has not been made to repeal Part IIA of the Act and to do so would be counterproductive. Part IIA has a positive, educative effect that flows beyond the individual actions; over 98\% of complaints submitted to the Australian Human Rights Commission are conciliated. The current provisions send a strong message that Australia is committed to its multicultural values and the protection of human rights for all its citizens and residents.

\textsuperscript{14} Waleed Aly ‘Brandis’ Race Hate Laws are Whiter than White’ \textit{The Age} Friday March 28, 2014. Waleed Aly goes on the say ‘...plenty of white people (even ordinary reasonable ones) are good at telling coloured people what they should and shouldn’t find racist, without even the slightest awareness that they might not be in prime position to make that call.’

\textsuperscript{15} Jeremy Waldron \textit{The Harm in Hate Speech} (Oxford University Press 2012), pp.6-7.

\textsuperscript{16} Nine out of ten Australians surveyed in a \textit{Fairfax-Nielsen} poll said they did not want Part IIA changed. ‘The latest Fairfax-Nielsen poll specifically asked voters if they believe it should it be lawful or unlawful to "offend, insult or humiliate" somebody based on their race. The answer was a statistically conclusive 88 per cent - or nine out of 10 - in favour of the status quo - that is, that it should remain unlawful to discriminate.’ Mark Kenny ‘Race hate: voters tell Brandis to back off’ \textit{The Age}, 13 April 2014.