



Australian
Human Rights
Commission

Perspectives on the Racial Discrimination Act

**PAPERS FROM THE 40 YEARS OF THE
RACIAL DISCRIMINATION ACT 1975 (CTH)
CONFERENCE
SYDNEY, 19 - 20 FEBRUARY 2015**

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Introduction

The year 2015 marks the 40th anniversary year of the *Racial Discrimination Act 1975* (Cth). It has been an important opportunity to reflect on what has been achieved in race relations since the Act's inception, and on what remains to be achieved.

This publication brings together a selection of papers presented at a conference held on 19 and 20 February 2015 to mark the occasion. The conference brought together leading scholars and experts in human rights, public law and multiculturalism – with more than 100 people attending sessions on each of the two days. Governor-General Sir Peter Cosgrove also delivered a special address to the conference.

The papers in this publication reflect the major themes explored in February: the Act's history and impact, the question of racial vilification and free speech, emergent challenges concerning cyber racism, the relationship between race and religion, systemic outcomes and the law, and the Act's ability to protect Indigenous Australians against racial discrimination.

I thank staff at the Commission who worked in organising the conference and in collating these papers: Katie Ellinson, Ting Lim, Stephanie Fowler, Lucian Tan, Kristian Barron, Rivkah Nissim and Anna Nelson.

Most of all, I hope this publication will be a valuable contribution to public understanding of the *Racial Discrimination Act* and its vital role in countering racial prejudice and discrimination.

Dr Tim Soutphommasane
Race Discrimination Commissioner

August 2015

A sword rather than a shield

Gillian Triggs

Welcome to you all to the Australian Human Rights Commission to celebrate 40 years of the Commonwealth's *Racial Discrimination Act 1975* (Cth) ('RDA').

I would like to acknowledge the traditional owners of the land on which we meet today, Gadigal people of the Eora Nation, and pay respect to their elders past and present.

This comprehensive two day conference aims to recognise the RDA at 40 and provides an opportunity for scholars, lawyers, historians and those working in multicultural and Indigenous policy to come together to discuss not only the impact of the RDA over the last 40 years, but also to consider its vulnerability to exclusion and current efforts to reform it, and to reimagine the role of the Act in the cyber age.

I congratulate Dr Tim Soutphommasane in his role as Australia's Race Discrimination Commissioner for his initiative in bringing you all here today.

The RDA warrants both celebrating and interrogating. The Act came into force on the 31st October 1975, a month or so after Australia ratified the *Convention on the Elimination of All Forms of Racial Discrimination 1969*. It might be worthwhile to remind ourselves of the extraordinary vision and breadth of the Convention that commits all State Parties to:

Prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to quality before the law, to personal security, and to all civil, political, economic, social and cultural rights.

The Convention is the universal commitment to racial equality and has over the years proved to be a vital foundation stone for all contemporary democracies. Australia's implementing legislation has also come to be fundamental to the success and stability of our multicultural society.

As an international lawyer, I say this advisedly and with some passion, for it has emerged over these last 40 years that the RDA is one of the few international human rights treaties to which Australia has become a party that has been made directly part of Australian law. In short, it is a sword for enforcement of human rights rather than a shield.

One of the greatest challenges for the effective implementation of human rights in Australia has been our 'exceptionalist' approach. We have few constitutional protections for freedoms

and rights, no Charter of rights and little implementing legislation other than in respect of the Conventions on race, sex and disability. Indeed, we have recently seen a shrinking of the legislative commitment to human rights in amendments that virtually eliminate our obligations under the 1951 Refugee Convention and an expansion of executive discretion without judicial oversight.

But we are here to celebrate the RDA and so we should.

One of the Australian Human Rights Commission's most important functions is to investigate complaints and try to resolve them by conciliation. We receive about 21,000 inquiries and complaints a year that distill into about 2,300 formal complaints, of which we successfully conciliate about 70 per cent of them. But we are not a judicial body and can make findings and recommendations only. Last year we received 380 complaints under the RDA, seventeen per cent of all received complaints, most of which arose in the context of employment and the delivery of goods and services.

The Commission also has a role in education and community discussion. Tim's leadership in the campaign *Racism. It Stops with Me.* has been highly successful and 336 organisations have now signed up to the program.

This conference emphasises the importance of evidence-based research on racial discrimination and will make an important contribution to a more comprehensive commitment by Australians to the RDA. However, 40 years is not a very long time and the RDA remains vulnerable and fragile. I know that this conference will help to strengthen the Act and ensure it remains a cultural and legal norm for Australian society.

Thank you all very much for being part of this exciting conference.

A brave Act

Tim Soutphommasane

There's nothing like a good birthday celebration. Throughout this year, the Australian Human Rights Commission will be observing the 40th anniversary of the *Racial Discrimination Act*.

A year-long celebration may sound a bit excessive. But finding a precise anniversary date for a piece of legislation is complicated. Is the pivotal date that of when a bill passes in the Parliament? Is it when an Act received its assent? Or is it the date when an Act comes into force?

With this week's conference, we are getting in on the act early. There is also some symmetry in us gathering here this week to reflect on matters of race. Fifty years ago, a group of students from Sydney University, led by Charles Perkins, embarked on a freedom ride through country NSW, bringing racial prejudice to national attention.

It was also almost exactly 40 years ago, on 13 February 1975 that the late Kep Enderby, Attorney-General during the Whitlam Government, introduced the Racial Discrimination Bill in the House of Representatives. The Bill would pass in the Parliament in June 1975, receiving its assent on 11 June. The Act came into force on 31 October 1975.

We will, of course, be marking those moments in June and October. But we begin here this week.

We are delighted to have at this conference over the next two days some of Australia's leading authorities on human rights, public law and multiculturalism. Our speakers will explore the historical significance and impact of the *Racial Discrimination Act* – and also consider some of the emerging challenges in combatting racial discrimination.

Clearly, this exercise isn't simply a celebratory one. It's also intended to be educative and critical. This is only appropriate. The *Racial Discrimination Act* has – as I've noted – been the subject of much public commentary and political contest.

It is worth debating things with the benefit of some perspective.

In his eulogy for Gough Whitlam late last year, Noel Pearson described the *Racial Discrimination Act* as akin to the Civil Rights Act in the US. And rightly so. The Act was groundbreaking: it was Australia's first federal human rights legislation. It was the law that secured for all Australians, whatever their racial background, equality before the law.

Yet the significance of the law can be overlooked. This is in part because of Australia's relatively quiet march towards racial equality.

In the United States, civil rights legislation was enacted as the culmination of a rights struggle: *Brown v Board of Education*, Emmett Till, Rosa Parks, Martin Luther King Jr. A nation came to believe that it could fulfil a certain dream.

In Australia, the forces behind the introduction of racial equality laws came as much from the international sphere as they did from the domestic. The *Racial Discrimination Act* was introduced to give effect to the *International Convention on the Elimination of All Forms of Racial Discrimination*.

Insofar as there was local urgency to racial equality, this didn't become clear during the 1960s. But by the 1970s, the conditions for change were met.

Following the freedom ride of 1965, there was the 1967 referendum, the protests against the touring Springboks in 1971, the formal demise of the White Australia policy in 1973. Australia was becoming a multicultural society – not only in social composition but the endorsement of cultural diversity in public policy.

The *Racial Discrimination Act* introduced something new to Australian law and society. It represented an attempt to legislate for human dignity. More precisely, the law broadcasts our society's disapproval of the *indignity* of discrimination.

The law ensures one fundamental thing. Prior to the *Racial Discrimination Act*, there were few effective remedies against racial discrimination.

This is the practical effect of having the *Racial Discrimination Act* in place. It means that people cannot lawfully discriminate on race, colour, descent, ethnicity or national origin. It means that equal opportunity is guaranteed across a range of activities in society. It means that people can hold others to account when they have experienced racial discrimination and acts of racial hatred.

The *Racial Discrimination Act* does this, but it is not about punishing racism. Rather, the Act is about protecting people against prejudice.

Contrary to some public commentary, the legislation does not mean that people can be prosecuted and convicted under the law. Nor does it enable media outlets to be 'shut down' if they publish or broadcast racially offensive material. The legislation is more modest than this. It works not through coercion but through conciliation.

Over the almost 40 years the *Racial Discrimination Act* has been in operation, more than 6,000 complaints have been resolved. Only a small number of complaints under the Act reach the courts: last year, it was only three per cent of complaints finalised by the Commission. And the law is not only just about remedies. Its impact has been systemic.

As the first Commonwealth legislation concerning human rights and discrimination, the *Racial Discrimination Act* set a precedent. In the time that has elapsed since 1975, all states and territories have enacted anti-discrimination legislation. During that time, the Commonwealth Parliament has enacted legislation concerning sex discrimination, disability discrimination and age discrimination.

Through the courts, the *Racial Discrimination Act* has also shaped our public law. The High Court case of *Koowarta v Bjelke-Petersen* was the first instance the courts recognised that domestic laws could be considered valid exercises of the external affairs power in the Constitution.¹ The *Koowarta* case was to foreshadow the *Racial Discrimination Act's* importance as an instrument in securing land rights for Indigenous people.

From the outset, the Act has also been concerned with social change. In his second reading speech of the Racial Discrimination Bill in 1975, Kep Enderby explained it the following way:

The proscribing of racial discrimination in legislative form will ... make people more aware of the evils ... of discrimination ... and make them more obvious and conspicuous. In this regard the Bill will perform an important educative role ... The fact that racial discrimination is unlawful will make it easier for people to resist social pressures that result in discrimination.

If the law does educate, it is because the law stands to express a community's political morality. The law sets a standard for how we live together. The law reflects our aspirations for fairness and justice.

Over four decades, decades of social change, the *Racial Discrimination Act* has stood firm against prejudice and bigotry. It stands as a statement from our society that it is committed to the equal dignity of its members. It stands to remind people that their country will protect them from discrimination and vilification.

¹ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

Speaking on the twentieth anniversary of the Act, then Prime Minister Paul Keating observed that the *Racial Discrimination Act* was ‘a very brave piece of legislation’. And it was very brave. The Act’s inception was met with stiff resistance.

In the Second Reading debates in 1975, one senator predicted that, far from eliminating racial discrimination, the Bill would have ‘the most dangerous effect’ of creating ‘an official race relations industry with a staff of dedicated anti-racists’ intent on persecuting white Australians.² Another fulminated that, ‘it is a lot of utter nonsense and rubbish to bring such a Bill before this Parliament’, since ‘racialism in this country probably is practised less than it is in the big majority of countries’.³ Yet another argued that there was ‘a tendency for laws of this character to exacerbate the tensions which they were expressly designed to avoid’, and to ‘be used as a source of provocation, a focal point for professional agitators who wanted to stir up trouble’.⁴

Throughout its life, the Act has had its share of political contest. This has, of course, been true of s 18C of the Act. This is a section which must surely lay claim to being the most cited provision of Australian legislation in public debate, if not also the most misunderstood.

Yet while many debates about race can divide people, the debate we have had during the past year has seen a different result. We have seen an emphatic affirmation of our commitment to racial tolerance. Just as we value freedom of speech, so we value freedom from racial vilification. Just as a law exists to reflect our standards, so it sets the standards to which we aspire. A mature society does not diminish itself by giving licence to hatred and bigotry.

No law, of course, is a panacea. While the *Racial Discrimination Act* has made a significant impact, it hasn’t eradicated racism. Yet no law could ever eliminate a social evil all on its own. We should be careful not to judge legislation against an impossible standard.

At the same time, we should not be afraid to be critical – and to seek improvement. It is in this spirit that this conference is convened, and in which I hope our conversations during the next two days will be conducted.

But I can’t stress enough the importance of legislation like the *Racial Discrimination Act*. Today, we are faced with many potent sources of social friction and cultural division; we can afford no complacency. It is instruments like the *Racial Discrimination Act* that make us stronger and

² Sheil, G. ‘Second reading speech: Racial Discrimination Bill 1975’, The Senate, 15 May 1975, p. 1.

³ Wood, I., ‘Second reading speech: Racial Discrimination Bill 1975’, The Senate, 22 May 1975

⁴ Greenwood, I. ‘Second reading speech: Racial Discrimination Bill 1975’, Speech, The Senate, 15 May 1975, p. 4.

more united – ensuring that every Australian can enjoy the assurance that they will be treated equally and with dignity.

Address by the Governor-General

Sir Peter Cosgrove

I acknowledge the traditional owners of the land on which we meet, the Gadigal people of the Eora nation, and pay my respects to their Elders past and present.

President of the Australian Human Rights Commission, Professor Gillian Triggs; Race Discrimination Commissioner, Dr Tim Soutphommasane; New Zealand Race Relations Commissioner, Dame Susan Devoy; Distinguished speakers and delegates; Ladies and gentlemen.

It is an honour to join you here at the Australian Human Rights Commission for this landmark conference 40 years since the passage of the *Racial Discrimination Act* – the very first of Australia’s human rights laws, and certainly one of the most significant pieces of legislation affecting Australian civil society to be passed by our federal parliament.

Its authors, advocates and early administrators foresaw its critical role in guiding a maturing nation. They were among the pioneers of Australian human rights law for whom we can be forever grateful for their unapologetic insistence on the formal recognition of dignity, respect, equality and freedom as fundamental human liberties.

We still need energetic, values driven human rights specialists because the mechanisms central to the *Racial Discrimination Act* are not, and cannot be, static; they must have the ability to intelligently read and respond to changes in Australian society and attitudes. Your conference program speaks clearly to this intent, and reveals to me a deep understanding of the many complex layers at play, globally, legally, socially and individually.

Like all specialists, you have a tough brief. Martin Luther-King said it like this: ‘It may be true that morality cannot be legislated but behaviour can be regulated. The law may not change the heart, but it can restrain the heartless.’

It is a tall order for a law and its regulators, to challenge and change entrenched patterns of social privilege and disadvantage, power and discrimination. It can be a long road between redressing individual culpability and addressing the systemic flaws that underlie it.

But, you know what, despite the difficult issues and the very hard yards, I really do believe the democratic principles behind the *Racial Discrimination Act* and all that it embodies, ought to be celebrated, as it has been each decade of its life to date.

Most things humanity cherishes we've had to fight for. Democracy itself inevitably involves a struggle to gain and hold onto those fundamental human liberties (I mentioned before) of dignity, respect, equality and freedom. It means taking risks, questioning norms, allowing expression, and rejecting oppression. Eventually, through a tumultuous state of flux, a balance is achieved between stability and adaptability.

Thereafter, it is the duty of the state and civil society to keep it in check, and to serve what Aristotle said was the ultimate end - human flourishing.

That is the story of the *Racial Discrimination Act*. Its meaning and influence can only be understood by acknowledging all that came before it.

I'm pleased to be talking about these things in a time when Australians on the whole look for honesty and openness when discussing our nation's history, rather than shy away from the uncomfortable detail for fear of blame or retribution.

It is a sign of an intellectually and morally healthy people that we can recognise the far-reaching impacts of colonial settlement; Indigenous displacement, dispossession and discrimination; white-restricted immigration replaced by an immigration program of unparalleled cultural and ethnic diversity; and over time, work to change prejudicial behaviours, remedy the harm they cause, ratify long-withheld rights, and, most optimistically, see that these experiences help us to do better at human flourishing.

There is no justification for excluding, limiting, singling out, vilifying people on the basis of their looks, their language, their culture or their beliefs, or discredited theories or stereotypical notions of race.

And whilst this Act was no doubt intended to protect a minority from prejudice or discrimination on the part of the majority, it also serves to underpin our values as a society by protecting the majority from the damage that might be caused by any extreme views of a radical minority, wildly at odds with the rest of the community.

And, at the very least, and the very best, the Act is an opportunity. In the face of ignorance and fear - which must surely be the roots of prejudice - there is an opportunity to teach and learn a different way of looking at and thinking about others who are different from ourselves.

A way that encourages curiosity without judgement; cultural pride; understanding, respect and acceptance; and - essential to building our reserves of social capital - strong bonds of trust and cooperation.

A democratic way that is enshrined in the *Racial Discrimination Act*, not only an instrument for the prosecution and remedying of acts of racial discrimination, but for the official voice on racism in the Australian community, a voice that speaks in tones of empowerment, not reprimand, one that seeks to educate and unite.

This is what we see in some of the previous work of the Australian Human Rights Commission. For example, in its comprehensive guide to the operation of the Act. In the RightsED resources its officers have developed for primary and secondary schools throughout the country. In the cultural diversity tool for workplaces. In the 'Racism. It Stops With Me' campaign. And in fine ambassadors and role models such as last year's Australian of the Year, Adam Goodes, taking a public and positive stand against racism.

Human flourishing demands and deserves our constant attention. Look away, or get complacent, and we miss those who slip painfully through the cracks, or we rush to conclusions and solutions without gathering all the facts, without talking to the people affected. Even when we think we're paying attention, the issues are often so complex, it seems near impossible to get a proper handle on the full picture. More and more this is the case. And when we find ourselves threatened on home ground by forces of radical extremism, we are tested not to default to old and harmful reactionary norms.

Once again, we have an opportunity now to grow and learn through the current tumult here and around the world, and to apply the principles and lessons of democracy to reach a new state of stability and adaptability.

Our *Racial Discrimination Act* remains a crucial enabler. As you are, ladies and gentlemen. I wish you well in the coming days, and thank you for tackling some of the issues that so profoundly influence the health and wellbeing of Australian society.

Part 1

History of the *Racial Discrimination Act*

Australian opinion on issues of race: a broad reading of opinion polls, 1943 – 2014

Andrew Markus

This paper provides an overview of Australian public opinion on issues of race, to locate the *Racial Discrimination Act 1975* (Cth) in the context of shifts in opinion over a period of some seventy years. The paper is in two parts: first, it considers attitudes to the White Australia policy and Aboriginal Australians in the 1950s and 1960s; second, it considers the extent to which attitudes have changed since 1975, the year of enactment of the *Racial Discrimination Act 1975* (Cth), with particular focus on land rights, the public debates over the level of immigration from Asian countries in the 1980s and 1990s, and the current views towards Muslim Australians.

The surveying of attitudes to the White Australia policy dates from 1943. A compilation of surveys by Professor Murray Goot of Macquarie University has located three surveys in the 1940s, six in the 1950s, fifteen in the 1960s, and six in the 1970s.¹ The relatively large number of surveys in the 1960s is indicative of the increasingly controversial nature of the policy and public discussion concerning reform.

The one commercial agency conducting surveys until the 1970s was Morgan Gallup Polls, which used a range of questions to determine attitudes to the White Australia policy. The most popular wording up to 1957 asked respondents if laws should be changed to allow immigrants from 'certain countries', but 'not more than 50 from each of these countries'. Between 1959 and 1963 immigrants from Asia were specified. A poll in 1963 asked if 'the White Australia policy should be kept as it is, or should the policy be relaxed to allow greater number of Asians to settle in this country?' Between 1966 and 1972 polls asked for indication of 'the number of Asians who should be given permanent residential status'. Thus, in 1971 respondents were informed that 'last year 3,500 non-European people' were permitted to settle in Australia, and were then asked 'how many do you favour each year?'

The first polls indicated majority support for the White Australia policy, but also a substantial minority opposition. Thus in 1948, 57 per cent of respondents agreed that immigration of 'coloured people' should be stopped, while 39 per cent were favourable to at least some

¹ Goot, M. 1999, 'Migrant numbers, Asian immigration and multiculturalism: trends in the polls, 1943-1998', National Multicultural Advisory Council, *Australian Multiculturalism for a New Century*, Statistical Appendix part 2

immigration. By the late 1950s the proportions were reversed, with more than half the respondents agreeing that some Asian people should be allowed to 'come and live here permanently'. In 1965, 77 per cent of respondents agreed with immigration from Asia on a selective or unrestricted basis, while just sixteen per cent were of the view that there should be no immigration 'at all'. This was a similar finding to that obtained in 1972, when informants were told that of the 140,000 immigrants in the previous year, 3,000 were Asians and 7,000 'had mixed blood'.

The wording of specific questions potentially impacted on the proportion favouring or opposed to the White Australia policy, but the average of survey results reveals declining support for racial exclusion. The broad pattern indicates that between 1943-1957 a majority, averaging 54 per cent, supported racial exclusion, whilst between 1959-1963 only a minority of close to one-in three (34 per cent) were in support. The refusal to reform policy in the last years of the Menzies government, which came to an end in 1966 with the retirement of the Prime Minister, was not supported by majority opinion. By the 1970s, the period of the *Racial Discrimination Act 1975* (Cth), support for a racially discriminatory policy was below to one-in-five of the population (eighteen per cent).

Table 1: Extent of support for the White Australia policy, 1943-1979²

Surveys	1943-1957 (per cent)	1959-1963 (per cent)	1970-1979 (per cent)
	51	34	15
	53	34	20
	57	39	35
	54	32	13
	61	30	16
	51	34	8
	55	32	
Average	54	34	18

² Goot, M. 1999, 'Migrant numbers, Asian immigration and multiculturalism: trends in the polls, 1943-1998', National Multicultural Advisory Council, *Australian Multiculturalism for a New Century*, Statistical Appendix part 2 at 49-51

Surveys between 1966 and 1979 also provide indication of the proportion of respondents opposed to any Asian immigration. In the nine surveys which asked specifically for indication of the number of Asians to be admitted, the proportion indicating none, or who indicated ‘only people from Britain and Northern Europe’, ranged from eight to 21 per cent, with an average of fourteen per cent for the nine surveys. One identically worded question asked in 1969 and 1979 showed that the proportion opposed to any Asian immigration, or who indicated that ‘only people from Britain and Northern Europe’ should be admitted, declined from 21 to eight per cent, which is a substantial shift in opinion.

Table 2: Opposition to Asian settlement in Australia, 1966-1979³

Date	Response option: number allowed to settle	Proportion opposed (per cent)
1966 Nov.	‘0’	18
1967 March	‘0’	10
1969 Aug.	‘0’	8
1969 Oct.	‘... not allowed to enter as immigrants’ + ‘only allow people from Britain and Northern Europe ..’	5 + 16
1970 Oct.	‘0’	15
1971 May	‘0’	20
1971 July	‘0’	13
1972 Oct.	‘0’	16
1979 Sept.	‘... not allowed to enter as immigrants’ + ‘only allow people from Britain and Northern Europe ..’	3 + 5

³ Goot, M. 1999, ‘Migrant numbers, Asian immigration and multiculturalism: trends in the polls, 1943-1998’, National Multicultural Advisory Council, *Australian Multiculturalism for a New Century*, Statistical Appendix part 2 at 49-51

There was more limited surveying of attitudes to Aboriginal people in the 1950s and 1960s. Several small surveys were conducted by academics in Western Australia. They found minority support for segregation. For example, a 1965 survey in Perth found that 27 per cent of respondents agreed with segregation in hotel bars, 22 per cent in swimming pools and fifteen per cent in cafes, with higher support for segregation in country towns. Indicative of the tenor of racial discourse in post-war Australia, some surveys asked respondents if they considered Aboriginal people to be inferior: a 1954 national survey found that ten per cent of respondents did so; a 1965 academic survey in Perth and a Western Australian country town obtained a higher proportion: 30 per cent in Perth, 37 per cent in the country town.⁴

At the national level, however, there was a large majority in support of the grant of full citizenship rights to Aboriginal people, in higher proportion than those in support of Asian immigration. In 1954 a Morgan national poll asked 'do you think Aborigines should or should not have the right to vote at Federal elections?' 77 per cent responded that they should, with only fifteen per cent that they should not. A second national survey conducted in 1961, with wording which specified the vote to 'all Australian Aborigines', found a lower 64 per cent for, 30 per cent against.

A 1965 survey in a NSW country town found 90 per cent in agreement with the proposition that 'All Aborigines should possess Australian citizenship automatically'. When asked about the exclusion of Aborigines from the national census, which was ended by the passage of the 1967 referendum, three Morgan national polls conducted between 1965 and 1967 found support for inclusion at 88 per cent, 87 per cent and 86 per cent. The actual referendum vote, seen at the time as a judgement in support of the ending of discrimination and the granting of full citizenship rights, obtained 90 per cent in support, the highest proportion for change recorded in an Australian referendum.

After the 1970s

There seem to have been no opinion polls on the passage of the *Racial Discrimination Act 1975* (Cth), which had bipartisan support and did not result in public controversy. In contrast, while there was relatively muted opposition to the first land rights enactments in the 1970s, the issue of land rights became a divisive political issue in the 1980s and 1990s. As a result, there were many surveys of opinion, often utilising value laden questions and with findings at times

⁴ Goot, M. and Rowse T. 2007, *Divided Nation: Indigenous Affairs and the Imagined Public*, Melbourne University Press, Carlton, at 58, 27

interpreted to serve political agendas. This is an issue carefully analysed in the 2007 book *Divided Nation* by Murray Goot and Tim Rowse.⁵ Their detailed research uncovers the impact of question wording on the pattern of response and interpretation of public opinion.

Questions that asked respondents for their views on equal rights for Aborigines and other Australians found high levels of support for equality. A survey in 1983 asked if Aborigines should have 'more, the same, or less land rights than other Australians' and obtained 72 per cent in agreement with 'same' rights. Goot and Rowse comment that 'there is no doubt that the Australian public likes the idea of 'equality' and there is much evidence of the 'strength of belief in the abstract equality of all Australians'.⁶

Where questions presented land rights as conferring limited rights on Indigenous people, with the beneficiaries described as 'full-blood' or 'tribal', and with attention directed to reserve land and remote regions of Australia, surveys at times registered majority support. For example, in 1981 the Australian Gallup Poll asked whether 'Aboriginal people on Aboriginal reserves' should 'be given land rights – that is, be given freehold land – or should the land on which they live be leased to them?', 53 per cent indicated agreement that they should have freehold.⁷

But when questions were worded in general terms – 'Aborigines', 'land rights' – then surveys consistently found minority support.

The largest number of polls was conducted in 1993-1994, in the context of the High Court's Mabo decision; Goot and Rowse have identified nineteen surveys employing over 160 questions between January 1993 and January 1994. The pattern of response, while complex, reveals a large measure of consistency with the poll results obtained in the 1980s.

There continued to be majority support for 'traditional owners' to be given limited rights to 'genuine tribal lands', 'sacred sites', or where specific claims with 'individual merit' were involved.⁸ Less than twenty per cent of respondents across surveys were of the view that Aboriginal claims to land should be 'totally disregarded'.

⁵ Goot, M. and Rowse, T. 2007, *Divided Nation: Indigenous Affairs and the Imagined Public*, Melbourne University Press, Carlton

⁶ Goot, M. and Rowse, T. 2007, *Divided Nation: Indigenous Affairs and the Imagined Public*, Melbourne University Press, Carlton at 82 and 85

⁷ Goot, M. and Rowse, T. 2007, *Divided Nation: Indigenous Affairs and the Imagined Public*, Melbourne University Press, Carlton at 80-81

⁸ Goot, M. and Rowse, T. 2007, *Divided Nation: Indigenous Affairs and the Imagined Public*, Melbourne University Press, Carlton at 101

In 1993 AGB McNair posed a neutrally worded question which indicated the limited land rights that Indigenous Australians stood to gain:

The High Court of Australia recently decided that Aboriginal people own land which they have been continually associated with since before European settlement. This does not affect any privately owned land. How strongly do you agree or disagree with the High Court decision that Aboriginal people should own their traditional land?⁹

It found 55 per cent of respondents in agreement with the High Court, just 24 per cent in disagreement.

But as in the 1980s, when questions asked if Aboriginal rights to land should be 'greater than, lesser than, or equal to other Australians', then the majority continued to favour equal rights. Thus an AMR Quantum survey obtained 74 per cent in favour of equal rights. Another survey presented respondents with the proposition that 'Aboriginals should be treated in all respects just the same as other Australians'. 79 per cent of respondents were in agreement.¹⁰ Surveys conducted for Reconciliation Australia in 2008, 2010, and 2012, were important for their attempt to disaggregate views held in the general community and by Indigenous respondents. They found considerable divergence of views on a number of issues and a large measure of consistency for most questions across the three surveys.

Asked for views on the level of prejudice Australians hold towards Indigenous people, the 2012 survey of respondents in the general community found that 21 per cent agreed that prejudice was 'very high', a further 49 per cent that it was 'high', a total of 70 per cent. In contrast, amongst Indigenous respondents 59 per cent were of the view that prejudice was 'very high' and a lower proportion, 36 per cent, viewed it as 'fairly high', a total of 95 per cent.

When asked concerning the significance of discrimination in 'creating the disadvantage suffered by some Indigenous people today', in 2012, within the general community 34 per cent indicated that it was 'very important', compared to 80 per cent of Indigenous respondents.

⁹ Goot, M. and Rowse, T. 2007, *Divided Nation: Indigenous Affairs and the Imagined Public*, Melbourne University Press, Carlton at 107

¹⁰ Goot, M. and Rowse, T. 2007, *Divided Nation: Indigenous Affairs and the Imagined Public*, Melbourne University Press, Carlton at 108

In response to the proposition that ‘previous race based policies continue to affect some Indigenous people today’, in 2012 twelve per cent of general community respondents indicated ‘strong agreement’, a sharp contrast with 68 per cent of Indigenous respondents.

These findings were consistent with qualitative research undertaken in the 1990s by Saulwick and Associates, which found that within the general community there was little overt prejudice against Aborigines ‘on the basis of race alone’, and also majority recognition that Aborigines had been badly treated in the past, but little understanding of the continuing impact of the policies of the past on contemporary Indigenous life.¹¹

Consistent with these findings, in the general community, ‘strong’ support for ‘government measures ... to help Indigenous people in specific ways’ was indicated by a small minority: in the Reconciliation Australia 2012 survey, by fourteen per cent of general community respondents, in contrast with 54 per cent of Indigenous respondents.¹²

Immigration policy

There is a similarity in patterns of response to questions on land rights and immigration policy. At the level of broad principle, majority opinion favours a selection policy freed from considerations of race. In the application of non-discriminatory policy, there is large majority in support of limited entry of non-Europeans, similar to the support for a limited grant of land to Aboriginal people.

But a policy that is seen to produce substantial change, whether in terms of immigration from Asian countries or land rights, in the context of public contestation and controversy, raises levels of concern and moves the middle ground of opinion to a position of opposition.

The proportion of settler arrivals from Asian countries rapidly increased after 1975 – from fifteen per cent of the intake to close to 30 per cent in 1979-1980, 38 per cent in 1983-1984, and 40 per cent in 1984-85. After a small decline between 1986 and 1988, the intake from Asian countries stabilised above 35 per cent, with a peak of 50 per cent between 1990-1992. In numerical terms, in the context of significant yearly fluctuations in the immigration intake, the increase was from 8,050 in 1975-1976 to 30,610 in 1984-1985, and to 60,910 in 1990-

¹¹ Goot, M. and Rowse, T. 2007, *Divided Nation: Indigenous Affairs and the Imagined Public*, Melbourne University Press, Carlton at 131

¹² Goot, M. and Rowse, T. 2007, *Divided Nation: Indigenous Affairs and the Imagined Public*, Melbourne University Press, Carlton at 63

1991.¹³ These shifts in immigration occurred in a context of extended periods of public controversy – in 1984, 1988, 1996, and 1998.

In 1984, a leading participant in the debate over the level of Asian immigration was the Australian historian, Professor Geoffrey Blainey of the University of Melbourne, who claimed that the rapid increase did not enjoy majority public support. Some participants in the debate in 1984, and subsequent years, advocated the reintroduction of a racially discriminatory immigration policy, couched in terms of limits, but not the exclusion that defined the White Australia policy.

Surveys seemed to support the claims made about public opinion. During 1984 six surveys asked, using varying terminology, questions concerning the number of immigrants from Asian countries. The proportion indicating that the intake was too high was respectively 54 per cent, 41 per cent, 57 per cent, 62 per cent, 59 per cent and 60 per cent, with an average of 56 per cent for the six surveys.

There was, however, a problem with this reading of survey results, for the primary concern of respondents may have been with the level of immigration, not narrowly with Asian immigration. In 1984, five surveys asked for views on the immigration intake. The consistent finding was that close to 60 per cent agreed that the intake was too high: the results obtained were 59 per cent, 60 per cent, 64 per cent, 58 per cent and 62 per cent, an average of 61 per cent and higher than the level of concern over Asian immigration. This level of negative valuation of the level of immigration was a feature of survey findings between 1984 and 1997. Opposition reached a peak in the recession of the early 1990s, when unemployment exceeded ten per cent of the workforce and five surveys recorded over 70 per cent of respondents in agreement that the intake was too high.

The negative view of Asian immigration in the 1984 surveys, and in subsequent years, in large part mirrored the negative view of immigration. A credible assumption is that a respondent concerned with the level of immigration would be similarly concerned if asked for views on the intake from a specific region.

¹³ Department of Immigration and Border Protection 2015, Historical Migration Statistics, available at <https://www.immi.gov.au/media/statistics/historical-migration-stats.htm> (accessed 5 February 2015)

But concern with the increased intake from the Asian region should not be simply dismissed. A segment of the population, whose proportion is difficult to establish, was specifically concerned with immigration from Asia.

In 1988, the issue of Asian immigration again assumed prominence in the media, in part as a result of statements by the Leader of the Opposition. When in 1988 Newspoll asked 'Do you agree or disagree with the recent statement by the Leader of the Opposition, Mr Howard, that Asian immigration to Australia should be slowed down?', 51 per cent of respondents indicated 'strong agreement' and 26 per cent 'partly agreed', a total of 77 per cent, while only eight per cent 'strongly disagreed' and ten per cent 'partly disagreed'.

The issue of Asian immigration next rose to public prominence in 1996, following the election of the Howard government and the Independent Pauline Hanson, who had campaigned on the issue of Asian immigration.

Two AGB McNair surveys posed questions that separated attitudes to Asian immigration and total immigration intake. The first asked respondents if they considered the current balance of immigrants 'from different countries and regions' to be about right, or if Australia was receiving 'too many migrants from a particular region or country'. Almost half the respondents (51 per cent) agreed with the view that there were 'too many ... from a particular region or country', and of these 88 per cent specified Asia, constituting 45 per cent of the total sample.

The second survey asked for reaction to Pauline Hanson's maiden parliamentary speech, with specific reference to whether 'the proportion of Asians in our migrant intake should be reduced?' 53 per cent of respondents agreed, 36 per cent disagreed and ten per cent did not know.

Since the late 1990s, however, survey findings indicate that the level of concern over immigration, and immigration from the Asian region, has markedly declined, in the context of economic prosperity and low levels of unemployment.

A finding over a period of almost fifteen years is of majority support for immigration, with the exception of one year. The average of seven surveys conducted between 1996-1997 was that 65 per cent of respondents favoured a reduction of immigration, while only 31 per cent supported the level of intake or its increase. But between 1999-2009, the average result of sixteen surveys was that 57 per cent supported the intake or its increase and 38 per cent favoured reduction. While 2010 saw opinion on immigration divided, in the context of renewed political debate in an election year, surveys between 2011-2014 saw the level of support for immigration return to the earlier high level.

Table 3: Attitudes to immigration intake, average result of telephone and mail surveys, 1996-2014¹⁴

Years	Increase/ Maintain	Reduce	Don't Know	Number of surveys
1996-1997	31.0	64.7	4.0	7
1999-2009	57.3	38.3	4.5	16
2010	48.7	47.9	3.6	7
2011-2014	58.6	37.0	6.0	7

The issue of immigration from Asia did not spark public controversy between 2000 and 2014. It is notable that in 2010, public debate was over the level of population growth, with a focus on numbers, not on national origins. This was despite further increase in immigration from Asian countries, with this component of the intake forming close to half the permanent additions to the population, an annual level consistently over 100,000 persons.¹⁵

Surveys conducted by VicHealth and the Scanlon Foundation between 2010 and 2014 provide evidence of attitudes to specific immigrant groups.

In all countries of immigration, there is a hierarchy of ethnic preference, which informs attitudes to newcomers, at times determining categories of admission and exclusion. For much of the twentieth century, there was a large degree of consistency in the status hierarchy within Australian society, with immigrants from the United Kingdom and other English speaking countries ranked at the top, Northern Europeans next, followed by other Europeans. In most surveys, non-Europeans were lowest ranked.

¹⁴ Goot, M. and Watson, I. 2011, *Population, Immigration and Asylum Seekers: Patterns in Australian Public Opinion*, Parliament of Australia, Parliamentary Library, May at 23; Lowy Institute 2014, *The Lowy Institute Poll* at 26; Markus, Andrew 2007-2014, *Mapping Social Cohesion, The Scanlon Foundation Surveys*, available at Mapping Australia's Population internet site, <http://monash.edu/mapping-population/> at 39; McAllister, Ian and Sarah Cameron 2014, *Trends in Australian Political Opinion. Results for the Australian Election Study, 1987-2013*, The Australian National University at 61

¹⁵ Department of Immigration and Border Protection 2015, *Historical Migration Statistics*, available at <https://www.immi.gov.au/media/statistics/historical-migration-stats.htm> (accessed 5 February 2015)

The recent surveys show that in broad outline this ranking still prevails, but the level of negative sentiment towards Asian peoples is now greatly reduced when compared to the survey findings of the 1980s and 1990s.

A Victorian survey conducted in 2013 for VicHealth asked for attitudes to specified racial, ethnic, and religious groups. Respondents were requested to indicate responses on a five-point scale, with response options of ‘very cold’, ‘cold’, ‘neither cold nor warm’, ‘warm’ and ‘very warm’. ‘Very cold’ or ‘cold’ attitudes were indicated by less than five per cent of respondents for groups designated as ‘Anglo-Australian’, ‘Mediterranean European’, ‘Aboriginal’, and ‘Jewish’. These negative attitudes were indicated for six per cent of the group designated ‘Asian’, with higher proportions for ‘African’ and ‘Middle Eastern’, and a peak of 22 per cent for Muslim. 69 per cent of respondents were ‘very warm’ or ‘warm’ towards Anglo-Australians, 61 per cent towards Asians and 40 per cent towards Muslims.

Table 4: Attitudes to racial, ethnic, religious groups, Victoria 2013¹⁶

Group	Very cold/ cold	Neither cold/ warm	Warm/ very warm
Anglo-Australian	2	28	69
Mediterranean	2	28	69
Aboriginal	3	31	62
Jewish	4	35	57
Asian	6	32	61
African	11	35	50
Middle Eastern	14	38	45
Muslim	22	35	40

The Scanlon Foundation national surveys conducted between 2010-2014 explored attitudes towards specific national and religious groups and obtained a similar ranking to the VicHealth survey, although there was a broader differentiation in responses. The Scanlon Foundation

¹⁶ VicHealth. 2014, *Findings from the 2013 Survey of Victorians’ Attitudes to Race and Cultural Diversity*, Victorian Health Promotion Foundation, Melbourne

surveys also utilised a five-point scale, with response options designated as 'very positive', 'somewhat positive', neutral, 'somewhat negative' and 'very negative'.

The level of negative sentiment directed towards immigrants from English-speaking countries (England, New Zealand) and European countries (Italy, Germany) averaged three per cent. Negative sentiment towards immigrants from Vietnam was eight per cent, China eleven per cent, and India fifteen per cent. The relatively high level of negativity towards immigrants from India may reflect controversy sparked by the treatment of Indian students in Australia.

When questioned with regard to feelings towards immigrants from specific Middle Eastern countries, identified in public discussion as the main centres of Muslim population, negative sentiment averaged 24 per cent for immigrants from both Iraq and Lebanon.

The level of positive response to immigrants from England, New Zealand and Italy was similar to that obtained by the VicHealth survey, but lower for specific Asian (Vietnam 49 per cent, China 48 per cent, and India 44 per cent) and Middle Eastern countries (Lebanon 34 per cent, Iraq 30 per cent). The different proportions may in part be explained by the national sample of the Scanlon Foundation, compared with the limitation of the VicHealth survey to Victoria, a state in which surveys indicate relatively high levels of positive sentiment towards immigration issues and multiculturalism.

Table 5: Attitudes to national groups, 2010-2013¹⁷

Group	Very negative/ somewhat negative	Neutral	Very positive/ somewhat positive
England	3	33	63
New Zealand	3	34	61
Italy	3	35	61
Germany	3	38	58
China	11	39	48
Vietnam	8	41	49
India	15	40	44
Lebanon	24	40	34
Iraq	24	44	30

The broad pattern of recent survey findings points to substantial change in Australian attitudes in a relatively short period of time. Immigrants from Asia, whose entry to Australia in large numbers in the 1980s and 1990s became a focus for public controversy and calls for reintroduction of a racially discriminatory policy, are now seen in a positive or neutral light by a large majority of Australians.

The one qualification is the relatively high level of negative views towards Muslims, viewed as immigrants although a substantial minority of those of the Muslim faith in Australia are locally born. Scanlon Foundation surveys conducted in 2010, 2011, 2012 and 2014 asked respondents for their attitudes towards three faith groups: Christian, Buddhist and Muslim, again employing a five-point response scale. The proportion indicating negative views towards Muslims was 25 per cent, five times the level towards Christian and Buddhist (five per cent), and close to the proportion indicating negative attitude towards immigrants from Muslim countries. This proportion may understate the level of negativity. Both the VicHealth and Scanlon Foundation national surveys were administered by an interviewer and conducted by telephone. When sensitive issues are raised by an interviewer, many respondents do not fully

¹⁷ Markus, A., 2007-2014, *Mapping Social Cohesion, The Scanlon Foundation Surveys*, available at Mapping Australia's Population internet site, <http://monash.edu/mapping-population/> 2013 at 33

disclose their true feelings. An internet-based survey of third generation Australians conducted by the Scanlon Foundation in 2014 found that negativity towards Muslims was indicated by 44 per cent of respondents, compared with 28 per cent of third generation Australians interviewed by telephone.

A further indication of concern over Muslim immigration was obtained in 2011 by the Essential Report, which conducts weekly internet-based surveys. The Essential Report asked: 'should the Australian government exclude Muslims from our immigration intake?' While 55 per cent responded in the negative, 25 per cent indicate agreement and a high twenty per cent that did not know or declined to answer (28 February 2011).

There is thus evidence of a shift in attitudes towards immigration from Asian countries, with the highest level of negative sentiment now directed towards immigrants from the Middle East and towards Muslims. A further question of importance relates to the level of core opposition, those who indicate the strongest level of negative response ('very cold', 'strongly disagree'), and whether that segment of the population has decreased since the post-war decades. This is a segment of the population that indicates unease in the presence of minority groups, believes in racial inferiority, is opposed to a diverse immigration intake and to policies of multiculturalism, and opposes government programs to assist minorities, combat racism and foster understanding of minority cultures.

There is some evidence that the core level of intolerance has not changed significantly. While there can be no definitive measure of the level of intolerance, with interpretation dependent on survey questions and response options, there is support for the view that the core is close to ten per cent of the population. On a broader definition, intolerance and rejection of cultural diversity is within the range twenty per cent to thirty per cent, while on heavily politicised issues such as asylum policy and Muslim immigration it can exceed 40 per cent.

In 1967, those who voted against the referendum were ten per cent of the electorate. The proportion opposed to any Asian immigration in surveys between 1966-1979 was in the range ten to twenty per cent, at eight per cent in 1979. Surveys between 1993-1994 on land rights found that less than twenty per cent were of the view that Aboriginal claims to land should be 'totally disregarded'. The Scanlon Foundation surveys found 'very negative' or 'negative' attitudes towards immigrants from Asian countries in the range eight to fifteen per cent. When the same surveys asked respondents if their local area is a 'place where people of different national or ethnic backgrounds get on well together', those who 'strongly disagree' or 'disagree' were in the range ten to twelve per cent. The seven Scanlon Foundation national surveys conducted between 2007 and 2014 asked for response to the proposition that 'accepting immigrants from many different countries makes Australia stronger', those indicating 'strong disagreement' ranged from eight to eleven per cent, 'disagreement' from fifteen to nineteen per cent, and a combined 26 to 30 per cent.

Possible further evidence of the continuing force of negative racial attitudes is found in support of harsh policies towards asylum seekers arriving by boat. Five Scanlon Foundation national surveys have asked respondents for their view on government policy towards asylum seekers reaching Australia by boat. Those who favour the turning back of boats exceeded 30 per cent of respondents in 2013 and 2014, while a further ten per cent or higher have supported detention and deportation.

The argument has been made that public opinion would be more favourable if the asylum seekers were from English speaking countries, or of European descent. Such an argument is necessarily hypothetical, as Australia's experience is confined to boat arrivals from the Asian region. There is evidence in support of a contrary interpretation. Australia has a history of maintaining a tightly regulated immigration program that gains acceptance because it is seen to be of economic benefit. There are a relatively small number of undocumented entrants in Australia, and considerable resources are allocated to find and deport those who overstay their visas. There is also evidence of harsh treatment, irrespective of national origin, of those who are perceived to be illegal residents, as evidenced by the case of the German citizen Cornelia Rau. The arrival of perceived large numbers of European asylum seekers by boat, evading established entry requirements, could result in the same level of negative opinion as currently found towards boat arrivals from Asian countries.

Conclusion

This paper has argued that there have been significant shifts in Australian opinion since 1945, first evident in the declining proportion that supported policies of overt racial discrimination in the 1950s and 1960s. The principle that government policy should be free from overt racial discrimination came to receive broad endorsement, clearly evident in the vote to pass the 1967 referendum. Survey findings indicate that majority support for the ending of the racially exclusive immigration policy was ahead of change in government policy in the 1960s. While opposition to racial discrimination was entrenched in principle, concern over the level of Asian immigration was mobilised in 1980s and 1990s, with prominent advocacy of racial limits in the immigration intake. Over the same decades, while limited grant of land to traditional owners received majority support, concern was mobilised over the potential for broad applicability of land rights. Surveys indicate the divergence in the understandings of ongoing discrimination and the legacy of past policies between Indigenous and mainstream respondents.

There is evidence of a second substantial shift in opinion since the late 1990s. Acceptance of substantial immigration from Asian countries came to receive broad endorsement, on the pattern of the acceptance of European immigration by the 1970s. Immigration is no longer debated with a focus on Asian entrants nor, it can be argued, in terms of countries of origin or race. While current concerns continue at a relatively high level, they now have a religious

dimension, or perhaps more accurately a dimension that relates to perceived willingness to integrate, focused on Muslim Australians.

While this paper has sought to identify markers of change, it has also highlighted the limits of change, evident in the context of perceived threats to the mainstream, and also in core levels of intolerance. Australia's cultural diversity, in the context of a continuing large and increasingly diverse immigration intake, poses ongoing social challenges.

The Racial Discrimination Act: a 1970s perspective

Sarah Joseph

Introduction

The Racial Discrimination Bill was originally introduced in the first term of the Whitlam government by the then Attorney General, Senator Lionel Murphy. It lapsed with the 1974 election. It was reintroduced in the next Parliament by the new Attorney General, the late Kep Enderby.

How was the *Racial Discrimination Act 1975* (Cth) viewed in the Parliamentary debates preceding its adoption? One must remember this was unprecedented legislation, the first statute which implemented Australia's international human rights obligations.¹ A number of interesting themes arose in the 1975 debates.

Was there a problem of racial discrimination to be addressed?

A number of parliamentarians actually suggested that there was no problem of racial discrimination in Australia. For example, Senator Ivor Greenwood (Liberal, Victoria), then Deputy Leader of the Opposition in the Senate, stated:

'We in Australia have been singularly free of racial discrimination.'

He mentions these matters as he felt that 'those who cry racist often create problems where previously none existed.'² Senator Condor Laucke (Liberal, SA) asked if there was any country with 'more harmonious inter-racial or inter-cultural relationships than Australia'.³

The most extraordinary speech given in the debates on the RDA came from the former mayor of Mackay, Senator Ian Wood (Liberal, Queensland). Wood did not deny the existence of racial discrimination, or in his words, 'racialism'.⁴ However, he proceeded to talk of the horrors of racism in Nigeria, PNG, Uganda, Malaysia, Fiji, and Hong Kong, that is 'all the racism in non-white countries'. According to Wood, whatever the issues in Australia, 'we are only amateurs'.⁵

¹ Australia did not in fact accede to the relevant treaty, the *Convention on the Elimination of all Forms of Racial Discrimination 1966* ('CERD') until the RDA was passed but prior to its coming into force.

² Commonwealth, *Parliamentary Debates*, Senate, 15 May 1975, 1518 (Ivor Greenwood).

³ Commonwealth, *Parliamentary Debates*, Senate, 15 May 1975, 1536 (Condor Laucke).

⁴ Commonwealth, *Parliamentary Debates*, Senate, 22 May 1975, 1791 (Ian Wood).

⁵ Commonwealth, *Parliamentary Debates*, Senate, 15 May 1975, 1544 (Ian Wood).

Senator Cleaver Bunton (Independent, NSW) agreed that Australia had no problems of racial discrimination. Rather, he felt that Australians engaged in 'normal discrimination', such as discrimination because of people's likes and dislikes in music, and against men with long hair.⁶ Later in the debates, an example of racial discrimination was given of the Myer family being refused access to the Melbourne Club (presumably because they were Jewish): Bunton replied that that was an example of discrimination rather than racial discrimination.⁷

In the House of Representatives, Michael MacKellar (Liberal, Warringah) talked of how most racism in Australia was inadvertent rather than deliberate,⁸ as if that somehow meant it was not particularly problematic. To be fair to MacKellar, notions of indirect and substantive discrimination were not well understood at all at that time.

Many of the Liberal opposition did recognise significant racial discrimination. For example, Senator Gordon Sinclair Davidson (Liberal, SA) gave a particularly intelligent speech, pointing out the differences between assimilation and integration, and the value of diversity.⁹

And there was an admonition from Senator Neville Bonner (Liberal, Queensland), the first Indigenous member of Parliament. He reminded his fellow politicians that they were perhaps not in the best position to know if there was in fact egregious racial discrimination in the community. He stated:

I have had the opportunity to read some of the speeches on this Bill. Some have said that there is no discrimination. I say to all and sundry: ask an Italian, a Sicilian or a Greek who has been called, to use some of the denigrating terms that have been used, a wop or a greaser or ask a Jew who has been called a hooknose or a moneybags whether he knows what discrimination is. Ask some of the Aboriginal people who have been called boongs, Abos and such like whether there is discrimination. There is discrimination and we must do something about it.¹⁰

Is racism bad?

This leads us to the next issue, a surprising one of whether racism is indeed bad. Here, I return to the inimitable Senator Wood.

⁶ Commonwealth, *Parliamentary Debates*, Senate, 22 May 1975, 1808-9 (Cleaver Bunton).

⁷ Commonwealth, *Parliamentary Debates*, Senate, 27 May 1975, 1884 (Cleaver Bunton).

⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 3 April 1975, 3249 (Michael MacKellar).

⁹ Commonwealth, *Parliamentary Debates*, Senate, 27 May 1975, 1877 (Gordon Sinclair Davidson).

¹⁰ Commonwealth, *Parliamentary Debates*, Senate, 27 May 1975, 1884 (Neville Bonner).

Sometimes people have an aversion to others either because of personality, race, creed, or whatever it might be. Does that mean that is such a bad thing? ...

The fact of somebody having a racial attitude towards a person should not worry that person. It should not affect him.¹¹

His proof of this thesis was the Jewish people:

one of the most intelligent, best educated and most creative people in the world despite all that has been done against them, because of the character within them.¹²

Basically, according to Wood:

if people have the right character, thinking and ability within themselves adversity and things against them often give them a determination to dig deep within themselves and to build themselves into better and richer persons mentally and in other ways.¹³

Senator Wood came remarkably close to saying that racism is actually good for you.

Of course, there were many responses and interventions attesting to the evil of very real racism, the majority concerning Indigenous people. For example, the Minister for Aboriginal Affairs, Senator Jim Cavanagh (ALP, SA) spoke of the fact that Indigenous people had been hated and exterminated.¹⁴ Ted Innes (ALP, Melbourne) spoke of the history of white colonisation, and the fact that Indigenous people were treated like vermin to be hunted, poisoned and scattered. He spoke of genocide, physical death, being replaced by assimilation, cultural death.¹⁵

These statements by Cavanagh and Innes are interesting, as they were not specifically challenged. Such statements today, particularly by a Minister, would be treated with outrage in the Parliament and in sections of the media. It seems that the backlash against the so-called 'black armband' of history in the 1990s under the government of John Howard has silenced mainstream discussion of this matter. The shocking history of barbaric treatment of Aboriginal people is simply not mentioned these days in the federal legislature.

¹¹ Commonwealth, *Parliamentary Debates*, Senate, 22 May 1975, 1792-3 (Ian Wood).

¹² *Ibid* 1792.

¹³ *Ibid*.

¹⁴ Commonwealth, *Parliamentary Debates*, Senate, 22 May 1975, 1806-7 (Jim Cavanagh).

¹⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 8 April 1975, 1295 (Ted Innes).

How was racism to be countered?

The majority in Parliament did agree that racism was an evil that existed in Australia. However, there was disagreement over the best way to address racism.

In the House of Representatives, a very young John Howard (Liberal, Bennelong) warned that 'the real path to tolerance between the races and between persons of difference race is not primarily to be found through legislative coercion'.¹⁶

The former Liberal Prime Minister Billy McMahon (Liberal, Lowe) went further. He did not believe that a statute was the appropriate instrument to 'carry out basic reforms relating to individual attitudes or reforms of a moral or sociological nature'. He did not think that the Whitlam government could 'do anything but create greater difficulties than those attempting to be cured by introducing' the Bill.¹⁷

Senator Magnus Cormack (Liberal, Victoria) added that 'it is not possible to solve the problems of human nature by passing Acts of Parliament'.¹⁸

Others warned of abuse of the Bill for spurious claims.¹⁹ These claims were mocked by Senator John Button (ALP, Victoria), when he noted rumours that the RDA could be used to force people to marry people of other races.²⁰ That same sort of argument seems to be made today about same sex marriage, given the fears that it somehow poses a threat to traditional marriage.

There were also concerns over the creation of a 'race relations industry', for example from Senator Davidson.²¹ The parallel argument today are claims about a 'human rights industry' in Australia, often raised by conservative commentators with an uneducated view of the actual powers of the Australian Human Rights Commission, and of human rights in general.

In the Senate, running a close second to Senator Wood in terms of astonishing interventions, was Senator Glen Sheil (National Party, Queensland).

¹⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 8 April 1975, 1303 (John Howard).

¹⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 9 April 1975, 1415 (Billy McMahon).

¹⁸ Commonwealth, *Parliamentary Debates*, Senate, 22 May 1975, 1795 (Magnus Cormack).

¹⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 9 April 1975, 1397 (Calder Stephen Edward).

²⁰ Commonwealth, *Parliamentary Debates*, Senate, 15 May 1975, 1541 (John Button).

²¹ Commonwealth, *Parliamentary Debates*, Senate, 27 May 1975, 1878 (Gordon Sinclair Davidson); Commonwealth, *Parliamentary Debates*, Senate, 15 May 1975, 1527 (Glen Shiel).

No country on earth has solved the problem of inter-racial relations especially when those races are living side by side. The problems seem to me to be worse in those countries that have legislated. ... Forced integration has been tried, for example, in the United States of America and it has proven a monumental failure. Forced segregation has been tried, for example, in South Africa and Rhodesia and it has led those countries into international ostracism, unjustifiably in my opinion because the multiracial and multinational problems in South Africa appear to be of much less magnitude than they are in other countries.²²

As an aside, I note that Senator Sheil later became Australia's shortest serving Minister (43 hours). He was dumped by PM Malcolm Fraser as the nominated Minister for Veterans Affairs after making pro-apartheid statements.²³

It must be noted that other Senators were highly critical of Senators Wood and Sheil, on both sides of politics. Perhaps the most scathing rebuttal of these two Senators came from their own side of politics, from Senator Alan Missen (Liberal, Victoria).²⁴

The Attorney-General, Kep Enderby (Labor, Canberra), agreed that law alone could not change attitudes, but he argued that law 'could express the feelings of a civilised society'. He also responded by referring to the 'dismal failure' of the common law to combat racial discrimination, meaning that a statutory response was needed.²⁵ Indeed, the common law is more likely to recognise the right of a person or a business to hire or associate with whoever they want, regardless of any discriminatory motive. Senator Missen also conceded the failures of the common law, which had for example allowed for slavery and child labour.²⁶

These comments are interesting as I am personally a sceptic over the common law's record as a protector of human rights, an issue which relevant in today's discourse given the Attorney-General's preferred focus on so-called traditional rights and freedoms rather than internationally recognised human rights.²⁷

²² Commonwealth, *Parliamentary Debates*, Senate, 15 May 1975, 1526 (Glen Shiel).

²³ Obituary, 'No chance to grow old as veterans affairs Minister', *Sydney Morning Herald*, 15 October 2008, at <http://www.smh.com.au/news/obituaries/no-chance-to-grow-old-as-veterans-affairs-minister/2008/10/14/1223750030243.html>

²⁴ Commonwealth, *Parliamentary Debates*, Senate, 27 May 1975, 1879-81 (Alan Missen).

²⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 9 April 1975, 1416 (Kep Enderby).

²⁶ Commonwealth, *Parliamentary Debates*, Senate, 27 May 1975, 1881 (Alan Missen).

²⁷ See Fletcher, A. and Joseph, 'Traditional Rights and Freedoms: Encroachments by Commonwealth Laws', Submission to the ALRC, February 2015, at

The Al Grassby factor

Significant responsibilities under the RDA were to be, and were, conferred on the Commissioner for Community Relations ('CCR'). These days the equivalent powers are conferred on the Race Discrimination Commissioner in the Australian Human Rights Commission. One constant iterated concern for the opposition during passage of the RDA was the powers of the CCR, and indeed they succeeded in having them watered down. One must wonder if that concern was due, in part, to the intended identity of the CCR, one Al Grassby.

Grassby had been Minister for Immigration in the first Whitlam government, and is often called the father of multiculturalism. He narrowly lost his seat in the 1974 election in the seat of Riverina (NSW) after a viciously racist campaign against him, run by opponents of immigration rather than his political opponents in the Liberal party. Grassby's unhappiness over the manner of his loss was obvious after the election.

In the Senate debates, Ivor Greenwood referred to Grassby as being paranoid over the loss of his seat. He implied that Grassby would use his new powers under the RDA to retaliate against people.²⁸ In response, ALP Senators laid out some of the details of the campaign against Grassby. Senators Arthur Gietzelt (ALP, NSW) and Button spelt out some of the material that circulated in the Riverina.

The campaign against Grassby in the 1974 election was echoed in a grassroots campaign against the RDA consisting, again, of vile racist material. At one point in the debate, Senator Ruth Coleman (ALP, WA), one of very few women in Parliament, sought leave to have some of that material incorporated into Hansard. Permission was refused, so she proceeded to read extensive excerpts into Hansard.²⁹

Racial vilification provisions

The campaigns against Grassby and the RDA bring up the issue of racial vilification. There were criminal provisions in the original Bill regarding racial vilification. Ultimately, the Senate forced the removal of these provisions, for free speech reasons.

http://www.alrc.gov.au/sites/default/files/subs/18_0rg_monash_uni_castan_centre_for_human_rights_law.pdf

²⁸ Commonwealth, *Parliamentary Debates*, Senate, 15 May 1975, 1514 (Ivor Greenwood).

²⁹ Commonwealth, *Parliamentary Debates*, Senate, 15 May 1975, 1521 – 1523 (Ruth Coleman).

For example, Neville Bonner supported deletion. In doing so, he noted how they could be used against racial minorities.

Because of past discrimination and things that have happened in the past, a group of young Aboriginal men and women could become angry, and outside this place they could shout 'Down with the whitey' or something about some race of people. Under this Bill they can then be summonsed, taken to court and gaoled or what have you.³⁰

Senator Laucke also spoke against the provisions, and argued that class hatred was a worse problem than racial hatred, resulting in for example the French revolution and the communist system.³¹

Racial vilification provisions were not inserted until 1995, and then by way of civil rather than criminal enforcement provisions. These provisions became controversial in 2011 when prominent conservative commentator Andrew Bolt fell foul of them, by publishing two articles which questioned, in a mocking tone, the identification of certain lighter-skinned Indigenous people as Indigenous.³²

Interestingly, there were early echoes of this episode in the debate, unsurprisingly in the speeches of Senator Wood. He repeatedly questioned whether Charlie Perkins, then a public servant who had condemned Australia as a racist country, was in fact an Indigenous person, by referring to his mixed ancestry.³³

Constitutionality

There were naturally concerns over the constitutionality of the legislation.³⁴ The legislation was based on the Commonwealth's power under s 51(xxix) of the Constitution, the external affairs power. The scope of that power with regard to the incorporation of international treaties into

³⁰ Commonwealth, *Parliamentary Debates*, Senate, 27 May 1975, 1885 (Neville Bonner).

³¹ Commonwealth, *Parliamentary Debates*, Senate, 15 May 1975, 1536 (Condor Laucke).

³² See Joseph, S., 'Andrew Bolt, Free Speech, and Racial Intolerance', *Castan Centre Blog*, 29 September 2011, at <http://castancentre.com/2011/09/29/andrew-bolt-free-speech-and-racial-intolerance/>

³³ Commonwealth, *Parliamentary Debates*, Senate, 15 May 1975, 1543; Commonwealth, *Parliamentary Debates*, Senate, 22 May 1975, 1791; Commonwealth, *Parliamentary Debates*, Senate, 29 May 1975, 2035. Perkins' public condemnation of Australia's race relations in international forums was a source of consternation for many members of the Parliament on both sides. Senator Greenwood used Perkins as a reason not to accede to the CERD, as he feared such accession might have given Perkins an avenue of individual complaint to the UN against Australia.

³⁴ See, eg, Commonwealth, *Parliamentary Debates*, Senate, 15 May 1975, 1515 (Ivor Greenwood); Commonwealth, *Parliamentary Debates*, Senate, 22 May 1975, 1797 (Magnus Cormack).

domestic was not settled in 1975. The law was passed anyway, and its constitutionality was finally confirmed in the *Koowarta* case in 1982.³⁵

Conclusion

Of course, the Bill ultimately passed, an achievement which must not be underestimated. After all, it was a radical statute for the time, and survived the extraordinary rancour of that particular Parliament. It passed both Houses only a few months before the battle over supply which led to the dismissal of the Whitlam government.

The opposition, with its blocking power in the Senate, won some serious concessions. As noted, the racial vilification provisions were removed. The powers of the CCR were reduced, including a proposed power to bring proceedings against people, and to apply to a judge to obtain evidence against a person. Vicarious liability was also removed.

I leave the penultimate word to Senator Bonner. His words resonate today, in light of contemporary debates over the meaning of 'freedom':

Sure, we can say that the people in Australia are free. We say that there are opportunities for all. What are opportunities if one is not able to take advantage of them? Take this example: One is living in pretty appalling conditions, and sees an advertisement in a paper that flats are available in a certain area or a house is available to rent. One rings the number that is quoted in the newspaper and says to the person: 'I saw your advertisement in the newspaper. You have a house to rent'. The person replies: 'Yes'. One says: 'Look, I am coming round to see you'. The person replies: 'By all means do'. One goes to the address and knocks on the door. A man comes to the door. He says: 'What do you want?' One replies: 'I am here in answer to your advertisement'. He says: 'Sorry, the house is not available. It was taken 5 minutes ago'. One cannot say that he was doing that because one is an Aborigine, but it seems very strange that within fifteen or twenty minutes, somehow or other, the house has been taken and is not available. The man has seen that one is black. Is that freedom?³⁶

Implicitly, Bonner felt 'no'. I agree, hence the RDA was and remains a major step towards real freedom for many.

³⁵ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

³⁶ Commonwealth, *Parliamentary Debates*, Senate, 27 May 1975, 1885 (Neville Bonner).

Part 2

The Impact of the *Racial Discrimination Act* on Public Law and Human Rights

The Racial Discrimination Act and the Australian Constitution

George Williams & Daniel Reynolds

Introduction

The *Racial Discrimination Act 1975* (Cth) ('RDA') is in many ways just another federal statute. It may be repealed or amended by the federal Parliament at will and has no special constitutional status. Despite this, Sir Harry Gibbs, a former chief justice of the High Court, went so far as to say that in the RDA 'we may already have what appears to be a bill of rights, limited it is true in scope, which is effective[ly] entrenched against the States.'¹

Sir Harry's comment no doubt had a rhetorical tone to it, but it nonetheless highlights how the RDA has assumed a special place in the statute book. One aspect of this is the political importance attached to it over and above almost any other piece of federal legislation. This no doubt stems from the fact that the RDA touches upon fundamental community values in amounting to Australia's most significant prohibition of racial discrimination. Its importance is highlighted, rather than diminished, when the RDA is set in contrast to Australia's lengthy, past history of enacting laws that discriminate on the basis of race. The RDA marks a key legal and political turning point from laws such as those that denied Aboriginal people the right to marry or move freely, or to cast a vote in federal elections.²

The iconic nature of the RDA can be evident when a federal government proposes that amendments be made to it. The recent controversy over s 18C is a case in point, while the suspensions of the RDA brought about in 1998 in respect of native title³ and in 2007 in regard to the Northern Territory intervention⁴ sparked long-running national debates. The suspensions also gave rise to a strong sense of grievance amongst Aboriginal people, who have been the only group in the community ever denied the protection of the Act.

The political and community importance attached to the RDA is reinforced by the effect given to the Act by the Australian Constitution. It is in this respect that the RDA comes closest to Sir Harry's description of it as some form of a Bill of Rights. Section 109 of the Constitution states:

¹ Gibbs, H., 'The Constitutional Protection of Human Rights' (1982) 9 *Monash University Law Review* 1, 13.

² As to the last, see *Commonwealth Franchise Act 1902* (Cth) s 4.

³ *Native Title Amendment Act 1998* (Cth).

⁴ *Northern Territory National Emergency Response Act 2007* (Cth).

109. Inconsistency of laws

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

The effect of this provision is to render inoperative any section of a state statute that is inconsistent with a federal law. This can typically arise in any one of three ways:

1. If it is impossible to obey both laws.
2. If one law purports to confer a legal right, privilege or entitlement that the other law purports to take away or diminish.
3. If the Commonwealth law evinces a legislative intention to 'cover the field', and a State law also operates in that same field. In this case there need not be any direct contradiction between the two enactments.⁵

This supremacy of federal law over state law, combined with like rules that operate with respect to federal and territory laws,⁶ has enabled the RDA to set down a standard of racial non-discrimination not only at the federal level, but also for state and territory conduct. In this paper we examine this constitutional dimension of the RDA.⁷

Inconsistency with state and territory laws

This Part considers the track record of cases where a party has sought to invalidate or override a provision of a state or territory Act because of its inconsistency with the RDA. Since 1975, such arguments have been raised in a total of twenty-six cases, of which seven have been successful.⁸

⁵ Williams, G., Brennan S., and Lynch, S., *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 6th ed, 2014), 298.

⁶ In the case of the Australian Capital Territory, see *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 28. No such legislative provision operates with respect to the Northern Territory, however a like principle of inconsistency nonetheless applies (*Attorney-General (NT) v Minister for Aboriginal Affairs* (1989) 90 ALR 59, 75 (Lockhart J)).

⁷ As opposed to other constitutional questions, such as the source of power that enables the Commonwealth to enact the RDA: see *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

⁸ These cases were identified by conducting searches on LexisNexis for all cases referencing the *Racial Discrimination Act 1975* (Cth) and containing either of the terms 'inconsistent' or 'override' (or their variants). All 753 results were considered, though after duplicates and irrelevant cases were excluded, only 26 remained. The seven successful cases are *Viskauskas v Niland* (1983) 153 CLR 280; *University of Wollongong v Metwally* (1984) 158 CLR 447; *Mabo v Queensland (No 1)* (1988) 166 CLR 186; *Western Australia v Commonwealth; Wororra Peoples & Biljabu v State of Western Australia (Second Native Title Act case)* (1995) 183 CLR 373; *Western Australia v Ward* (2002) 213 CLR 1; *Jango v Northern Territory of Australia* (2006) 152 FCR 150; *James v State of Western Australia* (2010) 184 FCR 582.

A. Covering the field

The RDA was enacted by the federal Parliament in 1975 to give effect to the *International Convention on the Elimination of all forms of Racial Discrimination* ('ICERD').⁹ The Convention seeks to ensure equality in the enjoyment of human rights by people of all races. The RDA implements this object by creating a series of unlawful acts and offences,¹⁰ by establishing a Race Discrimination Commissioner,¹¹ and by creating a statutory right to equality before the law.¹²

In *Viskauskas*,¹³ and *Metwally*,¹⁴ both decided in 1983, the High Court considered whether sections of the *Anti-Discrimination Act 1977* (NSW) dealing with racial discrimination were invalid because of inconsistency with the RDA. In *Viskauskas*, the Court found that the RDA 'covered the field' of racial discrimination law in Australia, stating that the Act was 'intended as a complete statement of the law for Australia relating to racial discrimination'.¹⁵ As a result, the relevant sections of the NSW Act were held to be inoperative.

The Commonwealth Parliament responded to the decision in *Viskauskas* by inserting s 6A(1) into the RDA. It states:

This Act is not intended, and shall be deemed never to have been intended, to exclude or limit the operation of a law of a State or Territory that furthers the objects of the Convention and is capable of operating concurrently with this Act.¹⁶

This provision establishes that the federal Parliament does not intend the RDA to 'cover the field' relating to racial discrimination in regard to every state or territory law on the subject. It is made express that any such intention does not extend to 'a law of a State or Territory that furthers the objects of the Convention and is capable of operating concurrently with this Act'. Section 6A(1) is significant in saving the operation of current state and territory laws of this kind, and also in leaving room for future state and territory laws to provide broader protection for racial discrimination, such as in the event that the RDA is wound back.

⁹ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

¹⁰ *Racial Discrimination Act 1975* (Cth) pts II, IIA and IV.

¹¹ *Ibid* pts III and VI.

¹² *Ibid* s 10(1).

¹³ *Viskauskas v Niland* (1983) 153 CLR 280 ('*Viskauskas*').

¹⁴ *University of Wollongong v Metwally* (1983) 158 CLR 447 ('*Metwally*').

¹⁵ *Viskauskas* (1983) 153 CLR 280, 292 (Gibbs CJ).

¹⁶ *Racial Discrimination Act 1975* (Cth) s 6A(1).

A possible example of this was the Abbott government's proposal to amend or repeal s 18C of the RDA. If that had occurred, a state or territory could have responded by re-enacting s 18C in its jurisdiction without necessarily encountering a problem of inconsistency with the federal law. It is not possible to be conclusive about the issue of inconsistency because even though 'covering the field' inconsistency might be precluded, other forms of direct inconsistency, such as if the two statutes directly conflict, can still arise.¹⁷

Section 6A(1) came under immediate scrutiny in *Metwally*, where the High Court held that it could not operate retrospectively to validate state legislation which, at the relevant time, was still in fact invalid by reason of s 109 of the Constitution. However, it made no such finding about the *prospective* operation of s 6A, and indeed Gibbs CJ considered that from the day the amending Act came into force, all state racial discrimination legislation would 'thereupon revive'.¹⁸

B. Other forms of inconsistency

Section 10(1) of the RDA provides broad recognition of rights to non-discrimination on the basis of race, and so is an obvious source for inconsistency with other statutes. It provides:

10 Rights to equality before the law

- (1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

This section can operate in two ways, as first identified by Mason J in *Gerhardy v Brown*,¹⁹ and later adopted by the High Court in *Western Australia v Ward*.²⁰ The first is where a state law creates a right which is not universal because it is not conferred on people of a particular race. In such cases, s 10(1) will supply and confer that same right to people of the race previously neglected. Importantly, the state law is not invalidated in this scenario – rather, the federal law complements the state law by filling the gap the latter created.

¹⁷ *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545, 563-564 (Mason J).

¹⁸ *Metwally* (1983) 158 CLR 447, 456 (Gibbs CJ).

¹⁹ (1985) 159 CLR 70, 98-9 (Mason J).

²⁰ (2002) 213 CLR 1, 99-100 [106]-[107].

The second scenario is where a state law imposes a prohibition forbidding the enjoyment of a human right by persons of a particular race, or deprives those people of a right previously enjoyed regardless of race. In that situation, s 10(1) confers the right on the people prohibited or deprived, and because this necessarily results in a direct inconsistency between s 10(1) and the state law, the state law is invalidated to the extent of the inconsistency due to s 109 of the Constitution. In both cases s 10(1) has a clear rights-protecting function, however only in the latter case is that function dependent on the constitutional dimension of the RDA.

The paradigm example of this second scenario was the High Court's decision in *Mabo v Queensland (No 1) (Mabo No 1)*,²¹ which established a clear precedent for the interaction between s 10(1) of the RDA and state laws on native title. The case also had a broader significance in clearing the way for the High Court to subsequently determine that Aboriginal and Torres Strait Islander peoples retain rights to native title in Australia.²²

The plaintiffs in *Mabo No 1* were Murray Islanders and members of the Miriam people who sought recognition of their traditional rights and interests in relation to the lands, seas, seabeds and reefs of Murray Island. After they had commenced proceedings seeking this, the Queensland Parliament passed the *Queensland Coast Islands Declaratory Act 1985* (Qld) – which purported to retrospectively abolish all rights and interests that the Miriam people may have held prior to its enactment. The plaintiffs argued that the 1985 Act was invalid because of s 10(1) of the RDA.

The Court, in a 4:3 split, found for the plaintiffs. As Brennan J in the majority explained:

[Section] 10(1) of the *Racial Discrimination Act* clothes the holders of traditional native title who are of the native ethnic group with the same immunity from legislative interference with their enjoyment of their human right to own and inherit property as it clothes other persons in the community ... The attempt by the 1985 Act to extinguish the traditional legal rights of the Miriam people therefore fails.²³

This is the most common kind of inconsistency with the RDA, that is, where a state law seeks to prohibit or deprive people of a certain race from enjoying a human right, and s 10(1), reinforced by s 109 of the Constitution, invalidates the law to the extent of the inconsistency.

²¹ (1988) 166 CLR 186.

²² *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

²³ *Mabo No 1* (1988) 166 CLR 186, 218–9 (Brennan, Toohey and Gaudron JJ).

The same reasoning was again applied in striking down parts of the *Land (Titles and Traditional Usage) Act 1993* (WA) in 1993,²⁴ and parts of the *Mining Act 1978* (WA) in 2010.²⁵

While almost all of the cases dealing with RDA inconsistency have involved s 10(1), this is not the only source for a potential clash between federal and state laws. Section 9, which makes ‘act[s] involving a distinction... based on race’ unlawful, is often cited as an alternative. Its success rate in such cases is limited, as courts have considered that s 10(1) is the provision more readily designed to deal with legislative inconsistency, while s 9 is directed at non-legislative actions.²⁶ That said, there is the potential for conflict where a state law makes lawful the doing of an act which s 9 forbids.²⁷

Inconsistency may also arise where a state anti-discrimination Act contains provisions that are incapable of operating alongside the federal Act. This was argued in *Central Northern Adelaide Health Service v Atkinson*,²⁸ where a state exception to the prohibition on discriminatory legislation had a broader ambit than the RDA equivalent of s 8 (the ‘special measures’ provision).

Brian Atkinson had been refused medical care by the Central Northern Adelaide Health Service, which operated a medical centre providing services exclusively to ethnic minorities, including Indigenous Australians and migrants. Atkinson lodged a complaint under the *Equal Opportunity Act 1984* (SA) (‘EOA’), alleging discrimination on the grounds of both age and race. The South Australian Equal Opportunity Tribunal found in his favour and ordered the Health Service to make an apology. The Health Service appealed, arguing that its business fell within s 65 of the EOA, which provided: ‘This Part does not render unlawful an act done for the purpose of carrying out a scheme or undertaking for the benefit of persons of a particular race.’²⁹

Atkinson argued in the South Australian Court of Appeal that this provision was inconsistent with s 8 of the RDA – the ‘special measures’ exemption to racial discrimination – as that exemption, which invoked art 1.4 of ICERD, allowed:

Special measures taken for the *sole purpose* of securing adequate advancement of certain racial or ethnic groups or individuals *requiring such protection* as may be

²⁴ *Western Australia v Commonwealth (Native Title Act case)* (1995) 183 CLR 373.

²⁵ *James v State of Western Australia* (2010) 184 FCR 582.

²⁶ *Gerhardy v Brown* (1985) 159 CLR 70, 93 (Mason J).

²⁷ *Ibid*, citing *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466.

²⁸ (2008) 103 SASR 89 (‘Atkinson’).

²⁹ *Equal Opportunity Act 1984* (SA) s 65.

necessary... [provided] they shall *not be continued after* the objectives for which they were taken have been achieved (emphasis added).³⁰

Justice Gray (with whom Kelly J agreed), found that the RDA exemption was considerably narrower than its South Australian counterpart, as it was curtailed in both scope and duration. He went on to find:

There is a tension between s 8 of the RDA and s 65 of the *Equal Opportunities Act* [sic]. In my view a literal reading of s 65 would lead to an inconsistency with the RDA such that s 109 of the Australian Constitution would have application, and as a consequence, s 65 would be inoperative.³¹

Rather than strike down the EOA provision, Gray J observed that ‘a purposive construction is the usual or general approach to be taken to issues of statutory construction’,³² and found that the EOA could be construed purposively as permitting ‘a scheme or undertaking for the benefit of persons of a particular race’ so long as, consistently with the RDA, that benefit was the sole purpose of the scheme or undertaking, and that it would not be continued after the purpose was achieved.³³ In other words, the Court adopted a construction of the EOA that removed the inconsistency between the federal and state acts.

C. Reasons that RDA inconsistency arguments fail

Despite these noteworthy wins, in the majority of cases where a party has alleged that a state or territory law is inconsistent with the RDA, the argument has failed. There have been three main reasons for this. The first is that the impugned legislation falls within the just mentioned ‘special measures’ exemption in s 8 of the RDA, meaning that its sole purpose is to secure the advancement of certain racial groups in order to ensure their equal enjoyment of human rights with other groups.

For example in *Maloney v R*,³⁴ an Indigenous resident of Palm Island in Queensland was charged with possession of more than the prescribed quantity of liquor in a restricted area predominantly inhabited by Indigenous people. While the High Court agreed that Maloney’s

³⁰ *Atkinson* (2008) 103 SASR 89, 103 [66] (Gray J), citing *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 1.4.

³¹ *Atkinson* (2008) 103 SASR 89, 115 [106].

³² *Ibid* 107 [79], citing *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd* (2005) 222 CLR 194.

³³ *Ibid* 116 [111]–[113].

³⁴ (2013) 298 ALR 308.

'right to own property' had been limited more than that of non-Indigenous persons in Queensland, it found that the Schedule to the *Liquor Regulation 2002* (Qld) curtailing that right was a 'special measure' that was reasonably necessary to ensure the equal enjoyment of other human rights by Indigenous people, namely security of person, protection against violence and public health.

The second way these arguments fail is where the statute in question does not discriminate on the basis of race. For example in *Aurukun Shire Council v CEO Office of Liquor*,³⁵ a state Act prohibiting all local governments from selling alcohol was found to operate equally throughout the entire state of Queensland, without differentiation on the grounds of race. The state Act was therefore upheld as consistent with the RDA. At times though, legislation which on its face involves no racial discrimination will, in practice, operate in a way that does involve discrimination. For this reason, courts must consider that s 10(1) is directed at 'the practical operation and effect' of an Act and is 'concerned not merely with matters of form but with matters of substance'.³⁶

The third reason such arguments fall down is that the party alleging inconsistency fails to identify a valid right which has been affected. This was another weakness in the appellants' case in *Aurukun*, where the Court held that 's 10 requires the identification of a right enumerated in Art 5 of the CERD',³⁷ and that 'the opportunity to have access to a licensed source of alcohol supply provided by local government... has not been recognised as such a human right or fundamental freedom'.³⁸ This highlights the importance when embarking on a challenge to a state or territory law to begin with an examination of the nineteen rights listed in art 5 of ICERD in order to identify a right that the RDA will protect.

Inconsistency with federal laws

A. Principles

Section 109 of the Constitution provides no basis for the RDA to override other, inconsistent federal statutes. Indeed, the ordinary rule, which is an incident of parliamentary sovereignty, is that the federal Parliament may by express words, or by implication, amend any of its own statutes through the making of a subsequent statute. This power enables the federal

³⁵ *Aurukun Shire Council v CEO Office of Liquor, Gaming and Racing in the Dept of Treasury* (2010) 265 ALR 536 ('*Aurukun*').

³⁶ *Western Australia v Ward* (2002) 213 CLR 1, 103 [115] citing *Mabo v Queensland (No 1)* (1989) 166 CLR 186, 230 (Deane J).

³⁷ *Aurukun* (2010) 265 ALR 536, 581 [139] (Keane JA).

³⁸ *Ibid* 583–4 [148] (Keane JA).

Parliament to amend or repeal the RDA as it chooses.³⁹ Unlike at the state level, where state parliaments can entrench certain statutes from repeal by way of manner and form provisions, such as by requiring a referendum, there is very limited scope for the RDA to be protected from the future actions of the federal Parliament.⁴⁰

Absent a change to the Australian Constitution, Parliament cannot be prevented from amending or repealing the RDA. So long as Parliament does so by specific and direct amendment, its capacity to do so cannot be doubted. Normally, it is also accepted that subsequent statutes can amend earlier statutes by way of implied repeal, that is, that the earlier statute can have its operation altered when a later statute provides an inconsistent rule, even if that rule is not expressly stated to override the earlier statute. This rule of implied repeal is so widely accepted that it even applies to the state constitutions, which are themselves merely Acts of parliament.⁴¹

There is nevertheless scope to argue that the principles of implied repeal do not apply to the RDA, meaning that federal Parliament can only amend the statute if it does so expressly. Reasoning of this kind has gained currency in other comparable nations, with appellate courts in Canada and the United Kingdom adopting new approaches to the amendment or repeal of ‘constitutional’ or ‘human rights’ legislation. Thus, in *Winnipeg School Division No 1 v Craton*,⁴² the Supreme Court of Canada has held that:

Human rights legislation is of a special nature and declares public policy regarding matters of general concern. [It] is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement.⁴³

Similarly, in the United Kingdom in *Thoburn v Sunderland City Council*,⁴⁴ Laws LJ identified a class of statutes that enlarge or diminish ‘what we would now regard as fundamental

³⁹ See, eg, *New South Wales v Commonwealth* (2006) 229 CLR 1, 151 [307] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) (*Work Choices Case*).

⁴⁰ *Work Choices Case* (2006) 229 CLR 1, 151 [307] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651, 659 [3] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

⁴¹ *Taylor v Attorney-General (Qld)* (1917) 23 CLR 457; *McCawley v The King* [1920] AC 691.

⁴² [1985] 2 SCR 150.

⁴³ *Ibid* 156. See the similar argument put by Shaw QC in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 6. The position of the Canadian Supreme Court has been criticised: see Peter W Hogg, *Constitutional Law of Canada: Volume 1* (Carswell, 5th supplemented ed, 2007) 12–17 n 67.

⁴⁴ [2003] QB 151.

constitutional rights'.⁴⁵ He argued that amendment of 'constitutional statutes' could not be effected in the same way as any other statute.⁴⁶ Instead, it must be shown 'that the legislature's actual – not imputed, constructive or presumed – intention was to effect the repeal'.⁴⁷

In Australia, while there is no precedent for a distinction between 'human rights' or 'constitutional' statutes and other statutes, courts might arrive at a similar result by applying existing principles of statutory interpretation governing the implied repeal of statutes.⁴⁸ For instance, if an existing Commonwealth law expressly confers a right, privilege or immunity, there may need to be at least 'strong grounds',⁴⁹ such as 'clear words',⁵⁰ manifesting in 'actual contrariety',⁵¹ before a later Act will be taken to have impliedly repealed the earlier right, privilege or immunity.⁵² The fact that the right conferred by the earlier statute was discernibly 'important' or 'fundamental' would strengthen any inference that the later statute did not intend to repeal it.

Similarly, by invoking another tenet of statutory interpretation, the principle of legality, courts will assume that it is 'improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness'.⁵³ While this principle is ordinarily associated with the protection of common law rights,⁵⁴ it has also been applied to statutory rights.⁵⁵

⁴⁵ Ibid 186 [62].

⁴⁶ This approach and its lack of clarity have been criticised: see, eg, *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395, 419–20 [62] (Rodger LJ); 'Editorial – Constitutional Statutes' (2007) 28(2) *Statute Law Review* iii. See also *Re Local Government Byelaws (Wales) Bill 2012* [2012] 3 WLR 1294, 1312 [80] (Hope LJ, with whom Clarke, Reed and Carnwath LLJ agreed) (doubting that the 'description' of a statute as 'constitutional' could 'be taken to be a guide to its interpretation' and holding that 'the statute must be interpreted like any other statute').

⁴⁷ *Thoburn v Sunderland City Council* [2003] QB 151, 187 [63]. An Australian court would reject the idea that courts could identify an 'actual' intention of Parliament distinct from its imputed, constructive or presumed intention: *Zheng v Cai* (2009) 239 CLR 446, 455 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

⁴⁸ Taking this approach would better accord with the view expressed by French CJ in *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195. There, French CJ suggested that questions such as those considered in *Thoburn* were likely to be resolved through the 'characteristics of a statute' rather than through the designation of a statute as 'constitutional': 218 [56].

⁴⁹ *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130, 137–8 [18] (Gummow and Hayne JJ).

⁵⁰ *Wurridjal v Commonwealth* (2009) 237 CLR 309, 366–7 [114] (French CJ), 378–9 [158]–[159] (Gummow and Hayne JJ).

⁵¹ *Putland v R* (2004) 218 CLR 174, 189 [40] (Gummow and Heydon JJ).

⁵² See also *Commissioner of Police v Eaton* (2013) 294 ALR 608, 631 [98] (Gageler J); cf 620–1 [44]–[48] (Crennan, Kiefel and Bell JJ).

⁵³ *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J), quoting Sir Peter Benson Maxwell, *On the Interpretation of Statutes* (Sweet & Maxwell, 4th ed, 1905) 122.

⁵⁴ Williams, G., and Hume, D., *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013), 36–46.

⁵⁵ See Herzfeld, P., Prince T., and Tulley, S., *Interpretation and Use of Legal Sources: The Laws of Australia* (Thomson Reuters, 2013) 227, citing *Tassell v Hayes* (1987) 163 CLR 34 (statutory right to

Each of these principles, which might enable the RDA to prevail over an apparently inconsistent later federal statute, is a rebuttable presumption. This means that if the federal Parliament decides to unambiguously oust the operation of a rights-protecting statute such as the RDA, it can do so. As Gageler and Keane JJ of the High Court explained in *Lee v New South Wales Crime Commission*,⁵⁶ the principle of legality exists to protect rights from ‘inadvertent and collateral alteration’, and ‘does not exist to shield those rights ... from being specifically affected in the pursuit of a clearly identified legislative object’.⁵⁷

The Commonwealth Parliament has cleared this hurdle twice with regard to the RDA. The first instance was the *Native Title Amendment Act 1998* (Cth), which implemented the Howard government’s ‘ten point plan’ for native title after the High Court’s decision in *Wik Peoples v Queensland*.⁵⁸ In seeking to achieve, in the words of the Deputy Prime Minister Tim Fischer, ‘bucket-loads of extinguishment’, the Act overrode the RDA. This was achieved by introducing a new s 7 into the *Native Title Act 1993* (Cth), which expresses an intention that the RDA only overrode the *Native Title Act* where the provisions of the *Native Title Act* were ambiguous. The second suspension of the RDA was achieved under the legislation that brought about the Northern Territory intervention in 2007 in response to findings of child sexual abuse within Aboriginal communities.⁵⁹

B. Cases

There have been thirteen attempts in the last 40 years to allege inconsistency between the RDA and a subsequent federal law. For the same reasons identified above in respect of state and territory laws, only one of these attempts has been successful: *Shi v Minister for Immigration and Citizenship*.⁶⁰

Before exploring that case, it is important to mark a distinction between federal–state inconsistency and federal–federal inconsistency. In Part II above we discussed cases where the RDA ‘overrode’ or prevailed over state laws to the extent that they were inconsistent with the RDA. For the reasons just explained, the RDA cannot ‘override’ another federal law, as federal laws emanate from the same Parliament and therefore operate on an equal footing.

elect trial of indictable offence by jury); *Buck v Comcare* (1996) 66 FCR 359 (statutory compensation for workplace injury); *Schofield, Re; Ex parte Rangott v P & B Barron Pty Ltd* (1997) 72 FCR 280 (limitation on admissibility of transcripts of examination of bankrupt); *University of Western Australia v Gray (No 20)* (2008) 246 ALR 603 (superannuation).

⁵⁶ (2013) 251 CLR 196, 310 [313].

⁵⁷ *Ibid.*

⁵⁸ (1996) 187 CLR 1.

⁵⁹ *Northern Territory National Emergency Response Act 2007* (Cth).

⁶⁰ (2011) 123 ALD 46.

What the RDA can do, however, is compel or constrain the statutory construction of another federal law so that the two laws operate harmoniously. It is only in very rare cases that the principles of implied repeal or of legality might further render the latter statute inoperative.⁶¹

Judges will first strive to find a way for the laws to co-exist. *Shi v Minister for Immigration and Citizenship*⁶² is such a case. Mr Shi was a citizen from the People's Republic of China who had lived in Australia for thirteen years, eventually obtaining a visa that gave him a right permanent residency. During that time, he had been convicted of three offences – malicious wounding in company, supply of a prohibited drug and detaining a person with intent to obtain an advantage – spending over six years in prison as a result. This enlivened a power for a delegate of the Minister to cancel Mr Shi's visa under s 501(2) of the *Migration Act 1958* (Cth), which was done in November 2010 on 'character grounds'.

Mr Shi sought a review of this decision in the Administrative Appeals Tribunal. In reviewing the decision, the Tribunal was required to have regard to a Direction given by the Minister under s 499(1) of the Act that allowed the person's 'ties and linkages to the Australian community' to be considered. In affirming the Minister's decision to cancel Mr Shi's visa, Senior Member Allen held:

The Applicant was aged 14 years when he arrived in Australia. To that extent [sic] this primary consideration weighs in his favour. On the other hand a large part of his upbringing and character formation was in China. Such ties to the Australian community that the Applicant did develop appear to have been ethnically based and with persons who had little regard for the law.

Mr Shi appealed to the Federal Court, arguing that the ethnicity of persons with whom he chose to associate was an irrelevant consideration. In deciding in favour of Mr Shi, Perram J considered the interplay between s 10(1) of the RDA and s 499(1) of the *Migration Act*.

The effect of s 10(1) is ... to require this Court to construe [the *Migration Act*] (and, hence, the Direction) as not permitting decision-making processes in which ethnicity is an integer. It is true, as the Minister submits, that the Tribunal had to consider the links which Mr Shi had to the Australian community. But the effect of s 10 of the RDA is that, whatever else that concept denotes, it lacks ethnic features.⁶³

⁶¹ *Coco v The Queen* (1994) 179 CLR 427, 438 (Mason CJ, Brennan, Gaudron and McHugh JJ): '[I]t would be very rare for general words in a statute to be rendered inoperative or meaningless if no implication of interference with fundamental rights were made, as general words will almost always be able to be given some operation, even if that operation is limited in scope'.

⁶² (2011) 123 ALD 46.

⁶³ *Ibid* 50 [19] (Perram J).

In reaching this decision, Perram J noted that ‘it would require express words to convey an intention that a general power to make regulations for a stated purpose authorised the repository to repeal or amend the Parliament’s own enactments’.⁶⁴ In the absence of such words, the *Migration Act* could not lawfully be construed so as to permit a finding that took into account the appellant’s ethnicity, and so the Tribunal’s decision was quashed. While neither the *Migration Act* itself nor the Direction made under it were held to be inoperative, the RDA directly affected their operation in such a way that preserved the appellant’s right to equal treatment before the law.⁶⁵

Conclusion

The RDA has proved to be a powerful instrument in setting down a national standard of racial non-discrimination. This has been due in large part to the overriding force given to the statute by s 109 of the Constitution. This aspect to the RDA has been of great legal and political significance, such as in *Mabo No 1* by overturning Queensland’s pre-emptive strike against the recognition of native title.

This effect of the Act should not be overstated. The potential of the RDA to set down a national standard by overriding state and territory laws has not often been realised over the past four decades. Indeed, of the twenty-six occasions upon which such an argument has been put in an Australian court, it has only succeeded seven times. As these statistics make clear, in the majority of cases, attempts to rely upon the RDA in this way have failed. These cases have demonstrated the clear limits to the protection offered by the RDA.

Another area in which the RDA has had a limited impact is with respect to federal statutes. Orthodox principles of parliamentary sovereignty and statutory interpretation establish that the RDA can be overwritten by subsequent federal statutes, at least so long as the intention to do so is manifested in clear language. This has occurred on two occasions. More generally, other federal statutes may operate despite inconsistency with the RDA, although interpretive techniques do exist to mitigate or reduce the possibility of this occurring.

The RDA appears to be an unequivocal rejection of racial discrimination. However, its capacity to achieve this is subject to significant limitations, especially in regard to federal statutes. Four decades after its enactment, it is appropriate to consider whether the protection offered by the

⁶⁴ Ibid [20] citing *De L v Director-General, NSW Department of Community Services (No 2)* (1997) 190 CLR 207 at 212 (Brennan CJ and Dawson J); Pearce and Argument, *Delegated Legislation in Australia* (3rd ed, 2005) [19.21].

⁶⁵ Although not expressly identified in Justice Perram’s judgment, the right to ‘equal treatment before the tribunals and all other organs administering justice’ is a protected ICERD right under the RDA.

RDA should be strengthened. If the principle of racial non-discrimination is as fundamental as support for the RDA might suggest, then that principle should be put beyond the possibility of suspension or repeal by the federal Parliament.

The obvious way of achieving this is to entrench the principle of non-discrimination on the basis of race into the Australian Constitution. Such protection is commonplace in other nations, and indeed Australia is exceptional not only in lacking such protection, but in having two provisions in its Constitution that not only run counter to the objects of the RDA, but to the whole idea of racial non-discrimination. These are s 25, which contemplates that states may deny people the vote on the basis of their race, and s 51(xxvi), which enables the federal Parliament to pass laws that both discriminate for and against people on the basis of their race.

The former section was included in recognition of past policies of disenfranchising Aboriginal people. The latter section is in the Constitution in order to, in the words of Sir Edmund Barton, Australia's first prime minister and one of the first members of the High Court, enable the Commonwealth to 'regulate the affairs of the people of coloured or inferior races who are in the Commonwealth'.⁶⁶ One has to ask just how deep Australia's commitment to racial non-discrimination runs when clauses of this kind remain in the nation's most important law. Indeed, we are not aware of any other Constitution in the world that still provides a licence to its national Parliament to discriminate negatively on the basis of race.

It is right to laud the importance and achievements of the RDA. On the other hand, we need also to reflect upon its limitations. If we are serious about eradicating racial discrimination in Australia, and especially within the law, the RDA should be seen as a stepping stone to even stronger protection. 40 years after the enactment of the RDA, it is appropriate that Australia finally remove clauses from its Constitution that enable racial discrimination while also entrenching the principle that no law or policy, whether at the federal, state or territory level, may discriminate against a person on the basis of their race.⁶⁷

⁶⁶ *Official Record of the Debates of the Australasian Federal Convention: 1891–1898*, vol 4, Melbourne 1898, 228–9.

⁶⁷ An example of such a clause developed in the context of recognising Aboriginal and Torres Strait Islander peoples in the Constitution is:

Section 116A Prohibition of racial discrimination

(1) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.

(2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group.

Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (2012), 173.

Translating the International Convention on Racial Discrimination into Australian law

Hilary Charlesworth¹

This paper considers the *Racial Discrimination Act 1975* (Cth) ('the RDA') and its genesis in the *International Convention on the Elimination of All Forms of Racial Discrimination* of 1965 ('ICERD') as an example of the translation of international human rights standards into national legal systems. The idea of translation draws attention to the complex process of moving from one system of language, meaning and reference to another. How are international norms, typically cast in general terms, adapted into a national legal system? Scholars have identified two different approaches to translation: the first celebrates faithfulness to the original text and accuracy of meaning, while the second emphasises the creative and adaptive possibilities of translation.² Both these approaches are implicated in debates about the relationship between the RDA and the ICERD.

Australia signed the ICERD in 1966, during Harold Holt's term as Prime Minister, but did not ratify it until 1975. The RDA both gave effect to the ICERD in the Australian legal system, and provided legislative approval for ratification of the treaty.³ Although the Australian Constitution assigns the power of signature and ratification of treaties to the executive,⁴ endorsement of these activities by the legislature confers an enhanced democratic legitimacy.

Bringing an international treaty directly into national law was a novel step in the protection of human rights in Australia in the 1970s. Until that time, Australia had been diffident about the domestic implementation of human rights treaties.⁵ The promoters and drafters of the RDA conceived it as a straightforward translation of ICERD. This was partly for philosophical reasons: the new Labor government, led by Prime Minister Gough Whitlam, wanted to signal its credentials as an internationally-engaged entity in contrast to the caution of the previous conservative government in relation to international human rights standards. Indeed, the Commonwealth government announced the enactment of the RDA as part of Australia's

¹ Many thanks to Stephanie Guest for her comments on this paper and to Jacinta Mulders for her research assistance.

² See Venuti, L., *The Translator's Invisibility: A History of Translation* (Routledge, 1995).

³ *Racial Discrimination Act 1975* (Cth) s 7 ('*Racial Discrimination Act*').

⁴ *Australian Constitution* s 61.

⁵ de Stoop, D., 'Australia's Approach to International Treaties on Human Rights' (1970-1973) 5 *Australian Year Book of International Law* 27.

program for the United Nations Decade for Action to Combat Racism and Racial Discrimination, which had been launched in November 1972.⁶

A second rationale for a faithful translation of the ICERD into Australian law was to ensure constitutional validity. The major basis for the Commonwealth's power to enact the RDA was the external affairs power in the Constitution (s 51(xxix)). The closer the Commonwealth legislation hewed to the text of the treaty, the more likely it was to pass constitutional muster.⁷

The legislation

In some respects, the relationship between the text of the Convention and the RDA appears more transposition than translation, with the language of the treaty simply copied directly into the Australian law. One example is the Convention's definition of racial discrimination in art 1, which provides that:

the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

This language is reproduced word for word in s 9(1) of the RDA. The legislation goes on to define 'human rights and fundamental freedoms' as including the rights specified in art 5 of the Convention, which covers most of the rights contained in the Universal Declaration of Human Rights of 1948.⁸ Section 9 thus has the interesting effect of introducing the notion of a broad category of human rights and fundamental freedoms into the Australian legal system, which has always harboured a deep distrust of such concepts.⁹ The argument has been that 'human rights' is a vague and politicised category, which would lure the Australian judiciary into judgments about values rather than legal principles.¹⁰

⁶ Starke, J.G., 'Australia and the International Protection of Human Rights' in K W Ryan (ed), *International Law in Australia* (Law Book, 2nd ed, 1984) 136, 149.

⁷ The preamble to the *Racial Discrimination Act* also identifies s 51(xxvi) of the Constitution, the power to make laws with respect to the people of any race for whom it is deemed necessary to make special laws, and s 51(xxvii), the power to make laws with respect to immigration, as bases for the *Racial Discrimination Act*. In *Koowarta v Bjelke-Petersen*, discussed below, the High Court rejected s 51(xxvi) as a basis for the *Racial Discrimination Act* by a vote of 6:1.

⁸ *Racial Discrimination Act* s 9(2).

⁹ See Charlesworth, H., 'The Australian Reluctance about Rights' (1993) 31 *Osgoode Hall Law Journal* 195.

¹⁰ See, eg, Allen, J., 'What's Wrong About a Statutory Bill of Rights' in Leeser, J., and Haddrick, R. (eds), *Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights* (Menzie's Research Centre, 2009) 83; and Howard, J., 'Don't Risk What We Have' in Leeser, J., and Haddrick, R. (eds),

Reading the RDA, we might be struck by the uneasy co-existence of two different types of language. There is both the international treaty language of human rights and fundamental freedoms, implicitly referencing the soaring vocabulary of documents such as the Universal Declaration of Human Rights of 1948 mixed with a particular brand of Australian legalese, full of specificities and sub-sub-clauses. For example Part II of the RDA translates some of the specific human rights referred to in art 5 of the Convention into a rather convoluted Australian legal dialect. Thus the treaty right to non-discrimination in relation to freedom of movement (art 5(d)(i)) is rendered in the RDA as:

It is unlawful for a person:

- (a) to refuse to allow another person access to or use of any place or vehicle that members of the public are, or a section of the public is, entitled or allowed to enter or use, or to refuse to allow another person access to or use of any such place or vehicle except on less favourable terms or conditions than those upon or subject to which he or she would otherwise allow access to or use of that place or vehicle;
- (b) to refuse to allow another person use of any facilities in any such place or vehicle that are available to members of the public or to a section of the public, or to refuse to allow another person use of any such facilities except on less favourable terms or conditions than those upon or subject to which he or she would otherwise allow use of those facilities; or
- (c) to require another person to leave or cease to use any such place or vehicle or any such facilities;

by reason of the race, colour or national or ethnic origin of that other person or of any relative or associate of that other person.¹¹

The RDA is explicit however that the ICERD's general protection of human rights and fundamental freedoms in the context of racial discrimination is not limited in the RDA.¹²

Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights (Menzie's Research Centre, 2009) 67.

¹¹ *Racial Discrimination Act* s 11.

¹² *Ibid* s 9(4).

Another example of transposition of international language is the RDA's adoption of ICERD's concept of 'special measures'. Article 1(4) of the Convention provides that:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

The RDA incorporates this provision by reference in a section dealing with exceptions to the prohibition of racial discrimination.¹³ Designation of special measures as an exception implies that they are inconsistent with racial equality and not a means of achieving it. Such a frame of reference relies on a formal approach to equality, rather than a substantive one.

The RDA, when enacted in 1975, departed from the Convention in some significant respects, by omitting certain international commitments. Perhaps the most obvious example is the ICERD's art 4:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in art 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall

¹³ Ibid s 8(1).

recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

The final draft of the RDA contained a prohibition on promoting or inciting racial hatred, but it was deleted in the Act's passage through the Senate. The prohibition had prompted intense controversy in parliamentary debates. In the House of Representatives, John Howard and other Coalition members of parliament had pushed for the offence to be removed, arguing that it was against the interests of preserving a 'completely free society in which it is proper and reasonable for people to have freedom to disseminate ideas.'¹⁴ Acknowledging the government's need to compromise to ensure the passage of the legislation, Australia made a formal declaration when ratifying the ICERD, which stated:

Australia is not at present in a position specifically to treat as offences all the matters covered by article 4 (a) of the Convention. Acts of the kind there mentioned are punishable only to the extent provided by the existing criminal law dealing with such matters as the maintenance of public order, public mischief, assault, riot, criminal libel, conspiracy and attempts. It is the intention of the Australian Government, at the first suitable moment, to seek from Parliament legislation specifically implementing the terms of article 4 (a).

The first suitable moment turned out to be a long time coming. It took another twenty years for amendments to the RDA to be adopted to make public acts of racial vilification unlawful.¹⁵ The amendments do not fully translate art 4 of ICERD in the sense that they do not render racial vilification a criminal offence.¹⁶ The remedy provided for unlawful racial discrimination is through a complaint to the Australian Human Rights Commission.¹⁷ The 1995 amendments also allow various exemptions from the prohibition of racial vilification, such as statements made 'reasonably and in good faith' in artistic, academic, scientific or public interest contexts. Nevertheless the amendments remain a source of keen contention in Australian politics today, as the recent campaign for the repeal of Part IIA indicates.

¹⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 9 April 1975, 1408.

¹⁵ *Racial Discrimination Act* pt IIA.

¹⁶ *Ibid* s 26.

¹⁷ *Australian Human Rights Commission Act 1986* (Cth) s 46P.

Judicial approaches

How have Australian courts dealt with the relationship between the RDA and the ICERD? The first Australian High Court case on the RDA, *Koowarta v Bjelke-Petersen*, addressed directly and indirectly the translation of international human rights norms into Australian law. *Koowarta* involved a challenge to the constitutionality of the RDA by Queensland on the basis that it was outside Commonwealth legislative power. John Koowarta had challenged as a violation of ss 9 and 12 of the RDA the Queensland government's refusal to transfer to the Winychanam (Wik-Mungkan) people a pastoral lease over their traditional lands.¹⁸ Queensland had invoked a policy preventing the acquisition of large tracts of land for development by Aboriginal people 'as it is considered that sufficient land in Queensland is already reserved and available for use and benefit of Aborigines.'¹⁹ In response to John Koowarta's claim for damages for breach of the RDA, Queensland sought a declaration that the Act was constitutionally invalid. Victoria and Western Australia intervened to support Queensland's case, while the Commonwealth intervened on behalf of John Koowarta.

While Queensland conceded that the RDA 'conformed' to the text of the Convention, it argued that the operation of a treaty prohibiting racial discrimination was primarily within Australia and thus not properly considered an 'external affair' in the terms of the Constitution's grant of legislative power to the Commonwealth. In this sense, the argument was that the translation from the international to national realm was an illegitimate bid to enlarge Commonwealth power.

The faithfulness of the RDA to the relevant parts of ICERD was significant for the judges in the narrow majority (4:3) upholding the validity of the RDA. Justice Brennan made this point most explicitly. He said: 'if there were a disconformity between [the relevant RDA provisions] on the one hand and the Convention obligation on the other, the Convention obligation might fail to stamp the character of an external affair on [the RDA provisions]... and further consideration would have to be given to their validity.'²⁰

Responding to a claim by the Victorian Solicitor-General that s 9(1) of the RDA, transposing the ICERD's definition of racial discrimination, was meaningless in Australian law, Justice Brennan insisted that the legislative provision should be read in light of its international legal meaning. He stated that, given the precise reproduction of the ICERD's definition of racial discrimination in s 9(1) of the RDA, 'it is reasonable to assume that Parliament intended to import into municipal law a provision having the same effect as the corresponding provision in

¹⁸ Section 12 prohibits racial discrimination in the context of land and housing.

¹⁹ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 177.

²⁰ *Ibid* 261.

the treaty ... [and it should be construed by Australian courts] in accordance with the meaning to be attributed to the treaty provision in international law.²¹ Indeed, Justice Brennan warned, to do otherwise might invalidate a statute based on international law. He went on to apply the principles relevant to the interpretation of treaties found in art 31 of the Vienna Convention on the Law of Treaties of 1969 to s 9(1), finding that it covered the Queensland government's refusal to allow the transfer a pastoral lease. This approach seems to endorse adherence to the original text as the goal of translation.

Since *Koowarta*, however, Australian courts have often overlooked the evolution of international law on racial discrimination. The clearest example of this is in relation to special measures, a category imported directly into the RDA from the ICERD, as noted above. The High Court's decision in *Gerhardy v Brown* treated all forms of differential treatment on the basis of race as prohibited, unless such acts could be characterised as special measures.²² This analysis, resting on a limited, formal approach to racial equality, did not take into account the prevalent view in international law that equality may require different treatment of racial groups to take into account historic patterns of discrimination or to preserve distinct cultural identities.²³

In *Maloney v The Queen*, the High Court considered whether Queensland laws that restricted alcohol consumption on Palm Island, a location whose population is almost entirely Aboriginal, could be justified as a special measure under the RDA.²⁴ The Court was directed to many international instruments dealing with the nature of racial discrimination and special measures, such as statements by UN human rights treaty bodies, but most members of the Court were very wary of using this jurisprudence in interpreting the RDA.²⁵ Chief Justice French, for example, was concerned that reference to such material could 'rewrite the [treaty] text', implying that the meaning of the provisions of the RDA drawn from the ICERD was settled in 1975.²⁶ This view was put most explicitly by Justice Hayne.²⁷ Justice Gageler was the only member of the Court to examine developments in international jurisprudence systematically,

²¹ *Ibid* 265.

²² (1985) 159 CLR 70.

²³ See, eg, Warwick McKean, *Equality and Discrimination under International Law* (Clarendon Press, 1983).

²⁴ (2013) 252 CLR 168.

²⁵ For a thorough analysis of this point see Wall, P., 'The High Court of Australia's Approach to the Interpretation of International Law and Its Use of International Legal Materials in *Maloney v The Queen* [2013] HCA 28' (2014) 15 *Melbourne Journal of International Law* 228.

²⁶ *Maloney v The Queen* (2013) 252 CLR 168, 185 [23]. Justice Bell is also wary of the possibility that the treaty text might be 'supplemented' by the non-binding recommendations of the treaty bodies: at 256 [235].

²⁷ *Ibid* 198–99 [61].

although he ultimately agreed with the Court's decision that the Queensland laws constituted a special measure under the RDA.

Overall, the judgments in *Maloney* suggest an approach to the Australian translation of an international treaty that does not fit neatly into either of the two categories of translation sketched above. It is neither faithful to the contemporary meaning of the original text, nor a creative adaptation. The High Court seems rather to insist that, once incorporated from the treaty into Australian law, the category of special measures is detached from its international context and its meaning is frozen as at the date of the incorporation. This technique is inconsistent with the international law relating to treaty interpretation, which endorses the principle of interpretation in 'good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'²⁸

International scrutiny of the RDA

A different lens on translation of international standards is provided in the scrutiny of Australian implementation of the Convention by the UN Committee on the Elimination of Racial Discrimination, an expert monitoring body established by the ICERD.²⁹ Under the Convention, Australia is required to submit reports on its implementation to the Committee every two years.³⁰ The Committee then engages with Australia in what is optimistically termed 'constructive dialogue', a process concluded by the preparation of 'concluding observations'. Since 1975, Australia has submitted seventeen reports to the Committee, some reports being consolidations.

The constructive dialogue about the translation of international standards can, occasionally, go off the rails and become explosive. In Australia's case, this occurred in 2000, when, as Minister for Immigration, Philip Ruddock led the Australian delegation to the dialogue with the Committee on the Elimination of Racial Discrimination. Mr Ruddock faced tough questioning, particularly on the amendments to the Native Title Act, allowing extinguishment and impairment of native title, prompted by the High Court's decision in *Wik*.³¹ A joint press release from Mr Ruddock, Alexander Downer, Minister for Foreign Affairs and Daryl Williams, Attorney-General, later stated that the Australian government was 'appalled at the blatantly political and partisan approach taken by [the Committee].' The three ministers denounced the Committee's 'polemical attack on the Government's indigenous policies ... [which were] based on an

²⁸ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31.

²⁹ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) art 8(1).

³⁰ *Ibid* art 9(b).

³¹ *Wik Peoples v Queensland* (1996) 187 CLR 1.

uncritical acceptance of the claims of domestic political lobbies and take little account of the considered reports submitted by the Government.³²

Overall, the Committee on the Elimination of Racial Discrimination has assessed the Australian translation of the Convention obligations, both legally and politically, as partial and inadequate. Australia's most recent appearance before the Committee was in 2010. The Committee noted a number of positive developments in Australia, including the 2007 National Apology to the Stolen Generations, the endorsement in 2009 of the UN Declaration on the Rights of Indigenous Peoples (which Australia had voted against at the time of its adoption by the UN General Assembly in 2006), and the policy of 'closing the gap' in Indigenous health inequality. It expressed however serious concerns about the consistency with ICERD of a range of Australian laws, policies and practices, including the Northern Territory Intervention and the suspension of the RDA, the treatment of refugees and asylum seekers, and the impact of Australia's counter-terror laws.³³

The Committee also regretted that many recommendations from previous reports had not been fully implemented in Australia, including in relation to Aboriginal deaths in custody, the socio-economic disadvantage of Aboriginal and Torres Strait Islander peoples, massive over-representation of Aboriginal and Torres Strait Islander peoples in the prison population, Aboriginal land rights and the mandatory detention of asylum seekers.

The Committee made over twenty recommendations to address racial discrimination, disadvantage and inequality in Australia, including in relation to Australia's legal framework, Indigenous peoples, refugees and asylum seekers.³⁴ It called for the comprehensive implementation of ICERD in Australian law, for example through strengthening Commonwealth anti-discrimination laws. It proposed the amendment of the RDA to require a complainant to prove only *prima facie* discrimination, at which point the evidentiary burden would shift to the respondent to establish that there had been no racial discrimination. It also recommended the criminalisation and prosecution of acts of racial hatred. The Committee drew attention to the need for a legal framework to prevent Australian corporations breaching the rights of Indigenous peoples domestically and overseas as well as the importance of regulating the extra-territorial activities of Australian corporations abroad that affected Indigenous rights.

³² Downer, A., 'Government to Review UN Treaty Committees' (Media Release, 30 March 2000) <http://foreignminister.gov.au/releases/2000/fa024_2000.html>.

³³ Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties under Article 9 of the Convention—Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia, 77th sess*, UN Doc CERD/C/AUS/CO/15-17 (13 September 2010).

³⁴ *Ibid.*

Australia's response to the Committee was selective and almost desultory, addressing only three of the Committee's recommendations.³⁵

The lack of Australian interest in translating the international norm of non-discrimination on the basis of race into the domestic sphere emerges also in the way that Australia regularly dismisses the Committee's views on individual communications under art 14 of ICERD. Take for example Stephen Hagan's complaint about the continued use of the word 'nigger' in the name of a football stadium in Toowoomba, unsuccessfully challenged under ss 9(1) and 18C(1) of the RDA in the Australian legal system. One of Mr Hagan's arguments before the UN Committee was that the RDA did not give full effect to the terms of the Convention. The Committee argued that 'the Convention, as a living instrument, must be interpreted and applied taking into account the circumstances of contemporary society.' It paid attention to the 'increased sensitivities in respect of words [such as 'nigger'] appertaining today'.³⁶ The Australian government dismissed this view cursorily, asserting simply '[t]he Government is confident that Australia's domestic processes ... are second to none in the world.'³⁷

The problems of translation between the international and national legal spheres are not just Australian ones. Occasionally the Committee's views can seem rather removed from political reality in Australia. An example of this is its consistent references to the need for constitutional amendment to incorporate a prohibition on racial discrimination. The well-documented barriers to constitutional reform in Australia make this seem a rather pro-forma comment.

Conclusion

Overall, Australia's engagement with ICERD suggests that much is lost in the Australian translation of international human rights standards. The legal translation process renders the treaty text static, neither keeping pace with jurisprudential developments at the international level, nor adapting the treaty commitments into a dynamic source of Australian law. A literary analogy might be Alexander Pope's translation of Homer, which rendered Homer's flowing dactylic hexameter into rather clunky heroic couplets.³⁸ Robert Fagles' recent translation into

³⁵ Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties under Article 9 of the Convention—Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia—Addendum—Information Received from the Government of Australia on the Implementation of the Concluding Observations*, 80th sess, UN Doc CERD/C/AUS/CO/16-17/Add.1 (4 October 2011).

³⁶ Committee on the Elimination of Racial Discrimination, *Opinion: Communication No 26/2002*, 62nd sess, UN Doc CERD/C/62/D/26/2002 (14 April 2003) 10 [7.3].

³⁷ Wilson, A., 'Canberra to Defy UN on 'Nigger' Sign', *The Canberra Times* (Canberra), 24 April 2003.

³⁸ Homer, *The Odyssey of Homer* (Alexander Pope trans, 1726).

free verse and contemporary language, by contrast, captures the clarity and energy of the epic.³⁹

There will always be tensions in translating broad international commitments into specific constitutional orders and I am not proposing that we should aspire to some sort of homogenous world-wide interpretation of international legal standards. The process of translation means that there will be inevitable shifts in meaning and emphasis, suggesting that the two approaches to translation I referred to at the start can overlap and may often blur. As Karen Knop has pointed out: '[j]ust as we know that translation from one language to another requires more than literalness, we must recognize the creativity, and therefore the uncertainty, involved in domestic interpretation.'⁴⁰ In other words, the outcome of the translation of international law will not always be the same in different legal cultures – in Knop's words, 'translation owes fidelity to the other language and text but requires the assertion of one's own as well.'⁴¹

Legal anthropologist Sally Engle Merry has identified vernacularisation as a fruitful mode of translation of international human rights treaties to the local level.⁴² She uses this term to mean the ways global ideas of human rights are translated into specific local languages and contexts, acquire new accents and resonances, and are appropriated for use in daily life. The idea of vernacularisation emphasises the crucial role of local actors in making international human rights standards relevant in their communities.

So, a challenge for the next 40 years of the RDA is to consider how its basic purpose, the elimination of discrimination based on race, might be vernacularised more productively in Australia. While the legal framework of the RDA is important, it is not enough in itself. Vernacularisation also requires political and social change, and can only grow from specific, every day, local commitments to non-discrimination and racial equality.

³⁹ Homer, *The Odyssey* (Robert Fagles trans, Penguin Books, 1996).

⁴⁰ Knop, K., 'Here and There: International Law in Domestic Courts' (2000) 32 *New York University Journal of International Law and Policy* 501, 506.

⁴¹ *Ibid.*

⁴² Merry, S.E., *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press, 2006).

The RDA after 40 years: advancing equality, or sliding into obsolescence?

Beth Gaze

This paper analyses the achievements of the RDA over its 40 year existence, as well as the areas in which it is falling short and new paths forward are necessary.¹ The starting point must be to acknowledge the enormous significance of the Act. As the first anti-discrimination law adopted at the federal level,² and the first human rights legislation adopted by the Australian government, it was part of the Whitlam government's drive to modernise Australia, reflecting the energy and optimism of the era in its push for more egalitarian race relations. It also pioneered the expanded constitutional powers of the Commonwealth to legislate for human rights on the basis of the external affairs power, and the developing importance in Australia of the international human rights treaties such as the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD),³ in their own right and as a basis for legislative power. It showed considerable optimism about the ability of legal action to change social reality.

Forty years later, in less optimistic times, we know a lot more from experience about how discrimination works and how laws like this work. In reviewing some of that experience and reflecting on what it tells us about the RDA and its limits and potential, I will have to be very selective in this short paper. First, it is notable that the RDA is far from a simple anti-discrimination law. It operates at multiple levels.

As well as its powerful symbolic effect in condemning racial discrimination, the Act contains legal tools at several levels to combat racial discrimination and inequality. These include:

- prohibiting racial discrimination, defined in terms of denial of equal enjoyment of human rights protected by the ICERD;
- provisions prohibiting indirect racial discrimination;

¹ I thank the Race Discrimination Commissioner for organising this conference and giving me the opportunity to review the Act's performance, Stephanie Batsakis for her research assistance in the preparation of this paper, and the Melbourne Law School for funding assistance.

² The RDA was preceded only by legislation against racial discrimination in South Australia first on a criminal and then a civil basis: Ronalds, C., and Raper, E., *Discrimination Law and Practice* (4th Ed, 2012, Federation Press) 3; Rees, N., Rice S., and Allen D., *Australian Anti-discrimination Law* (2nd Ed., 2014, Federation Press) 1.

³ UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195. The Convention appears as Schedule to the RDA.

- provisions prohibiting victimisation of those who are involved with a discrimination complaint, discriminatory advertising, and incitement to or assisting or promoting the doing of an unlawful act;
- the well-known s 18C, making behaviour (which can include speech acts) based on race unlawful where it is 'reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate' a person or group and it is done otherwise than in private; and
- section 10, which provides an *almost* constitutional style of protection against racially discriminatory legislation, which appears to include both disparate impact based on race, as well as disparate treatment based on race – that is, unreasonably racially biased outcomes, as well as overt racial distinctions in legislation.⁴

In addition to these legal mechanisms, the Act also creates public offices whose occupants play a vital role in supporting the Act's principles. The Race Discrimination Commissioner, and the Aboriginal and Torres Strait Islander Social Justice Commissioner (appointed on the recommendation of the Royal Commission into Aboriginal Deaths in Custody) have a fundamental role in supporting and defending the Act through education, policy development, research, speeches, submissions, media contributions and other activities. The importance of this role is emphasised by the recent display of the courage that can be needed to advance and support what can be unpopular perspectives on the public agenda.

Apart from the regular annual reporting by these two Commissioners, there is a series of important reports by them and the Australian Human Rights Commission stretching back over several decades that contain information that would otherwise not be available,⁵ from the 1991 National Inquiry into Racist Violence, to the National Anti-Racism Strategy and 'Racism. It Stops With Me' campaign, including in between attention to the position of indigenous people,⁶ Muslims, people of African descent,⁷ and international students⁸ among other groups.

The Commission and Commissioner have initiated reviews and assessments of the RDA, most particularly in 1995 and 2008.⁹ These contributions are invaluable, as the Commissioners are the only funded officers that have the position and authority to undertake them, as well as access to much of the relevant information about the Act's performance. Keeping issues to do

⁴ *Maloney v R* [2013] HCA 28.

⁵ These reports can be found at the AHRC web site under Publications and Race.

⁶ *The Suspension and Reinstatement of the RDA and Special Measures in the NTER* (2011).

⁷ *Human rights issues affecting African Australian communities - Western Sydney and Perth Roundtables* (2011).

⁸ *Principles to promote and protect the human rights of international students* (2012).

⁹ Human Rights and Equal Opportunity Commission, *A Review of the Racial Discrimination Act* (1995), Australian Human Rights Commission, *An International Comparison of the Racial Discrimination Act 1975* (2008).

with race relations and the needed changes in understanding, attitudes and practices on the public agenda and defending them when needed is essential to any progress.

Assessing

The Act's task of changing social attitudes to racial discrimination and exclusion, while also providing justice to individuals and groups affected by discrimination, is no minor challenge. In its 40 years it has counted some major advances, contributing to important changes in Australian attitudes and practices, including the adoption in 1995 of the provisions relating to offensive behaviour based on race including s 18C. But apart from those changes and the 1990 introduction in s 9(1A) of a definition of indirect discrimination, the substance of the Act has changed very little since 1975; while understanding of the operation of anti-discrimination laws and of group relations and individual psychology has advanced substantially. Although the Act has, as I said, a number of major achievements, it also has some substantial deficiencies that need to be addressed, after reviewing its achievements.

Achievements

1. Making racial discrimination unlawful

The Act's original and fundamental achievement was to make racial discrimination something that was unlawful – not merely unfair, but also against the law. Before that, you could lawfully refuse someone a job because of their race, or pay them less because of their race, or refuse to serve them in a bar or restaurant. Making discrimination on the basis of race unlawful was revolutionary. It opened up the ability to use unlawfulness as a framework for claims and negotiation within workplaces and all other locations where discrimination had occurred.

The prohibition on discrimination extends to ancillary actions such as victimisation of people involved with a complaint of discrimination, and to discriminatory advertising etc. It also, since 1995, extends to offensive behaviour based on race that occurs otherwise than in private. These provisions provide important protection against public vilification on the basis of race to individual and groups, and provide some capacity to legally acknowledge the importance of speech acts in creating a climate of racial hostility and fear. Due to lack of space, this paper will not further discuss the 'racial hatred' provisions, other than to note that they had been well accepted and uncontroversial until the decision in *Eatock v Bolt*, in which the series of articles involved was held to have failed the standard of reasonable journalism by failing to check facts with the individuals who were the subject of the articles.¹⁰

¹⁰ *Eatock v Bolt* [2011] FCA 1103.

Although the very existence of these prohibitions, especially that of racial discrimination, is important, the Act needs to also provide an effective remedy for racial discrimination wherever it occurs and to help to change systems that allow discrimination to persist.

2. *Overriding discriminatory state and territory laws*

A second extremely important achievement of the Act is the operation of s 10 against discriminatory state (and territory) legislation. Section 10 is one of two unique features of the RDA compared to other Australian anti-discrimination laws, the second being the way that its prohibitions are expressed in terms of a breach of equal enjoyment of human rights. Section 10 provides that:

If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin *do not enjoy a right* that is enjoyed by persons of another race, colour or national or ethnic origin, or *enjoy a right to a more limited extent* than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin *shall, by force of this section, enjoy that right to the same extent* as persons of that other race, colour or national or ethnic origin. (emphasis added).

Section 10 is the closest we have to an equal protection clause, because it can be and has been used to invalidate discriminatory state laws. It does not require any complaint of discrimination to be made to the Australian Human Rights Commission, and provides its own remedy where it applies. It was successful in invalidating state laws designed to defeat native title claims in the *Mabo v Queensland (No 1)*,¹¹ where Queensland tried to defeat the land claim by asserting crown title in the Coastal islands, and in *Western Australia v Commonwealth*¹² where the WA government tried to replace the Native Title Act with state legislation that purported to extinguish native title across the whole of WA and replace it with inferior rights. In both those cases, the effect of s 10 and s 109 of the Constitution was to invalidate the state laws and protect the indigenous title involved.

The scope of s 10 has not yet been fully explored or exploited. Its wording extends to cover laws that do not explicitly use race as a criterion but nevertheless have a disparate impact on racial groups, similar to indirect discrimination claims. For example the essence of the claim

¹¹ *Mabo v Queensland (No. 1)* (1988) 166 CLR 186.

¹² *Western Australia v Commonwealth* (1995) 183 CLR 373.

that the Queensland *Liquor Act 1992* was discriminatory in *Maloney v R*¹³ was that Maloney was treated differently and worse than a non-Aboriginal person would have been treated in relation to her right to consume alcohol at home. It was how the *Liquor Act* was used, not its explicit criteria, that resulted in the inequality of rights that attracted the operation of s 10. It should also be noted that s 10(2) provides that, as in the definition of discrimination in s 9, the reference in s 10 to a right 'includes,' but is not limited to 'a right of a kind referred to in Article 5 of the Convention', so it can extend to denials or restrictions of other rights that are not within the listing of human rights in s 5 of the Convention. This is potentially important in providing protection against discriminatory treatment that affects things that may not fall within the human rights in the Convention, but has not yet been explored.

However, although s 10 is expressed as operating against both commonwealth and state legislation, it has not been effective against Commonwealth legislation. Because s 10 is only legislation rather than a constitutional provision, it can be overridden by later inconsistent legislation, or by later legislation that specifies that s 10 is not to apply. Partial or full limitation of RDA rights occurred with the *Native Title Amendment Act 1998* (Cth) amending the *Native Title Act 1993*,¹⁴ and the *Northern Territory Emergency Response Act 2007*.¹⁵

These examples are clear illustrations of the need for constitutional protection against discriminatory legislation, which would bring Australia in line with virtually every country we like to regard as comparable.¹⁶ This is the challenge of the current debate over recognition of Indigenous people in the Constitution.¹⁷ Resistance to adopting such protection indicates that the Commonwealth is reluctant to allow the courts to decide whether or not its legislation is racially discriminatory. Its refusal to allow assessment of its racial policies and laws leaves the government unaccountable and out of step with every other advanced democracy.

¹³ [2013] HCA 28.

¹⁴ See *Native Title Act 1993* (Cth) s 7(3), discussed in *WA v Ward* [2002] HCA 28; 213 CLR 1; 191 ALR 1.

¹⁵ Although it did not directly roll back RDA rights, the *Hindmarsh Island Bridge Act 1997* (Cth) overrode indigenous heritage protection by removing the power of the Minister for Aboriginal Affairs to declare a protected area under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) in the area in which the bridge was to be built. See Howard-Wagner, D., 'Legislating away Indigenous Rights,' *Law Text Culture*, 12, 2008, available at: <http://ro.uow.edu.au/ltc/vol12/iss1/5>.

¹⁶ There is, of course, debate about how discrimination should be defined and what sort of equality should be pursued, but there is no doubt that some form of restraint over government ability to discriminate in legislation is needed.

¹⁷ See Report of the Expert Panel, 'Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution' (2012); Australia, Parliament, Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Progress Report* (October 2014), *Interim report* (July 2014).

Challenges

In the course of examining the operation of s 10 we have moved into considering the Act's challenges. In this category, along with concern about the need for protection against discriminatory Commonwealth laws, a major issue is inability to effectively enforce the prohibition on discrimination in s 9 and ss 11 -15 of the Act. I argue that these provisions are the Act's weakest link and need reform.

The prohibition on discrimination

The Act's name suggests that the prohibition of discrimination is its central goal. However, it turns out to be the Act's Achilles Heel, as experience has shown that these provisions are very difficult to enforce, and the record of litigation shows that failure is much more frequent than success in discrimination cases under the Act. In this section I will touch on the meaning of the prohibition of discrimination, and then look at the record of litigation.

For these purposes I am looking only at cases that raise issues under s 9 or ss 11-15 of the Act, not cases solely on s 10 or s 18C, which both raise very different issues of enforcement and proof. Due to lack of space, I have excluded discussion of s 18C from this paper.

(i) What does the prohibition of discrimination mean?

The RDA is unique among Australian anti-discrimination laws in using the terminology of human rights to define discrimination. This was necessary in 1975, because it was not clear how closely the RDA would need to follow ICERD in order to be regarded as a valid exercise of the external affairs power. The definition has been problematic, because it refers to a number of concepts in international law that are quite broad and not necessarily easy for Australian lawyers to deal with when they are engaged in proving the elements of a specific case in court, or in negotiations.

Section 9 is too narrow in some respects, because it only prohibits discrimination in relation to the equal enjoyment of the human rights protected by article 5 of ICERD.¹⁸ In contrast, other

¹⁸ Section 9 provides: 'Racial discrimination to be unlawful.

(1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

(2) A reference in this section to a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life includes any right of a kind referred to in Article 5 of the Convention.

anti-discrimination laws like the *Sex Discrimination Act* prohibit any different treatment based on sex in the areas that they cover, such as work, education, provision of goods and services, etc. The RDA's reference to human rights does serve to remind us that we are dealing with a fundamental right, but in practice it operates to add an extra element to the definition of discrimination, so the complainant has to prove that the right affected was a human right within the Convention. The definition does clearly identify as discrimination actions that have either the purpose or the effect of impairing equal enjoyment of such rights, but again, exactly what effects a court would be prepared to recognise is far from clear, and has not been litigated, presumably because of the risks and uncertainty involved. Most discrimination cases under the RDA are brought under ss 11-15, which define discrimination in much more concrete terms without specific reference to the human rights protected by the Convention.

(ii) Indirect discrimination

The indirect discrimination provisions adopted in 1991 as s 9(1A) of the RDA have hardly been used, at least in court.¹⁹ Again, the inclusion of ICERD terms may have lawyers scratching their heads about what is to be proved and how to go about it. All other Australian anti-discrimination laws have been reformed to provide that in relation to indirect discrimination, the onus of proving that the challenged condition or requirement was reasonable is on the respondent, who after all, controls all the evidence about why it was imposed. However the RDA still appears to leave the onus of proving 'not reasonable' on the complainant.²⁰ With no enforceable access to the relevant evidence, this is an impossible task.

(iii) The equal treatment model of discrimination and special measures

The *model of discrimination* in the Act has been interpreted as formal and requiring equal treatment. The High Court has held that s 9 prohibits any differential treatment based on race; it is not a question of looking at whether the distinction being drawn disadvantages or advantages the racial group, but merely whether they have been treated differently because of race.²¹ This means that positive actions designed to improve substantive equality would be regarded as discriminatory under the Act. To survive, they need to be identified as exceptions

¹⁹ There have been no successful indirect discrimination cases under s 9(1A) since 2000, compared to cases under state laws, such as *Awad v Western Sydney Local Health District* [2013] NSWADT 287..

²⁰ RDA s 9(1A)(a).

²¹ *Gerhardy v Brown* (1985) 159 CLR 70. This formal principle of equality, under which any difference in treatment based on race is discrimination, not just those differences that increase inequality and disadvantage, is contrary to the concepts of discrimination and equality in international law, which rest on an idea of substantive equality, and look to the purpose of a distinction to decide whether it is discriminatory; see eg Pobjoy, J 'Treating Like Alike: The principle of non-discrimination as a tool to mandate the equal treatment of refugees and beneficiaries of complementary protection' (2010) 34 *Melb. University Law Review* 181.

to the prohibition of discrimination by meeting the requirements for a valid special measure within s 8(1). For example, in *Gerhardy v Brown*, a prosecution of a person for entry on land without a permit under the South Australian *Pitjantjatjara Land Rights Act* was held to be racially discriminatory in breach of s 9.²² The ability to enforce the *Land Rights Act* was preserved only because it was regarded as a 'special measure.' But special measures according to article 1.4 of ICERD are meant to be temporary measures taken until equality is achieved; it is, at the very least, an odd way to characterise a land rights law, which is presumably intended to have a permanent effect.

The use of special measures can be controversial. In *Maloney v R*,²³ the Queensland Liquor Act's restrictions on possession of alcohol in a prescribed area were held to be in breach of s 10, but were upheld as a valid special measure.²⁴ The Act imposed criminal liability on the supposedly 'protected' group, which is an unusual way to pursue equality for the group. The High Court did not deal directly with the issue of what, if any, consent or consultation is needed on behalf of the group whose freedoms are restricted by the measure. The freedom of the appellants to access alcohol conflicted with the interests or rights of others in the community to live in safety and security, but the special measures exception in the Act does not provide a mechanism through which the tension between conflicting rights can be analysed, like, for example s 7 of the Victorian *Charter of Human Rights and Responsibilities Act 2006*.²⁵

Who is protected?

The Act is expressed symmetrically in prohibiting discrimination based on race, rather than discrimination against minority races and ethnicities, but nevertheless operates largely to protect racial minorities. Most cases are brought by people of indigenous or minority race or ethnicity. However a number of cases have been litigated by white people claiming that they have suffered racial discrimination. *Brandy v HREOC*²⁶ was one such case, in which an Aboriginal organisation was sued for discrimination by a non-Aboriginal employee. The

²² Ibid (n 21).

²³ [2013] HCA 28.

²⁴ As the essence of the claim in *Maloney* was the denial of the right to indigenous people to access alcohol on the same basis as other people, it was rightly treated as discriminatory. The case recognised the discriminatory impact of the law, not just a discriminatory distinction. However the interpretation of special measures in this case was problematic. The case also raised issues of the right to liberty and security of the person for others affected, but use of alcohol in 'mainstream' communities raises this issue as well.

²⁵ No Australian anti-discrimination laws have yet resolved the issue of how to ensure that special measures cannot be used against the will of the group affected. For another example, see *Colyer v State of Victoria* [1998] 3 VR 759. Some laws require consideration of a number of factors before the conclusion can be drawn that a measure is a special measure, eg *Equal Opportunity Act 2010* (Vic) s 12, but this is not a sufficient approach.

²⁶ *Brandy v HREOC* (1995)183 CLR 245.

organisation ran a defence that the enforcement scheme under the Act was constitutionally invalid, and succeeded. This invalidated the early enforcement structure in which the HREOC had acted as a specialist tribunal to hear claims. The only successful racial discrimination case brought under the Act between 2000 and 2004 was also such a case, *Carr v Boree Aboriginal Corporation*,²⁷ brought by a non-Aboriginal employee of the corporation for termination of employment after a policy decision was made to employ only Aboriginal people. The Corporation did not defend the case, although they may have been able to argue that the policy was a special measure.

Enforcement process: risk, need for public enforcement and the problem of proof

The solution to the invalidation of the enforcement process was introduced in 2000, directing all litigation away from the specialist tribunal to the federal courts, which meant that the normal court costs rules would then apply, together with greatly increased formality and the loss of specialist expertise in anti-discrimination law. However, expecting individuals who are on the receiving end of discrimination to enforce the law through individual litigation is not a basis for effective enforcement.²⁸ There are two main problems. First, leaving enforcement up to the most vulnerable and least resourced is ineffective, and secondly, the elements of proof are close to impossible for complainants to make out.

Like all Australian anti-discrimination laws, enforcement rests solely on the shoulders of those who are vulnerable to discrimination, with no assistance by any public agency and limited access to legal aid. This means that less public assistance is provided to enforce anti-discrimination laws than to enforce consumer protection laws. The anti-discrimination and human rights agencies do assist complainants by receiving complaints, investigating claims and defences and organising conciliation processes to help the parties settle their differences, but there is no public assistance for individual litigants after that process. There may be some limited legal aid provision, both from state legal aid bodies or from the Attorney General's fund under s 49PU of the *AHRC Act*, but public agencies do not undertake any of the risk or strategy involved in bringing cases and developing precedents.²⁹

The vast majority of claims are settled before they reach court, with stronger claims are more likely to be settled leaving weaker or more risky claims to be litigated. Conciliated settlements may often provide good remedies, but the process of confidential settlement conceals a great deal of knowledge about the types of complaints brought and the basis on which they settle,

²⁷ [2003] FMCA 408.

²⁸ Gaze, B., & Hunter, R., *Enforcing Human Rights: An Evaluation of the New Regime* (2010, Federation Press).

²⁹ Gaze, B., & Hunter R., 'Access to Justice for Discrimination Complainants: Courts and Legal Representation' (2010) 32 *UNSW Law Journal* 699.

such as what remedies are agreed, and whether those agreements are complied with. This leaves all complainants poorly informed of the landscape in which they are negotiating. For the law to provide better guidance across the wide range of situations to which it applies, we need more publicised court cases to develop a clearer set of precedents, or more publicity about the nature of and remedies in conciliated cases, while preserving anonymity by removing identifying details.

Even then, court enforcement only occurs if the vulnerable are prepared to bring cases, but litigation in the federal courts is far too risky, stressful and unsuccessful to be an attractive remedy for complainants.³⁰ Factors that operate as deterrents include the risk of having to pay costs if the case is lost, the inadequate compensation for their own costs even if successful, the high standard for what has to be proved, and relatively low levels of damages for the personal risks undertaken. Well resourced respondents settle good cases to avoid precedents being developed, leaving weaker cases to be litigated with predictably poor outcomes. This further deters litigation, and as a result the law is left largely unenforced at a public level, and the body of precedent developed tends to focus on weak cases that are lost.

The second major problem in enforcing the law is one that is common to all Australian anti-discrimination laws. The most common complaint of discrimination brought is of direct discrimination, for which the complainant has to prove that the respondent took the disadvantaging action 'because of' or 'based on' the complainant's race. All the evidence of why the respondent acted is under the control of the respondent, and the complainant is unlikely to have any access to it. In practice, complainants very often succeed in showing they were treated less favourably but fail in proving that it was because of their race or ethnicity. In retaining this structure of proof, Australia is out of step with all major comparable countries.³¹ The European Union Directive on the Burden of Proof (which applies to and has been implemented by the UK) requires all countries to provide in their legislation that if a prima facie case is made out and the respondent fails to adduce evidence explaining why the decision was made, that the complainant can succeed. The USA and Canada both have doctrines that require the respondent to prove a legitimate motive once a prima facie case of unfavourable treatment and a racial disparity has been shown.³²

Australia has not moved on this issue while other countries have recognised this injustice, and the *Racial Discrimination Act* (and other anti-discrimination laws) as a result is now outmoded and old fashioned. It does not reflect what has been learned over 40 years about how difficult it can be to prove a discrimination case. Because cases are so hard to prove, there is little

³⁰ Above, n 28.

³¹ Rees, N., Rice, S., and Allen, D., *Australian Anti-discrimination Law* (2nd Ed, 2014) 142-148.

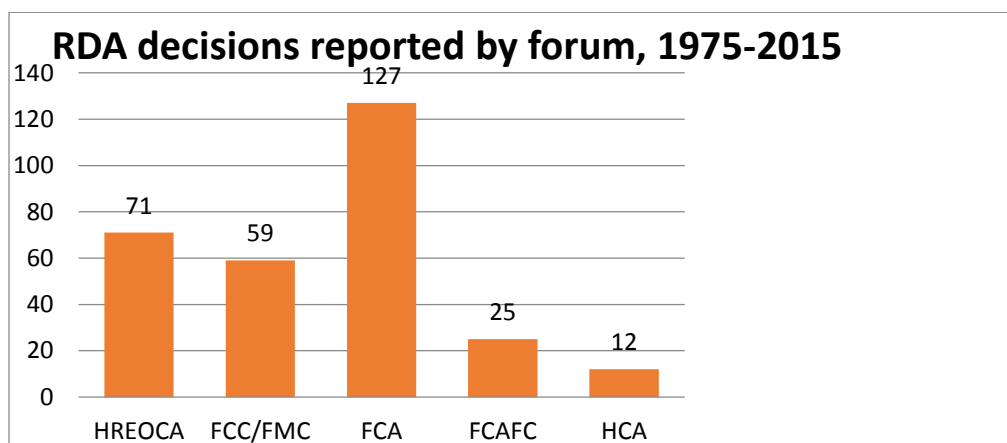
³² *Ibid.*

incentive for respondents to take action to minimise the possibility of discrimination occurring, so the Act's ability to impose pressure for less discriminatory processes is limited.

The enforcement record in discrimination cases

In an article published in 2005 I reviewed the litigation that had occurred in the federal courts under the RDA from 2000 to 2004. I was shocked to find that there was only one successful racial discrimination claim in the federal courts during that time (as opposed to claims of racial vilification under s 18C), and that it was brought by a white employee dismissed by an Aboriginal organisation on the basis of an explicit change of policy to preferring to have Aboriginal employees.³³ As outlined above, *Carr v Boree Aboriginal Corporation* was a case that was not defended by the Aboriginal organisation, and the change of policy was expressly race-based. In other words, for those four years, no person of minority race or ethnicity brought a successful claim of racial discrimination, and the only successful claim was an undefended case based on an explicit racial criterion. Plenty of unsuccessful cases were brought, but failed because they could not prove that race was the basis of the differential treatment.

For this paper I reviewed the reported case law from 2005 to January 2015 complete the record of litigation outcomes from 2000-2014. First, to check the fora in which cases have been heard, all reports available electronically of cases under the *Racial Discrimination Act* were collected. The distribution is shown in the chart below. Because it contains only decisions that could be located electronically, it excludes many decisions from the early years of the RDA which are only available in hard copy.



The HREOC tribunal cases ended in mid-2000. Decisions in the Federal Court (FCA) include both first instance decisions and appeals from the Federal Magistrates Court (FMC)/Federal Circuit Court (FCC), while decisions in the Full Court of the Federal Court (FCAFC) and the

³³ *Carr v Boree Aboriginal Corporation* [2003] FMCA 408.

High Court (HC) are all appeal decisions. Since 2000, the HC has dealt with the RDA only twice, both in cases on s 10: in *Western Australia v Ward* (2002)³⁴ on the *Native Title Act* amendments, and *Maloney v R* (2013)³⁵ on the Queensland *Liquor Act's* alcohol controls.

Decisions in the federal courts since 2000 are further analysed in the Table below. The first line counts all categories of RDA cases from 2000-Jan 2015. These include costs decisions and many cases dealing only with procedural or interim issues. The second line shows the numbers of racial discrimination cases (brought under s 9 and ss 11-15), excluding cases on s 10, s 18C and other provisions such as victimisation which do not deal directly with discrimination or provide a remedy to individuals for unfair discrimination in education, work, goods and services, etc. The third line further breaks these decisions down by excluding decisions that involved only procedural or interim issues such as applications to strike out proceedings or amend claims, thus recording the number of cases in which a decision was made on the substantive claim of racial discrimination. Finally, the fourth line shows the number of those decisions in which the victim of discrimination was successful in their claim. This counts complainants who brought racial discrimination cases and ended up with a decision in their favour from the court. It excludes cases where a discrimination claim may have been successful but the defence of special measures was established.³⁶

Period: 2000-Jan 2015	FMC/FCC	FCA	FCAFC	HC
Forum				
All RDA reported decisions	59	94	17	2
All racial discrimination claims	48	57	6	0
Decisions on substantive racial discrimination claim	35	40	6	0
Substantive decisions in which the complainant succeeded.	5	1	1	

The low numbers of successful cases is just as striking as it was in 2004. To the 2000-2004 tally of one, we can add another five successful racial discrimination claims brought in the

³⁴ (2002) 191 ALR 1.

³⁵ [2013] HCA 28.

³⁶ This was the case in *Gerhardy v Brown* (n 21 above), and *Maloney v R* (n 35 above). Other cases in which the defence of special measures succeeded are reviewed in AHRC, *Federal Discrimination Law Online* at 3.3. They generally involve policies directed explicitly at Aboriginal groups, so they did not involve problems of proving the basis of the treatment.

federal courts (one of which was confirmed on appeal),³⁷ making a total of six successful cases over fifteen years Australia-wide. This raises the question whether the RDA has any effect in eliminating or reducing racial discrimination.

A review of the successful cases suggests that a major reason for this litigation outcome is the failure to deal with the difficulty of proving the racial basis of treatment. Because of the impossibility of proving the basis of the treatment was race, the only cases that have succeeded are those in which an overt racial criterion is used or an explicit racial insult or harassment occurs, which provides clear evidence that race was the basis. There is not one reported case in which an Australian court has been prepared to infer that race was the basis of disadvantaging treatment under s 9 of the RDA.

Of the five decisions reported between 2005 and 2014, three involved overt racial references. In *Gama v Qantas Airways*,³⁸ the complainant experienced explicitly racial harassment by his workmates; on appeal to the Full Federal Court, the claim of racial discrimination was upheld but an accompanying claim of disability discrimination was overturned.³⁹ In *Trapman v Sydney Water*,⁴⁰ an Aboriginal man complained of a racist work environment, and six separate incidents involving explicit racial or colour references. The only allegation of discrimination that was upheld was one that was admitted by his workmate; all the other incidents were denied and the court found them not proved. *Caves v Lewi Chan*,⁴¹ involved an explicit exclusion of a person from a literary association on the basis of race. In *House v Queanbeyan Community Radio Station*,⁴² refusal to allow Aboriginal applicants to join the community radio station was based explicitly on their race and therefore discriminatory. The remaining case was *Baird v Queensland*,⁴³ a 'stolen wages' case in which the Queensland government was held liable for racial discrimination for funding a Lutheran Mission at a rate that did not allow for equal pay for the indigenous workers it employed. All five cases involved clear, explicit racial discrimination. The absence in fifteen years of any case in which the court was prepared to infer that discrimination was because of race in the absence of explicit evidence indicates precisely how limited is the scope of the *Racial Discrimination Act*, and the difficulties of pursuing remedies for discrimination through the Act in the most common situation where no reason for unfavourable treatment is obvious or volunteered.

³⁷ *Qantas Airways Limited v Gama* (2008) 167 FCR 537 in which a decision of the FCA finding discrimination was upheld on appeal by the FCAFC but the scope of the decision was narrowed by overturning the decision that disability discrimination had also occurred.

³⁸ *Gama v Qantas Airways Pty Ltd* (No 2) [2006] FMCA 1767.

³⁹ Above, n 38.

⁴⁰ *Trapman v Sydney Water Corporation* [2011] FMCA 398.

⁴¹ *Caves v Lewi Chan* (No 2) [2010] FMCA 817.

⁴² *House v Queanbeyan Community Radio Station* [2008] FMCA 897.

⁴³ *Baird v Queensland* (2006) 156 FCR 451.

This data suggests that in cases where the racial basis of treatment cannot be proved on clear evidence, there is little point in litigating. However, its effect on negotiations and conciliation is less clear. In settlement negotiations, the shadow of the law means that complainants may have little bargaining power in cases where proving their treatment was because of race is difficult. This further emphasises the need to reform the method of proof, so that where a complainant has established a prima facie case, the respondent is required to provide evidence of the basis for their action, and if they fail to do so, then the prohibited basis can be inferred.

While complainants always have the alternative option of bringing racial discrimination claims under state laws instead, none of the state laws resolves the problem of how to obtain evidence of the respondent's reasons for their action. Given the RDA's status as a flagship law for protection of human rights in Australia, this limited effect is of great concern.

The necessary reforms

This review of the case law indicates that there is a clear and urgent need for more effective enforcement, involving two main steps. First, there is a need for a public agency to ensure the law is enforced and to counter the disparity of resources and bargaining power that often characterises discrimination cases. Such an agency should ensure the development of a set of legal precedents to clarify what the law requires.

Secondly, we need to deal with the problem of proof, especially how the racial basis of an action can be proved. It is widely recognised that it is impossible for a complainant to prove discrimination was based on race when all the evidence about why a decision was made is controlled by the respondent.⁴⁴ This renders the prohibition of discrimination either illusory or limits it only to overt discrimination, which is now an unusual category. The law needs to provide a mechanism that requires the respondent, once a prima facie case has been established, to explain the basis for their decision. A shifting onus of proof has existed in the workplace relations laws since 1905 and is presently found in relation to the adverse action provisions of the *Fair Work Act 2009* (Cth).⁴⁵ There is no reason why a similar approach should not be used in relation to the RDA. The justification for this shifting onus is that the respondent controls all the information needed for the complainant to make out an essential element of their case, and thus should be required to provide some of that evidence when a prima facie

⁴⁴ See eg Hunyor, J., 'Skin-deep: Proof and Inferences of Racial Discrimination in Employment' (2003) 25 Sydney Law Review 535; Allen, D., 'Reducing the burden of proving discrimination in Australia' (2009) 31 Sydney Law Review 579-605.

⁴⁵ FWA s 361, Love, K., Chapman, A. and Gaze, B., 'The reverse onus of proof then and now: the Barclay case and the history of the Fair Work Act's union victimisation and freedom of association provisions' (2014) 37 *University of NSW Law Journal* 471- 506.

case is established. Refusal to provide this mechanism puts Australia out of step with all comparable countries and renders our protection against racial discrimination ineffective.

Conclusion

Because we know much more now than 40 years ago about discrimination, the harms that it causes,⁴⁶ and the difficulties facing efforts to use laws to discourage and reduce it, it is very important that we act on the knowledge that we now have. If, as a society, we really believe that discrimination is not acceptable, then we need to ensure that the law provides a way to combat it and a remedy for those who suffer from it. At present, this is not happening.

Efforts to reform and review the legislation have been initiated several times, but often the moment has passed without any change. The 1995 Review of the Act initiated by the Race Discrimination Commissioner did not proceed to any reform. In 2007 a comparison with international jurisdictions was undertaken, but no reform resulted. The Commonwealth anti-discrimination law consolidation process from 2012 to 2013 became caught up in controversy over freedom of expression and failed to deal with the substantial problems that this litigation record demonstrates. This review of the scant record of successful discrimination claims may help to raise awareness of how little enforcement of this law actually occurs and how difficult it is to develop a broader understanding of the need for reform.

Reform of anti-discrimination provisions is not the complete answer to problems of discrimination in our society – many other avenues, both social and legal, need to be established and developed. For example, treating discrimination more like negligence, by developing a duty on employers and service providers to protect against discrimination and holding them liable for breaches of that duty may be a more effective way to formulate a discrimination claim than the type of implicitly fault-based law we currently have. However, even with other avenues, it is still necessary to provide compensation and relief for the individuals who suffer discrimination. Discrimination is a serious injury suffered by individuals, and it cannot be left unremedied. No amount of proactive prevention, or measures to pursue substantive equality pro-actively, will prevent some cases of discrimination occurring, and we will always need a law that does what it claims to do and makes the prohibition of racial discrimination effective. Reform of the RDA is long overdue.

⁴⁶ See the work of Professor Y. Paradies of Deakin University for detailed analyses of the health impacts of racism.

Part 3

Racial Vilification

Psychological dimensions of racial vilification and harassment

Winnifred R. Louis & Matthew J. Hornsey

Introduction

This paper focuses on applied approaches to the psychology of racial vilification and harassment, and in particular asks the question, ‘How can national legislation such as the *Racial Discrimination Act 1975* (Cth) be aligned with research on preventing harm-doing and mitigating its effects?’ We discuss the psychological research that speaks to the changes to the Act, which were discussed in 2014. On the basis of this research, it is clear that even non-physical discrimination has a harmful impact on disadvantaged groups, beyond physical injury or fear of physical attack. Further, we highlight the perspective that legislation has a normative impact in communicating national standards and values. The paper briefly comments on the challenge of deterring racial vilification, closing with some reflections on psychology and the law.

Non-physical discrimination is harmful

While there is an enormous literature in psychology on discrimination and its antecedents and outcomes, we focus today on one particularly relevant research topic: that of ‘minority stress’.¹ Meyer’s concern is that the physical and mental health of minorities or disadvantaged groups is often lower than advantaged groups. For example, in Australia, it is well known that life expectancy is much lower for Indigenous Australians than for White/European Australians, and rates of mental illness and substance abuse are higher.² These worse outcomes in health are associated with concrete barriers, such as unequal access to health care, and chronic factors associated with disadvantage such as poverty. In addition, Meyer’s ‘minority stress hypothesis’ suggested that experiencing discrimination itself is associated with worse physical and mental ill health outcomes.

¹ Meyer, I.H., (1995). Minority stress and mental health in gay men. *Journal of Health and Social Behaviour*, 1, 38-56. Meyer, I.H., (2003). Prejudice, social stress, and mental health in lesbian, gay and bisexual populations: conceptual issues and research evidence. *Psychological Bulletin*, 129(5), 674-697.

² Example, Paradies, Y., (2006) A systematic review of empirical research and self-reported racism and health. *International Journal of Epidemiology*, 35(4), 888-901; Paradies, Y., & Cunningham, J., (2009). Experiences of racism among urban Indigenous Australians: Findings from the DRUID study. *Ethnic and Racial Studies*, 32(3), 548-573; Paradies, Y.C., & Cunningham, J. (2012). The DRUID study: Exploring mediating pathways between racism and depressive symptoms among Indigenous Australians. *Social Psychiatry and Psychiatric Epidemiology*, 47(2), 165-173.

Early research explored this hypothesis with sexual minorities. The primary analysis tool is a technique called mediation analysis, which we will digress a moment to describe. In this approach, statistical associations among three or more factors can be explored. The goal is to understand whether the relationship between one factor (e.g., being LGBT vs heterosexual) and another (e.g., worse physical or mental health) is explained by a third factor (e.g., discrimination). Mediation models propose causal chains from the distal cause to the mediator to the effect: for example, from being LGBT to experiencing discrimination to greater mental illness. If the mediator explains all of the association between the cause and the effect, that is described as ‘full mediation’. If a mediator explains part of the cause-effect relationship, that is described as ‘partial mediation’.

To make a long story short, the early research with sexual minorities suggested that discrimination was a critical mediator of health and mental health disparities between groups. For example, Mays and Cochran found that LGBT individuals had higher rates of psychiatric illness than heterosexuals, and that this greater risk was fully mediated by perceived discrimination.³ Russell and Joyner found that a higher suicide risk among LGBT individuals, relative to heterosexuals, was partially mediated by perceived discrimination. A mountain of similar studies quickly accumulated.⁴

These data of course are correlational: they rest on the fact that when you ask a group of LGBT people about their mental health and their experiences, those who are more troubled are more likely to say that they perceive greater discrimination. What about the idea of third factor causality? Perhaps some people, such as those who score higher on tests of anxious personality (neuroticism), are both more likely to perceive discrimination and also more vulnerable to mental illness? Or what about the idea of reverse causality, whereby people who are more mentally ill are more likely to attribute negative social interactions to discrimination, and thus to perceive more discrimination as a consequence of their being mentally ill?

Longitudinal data quickly emerged to address these concerns, with the fraught political context around same sex rights and marriage equality particularly helpful to researchers, if not to LGBT individuals. Comparative data revealed that rates of mood disorders, substance abuse, and psychiatric illness increased for LGBT in US states where marriage bans passed,

³ Mays, V.M., & Cochran, S.D., (2001). Mental health correlates of perceived discrimination among lesbian, gay, and bisexual adults in the United States. *American Journal of Public Health, 91*(11), 1869-1876.

⁴ Russell, S.T., & Joyner, K., (2001). Adolescent sexual orientation and suicide risk: Evidence from a national study. *American Journal of Public Health, 91*(8), 1276-1281.

but not for heterosexuals in those states, or for LGBT in states without discriminatory laws.⁵ It also became evident that families of origin and friends suffer from some of the same negative consequences of changes in institutional discrimination: parents and children of LGBT people also show increased anxiety after discriminatory laws passed, for example.⁶ Further, both LGBT and their families showed improved mental and physical health in US states where marriage equality laws were passed.⁷ These changes in mental and physical health following changes in discriminatory laws suggest that the minority stress effects cannot be dismissed solely as explained by reverse causality or third factors.

Further research also established that minority stress effects linking discrimination to health outcomes can be observed in a wide range of disadvantaged groups, not just sexual minorities. For example, discrimination has been linked to Black Americans' greater cardiovascular ill health,⁸ depression, smoking, and substance abuse,⁹ and diabetes.¹⁰ Minority stress models have been applied to study health outcomes for immigrants¹¹ and Asian and Pacific Islanders.¹² In Australia, minority stress has been applied to understand

⁵ Hatzenbuehler, M.L., McLaughlin, K.A., Keyes, K.M., & Hasin, D.S., (2010). The impact of institutional discrimination on psychiatric disorders in lesbian, gay, and bisexual populations: A prospective study. *American Journal of Public Health, 100*(3), 452-459; Rostosky, S.S., Riggle, E.D.B., Horne, S.G., & Miller, A.D. (2009). Marriage amendments and psychological distress in lesbian, gay, and bisexual (LGB) adults. *Journal of Community Psychology, 36*(1), 67, 56-66.

⁶ Arm, J.R., Horne, S.G., & Levitt, H.M., (2009). Negotiating Distance to the GLBT Experience: Family Members' Experience of Anti-GLBT Movements and Policies. *Journal of Counselling Psychology, 56*, 82-96; Horne, S.G., Rostosky, S.S., & Riggle, E.D., (2011). Impact of Marriage Restrictions Amendments on Family Members of Lesbian, Gay, and Bisexual Individuals: A Mixed-Method Approach. *Journal of Social Issues, 67*(2), 358-375.

⁷ Ramos, C., Riggle, E.D.B., Horne, S.G., & Miller, A.D., (2009). Marriage amendments and psychological distress in lesbian, gay, and bisexual (LGB) adults. *Journal of Community Psychology, 38*(4), 647-666.

⁸ U.S. Center for Disease Control. (2004). *Health, United States, 2004*. Hyattsville, MD: U.S. Department of Health and Human Services.

⁹ Williams, D. R., Yu, Y., Jackson, J. S., & Anderson, N. B., (1997). Racial differences in physical and mental health socio-economic status, stress and discrimination. *Journal of Health Psychology, 2*(3), 335-351; Williams, D. R., & Williams-Morris, R., (2000). Racism and mental health: the African American experience. *Ethnicity and Health, 5*(3-4), 243-268.

¹⁰ U.S. Center for Disease Control. (2004). *Health, United States, 2004*. Hyattsville, MD: U.S. Department of Health and Human Services.

¹¹ Bhugra, D., & Ayonrinde, O., (2004). Depression in migrants and ethnic minorities. *Advances in Psychiatric Treatment, 10*(1), 13-17. Noh, S., & Avison, W. R., (1996). Asian immigrants and the stress process: A study of Koreans in Canada. *Journal of Health and Social Behaviour, 37*(2), 192-206.

¹² Yoshikawa, H., Alan-David Wilson, P., Chae, D. H., & Cheng, J. F., (2004). Do family and friendship networks protect against the influence of discrimination on mental health and HIV risk among Asian and Pacific Islander gay men?. *AIDS Education and Prevention, 16*(1: Special issue), 84-100.

the health and experiences of LGBT individuals,¹³ drug-users in NSW,¹⁴ Muslim Australians,¹⁵ and HIV positive men.¹⁶ And of course, discrimination has been linked to worse health outcomes for Indigenous Australians by many, including Paradies and his team.¹⁷

What is the psychological mechanism of non-physical harm doing?

It is intuitive that if a bigot hits you with a brick, you may be bruised, break bones, or even die from a fractured skull. Yet what on earth could be the mechanism for non-physical harm doing from discrimination? If we reflect on our formative experiences in the school yard, many of us learned to respond to verbal taunting with the riposte that ‘Sticks and stones may break my bones but words will never hurt me’. So how can merely perceiving that someone has slighted me based on race, sexual orientation, gender, or ethnicity affect my morbidity and mortality?

To answer, we have to unpack the ‘stress’ part of the ‘minority stress hypothesis’. But first, a brief illustration to allow a readership presumed to be mostly lawyers to undergo a personal experience of vilification. Are you ready? We are now going to attack your cardiovascular fitness....

Please read the paragraph below carefully, imagining that someone that you know well is saying this to you.

I'm not prejudiced against lawyers – my best friend is a lawyer – but we all know that they are among the most disliked, despised professionals in Australia, and there are good reasons for that. Most people believe that lawyers have questionable morals or no morals: that they strive after money and fame without any care for higher moral principles. Lawyers

¹³ Hughes, T., Szalacha, L. A., & McNair, R., (2010). Substance abuse and mental health disparities: Comparisons across sexual identity groups in a national sample of young Australian women. *Social Science & Medicine*, 71(4), 824-831.

¹⁴ Hopwood, M., Treloar, C., & Bryant, J., (2006). Hepatitis C and injecting-related discrimination in New South Wales, Australia. *Drugs: Education, Prevention, and Policy*, 13(1), 61-75.

¹⁵ Every, D., & Perry, R. (2014). The relationship between perceived religious discrimination and self-esteem for Muslim Australians. *Australian Journal of Psychology*, 66(4), 241-248.

¹⁶ Lyons, A., Pitts, M., & Grierson, J. (2012). Exploring the psychological impact of HIV: Health comparisons of older Australian HIV-positive and HIV-negative gay men. *AIDS and Behavior*, 16(8), 2340-2349.

¹⁷ Example, Paradies, Y. (2006). A systematic review of empirical research on self-reported racism and health. *International Journal of Epidemiology*, 35(4), 888-901. Paradies, Y., & Cunningham, J. (2009). Experiences of racism among urban Indigenous Australians: Findings from the DRUID study. *Ethnic and Racial Studies*, 32(3), 548-573. Paradies, Y. C., & Cunningham, J. (2012). The DRUID study: Exploring mediating pathways between racism and depressive symptoms among Indigenous Australians. *Social Psychiatry and Psychiatric Epidemiology*, 47(2), 165-173.

also work long hours struggling for success in their profession, and they often sacrifice true friendships and relationships for that. They often can't care for their family properly, including their parents, their partners or their children. They have among the highest rates of divorce across professions in Australia. Lawyers have very high rates of depression and alcoholism as well.

Ok, how do you feel now? What do you feel in your body? If you feel muscle tension, adrenaline, or flushing, those are symptoms of the body's 'stress response'. Even the shrill quality of laughter can reveal the adrenaline flowing.

The short version of how discrimination harms is that both acute and chronic stress have direct physiological effects which are profound and affect many different body systems.¹⁸ Stress responses help to defend against physical stressors, but they are less effective against non-physical stressors, and in fact may become associated with physical and mental illness.

Simply put, when we are stressed, muscles tense up to help prepare for 'fight or flight', and this change in musculo-skeletal function may become associated with problems such as tension headaches, or secondary conditions like chronic pain or muscle atrophy.

Breathing becomes more rapid, and this can trigger problems in the respiratory system, such as asthma attacks or hyperventilation; it can be linked to exacerbation of illnesses like emphysema.

In the cardiovascular system, stress hormones are released (such as adrenaline, noradrenaline and cortisol), leading to increase in heart rate; blood vessels to the heart are dilated to facilitate physical activity such as running away or fighting, by pumping more blood (which increases blood pressure). In the longer term, this leads to a greater prevalence of hypertension, stroke risk, and heart failure.

The liver produces more glucose for muscle use, which if not used for physical activity, in combination with genetic risk factors, greatly increases your risk of diabetes. (Most people do not know that controlling your stress has as large an effect on blood sugar as medication does.)

¹⁸ To see a more detailed description of the effects of stress, see example, American Psychological Association (2015). Stress effects on the body. Downloaded from <http://www.apa.org/helpcenter/stress-body.aspx> on 19 April 2015.

And there is much more: stress is associated with stomach upsets, bowel trouble, sexual/fertility impacts, and in the long term with reduced immune system functioning. What is important to know is that although we can be stressed by a variety of stressors, from poverty to road traffic or annoying noises, social rejection has been found to have an especially acute, distressing impact. The work of Kip Williams and colleagues has highlighted the power of rejection to evoke distress.¹⁹ In this work, people who are rejected show threatened needs for belonging, self-esteem, control, and even report lower perceptions of the meaningfulness of their existence.

What is striking is that people show distress from rejection even when they do not know, or do not like, the rejector, and even if they are told that they are receiving rejecting messages from a computer which has been programmed to reject them. There are individual differences in rejection sensitivity, but even people who deny or do not believe they are being affected by rejection often show the effects. From an evolutionary perspective, it makes sense to be attuned to rejection: for pack animals, social exclusion is life-threatening. However, regardless of whether we believe that distress from social rejection is partially constructed socially, or that it is based in our genes, it is clear that rejection is distressing and painful.

When we put those two things together, we can see how misguided the ‘Sticks and stones’ lyrics are. From a health perspective there might sometimes be advantages for our long-term well-being, in fact, if we got into a fistfight with a bigot than if they insulted us and walked away smirking. In a physical altercation, the stress response would be put to its intended use and would be dissipated by physical activity rather than lingering on in our lasting frustration, humiliation, higher blood pressure, muscle tension, and the like. Of course there are moral concerns!

In addition, it is important to know that stress has variable effects in part due to the variability in people’s coping resources. So the impact of cumulative stress is not linear: two times the stressors is more than two times the stress. Indeed, additional stressors become disproportionately impactful as the person’s coping is increasingly overloaded. Discrimination therefore has not only a direct effect as a stressor, but also an indirect effect in consuming or co-opting part of the person’s coping resources, magnifying vulnerability to other stressors in their lives. For example, if a woman walks into a stressful meeting after a man has called out ‘slut!’ to her in the street, the impact is not only the immediate psychological humiliation or physical tension that she experiences in the moment of being

¹⁹ Example, Williams, K. D., & Nida, S. A., (2011). Ostracism consequences and coping. *Current Directions in Psychological Science*, 20(2), 71-75.

insulted, but also the subsequent difficulty in meeting the challenge of the meeting, with flow on consequences for work and social functioning.

Together, this research suggests that restricting racial vilification laws to the regulation of physical injuries and fear of physical injuries is misguided: it overlooks significant harmful impacts of non-physical harmdoing, and in particular the harmful effects of race-based insults and rejection.

Laws, norms and discrimination

Turning now to a second topic, let us consider the relationship between laws, norms, and discrimination, and the communicative function of legislative changes.

Social groups have norms, which are standards or rules for behaviour, and this has been the subject of a great deal of research in psychology.²⁰ We use these rules to guide behaviours from when to marry and how many children to have, to what margins to use on a paper and what font and font size to employ.

Importantly, as Cialdini and colleagues pointed out,²¹ there is a difference between descriptive norms, which are groups' perceived standards regarding what people commonly do, and injunctive norms, which are perceptions of what people think should be done. In general, laws create a mixed normative message. We legislate when injunctive and descriptive norms are not aligned: people are not doing what they should, or are doing what they should not. In a given behavioural context, however, new laws communicate new injunctive norms.

We therefore would expect a change in the laws to allow more racial vilification to lead to the perception that leaders (and society) approve more of racial vilification, or are ready to tolerate more racial vilification. All other things being equal, this would in turn increase the problem behaviour, increasing racial vilification in the community. That is one reason to oppose any changes to weaken the racial vilification laws.

²⁰ Smith, J. R., & Louis, W. R., (2009). Group norms and the attitude–behaviour relationship. *Social and Personality Psychology Compass*, 3(1), 19-35.

²¹ Cialdini, R. B., Kallgren, C. A., & Reno, R. R., (1991). A focus theory of normative conduct: A theoretical refinement and re-evaluation of the role of norms in human behavior. *Advances in Experimental Social Psychology*, 24(20), 1-243. Cialdini, R. B., Reno, R. R., & Kallgren, C. A. (1990). A focus theory of normative conduct: recycling the concept of norms to reduce littering in public places. *Journal of Personality and Social Psychology*, 58(6), 1015-1026.

Are vilification laws ineffective and counter-productive? No.

Some may ask the question, if racial vilification persists despite laws that attempt to reduce it, does this mean that the laws are ineffective and should be repealed? This is analogous to asking, if people continue to murder despite millennia of laws prohibiting it, should we repeal the laws against murder? We would say no.

It is not that ineffective laws do not pose a danger of producing a backlash: we think they do. If the passage of the laws, and the debate surrounding the legislative change, leads to the perception that there is widespread racial vilification needing to be regulated, this would promote the perception of a negative descriptive norm. The descriptive norm that racism is perceived as common would then reinforce the racist behaviour, creating an undesirable backlash from the campaign. This undesirable effect would be exacerbated if there is a view that the injunctive norm against racial vilification is not in fact consensually embraced, such that many people (including powerful leaders) turn a blind eye to racism. There is a growing body of research to suggest that communicating misaligned norms such that people are doing X and believe that Y should be done does not promote Y, and in fact may sometimes lower Y.²²

However, in our view the solution is not to avoid the debate, but instead for leaders and media to communicate the norms clearly and unambiguously: Racial vilification is rare, and widely condemned. The laws should be communicated as in line with social values, which polls show to be the case.²³ If so, there is good reason to hope that the laws will function to reduce racial vilification, which further reinforces perceptions that racial vilification is socially disapproved of and uncommon, creating a virtuous rather than a destructive feedback loop.

Deterring racial vilification across the political spectrum

The suite of factors that are needed to address racism is large. Beyond laws of deterrence and punitiveness, where racism is motivated by antipathy toward an outgroup, deterrence needs to include Reconciliation, which is attention to and improvement of the relationships between the groups. For example, measures that improve the status of Indigenous

²² For example, Smith, J. R., & Louis, W. R. (2008). Do as we say and as we do: The interplay of descriptive and injunctive group norms in the attitude-behaviour relationship. *British Journal of Social Psychology*, 47(4), 647-666. Smith, J. R., Louis, W. R., Terry, D. J., Greenaway, K. H., Clarke, M. R., & Cheng, X. (2012). Congruent or conflicted? The impact of injunctive and descriptive norms on environmental intentions. *Journal of Environmental Psychology*, 32(4), 353-361.

²³ Australian Human Rights Commission (2014). Overwhelming majority reject change to racial vilification law. Downloaded from <https://www.humanrights.gov.au/news/stories/overwhelming-majority-reject-change-racial-vilification-law> on 19 April 2015.

Australians or the likelihood that White/European Australians will listen to Indigenous voices should lower racial vilification, all other things being equal.

It is also worth noting, however, that racism can also be motivated by intra-group positioning: I tell you a racist joke which allows us to bond; I might equally well tell sexist or homophobic jokes. My intentions are really to demarcate our exclusive common circle; any antipathy is for outsiders not necessarily for the specific minority group I am targeting. In this communicative dynamic, group members bond because their shared rejection of a target highlights their common values and differentiates them from another group: it might involve denigration of other social groups, as in racism or sexism, but it could be equally bonding to reject certain musical bands to signal gender or generational group membership, such as The Beatles or Spice Girls. Any group-based antipathy can have this cohesion-promoting function – the target is incidental to the social function of the message.

For the purposes of this talk, the point is that positioning racism as more right-wing can reinforce this pernicious secondary dynamic, promoting racism among right-wing people. More broadly, the more that bigotry is put forward as a defining attribute of certain political or social groups, the more that these political or social groups' bigotry potentially is reinforced. In our view, even if left-wing and right-wing respondents differ in the intensity of their feelings about vilification, or in the scope of the vilification they would like to restrict, a common desire to reduce and restrict vilification can be perceived, and if perceived should be articulated. Recognising shared values provides a stronger basis for communication and persuasion. It also prevents an unintended backlash from anti-racist messages from occurring, such that racism is reinforced on the right side of the political spectrum. If willingness to emit or tolerate messages that denigrate group X comes to be seen as a sign of ideological commitment to conservatism that would be a highly undesirable outcome of anti-racist advocacy. Thus, any conversation about racial vilification and changes to the racial vilification act should highlight the common ground that most Australians have in rejecting changes, including most right-wing voters.

We thank the readers for their attention, and invite comment and response, to
w.louis@psy.uq.edu.au .

Freedom and social cohesion: a law that protects both

Peter Wertheim

The argument over s 18C and its related sections in Part IIA of the *Racial Discrimination Act* (RDA) has sometimes falsely been cast as a Manichaeian struggle between supporters and opponents of freedom of expression or, alternatively, between racists and anti-racists. It is neither. Almost all supporters of the legislation readily acknowledge the critical importance to our society of freedom of expression, and almost all opponents of the legislation readily acknowledge that racism is a destructive evil. The argument has been about the appropriate balance to be struck between freedom of expression and the freedom to live one's life without harassment, intimidation or denigration on account of the colour of one's skin or one's national or ethnic origin.

According to the 2011 Census, more than 44per cent of Australia's 22 million people were born overseas or have at least one parent who was born overseas. Australians speak 260 languages and identify with some 300 ancestry groups.¹

It follows that Australia is, and has chosen to be, a multicultural society. Its viability as such demands that the ethnic communities that make up Australian society can live together in peace and harmony. Vilifying individuals or groups because of their race is inimical to that goal, and necessarily undermines Australia's multicultural social fabric in a way that vilification on the basis of other immutable factors does not. As the Australian Law Reform Commission put it more than twenty years ago:

In a multicultural society people are entitled to be protected against serious attempts to undermine tolerance by creating or playing on racial hatreds between groups. Laws prohibiting such conduct protect the inherent dignity of the human person. Peace and social order are underwritten by values such as equality of status, tolerance of a wide variety of beliefs, respect for cultural and group identity and equal opportunity for everyone to participate in social processes which are respected and protected by the law. Laws prohibiting racial vilification indicate a commitment to tolerance, help prevent the harm caused by the spread of racism and foster harmonious social relations.²

¹ 'The People of Australia: Australia's Multicultural Policy', 2011, Department of Social Services, p.2: http://www.dss.gov.au/sites/default/files/documents/12_2013/people-of-australia-multicultural-policy-booklet_print.pdf (viewed 17 August 2014)

² Australian Law Reform Commission, *Multiculturalism and the Law, Report No 57* (1992), para 7.44: <http://www.austlii.edu.au/au/other/alrc/publications/reports/57/> (viewed 17 February 2015)

In using the expression 'racial vilification' I adopt the Macquarie dictionary meaning of the word 'vilify', that is, '*to speak evil of, defame or traduce*'.³ To engage in racial vilification is therefore to speak evil of, defame or traduce a person or group because of their race, colour or national or ethnic origin. Note that the focus of the ordinary dictionary definition of 'vilify' is on the effect on the target person or group, and not on whether there has been any incitement or other effect on the broader community.

Is 'good speech' the only counter we need to hate speech?

There are those who believe that in an ethnically and culturally diverse society the threat to public peace and order posed by home-grown and imported forms of racism too can, in every case falling short of threats or acts of physical violence, be left to sort itself out within the community. Good speech, they tell us, in the form of rational argument and public opprobrium, is invariably the most effective response to racial vilification.

Often, this might indeed be the case. But it is naïve to suggest that racial vilification - any more than defamation of an individual - is *in every case* capable of being rectified or neutralised by rebuttal. Even if it is only in exceptional cases that good speech is ineffective to counter racial vilification, this ought to be sufficient to justify providing the targets of racial vilification with a private legal remedy with which to defend themselves as a last resort, using their own resources. Those who contend that racial vilification can in every case, without exception, effectively be countered by good speech seem to lack knowledge of, and insight into, the nature of racial vilification and the genuineness and seriousness of the harm that it does, as identified in research in Australia and overseas. That harm extends well beyond mere hurt feelings or injured sensibilities.

Harms of racial vilification

The targeting of individuals or groups because of immutable factors such as skin colour, ethnicity or national origin has nothing to do with the expression of opinions or ideas. One can change one's opinions and ideas. One cannot change one's genetic make-up or national or ethnic origin. Racial vilification is therefore a direct attack on the target's humanity and dignity. By desensitising others to the target's humanity, racial vilification impacts negatively on the target's relationships with neighbours, work-mates, friends, acquaintances and others, undermining the good standing of members of the target community with other citizens⁴ along with their basic sense of safety and security.

³ Macquarie Online Dictionary (viewed 17 February 2015)

⁴ Sunstein, C., 'Words, Conduct, Caste', (1993), *The University of Chicago Law Review*, Vol.60, Nos. 3 and 4, pp. 795-844 at p.814.

Racial vilification also has a silencing effect on its targets. The targets of expressions of racism tend to curtail their own speech as a protective measure for a range of reasons.

- The target has a reasonable fear that a response will provoke further abuse.⁵
- In many cases the speaker is in a position of authority over the target, which further restricts the target's belief in his or her ability to respond in a meaningful way, as the target may fear victimisation, or lack the confidence to challenge a person in a position of authority over the target.⁶
- Members of the majority or dominant group in society 'get a lot more speech than others'. Members of relatively less powerful groups within the community do not operate from a level playing field.⁷ Even when a target has the opportunity to respond, it can be in circumstances in which the response will not be given a fair hearing and taken seriously.⁸
- Verbal racist attacks should not be dignified with a response in circumstances where a response would imply wrongly that the attack has a rational basis, or that the target's very humanity is a legitimate matter for 'debate'.

For these and other reasons, it is racial vilification itself, more than the prohibition of it, which operates to curtail freedom of expression.

Speaking back against expressions of racism will rarely change a racist's basic attitudes. Although racism is said to spring from a belief that there are distinct human races with distinctive characteristics which determine the moral and other qualities of their individual members, the belief has no scientific basis. In fact racism is rarely the product of any kind of purely cognitive process. People who propound racist beliefs are almost always motivated by emotional or psychological factors or by a supervening interest, and will therefore persist in

⁵ Delgado, R., 'Words that Wound: A Tort Action for Racial Insults, Epithets and Name Calling' (1993) in Matsuda, M., Lawrence, C., Delgado, R., and Crenshaw, K., (eds.), *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Colorado: Westview Press, 1993) pp. 89-110 at p. 95; and also Matsuda, M., 'Public Response to Racist Speech: Considering the Victim's Story' (1993) in Matsuda, M., Lawrence, C., Delgado, R., and Crenshaw, K., (eds.), *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Colorado: Westview Press, 1993) pp. 17-52 at pp. 24-25.

⁶ *Ibid.*

⁷ MacKinnon, C.A., *Only Words* (Cambridge, Massachusetts: Harvard University Press, 1993).

⁸ Langton, R., 'Speech Acts and Unspeakable Acts' (1993) *Philosophy and Public Affairs*, Vol. 22, No. 4, pp. 293-330, at pp. 314-316

such beliefs even in the face of overwhelming contrary evidence. The so-called ‘reasons’ proffered for racist attitudes towards entire ethnic or national groups are necessarily no more than rationalisations.⁹

Scope of ‘offend’ and ‘insult’

During the 2014 debate about s 18C it was sometimes asserted that the inclusion of the words ‘offend’ and ‘insult’ in that section were a legislative over-reach, going beyond what is necessary to address the acknowledged harms caused by racial vilification. This is also the contention of Senator Day and his supporters who currently have a Bill before the Senate which seeks to remove both words from s 18C. However, this contention is not borne out by an analysis of the case law - of how s 18C has actually operated in practice.

Section 18C does not prohibit generic offence and insult. The alleged contravention must have occurred ‘*because of the race, colour or national or ethnic origin*’ of the complainant. Section 18C therefore does not apply if the alleged offence, insult, humiliation or intimidation arises because of the opinions or beliefs, rather than the race, of the complainant.

Although the judgment of Bromberg J in *Eatock v Bolt* [2011] FCA 1103, has been the focus of many of the criticisms of Part IIA of the RDA, it too confirmed expressly that the contravention of s 18C that was found to have occurred was not due to the overall topic or thesis of the respondents’ publications.¹⁰ The decision was based on a combination of findings of errors of fact and distortions of the truth¹¹ and of a lack of reasonableness and good faith.¹² There was no appeal against these findings. All four grounds in s 18C were found to have been contravened. Even if s 18C had not contained the words ‘offend’ and ‘insult’, the outcome of that case would therefore have been the same.

Section 18C does not place any topic, or side of the argument on any topic, ‘off limits’ for discussion. No case under Part IIA has been decided against a respondent simply because of the subject matter dealt with, or even for the sole reason that the thesis presented might be seen to reflect negatively on a group of people because of their race.¹³

⁹ Polycarp, I., ‘Conceptualizing Racism and Its Subtle Forms’, *Journal for the Theory of Social Behaviour*, Volume 41, Issue 2, June 2011, pp 161–181

¹⁰ *Eatock v Bolt* [2011] FCA 1103, Summary of Judgment, para [30]

¹¹ *Ibid*, Reasons for Judgment, paras [384]-[386]

¹² *Ibid*, para [425]

¹³ For example, in *Walsh v Hanson* (2000) HREOCA 8 (2 March 2000) a complaint had been made against Australian politician, Pauline Hanson, who co-wrote a book contending that Aboriginal people were getting welfare payments undeservedly for which other Australians were not eligible. Regardless of factual and methodological flaws in the book, Ms Hanson was found to have a complete defence under section 18D and the complaint was dismissed.

In my view this is as it should be. To offend or insult a person or group merely by confronting them with ideas or opinions which they perhaps find incompatible with their own belief systems, might hurt their sensibilities, but does not in any way impugn their human dignity. In a free society, ideas of any kind - including religious, political, ideological and philosophical beliefs - are and should be capable of being debated and defended. Accordingly, the anti-religious cartoons published by the *Charlie Hebdo* magazine in France, including the Mohammad cartoons, would almost certainly not be prohibited by s 18C, as offensive and distasteful as many people find these cartoons to be. If *Charlie Hebdo* can lawfully be published in France, whose anti-vilification legal regime, unlike Australia's, extends to religion and includes criminal sanctions, then it can also lawfully be published in Australia.

Objective test

Section 18C does not enforce the subjective, and possibly capricious, perspectives of complainants about perceived harm. Not a single judgment has interpreted the section in that way. On the contrary, the courts have consistently held that the question of whether a publication is 'reasonably likely' in all the circumstances to offend, insult, humiliate or intimidate because of race is to be decided by the court according to an objective test, and not according to the subjective perceptions of the complainant or witnesses. It is not necessary for a complainant to adduce evidence that anyone has in fact been offended, insulted, humiliated or intimidated. Such evidence, if led, is admissible but not determinative. The Court must make an objective assessment of the position itself, so that community standards of behaviour rather than the subjective views of the complainant are the decisive consideration.¹⁴

Community Standard

The judgment in *Eatock v Bolt* has been criticised for defining the relevant community standard as that of the reasonable member of the group which was the target of the alleged contravention, rather than the more generic reasonable person. The criticism is a serious one, but the point was never tested on appeal, possibly because if a broader community standard had been applied in that case it might not have altered the overall outcome.

Mere hurt feelings not prohibited

The case law has also demonstrated the falsity of claims that the words 'offend' and 'insult' provide a remedy for mere hurt feelings and trivial slights. The prohibition in s.18C has been

¹⁴ *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615 at [15]; *Creek v Cairns Post Pty Ltd* [2001] FCA 1007 at [12]; *Jones v Scully* [2002] FCA 1080 at [98]-[101].

found by the courts to be limited to those circumstances in which the offence, insult, humiliation or intimidation has '*profound and serious effects, not to be likened to mere slights*'.¹⁵ This means that s 18C of the RDA has been interpreted by the courts as applying only to the kind of authentic harms which I outlined earlier.

Threat of litigation

Opponents of Part IIA of the RDA have also contended that the mere prospect of a complaint and litigation, with its attendant legal and other costs, is ordinarily enough to cow a publishers into submission before or during conciliation, or even before a complaint is made, and thus to chill public debate, whether s 18C has been contravened or not. This contention seems to me to be singularly unconvincing. Cases brought in the Federal Court or Federal Circuit under Part IIA of the RDA are subject to the same costs regime that ordinarily applies in litigation. Losing parties, whether they are complainants or respondents, pay their own legal costs and also the lion's share of the costs of the successful party. It mystifies me why this should be a more daunting prospect for publishers, especially media corporations backed by considerable resources and teams of experienced lawyers, than for private individual complainants and not-for-profit community groups.

Conclusion

Part IIA of the RDA is not about censorship; it is about accountability.¹⁶ Exercising one's freedoms comes with duties and responsibilities. It involves being accountable when one infringes against another's freedom. Racial vilification is a form of infringement against another's freedom which can and should ordinarily be dealt with by non-legal means. However, a peaceful avenue for redress through the process of the law remains essential when all other means of redress fail.

¹⁵ *Creek v Cairns Post Pty Ltd* [2001] FCA 1007 at [16] *per* Kieffel, J

¹⁶ I am indebted to the Race Discrimination Commissioner, Dr Tim Soutphommasane, for this formulation: 'In bowing to public opinion, PM shows good leadership', *The Age*, August 7, 2014 : <http://www.theage.com.au/comment/in-bowing-to-public-opinion-pm-shows-good-leadership-20140806-100zqo.html> (accessed 18.2.2015)

Why the campaign to reform the Racial Discrimination Act failed

Geoffrey Brahm Levey

Introduction

The Abbott Government's plan to amend Part IIA of the *Racial Discrimination Act 1975* ('RDA'), covering race hate provisions, ignited fierce public debate and ultimately came to nothing. Three enduring factors explain why the Government's proposed reforms were a lost cause, both publicly and politically.

The three factors have to do with the classical liberal position (also known as libertarianism), the civil libertarian position, and the character of multiculturalism in Australia. It is important, I think, to distinguish between classical liberalism and civil libertarianism, two philosophical positions that were often conflated in the pro-reform case. For reasons to be explained, the classical liberal position may be dispatched summarily. The civil libertarian argument and Australian multiculturalism warrant rather more consideration.

Classical liberalism

Classical liberalism endorses small government across the board. It challenges the state regulation of citizens' lives, short of elementary morality, violence and theft. Classical liberals tend to prize one principle or value above all else, and from which other principles, institutions and policies are derived. Within the tradition, however, there is considerable variation regarding which principle is the fundamental one. Candidates include toleration, private property, the free market, and the freedoms of association, conscience, or expression. Prominent advocates of classical liberalism in Australia include the Human Rights Commissioner Tim Wilson and his former employer, the Institute of Public Affairs in Melbourne.

The classical liberal perspective in the RDA debate was always unlikely to resonate much in Australia, which some have called a 'Benthamite society'.¹ The state preceded the formation of civil society in colonial Australia, and has been strong and central in its national life ever since. Australians do not fear government – in fact, they look to it for everything! They might not respect or trust politicians, but this is because they are forever turning to them and being disappointed. We have none of the cyclical popular ambivalence towards government – one side of which is a principled objection to it – witnessed, for example, in the United States. Our

¹ Collins, H., 1985. 'Political ideology in Australia: The distinctiveness of a Benthamite society', *Daedalus*, 114, 1, 'Australia: Terra Incognita?' (Winter): 147–169.

political culture values pragmatic, utilitarian, and efficient solutions to problems. It is not in thrall to tradition, ideology, or principle for principle's sake.

Of course, this does not mean that Australia is bereft of individuals and movements who propagate classical liberalism. Clearly, that is not so. But it does mean that these bodies and arguments cut against the Australian grain. Or to put it less dryly, these ideas are a case of 'pissing into the wind'.

Civil libertarianism

A second position in favour of reform is civil libertarianism. Unlike classical liberalism, civil libertarianism is not opposed to government intervention across the board. Rather, it stresses the importance of certain individual freedoms, in particular, speech, association, press, and religion. The leading advocate of this position in the RDA debate was the Attorney-General George Brandis, though there were (and are) many others.

This more moderate, civil libertarian stance also faced a 'perception' difficulty in the debate. The Attorney-General's insistence on the need to get the 'balance' right between free speech and protection against racial hatred points to precisely what the RDA's anti-vilification provisions were designed to achieve. And for some sixteen years, until the Andrew Bolt case in 2011, they had been widely applauded for achieving it. As almost everyone knows, the 18C provisions render unlawful behaviour that 'offends, insults, humiliates or intimidates' in a discriminatory manner on the basis of a specified group characteristic. And the 18D provisions protect action that is done reasonably and in good faith in artistic, scientific, academic, or journalistic pursuits in the public interest. So balance is integral to the Act.

This shouldn't mean that the current legislation is the last word on the matter. Soon after the racial hatred provisions were added to the RDA in 1995, the then Race Discrimination Commissioner, Zita Antonios, oversaw a review of the legislation. It asked probing questions about whether the right balance had been struck.² Such review should be ongoing. For instance, I have never been a fan of the language of 'offend' and 'insult' in the context of speech regulation. Conceptually, these categories are too sensitive. And even in the case of the RDA, where they operate together with other criteria in the context of discrimination as a 'high bar' for legislative purview, these terms lend themselves to public misunderstanding and/or to being

² Race Discrimination Commissioner. 1995. *The Racial Discrimination Act: A Review*. Canberra: AGPS. Race Discrimination Commissioner. 1996. *The Racial Discrimination Act: A Review. Community Consultation Guide*. Canberra: AGPS.

exploited polemically, as we have seen. Be that as it may, when values are balanced against each other that balance can always be recalibrated in light of particular circumstances.

The problem with the civil libertarians in this case is they are not really interested in balance. Indeed, their whole point is that free speech *should not* be weighed against protection from discriminatory action of this kind. Free speech, they say, is simply too fundamental to liberty and/or to democracy. However, in these matters we always need to ask: What is it that we are trying to do? What are we trying to achieve politically? Is our aim to build the most pristine form of liberal political order imaginable? If so, stop right there, because there is no single account of such an order. Not only are there multiple liberal values – liberty, equality, fraternity, toleration and so on. There are also multiple and rival accounts of each of these values. So we always have to make collective decisions about which liberal or, for that matter, other values we want to prioritise and when, and which interpretation of these values we want to adopt and why. Liberal democracies around the globe answer these questions differently. And every democracy, including Australia, typically answers them variously across cases and over time.

But all this is at the level of principles. Civil or even old-time libertarians might retort that they have another string to their bow. The problem with regulating speech, they say, is not only or even mainly its breach of a fundamental principle. Rather, it is the deleterious consequences that follow from such regulation that is of primary concern. Regulating speech makes people over-cautious about speaking their mind. A so-called ‘chilling effect’ is thus introduced that drains public discourse of authenticity, which in turn undermines democratic legitimacy.

There is a genuine issue here, which often gets lost in the debate.

Those opposed to amending the RDA provisions sometimes challenge the reformers by asking, ‘What is it that you want to say that isn’t already protected under s 18D?’³ It’s a fair question, but it does not quite tackle the issue of the chilling effect. Sensing this, Human Rights Commissioner Tim Wilson rather unkindly called the question a ‘party trick’.⁴ The question assumes that one wants to say something racist, but that is not so, he protested. As an example, Wilson cites his own self-censorship on hearing the boxer Anthony Mundine say that Aboriginality and homosexuality are incompatible according to Aboriginal law. Wilson says that he wanted to ‘harshly criticise’ the basis of Mundine’s comment but because of 18C, he and other non-Aboriginal Australians ‘have to cautiously discuss the topic’ lest they offend Mundine’s ‘ethnic origins’.

³ Soutphommasane, T., 2014. ‘Tim Soutphommasane and Tim Wilson debate Racial Discrimination backflip’, *ABC Radio National Breakfast*, 6 August.

⁴ Wilson, T., 2015. ‘Charlie Hebdo vs 18C: no contest’, *The Australian*, 19 January.

Yet, by framing the issue in terms of ‘harsh criticism’, Wilson’s example only highlights the force of the question he derides. What does he mean by criticising *harshly*? As Justice Bromberg made clear in his decision in *Eatock v Bolt* (2011)⁵, 18C does not prohibit anyone, including non-Aborigines, from critically discussing aspects of Aboriginal identity and tradition. Were Wilson’s ‘harsh’ criticism to be reasonably made – for example, by suggesting that if Aboriginal law condemns homosexuality, it is homophobic and discriminatory in just the way that Christianity, Judaism and Islam traditionally are – there would be no issue even if the remark upset some Indigenous Australians. Were his ‘harsh’ criticism to condemn Aboriginal law and culture in their entirety, Wilson might have a problem. But then he would have succumbed to the rub of the ‘party trick’ question.

The chilling effect is most pernicious *not* when there are things that some people are just itching to say but which would put them in jeopardy under 18C and 18D; discouraging racist and discriminatory behaviour is the very point of these provisions. Rather, the concern about the chilling effect is that regulating speech may discourage people from publicly engaging on controversial issues even when what they have to say may be valuable and perfectly legitimate as far as the law is concerned. The concern, in other words, is that a climate of political correctness is created in which people ‘walk on egg shells’ or worse, simply disengage.

Three points are worth making about this concern. First, the psychology and sociology behind such ‘chilling’ effects are well documented. People do routinely anticipate and assess the likely consequences in managing their choices and conduct. In political science, the theory of anticipated reactions has been used to identify a key dimension of power.⁶ For example, presidents and prime ministers sometimes decline to bring a legislative bill to a vote if they think they lack the numbers to have it passed. Employees will often not vent a grievance at a meeting with the boss if they fear a tirade or retribution. And Joe and Josephine Citizen might not publicly engage on contentious issues if they anticipate a public brawl or legal ramifications. These effects are elementary, mundane, and real.

Second, the idea that ss 18C and 18D have created in Australia just such a generalised and pernicious chilling effect seems fanciful. Those who believe the sections have had this effect must believe that when it comes to our public discourse, Australians have been chilled out since 1995. On this argument, our public discourse has been artificially impoverished through self-censorship and less than robust. Such propositions fly in the face of evidence. For example, when John Howard came to power in 1996, there was much talk by him and his government of how for too long Australians had been living under the scourge of political correctness, unable or unwilling to speak their mind for fear of offending minorities. Although

⁵ *Eatock v Bolt* [2011] FCA 1103

⁶ Bachrach, P., and Morton S. B., 1970. *Power and Poverty: Theory and Practice*. New York: Oxford University Press; Lukes, S., 1974. *Power: A Radical View*. New York: Macmillan.

Part IIA was added to the RDA in the year prior to Howard's coming to power, the next half-decade saw the phenomena of Pauline Hanson and Hansonism. Nothing in the RDA chilled people from speaking their minds, often in ugly ways.

Third, whatever else may be said, those who believe 18C does have a generalised and pernicious chilling effect surely need another poster boy for their cause than Andrew Bolt. As one of the most read columnists in the country and a man who, in the aftermath of his entanglement with the RDA, was handed his own public affairs television program, Bolt is hardly 'Exhibit A' of the way 18C silences people. Again, there is little wonder that the pro-reform case lacked public support.

Australian multiculturalism

If our goal is not to build an impossibly correct liberal order, then what? Another aim might be instead to build a liberal democracy, in our own fashion, that can make a multicultural society work. I believe this aim has defined the Australian project, albeit in fits and starts, since the 1970s.⁷ This brings us to the third factor, the character of Australian multiculturalism.

The Institute of Public Affairs, legal academic James Allan, and other commentators made much of Canada's repeal in 2013 of a race hate provision (s 13) in the *Canadian Human Rights Act* (1985).⁸ 'If Canada could do it', they chanted, 'so should we!'.⁹ Indeed, comparing the Canadian and Australian cases *is* highly instructive here.

There are some similarities. Both countries revisited their racial hatred laws in the wake of controversial cases involving conservative commentators. In Canada, it was Mark Steyn and Ezra Levant.¹⁰ In Australia, it was Andrew Bolt. In both countries, the reform initiatives happened on the watch of federal conservative governments. Both countries have criminal law provisions against incitement to violence against particular groups. There are also differences. Canada's reform came through a private member's bill and not through government initiative, as was the case here. And, importantly, Canada's s 13 treated racial hatred only as transmitted on the Internet. It was not a general protection against discriminatory action, including speech, as in 18C of the RDA.

But the biggest contrast was in the reactions of minority groups in the two countries to the proposed repeals. In Canada, there was no concerted opposition by minority groups to the

⁷ Levey, G. B., (ed.). 2012. *Political Theory and Australian Multiculturalism*. New York: Berghahan Books.

⁸ *Canadian Multiculturalism Act*,

⁹ Allan, J., 2014. 'Craven cave in on free speech', *The Australian*, 6 August.

¹⁰ Moon, R., 2010. 'The attack on Human Rights Commissions and the corruption of public discourse', *Saskatchewan Law Review*, 73: 93-129.

repeal. Even the Jewish community, to whom Prime Minister Stephen Harper had given an earlier undertaking not to repeal s 13, let the issue pass quietly. In Australia, however, the story couldn't be more different. Ethnic and religious minorities joined forces and mobilised as never before against the proposed changes. Why such different responses? Why were Australian minorities so animated about the federal provisions when our states and territories retain anti-vilification laws? I would suggest that the different reactions are largely due to the very different experiences of minorities in the two countries, and to the latter's different approaches to multiculturalism.

Canadian multiculturalism grants minorities and cultural diversity a level of symbolic and practical acceptance unknown in Australia. It does so, to be sure, out of its own strategic interests in trying to accommodate and placate Québec. The Canadian national imaginary is so inclusive, not least because referring to 'British Canada' or 'English Canada' as a core culture is politically unacceptable. Nevertheless, in all sorts of ways, including enshrining multiculturalism in the *Canadian Multiculturalism Act*¹¹, and in s 27 of the *Canadian Charter of Rights and Freedoms*¹², Canadian multiculturalism embraces immigrant and visible or religious minorities like nowhere else. With that kind of acceptance and support, minorities in the rest of Canada (ie. outside Quebec) did not feel particularly threatened by the repeal of s 13.

Now, compare Australia. Our first national multicultural policy *National Agenda for a Multicultural Australia*¹³ stated that '[o]ur British heritage...helps to define us as Australian'. That's our multicultural policy speaking, not David Flint and the monarchists! Australian multiculturalism operates on what the *Québécois* sociologist Gérard Bouchard¹⁴ calls a 'duality paradigm', that is, a majority culture that is recognised as foundational and which enjoys considerable precedence, and then the rest. We may call it multiculturalism, but our multicultural policy has never been about disclaiming a core culture, minority cultural maintenance, group rights, or even celebrating diversity for diversity's sake. Rather, Australian multiculturalism is primarily concerned with *common* citizenship rights and therefore with non-discrimination. It is essentially a liberal democratic attempt to check the excesses and exclusions levied by a dominant Anglo-Australian majority.

On its 40th anniversary, it is appropriate to recall Gough Whitlam's¹⁵ words on the passing of the RDA. The *Racial Discrimination Act 1975* (Cth), he said,

¹¹ *Canadian Multiculturalism Act*, R.S.C. 1985.

¹² *Canadian Charter of Rights and Freedoms. Constitution Act, 1982* (Can.).

¹³ Office of Multicultural Affairs [OMA]. 1989. *National Agenda for a Multicultural Australia*. Canberra: AGPS at pg 51

¹⁴ Bouchard, G., 2011. 'What is Interculturalism?', *McGill Law Journal*, 56: 435-468.

¹⁵ Whitlam, Hon. E.G., 1975. Launch of the Office of the Commissioner for Community Relations, Canberra.

wrote it firmly into the legislation that Australia is in reality a multicultural nation, in which the linguistic and cultural heritage of the Aboriginal people and of peoples from all parts of the world can find an honoured place.... The Act, inadequate as it is in many respects, is still the best guarantee that Australians have ever had that the dark forces of bigotry and prejudice which have prevailed so often in the past will never again be able to exercise influences far greater than their numbers in the community.

The Old Man, as Noel Pearson¹⁶ might say, got this right. Ethnic minorities' sense of acceptance and belonging in multicultural Australia is still largely tied to the legal protections against discrimination. The anti-vilification provisions of the RDA are considered to be a vital extension of the principle of non-discrimination and a public sign of minorities' social acceptance.

That is why minorities in Australia mobilised so concertedly against amending 18C, despite still being largely protected by anti-discrimination laws and multicultural policies at the state level. For them, at stake was the message that a dilution of the federal protections would send about their standing in modern Australia. It would throw into question whether they still retained, in Whitlam's phrase, 'an honoured place'. The campaign to reform the RDA may have been waged on civil or old-time libertarian principles, but the fear was that watering down the anti-vilification provisions would reopen the door to cultural-nationalist stridency and to racial and ethnic prejudice.

When the Attorney-General stood in the Senate chamber and defended his reforms with those now infamous words, 'People do have a right to be bigots, you know!', he was not only channelling Ronald Dworkin¹⁷, whose lectures he attended (and evidently took notes on) during his Oxford days. He was also painting a vivid picture of the kind of Australia that minorities and, seemingly, the public at large thought had been left behind long ago.

¹⁶ Pearson, N., 2014. 'Noel Pearson's eulogy for Gough Whitlam in full', *The Sydney Morning Herald*, 5 November.

¹⁷ Dworkin, R., 1977. *Taking Rights Seriously*. Cambridge, Mass.: Harvard University Press. Dworkin, R. 2006. 'Even bigots and Holocaust deniers must have their say', *The Guardian* (UK), 14 February.

Part 4

Cyber Racism

Hunting for the Snark and finding the Boojum - building community resilience against race hate cyber swarms

Andrew Jakubowicz¹

Hunting for the Snark and finding the Boojum

'The Hunting of the Snark: an agony in eight fits' was written by Lewis Carroll, creator of Alice in Wonderland, in 1876, and details the search for the elusive Snark, guided by an ornate but blank map of the globe. At the poem's end the Snark turns out to be its fearsome alternative, the Boojum, and nothing is as it seems. Trying to track cyber racism has many similar qualities, including the continuing struggle over what it is, how legitimate categories of race may be, and where are the lines 'we should not cross'?

This paper makes the following argument: race is a social construct with real but variable consequences, engaging (or dis-engaging) perpetrators, targets, bystanders and by-passers. With the exponential increase in interactions facilitated through the spread of the Internet and related electronic communication spaces, 'race' multiplies as a trope that differentiates within and between audiences, producers, and other net-travellers. Even given the transient and often momentary intersection of net-users, 'race' has the potential to survive as a sticky meme around which users can cluster, forming in the process an e-community. 'Race hate cyber speech', the focus of this paper, thus serves as a mobiliser for e-community development, and can thus be subject to analyses of community and counter-community development existing in the 'off-line' world. Even so, the perpetrators and their strategies may be quite elusive, offering themselves as apparently innocuous Snarks simply proffering their views of the world as free speakers, while in practice, they may be constituting hate swarms with all the brutish malevolence said to be characteristic of the Boojum.

The paper begins by reviewing the ways in which public debate and online speech use 'race' to identify and distinguish individuals and groups and both constitute and represent consequential power hierarchies. Then, utilising a number of the submissions made to the 2014 Australian Attorney General's consultation on amendments to s 18C of the *Racial Discrimination Act 1975* (Cth), a taxonomy is developed of 'race' speech as practice in Australia – in both its affirmative and derogatory dimensions.

¹ The research is supported by the Australian Government through the Australian Research Council, in linkage with the Australian Human Rights Commission, VicHealth and FECCA. Additional research by Matthew Johnson, Hazel Maxwell, James MacCallum.

Having created a working frame for determining the ways race can be used, a more detailed investigation probes 'racial' locations in cyberspace, using examples to illuminate how race emerges as a sticky pad for the attraction of and clumping of internet users, not all of them self-aware racists. Examples of hate e-communities are then probed to understand how they develop into hate speech swarms and link up with other swarms. The method used allows an identification of community leaders and development strategists in what appears to be a rather more de-centralised and non-hierarchical organisational model than that usually associated with offline racist organisations.

While on-line hate organisations and networks grow, counter-communities are called into existence to defend against or circumvent the hate-swarm. This process of resilience parallels other resilience dynamics in the face of those traumatic confrontations that tend to isolate individuals and fragment looser sets of relationships. Projects funded by the Australian Government under its counter-radicalisation program, an exercise abandoned in 2013 - 2014, provide a sense of the range of ways the state has supported strategies of resilience, and the types of outcomes perceived to be of value.

The paper concludes by examining how e-media can be utilised to build community resilience in the face of swarming cyber-hate practitioners.

Who or what is racist?

In her 2013 review of research on Internet racism, US scholar Jesse Daniels proposes that 'race' has in many ways structured the internet². She demonstrates that race is an omnipresent category of distinction in cyberspace, produced through modes of racialization of participants and issues, while in the process both become carriers and vectors of racism as discourse and embodied practice. As Bourdieu argues, 'race' is a way of representing the real world of human group interactions, a principle of vision and division; moreover reflexivity and thus self-awareness of the use of race is a necessary element in transforming participants from 'the agents of action into something more like the true subjects of action'³.

While there are many definitions of 'race', ranging from the biological to the social⁴, we are interested in how people who are engaged in public debates about the regulation of and response to racism would use the idea of race and exemplify the practices of racism. The most

² Daniels, J., 2013, 'Race and racism in Internet Studies: A review and critique', *New Media and Society*, vol. 15, no. 5, pp. 695-719.

³ Emirbayer, M., & Desmond, M., 2012, 'Race and Reflexivity', *Ethnic and Racial Studies*, vol. 35, no. 4, pp. 574-99.

⁴ Roseman, C., 2014, 'Troublesome Reflection: Racism as the Blind Spot in the Scientific Critique of Race', *Human Biology Open Access Pre-Prints*, vol. 67.

contemporary Australian reservoir of such material can be found among the 5500 submissions⁵ made to the Attorney General's review of s 18C of the *Racial Discrimination Act 1975* (Cth) in 2014. As Melissa Castan notes on the Castan Centre site, despite specific agreement by many authors the Attorney General's Department refused to make their submissions public. The Attorney's decision confronted this researcher with a dilemma over how to access this data source.

Using the *Freedom of Information Act 1982* (Cth), we sought access to all the submissions that authors had approved for release. Following negotiations, we were told that to find out what this figure might be would incur a charge – we paid. We were then told that just over 100 submissions could be identified as fitting the criteria. We thought, 'better than nothing'. We then received fifteen submissions from the Department, most of which were also online, with no rationale as to why these were chosen and others not included. Using other online sources we discovered another sixty or so, ending up with some seventy documents. The majority (sixty-four) of the submissions that we collected had opposed the changes. Thus, they included quite robust discussions and examples of racism, which they feared that changes to the law would allow to flourish.⁶

Given that there is debate over the meaning of 'race' (between those who see it as a biological characteristic with no social implications, to those who see biology as generating certain social consequences, to those who argue that race is a social construct based on political and economic relationships of power, to those who focus on the differences between cultures and their conflicts), our emphasis will be on racism. By racism we mean a pattern of ideas, social structures, institutions and behaviours that irrespective of the concept of race drawn on, seeks to suppress, exclude, exploit or damage those determined to be of an 'other' or 'lesser' race. Section 18C classes race vilification (that is the language used to promote or inflict racism) into one of four categories, from language that insults, offends, and humiliates to intimidate. In presenting their cases, the opponents point to the negative personal, social, health and political consequences of racism. Unrestrained racial vilification would, the composite picture suggests, have very dangerous social outcomes, in particular by undermining the hard-won yet still fragile civility of contemporary multiculturalism. One submission recalled the speech by the then Prime Minister Gough Whitlam in 1975:

There is a need to spell out in an enduring form the founding principles of our civilisation, and in particular the principle that all Australians, whatever their colour, race

⁵ Castan Centre for Human Rights Law, *Freeing the RDA 'Free Speech' submissions* (2014) <<http://castancentre.com/2014/06/26/freeing-the-submissions/>>.

⁶ We did reflect that a proposal ostensibly promoted to increase free speech should make accessing the public debate on the issue so restrictive.

or creed, are equal before the law and have the same basic rights and opportunities...The main sufferers in Australian society, the main victims of social deprivation and restricted opportunity, have been the oldest Australians on the one hand and the newest Australians on the other. We stand in their debt. By this Act we shall be doing our best to redress past injustice and build a more just and tolerant future.⁷

As Whitlam suggests, though the Act itself is less clear in this regard, *Racial Discrimination Act 1975* (Cth) seeks to ensure that Australians who demonstrate social differences based colour, race and creed (religious beliefs) have equal rights and opportunities. Reflecting this view, we use 'racism' to encompass a set of practices, drawing together ideas, discourses and behaviours, recognising that few users of the term seek to limit its use to the confined definitions of race to which we refer above. Rather racism is used in the public arena to encompass ethnicity (cultural practices where skin colour may not be relevant), religious beliefs and practices (especially in relation to Jews and Muslims), national origins, and indigeneity.

Racist vilification refers, at the very least, to an emotional pain, either short-lived or ongoing, sufficient to cause some level of trauma. Race hate speech though extends beyond the level of intimidation, to the advocacy or instigation of violence against a target individual or group. We are referring here not simply to opinions (the supporters of the Attorney's changes to 18C wished to remove the expression of opinions from any constraint), but rather to behaviours (action on the internet is a behaviour requiring volition, use of scarce resources, and awareness of audience and some desired impact).

Finding racists in Cyberspace

Having developed a working definition of racism, we are then able to delineate the cyber space in which 'racists' might operate. We expect that cyber racists might be found in discussions or 'liking' or lurking on sites and topics in which racism in the broadest sense is developed and communicated. Some sites, those that most strongly fulfil criteria of intentionality, targeting, vilification and instigation of on-line or off-line race hate behaviours, can be quite readily identified. As these criteria become less evident in sites, naming them as race hate and their denizens as racists becomes more contentious, especially in locations such as comments lists attached to the online writing of populist demagogues.

⁷ Quote in Australian Lawyers' Association submission 2014, 4-5

Internet communities are constantly forming and dissolving, people interact, stick around or depart, with some sites stagnating and decaying, while others revitalise or rapidly expand, going viral. The community metaphor helps us understand the process of cyber racism as a continuum. These are communities that seek to traumatise their targets either directly or indirectly, either more or less consciously. Their informal members range from the activist core, which advances the arguments, defends the space, and often advocates off-line action, to the regular attendees who gain sustenance from community membership, to the occasional participants, to the lurkers, and accidental visitors.

As Jesse Daniels has suggested, the Internet has grown into a space which is highly racialised, with racially inflected distinctions ranging from those that advocate significant hate crimes, to those which act as community development sites for self-defining racial communities. So the racialisation of cyber space locations do not mean that sites or their participants are racist, or at least not intentionally so. Nor does the promotion of the value of a particular race to its members necessarily draw the label of racist to it. Nor does the use by self-defined racists of a public platform such as Google or Twitter mean that these providers are necessarily racist; however the way in which they respond to citizen complaints may point to what extent they may perceive racism should be managed by the provider in terms of social order.

Racism occurs on the Internet in many different locations. Given its vast expanse, a method is required that ensures an adequate coverage of the range of events and circumstances. Categories will be required that ensure a diversity of events, capture the range of targets, the means through which racists operate, the organisations or groups involved, the targeted communities, whether they are transient or more sedentary, and the degree of privacy they achieve, and if possible, the strength or weakness of the communal ties. In keeping with the later part of this paper, we also wish to understand the dynamics and strength of resilience by target communities in the face of the trauma they have experienced. Community organisations seeking to build resilience, such as the Online Hate Prevention Institute, All Together Now, the Human Rights Commission, Anti-Bogan and Indigenous, Jewish and Muslim groups, can also point out Internet activities that they believe are particularly corrosive in terms of racism.

Results from the online survey by the Cyber racism and community resilience project led by Kevin Dunn and Yin Paradies, have demonstrated that the main targets of cyber racism are Indigenous Australians, people from the Middle East, Africans, and Muslims and Jews. Thus, all the diverse categories are in play at the same time, but in different spaces. Event-based analysis allows specific issues to be tracked in different sites and different media, while also providing lines of inquiry that can explore the most active participants in issues, and their links across sites and to other individuals and groups. Each provider/conveyor, such as Facebook, Twitter, YouTube, Instagram and websites, exposes different types of data, each requiring different analytical tools and different strategies of analysis.

For the purposes of this paper, we wish to examine one issue and the key cyber protagonists involved. In 2014, considerable public interest was focused on the decision in Bendigo Victoria of the Council to approve the application by a local Muslim organisation to build a mosque in the area.⁸ A number of anti-Islamic groups joined the campaign, which has since blossomed during 2015 to seek the sacking of the Council. The anti-Mosque group created a Facebook community site called 'Bendigo Mosque – reasons to oppose it'. New associations have also been promoted with Reclaim Australia and its spoke-person,⁹ and have included posts by the host criticising multiculturalism.

The site has been chosen not only because of its anti-Islamic stand, its pan-state following, its links to other anti-Islamic sites and its proliferation of posts, but also because the host has argued that it is neither racist nor intolerant of religions, pointing to Islam as an ideology, not as a race or religion. Cultural practices ostensibly associated with Islam, anti-Semitic statements by some radical Islamic clerics, and other material that claims to see in Islam the end of European civilisation in Australia, have been marshalled in an attempt to raise the ire of locals against the mosque. At the time of writing an appeal remains pending to the Council's decision.

The site provides a case study of the way in which a race hate speech cyber-swarm can develop and grow. Prior to the Mosque proposal becoming public in January 2014, the site did not exist. It begins with a concern about the impact of Muslims on the harmony and beauty of Bendigo, then begins to grow as the founders find and build relationships with more overtly Islamophobic sites. It rapidly introduces Australian nationalist images (a fist inside an Australian flag glove), and soon begins to build its following and its introduction of global anti-Islamic materials. By April, it has drawn in posts from the Patriots Defence League Australia, and has become a major channel for anti-Islamic information. A year later, the site had over 3,000 likes, and was strongly involved with support for the Reclaim Australia rally.

The site therefore provides a good example of the growth of an online community built around the use of hatred of Muslims in cyber space as a means of mobilising offline activism. The Charlie Hebdo events in Paris in January 2015 provided the opportunity for the host to post what was to become one of the most 'liked' comments, on 6 January. Using that post we have explored the pattern of 'likes' and the links between them, using the Facebook applicant NetVizz and the data visualisation software Gephi. Essentially, NetVizz creates a spreadsheet

⁸ The Online Hate Prevention Institute, 'Bendigo stands up to Islamophobia' (2014) <<http://ohpi.org.au/bendigo-stands-up-to-islamophobia/>>.

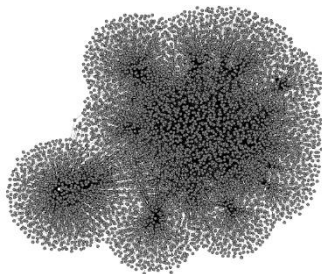
⁹ #ReclaimAustralia organised a string of rallies across Australia on Easter Saturday 2015, many of which resulted in violent conflicts with anti-racist groups. The organisation's spokespeople denied they were racist, or even anti-Muslim; rather they opposed radical Islam that did not fit with Australian morals.

of 'likes' and how they link out to other likers of the comment (two circles of contact), while Gephi processes that data into patterns that allow visual representation.

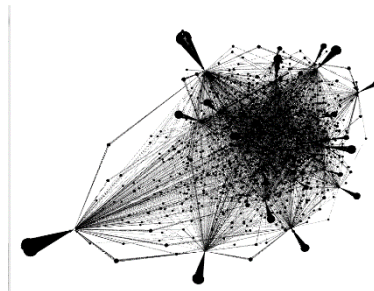
Nodes	Id	Label
Bendigo Mosque - reasons to oppose it updated their cover photo.	293	Bendigo Mosque - reasons to oppose it updated their cover photo.
A vote for Labor is a vote for Islam. I wonder if the many Labor voters in Bendigo ever thought about this when they voted in	913	A vote for Labor is a vote for Islam. I wonder if the many Labor voters in Bendigo ever thought about this when they voted them in
user_100003114132106	00a	user_100003114132106
user_678501523	570	user_678501523
user_100000970674001	05d	user_100000970674001
user_1344108003	90b	user_1344108003
user_100003023885482	122	user_100003023885482
user_1472300909	04b	user_1472300909
user_1150617556	632	user_1150617556
user_100000985573130	830	user_100000985573130
user_1449146396	4b0	user_1449146396
GET ONTO IT! THE REBELLION IN BENDIGO STARTS NOW! Tag everyone you know locally to get onto these local sites. This	077	GET ONTO IT! THE REBELLION IN BENDIGO STARTS NOW! Tag everyone you know locally to get onto these local sites. This mosiq
user_76705359972738	061	user_76705359972738
user_731107620	e44	user_731107620
Bendigo Mosque - reasons to oppose it added a new photo.	4d4	Bendigo Mosque - reasons to oppose it added a new photo.
user_728998872	f9b	user_728998872
user_1790687199	2ca	user_1790687199
user_1406656864	aad	user_1406656864
user_10000191177890	81b	user_10000191177890
user_742144027	565	user_742144027
Bendigo Mosque - reasons to oppose it added a new photo.	6d3	Bendigo Mosque - reasons to oppose it added a new photo.

NetVizz data sheet

The first two images show the process under development. The first plot chart (Data cloud 1) points to large numbers of people with few other links to each other, clustered around a small number of regular commenters. The second chart forces the cloud to compress around nodes of active commenters, where it can be seen that a few key commenters (about 15 of the 270 or so) tend to be the most active posters to this page.

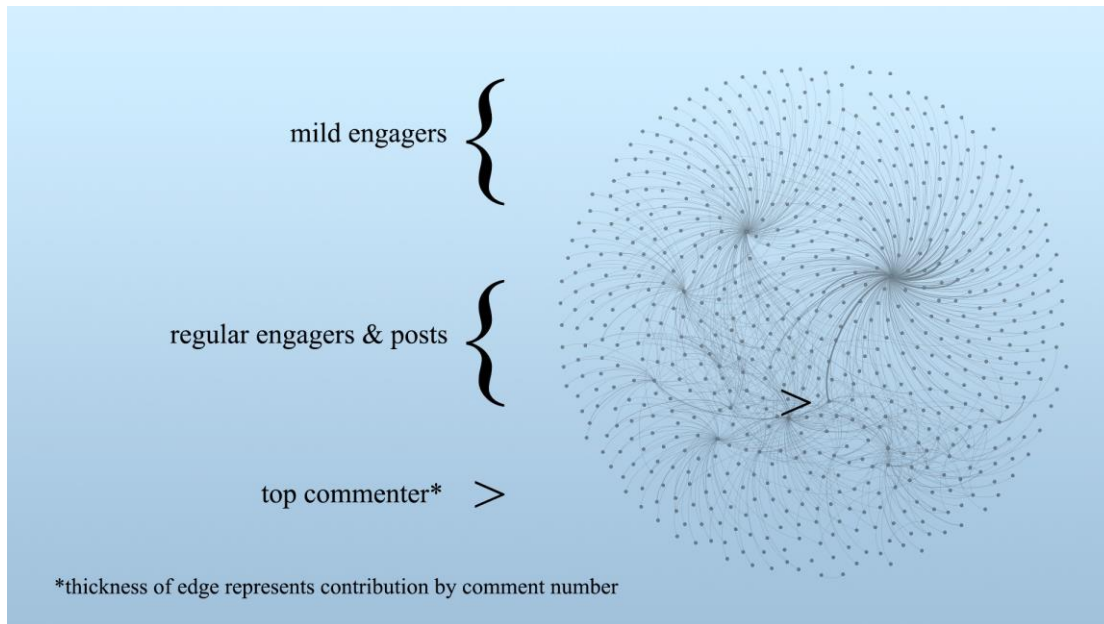


Data cloud 1



Data cloud 2

When this data is stretched to enable us to distinguish mild, regular and intense engagers, the diagram resolves into a swarm. The thicker lines and their intersection from the middle down to the bottom of the diagram, shows those top commenters and the numbers of their comments. We can see here that the page hosts and a small number of other posters play a key role in attracting the mild engagers who form the bulk of their numbers but a minority of their contributors. The challenge for the host is to keep the page on message, while continuing to sustain the interest of the mild engagers. This page has been quite successful at doing this, but only at the cost of bringing in more intense Islamophobic material, and effectively mortgaging the narrative to the larger and more driven anti-Islamic partners.



Data cloud 3

A recent development since these images, has been the anger and the outrage around a tweet by an anti-Mosque councillor to a pro-Mosque member of the public that showed a picture of a mutilated female genitalia, the alleged future consequence of any Muslim presence in Bendigo. Two Change.org petitions are now running, one supporting¹⁰ and one condemning the councillor,¹¹ with support running at 2:1. The Change.org pages provide lists of the supporters and can be used in time to explore the range of attitudes and approaches to the relationship between freedom of speech, intolerance of Islam, and support for multiculturalism. The support for the Councillor is global, including anti-Islamic posts from Germany, while opposition to her perceived Islamophobia is concentrated in the local Bendigo community.

Community resilience

The focus on the relationship between online racism and local community activism leads to the final element in the paper: the concept of community resilience. Two broad trajectories of resilience intersect in the sphere of cyber racism. Resilience in community development terms refers to the capacity of populations in localities to recover, following serious trauma. In most

¹⁰ Change.org, 'We the undersigned residents and interested parties of Bendigo formally support Elise Chapman's position as Councillor on the Bendigo City Council and insist that she does not resign or be removed from her position' (2015) <https://www.change.org/p/to-bendigo-city-council-we-the-undersigned-residents-ratepayers-and-interested-parties-of-bendigo-formally-support-elise-chapman-s-position-as-councillor-on-the-bendigo-city-council-and-insist-that-she-does-not-resign-or-be-removed-from-her-position?just_created_and_shared=true>.

¹¹ Change.org, 'Bendigo Council Remove Elise Chapman from Council' (2015) <<https://www.change.org/p/bendigo-council-remove-elise-chapman-from-council>>.

of the discussion, the trauma tends to be the consequence of natural calamities, such as wild fires, floods, earthquakes and storms.

Communities become traumatised as their infrastructure, social networks and economic capacity is ravaged, often accompanied by death and injury on a significant scale. In Australia an additional dimension has been created, that of resilience in the face of the danger of youth radicalisation. Thus communities said to be at risk of such threats have been identified as requiring support, mainly aimed at the counter-radicalisation of those who might cross over. For the most part the threats have been presented as being primarily from Islamist violence, though Tamil Tigers were also for a period of concern.

The theorisation of resilience in relation to the first dimension provides a sophisticated interpretation of the layers of preparation and support that might be required to ensure survival and 'bounce forward' among potentially threatened communities. The theorisation in the second case is far cruder, and has to be extracted in retrospect from the programs funded under the Community Resilience program of the Australian government from the late 2000s.

'A community is resilient if it is able to 'bounce forward' after an adverse event'¹², with five key dimensions that support or enhance that ability, most of which have their roots in 'strengthening social infrastructure at the community level'¹³. These are primarily communication-focused as it is the capacity to own the processes through which meaning is communicated that plays a critical role in the capacity to bounce forward. Thus, communities experiencing trauma require the capacity to connect with and care for each other, understand the transformative potential of the trauma, manage the actual event in an effective and intelligent manner, identify and access the resources that are needed, and access and utilise information and communication in a timely and accurate manner¹⁴.

A critical part of this process lies in the capacity of communities to reknit through a shared process of visioning a future post the trauma. In doing so, governments and communities need to work together in ways that ' (a) use a multi hazard approach relevant to the local context, (b) utilise community assessment, (c) focus on community engagement, (d) adhere to

¹² Houston, J.B., Spialek, M.L., Cox, J., Greenwood, M.M. & First, J. 2015, 'The Centrality of Communication and Media in Fostering Community Resilience: A Framework for Assessment and Intervention', *American Behavioural Scientist*, vol. 59, no. 2, pp. 270-83.

¹³ Aldrich, D.P. & Meyer, M.A., 2015, 'Social Capital and Community Resilience', *American Behavioural Scientist*, vol. 59, no. 2, pp. 254-69.

¹⁴ Pfefferbaum, R.L., Pfefferbaum, B., Nitiéma, P., Houston, J.B. & Van Horn, R.L. 2015, 'Assessing Community Resilience: An Application of the Expanded CART Survey Instrument With Affiliated Volunteer Responders', *American Behavioural Scientist*, vol. 59, no. 2, pp. 181-99.

bioethical principles, (e) emphasize both assets and needs, and (f) encourage skill development'¹⁵.

The importance of this perspective lies in its capacity to focus on arming communities that are confronting traumatising events, such as sustained racism and exclusion, to re-assert their own agency within their own frames of reference, without entering long term conflictual relations with the wider society.

The model, developed by Houston's Missouri team, illuminates the social capital issues, with their importance to the validation of the perspectives and deeper values of communities under threat. The importance of building the bonding social capital inside the communities to overcome isolation and fragmentation can be recognised quite clearly, but also they illuminate the crucial role of bridging social capital that 'knits' individuals and groups into wider networks through layers of 'weak ties'. By focusing on the sphere of communication and demonstrating the interrelationships between the elements, the model points to the range of check-off issues that an effective community resilience program would need.

¹⁵ Pfefferbaum, B., Pfefferbaum, R.L. & Van Horn, R.L. 2015, 'Community Resilience Interventions: Participatory, Assessment-Based, Action-Oriented Processes', *American Behavioural Scientist*, vol. 59, no. 2, pp. 238-53.

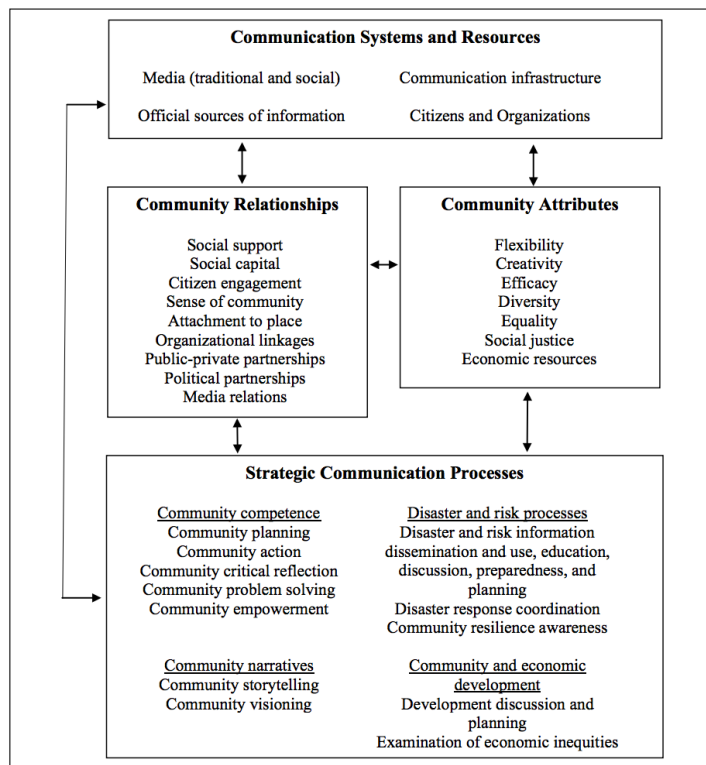


Figure 1. A communication and media approach to community resilience.

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The closest empirical data available to understand how building community resilience in relation to cyber racism might be fashioned exists in the now closed program of Community Resilience, operated by the Australian Department of Attorney General, while an analytical policy review of the concept has been undertaken by Rivka Nissim of the Human Rights Commission.

Commenced by the Labor government in 2010, and closed down in June 2013, the program funded 59 projects. For this paper, we were able to examine 11 in some detail, while all the project summaries were collected for further analysis (see Appendix 1). Drawing on work that looked at how to build resilience in Indigenous communities against racism¹⁷, and then adapted

¹⁶ Houston, J.B., Spialek, M.L., Cox, J., Greenwood, M.M., & First, J., 2015, 'The Centrality of Communication and Media in Fostering Community Resilience: A Framework for Assessment and Intervention', *American Behavioural Scientist*, vol. 59, no. 2, pp. 270-83.

¹⁷ Aldrich, D.P. & Meyer, M.A. 2015, 'Social Capital and Community Resilience', *American Behavioural Scientist*, vol. 59, no. 2, pp. 254-69. Bodkin-Andrews, G., Newey, K., O'Rourke, V., & Craven, R., 2013, 'Promoting Resiliency to Counter Racism: The Lived Wisdom within Aboriginal Voices', *InPsych: The Bulletin of the Australian Psychological Society Ltd*, vol. 34, no. 4, pp. 14-5.

and extended by Nissim¹⁸, four sets of key activities can be identified. They sit closely with the work that the Pfefferbaum network has undertaken in the USA¹⁹.

The 59 project summaries highlighted the following key activities:

- Knowledge and awareness through education – the development of multi-faith educational resources, learning about radicalisation, understanding the counter narrative, challenging myths and racism and cultural tolerance;
- Skill building - peace building activities, social media training, website creation, leadership skills, sporting skills, employment and business skills, multimedia skills, and team work activities;
- Mentoring - training for mentors, working with community leaders, mentoring for support and role modelling for others; and
- Networks and civic participation - community forums, community events, volunteering, interactive websites, social activities and sporting activities.

These are crucial features of effective community development in the face of potentially demobilising trauma, where recognising the way the event can produce trauma and having access to models of response and recovery fit closely into the 'bouncing forward' approach. The building of collectives for survival develops mutual sharing of trauma response, so that pathways for eroding the capacity of events to deepen trauma increasingly shapes the responses over time.

As well as these community development approaches for those potentially attacked by hate and vilification online, a few community organisations have taken a more pro-active route. *All Together Now* (ATN) has initiated a number of complementary campaigns utilising online technologies. EXIT WHITE POWER seeks to reduce the attraction of racist ideology for young white men, while #ILLRIDEWITHYOU builds on the response on Twitter in the aftermath of the Sydney December Lindt Café shootings to offer support to Muslim Australians who feared harassment and a backlash against them after the killings. ATN has also created a smartphone applicant to provide users with a choice of target roles that allow a week-long exposure to living in the skin of someone who experiences regular racism.

The *Online Hate Prevention Institute* (OHPI) has emerged as a significant developer of online responses to racism. While concentrating on Facebook and related social media sites, OHPI has developed analytical tools for unpacking racist sites, and tracking their links across the

¹⁸ Nissim, R. 2014, 'Building resilience in the face of racism: options for anti-racism strategies.', Unpublished paper. Sydney.

¹⁹ Pfefferbaum, R.L., Pfefferbaum, B., Nitiéma, P., Houston, J.B. & Van Horn, R.L. 2015, 'Assessing Community Resilience: An Application of the Expanded CART Survey Instrument With Affiliated Volunteer Responders', *American Behavioural Scientist*, vol. 59, no. 2, pp. 181-99.

Web. It produces reports on significant online hate events and analyses the targeting of Indigenous, Muslim and Jewish Australians by groups and individuals with discernible racist agendas. In December 2014, it launched a new portal called *fightagainsthate* (FAH) that allows registered members to name and report racist and other hate material they find on the Web. The reports from OHPI and from FAH have begun to have an effect on the willingness of major social media sites such as Facebook to tighten the application of their own standards.

Conclusion

Approaches to reducing the trauma associated with racism on the Internet have in the past been affected by perceptions that individuals offended by the race hate can choose not to visit spaces where the offensive material might live, that is, race hate is really a Snark. However, the building of race hate communities is widespread. Their interconnectedness and capacity to hook in passers-by and active seekers of like-minded circles of hate produces what we describe as hate speech cyber swarms, the epitome of a Boojum. The apparent tranquillity of the pages or sites in their first incarnations soon transmutes into far more vicious and systematic hate speech, bolstered by activist groups with deeper agendas and wider intolerance. While the outer edges of the swarms may lie far from the intensity of committed race hate zealots, the stickiness of the Internet hate locations can attach people and draw them over time into a regularity of contact. These by-passers may soon become bystanders, following which they can become more integrated into the hate narratives conveyed through the sites or pages or tweets. By then they have become active hate practitioners, capable in their own way of developing new nodes for evolving communities of hate.

Communities of hate form around these sticky centres, and increasingly find in their interactions with the focal point a self-reinforcing attraction to the ideas and practices that are being promoted. If community development tactics help to form communities of hate, then community development practices such as the ones we have outlined about can support counter-community formation. Furthermore, they can point to how it is possible to degrade the communities of hate using methodologies of critical identification and calling out, resilience and affirmation.

Regulating online racism in the online age

Kevin M. Dunn & Rosalie Atie

Cyber-racism has become a major issue of concern for the world community, as it tests two sets of civic values: those of tolerance, respect and civility; and those of free speech¹. In the big, and big business, world of Web 2.0 it is not clear whether the model of community monitoring which to date has been the overarching mechanism of managing internet behaviour, is the most effective means of ensuring civil and safe relations across the issues of cultural diversity. This article outlines the main findings of the Cyber Racism Survey conducted as a part of the ARC funded Cyber Racism and Community Resilience Project, in December 2013. Over two thousand Internet users across Australia were surveyed about their encounters with racism online, the impact of these encounters and their responses to same. The survey found that a significant number of internet users are at risk of harm as a result of racism, not only as targets but also as witnesses of racism online, and that a small but prolific group of users are publishing racist content on the internet and broadcasting to a wider audience than was ever possible before. There are similarities with non-online rates of racism but also some interesting differences in terms of action in response to the racist content encountered. When the *Racial Discrimination Act* (RDA) was developed, and even when the 18C provisions against racial vilification were added, it was not possible to contemplate the effects and importance of the internet and social media to relations across ethnic and religious difference.

Cyber-racism is an increasingly important social phenomenon. Though the international reach of the Internet often bedevils attempts by national governments to control its local impacts, the United Nations (UN), the Council of Europe (CoE) and the Organisation for Security and Cooperation in Europe (OSCE) have sought to develop protocols and strategies to outlaw and limit the impact of cyber-racism since the 1990s. With the Government's announcement of a National Anti-Racism Partnership and Strategy racism has been re-positioned as a social policy priority². Australia has arguably one of the highest proportional uses of social media in the advanced Western world, with Australian Internet users spending the most time visiting social networks and blogs³. As such, Australians are potentially more exposed to cyber-racism than residents of other countries. The Australian Human Rights Commission (AHRC) advised that over 30 per cent of racial complaints in 2009-2010 were concerned with Internet racism.

¹ Thampapillai, D., 2010 "Managing Dissent Under Part IIA of the Racial Discrimination Act", eLaw Journal: Murdoch University Electronic Journal of Law 17(1)

² (AMAC) Australian Multicultural Advisory Council. 2010. "The People of Australia: The Australian Multicultural Advisory Council's Statement on Cultural Diversity and Recommendations to Government." Canberra.

³ Nielsen. 2011. "State of the media: The Social Media Report Q3." Incite/Nielsen

VicHealth has identified cyber-racism as a key priority for its program on racism and well-being⁴. But the official complaints and reports represent only a small proportion of the encounters with racism, and we assert a small proportion of the responses to online racism. The RDA and vilification provisions are symbolic statements that send a message that racism is uncivil and inappropriate. To what extent, and how, do people take action against the racism they encounter online?

It has been argued that the internet and social media have an innately cosmopolitanising influence; that it facilitates and encourages the sharing of values and perspectives, and is associated with a mostly younger and tech-savvy demographic who are generally more tolerant of cultural diversity⁵. The beginnings of the internet were associated with early adopters who championed tolerance, equality and voice. These values were detectable with the early statements on Netiquette⁶. User discourse and behaviour was community / peer monitored. From a scholarly perspective, the internet was envisioned as a 'neutral space'⁷, an 'escape from the boundaries of race and the experience of racism' in which users could undertake a kind of 'identity tourism' full of 'playful possibilities'⁸. However, since these optimistic predictions were made, it has become apparent that users do not enter into the online world with a blank slate. Rather, users bring with them the world of prejudice that is tied to them in the non-online world, 'race matters in cyberspace precisely because all of us who spend time online are already shaped by the ways in which race matters offline, and we can't help but bring our own knowledge, experiences, and values with us when we log on'⁹.

Research to date on racist online content has focused on hate group poetics and politics, as well as cultural privilege and stereotypes in online news, and the reception of such

⁴ VicHealth, 2009, "Building on our strengths: a framework to reduce race-based discrimination and support diversity in Victoria." Melbourne: Victorian Health Promotion Foundation.

⁵ Paradies Y., Forrest, F., Dunn, K., Pedersen, A., and Webster, K., 2009, More than tolerance: racism and the health of young Australians, in Mansouri, F., (ed.), *Youth Identity and Migration: Culture, Values and Social Connectedness*, 207-226 (Chapter 13), Common Ground Publishing, Altona, Victoria. Hannah, T., 2012, *Social Media for Social Change: Using the Internet to Tackle Intolerance: Action Research Report*, Institute for Strategic Dialogue, Open Source Technologies, UK

⁶ See Rinaldi, A.H., 1994, The net: user guidelines and netiquette, Academic/Institutional Support Services, Florida Atlantic University, viewed 22 January 2009, <http://www.wifak.uni-wuerzburg.de/wilan/sysgroup/texte/netiquet/netiquet.txt>; Scheuermann L., and Taylor, G., 1997, 'Netiquette', *Internet Research: Electronic Networking Applications and Policy*, 7, 4, 269-273.

⁷ Hughey & Daniels 2013, Racist comments at online news sites: a methodological dilemma for discourse analysis *Media Culture Society* 35:332

⁸ Nakamura, 2002, Turkle, 1997, Daniels, J., 2013, Race and racism in Internet studies: A review and critique, *New Media & Society*, August 2013, 15, 695-719

⁹ Kolko et. al., 2005: 5 cited in Hughey & Daniels 2013, Racist comments at online news sites: a methodological dilemma for discourse analysis *Media Culture Society* 35:332

messaging¹⁰. Tynes and Markoe's¹¹ study is one of few that analysed how users respond to racist content online, they looked at the link between colour blind racial attitudes and online racism using photographs posted Facebook and Myspace as prompts. They found that users were largely unaffected by racist content and some even found it amusing. Outside of this research, there is surprisingly very little in the way of research on the negotiation of racism online and how racism shapes internet use at an everyday level¹². But, in general, there is an astounding lack of data that investigates the frequency, affect, and response to online racist content and the effectiveness of regulatory measures for dealing with it.

The Cyber Racism and Community Resilience research project was a joint project involving a number of Australian Universities in partnership with the Victorian Health Promotion Foundation (VicHealth), the Australian Human Rights Commission and the Federation of Ethnic Communities' Councils of Australia, to address contemporary and evolving forms of cyber-racism by, amongst other things, considering the neglected issue of the negotiation of racism online by internet users.

Methodology

The Cyber Racism Survey used established prompts on encounters with different types of racism (name-calling, exclusion, violent incitement, discrimination, etc.) narrowed and adapted to those likely to be apparent within the Internet, across mainstay Internet platforms such as Facebook, Twitter, YouTube and more broadly, on Internet forums. The survey also examined the extent of the morbid effects of such encounters (sense of wellbeing, belonging, etc.), and the actions taken by respondents (report, formal complaint, ignore, engage with, etc.). The sample was generated by a commercial online provider, MyOpinion, who constructed two online panels: one reflecting the demographics of the Australian population aged 15-54 as at

¹⁰ Back, L., 2002, Aryans reading Adorno: cyber-culture and twenty-first century racism, *Ethnic and Racial Studies*, 25, 4, 628-651. Daniels, J., 2009(a), Cloaked websites: propaganda, cyber-racism and epistemology in the digital era, *New Media & Society*, August 2009, 11, 659-683; Daniels, J., 2009(b), *Cyber Racism: White Supremacy Online and the New Attack on Civil Rights*, Rowman and Littleman Publishers, Maryland, USA Douglas, K.M., McGarty, D., Bluiic, A-M., Lala, G., 2005, Understanding cyberhate: social competition and social creativity in online white supremacist groups, *Social Science Computer Review*, 23, 1, 68-76. Hughey & Daniels 2013, Racist comments at online news sites: a methodological dilemma for discourse analysis *Media Culture Society* 35:332 Loke, J., (2012) Public Expressions of Private Sentiments: Unveiling the Pulse of Racial Tolerance through Online News Readers' Comments, *Howard Journal of Communications*, 23:3, 235-252, DOI: 10.1080/10646175.2012.695643; Steinfeldt, J.A., Foltz, B.D., Kaladow, J.K., Carlson, T.N., Pagano Jr, L.A., Benton, E., et al. (2010) Racism in the electronic age: role of online forums in expressing racial attitudes about American Indians. *Cultural Diversity and Ethnic Minority Psychology* 16(3): 362–371.

¹¹ Tynes, B., and Markoe, S., (2010) The role of colour-blind racial attitudes in reactions to racial discrimination on social networking sites. *Journal of Diversity in Higher Education* 3(1): 1–13

¹² Daniels, J., 2013, Race and racism in Internet studies: A review and critique, *New Media & Society*, August 2013, 15, 695-719

the 2011 Census (mirroring the ethnic diversity of Australia); the other identifying groups significantly at risk of racism, including Australians from the following groups: (1) Indigenous Australians ($n=58$), (2) Australians of North African and Middle Eastern background ($n=34$), (3) Australians of South- East Asian background ($n=192$), (4) Australians from North-East Asian background ($n=266$) and (5) Australians from Southern and Central Asian background ($n=142$). Panel participants self-nominated to participate in the survey. The data were collected in December 2013 and the total number of respondents was 2141. The age range of respondents was spread fairly evenly across most age brackets and roughly half the respondents were male and half female.

Encountering online racism: targets and witnesses

One-third of respondents indicated that they had witnessed racist content online (34.8 per cent). Most of these encounters had occurred quite recently, having taken place in the last month (40.3 per cent). A small but significant number of respondents indicated that they had been targets of racist content online (4.8 per cent). When asked to think back to the most recent occasion when they had been targets of racist content online, one-third of respondents said that this had happened within the last month, two-thirds within the last six.

Racist content was most commonly encountered on Facebook (40.1 per cent). Other platforms where racist content appeared to be more prevalent were the commentary in response to online news stories, at almost one-fifth (18.5 per cent) and YouTube (15.7 per cent). Almost half (44.6 per cent) of targets indicated that their most recent encounter as a target of racist content online was on Facebook.

Responding to online racism

In reflecting on the last occasion on which they had encountered racist content online, witnesses were asked to report on how they had responded to this content. They were provided with a checklist of responses relevant to the platform on which they encountered the content. As Facebook was the stand-out site on which racist content was encountered, those results are highlighted here.

Almost half of the respondents said that they simply ignored the racism they witnessed (48.8 per cent). Close to 40 per cent of those who were targets also ignored the racism. This contrasts to the non-online-world, where 64-69 per cent would not respond when being a target of race hate talk (CRP). The international literature suggests that, for the non-online world, witnesses or bystanders are more likely to ignore racist incidents, with two-thirds of respondents choosing to take no action. Recent in-progress research on bystander action in

Australia is more encouraging, suggesting that only half (48.6 per cent) would take no action¹³. It is encouraging that people are more likely to take action in the cyber world than elsewhere. Across the range of responses, targets were generally more likely to take action challenging the racist content than witnesses. For example, targets were more likely to make a comment disagreeing with the content (39 per cent) and to block the poster (31.7 per cent) than witnesses. These data are to be expected, but more witness action is needed so as to share the burden of anti-racism which sits too heavily upon the shoulders of targets at present. Taking a more hopeful interpretation, we can see here untapped political resources; ie scope for more witness (bystander) action.

While almost half of witnesses ignored the racism on Facebook, most of the rest took some form of dissonant action. This took the form of online disagreement through comments (25 per cent) and reports with the platform (twenty per cent). For targets these were also the dominant modes of response: in platform reports (49 per cent); dissonant posts (39 per cent), as well as blocking the poster of the racism (32 per cent) and defriending (22 per cent). The use of within platform responses was strong: reporting on the racist content, blocking and de-friending the poster, for both witnesses and targets. The responses to racist content witnessed on platforms other than Facebook followed similar patterns. Complaints to other bodies (such as human rights commissions, police or other authorities) was less common, as a form of response to Facebook racism. Only 12.5 per cent of targets took up such complaints, and 6.5 per cent of witnesses. Formal complaints are not a common form of response to online racism. Witnesses and targets ignore or engage, and the latter from of response is mostly through 'within-platform mechanisms'. In-platform anti-racist forms of action were the most common responses – reporting, blocking, comments disagreeing, and de-friending. What are the outcomes of these actions? What are the rates of take-downs, warnings, account cancellations? Are these data being collected? Is it being publicly reported?

Regulating anti-racism?

There is racist material within social media. Just like the non-cyber world, there are a minority of people with exclusionary views who use such platforms for the inculcation of intolerance towards diversity and certain cultural groups. The results of the online survey into encounters of racism indicate that the prevalence of racism online is quite high, with one-third of those surveyed having witnessed racist content online and 40 per cent of these within a month prior to the taking the survey. Facebook, online news commentary, and YouTube had the highest prevalence of racist content, relative to exposure, Twitter and email being sites of lesser encounter. Over half of the witnesses to racist content online made active responses to the

¹³ Nelson J. K., Dunn, K.M., and Paradies, Y., 2011, Bystander anti-racism: a review of the literature, *Analyses of Social Issues and Public Policy*, 11, 1, 263-284.

content. This kind of response is higher online than in the non-online world globally, although it aligns with Australian 'non-online' realms. Additionally, targets of online racism are more likely to make active responses, compared to the non-cyber-world, where two-thirds of respondents make no response to being a target of race hate talk. The most common forms of response for both witnesses and targets are 'within platform', that is, in the Facebook example, posting a dissonant reply, reporting the content and blocking or de-friending the author. A significant question that arises with regards to these in-platform responses is one that concerns data collection and reporting. What happens to all of this reporting? Is it recorded? How is it managed? What are the outcomes? There is a lack of transparency around reporting from these mechanisms. Reports to human rights commissions actions under the RDA and vilification provisions like 18C, are officially recorded and reported, as are most such reports to policing agencies. However, the lack of public reporting of within platform actions is a serious impediment to the anti-racism regulatory effort. It contravenes commitments under global instruments to record and monitor racism.

Our results make a strong case for the need for more sophisticated regulatory measures. Whilst significant numbers of users appear to be making use of the reporting functions within platforms or otherwise making active responses to the racism they encounter, the current practices around reporting and management of racist content are too idiosyncratic and are not transparent. Peer and community monitoring of internet behaviour alone, are unlikely to be sufficient for ensuring civil and healthy relations across the issues of cultural diversity.

Part 5

Attributes

Mere definition? Blurred lines? The intersection of race, religion and the Racial Discrimination Act 1975 (Cth)

Kate Eastman SC¹

Ultimately, whether any group of people can be called an ‘ethnic group’ or ‘race’ ... requires a judgment for which no amount of legal training can assist. The lawyer is neither equipped nor entitled to give fixed legal definitions for such important social phenomena and at best the law can do little more than point to the general direction of what seems an elusive concept.²

The *Racial Discrimination Act 1975 (Cth)* (‘RDA’) makes it unlawful to discriminate against a person by reference to race, colour, descent, national origin and ethnic origin. It is not unlawful to discriminate by reference to a person’s religious beliefs. But, it is beyond debate that discrimination of Jews is unlawful in Australia.³ Since 1995, race hate directed to Jews is unlawful in Australia. Why are adherents of some religious groups protected by the RDA but other religious groups are not? The answer lies in the definition ‘ethnic origin’ and two landmark judicial decisions in New Zealand and England in the 1970s and 1980s which recognised Jews and Sikhs as ethnic groups. But the decisions show the line between race and religion is blurred.

This paper explores whether there is scope to interpret the expression ‘ethnic origin’ in the RDA to include other religious groups, in particular Muslims in Australia. The starting point is the language of the RDA.

Relevant provisions of the *Racial Discrimination Act 1975 (Cth)*

When Australia wished to ratify the *International Convention on the Elimination of All Forms of Racial Discrimination* (‘CERD’),⁴ it enacted the RDA. The RDA incorporates the language and

¹ I acknowledge Robert Pietriche’s invaluable research assistance in preparing this paper.

² Pagone, G.T., ‘*The Lawyers’ Hunt for Snarks, Religion and Races*’ (1984) 43(2) *Cambridge Law Journal* 218, 222.

³ *Jones v Scully* (2002) 120 FCR 243, 271 – 272 [110] – [113], *Jones v Toben* (2002) 71 ALR 629, 645 [69], *Jones, and on behalf of the Executive Council of Australian Jewry v The Bible Believers Church* [2007] FCA 55, *Silberberg v The Builders Collective of Australia Inc* [2007] FCA 1512, *APS Group (Placements) Pty Ltd v O’Loughlin* [2011] FWA FB 5230 and *Eatock v Bolt* (2011) 197 FCR 261, [310].

⁴ The RDA received Royal Assent on 11 June 1975. The CERD entered into force generally on 4 January 1969. CERD entered into force for Australia on 30 January 1975 (except Article 14 on 28 January 1993). 1975 ATS 40.

the key provisions of CERD. Section 9 mirrors the language of Article 1(1) of CERD and relevantly provides:

It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

Section 10 is directed to the operation of discriminatory laws. It provides:

(1) If, by reason of, or of a provision of, a law of Australia or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first- mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

(2) A reference in sub-section (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.

In December 1990, the RDA was amended.⁵ The amendment confirms that the RDA included ‘indirect race discrimination’. It provides:

(1A) *Where:*

- (a) *a person requires another person to comply with a term, condition or requirement which is not reasonable having regard to the circumstances of the case; and*
- (b) *the other person does not or cannot comply with the term, condition or requirement; and*
- (c) *the requirement to comply has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, by persons of the same race, colour, descent or national or ethnic origin as the other person, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life;*

⁵ *Law and Justice Legislation Amendment Act 1990 (Cth)*, No. 115 of 1990 – Schedule.

the act of requiring such compliance is to be treated, for the purposes of this Part, as an act involving a distinction based on, or an act done by reason of, the other person's race, colour, descent or national or ethnic origin.

(a) Section 18C was enacted in 1995 by the Racial Hatred Act 1995 (Cth).⁶ It relevantly provides:

- (1) It is unlawful for a person to do an act, otherwise than in private, if:
- (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
 - (b) the act 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.

The expressions 'race', 'colour', 'descent', 'national origin' and 'ethnic origin' are not defined in CERD or the RDA. Do these expressions have the same meaning in ss 9, 9(1A), 10 and 18C? Are the meanings of these expressions fixed at 1975, 1990 or 1995? Can meaning of the words or the subject matter covered by these words evolve and change over time?

International law accepts that expressions used in a treaty may evolve and change. The International Court of Justice affirmed that a treaty is not static and 'open to adapt to emerging norms of international law'.⁷ International human rights instruments are interpreted and applied as 'living instruments'.⁸ A treaty is not frozen and is interpreted in light of contemporary conditions.⁹ The CERD Committee described CERD as 'a living instrument that must be interpreted and applied taking into account the circumstances of contemporary society. This approach makes it imperative to read its text in a context-sensitive manner'.¹⁰ In the context of CERD, the meaning of 'race' and 'ethnic origin' are malleable expressions and may be interpreted to reflect contemporary conditions.

⁶ Section 18C does not use the language of CERD. It relies only in part on CERD. Compare art 4(1) of CERD.

⁷ *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Reports 7, [112], [140] and *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* [2009] ICJ Reports 213, [64]-[66].

⁸ *Tyrer v United Kingdom* (1978) Series A, No. 26 [31] (European Court of Human Rights).

⁹ *Vienna Convention on the Law of Treaties* article 31(3)(b).

¹⁰ *Committee on the Elimination of Racial Discrimination Seventy-fifth session, August 2009 - General Recommendation No 32* [5].

Reflecting the evolving nature of race discrimination and the intersection between race and religion, the Committee has explored whether discrimination based on religion may be a form of race discrimination.¹¹ The Committee has:

- emphasised that ‘religious questions are of relevance to the Committee when they are linked with issues of ethnicity and racial discrimination’;¹²
- recognised that the grounds of discrimination enumerated in Article 1 of CERD apply to double or multiple forms of discrimination in *General Recommendation No 32* (2009);¹³
- taken a broad approach to the meaning of ‘ethnic origin’ to include Islamophobia,¹⁴ discrimination against Jews, Sikhs, Indigenous religions, and desecration of sacred sites;
- stated in the *Concluding Observations on the UK* (2003) that ‘...the State party recognizes the ‘intersectionality’ of racial and religious discrimination, as illustrated by the prohibition of discrimination on ethnic grounds against such communities as Jews and Sikhs, and recommends that religious discrimination against other immigrant religious minorities be likewise prohibited.’;¹⁵
- implemented reporting practices which have regularly considered the increasing instances of Islamophobia and urged States to address religiously-motivated violence or discrimination: see 2006 *Concluding Observations on Denmark* at [11] and the 2010 *Concluding Observations on The Netherlands* at [14];
- highlighted concerns about indirect discrimination against Muslims in Australia,¹⁶ hostility towards Muslims in Switzerland,¹⁷ and political racist speech in New Zealand;¹⁸ and
- sought specific information on particular ethno-religious minorities, such as the Yezidi-Kurds in Georgia¹⁹ and Muslim ethnic minorities in Moldova.²⁰

¹¹ Thornberry, ‘Confronting Racial Discrimination: A CERD Perspective’ (2005) 5 *Human Rights Law Review* 239, Alves J ‘Race and Religion in the United Nations Committee on the Elimination of Racial Discrimination’ (2008) 42 *University of San Francisco Law Review* 942 and Berry S, ‘Bringing Muslim Minorities within the International Convention on the Elimination of All Forms of Racial Discrimination - Square Peg in a Round Hole?’ (2011) 11:3 *Human Rights Law Review* 423.

¹² Report of the Committee on the Elimination of Racial Discrimination to the General Assembly 2005 A/60/18, [246] (Georgia).

¹³ Above n 10.

¹⁴ Report of the Committee on the Elimination of Racial Discrimination to the General Assembly 2003 A/58/18, [540] (United Kingdom).

¹⁵ CERD/C/63/CO/11 (10 December 2003).

¹⁶ CERD, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: ICERD: Australia* (2005), [13], [22]-[23] (UN Doc CERD/C/AUS/CO/14).

¹⁷ CERD, *Report of the Committee on the Elimination of Racial Discrimination*, 60-61st Sess (UN Doc A/57/18 (2002)), 47.

¹⁸ CERD/C/NZL/CO/18-20 (2013), [10].

¹⁹ CERD, *Concluding Observations Georgia* (2007), [18].

²⁰ *Ibid* [14].

The Committee's consideration of individual communications also highlights the intersection between race and religion. In two communications, concerning offensive public statements about Muslims in Denmark,²¹ the Committee dismissed the complaints. The Committee found the discrimination was done because of the complainant's religion beliefs. There was no connection to the complainant's ethnic origins. The Committee said:

6.3 The Committee recognises the importance of the interface between race and religion and considers that it would be competent to consider a claim of 'double' discrimination on the basis of religion and another ground specifically provided for in article 1 of the Convention, including national or ethnic origin. However, this is not the case in the current petition, which exclusively relates to discrimination on religious grounds. The Committee recalls that the Convention does not cover discrimination based on religion alone, and that Islam is not a religion practised solely by a particular group, which could otherwise be identified by its 'race, colour, descent, or national or ethnic origin.' ...

Other United Nations bodies have considered the intersection between race and religion.²² In *A study of racial discrimination and religious discrimination: identification and measures*²³ the former Special Rapporteur on Religious Intolerance observed there are 'borderline cases where racial and religious distinctions are far from clear-cut'. He referred to the experience of 'aggravated discrimination' whereby an ethnic dimension is attributed to a religious group. He said 'religion shares something of the definition of ethnicity, just as ethnicity is basic to religious identity'.²⁴

The UN Human Rights Council noted 'the nexus between racism and religion poses complex and sensitive issues which are not adequately addressed under international law'.²⁵ It recommended that the CERD Committee adopt a General Recommendation focusing on 'concerns which have emerged in the area of racial discrimination and religion or belief'.²⁶

²¹ *PSN v Denmark* (Communication No 36/2006), *AWRAP v Denmark* (Communication No 37/2006).

²² Durban Declaration and Programme of Action adopted in September 2001 by the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance UN Doc A/CONF.189/12.

²³ Amor, A., Special Rapporteur of the Commission on Human Rights on Religious Intolerance in accordance with Commission Resolution 1999/78 (UN Doc A/CONF.189/PC.1/7).

²⁴ Report by Amor, A., for the Durban World Conference on Racism, A/CONF.189/PC.1/7, 13 April 2000, [122].

²⁵ Human Rights Council, *Complementary International Standards, Compilation of Conclusions and Recommendations of the Study by the Five Experts on the Content and Scope of Substantive Gaps in the Existing International Instruments to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance* (18 February 2008), UN Doc A/HRC/AC.1/1/CRP.4, [48].

²⁶ *Ibid* [49].

In April 2011, the UN Human Rights Council adopted Resolution 16/18 on *Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion and belief*.²⁷

Has the meaning of ‘ethnic origin’ evolved for the purpose of the RDA?

Because the RDA gives effect to CERD²⁸ and uses the same language as CERD, the RDA should be construed consistently with CERD.²⁹ If the RDA is interpreted by reference to CERD, then the meanings’ expression in the RDA may change. Like CERD, the RDA should also be a ‘living instrument’. But a recent High Court decision casts doubt on whether the RDA may evolve to reflect international developments.³⁰ In *Maloney v R* [2013] HCA 28 at [15], French CJ rejected the idea that the RDA is an organic or living instrument because it may lead to ‘informal modification’ or impermissible judicial amendment of the RDA. At [23], the Chief Justice said:

23. *An interpretation of a treaty provision adopted in international practice, by the decisions of international courts or tribunals, or by foreign municipal courts may illuminate the interpretation of that provision where it has been incorporated into the domestic law of Australia. That does not mean that Australian courts can adopt ‘interpretations’ which rewrite the incorporated text or burden it with glosses which its language will not bear.*

At [61] Hayne J said:

61. *Of course, resort may be had to the Convention in interpreting provisions of the RDA. But, because an Act like the RDA is to be interpreted ‘by the application of ordinary principles of statutory interpretation’ the only extrinsic materials that may bear upon that task are materials of a relevant kind that existed at the time the RDA was enacted. Material published later, such as subsequent reports of United Nations Committees, may usefully direct attention to possible arguments about how the RDA should be construed but any debate about its construction is not concluded by reference to or reliance upon material of that kind.*

(footnotes omitted)

²⁷ A/HRC/RES/16/18 (12 April 2011)

²⁸ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

²⁹ The High Court referred to international jurisprudence with approval in *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 205 and 219, *Gerhardy v Brown* (1985) 159 CLR 70 at 128 and 135 and *Mabo v Queensland (No 2)* (1992) 175 CLR 1 40, 181.

³⁰ Compare Malbon, J., ‘The Race Power Under the Australian Constitution: Altered Meanings’ (1999) 21(1) *Sydney Law Review* 80.

All members of the High Court agreed,³¹ except Justice Gageler. He referred to the history and the context of the CERD at [273] ff. He also referred to the work of the Committee and its General Recommendations. He specifically noted the General Recommendations ‘over the last two decades have elaborated a coherent understanding of the meaning and interrelationship of Arts 1(1), 1(4), 2(2) and 5 of the Convention. They have contributed to, and are indicative of, a ‘normative development’” [at [289] footnotes omitted].

Justice Gageler accepted that the RDA be interpreted consistently with international law. At [327] – [328] he said:

327 The Convention is, and always has been, firmly understood to be based on the principles of the dignity and equality of all human beings and to have as its objective the securing of equality in fact in the enjoyment of human rights by persons of all races. The international understanding of its content has nevertheless evolved. Whatever uncertainty may have existed at the time Gerhardy was decided, the repeated pronouncements of the Racial Discrimination Committee in its recommendations to the General Assembly of the United Nations can be taken to reflect what is now a clear and consistent international understanding of what is required to eliminate racial discrimination and to guarantee racial equality before the law in the enjoyment of human rights. ...

328. The purpose of s 10 would not be achieved were constructional choices now presented by its text not to be made consistently with that contemporary international understanding.

Gageler J was in the minority. The majority’s approach means a Court may be limited in how it uses contemporary State practice, General Recommendations and the Committee’s jurisprudence, when interpreting the RDA. This is concerning because significant developments in State practice and recognition of concepts such as ‘double discrimination’ and ‘aggravated discrimination’³² may be given little or no weight.

³¹ Crennan J at [134], Kiefel J, [176] and Bell J, [235].

³² See also Background Paper ‘United Nations strategies to combat racism and racial discrimination: past experiences and present perspective’ by van Boven, T.,: UN Doc E/CN.4/1999/WG.1/BP.7 (26 February 1999)

Approaches to construing the *Racial Discrimination Act 1975* (Cth)

The relevant rules of statutory interpretation³³ will determine the meaning of ‘race’ and ‘ethnic origin’ for the purpose of the RDA. The following principles apply to working out the meaning of these words.

First, statutory construction must begin and end with a consideration of the text.³⁴ The words are given their plain and ordinary meaning³⁵ unless the contrary is shown.³⁶

Secondly, the context in which the words are used should be considered.³⁷ The context and legislative purpose show how the words should be understood.³⁸

Thirdly, a Court must give the words the meaning that Parliament intended *when* the RDA was enacted. This approach fixes a meaning of words at a particular point in time. It is an inter-temporal rather than evolutionary approach to interpretation.³⁹

Fourthly, when determining Parliament’s intention, a court may consider the legislative history and extrinsic materials. Section 15AB of the *Acts Interpretation Act 1901* (Cth) sets out the nature of the extrinsic material that may be relied on. However, resort to this material has no utility unless it *assists* in fixing the meaning to the text.⁴⁰ The legislative history and extrinsic

³³ For the purpose of this paper, I will not address questions of interpretation concerning the expression ‘race’, ‘colour’, ‘descent’ or ‘national origin’. However, each of the different terms should be understood as different ways to describe race and so possibly overlapping. But they are also as discrete categories, which may be treated as separate and alternate from each other: see *Boyce v British Airways PLC* (EAT unreported 385/97, 31 July 1997) and *Northern Joint Police Board v Power* [1997] IRLR 610, 613. It is also beyond the scope of this paper to explore the legal meaning of ‘religion’.

³⁴ *Alphapharm Pty Ltd v H Lundbeck A/S* (2014) 314 ALR 182 at 193 [42], *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39], *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46 [47].

³⁵ *Project Blue Sky Inc v Australian Broadcasting Authority* ((1998) 194 CLR 355, 384.

³⁶ *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249 at [96] and *Sydney Attractions Group Pty Ltd v Frederick Schulman* [2013] NSWSC 858, [64] ff.

³⁷ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 and *Short v FW Hercus Pty* (1993) 40 FCR 511, 518

³⁸ *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27 [4]. See also *Certain Lloyd’s Underwriters Subscribing to Contract No. IH00AAQS v Cross* (2012) 248 CLR 378 [23] – [26], [88] – [89], *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500 at [41], *Kline v Office to the Governor-General* (2013) 249 CLR 654 at [32] and *Alphapharm Pty Ltd v Lundbeck* [2014] HCA 42, [39] & [62] .

³⁹ Shobe J, ‘Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting’ (2014) 114(4) *Columbia Law Review* 807.

⁴⁰ *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39].

materials cannot displace the meaning of the statutory text. Nor is an examination of the extrinsic material an end in itself.⁴¹

Fifthly, the construction of the expression should promote the purpose or object of the RDA: see s 15AA of the *Acts Interpretation Act 1901* (Cth).

Sixthly, questions of policy may assist a court construe the RDA.⁴²

Finally, in addition to these general principles, the courts generally accept if the underlying purpose or object of a statute is the protection of human rights, then the court should endeavour to construe its provisions to give effect to the human rights protections. A construction consistent with the obligations should be preferred.⁴³ Because the RDA incorporates CERD, the expressions used in the RDA should be given the same meaning as CERD.⁴⁴

Plain and ordinary meaning of ‘ethnic origin’

Dictionary definitions are useful tools to understand the plain and/or ordinary meaning of words. A dictionary is an aid to working out the meaning of the words but it is not determinative or a substitute the words in the RDA. As Spigelman CJ said in *Caterpillar of Australia Pty Ltd v Industrial Court of New South Wales* (2009) 78 NSWLR 43 at [88] ‘Judges no longer approach a statute with scissors in one hand and a dictionary in the other.’

Dictionaries reveal there is no fixed meaning of ‘ethnic’ or ‘ethnicity’. The *Shorter Oxford English Dictionary* defines ‘ethnic’ as follows:

a noun –

‘a person who is not a Christian or a Jew’ or ‘pertaining to nations’;

an adjective –

1. *neither Christian nor Jewish; pagan, heathen;*
2. *pertaining to race, ethnological; peculiar to a race or nation;*

⁴¹ Ibid.

⁴² *Thomas v Mowbray* (2007) 233 CLR 307 at 348-351 [80]-[93], *Zheng v Cai* (2009) 239 CLR 446 at 453 [18], 455-456 [28], *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 295 ALR 638 at 646.

⁴³ *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 359, 372, 394 and 406-407.

⁴⁴ *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 and *De L v Director General of Community Services* (1996) 187 CLR 640 at 675.

3. *(of a population group) sharing a distinctive cultural and historical tradition, often associated with race, nationality or religion, by which the group identifies itself and others recognise it.*

If this meaning applied, it would exclude Jews from coverage under the RDA.⁴⁵ This dictionary definition does not represent the popular meaning of 'ethnic' as used in the RDA in 1975 and/or 1995. This meaning is unlikely to have reflected Parliament's intention in 1975.

The current *Oxford English Dictionary* online ('OED') describes the above definition as archaic. In 2015, the online version of the OED defines 'ethnic' by reference to a popular meaning and gives examples of how the use of the expression has evolved over time. The OED defines 'ethnic' as follows:

d. Designating or relating to art, music, dress, or other elements of culture characteristic of a particular (esp. non-Western) national or cultural group or tradition; modelled on or incorporating elements of these. Hence: (colloq.) foreign, exotic.

e. Designating or relating to a population subgroup (within a dominant national or cultural group) regarded as having a common descent or national or cultural tradition. In the United States sometimes spec. designating members of non-black minority groups. Now often considered offensive.

f. Designating origin or national identity by birth or descent rather than by present nationality.

Special uses

ethnic minority n. (also ethnic minority group) a group within a country or community which has different national or cultural traditions from the larger, dominant population.

Likewise, the *Macquarie Dictionary* relevantly defines 'ethnic' as:

1. *having to do with a particular population, especially with a speech group, loosely also race.*
2. *having to do with the origin, classification, characteristics etc of such groups.*
3. *having to do with members of the community who are migrants or the descendants of migrants and whose native language is not English.*
4. *recognisable coming from an identifiable culture.*

⁴⁵ This point was made in the context of the UK *Race Relations Act 1976* in *Mandla v Dowell Lee* [1983] 2 AC 548, 561 by Lord Fraser.

‘Origin/s’ means ‘a person’s parentage or ancestry’ and is not limited to a specific place or territory.

Sometimes Courts accept that the popular meaning of words change or capture new and unexpected circumstances after the passage of legislation.⁴⁶ Notwithstanding *Maloney* (above), if the contemporary or popular meaning ‘ethnic’ and ‘origin’ is used, an ‘ethnic origin’ applies to a wide range of features that may identify a distinct group. This does not involve impermissible judicial amendment of the RDA. The meaning does not materially change, it simply operates in a more expansive manner.

A person’s ethnic origin may be demonstrated by a combination of shared traits or life experiences with other members of a group, such as:

- language;
- customs;
- dress, appearance;
- cuisine and dietary practices
- descent and family lineage;
- migration status;
- religion.

Relevance of the object and purpose of the RDA

The RDA has no express objects clause. But the clear purpose of the RDA is to give effect to CERD. The purpose of CERD is found in its Preamble. It states the purpose of CERD is ‘eliminating racial discrimination throughout the world in all its forms and manifestations and of securing understanding of and respect for the dignity of the human person’. These are broad and wide ranging objects for the promotion of human rights without discrimination based on race. The purpose of CERD informs the purpose of the RDA. The Parliament intended the RDA to promote and protect human rights, rather than limit the beneficiaries of these rights or exclude persons needing protection.

In construing beneficial legislation designed to protect human rights such as the RDA, provisions which confer or amplify rights should be generously construed.⁴⁷ If such an

⁴⁶ Compare *The Attorney-General for the Commonwealth & ‘Kevin and Jennifer’* [2003] FamCA 94 where the question was the meaning of ‘man’ for the purpose of the *Marriage Act 1961* (Cth). At [374], the Full Court agreed that the meaning of ‘man’ should be its contemporary meaning to include post-operative transsexuals not the meaning of man (which would exclude such persons) which may have been ascribed the meaning in 1961. See also *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 and *Australian Hospital Care (Latrobe) Pty Limited v Commissioner of Taxation* [2000] FCA 1509.

⁴⁷ *X v Commonwealth* (1999) 200 CLR 177 at 233 per Kirby J and *Qantas Airways Limited v Christie* (1998) 193 CLR 280 at 333 per Kirby J.

approach is taken, the expression 'ethnic origin' should be construed in a way that provides the broadest possible coverage.

Is the extrinsic material to the RDA and Racial Hatred Act helpful?

The extrinsic materials may elucidate Parliament's intention and the purpose of the RDA and the *Racial Hatred Act 1995* (Cth).

The Second Reading Speech for the Racial Discrimination Bill 1975 (Cth) makes it plain the Parliament's intention was:

- to make racial discrimination unlawful in Australia;
- to provide an effective means of combating racial prejudice in Australia;
- to give effect to CERD;
- to use the definitions used in CERD in the domestic law;
- to create practical and effective legal remedies against discrimination; and
- to combat racial discrimination and to promote understanding, tolerance and friendship among racial and ethnic groups.⁴⁸

In 1995 the Parliament's intention as to *who* should benefit from *Racial Hatred Act 1995* (Cth) was clear. The Parliament intended s 18C to reflect legal developments since 1975. The Explanatory Memorandum to the Racial Hatred Bill⁴⁹ stated:

The terms 'ethnic origin' and 'race' are complementary and are intended to be given a broad meaning.

*The term 'ethnic origin' has been broadly interpreted in comparable overseas common law jurisdictions (cf King-Ansell v Police [1979] 2 NZLR per Richardson J at 531 and Mandla v Dowell Lee [1983] 2 AC 548 per Lord Fraser at 562). **It is intended that Australian courts would follow the prevailing definition of 'ethnic origin' as set out in King-Ansell.** The definition of an ethnic group formulated by the Court in King-Ansell involves consideration of one or more of characteristics such as a shared history, separate cultural tradition, common geographical origin or descent from common ancestors, a common language (not necessarily peculiar to the group), a common literature peculiar to the group, or a religion different from that of neighbouring groups*

⁴⁸ House of Representatives Official Hansard No. 7, 1975 Thursday, 13 February 1975 at page 285ff.

⁴⁹ Explanatory Memorandum, Racial Hatred Bill 1994 (Cth) 2-3.

*or the general community surrounding the group. **This would provide the broadest basis for protection of peoples such as Sikhs, Jews and Muslims.***

*The term 'race' would include ideas of ethnicity so **ensuring that many people of, for example, Jewish origin would be covered. While that term connotes the idea of a common descent, it is not necessarily limited to one nationality and would therefore extend also to other groups of people such as Muslims.***

(Emphasis added)

The Parliament intended the expression 'ethnic origin' to be broad and take into account how the expression had been interpreted *since* the enactment of the RDA in 1975.

Interpretation and approach taken by the courts in comparable jurisdictions

The High Court has said courts should be cautious when referring to the human rights jurisprudence of other jurisdictions because the legislative context may be different.⁵⁰ The comparable New Zealand and United Kingdom race discrimination laws were similar to the RDA, until recent times. Accordingly, New Zealand and English decisions considering such laws may assist Australian courts when considering similar provisions. This is particular so for defining expressions such as 'race' and 'ethnic origin'.

Prior to the enactment of the RDA, there was little relevant judicial authority in comparable jurisdictions. In *Ealing LBC v Race Relations Board* [1972] AC 342, Lord Simon considered the meaning of 'race' in the 1968 UK *Race Relations Act*. At 362, he said:

Moreover, 'racial' is not a term of art, either legal or, I surmise, scientific. I apprehend that anthropologists would dispute how far the word 'race' is biologically at all relevant to the species amusingly called homo sapiens.

...

This is rubbery and elusive language -- understandably when the draftsman is dealing with so unprecise a concept as 'race' in its popular sense and endeavouring to leave no loophole for evasion.

Ealing influenced the later decisions in New Zealand and the United Kingdom.

In *King-Ansell v Police* [1979] 2 NZLR 531, King-Ansell was charged under the *Race Relations Act 1971* (NZ) with vilifying and inciting hatred against Jewish people. The *Race Relations Act* implemented CERD into New Zealand law. King-Ansell pleaded not guilty to an offence of

⁵⁰ *Purvis v State of New South Wales* (2003) 217 CLR 92, [198].

inciting ill will against persons because he argued that Jews were not a 'race' protected by the Act. The contention was rejected.

The Court addressed the question – 'in what sense is the word 'ethnic' used in its context in s25 of the Race Relations Act?' At 535, Richmond P held that the Act covers groups of persons with common ethnic origins, including groups 'marked off from the generality of our society by shared beliefs, customs and attitudes'.

At 538, Woodhouse J considered the meaning of 'race' by reference to the 1972 Supplement to the Oxford Dictionary but noted 'it would be a mistake to regard [the dictionary meaning] as though it had to be imported word for word into the statutory definition and construed accordingly'. He accepted the 1972 Supplement was a helpful guide and found that the Jewish people had an ethnic origin for the purpose of the Act.

At 542, Richardson J said:

The ultimate genetic ancestry of any New Zealander is not susceptible to legal proof. Race is clearly used in its popular meaning. So are the other words. The real test is whether the individuals or the group regard themselves and are regarded by others in the community as having a particular historical identity in terms of their colour or their racial, national or ethnic origins. That must be based on a belief shared by members of the group.

At 543, Richardson J said an ethnic origin means the shared customs, beliefs, traditions and characteristics derived from a common or presumed common past. A combination which gives them a 'historically determined social identity based ... on their belief as to their historical antecedents.'

Justice Richardson's approach reveals that the concept of race is not fixed. His approach represents a constitutive theory, namely that a person's race or ethnic origin is based on self-identification together the acceptance by the group and the broader community of that race or ethnic origin. This approach does not depend on satisfying a checklist of factors of proof by evidence. Justice Richardson described a simple approach. The meaning depends on the context and the particular circumstances of a given case. The approach accommodates evolving notions of ethnicity.

The second and frequently cited authority on meaning of 'ethnic origin' is *Mandla v Dowell Lee* [1983] 2 AC 548. The case concerned school uniform requirements. A Sikh boy insisted on wearing a turban and refused to cut his hair. The issue was whether the school failed to respect the boy's religious traditions or practices. The factual circumstances were very different to *King-Ansell*.

The Court of Appeal dismissed the claim.⁵¹ The Court of Appeal accepted the school's argument that religious identification was not an attribute of 'ethnic origin'. Lord Denning MR said the expression 'race' and 'ethnic origin' did not include religion or politics or culture; Sikhs were not a racial group. Lord Denning noted the word 'ethnic' derived from a Greek word meaning 'heathen'.⁵² He traced the English dictionary meaning from 1890, where the word was used to denote people who were not Christian or Jewish. He also traced the meaning of 'origins' to reach the conclusion that the appellant's complaint was about religion rather than his race.

On appeal, the House of Lords reversed the Court of Appeal's decision. The Law Lords said 'ethnic origins' embodied a wider concept than race. However, the leading speeches of Lord Templeman and Lord Fraser reveal different approaches to identifying a 'race' for the purpose of the *Race Relations Act 1976* (UK) ('RRA').

At 569, Lord Templeman said:

I agree with the Court of Appeal that in this context ethnic origins have a good deal in common with the concept of race, just as a group defined by reference to national origins may be different from a group defined by reference to nationality. In my opinion, for the purpose of the Race Relations Act a group of persons defined by reference to ethnic origins must possess some of the characteristics of a race, namely group descent, a group of geographical origin and a group history. The evidence shows that the Sikhs satisfy these tests. They are more than a religious sect, they are almost a race and almost a nation. As a race, the Sikhs share a common colour and a common physique based on common ancestors.

Lord Templeman referred to an essential requirement that a group of persons claiming ethnic origin must possess - based on colour, appearance or descent. This is an essentialist view of race.⁵³

Lord Fraser considered *King-Ansell*. He also referred to the 1972 Supplement to the Oxford English Dictionary defining 'ethnic' as 'pertaining to or having common racial, cultural, religious or linguistic characteristics, esp. designation a racial or other group within a larger system; ...' At 562, he said:

*The value of the 1972 definition is, in my view, that it shows that ethnic **has come to be commonly used in a sense appreciably wider than the strictly racial or***

⁵¹ *Mandla v Dowell-Lee* [1983] QB 1.

⁵² [1983] QB 1, 9.

⁵³ Coates R., *Race and Ethnicity Across Time, Space and Discipline*, Bill NV, 2004 and Jivjar, S., *The Religion of Law: Race, Citizenship and Children's Belonging*, Palgrave Macmillan 2013.

biological. *That appears to me to be consistent with the ordinary experience of those who read newspapers at the present day. In my opinion, the word 'ethnic' still retains a racial flavour but it **is used nowadays in an extended sense to include other characteristics which may be commonly thought of as being associated with common racial origin.***

*... ethnic **has come to be commonly used** in a sense appreciably wider than the strictly racial or biological. That appears to me to **be consistent with the ordinary experience of those who read newspapers at the present day.** In my opinion, the word 'ethnic' still retains a racial flavour but **it is used nowadays in an extended sense** to include other characteristics which may be commonly thought of as being associated with common racial origin. For a group to constitute an ethnic group in the sense of the 1976 Act, it must, in my opinion, regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential others are not essential but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these: (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance.*

In addition to those two essential characteristics the following characteristics are, in my opinion, relevant: (3) either a common geographical origin, or descent from a small number of common ancestors (4) a common language, not necessarily peculiar to the group (5) a common literature peculiar to the group (6) a common religion different from that of neighbouring groups or from the general community surrounding it (7) being a minority or being an oppressed or a dominant group within a larger community, for example a conquered people (say, the inhabitants of England shortly after the Norman conquest) and their conquerors might both be ethnic groups.

*A group defined by reference to enough of these characteristics would be capable of including **converts, for example, persons who marry into the group, and of excluding apostates.** Provided a person who joins the group feels himself or herself to be a member of it, and is accepted by other members, then he is, for the purpose of the 1976 Act, a member. That appears to be consistent with the words at the end of sub-s (1) of s 3: 'references to a person's racial group refer to any racial group into which he falls.' In my opinion, it is possible for a person to fall into a particular racial group either by birth **or by adherence**, and it makes no difference, so far as the 1976 Act is concerned, by which route he finds his way into the group.*

(Emphasis added)

There are two important aspects of Lord Fraser's approach. First, he emphasised the importance of a contemporary meaning reflecting the evolution of the concept of ethnicity. He did not fix the meaning of 'ethnic origins' by reference to any particular point in time.

Secondly, Lord Fraser describes a social construct of ethnicity. He does not require the essential or fixed elements described by Lord Templeman.

Some argue that Lord Fraser's approach does not provide certainty in the law. As has been pointed out the Royal Family may be an ethnic group on Lord Fraser's analysis. Some say Lord Fraser's approach is too flexible.⁵⁴ I do not share those concerns, rather this approach reflects the importance of interpreting these expressions to respond to contemporary human rights problems. Both decisions *post-date* the enactment of the RDA in 1975 and confirm religious affiliation may identify a person's ethnic origin.

Later English decisions confirm that 'ethnic origins' has a broad, non-technical meaning.⁵⁵ In *R v White* [2001] EWCA Crim 216, the Court of Appeal said that Lord Simon's reference in *Ealing* to 'rubbery and elusive language' remained apt in 2001. The Court of Appeal said that *Mandla* and *Ealing* stood as authority that the court was not tied to the precise definition in any dictionary. In that case, the issue was whether being called 'African' could be a reference to a racial group.

In English law, Sikhs,⁵⁶ Jews⁵⁷ and gypsies/Roma have an ethnic origin.⁵⁸ But, Rastafarians,⁵⁹ Jehovah's Witnesses,⁶⁰ Welsh speakers⁶¹ and members of a 'caste'⁶² do not. The factual circumstances of each case have been determinative in whether a person has a particular ethnic origin.

⁵⁴ Benyon, H., and Love, N., 'Mandla and the Meaning of 'Racial Group''(1984) 100 *Law Quarterly Review* 120. The authors suggest that Lord Templeman's approach should be preferred.

⁵⁵ *R v Rogers* [2007] 2 AC 62 [14], *Thompson v Bermuda Dental Board (Human Rights Commissioners intervening)* [2008] UK PC 33, [26].

⁵⁶ *Singh v Rowntree Macintosh Ltd* [1979] ICR 504 and *Panesar v Nestlé Co Ltd* [1980] ICR 144.

⁵⁷ *R (E) v Governing Body of JFS* [2009] UKSC 15; [2010] 2 AC 728, *Seide v Gillette Industries Limited* [1980] IRLR 427.

⁵⁸ *Commissioner for Racial Equality v Dutton* (1989) QB 783.

⁵⁹ *Dawkins v Department of Environment, sub nom Crown Supplies (Property Services Agencies) v* [1993] ICR 517.

⁶⁰ *Lovell-Badge v Norwich City College of Further and Higher Education* (unreported EAT1502237/97).

⁶¹ *Gwynedd County Council v Jones* [1986] ICR 833.

⁶² *Chandhok & Anor v Tirkey (Race Discrimination)* [2014] UKEAT 0190_14_1912.

For Muslims the application of the RRA has been mixed.⁶³ In *Nyazi v Rymans Limited* (unreported [1988] EAT/6/88) the issue was whether Ms Nyzai had been subjected to race discrimination because her employer refused her leave to celebrate the festival of Id al Fitr. On the facts of that case, the Employment Appeals Tribunal held that the reason for the alleged discrimination was Ms Nyazi's wish to celebrate a religious festival, not because of her ethnic origin. The Tribunal noted that Muslims were not an ethnic group because the Muslim faith was widespread covering many nations, colours and languages. The Tribunal said adherents to Islam were widespread and there was no common denominator other than religion, so Muslims were not a racial group for the purpose of the RRA.

However, in the area of 'indirect' race discrimination, the RRA has applied to discrimination against Muslims in the work place.⁶⁴ In the area of hate speech, in *Wilson v Procurator Fiscal* [2005] ScotHC HCJAC 97 the issue was the distribution of leaflets which were insulting and abusive to the Muslim population. At [12], the court noted that 'racial hatred' for the purposes of the *Public Order Act 1986* concerned hatred against 'a group of persons...defined by reference to colour, race, nationality or ethnic or national origins', which did not include religious beliefs. In the context of that case, the court accepted references to Muslim was a reference to persons of Pakistani origin.

Approach of Australian courts and tribunals to interpreting 'ethnic origin'

While the Australian experience is mixed,⁶⁵ the courts have followed *King-Ansell* and *Mandla*. The Parliament referred to both decisions when enacting the *Racial Hatred Act 1995* (Cth). These two decisions have influenced the Australian approach to interpreting the RDA.

Wide approach

In *Commonwealth v Tasmania (the Tasmanian Dam Case)* (1983) 158 CLR 1, Deane J referred to *King-Ansell* and *Mandla* on the meaning of 'race'. Deane J agreed with a broad approach and at 276, he said:

⁶³ *Tariq v Young* (unreported EAT 24773/88). See also Weller, P., 'Addressing Religious Discrimination and Islamophobia: Muslims and Liberal Democracies. The case of the United Kingdom' (2006) 17(3) *Journal of Islamic Studies* 295-325.

⁶⁴ See Hepple QC and Choudhury, *Tackling religious discrimination: practical implications for policy-makers and legislators*, Home Office Research Study 221, Home Office Research, Development and Statistics Directorate, February 2001 <http://www.religionlaw.co.uk/reportae.pdf>. See *Ahmad v Inner London Education Authority* [1978] 1 All ER 574, *JH Walker v Hassain* [1980] IRLR 11, *CRE v Precision Manufacturing Services*, *Yassin v North West Home Care* CRE Rep 1993, p21 and *Safouane and Bouterfas v Joseph Limited* (1996) (Case 12506/LS, Case 12568/95), *Khanum v IBC Vehicles Limited* [1997] ET/1200058/97.

⁶⁵ Thornton, M., and Luker, T., 'The Spectral Ground: Religious Belief Discrimination' (2009) 9 *Macquarie Law Journal* 71. See also *Metwally v University of Wollongong* (1984) EOC 92-030 at 75,560 and *Kapoor v Monash University* (2001) 4 VR 483.

The reference to ‘people of any race’ includes all that goes to make up the personality and identity of the people as a race: spirit, belief, knowledge, tradition and cultural and spiritual heritage.

In *Attorney-General of the Commonwealth v Queensland* (1990) 94 ALR 515, French J (as he then was) was open to an evolving concept of membership of a particular race. There the issue was the meaning of ‘Aboriginal’. At 538, French J said:

The evolving social perception of what constitutes membership of the group called by the word ‘Aboriginal’ and the varying context in which it may be used indicate the need for caution in applying interpretations adopted in one context and for one purpose to a different context or purpose.

He concluded at 539, that in the particular context:

... the better view is that Aboriginal descent is a sufficient criterion for classification as Aboriginal. ... It also leaves open the question whether a person with no Aboriginal genetic heritage may be regarded as Aboriginal by reason of self-identification and communal affiliation.

The expression ‘ethnic origin’ has been considered in cases concerning ss 9 or 10 of the RDA.⁶⁶ In *Macabenta v Minister of State for Immigration & Multicultural Affairs* (1998) 90 FCR 202, the issue was whether a migration regulation had the effect of preferring one group of persons of a particular national origin over another group. While the case concerned the meaning of ‘national origin’, the Full Court considered the meaning of ‘ethnic origin’. At 210D, the Full Court cited Lord Fraser’s approach in *Mandla* with approval and then concluded that ‘ethnic origins may have become blurred over time ...’

With respect to s 18C of the RDA, the Federal Court confirmed the expression ‘ethnic origin’ should be construed broadly. In *obiter*, two Federal Court judges acknowledged s 18C may cover Muslims.⁶⁷ However, the Court has also explained that there are limits. In *Miller v Wertheim* [2002] FCAFC 156, the Full Court considered whether the RDA applied to an intra-communal religious conflict. At [13] and [14] having considered the content and context of the impugned act of hate, their Honours said:

⁶⁶ see *Commonwealth of Australia v Stamatov* [1999] FCA 105, [32] – [34], *AB v State of New South Wales* [2005] FMCA 1113, *Azriel v NSW Land and Housing Corporation* [2006] NSWCA 372, [47] and *Kienle v Commonwealth of Australia* [2011] FMCA 210 and *Phillips v State of New South Wales* [2011] FMCA 308. See also *Miller v Mieson* (1991) EOC 92-341, 78,379, *Ella & Ors v State of New South Wales (NSW Police)* (EOD) [2006] NSWADTAP 5.

⁶⁷ *Jones v Scully* (2002) 120 FCR 243, 271 – 272 [110] – [113] (Hely J) and *Eatock v Bolt* (2011) 197 FCR 261, [310] (Bromberg J).

13 However, it is not reasonably arguable that any of these arguable aspects of the speech is capable of being characterised as an act done because of the race or ethnic origin of the group, or of its members, who were being criticised by the first respondent. The group and its members were criticised in the speech because of their allegedly divisive and destructive activities, and not because the group or its members were of the Jewish race, of Jewish ethnicity or because they were persons who adhered to the practices and beliefs of orthodox Judaism.

14 Thus, although it can be readily accepted that Jewish people in Australia can comprise a group of people with an 'ethnic origin' for the purposes of the Act (see *King-Ansell v Police* [1979] 2 NZLR 531, for the reasons set out above we are satisfied that the Magistrate was correct in concluding that it was not reasonably arguable that the act of the first respondent that was complained of by the appellant is an act done because of the race or ethnic origin of any person or group of persons.

Narrow approach

In *Philip v State of New South Wales* [2011] FMCA 308 at [83] the Federal Magistrates Court considered the meaning of 'ethnic origin' and 'ethnic group'. The Court concluded that Muslims could not constitute a group of ethnic origin as Islam is a religion observed by a broad range of ethnic groups. There was no evidence to support such a finding and the Magistrate cited as authority for the conclusion, the following decisions - *Nyazi v Rymans Ltd* [1988] VAT 86 (sic), *Carn* (sic) *v Commissioner, Department of Corrective Services* [2002] NSWADT 131 and *Dawkins v Department of Environment* [1993] ICR 517. I would respectfully say that these decisions do not assist in interpreting the RDA and his Honour may not have appreciated the full effect of *Mandla*. His observations are *obiter* because the case was not concerned with discrimination against Muslims. Rather, the issue was about alleged discrimination based on the complainant's African accent. The Federal Court is unlikely to follow *Phillips*.

In 1994 the expression 'ethno-religious origin' was introduced to the *Anti-Discrimination Act 1977* (NSW) to recognise the intersection between race and religion. The then Attorney-General said:

*The effect of the latter amendments is to clarify that ethno-religious groups such as Jews, Muslims, and Sikhs have access to racial vilification and discrimination provisions in the Act.*⁶⁸

One might assume that the Parliament's intention was clear. However, in *Khan v Commissioner, Department of Corrective Services* [2002] NSWADT 131 the Tribunal rejected

⁶⁸ See NSW Legislative Assembly Hansard 4 May 1994, 1827.

a claim that a refusal to provide Halal food to a prisoner was discrimination on the ground of his ethno-religious origin. Mr Khan was an Indian Muslim. *Khan* is the leading decision in New South Wales on the meaning of 'ethno-religious origin', but the facts of the case were not an appropriate vehicle to decide when a person may claim an ethno-religious origin. The approach taken in *Khan* reveals some departures from the usual approach to statutory interpretation (for example, relying on inappropriate extrinsic material). It is beyond the scope of this paper to critique the *Khan* decision and its later application.

Then, in September 2004, in a second reading speech on another Anti-Discrimination Amendment (Miscellaneous Provisions Bill), the then Attorney-General said:

I mention in passing one other matter relating to the definition of 'race' within the Act. In 1994 the then Attorney, Mr John Hannaford, MLC, in moving the second reading of an earlier bill to amend the Act, noted that the term 'ethno-religious origin' was being added to the definition of 'race', and I quote; to clarify that groups such as Jews, Muslims and Sikhs, have access to the racial vilification and discrimination provisions of the Act.

The Attorney-General's clarification has not shifted reliance on *Khan*.⁶⁹ Suffice to say the approach taken in New South Wales is concerning. Because of *Khan*, Muslims generally are not protected by the *Anti-Discrimination Act 1977* (NSW).⁷⁰ A Muslim will only be protected by these provisions if he or she can add a satisfactory adjective denoting a geographical location to their 'brand' of Islam.⁷¹

Is there scope for religious groups to be covered by the RDA?

Jews in Australia have an 'ethnic origin' for the purposes of the RDA.⁷² The Federal Court has not been asked to determine whether people affiliated with other religions have an 'ethnic origin'. If asked, the Federal Court may find that a Sikh, Muslim or member of another minority religious communities has an 'ethnic origin' for the purpose of the RDA. Applying the approach

⁶⁹ *Jones and Harbour Radio Pty Limited v Trad (No 2)* (EOD) [2011] NSWADTAP 62, [19].

⁷⁰ Starting with *Khan v Commissioner, Department of Corrective Services & anor* [2002] NSWADT 131. See also for example, *Jones and Harbour Radio Pty Limited v Trad (No 2)* (EOD) [2011] NSWADTAP 62, *Ekeremawi v Jones and Harbour Radio Pty Ltd* [2011] NSWADT 280 *Toll Pty Limited trading as Toll Express v Abdulrahman* [2007] NSWADTAP 70, [8], *Laala v DG of NSW Dept of Education and Training* [2008] NSWADT 327, [36], *Ekeremawi v Fairfax Publications Pty Ltd* [2008] NSWADT 351, [10], *Kunhi v University of New England* [2008] NSWADT 333 at [4], *Hollows v Macquarie University* [2009] NSWADT 23, [11], *Ekeremawi v Network Ten Pty Limited* [2008] NSWADT 334, *Trad v Jones* [2009] NSWADT 318, *Ekeremawi v Harbour Radio Pty Ltd* [2010] NSWADT 145 and *Alchin v Rail Corporation NSW* [2012] NSWADT 142, [42]-[48].

⁷¹ *Fraoucene v Gerald Caruana & Arthur Caruana t/as GAC Property Management Services* [2005] NSWADT 1, *Sleiman v Kmart Australia Limited* [2003] NSWADT 21.

⁷² *Jones v Scully* (2002) 120 FCR 243, 272 [113].

taken by Lord Fraser in *Mandla*, it should be beyond debate that a person's religious affiliation may be a marker of his or her ethnic origin.

A person will need to prove his or her ethnic origin by evidence covering all or some of the following:

- membership of a population subgroup within a dominant national or cultural group in Australia
- a common descent or national or cultural tradition shared with others
- the distinct features of a group compared to the larger, dominant population such as:
 - common language
 - common binding customs
 - dress, appearance
 - cuisine and dietary practices
 - descent and family lineage
 - migration status
 - common belief, knowledge, tradition and cultural and spiritual heritage

It is not enough to prove simply that the religious affiliations indicate a person's ethnic origin. The critical issue in all claims is whether there is a link between the person's ethnic origin and the offending conduct. A person's 'ethnic origin' must be one of the reasons for the discrimination or hatred: see s 18B of the RDA. It does not need to be the only or dominant reason.

It is important to examine the nature of the impugned act and the context in which the discrimination or hatred occurs. If, on a proper analysis, the impugned act involves attributing an ethnic dimension to members of a religious group, then the reason or motivation for the discrimination or hatred cannot be simply dismissed as based on religion. The reason/s for a person's actions may also be based on inferences being drawn. In all cases, the context of the conduct will be critical. In a racial hatred claim, the court should not be restricted to considering the act done or words used. The context or circumstances of the particular conduct must be considered in order to determine whether the discrimination was done by reference to,⁷³ in whole or in part, the complainant's ethnic origin. In *Baird State of Queensland* (2006) 156 FCR 451, Allsop J (as his Honour then was) said:

70 ... One does not look at the act divorced from the relevant distinction etc in assessing the relationship with race. It is the part of the act that is the distinction etc or the act involving the distinction that must be based on race.

⁷³ *Macedonian Teachers Association v Human Rights and Equal Opportunity Commission* (1998) 91 FCR 8.

If the impugned act is done for one reason only, namely a person's religious beliefs unconnected with ethnic origin, then a court is likely to find that RDA does not apply. Likewise, the impugned act may affect people of a certain ethnic origin but not be done because of the person's ethnic origin.⁷⁴ If a person's religious affiliation and ethnic origin are so intertwined, then seeking to identify the reason for the discrimination or hatred being based on *either* religion *or* ethnic origins may be artificial. The two grounds may not be easily separated and it should be necessary to do so.⁷⁵ These are blurred lines, not bright lines.

Concluding comments

The Australian Human Rights Commission has identified the intersection between religion and culture, religion and ethnicity and religion and national origin in a number of reports, including:

- *Combating the Defamation of Religions* (2008)⁷⁶
- *Living Spirit - Muslim Women's Project* (2006)⁷⁷
- *Ismaʿ: Listen - National consultations on eliminating prejudice against Arab and Muslim Australians* (2003).⁷⁸

These reports reveal that Australia has changed since 1975, but racism persists. There are new targets of racism. There are new means available to disseminate racist views. These reports reveal the blurred line between race and religion for victims of racism. The RDA should not be frozen at 1975 and must respond to all forms of racisms, including contemporary problems. The RDA has important work to do to protect victims of racism and achieve the purpose of CERD, which includes the harmony of persons living side by side. If the existence of racial barriers is repugnant to the ideals of Australian society, then the RDA must be interpreted in a manner that seeks to remove such barriers in which ever form they appear.

⁷⁴ See *Miller v Wertheim* [2002] FCAFC 156 above.

⁷⁵ See for example the intersection between race and sex in *Djokic v Sinclair & Central Qld Meat Export Co Pty Ltd* [1994] HREOCA 16.

⁷⁶ www.humanrights.gov.au/our-work/race-discrimination/projects/combating-defamation-religions-2008

⁷⁷ www.humanrights.gov.au/our-work/race-discrimination/publications/living-spirit-muslim-womens-project-2006

⁷⁸ www.humanrights.gov.au/our-work/race-discrimination/projects/isma-listen-national-consultations-eliminating-prejudice

Muslims and the RDA

Mariam Veiszadeh

One in two have anti-Muslim sentiments

There are approximately 100 people at today's event. This means that approximately 50 of you, so around 50 per cent of you either don't like me or what I represent. Now you may think that, that's a pretty confronting way to start my speech and I appreciate that given the audience here today, it is unlikely that any of you (I hope) would hold such views, but the reality is that a decade-long national study has found that nearly 50 per cent of Australians identify themselves as having anti-Muslim attitudes.¹

These findings could hardly come as a surprise to anyone familiar with the sheer amount of blatant Islamophobia that is reported through the Islamophobia Register Australia.

I myself have struggled tremendously both physically and mentally, being targeted by the Australian Defence League, finding myself on the receiving end of death threats and near-constant online bile.

This is part and parcel of being a visible Muslim in Australia today, who quickly become the target of social media vitriol, verbal abuse and physical assaults every time someone or something even remotely associated with Muslims or Islam is thrust involuntarily into the media spotlight. And with each instance, we'd see a surge in incidents of Islamophobia.

The word 'Islamophobia' has been coined because there is a new reality which needs naming: anti-Muslim prejudice. Just to be clear, this is not a matter of theological debate and disagreement, much less criticism of Islamic teachings and practices. This is about bigotry, discrimination, abuse and, I will argue, *racism*.

Today I have been asked to speak about whether

- (1) Islam should be considered an 'ethno-religion'; and
- (2) whether the RDA should extend to religious vilification.

¹ Editorial, 'Nearly half of Australians are anti-Muslim: study', *ABC News* (online), 23 Feb 2011, <<http://www.abc.net.au/news/2011-02-23/nearly-half-of-australians-are-anti-muslim-study/1954194>>.

In articulating my views on these issues, I will make reference to PhD researchers who have looked into these areas in far greater detail.

In particular I would like to acknowledge the works of Mariam Farida,² Rachel Bloul and Randa Abdel-Fattah.

The reality is that the definitions of what constitutes racism and discrimination have evolved, so it is only right that anti-discrimination laws should too.

At the outset, it is important to acknowledge that whilst we are discussing whether the RDA should be extended to cover Australian Muslims, a vulnerable minority group, given the existing political landscape, it seems to me that those in power are more interested in watering down the existing provisions.

Islam an ethno-religion?

Addressing the first question as to whether Islam should be considered an ethno-religion for the purposes of the RDA.

In my view, I think the answer should be a resounding yes.

Racialisation method

I note that the category of an ethno-religious group was created to cope with anti-Semitism as a special form of racism. This was the right move in my view. This is because this particular group of vulnerable people went through 'racialisation' over time.

I believe that it's time that we recognise the ethnicised and racialised nature of Islam in Western countries, to recognise Islamophobia as a form of racism akin to anti-Semitism and therefore to treat Islam as an ethno-religion.

Many scholars who have been mounting the argument that Muslims are going through a 'racialisation' method also support this view.³

² Farida, M., *Islamophobia, Australian Anti-Discrimination Law, and 'New Racism' Theory* (Masters Thesis, University of New South Wales, 2010).

³ Meer, N., and Modood, T., 'For 'Jewish' Read 'Muslim'? Islamophobia as a Form of Racialisation of Ethno-Religious Groups in Britain Today?' (2012) 1(1) *Islamophobia Studies Journal* 36-55; Solomos, J., *Theories of Race and Racism* (Routledge, 2010); Fredrickson, G., *Racism: a Short History* (2003, Princeton University Press); Bunzl, M., 'Between Anti-Semitism and Islamophobia: Some Thoughts on the New Europe' (2005) 32(4) *American Ethnologist* 499.

And what exactly is racialization I hear you ask. It's defined as the means where groups are categorised and given certain phenotypical features that stem from their way of living.

Ultimately, racialisation results in essentialism. It reduces people to one aspect of their identity and thereby presents a homogeneous, undifferentiated, and static view of an ethno-religious community.⁴

Randa Abdel-Fattah, an author and PhD candidate exploring Islamophobia in Australia, challenges the false claim that Muslims cannot be the victims of racism because they are not a race. This claim, she argues, is based on an impoverished understanding of the history of race, racial formation and racism. She argues that the body-fixated theory that sustains a demarcation between race and religion ignores the enormous scholarship carried out that demonstrates the falsity of claiming that religious affiliations are never to do with the body, and that 'race' is only to do with the body. She argues that 'the fact is that racial marking and racialisation do not depend on so-called biological attributes. Essentialising people on the basis of their outward appearance – whether it be skin colour, facial features, a headscarf, beard, an accent, – is precisely how the process of racialisation works'.⁵

Being religious is a choice not a biological trait

Whilst it is true that being a Muslim is voluntary and not a biological trait per se, in the way that 'African American' or 'South Asian' or 'European' is, but as scholars Nasar Meer and Tariq Modood point out, neither is being Jewish.

They argue that it took a long, non-linear history of racialisation to turn an ethno-religious group into a race.⁶ I am mindful of the fact that some may be insulted by a comparison of Islamophobia with anti-Semitism, on the grounds of the exceptionalism of the history of Jewish hatred in the West especially. I am not seeking to downplay the long history of persecution of the Jewish communities.

Double-standards – prisoner case

The issue, however, is the apparent double standards, the anomalies and contradictions embedded in anti-discrimination laws, which leads to ridiculously unjust but perfectly legal

⁴ Joshi, K.Y., 'The Racialization of Hinduism, Islam, and Sikhism in the United States' (2006) 39(3) *Equity and Excellence in Education* 211.

⁵ Meer, N., and Modood, T., 'For 'Jewish' Read 'Muslim'? Islamophobia as a Form of Racialisation of Ethno-Religious Groups in Britain Today?' (2012) 1(1) *Islamophobia Studies Journal* 36-55.

⁶ Ibid.

decisions whereby, for a complaint against similar offences when religion is not a protected attribute, a Jewish person can obtain reparation or protection while a Muslim cannot.⁷

Prisoner case example

And a prime example of this is a 2002 NSW case where a Muslim prisoner filed a case, when he was denied his request for Halal food in a private prison, knowing that his Jewish inmate obtained his Kosher meal when requested.

The Court stated that since Halal food is of a religious element and religion is not covered under the *Anti-Discrimination Act 1977* (NSW), therefore the case should be dismissed. Note that his Jewish inmate was granted his Kosher meal, and Kosher represents a religious aspect in Judaism.

The dismissal of the Muslim prisoner's request indicates the inadequacy of the New South Wales Anti-Discrimination laws, since a religious dietary requirement was obtained by one religious group, while denied for the other.

Such inconsistencies and double standards in the application of the law are problematic.

If the State of NSW refuses to include religious discrimination laws, then technically both groups should have been denied their religious meals.

Muslims still left exposed unless abuse is both racial and religious

In any event, as Mariam Farida in her Masters thesis rightly highlights, even if Muslims were considered an ethno-religious group, they may not be protected from religious discrimination under the law.⁸ She makes reference to specific cases and concludes that even if a party were of an ethno-religious background, the Court would only consider it a breach if the vilification was both on the grounds of ethnicity and religion and not purely based on religion alone.

We thus need to consider whether having Islam categorised as an *ethno-religion* would actually achieve the intended objective.

RDA to extend to religion

This leads inexorably to the question of whether the RDA be amended so as to extend to religious vilification. Quite apart from the obvious body of opposition to such a proposition, I

⁷ Bloul, R., 'Islamophobia and Anti-Discrimination Laws: Ethno- Religion as a Legal Category in the UK and Australia' (Paper presented at Challenges of Immigration and Integration in the European Union and Australia, University of Sydney, February 2003).

⁸ Farida, M., above n 2.

suspect that the likes of Andrew Bolt would have a hernia. He would have to acquaint himself quite intimately with what it means to write something in 'good faith'.

I acknowledge that there is a deep-seated resistance to include religion among the grounds covered by anti-discrimination laws.

Interestingly, despite the fact that some Christians' groups oppose religious vilification laws, the Australian Christian Lobby in its 2012 submission on the *Consolidation of Commonwealth Anti-Discrimination Laws* proposed that religion be a protected attribute against discrimination to remedy a substantial omission in the Commonwealth legislation.⁹

In Australia, the States that cover religious discrimination in their legislations are Victoria, Queensland, Western Australia, the ACT and the Northern Territory.

I note that NSW contains Australia's largest Muslim population and yet, they are not protected from religious vilification.

Interestingly, the *Anti-Discrimination Act 1977* (NSW) was amended in 1994 to add a reference to 'ethno-religious'. The NSW Attorney-General at the time John Hannaford, explained that 'the effect of the amendment is to clarify that ethno-religious groups, such as Jewish people, Muslims and Sikhs, have access to the racial vilification and discrimination provisions of the Act'.¹⁰ The stated intention was, in fact, to cover Australian Muslims - but this never materialised.

Religion is chosen and not a biological trait

One of the main arguments against making religion a protected attribute under the RDA is that religion is deemed strictly personal and tends to be chosen. This is true.

It is important to point out that in circumstances when a person finds himself born to a Muslim family, with Muslim stereotypes and characteristics, then it could be argued that it is not a matter of choice anymore.¹¹

However, when examining it from a practical perspective, one does not choose the name they are given or the families they are born into.

One does not choose to be named Mohamed Abdulla, for example. Yet, if there were no other

⁹ Australian Christian Lobby, Submission No. 92 to the Commonwealth Attorney-General's Department, *Inquiry into the Consolidation of Anti-Discrimination Laws*, 30 January 2012.

¹⁰ New South Wales, *Parliamentary Debates*, Legislative Council, 4 May 1994, 1827 (John Hannaford).

¹¹ Meer, N., and Modood, T., above n 5.

identifying features, this name alone is enough to identify a man as being a Muslim and therefore make him prone to being the subject of religiously motivated abuse.

Furthermore, researchers have made the point that one does not choose to be born a Muslim in a society where identifying as Muslim makes you the subject of suspicion and interrogation. If choice is the factor that precludes a Muslim from being seen as a victim of racism, then isn't the natural conclusion to be drawn from this that such a choice is a bad one? If a Muslim is the victim of a hate crime but cannot seek legal recourse because the attribute that attracted the abuse is a so-called 'Chosen One', then isn't the subtle message in this line of logic one that suggests that concealing this choice- that is, being less Muslim- would go towards preventing the abuse?

Sure, I'd cop far less abuse if I chose not to wear a hijab, but why should I be forced to make such a choice?

One cannot help but feel that the victim is being blamed or made to feel as though they are inviting being victimised.

This line of reasoning is deeply flawed, just as blaming a woman's dress sense for her being the victim of sexual harassment.

Impact of Islamophobia

Where religious groups or believers are subject to vilification, it can have deeply hurtful personal effects and create fear within religious communities. It feeds into a vicious cycle.

Islamophobia, if left unchecked, may serve to erect barriers to Muslim inclusion in Australia, increasing alienation, especially among young Muslims. Not only would such a situation do grave damage to our social cohesion, it would simultaneously rapidly expand the pool of recruits for future radicalisation.

Put simply, Islamophobia could help fuel radicalisation. This factor is often ignored or overlooked.

Conclusion

In closing, I'd like to read an extract from an article by my dear friend, Randa Abdel-Fattah.

'Do you want to know how it feels to be an Australian Muslim in the Australia of today?

Then turn on the television, open a newspaper. There will be a feature article analysing, deconstructing, theorising about Islam and Muslims in which your fellow Australians will be offered the chance to make sense of this phenomenon called 'the Muslim'.

This is what it means to be an Australian Muslim today. It is to try to live against the perception that one represents a synonym for terrorism and extremism.

It is to see the faith you embrace with such conviction defiled and defamed because acts that defy Islamic law and doctrine are still prefixed by the media with the word 'Islamic'. It is to have the reasonable, peaceful statements of your leaders ignored and the ignorant ravings of the minority splashed across the headlines. It is to be the topic of talkback radio rant and raves.

It is to come to accept that although atrocities are committed in the name of all religions around the world, it is Islam alone that will be judged by the actions of those who purport to be its followers. It is to refuse to lay blame for the behaviour of so-called Christians at the feet of Christ because you respect the intent of Christ's words and actions and because you know that even those acting in his name are misguided.

So what it means to be an Australian Muslim today is that you will often sit alone, in the silence of your hurt and fury, and wonder why it is so difficult for Islam, a religion followed by 1.5 billion people, all of whom cannot be uncivilised, unintelligent, immoral, unthinking dupes, to be treated with the same respect'.¹²

I will conclude my speech by leaving you with this thought.

Is it conscionable for some religious minority groups to be afforded with legislative protections and other religious groups, who are also in desperate need of such protections, to be denied such protections?

¹² Abdel-Fattah, T., 'Living in a Material World' (2005) 7 *Griffith Review* 162.

Part 6

Systemic Outcomes

The impact of section 18C and other civil anti-vilification laws in Australia

Luke McNamara & Katharine Gelber

Introduction

This paper reports on the findings of a large scale study of the impact of anti-vilification (or ‘hate speech’) laws,¹ on public discourse in Australia over more than two decades.² Its scope includes, but is not limited to s 18C of the *Racial Discrimination Act 1975* (Cth). We investigated the ways in which legislation might have affected public discourse over time. Our task was methodologically challenging, for connecting changes in public discourse to the introduction or enforcement of hate speech laws is fraught with difficulty. We triangulated data from a range of primary and secondary sources, to investigate the relationship between hate speech laws and public discourse over time. Sources include complaints data from, and interviews with, federal and state/territory human rights authorities; tribunal and court decisions; qualitative document analysis of letters to the editor published in newspapers; data from community organisations regarding their members’ experiences; and interviews conducted with members and representatives of target communities.

Five claims about the effects of hate speech laws

The chief organising concept for our project was an investigation of five of the most important and cogent claims made about the likely effects of hate speech laws.

The first claim is that hate speech laws provide a remedy to targets of hate speech. Australian laws are sufficiently broad to include both personally targeted vilification directed at an individual or a group, as well as speech that puts into circulation discriminatory views. This reflects the fact that the laws are designed to provide a remedy for both the personal assault on dignity experienced by targets, *and* the enhanced risks of discrimination and violence that

¹ We use the terms ‘hate speech’ interchangeably with ‘vilification’ to mean expression that is capable of inciting prejudice towards, or effecting marginalisation of, a person or group of people on a specified ground (adapted from Gelber, K., & Stone, A., (eds) 2007., ‘Hate Speech and Freedom of Speech in Australia’, Federation Press, Sydney: xii). We use it the latter being used in the Australian regulatory framework.

² We acknowledge funding from the Australian Research Council (DP1096721), and note that ethics approval for this project was granted by the University of Queensland (2011000341). We thank Jess Todhunter, Dave Eden, Sorcha Tormey and Ellyse Fenton for research assistance, and acknowledge the important work undertaken by Cultural and Indigenous Research Centre Australia (CIRCA). We are grateful also for the assistance of the relevant authorities and community organisations from whom we obtained data.

flow from allowing discriminatory stereotypes to circulate publicly. It follows that, in considering whether laws in Australia provide a remedy to the targets of hate speech, we consider two conceptions of 'targets'. The first are individuals who have been personally targeted, whether face-to-face, or by being named in a statement communicated to the public (eg newspaper article, radio program, website). The second are members of a targeted group, whether or not they individually were subjected to, or heard, the conduct in question.

A second core idea is that hate speech laws will, or ought to, have a constructive effect on public discourse by encouraging more respectful speech. Such laws are not designed to silence discussion on controversial topics, but to underpin an obligation to present opinions in a 'decent and moderate manner'³. Prior research in Australia has suggested precisely that they are designed to proscribe 'incivility in the style and content of publication of racist material'⁴, or even that, in attempting to regulate for civility, they privilege the 'racist acts of social elites'⁵, although other research has suggested these interpretations are too narrow⁶.

The third alleged effect of hate speech laws that we will consider is whether they have an educative or symbolic value. This is the idea that the laws make a statement by government that discourse of a certain type is unacceptable. Jeremy Waldron has described this goal as a publicly expressed commitment to uphold people's dignity⁷. Importantly, this claim is independent of whether hate speech laws are invoked in any particular instance.

The fourth claim is that these benefits can be achieved without producing a 'chilling effect' on speech. The fifth is that the risk of creating 'martyrs' is outweighed by the potential for authoritative condemnation of hate speech. These claims are rebuttals of two of the primary objections made by opponents of hate speech laws. As Schauer⁸ has pointed out, many laws are designed to 'chill' in the sense of deterring people from engaging in harmful behaviour. Chilling of this sort is considered to be laudable. Critics of hate speech laws use the term 'chilling effect' in a pejorative sense, connoting that individuals might be discouraged from

³ Post, R., (2009) "Hate Speech," in Hare, I., & Weinstein, J., eds., *Extreme Speech and Democracy*. New York: Oxford Univ. Press. 123-138. At 128

⁴ Chesterman, M., (2000) *Freedom of Speech in Australian Law: A Delicate Plant?* Aldershot: Ashgate. at 226

⁵ Thornton, M., (1990) *The Liberal Promise: Anti-Discrimination Legislation in Australia*. Melbourne: Oxford Univ. Press. At 50

⁶ McNamara, L., (2002) *Regulating Racism: Racial Vilification Laws in Australia*. Sydney: Inst. of Criminology. Meagher, D., (2005) "The Protection of Political Communication Under the Australian Constitution," 28 *Univ. of New South Wales Law J.* 30-68.

⁷ Waldron, J., (2012) *The Harm in Hate Speech*. Boston, Ma: Harvard Univ. Press. At 16

⁸ Schauer, F., (1978) "Fear, Risk and the First Amendment: Unravelling the 'Chilling Effect'," 58 *Boston Univ. Law Rev.* 685-732.

engaging in legitimate political debate for fear of falling foul of legislation that proscribes hate speech⁹. The risk of creating martyrs has been explained as follows:

... [J]udicial determinations of guilt or innocence under ‘hate speech’ laws have social implications that ... can create ‘martyrs’ of those who would incite discrimination and can claim to have been unjustly silenced by the state ... such offensive expression is given more public attention than it might otherwise have received¹⁰.

Proponents of hate speech laws claim that neither of these risks represents a compelling argument against creating legal regimes for delineating forms of unacceptable speech, and that they overstate the potentially negative effects of hate speech laws and downplay their benefits¹¹.

A remedy for harms?

There are two ways in which we construe a ‘remedy’. The first is whether targets are able successfully to lodge complaints for incidents of hate speech and achieve an outcome that ameliorates its effects. The second is whether the laws have contributed to a reduction in the frequency or virulence of hate speech.

A useful starting point in answering the first question is the number of complaints lodged with authorities since the laws were introduced. Our collection of complaints data from all Australian jurisdictions revealed that the number of complaints in any given year is relatively modest. In the decade up to 2010, the total number of complaints nationally fluctuated from a high of 342 to a low of 165 per year¹². These are relatively modest numbers of complaints, given the size of the Australian population at approximately 20 million, and the extent of anti-vilification laws that cover most jurisdictions and a variety of grounds.

We observed a trend, shortly after new legislation is introduced, to test it out, as evidenced by relatively higher numbers of complaints compared with later periods. For example, the year 2004-05 shows a significant increase in the numbers of complaints compared with the previous year. Nearly half of these complaints were in one jurisdiction – Tasmania – and occurred

⁹ Schauer, F., (1978) “Fear, Risk and the First Amendment: Unravelling the ‘Chilling Effect’,” 58 *Boston Univ. Law Rev.* at 690

¹⁰ Amnesty International (2012) “Written contribution to the thematic discussion on Racist Hate Speech and Freedom of Opinion and Expression organized by the United Nations Committee on Elimination of Racial Discrimination”, 28 Aug., <http://www.ohchr.org/Documents/HRBodies/CERD/Discussions/Racisthatespeech/AmnestyInternational.pdf> (accessed 5 March 2015).

¹¹ McNamara, L., (1994) “The Merits of Racial Hatred Laws: Beyond Free Speech,” 4 *Griffith Law Rev.* 29-59.

¹² Gelber, K., & McNamara, L., (2015) “The effects of civil hate speech laws: lessons from Australia,” 49(3) *Law and Society Review* (forthcoming).

shortly after the introduction of that state's anti-vilification laws. This peak is thus explicable as an example of the higher use of a complaints mechanism shortly after its introduction.

It may be that the higher use of the law in the first few years after it is introduced is due to a heightened awareness of the newly-enacted legislation, combined with a desire to test its utility and application. This suggestion was supported by Jeremy Jones, who, as an elected official of the Executive Council of Australian Jewry (ECAJ), has been instrumental in invoking racist hate speech laws to address anti-Semitism. Jones told us in interview that when the laws were first introduced, their organisation looked at, 'where do people feel most unable to respond as individuals, and where are we getting people saying we have to do something?'¹³ These cases were pursued and clarification of key aspects of the law's operation obtained, including the threshold required for an incident to be actionable, that material on the internet was covered by the provisions, and that Holocaust denial was prohibited. Subsequently, the community was able to use those judgments in combatting other incidents:

You have a newspaper that's published something, you say, 'look at the rules, look at this judgment', and people say ... 'we didn't know, we didn't realise, now we do, we don't want to break the law'.

The judgments were used as a tool of advocacy to convince people not to engage in vilification. This was the case even though less than two per cent of matters are resolved by formal adjudication in a tribunal or court, and therefore produce judgments that are released publicly. Where matters are resolved by confidential conciliation, there is very limited opportunity to use these outcomes for educational purposes. The human rights authorities report on some anonymised case studies in their annual reports, but do not release data that list how many hate speech complaints they have dealt with or what those complaints involved. This contributes to what we discovered in interviews with members of targeted communities: that public awareness of the existence and nature of hate speech laws is uneven and, in some communities, low.

After a 'peak' shortly after legislation was introduced, most jurisdictions see a drop-off in the number of complaints over time. For example, in New South Wales, 2009-2010 saw only 22 complaints of racial vilification lodged. There are a number of possible explanations for this drop off. One is that there is less need for the active engagement of the law because the community improves its discourse. This was the view expressed by a former Attorney-General for New South Wales. Commenting on public submissions to a review by that state of its never-

¹³ Jones, J., (2013) *Interview conducted by authors, unpublished.*

prosecuted criminal anti-vilification laws, Mr Dowd said the decline in the number of complaints over time indicated that the law was achieving its educative purpose¹⁴.

However, there is evidence to contradict this assertion. First, previous research has shown that the majority of hate speech matters terminate before a conciliation is achieved, due in part to some complaints lacking substance, but more usually to procedural barriers including the need to identify and locate the respondent, and the long time that it can take before a complaint reaches conciliation in some jurisdictions¹⁵. Second, there is evidence that the incidence of hate speech in the community has remained at concerning levels. Numerous reports from community organisations have pointed to ongoing high levels of verbal abuse suffered by target communities. For example, Jeremy Jones, who has for twenty years maintained a database on incidences of anti-Semitic 'racist violence',¹⁶ recorded a significant increase in verbal harassment from 8 in the year ending September 1990, to 128 in the year ending September 2011¹⁷.

There are continuing incidences of prejudicial expressions against Arabs and Muslims. In 1998 a report noted that the 1990 Gulf Crisis had created an atmosphere that was 'conducive to the 'scapegoating' of Arab and Muslim people¹⁸. A 2004 report on religious diversity noted that while in some areas religious communities cooperated well and inter-faith initiatives were burgeoning, nevertheless the terrorist attacks of September 11, 2001 had 'triggered an Australia-wide spate' of abuse, hate mail and assault. Veiled Muslim women were a particular target and reported an inability to venture into public¹⁹. These findings were replicated in our interviews with members of Arab and Muslim communities who stated that since the 2001 terrorist attacks, members of the wider community felt that it was acceptable to engage in verbal abuse towards them, in part because political leaders were also doing so.

Finally, reports on the experiences of Indigenous Australians demonstrate that verbal abuse is persistent and ongoing. A 2012 report in Victoria noted that 92 per cent of respondents had experienced being called racist names, or being subjected to racist comments or jokes in the

¹⁴ Merritt, C., (2013) "Don't Fiddle with Onus of Proof," *The Australian*, 19 Apr., p. 25.

¹⁵ Gelber, K., (2000) "Implementing Racial Anti-Vilification Laws in New South Wales, 1989-1998: A Study," 59(1) *Australian J. of Public Administration* at 18; McNamara, Luke (2002) *Regulating Racism: Racial Vilification Laws in Australia*. Sydney: Inst. of Criminology at 158

¹⁶ Jones uses the definition of 'racist violence' contained in the AHREOC's *Racist Violence: Report of the National Inquiry into Racist Violence in Australia* (1991: 14): 'verbal and non-verbal intimidation, harassment and incitement to racial hatred as well as physical violence against people and property'.

¹⁷ Jones, J., (2011) *Report on Anti-Semitism in Australia: 1 October 2010-30 September 2011*. Sydney: Australia/Israel & Jewish Affairs Council & Executive Council of Australian Jewry.

¹⁸ Australia, Human Rights and Equal Opportunity Commission (AHREOC) (1998) *Article 18: Freedom of Religion and Belief*. Sydney: HREOC. At 119

¹⁹ Cahill, D., et al. (2004) *Religion: Cultural Diversity and Safeguarding Australia*. Canberra: Department of Immigration and Multicultural and Indigenous Affairs, Australian Multicultural Foundation, World Conference of Religions for Peace, RMIT Univ., Monash Univ. at 79, 81, 84-5, 90.

previous 12 months²⁰. In our interviews, Indigenous people confirmed that they were routinely subjected to verbal expressions of racism that were disempowering, including children in school. This means that it is unlikely that the decline in the number of formal complaints under the civil hate speech laws over time reflects an improvement in the quality of public discourse or a reduction in incidents of hate speech.

We also conducted interviews with ‘successful’ complainants/litigants and their lawyers²¹. These showed that the complaints most likely to achieve the remedy sought and advance the wider objective of deterrence have occurred when the complainant is supported by a representative organisation, or has exceptional personal resolve to pursue the matter; and where the person alleged to have engaged in unlawful hate speech is an ‘ordinary’ member of the community, rather than a high profile public or media figure. This is because of the commitment required to pursue a complaint to a successful conclusion, and the likely amenability of the respondent to change their behaviour in a system that relies heavily on voluntary compliance with a conciliated settlement.

Successful deployment of hate speech laws ideally relies on an extraordinary individual, backed by a well-respected organisation that provides credibility, resources and expertise. As Jones observed with reference to the case in Tasmania, their first litigated ‘win’ under federal racial hate speech law,

... we had the advantage of an individual [Jones] who had been dealing with this stuff for twenty or more years at that time, We had a lawyer who is very used to industrial law but there were enough similarities and a barrister who had a lot of experience in defamation ... For an average member of the public to use the law [is] extremely difficult.

Jones adds that because he had been documenting anti-Semitic incidents for years, the ECAJ had an evidence base to support informed, strategic decision-making about which matters should be litigated. No other community affected by hate speech in Australia has documented the problem to the same extent.²²

²⁰ Victorian Health Promotion Foundation (VHPF) (2012) *Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities: Experiences of Racism Survey – A Summary*. Melbourne: VHPF. At 2

²¹ Gelber, K., & McNamara, L., (2014a) “Private Litigation to address a Public Wrong: A study of Australia’s regulatory response to ‘hate speech’,” 33(3) *Civil Justice Quarterly* 307-334.

²² In 2014 a website and Facebook page were launched called the Islamophobia Register Australia: <http://www.islamophobia.com.au> (Veiszadeh 2014).

We do not suggest that hate speech laws can only be successfully invoked in these circumstances. There is evidence to the contrary.²³ However, our interviews with litigants and members of targeted communities supported this view.

Keysar Trad's long-running battle with radio personality Alan Jones provides another example of the heavy burden carried by complainants/litigants under Australian civil hate speech laws. In April 2005, Jones made statements during his Sydney radio broadcasts including calling Lebanese Muslims 'mongrels' and 'vermin', and saying they 'hate our country and our heritage', 'have no connection to us', 'simply rape, pillage and plunder a nation that's taken them in', were a 'national security problem' who were 'getting away with cultural murder', and making women feel unsafe and threatened. It took nearly a decade for Trad to achieve what he set out to achieve: confirmation that Jones comments were unlawful under racial vilification under s 20C of the *Anti-Discrimination Act 1977* (NSW)²⁴.

Such stories confirm that Australia's primary model of hate speech regulation places a heavy burden on the targets of hate speech. The legislation can only be invoked in relation to a given incident if a member of the vilified group is willing to step up and take on the arduous, stressful, time-consuming and possibly expensive task of pursuing a remedy on behalf of the wider community. In a sense, the regulatory model *assumes* the existence of such a person in each of the targeted communities. As a result the benefits of the protection of Australian hate speech laws have been unevenly distributed, depending on the ability and willingness of the affected community to pursue hate speech litigation.

Overall, this analysis indicates that civil hate speech laws are providing a remedy, in two senses. The first is that complaints can be lodged and in some cases a favourable outcome obtained. The ability to have a governmental authority validate the message that hate speech breaches the law is important in and of itself, since it provides targeted communities with the knowledge that the law can assist in protecting them from discrimination. The second is in terms of the laws' educative role. That this educative role includes directly using precedents to dissuade hate speakers is of particular interest, since it would not be able to occur in the absence of hate speech laws. Given the ability of the civil hate speech model to target a wider range of expressive conduct than a purely criminal model would permit, this is particularly

²³ *Burns v. Radio 2UE Sydney Pty Ltd & Ors* [2004] NSWADT 267 (22 November 2004); *Trad v. Jones & Anor* (No. 3) [2009] NSWADT 318 (21 December 2009); *Eatock v. Bolt & Herald and Weekly Times* (2011) 283 ALR 505.

²⁴ Trad, K., (2013) *Interview conducted by authors, unpublished*. Gelber, K., & McNamara, L., (2014a) "Private Litigation to address a Public Wrong: A study of Australia's regulatory response to 'hate speech'," 33(3) *Civil Justice Quarterly* 307-334. 2015) Gelber, K., & McNamara L., (2015) "The effects of civil hate speech laws: lessons from Australia," 49(3) *Law and Society Review* (forthcoming). After numerous hearings, legal arguments and appeals, the complaint was upheld by the NSW Civil and Administrative Tribunal: *Trad v Jones* (No 7) [2014] NSWCATAD 225 (19 December 2014).

important. It provides direct evidence of the educative role that hate speech laws can play. The remedies are, however, limited as there are persistent, significant levels of hate speech, the burden on complainants in seeing a complaint through can be high, and there is an uneven distribution of the benefits among target communities²⁵.

A modification of speech?

We now consider other evidence regarding whether an improvement of discourse has occurred. We have already established that hate speech is ongoing. Here, we provide further data to consider whether there has been a reduction in hate speech over time.

We conducted a qualitative document analysis of 6612 letters to the editor published in newspapers in each jurisdiction over the period of the study²⁶. There is a difference between language use in the mediated outlets that are newspapers, and language use on the street (explicated above). We view the letters to the editor as a mediated discourse that demonstrates the tension between publishing views of members of the public on the one hand, and remaining within the confines of legally permissible expression on the other.

We found a discernible shift in language used to express prejudice towards Indigenous peoples. In the early 1990s terms such as ‘uncivilised’ and ‘not civilised’ were in prejudicial letters. By the mid-1990s prejudice was primarily conveyed by referring to ‘frivolous title claims’, ‘special laws for Aborigines’, the ‘Aboriginal guilt industry’, and the Stolen Generations ‘myth’. We found no consistent shift in language used to express prejudice towards recent migrants, with expressions including ‘send migrants back where they came from’, ‘ethnic crimes’, ‘noisy minorities’, and descriptions of asylum seekers since circa 2000 including ‘human evil’, ‘illegal immigrants’, ‘terrorists’, ‘uninvited intruders’ and ‘queue-jumpers’.

Overall, there was a modest but significant reduction in the expression of prejudice over time. When the letters are divided into three equal time periods, the proportion of ‘prejudicial’ letters published in 1992-1997 was 33.86 per cent, in 1998-2003 the figure was 29.08 per cent and in 2004-2009 the figure was 28.54 per cent. Of course, our data cannot tell us clearly the extent to which hate speech laws themselves contributed to this reduction in mediated expressions of prejudice and we acknowledge that a myriad of social factors has contributed to this change.

²⁵ Gelber, K., & McNamara L., (2014a) “Private Litigation to address a Public Wrong: A study of Australia’s regulatory response to ‘hate speech’,” 33(3) *Civil Justice Quarterly* 307-334.

²⁶ Gelber, K., & McNamara L., (2014b) “Changes in the Expression of Prejudice in Public Discourse in Australia: Assessing the Impact of Hate Speech Laws on Letters to the Editor 1992-2010,” 20(1) *Australian J. of Human Rights* 99-128.

Nevertheless, the laws likely played a part in forming the climate within which newspapers are publishing fewer prejudicial letters²⁷.

Interviews with members of targeted communities also yielded insights into whether hate speech laws have exerted a positive influence on discourse. Indigenous interviewees tended to be pessimistic, stating that the prevalence of hate speech towards Aboriginal and Torres Strait Islander people over time had remained the same, or increased. One interviewee said,

If you've got commentators who are out there with their hate speeches, a lot of it can be dressed up as acceptable speech, when, in actual fact, it's totally unacceptable. But, somewhere along the way, we've kind of been numbed into accepting that it's okay ...

A common theme in the views expressed by interviewees was that hate speech remained a prevalent feature of life, but that its primary targets had changed. For example, a member of the Vietnamese community felt that things had improved (compared to the 1980s and 1990s) for Vietnamese people in Australia, but that racist attention had shifted to Muslims and more recent immigrant communities from Afghanistan and Africa. This view was echoed by Sudanese and Afghan interviewees. A Turkish interviewee said,

I think it shifts from community to community ... so it might have been sixty, seventy years [ago] or whatever, the Italians and the Greeks, then the Middle Eastern [and] Turkish people, then it shifted to the Chinese, now to the ... African and the Afghani community.

No interviewees thought that hate speech laws had had a profoundly positive influence on the quality of public discourse. However, a number were of the view that the laws had yielded some benefits:

Has legislation had an impact on the level of hate speech? I think it has to a certain extent. It does not mean it's eliminated it ... But people are more conscious and aware of it ... it has curtailed some of the utterances that people might hold back ... So the legislation has had some role in perhaps reducing or minimising that harm.

An educative and symbolic effect?

Is there evidence from our study that Australian hate speech laws have had an educative effect on the public, or provide a symbol of support for targeted communities? We have already concluded that there have been two ways in which the laws play an educative role. The first is

²⁷ Gelber, K., & McNamara, L., (2014b) "Changes in the Expression of Prejudice in Public Discourse in Australia: Assessing the Impact of Hate Speech Laws on Letters to the Editor 1992-2010," 20(1) *Australian J. of Human Rights* 99-128.

the direct and conscious use of prior judgments in community advocacy and as a device to curb ongoing vilification by telling the perpetrators that the court has stated that what they are doing is unlawful. A second, albeit less direct and harder to quantify, educative effect has been evidenced by the reduction in the proportion of prejudicial letters published in newspapers. Combined with the evidence of knowledge of the existence (if not the definition) of hate speech laws among letter writers, it is possible that the existence of hate speech laws has played a role in educating them in how to avoid confrontation with the laws, even if they still wish to express prejudice. However, it is also possible that even *successful* hate speech litigation can communicate messages that are at odds with the laws' educational goals. This point was illustrated by the public discourse that emerged in the aftermath of the Federal Court of Australia's decision that newspaper columnist, Andrew Bolt, had engaged in unlawful hate speech by suggesting that a number of fair-skinned Aboriginal people had deliberately chosen an Indigenous identity over others that were more logically available to them, and that they had done so for personal gain²⁸.

Importantly, in interviews many community members and representatives, when asked if they thought hate speech laws were important, expressed overwhelming support for their retention. There was a strong sense that the laws could make a positive contribution outside their formal utilisation. The overwhelming view was that the laws were useful as a statement in support of vulnerable communities. Interviewees described it as important simply to 'know they're there' and that they set a standard for what's 'not acceptable'. It follows that the legal form and parameters of hate speech laws may be less important than the fact of their existence. The Australian experience with civil hate speech laws suggests that a decision *not* to rely on the criminal law should not automatically be interpreted as a 'weak' regulatory response, but rather as a potentially useful way of setting a standard for public debate.

A 'chilling effect' or the creation of martyrs?

Our analysis of letters to the editor revealed little evidence that public discourse has been diminished over the past 25 years. Robust debates have been had on a broad range of issues including the land rights of Indigenous Australians, same-sex marriage, and the treatment of asylum-seekers. Our analysis revealed the continued expression of prejudice over time. The fact that we detected a shift away from more intemperate styles of language cannot be said to support the chilling effect claim. At the heart of this claim is a concern about the *silencing* of views and opinion. Yet at the same time that Andrew Bolt claimed he was being 'silenced' by hate speech laws, he was able to disseminate his views widely through prominent media

²⁸ *Eatock v Bolt* (2011) 283 ALR 505; see Gelber, K., & McNamara L., (2013) "Freedom of Speech and Racial Vilification in Australia: the 'Bolt' case in Public Discourse," 48(4) *Australian J. of Political Science* 470-484.

attention²⁹. Therefore, although the distinction may be contentious, we distinguish between desirable and undesirable effects. Hate speech laws are designed to influence the terms in which individuals express their views in public (desirable), however they are not designed to make certain topics 'off limits' (undesirable). Our research suggests that the risk of a chilling effect has not been substantiated. Australians are willing to express robust views on a broad range of policy issues.

The story of Bolt's encounter with Australia's national racial hatred law *does* lend some support to the claim that hate speech laws can produce martyrs. After Bolt was found to have breached s 18C of the *Racial Discrimination Act 1975* (Cth), an orchestrated reconstruction of the decision dominated media discourse in which Bolt served as a representative victim for a wider class of opinion-holders on issues of Aboriginal identity, hate speech laws as incursions into free speech, and the vulnerability of free speech. These events confirm that the invocation of hate speech laws can have unintended effects that subvert rather than promote their underlying values³⁰.

Yet a sense of proportion is required here. No other case in over two decades of civil litigation has triggered a comparable martyr effect. Recalcitrant Holocaust denier Frederick Toben attempted to adopt a martyr position when he was found to have breached the same federal racial hatred law years earlier.³¹ His refusal to abide by orders of the Federal Court to remove Holocaust denial material from his website resulted in 24 contempt of court findings and, ultimately, a three month jail term for contempt of court³². However, in public discourse this attempt served to consolidate his infamy and status as a powerful illustration of precisely why hate speech laws were enacted in the first place³³. Two distinctive features of Australia's hate speech laws are noteworthy here. First, given that most transgressions of the law are addressed in confidential conciliation, with less than 2 per cent resulting in court or tribunal decisions that enter the public domain, opportunities for martyrdom are rare. Second, because the laws rely overwhelmingly on *civil* remedies, they tend not to produce the criminal sanctions on which the claimed martyr effect is based. The Bolt controversy does not justify a general

²⁹ Gelber, K., & McNamara, L., (2013) "Freedom of Speech and Racial Vilification in Australia: the 'Bolt' case in Public Discourse," 48(4) *Australian J. of Political Science* at 474-476.

³⁰ Gelber, K., & McNamara, L., (2013) "Freedom of Speech and Racial Vilification in Australia: the 'Bolt' case in Public Discourse," 48(4) *Australian J. of Political Science* 470-484.

³¹ *Jones v. Toben* (2003) 129 FCR 515.

³² Akerman, P., (2009) "Denier in jail after losing his appeal," *The Australian*, 14 Aug., p. 3.

³³ Richardson, G., (2014) "Auschwitz: Why I can't Back Brandis on Free Speech," *The Australian*, 28 Mar., p. 12. Aston, Heath (2014) "Holocaust denier Frederick Toben backs George Brandis' plans for discrimination law," *Sydney Morning Herald*, 13 May, <http://www.smh.com.au/federal-politics/political-news/holocaust-denier-frederick-toben-backs-george-brandis-plans-for-discrimination-law-20140513-zrbnx.html> (accessed 5 March 2015).

conclusion that hate speech laws necessarily produce a counterproductive martyr effect, as it was an atypical event in the history of civil hate speech laws in Australia.

Conclusions

Our project speaks both to the utility and the inefficacy of the dominant legal model for addressing hate speech in Australia. Anti-vilification laws like s 18C of the *Racial Discrimination Act 1975* (Cth) do provide targeted communities with the opportunity to lodge complaints with a human rights authority, in a process that reassures them that the law can assist them, and reminds them that the polity has enacted provisions that enable them to seek redress for hate speech. Further, the laws have educative functions – both direct and indirect – and symbolic importance. On the other hand, we found ongoing and significant levels of hate speech, a regulatory model that relies on individuals who are willing and able to bear the burden of enforcement, and an uneven distribution of benefits among targeted communities.

Despite these mixed results, targeted communities expressed overwhelming support for the value and retention of the laws, as a symbol of their protection and the government's opposition to racist vilification and discrimination. Indeed, although they are often demonised by strident opponents, it would appear that hate speech laws have become an accepted part of the Australian landscape. A 2014 opinion poll showed 88 per cent of the public supporting the retention of s 18C of the *Racial Discrimination Act 1975* (Cth) in its current form³⁴. This shows that a very large majority of the public supports the idea that hate speech laws are an appropriate component of the framework within which public debate takes place in Australia. This gives these laws a normative influence, and provides participants in public debate with a language they can employ to condemn hate speech when it occurs.

³⁴ ABC News (2014) "Racial Discrimination Act changes receive little support in new Nielsen poll," *ABC News*, 14 Apr., <http://www.abc.net.au/news/2014-04-14/race-law-changes-receive-little-support-in-new-poll/5387452> (accessed 5 March 2015).

Alternative Dispute Resolution: an effective tool for addressing racial discrimination?¹

Tracey Raymond

Introduction

Federal human rights and anti-discrimination law provides that complaints about discrimination, including complaints of racial discrimination, are initially dealt with through an Alternative Dispute Resolution ('ADR')² process of statutory conciliation. The use of ADR in this context has had its share of criticism. For example, concern has been expressed that the individualised form of the complaint process, combined with the traditional notion of the 'neutral' ADR practitioner and the confidential nature of ADR processes and outcomes, detracts from the social reformative aims of anti-discrimination law.

Such critiques appear, however, to be based on dated ideas of ADR practitioner neutrality and broad generalisations about ADR practice. This paper will, with reference to the conciliation work of the Australian Human Rights Commission and data obtained from that process, highlight the often unrecognised capacity for statutory conciliation processes to generate social change effects. In particular, the paper will highlight the legitimate educative role of conciliators, the potential for attitudinal change in non-adversarial dispute resolution, the ability for such processes to echo and generate norms and the significant potential for conciliation outcomes to include measures which contribute to broader social change.

1. Alternative Dispute Resolution and the work of the Australian Human Rights Commission

1.1 The role of National Human Rights Institutions

National Human Rights institutions ('NHRIs'), such as the Australian Human Rights Commission ('the Commission'); have been established by many countries around the world to assist the fulfilment of domestic obligations arising from international human rights treaties. 'Human rights' as codified in international treaties, are understood as universal legal

¹ This paper is developed from a paper previously presented by the author at the 10th National Mediation Conference, Adelaide. The views represented in this paper are the author's own and do not necessarily represent the views of the Australian Human Rights Commission.

² In this paper Alternative Dispute Resolution refers to processes other than judicial determination, in which a third person assists parties to resolve a dispute. Where terms such as 'mediation' and 'conciliation' are used, they refer to processes as defined by the Australian National Alternative Dispute Resolution Advisory Council (NADRAC) – See National Alternative Dispute Resolution Advisory Council (2003), 'Dispute Resolution Terms',

guarantees protecting individuals and groups against actions and omissions that interfere with fundamental freedoms, entitlements and human dignity. The objectives of these treaties can be summarised as the achievement of equality, dignity and justice. It is not surprising then that the language of human rights has been utilised as a means of enabling social change and achieving social justice.³

The notion of NHRIs as agents of social change and social justice is evident in the legislative frameworks in which they operate and in public statements of their mission and purpose which focus on the elimination of discrimination and the promotion of equality. For example the *Disability Discrimination Act 1992 (Cth)* ('DDA'), administered by the Commission, has the stated *objective to*:

...eliminate, as far as possible, discrimination against persons on the ground of disability...; and to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community (Section 3, DDA).

Similarly, the International Convention on the Elimination of All Forms of Racial Discrimination ('ICERD'), scheduled to the Racial Discrimination Act, 1975 (Cth) (RDA), sets out the State Party's commitment to:

...eliminating racial discrimination in all its forms and promoting understanding among all races... (Article 2, ICERD).

The role of NHRIs in promoting and protecting human rights includes providing advice to government in relation to law and policy, conducting public education and investigating and resolving complaints regarding alleged violations of rights. Complaints brought to NHRIs can be made by individuals or groups and the subject matter may range from alleged violations of civil and political rights by government, to allegations of harassment and discrimination by private individuals and/or organisations.

NHRIs generally do not have authority to impose legally binding outcomes in relation to complaints. Rather, the enabling legislation provides for informal resolution of complaints through ADR processes often described as 'mediation' or 'conciliation'. Where attempted resolution is unsuccessful, complaints may proceed to tribunals or courts that can issue final and binding determinations. The United Nations has described NHRIs as 'ADR mechanisms'

³ In this paper the term 'social justice' is used to refer to a form of social change that is focused on addressing issues of inequality and unfairness within society.

and referred positively to the role of NHRIs to provide a more accessible, timely and inexpensive means to resolve disputes in contrast with judicial determination.⁴

1.2 The role of the Commission in relation to complaints of racial discrimination

One of the Commission's key roles as Australia's NHRI is to receive, inquire into and conciliate complaints about unlawful discrimination, including complaints of racial discrimination under the RDA. Over the past five years, the Commission has received an average of 466 complaints under the RDA each year, which represents around twenty per cent of complaints received under federal human rights and anti-discrimination law.

Complaints made under the RDA can vary from alleged individual instances of racial discrimination in various areas of public life to more systemic issues. Systemic issues are understood to be those which extend beyond the individual and are linked with policies, practices and systems affecting broader groups.

The Commission's success in resolving complaints of racial discrimination through its conciliation process is evident in the statistics. For example in the 2013-2014 reporting year, where conciliation was attempted with RDA complaints, 71 per cent were successfully resolved. This is a high conciliation success rate and higher than the Commission's overall conciliation success rate for that year. Data on satisfaction with the Commission's conciliation process is also very high. In 2013-2014, where complaints were conciliated, 97 per cent of those who completed the service feedback survey,⁵ reported that they were satisfied with the service provided and 77 per cent rated the service they received as 'very good' or 'excellent'.⁶ In relation to complaints under the RDA that were conciliated, 100 per cent of those who completed the survey reported that they were satisfied with the service and 76 per cent rated the service as 'very good' or 'excellent'.⁷

While the conciliation process may be perceived positively by both complainants and respondents to complaints, the question remains as to whether it can be said that an ADR

⁴ United Nations Centre for Human Rights (1995), 'National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotional and Protection of Human Rights United Nations', New York and Geneva.

⁵ Parties to finalised complaints before the Commission, regardless of the outcome of the complaint, are invited to participate in the feedback survey which can be completed online or in other formats. In 2013-2014, the sample size was 463 with 205 complainants and 258 respondents completing the survey.

⁶ In terms of responses disaggregated by complainants and respondents, 96 per cent of complainants and 98 per cent of respondents reported that they were satisfied with the service and 80 per cent of complainants and 75 per cent of respondents rated the service as 'very good' or 'excellent'.

⁷ In terms of responses disaggregated by complainants and respondents, 100 per cent of both RDA complainants and respondents reported that they were satisfied with the service provided and 78 per cent of complainants and 76 per cent of respondents rated the services as 'very good' or 'excellent'.

process such as the Commission's conciliation process, is an effective tool for achieving the social change objectives reflected in the ICERD and the RDA.

2. Concerns about ADR in the anti-discrimination law context

The generally extolled benefits of ADR are seen to have particular resonance in the anti-discrimination law context. Namely, in comparison with litigation, ADR is seen to provide a more efficient and accessible means of dispute resolution and a process that can be empowering and relationship enhancing. Additionally, ADR's lack of legal and procedural rules is seen to be of particular value in dealing with claims of less overt discrimination which, it is claimed, is the more likely form of discrimination in society today and which can be very difficult to prove in judicial proceedings.⁸

However, concerns have been expressed that informal dispute resolution processes facilitated by NHRIs can impede, rather than contribute to, the social reform objectives of anti-discrimination law. These concerns mirror perceived limitations of ADR as a tool for broader social change that are seen to arise from key underpinning principles of ADR such as 'neutrality' and 'confidentiality'. These concerns, in terms of both ADR generally and ADR in the specific context of anti-discrimination law, are summarised below.

2.1 The 'neutral' ADR practitioner

In the formal dispute resolution process of western liberal democracies, the 'neutrality' of the legal adjudicator is considered central to fairness and justice. This connection between third party neutrality and fairness takes on heightened importance in ADR in light of the non-reviewable and privatised nature of such processes.⁹ The notion of ADR practitioner neutrality that is drawn from 'rule of law' values has been seen to imply that the ADR practitioner cannot bring the broader social context into the dispute resolution process.¹⁰ From this perspective the social context of the dispute, including group issues, would only be relevant to the process and outcomes of ADR when raised by the parties. Thus, it is said that outcomes advancing social change objectives would be dependent on the parties perceiving the dispute in broader

⁸ Stallworth, L., (et al) (2001) *Discrimination in the Workplace: How Mediation Can Help*, Dispute Resolution Journal Vol 56, p 35. Gadlin, H., (2009), *Addressing the Thornier Complexities of Racial Discrimination Complaints in the Workplace*, Dispute Resolution Magazine, Vol 15, p 25.

⁹ Astor H (2000), *Rethinking neutrality: a theory to inform practice - Parts 1 & 11*, Australasian Dispute Resolution Journal No 17, Thompson Lawbook Co, Sydney. Astor, H., (2007), *Mediator Neutrality: Making Sense of Theory and Practice*, Legal Studies Research Paper No.07/46, University of Sydney Law School.

¹⁰ Gadlin, H., & Sturm, S., (2007), *Conflict Resolution and Systemic Change*, Public Law & Legal Theory Working Paper Group, Columbia Law School, No 07-147. Schoeny, M., & Warfield, W., (2000), *Reconnecting Systems Maintenance with Social Justice: A Critical Role for Conflict Resolution*, Negotiation Journal.

societal or structural terms and being willing to consider remedies that extend beyond individual redress.

Therefore, in the anti-discrimination law context there is concern that the neutrality of the ADR practitioner, combined with the individualised nature of the complaint process, means that discrimination issues raised in complaints will be abstracted from the social context in which they occur with broader social and structural issues being reduced to the level of misunderstandings and 'one-off' incidents. As such, it is said that remedy will also focus on individual redress with no need or incentive for common respondents, such as government and corporations, to address systemic causes of discrimination.¹¹

Additionally, there is concern that in the anti-discrimination law context, the neutrality of the ADR practitioner will mean that likely power differentials between complainants and respondents will not be addressed in the process; leading to unfair outcomes for complainants which further detracts from the social change objectives of the law.¹²

2.2 Confidentiality

ADR processes are traditionally understood as being 'private' and 'confidential' processes, with confidentiality considered central to enabling the open exploration and efficient resolution of disputes.

This underpinning principle of confidentiality and the associated inability of ADR processes to generate legal precedent are central to concerns about ADR's inability to facilitate social change. In particular, critics of ADR argue that formal court determination processes are better mechanisms for dealing with public interest issues in that in this public legal forum, inequities of process can be seen and addressed and beneficial public norms generated.¹³

These concerns about ADR generally are echoed in the anti-discrimination law context in claims that the confidential ADR processes of NHRIs prevent public declarations that are

¹¹ For example, Thornton, M., (1990), 'The Liberal Promise: Anti-Discrimination Legislation in Australia', Oxford University Press, Melbourne. Thornton, M., (1995), *Revisiting Race* in 'Racial Discrimination Act 1975: A Review', Commonwealth of Australia, p 81.

¹² Thornton, M., (1990), 'The Liberal Promise: Anti-Discrimination Legislation in Australia', Oxford University Press, Melbourne.

¹³ Fiss, O., (1984), *Against Settlement*, Yale Law Journal, No 93, p 1073. Delgado et al (1985), *Fairness and formality: Minimising the risk of prejudice in Alternative Dispute Resolution*, Wisconsin Law Review, No 6, p 1359. Imbrogno, A., (1999), *Using ADR to Address Issues of Public Concern: Can ADR Become an Instrument for Social Oppression?* Ohio State Journal on Dispute Resolution, Vol 14, No 3.

necessary to further the legal rights of disadvantaged groups and progress social change.¹⁴ Some may even hold the view that the ADR processes of NHRIs are indicative of the tokenism of discrimination law and the way in which it can provide a semblance of justice which detracts from action to achieve substantive social change.

3. An alternative view of ADR in the anti-discrimination law context

While limitations on the ability of ADR to act as a direct agent of social change need to be acknowledged, the potential for ADR to contribute to systemic change and have impact beyond individual disputants, is a growing area of academic interest.¹⁵ The following section draws on developments in ADR theory and understandings of the diversity of ADR practice to highlight the manner in which the conciliation work of NHRIs such as the Commission, can be seen to contribute to the social change objectives of anti-discrimination law.

3.1 The role of the conciliator

Some of the concerns about ADR in the anti-discrimination law context, as noted at 2.1 above, appear to be based on generalisations about the required neutrality of ADR practitioners and unfamiliarity with the continuum of ADR which spans facilitative, advisory and determinative modes of practice.

Detailed expositions in feminist and critical legal theory have effectively challenged the myth of absolute neutrality which has, in turn, lead to the reconsideration of the connection between neutrality and fairness in ADR practice. In an alternative understanding, fairness of an ADR process is not dependent on the unrealistic goal of detached neutrality. Rather, fairness requires that practitioners exercise impartiality, both in terms of not inserting personal bias into the process and also conducting the process in a manner that does not privilege one party over the other and maximises party control.¹⁶

¹⁴ Scutt, J., (1986), *The Privatisation of Justice: Power Differentials, Inequality and the Palliative of Counselling and Mediation*, *Alternative Dispute Resolution*, (ed) Mugford, J., Conference Proceedings No 15, Australian Institute of Criminology, Canberra.

¹⁵ For example, Gadlin, H., & Sturm, S., (2007), *Conflict Resolution and Systemic Change*, Public Law & Legal Theory Working Paper Group, Columbia Law School, No 07-147.

¹⁶ Cobb, S., & Rifkin, J., (1991), *Practice and Paradox: Deconstructing Neutrality in Mediation*, *Law and Society Inquiry*, No 16. Mulcahy, L., (2001), *The Possibility and Desirability of Mediator Neutrality – Towards an Ethic of Partiality*, *Social and Legal Studies*, No 10, p 505. Astor, H., (2000), *Rethinking neutrality: a theory to inform practice - Parts 1 & 11*, *Australasian Dispute Resolution Journal* No 17, Thompson Lawbook Co, Sydney. Astor, H., (2007), *Mediator Neutrality: Making Sense of Theory and Practice*, Legal Studies Research Paper No.07/46, University of Sydney Law School.

As explained below, in the anti-discrimination law context the ADR practitioner is legitimately neither neutral nor passive and has the capacity to operate in a model indicative of advisory ADR processes.¹⁷

The Commission's ADR process is conducted within a legislative framework with clear public interest objectives. The legislation provides parameters for the content, process and outcome of disputes in that the subject matter of the dispute must be covered by the law, the manner in which the ADR process is conducted must accord with the law, and the terms on which the dispute is resolved must concur with, or at least not detract from, the law.¹⁸ Therefore, the legal framework requires that the practitioner have a professional interest in the content, process, and outcome of the dispute that includes attending to its broader social context.

This professional interest in the content, process and outcome of a dispute will not undermine fairness where parties participate in full knowledge of the statutory framework, practitioner interventions reflect the institution's statutory authority and facts and evidence before the institution, and are aimed at maximising empowerment of both parties in terms of process and outcomes.

An appreciation of this legitimate role of the ADR practitioner in relation to content, process and outcome highlights the potential for the process to be conducted in a manner that can contribute to the social reform objectives of anti-discrimination law such as the RDA.

Firstly, it is legitimate for the practitioner within this context to provide information and educate parties about rights and responsibilities in the law and the potential relevance of the law to the dispute at hand. As the law in this context relates to the rights of groups that share particular attributes, contextualising the dispute in the law also means that individual disputes are connected to collective rights. Therefore, the broader social and structural issues underpinning the law are germane to the issues raised in an individual complaint. Discussion of the purposes of the law may be important in understanding the issues in dispute and considering terms of resolution. Conciliator intervention is also likely to involve providing information to the parties about relevant case law and how the dispute might be considered by a determining body. In this way the ADR process can also provide a powerful avenue to echo legal norms, facilitate

¹⁷ Advisory ADR processes are defined as ones where the ADR practitioner '*...considers and appraises the dispute and provides advice as to the facts of the dispute, the law and in some cases, possible or desirable outcomes and how these may be achieved*' (National Alternative Dispute Resolution Advisory Council (2003), 'Dispute Resolution Terms')

¹⁸ See for example section 28 of the *Australian Human Rights Commission Act 1986* (Cth) which states '*The Commission shall, in endeavouring to effect a settlement...have regard to the need to ensure that any settlement...reflects a recognition of human rights and the need to protect those rights.*'

generalisation of values articulated in the law and contribute to self-initiated action in accordance with the objectives of the law.¹⁹

Additionally, there is a legitimate role for the conciliator to provide information about possible terms of resolution the parties may wish to consider. This may include providing information about how other complaints have been resolved and outcomes of cases that proceeded to court. Providing such information can assist to ensure that outcomes of the informal resolution process reflect what has been publicly determined to be 'fair' with reference to the broader purposes of the law. Further, as discussed in 3.3 below, the provision of such information can assist parties consider outcomes that extend beyond individual remedy and have systemic impact. Of course, however, any such conciliator intervention in relation to the outcome of the dispute must be implemented in a manner that balances public interest objectives with the needs and interests of the parties to the dispute and supports key ADR values of party empowerment and ownership of outcomes.²⁰

3.2 The value of non-adversarial approaches dispute resolution

The approach to ADR outlined above is best understood as a 'rights-based' approach and is a mode of practice which has credence in statutory contexts. However, another approach to ADR known as 'interest-based' dispute resolution is also of particular value in the anti-discrimination law context and has the potential to generate social change effects in different ways.

In contrast with a more adversarial rights-based approach, an interest-based approach to ADR focuses on encouraging disputants to understand each other's views, maintain constructive dialogue and develop creative resolution options to address mutual needs and interests. While an interest-based approach may not be appropriate for some types of disputes before NHRIs, the value of statutory conciliators being trained in these skills and utilising such skills where appropriate, cannot be overstated.²¹

¹⁹ This approach to ADR practice is also referred to as 'norm-educating' or 'norm-advocating' – See Hippensteele, S., (2009), *Revisiting the Promise of Mediation for Employment Discrimination Claims*, Pepperdine Dispute Resolution Law Journal, Vol 9, p 211. & Belthorn, S., (2005), *Settling Beyond the Shadow of the Law: How Mediation Can Make the Most of Social Norms*, Ohio State Law Journal on Dispute Resolution, Vol 20, No 3.

²⁰ For further discussion of the appropriate parameters of an advisory role in this context see Ball, J., & Raymond, T., (2004), *Facilitator or Advisor?: A Discussion of Conciliator Intervention in the Resolution of Disputes Under Australian Human Rights and Anti-Discrimination Law*, Proceedings of the 7th National Mediation Conference, Darwin, Australia
www.mediationconference.com.au/html/04_2004_papers.htm

²¹ Astor, H., & Chinkin, C., (2002), 'Dispute Resolution in Australia', Butterworths, Second edition, Sydney. Raymond T (2006), *Alternative Dispute Resolution in the Human Rights and Anti-Discrimination Law Context: Reflections on Theory, Practice and Skills*, Proceedings of the 3rd APMF Conference, June 2006, Fiji Islands www.auddispute.unisa.edu.au/apmf/2006/papers06.htm.

In particular, a focus on positive, constructive communication and on ‘needs’ and ‘interests’ rather than ‘rights’ and ‘demands’ can enable an environment in which both parties are more open to learn about the expectations of the law and appreciate the experiences of the other party and the group they may be seen to represent. This, in turn, may contribute to attitudinal change and broader social change in that a positive view of the ‘other’ arising from the ADR process may be replicated in future interactions and in social networks over time.²²

Additionally, the use of an interest-based approach when exploring settlement options can be effective in identifying areas of ‘interest convergence’ which go beyond individual remedy and have systemic impact.²³ For example, a complainant’s stated interest in pursuing a dispute may be to obtain a remedy for personal loss and ensure that ‘other people like me are not treated in the same way’. The respondent’s stated interest in resolving the dispute may be ‘to prevent further complaints and to be seen as a fair employer’. An interest-based intervention by the ADR practitioner in this situation can assist the parties to consider inclusion of an outcome such as the introduction of anti-discrimination training and policies, that may not only address mutual interests but also have beneficial effects for others with similar attributes to the complainant.

3.3 Enabling social impact through information and outcomes

As noted previously, a concern raised about ADR in the anti-discrimination law context is that it does not lead to public airing of alleged incidents of discrimination and public determinations of ‘right’ and ‘wrong’, which are considered central to furthering the social change objectives of laws such as the RDA. While limitations arising from the general confidentiality of ADR proceedings must be acknowledged, an understanding of the parameters of confidentiality in this context and an appreciation of the connection between the individual and the systemic, highlights the potential for ADR processes to assist, rather than impede, broader social change.

I turn first to concerns about the lack of public airing of issues and outcomes from ADR processes.

It is important to understand that the confidentiality of ADR processes is not necessarily a barrier to the provision of public information about the content and outcomes of complaints that are brought to NHRIs such as the Commission. For example, in accordance with education

²² Baruch Bush, R., & Folger, J., (1994), ‘The Promise of Mediation: Responding to Conflict through Empowerment and Recognition’, Jossey-Bass Inc Publishers, San Francisco. Baruch Bush, R., (1996), *The Unexplored Possibilities of Community Mediation: A Comment on Merry and Milner*, Law and Social Inquiry No 21, p 715.

²³ The concept of ‘Interest convergence’ as a principle in racial discrimination disputes is discussed in Green (2005).

and reporting functions, NHRIs often provide information about the content and outcomes of ADR processes to the public in the form of de-identified case studies and conciliation precedent registers.²⁴ Information about the subject matter of complaints and complaint trends over time also informs the separate educative and strategic advocacy work of NHRIs.

Additionally, while the law administered by the NHRI may have stipulations regarding ADR being conducted 'in private' and may require ADR related material to be excluded from any future determination proceedings, there may not be any statutory requirement regarding confidentiality of the terms on which a complaint is resolved.²⁵ In such situations confidentiality of settlement terms is a matter for the disputants to agree on and in some situations both parties may see value in the outcome of a conciliation process being publicised.²⁶ For example, this may occur where the outcome involves changes to a practice or procedure that will benefit customers or clients and will contribute to a positive image of a company.

In relation to concerns about the lack of social resonance of individualised complaint settlements, it is important to acknowledge that the complaint process of NHRIs like the Commission is not restricted to complaints about individual acts of discrimination. The Commission receives many complaints which raise issues of systemic discrimination which are resolved on terms that go beyond individual remedy.

Additionally, as highlighted at 3.2 above, even where the issue in a complaint relates to an alleged individual act of discrimination, the complaint may well be resolved on terms which have impact beyond any individual complainant. For example, the outcomes of the conciliation process may include agreements to: change a policy or practice which arguably has a discriminatory impact, introduce anti-discrimination policies and training, and modify buildings or facilities to ensure equality of access. In fact, it can be argued that ADR processes are more likely to be able to directly facilitate systemic outcomes as unlike courts, terms of resolution are not bound by legal notions of individualised harm and redress. In such situations, ADR can provide an efficient avenue for implementation of practical changes which address patterns of social exclusion, without the need for a potentially lengthy and costly formal determination process.

It is important to also acknowledge, as highlighted in writings by Sturm and Gadlin, that even where a complaint is resolved purely on the basis of a confidential individual remedy, the issues

²⁴ See for example the Commission's online Conciliation Register:

www.humanrights.gov.au/complaints_information/register/index.html

²⁵ For example, under federal anti-discrimination law there is no specific statutory requirement that the terms of a conciliation agreement be confidential.

²⁶ As part of a research project undertaken by the Commission in 2007-2008, 220 complaints finalised as 'conciliated' were reviewed. Where confidentiality of terms of agreement could be discerned from the file, (192 matters), 23 per cent did not include confidentiality clauses.

raised by the dispute may trigger broader system analysis and intervention to prevent recurrence of the problem that is not directly observable or articulated.²⁷

4. Is this alternative view of ADR supported by evidence?

The above discussion highlights the potential for ADR processes conducted by NHRIs such as the Commission, to contribute to the social change objectives articulated in the ICERD and the RDA. Specifically, there is said to be potential for the process to: contribute to attitudinal change in individuals; educate about the law and thus encouraging self-initiated action in accordance with the objectives of the law; and facilitate terms of resolution which have systemic impact.

It remains then to consider the extent to which such potential is born out in practice.

Discussions with ADR practitioners in the Commission and similar organisations can provide anecdotal evidence of: attitudinal change demonstrated in the conciliation process; respondents to complaints becoming more aware of the issues and problems experienced by those who lodge complaints; and individuals and organisations becoming more aware of rights and responsibilities in the law. Conciliation case studies in NHRI publications also refer to a range of systemic outcomes from complaints including: the introduction of anti-discrimination and Equal Employment Opportunity (EEO) training; changes to employment practices and service provision; and changes to government policies.

This anecdotal and case study evidence is also supported by data the Commission has obtained over recent years, which is summarised below.

4.1 Survey data regarding the impact of participation in the complaint process

The first set of data relates to a survey undertaken in 2007-2008 with some 238 organisations that were respondents to finalised complaints under federal anti-discrimination law. The survey, which was designed with the assistance of an external research consultancy, sought information about the level to which: (i) involvement in the complaint process can be said to increase knowledge and understanding of the law; and (ii) the extent to which respondents initiate systemic change as a result of their involvement in the complaint process.²⁸ While survey results have not been disaggregated by specific federal legislation, the data is relevant to the issues considered in this paper.

²⁷ Gadlin, H., & Sturm, S., (2007), *Conflict Resolution and Systemic Change*, Public Law & Legal Theory Working Paper Group, Columbia Law School, No 07-147.

²⁸ Details of the research methodology and findings are explained in more detail in the paper by the author published in Proceedings of the 10th National Mediation Conference, 2010.

This survey found that more than half of the respondents (54 per cent) reported that as a result of the complaint, they had gained a better understanding of anti-discrimination law and their responsibilities under the law. The data also indicated that the educative impact of the complaint process was relatively consistent, regardless of the outcome of the complaint.²⁹

In relation to action taken in response to the complaint, 39 per cent of respondents reported that they had introduced or revised anti-discrimination or EEO policies and 47 per cent reported that they had introduced or revised anti-discrimination or EEO training. 47 per cent reported that as a result of the complaint, they had made 'other changes' to their internal work practices or external service delivery which would generally be classified as positive actions to prevent discrimination and ensure equality of opportunity. A further seven per cent reported that as a result of the complaint they had made changes to their facilities or premises to address equality of access.

Analysis of this data supported a view that regardless of the outcome of the complaint, involvement in the complaint process can stimulate respondent organisations to review and make changes to their practices and policies which support the objectives of anti-discrimination law.³⁰ However, the data also indicated that respondents to complaints are much more likely to undertake changes to policies and practices where conciliation is attempted and successful.³¹

The findings of the 2007-2008 survey regarding the educative impact of involvement in the complaint process, is reinforced by data that the Commission now collects as part of its ongoing service feedback survey. For example, in the 2013-2014 survey, 67 per cent of survey participants agreed that as a result of the complaint process they had a better understanding of rights and responsibilities in the law.³² Where the complaint was conciliated, this figure rose to 71 per cent. The data relating to complaints under the RDA is relatively consistent with cross jurisdictional figures, which indicate an educative impact for the majority of participants. For

²⁹ Where conciliation was attempted, 54 per cent of respondents indicated that as a result of the complaint they had gained a better understanding of discrimination law and responsibilities under the law. The figure was 53 per cent where the complaint was dismissed and 54 per cent where the complaint was withdrawn.

³⁰ For example, even where complaints were dismissed by the Commission for reasons including that the complaint was found to be lacking in substance, 22 per cent of respondents indicated that they introduced or reviewed anti-discrimination or EEO policies; 28 per cent said they had introduced or reviewed staff training on anti-discrimination or EEO; and 28 per cent said that they made other positive changes to internal work practices or service delivery.

³¹ For example, where the complaint was successfully conciliated, 59 per cent of respondents said that as a result of the complaint they had introduced or reviewed staff training on anti-discrimination/anti-harassment or EEO. The figure dropped to 30 per cent where conciliation was unsuccessful and 28 per cent where the complaint was dismissed.

³² In 2013-2014, the sample size was 463 with 205 complainants and 258 respondents completing the survey.

example in 2013-2014, 64 per cent of RDA survey participants agreed that as a result of the complaint process they had a better understanding of rights and responsibilities in the law. Where the complaint was conciliated, this figure rose to 79 per cent.

4.2 Data on the outcomes of conciliation

The Commission now also collects and reports on data regarding systemic outcomes from the conciliation process.

Over the period 1 July 2013 – 31 December 2014, where the outcome of the conciliation was known to the Commission and recorded, 25 per cent were classified as systemic. In relation to RDA complaints, the figure was twenty per cent.³³

The main type of systemic outcomes arising from RDA complaints in this period related to the development or review of anti-discrimination policies and the development and/or facilitation of anti-discrimination or cross-cultural training (33 per cent). Such outcomes can have significant impact both in the short and longer term by setting behavioural standards, reinforcing norms of non-discrimination and encouraging attitudinal change³⁴. Other types of systemic outcomes from RDA complaints included changes to workplace and service delivery policies to address issues raised in complaints and agreements for respondents to spend time and undertake joint cultural activities with the complainant and/or within the complainant's racial group. It is also noted that some large scale systemic outcomes have resulted from RDA complaints in recent years. For example, the Commission's 2012 Social Justice Report provides a summary of a representative complaint made under the RDA by an Aboriginal and Torres Strait Islander community leader in the Northern Territory. Conciliation of this complaint, which was against both State and Commonwealth governments, resulted in a commitment to provide funding of \$7.2 million to be used for purposes including: construction of new school classrooms, a program to normalise school attendance; assistance for students with disabilities, and the provision of literacy/numeracy and job readiness training to adults in the community.³⁵

³³ In a relatively small percentage of cases, the parties may engage in private negotiations following the Commission's conciliation process and only advise the Commission that the matter has been resolved without disclosing the terms of settlement.

³⁴ A positive correlation between anti-discrimination policies/training and reduced incidents of discrimination in the workplace is supported by research regarding organisational influences on sexual harassment. See Hulin, C., et al (1996), *Organizational Influences on Sexual Harassment in Sexual Harassment in the Workplace: Perspectives, Frontiers and Response Strategies*, Women and Work: A Research and Policy Series, Vol 5, p 127.

³⁵ Australian Human Rights Commission (2012), 'Social Justice Report', p 80.

5. Conclusion

The question of whether ADR is an effective tool to address racial discrimination is interconnected with the broader question of whether ADR can be seen as a process that not only resolves individual disputes but also has the potential to produce aggregate social effects. Clearly the answer to this question is not straight forward with complexity arising from the various forms of ADR, the differing contexts in which ADR operates and the various ways in which ADR processes may generate social change effects.

This paper has sought to draw attention to the often unrecognised theoretical potential for ADR operating in a statutory context with clear public interest objectives to effectively contribute to the social change objectives of that law.

The data considered in this paper supports a view that this potential is being realised in the Commission's ADR practice, including in relation to complaints of racial discrimination. In particular the data supports that involvement in the complaint process increases knowledge about rights and responsibilities in the law and stimulates self-initiated action to address and prevent discrimination. Further, the data indicates that the terms on which complaints are resolved include components that have broader social impact.

Criticisms of ADR in this context that emerge from critical legal theory have played an important role in shaping the work of organisations like the Commission. It is timely now to give due consideration to ADR theory and practice and fresh attention to how the conciliation process, operating in the shadow of the RDA, can be an effective tool in addressing racial discrimination.

Part 7

Special Measures

A glass half empty? Alcohol, racial discrimination, special measures and human rights

Jonathon Hunyor¹

Access to alcohol for Aboriginal people has been, at times, a powerful symbol of racial equality. Yet the destructive effects of alcohol upon Aboriginal people and communities also undermine the enjoyment by Aboriginal people (and others) of other basic human rights.

This paper considers laws and policies that have regulated access to alcohol by Aboriginal people, particularly in the Northern Territory, from the perspective of the *Racial Discrimination Act 1975* (Cth) ('RDA'), including under the rubric of 'special measures'. It identifies the ways in which Australian jurisprudence has struggled to engage with the complexities of these issues while suggesting how policy-makers may more effectively respond to them.

Introduction: the 'right to drink'

Let me start with the 'right to drink'. Of course there isn't such a right, but it is impossible to deny the role access to alcohol has played as a marker of racial (in)equality. In her study of racial politics and power on the frontier, *Rednecks, Eggheads and Blackfellas*, Gillian Cowlshaw reflects:

When one young stockman... gestured to me with his beer can and said, 'When I stand up and drink a can of beer I'm not like old times. I'm a man', he was clearly articulating the relationship between citizenship and alcohol which existed among Territorians, as elsewhere in Australia. Assertions of manhood and mateship are made in the pub. When Aborigines had been forbidden alcohol, how could they be men among men?²

Racial prohibitions in relation to alcohol have been around since the late 1700s, when Governors Phillip and Macquarie gave orders that white settlers should not supply Aboriginal people with alcohol, while full-scale laws prohibiting the sale or supply of alcohol to Aboriginal Australians began in NSW in 1838.³

In the Northern Territory ('NT'), Aboriginal people were prohibited from drinking by operation of the Aboriginal Ordinance and then, in the 1950s, the Welfare Ordinance under which

¹ Principal Legal Officer, North Australian Aboriginal Justice Agency. These are my personal views, not those of NAAJA. Thanks to Sophie Brown for her assistance in researching this paper.

² Cowlshaw, G., 'Rednecks, Eggheads and Blackfellas' (1999, Allen and Unwin), 22.

³ Brady M., 'First Taste', *Book 6: Struggles over drinking rights* (2008, Alcohol Education & Rehabilitation Foundation), 3.

Aboriginal people were declared 'Wards of the State'.⁴ However, Aboriginal people who were able to get themselves removed from the Register of Wards (by establishing they were not in need of 'protection') were permitted to drink: this was done perhaps most famously and tragically by Arrernte artist Albert Namatjira in 1957.⁵

Opposition to a racially-based prohibition on drinking was an explicit part of the political movement against racial discrimination in the 1960s. As we commemorate 50 years since the 'Freedom Ride', we can also remember that the right of Aboriginal people to drink as equals in hotels and clubs was an explicit part of that campaign.⁶

In 1962, Aboriginal people were given the right to vote⁷ and from 1964 the racially-based prohibition on drinking was lifted, although informal segregation still exists in the NT. In this context it is perhaps no surprise that the idea of a 'right to drink' and the link between citizenship and drinking has lodged firmly in the collective consciousness.⁸ In the NT, we were reminded a couple of years ago of the central role that alcohol continues to play in our society when Chief Minister Adam Giles, Australia's first Aboriginal Chief Minister, described drinking in the NT as a 'core social value'.⁹

Other Aboriginal leaders have been less sanguine. The harm that access to alcohol has caused Aboriginal communities has led Noel Pearson to note ruefully that for Aboriginal people 'our citizenship gave us the right to passive welfare and the right to drink. We were given the dubious human rights to misery, mass incarceration and early death'.¹⁰

The late Charles Perkins, having been a leader on the Freedom Ride, went on to set up the Australians Against Alcohol Committee and organised a public meeting in Alice Springs in the early 1990's that gave rise to the Peoples' Alcohol Action Coalition, an organisation that continues to lobby for reform to alcohol policy to reduce its harmful effects.¹¹

⁴ *Aborigines Welfare Ordinance 1954 (Cth)*.

⁵ Brady, M., above n 3, 16.

⁶ *Ibid* 19.

⁷ *Electoral Act 1962 (Cth)*.

⁸ Race Discrimination Commissioner, *Alcohol Report* (AGPS 1995), 14. Martin, D., and Brady, M., have observed that '[t]he conflation of drinking rights with citizenship rights has led to the right to drink being viewed by some as a human prerogative, and is a sticking point in the debate about paternalism versus self-determination in Aboriginal health policy': Martin, D., and Brady, M., 'Human rights, drinking rights? Alcohol policy and Indigenous Australians', (2004) 364 *The Lancet* 1282, 1282.

⁹ O'Brien, K., 'Grog Culture Defended as a 'Core Social Value'', *ABC News* (online), 24 May 2013, <<http://www.abc.net.au/news/2013-05-23/giles-defends-nt-drinking-culture-as-core-social-value/4708310>>.

¹⁰ Pearson, N., *Up from the Mission* (2009, Black Inc), 180.

¹¹ See Brady, M., above n 3, 20; People's Alcohol Action Coalition (2011) <www.paac.org.au>.

Community responses to alcohol

There have been a range of ways in which Aboriginal and Torres Strait Islander people have sought to restrict access to alcohol for their communities to reduce the harm caused by grog.¹² An early and well-known example is the agreement reached by Pitjantjatjara, Yankunytjatjara and Ngaanyatjarra (collectively 'Anangu') people of Central Australia with the licensee of the Curtin Springs Roadhouse.¹³ Curtin Springs is about 80km east of Uluru. In the early 1980's, the licensee had informally agreed not to sell alcohol to Anangu. In 1988, the Roadhouse suddenly began to sell alcohol to Anangu. This began a ten year struggle by the Pitjantjatjara Council and NPY Women's Council to stem the flow of grog and reduce the harm it causes to Anangu people and communities.

The Councils sought a ban on sales to residents of, and travellers through, Anangu lands. However, the Liquor Commissioner cited concerns about a breach of the RDA.¹⁴ Although this may seem disingenuous, it was not entirely unreasonable given the approach to the prohibition of discrimination established by the High Court in *Gerhardy v Brown*.¹⁵

In *Gerhardy v Brown*, the Court rejected a substantive equality approach under which the prohibition on discrimination under the RDA would apply only to arbitrary, invidious or unjustified distinctions. In the context of alcohol bans, such an approach would recognise that, despite an overt racial distinction, the bans are a means of balancing rights: both the collective rights of Anangu people, seeking to preserve the integrity of their culture and society, and the individual rights of those, particularly women and children, who bear the brunt of the violence and neglect that alcohol abuse brings.

However, the High Court instead favoured a formal equality approach, finding that distinctions based on race – in that case, legislation that recognised the land rights of the Pitjantjatjara people - are *prima facie* discriminatory and contrary to the RDA, unless 'saved' as a special measure.¹⁶ A number of commentators, myself included, have been critical of this formalistic

¹² For a general discussion, see Maggie Brady, above n 4.

¹³ See Kavanagh, M., 'Curtin Springs Roadhouse - Ten Years of Community Struggle' (1999) 4(19) *Indigenous Law Bulletin* 15.

¹⁴ See also the discussion in the *Alcohol Report*, above n 7, 68-86.

¹⁵ (1985) 159 CLR 70.

¹⁶ See Pritchard, S., 'Special measures' in Race Discrimination Commissioner (ed) *Racial Discrimination Act 1975: A Review* (1995), 197-8.

approach to discrimination,¹⁷ but for better or worse, it has since become strongly entrenched in Australian jurisprudence.¹⁸

Special measures are provided for by s 8(1) of the RDA. They are measures taken for the sole purpose of securing adequate advancement of racial or ethnic groups or individuals requiring protection to equally enjoy their human rights. Such measures must not lead to the maintenance of separate rights for different racial groups and must not continue after they have achieved their objects.¹⁹

Special measures have generally been understood as being measures by way of ‘affirmative action’ or ‘positive discrimination’ — in other words, measures conferring benefits on a disadvantaged group to promote substantive equality.²⁰ Whether measures that restrict rights can fall within the scope of special measures is more controversial.

Alcohol bans as special measures

The position of alcohol bans was considered in detail in the landmark *Alcohol Report*,²¹ a project commenced by Race Discrimination Commissioner Irene Moss in 1990 and completed by Commissioner Zita Antonios in 1995. The report concluded that alcohol restrictions of the type proposed by Anangu, operating on a direct racial basis, are likely to be unlawful under the RDA. However, such restrictions *could* amount to a special measure.

Such measures confer a benefit on Anangu by counteracting the destructive effects of alcohol including: reducing violent crime, particularly violence against women; reducing Anangu contact with the criminal justice system; improvements to health; and broader benefits such as preservation of culture and identity. This benefit was the sole purpose of the alcohol bans and this could be shown by the history of the measures and the fact that they had been requested by Anangu themselves. Further, the measures were necessary in light of the evidence in relation to the impact of alcohol on Anangu communities and people.²²

The *Alcohol Report* suggested that this approach could provide a ‘legally workable solution’ to the problem of illegality under the RDA of race-based measures sought by Aboriginal

¹⁷ See Sadurski, W., ‘*Gerhardy v Brown* v the concept of discrimination: reflections on the landmark case that wasn’t’ (1986) 11 *Sydney Law Review* 5; Hunyor, J., ‘Is it time to re-think special measures under the *Racial Discrimination Act*? The case of the Northern Territory Intervention’ (2009) 14(2) *Australian Journal of Human Rights* 39.

¹⁸ This was put beyond doubt in *Maloney v The Queen* (2013) 87 ALJR 755 (note, however, the rearguard action of Gageler J).

¹⁹ *Racial Discrimination Act 1975* (Cth) s 8.

²⁰ See Hunyor, J., above n 16, 42.

²¹ *Alcohol Report*, above n 7.

²² *Ibid* 144-8.

communities to deal with the harm caused by alcohol.²³ This conclusion resulted in the issuing of 'special measures certificates' by the Race Discrimination Commissioner in relation to the Curtin Springs Roadhouse agreement amongst others. These certificates had no legal status, but they clearly gave the parties sufficient comfort that they were prepared to implement the bans and, almost 20 years later, they continue to operate.

Government responses: The Intervention

On 21 June 2007, the Australian government announced a range of laws and policies as part of what was described as a 'national emergency response' to issues of child sexual abuse and family violence in NT Aboriginal communities. This became known as the 'NT Intervention'.

Amongst the measures was a ban on the sale and consumption of alcohol in prescribed areas, such areas being essentially all remote Aboriginal communities and town camps.²⁴ Importantly, unlike the alcohol bans sought by Anangu in Central Australia, the Intervention was a top-down approach that involved no consultation or attempt to gain the consent of those communities subject to it. It also removed existing community alcohol restrictions.

Nevertheless, the legislation implementing the NT Intervention declared that it, and acts done under it, were 'special measures' for the purposes of the RDA.²⁵ To put the matter beyond doubt, the legislation and acts done under it were also explicitly excluded from the prohibition on racial discrimination in the RDA.²⁶

I have previously argued against characterising 'top down', non-consultative and restrictive measures like this as 'special measures'.²⁷ Such an approach leaves open the way for discrimination cloaked in paternalism. In the context of Indigenous people it is also, amongst other things, inconsistent with the right to free, prior and informed consent as recognised by Article 19 of the *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP') and the right to self-determination recognised by article 1 of the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, as well as article 3 of UNDRIP.

²³ *Alcohol report*, above n 7, 38.

²⁴ *Northern Territory National Emergency Response Act 2007* (Cth), Pt 2.

²⁵ *Ibid* s 132(1); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth), ss 4(2), (4); *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth), s 4(1).

²⁶ *Northern Territory National Emergency Response Act 2007* (Cth), s 132(2); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth), ss 4(3), (5); *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) s 4(2).

²⁷ See above n 16.

My view, however, has not been shared by Australian legislators, nor by our Courts.

Government responses: *Maloney v The Queen*

In 2002, in response to the *Cape York Justice Study Report*, prepared by the Hon. Tony Fitzgerald, the Queensland government introduced the *Indigenous Communities Liquor Licenses Act 2002* (Qld). One aspect of the law was to amend the *Liquor Act 1992* (Qld) to provide for the declaration of restricted areas in which the possession of alcohol was limited. The community of Palm Island was declared to be a restricted area.

Joan Maloney, an Aboriginal woman from Palm Island, was convicted of an offence of possessing alcohol on Palm Island contrary to the *Liquor Act 1992* (Qld). She argued that the prohibition that applied to Palm Island was contrary to s 10 of the RDA. In essence, the argument was that in its application to specific Indigenous communities, the law had a disparate impact on Indigenous people. Its impact was to limit the extent of the enjoyment of certain rights – notably the right to possess property in the form of alcohol - by Indigenous people.

The majority of the High Court accepted that s 10 was engaged by such a law.²⁸ The respondent argued that s 10 was not breached, because ‘non-Aboriginal persons on Palm Island are subject to the same restrictions as Aboriginal persons’.²⁹ This argument was rejected, the Court affirming that s 10 ‘does not require that the law to which it applies make a distinction expressly based on race.’³⁰ Rather, s 10 is directed to the operation and effect of the legislation.

However, the Court unanimously found that the legislation was a special measure.³¹ Hayne J put it in these terms:

Alcohol abuse and misuse, and the violence, disturbances and public disorder associated with those evils, all detract from the equal enjoyment and exercise of human rights and fundamental freedoms. Minimising those evils and their consequences, particularly the incidence of alcohol-fuelled violence, is essential to equal enjoyment and exercise of rights and freedoms. Those who live in fear of violence cannot exercise their rights. They are not free. And when the violence is spread through a community, the members of that community cannot exercise their rights and freedoms.³²

²⁸ *Maloney v The Queen* (2013) CLR 168 (French CJ, Hayne, Crennan and Bell JJ) (*‘Maloney’*).

²⁹ *Ibid* [78] (Hayne J).

³⁰ *Ibid* [11] (French CJ); [78], [84] (Hayne J); [204] (Bell J).

³¹ A similar conclusion was reached by the Queensland Court of Appeal in *Morton v Queensland Police Service* (2010) 271 ALR 112.

³² (2013) CLR 168 [107].

A significant aspect of Ms Maloney's case was her attack on the failure by the Queensland Government to adequately consult and the absence of free and informed consent by the people of Palm Island. In *Gerhardy*, in the context of land rights legislation, Brennan J had stated:

A special measure must have the sole purpose of securing advancement, but what is 'advancement'? ... 'Advancement' is not necessarily what the person who takes the measure regards as a benefit for the beneficiaries. The purpose of securing advancement for a racial group is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit. The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them.³³

It should be noted that consultation and consent can raise some fraught issues in the context of a measure that seeks to limit the rights of some within a group (here, the drinkers) for the benefit of others (primarily those who suffer abuse and neglect at the hands of the drinkers) or indeed for the rights of the group as a whole. Is it a matter of determining a majority view? How are the voices of children and victims of violence to be heard? As Peter d'Abbs has noted:

[T]he grog issue is not simply a matter of individual rights, but rather it is experienced by Aboriginal people as a clash or contradiction between what is perceived as the good of the community on the one hand, and on the other, the rights of the individual.³⁴

These sorts of difficulties were recognised by McMurdo P in *Morton v Queensland Police Service*,³⁵ an earlier case before the Court of Appeal in Queensland that had considered the validity of the *Liquor Act 1992* (Qld) in its operation on Palm Island. Her Honour concluded that there are 'prudent reasons for not making the desirability for consultation a mandatory prerequisite for the application of s 8 of the RDA.'³⁶

In *Maloney*, the High Court also rejected the proposition that a special measure requires either consultation *or* consent.³⁷ This didn't mean that an absence of consultation was irrelevant, just that it was not fatal. A majority of the Court accepted that, in the words of the Chief Justice:

³³ (1985) 159 CLR 70, 133 (Brennan J).

³⁴ d'Abbs, P., *Dry Areas, Alcohol and Aboriginal Communities: A Review of the Northern Territory Restricted Areas Legislation* (1990), cited in the *Alcohol Report*, above n 7, 78.

³⁵ (2010) 271 ALR 112.

³⁶ *Ibid* 123 [31].

³⁷ (2013) CLR 168, [24] (French CJ); [91] (Hayne J); [131]-[132] (Crennan J); [186] (Kiefel J); [240] (Bell J); [357] (Gageler J).

[I]n the absence of genuine consultation with those to be affected by the special measure, it may be open to a court to conclude that the measure is not reasonably capable of being appropriate and adapted for the sole purpose it purports to serve.³⁸

French CJ also accepted that

as a matter of common sense... prior consultation with an affected community and its substantial acceptance of a proposed special measure is likely to be essential to the practical implementation of that measure...³⁹

The High Court also poured cold water on another argument that may have proven to be an important limitation on the ability of government to impose 'special measures' against the wishes of a community, namely that such measures be proportionate to a legitimate end. French CJ appeared to reject such an argument, applying a test of whether the provisions were 'appropriate and adapted' to their purpose, avoiding 'debate about alternative and perhaps less restrictive mechanism that could have been adopted'.⁴⁰

Hayne J found that there was *some* role for proportionality analysis in determining whether a measure was 'adequate' in the context of securing 'adequate advancement' of people of a particular racial group. If the goal of the special measure:

can be achieved to the same extent by an alternative that would restrict the rights and freedoms of the relevant group or individuals to a lesser extent... it would readily be concluded that the law said to be a special measure is not 'adequate'.⁴¹

Crennan, Kiefel and Gageler JJ considered that any proportionality requirement involved no more than a test of 'reasonable necessity'.⁴²

The High Court's approach continues the tradition of significant judicial deference to the legislature when considering whether something is a special measure, based on a reluctance to adjudicate what is seen as essentially a matter of policy.⁴³

³⁸ (2013) CLR 168, [25]; see also [91] (Hayne J); [133] (Crennan J); [247] (Bell J); and also by implication in the judgment of Gageler J, [357].

³⁹ Ibid [25].

⁴⁰ Ibid [46].

⁴¹ Ibid [102], [109].

⁴² Ibid, [131] (Crennan J); [180]-[182] (Kiefel J, in *obiter*); [358] (Gageler J).

⁴³ See, for example, *Gerhardy v Brown* (1985) 159 CLR 70; *Bropho v Western Australia* [2007] FCA 519; *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* (2010) 265 ALR 536; *Morton v Queensland Police Service* (2010) 271 ALR 112.

Government responses: the Northern Territory

The final issue I would like to touch on is the extent to which other laws and policies that seek to regulate access to alcohol generally may be amenable to challenge under the RDA.

Writing in the context of the NT, Peter d'Abbs has noted that since racially-based restrictions on access to alcohol were 'no longer considered politically acceptable', spatially-based restrictions have been used,

enabling the government of the day to claim that discrimination against Aboriginal people with respect to alcohol had ceased... while maintaining mechanisms in place that primarily constrained Aboriginal people's access to alcohol.⁴⁴

D'Abbs cites the NT's 'Two Kilometre Law' as a prime example, which is a law that creates an offence of drinking alcohol in public within two kilometres of the licensed premises.⁴⁵ It is perhaps unnecessary to point out that it is overwhelmingly Aboriginal people who are likely to be consuming alcohol in public places in the NT.

Most recently, we have seen the introduction of two regimes designed to tackle more aggressively what is often described as 'problem drinking' (a term used to put good Territorians at ease in the knowledge that it does not apply to 'us', despite the fact that we are Australia's biggest drinkers).

The first of these is *Alcohol Mandatory Treatment*, under which people who are taken into protective custody three times in two months can be subject to detention for three months to undergo mandatory treatment for alcohol addiction.⁴⁶ To date, I understand that only one out of hundreds of people to go through the system has been non-Aboriginal.

The second is the regime of *Alcohol Protection Orders* ('APOs'). Police can issue a person with an APO in essence if they are charged with an offence and the officer believes that the person was affected by alcohol.⁴⁷ Some key features are:

- It is an offence for a person subject to an APO to possess or consume alcohol.⁴⁸ Drinking is criminalised.

⁴⁴ d'Abbs, P., 'Problematizing alcohol through the eyes of the other: Alcohol policy and Aboriginal drinking in the Northern Territory, Australia (2012) 39 *Contemporary Drug Problems* 371, 380.

⁴⁵ *Liquor Act* (NT) s 101U, formerly s 45D of the *Summary Offences Act* (NT).

⁴⁶ *Alcohol Mandatory Treatment Act 2013* (NT), ss 8-10.

⁴⁷ *Alcohol Protection Orders Act 2014* (NT), s 6.

⁴⁸ *Ibid* s 5(1)(b).

- It is also an offence for a person subject to an APO to enter licensed premises,⁴⁹ except for work or residence.⁵⁰ Given that alcohol can be purchased in most places in the Territory, this makes it an offence to go to the football stadium, the entertainment centre, almost all small local supermarkets and the area of the airport from which interstate flights depart.
- Police are given extraordinary powers under the law to stop, search and arrest people subject to an APO.⁵¹
- A person can seek a reconsideration by a senior office of the decision to issue an APO in writing within three days.⁵² There is a further right of review within seven days to the Local Court but only if the first avenue has been pursued.⁵³

To date, over 85 per cent of APOs have been issued to Aboriginal people, who represent less than thirty per cent of the general population of the NT. At the North Australian Aboriginal Justice Agency (NAAJA), the Aboriginal and Torres Strait Islander Legal Service in Darwin, we have many clients who have been repeatedly arrested for breaching orders they say they do not understand and, being people with long-term alcohol addictions, with which they cannot comply. It is perhaps unnecessary to point out that the law is contrary to the basic recommendations of the Royal Commission into Aboriginal Deaths in Custody, by criminalising drinking and exposing many Aboriginal people to an intense cycle of police contact and arrest.

Could such laws be challenged as contrary to s 10 of the RDA on the basis of their disparate impact? This question is being raised in litigation that is, at the time of writing, before the Supreme Court of the NT.⁵⁴

The background to the case provides a sense of how the regime works on the ground. The plaintiff is a homeless Aboriginal man. His first language is Tiwi and he requires an English interpreter. He has very limited English literacy. He was given his first three-month APO having been arrested for stealing a bread roll, silverside and an orange juice worth \$4.20 from a Coles supermarket while apparently intoxicated. Those charges were ultimately withdrawn. Three days later he was arrested for breaching the APO when he was found by police intoxicated. He was issued with a further six-month APO. A week later he was again arrested for drinking and was issued with a further twelve-month APO. He is banned from drinking until January 2016. At the time the proceedings commenced, he had been arrested for breaching the APO

⁴⁹ Ibid s 5(1)(b).

⁵⁰ Ibid s 5(2).

⁵¹ Ibid s 18-19.

⁵² Ibid s 9-10.

⁵³ Ibid s 11-13.

⁵⁴ *Munkara v Bencsevich and Others*, 77/2014 (21437457).

on a total of twenty occasions, but committed no other offences in that time. His case is far from unique.

The central issue is whether s 10 of the RDA applies to a facially neutral law that has a disparate impact on people of a certain racial group. In *Maloney*, the Court held that it could, affirming that s 10 looks to the *effect* of a law, not simply its purpose.⁵⁵ Arguably, the effect of the *APO Act* is to disproportionately limit the rights of Aboriginal people to possess property, enter public places, enjoy their privacy and, by reason of the law's extremely limited review provisions, equality before tribunals administering justice. It may also be that similar arguments could be made in relation to the *Alcohol Mandatory Treatment* regime.

Neither regime has been designed or described as a 'special measure' nor is it difficult to imagine any serious claim to that effect being made.⁵⁶ Unlike *Maloney*, therefore, if the measures are found to be contrary to s 10, they will not be 'saved' as a special measure.

Let me emphasise that the point is obviously not that governments cannot or should not seek to regulate alcohol consumption and reduce alcohol-related harm. They can and they should. But they should do so in ways that do not infringe on human rights and, if done in a way that reduces the rights of Aboriginal people, the measures must meet the requirement of a special measure.

There are, in fact, a range of non-discriminatory things that government could do to reduce alcohol-related harm, such as supply reduction and pricing. The best evidence shows that those things work.⁵⁷ One answer to why those things are not being done might be found in the influence of those who profit from alcohol sales – we might call them 'Big Booze'.

If a challenge to the *APO* or *Alcohol Mandatory Treatment* regimes is successful, we can only hope that it will encourage our politicians to get as tough with those who profit from grog's misery as those who are in its thrall. It may also be that government is encouraged to do what Peter d'Abbs has suggested is required to find a sustainable solution for the high levels of Aboriginal alcohol-related harm: 'listen to Aboriginal people and work with them in defining the problem before rushing to solutions'.⁵⁸

⁵⁵ (2013) CLR 168, [11], [38]-[39] (French CJ); [68], [84] (Hayne J); [112] (Crennan J); [148], [167] (Kiefel J, in obiter); [201], [204], [224] (Bell J); [338] (Gageler J).

⁵⁶ In the matter of *Munkara v Bencsevich and Others*, 77/2014 (21437457), the Northern Territory has not sought to argue that the *APO* regime is a special measure.

⁵⁷ See, for example, Gray, G., and Wilkes, T., 'Reducing alcohol and other drug related harm', December 2010, Australian Institute of Health and Welfare, available at: <<http://www.aihw.gov.au/uploadedFiles/ClosingTheGap/Content/Publications/2010/ctgc-rs03.pdf>>, 9.

⁵⁸ D'Abbs, P., above n 43, 391.

Conclusion: implications for policy

In my view, it is unfortunate that a more robust approach to the requirements for special measures has not been taken by our courts. But if the law can't make it happen we might hope that, maybe just once, the evidence might. The evidence is that working with communities around restrictive measures and applying them in a non-discriminatory way makes them more likely to succeed.⁵⁹

Dennis Gray and Ted Wilkes have observed that:

Blanket bans such as those imposed on remote communities under the [NT Intervention] are counterproductive. They take away Indigenous initiative, leading to resentment and exacerbation of existing social problems, both of which undermine willingness to work cooperatively with outsiders to address such problems. Indigenous Australians need support to control their own way out of poverty – including addressing harmful alcohol and other drug use, which are consequences of that poverty.⁶⁰

Maggie Brady has similarly observed that:

the most engaging and successful strategies to manage Indigenous alcohol abuse have developed from the 'bottom up' as a result of local action, rather than deriving from conscious implementation of institutionally based alcohol policies.⁶¹

In addition to the Curtin Springs example given above, we can also consider the success of measures introduced in Tennant Creek to limit the supply of alcohol to all residents, at the behest of the Julalikari Association, an organisation representing Aboriginal residents.⁶² The key to the measures was to stop takeaway sales every Thursday. The measures led to significant, measurable reductions in harm and enjoyed the support of Aboriginal and non-Aboriginal residents of the town. They were, however, lifted in 2006, following a shift in alcohol policy to focus more firmly on the 'problem drinker'.

D'Abbs cites the Tennant Creek measures and their success as demonstrating 'what can be achieved when Aboriginal voices are heeded in defining the problem as well as identifying the solution'.⁶³

⁵⁹ See Gray, D., and Wilkes, T., above n 57, 9.

⁶⁰ Gray, D., and Wilkes, T., 'Alcohol restrictions in Indigenous communities: an effective strategy if Indigenous-led', (2011) 194(10) *Medical Journal of Australia* 508.

⁶¹ Brady, M., 'Equality and difference: persisting historical themes in health and alcohol policies affecting Indigenous Australians', (2007) 61 *Journal of Epidermal Community Health* 759, 761.

⁶² A summary of these measures can be found in d'Abbs, P., above n 43, 391-2.

⁶³ *Ibid* 392.

Let me again emphasise that this is not to suggest there is not a significant role for Government, nor that, in the absence of consensus, Government should not take serious action to reduce the harm caused by grog. We have a drinking problem that is killing people and destroying communities and mere consultation is not any answer. Alcohol misuse is a symptom of community dysfunction, as well as having become a systemic cause of disadvantage.⁶⁴

D'Abbs suggests that '[p]ossibly the greatest single policy challenge' in this area is reconciling the necessary 'assertive policy stance – especially in confronting the vested interests that continue to benefit from harmful drinking among Indigenous people' with local control.⁶⁵ He argues that in a society in which alcohol occupies a 'privileged cultural and institutional status', 'any sustainable form of effective management of alcohol... must rest on individuals, families and communities rather than on externally imposed controls'.⁶⁶ This is, he notes 'a pragmatic observation as much as a moral commitment to notions of 'self-determination'', to which I would add 'or a legal obligation by reason of the RDA'.

Following *Maloney*, it is fair to say that governments can probably get away without engaging in meaningful consultation around alcohol measures. But if they actually want to find solutions, they might take a different approach.

⁶⁴ See d'Abbs, P., *Submission to the House of Representatives Standing Committee on Indigenous Affairs Inquiry into the harmful use of alcohol in Aboriginal and Torres Strait Islander communities*, Submission 99, available at: <http://www.aph.gov.au/Parliamentary_Business/Committees/House/Indigenous_Affairs/Alcohol/Submission99>, 18-21.

⁶⁵ *Ibid* 22.

⁶⁶ *Ibid*.

Australia's First Peoples – still struggling for protection against racial discrimination

Shelley Bielefeld & Jon Altman

Introduction

Martin Luther King stated that '[i]njustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality ... Whatever affects one directly affects all indirectly'.¹ This quote has pertinence for any discussion of racial discrimination. Still strongly affected by its colonial legacy, Australia offers very little by way of robust protection for Australia's First Peoples. The *Racial Discrimination Act 1975* (Cth) ('RDA') is an important enactment amidst Australia's long history of racially discriminatory legislation. During the Second Reading speech of the RDA in the Senate in 1974, Lionel Murphy indicated that the RDA's purpose is to implement 'into Australian law the obligations contained in the *International Convention on the Elimination of All Forms of Racial Discrimination*'.² He stated that the discrimination experienced by Indigenous Australians was '[p]erhaps the most blatant example of racial discrimination in Australia'.³ He referred to 'remnants of legislative provisions of the paternalistic type based implicitly on the alleged superiority of the white race' and founded on an assumption that Indigenous peoples were 'unable to manage their own personal affairs and property'.⁴ Murphy stressed that the government had a responsibility to address the poverty of Indigenous peoples, stating 'Aborigines are the poorest of the poor in our community. It is clear that past wrongs must be put right so far as the Aboriginal population is concerned and that special measures must be provided'.⁵ It was clearly the intention that the RDA would be deployed to redress these circumstances of grave injustice. Tragically, many of Murphy's comments still have currency over 40 years later.

¹ King, M.L., 'Letter from Birmingham Jail', August 1963, 1 <<http://www.uscrossier.org/pullias/wp-content/uploads/2012/06/king.pdf>>.

² Commonwealth of Australia, *Parliamentary Debates*, Senate, 31 October 1974, 2192 (Senator Lionel Murphy, New South Wales - Attorney-General and Minister for Customs and Excise).

³ Commonwealth of Australia, *Parliamentary Debates*, Senate, 21 November 1973, 1976 (Senator Lionel Murphy, New South Wales - Attorney-General and Minister for Customs and Excise). There were three attempts to introduce a Racial Discrimination Bill before it was enacted in 1975. A Racial Discrimination Bill was introduced in the Senate on 21 November 1973, then again on 4 April 1974, and a final time on 31 October 1974. Although there were some differences in the version introduced on 31 October 1974 the quoted comments of Murphy in 1973 are still apt as an expression of the intention behind the RDA and the problems it sought to address.

⁴ Commonwealth of Australia, above n 3, 1976.

⁵ *Ibid.*

Although the RDA has limitations, in the absence of constitutionally protected human rights or a national bill of rights, the RDA is of great practical and symbolic value.⁶ This is so because it has been successfully relied upon at times to protect the rights of Indigenous peoples to be free from racial discrimination and/or racial vilification. Examples of this are seen in *Mabo (No 1)* and *Eatock v Bolt*.⁷ The finding in *Mabo (No 1)* meant that the Queensland government could not lawfully extinguish all Indigenous land claims after 1975, as they had attempted via the *Queensland Coast Islands Declaratory Act 1985* (Qld). The *Bolt* case allowed a number of high profile Indigenous people to successfully bring an action over Andrew Bolt's racist newspaper articles vilifying Indigenous people with fair skin. In the wake of the *Bolt* case there were calls to amend the RDA because some claimed that its racial vilification provisions unnecessarily override the right to free speech.⁸ The proposals put forward by the Abbott government in 2014 to water down these protections were withdrawn after widespread community opposition.⁹ There are clearly many Australians who favour the maintenance of legislative provisions which offer protection from racial vilification.

The presence of the RDA is therefore an important statement about the value of racial equity and anti-discrimination in Australian society. This is why it is so disturbing that the *Racial Discrimination Act 1975* (Cth) was overridden three times by the Howard government between 1997 and 2007 to allow racially discriminatory laws that impacted negatively, in our view, upon Indigenous peoples. The *Hindmarsh Island Bridge Act 1997* (Cth) removed rights to protect Aboriginal cultural heritage, which was inconsistent with the RDA.¹⁰ The *Native Title Amendment Act 1998* (Cth) limited the scope of the RDA and diminished the native title rights of Indigenous peoples.¹¹ The precarious nature of the protection offered by the RDA was most clearly evident with the Northern Territory Emergency Response (the 'Intervention') and its aftermath, which overrode a number of human rights protections for Indigenous peoples living

⁶ Allison, F., 'A Limited Right to Equality: Evaluating the Effectiveness of Racial Discrimination Law for Indigenous Australians through an Access to Justice Lens' (2013/2014) 17(2) *Australian Indigenous Law Review* 3, 6, 11-12, 16-18.

⁷ *Mabo v Queensland (No 1)* (1988) 166 CLR 186; *Eatock v Bolt* [2011] FCA 1103 (28 September 2011).

⁸ Breheny, S., 'Abbott government's changes to Racial Discrimination Act a win for freedom of speech - Institute of Public Affairs' (Media release, Institute for Public Affairs)

<<http://ipa.org.au/sectors/freedom-of-speech/publication/2252/abbott-governmentpercent27s-changes-to-racial-discrimination-act-a-win-for-freedom-of-speech---institute-of-public-affairs>>.

⁹ There were over 5,000 submissions (including one from us) on the government's proposed amendments to the RDA, with the majority opposed to the proposed reforms: 'Government 'rethink' of race law changes cautiously welcomed', SBS, 28 May 2014,

<<http://www.sbs.com.au/news/article/2014/05/28/government-rethink-race-law-changes-cautiously-welcomed>>.

¹⁰ *Hindmarsh Island Bridge Act 1997* (Cth) s 4.

¹¹ *Native Title Amendment Act 1998* (Cth) s 7. Triggs, G., 'Australia's Indigenous Peoples and International Law: Validity of the *Native Title Amendment Act 1998* (Cth)' (1999) 23 *Melbourne University Law Review* 372, 397-408.

in prescribed communities in the Northern Territory¹² and continues to do so.¹³ The Intervention legislation left Indigenous peoples in the Northern Territory with only one legal domestic instrument to challenge these racially discriminatory laws.¹⁴

The Intervention highlights the limitations the Federal Parliament was willing to place on human rights for Indigenous peoples, allegedly to deal with child sexual abuse and ostensibly to promote beneficial outcomes.¹⁵ The rhetoric of human rights, especially the concept of ‘special measures’, was effectively used by government to underpin the power of the state and reduce the possibilities for independent activity of Indigenous peoples in the Northern Territory.¹⁶ However, government claims that such measures were beneficial stood, and still stand, in sharp contrast to the view of the United Nations and many Indigenous people affected by these measures.¹⁷

The Intervention, and its aftermath *Stronger Futures*, indicate that Australia is still struggling with unravelling what should be considered a beneficial ‘special measure’ under purported ‘crisis’ conditions. A range of rights-removing laws described by the government as ‘special measures’ were hailed as necessary for the betterment of prescribed communities in the Northern Territory in 2007. However, there has been little evidence (even in the government’s own statistical collections) of beneficial outcomes as a result of these laws and policies, and there is a documented absence of any policy logic for the suite of paternalistic measures

¹² The *Northern Territory National Emergency Response Act 2007* (Cth) s 132(2), the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) s 4(3) and 6(3), and the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) s 4(2) (all excluded the operation of the aspects of the RDA prohibiting racial discrimination).

¹³ Parliamentary Joint Committee on Human Rights (PJCHR), Commonwealth Parliament, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Stronger Futures in the Northern Territory Act 2012 and related legislation* (June 2013) 28, 49, 61-62, 74.

¹⁴ This domestic legal avenue was used in the constitutional claim brought in relation to compulsory five year leases of prescribed community areas where the majority of the High Court held the legislation did not infringe s 51(xxxi) requiring just terms compensation for compulsory acquisition of land: *Wurridjal v The Commonwealth of Australia* [2009] HCA 2 (2 February 2009); Shelley Bielefeld, ‘The ‘Intervention’ Legislation – ‘Just’ Terms or ‘Reasonable’ Injustice? – *Wurridjal v The Commonwealth of Australia*’ (2010) 14(2) *Australian Indigenous Law Review* 2, 7-12.

¹⁵ An issue highlighted in: Northern Territory Government, *Ampe Akelyernemane Meke Mekarle – ‘Little Children are Sacred’: Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007) <http://www.inquirysaac.nt.gov.au/pdf/bipacsa_final_report.pdf>.

¹⁶ Other western nations have also used human rights rhetoric to bolster their power: Douzinas, C., *Human Rights and Empire – The Political Philosophy of Cosmopolitanism* (Routledge, 2007) 179.

¹⁷ Letter from the United Nations to the Australian Government, 28 September 2009 <http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Australia28092009.pdf>.

introduced.¹⁸ Indeed there is some evidence of harm,¹⁹ and as Girardeau Spann makes clear, 'harmful effects are harmful regardless of the intent with which they are produced'.²⁰

It remains to be seen whether Australia is willing to move beyond a limiting framework of rights protection for Indigenous peoples. The current debate over the constitutional recognition of Australia's First Peoples brings this issue to the fore. Contemporary developments in law and policy show that robust protection of human rights for Indigenous peoples remains urgent. This is clearly apparent in several areas that we have examined recently in our research, including income management, the Improving School Enrolment and Attendance through Welfare Reform Measure ('SEAM'), and current proposals to reform the Remote Jobs and Communities Program ('RJCP').²¹ These measures are described by government as beneficial, even though they involve clear human rights violations. Each of these measures will now be briefly examined.

Income management – micromanaging money

Income management effectively involves a return to transfer payments in kind, as occurred in the 1960s, prior to training allowances and the payment of social security to individual beneficiaries in cash rather than to third parties. Compulsory income management, which was applied to all Indigenous welfare recipients in prescribed communities in the Northern Territory in 2007, warranted the strong criticism it has attracted from Indigenous and non-Indigenous civil society, community organisations and human rights advocates.²² After incurring

¹⁸ Altman, J., and Russell, S., 'Too much 'Dreaming': Evaluations of the Northern Territory National Emergency Response Intervention 2007-2012' (2012) 3 *Evidence Base* 1, 10, 16-18.

¹⁹ Australian Indigenous Doctors' Association (AIDA) and Centre for Health Equity Training, Research and Evaluation, University of New South Wales, *Health Impact Assessment of the Northern Territory Emergency Response* (2010) 23, 25; Equality Rights Alliance, *Women's Experience of Income Management in the Northern Territory* (2011), 19

<<http://www.equalityrightsalliance.org.au/projects/womens-experience-income-management-northern-territory>>; Bray, J.R., et al, *Evaluating New Income Management in the Northern Territory: First Evaluation Report* (Social Policy Research Centre UNSW, July 2012) 94-95; Commonwealth Ombudsman, *Ombudsman 2012–2013 Annual Report* (October 2013) 43-45; McDinny, R., quoted in Ritchie, T., 'All dressed up and nowhere to go' (2012) 118 *Arena Magazine* 30, 31.

²⁰ Spann, G., 'Pure Politics', in Delgado, R., and Stefancic, J., (eds), *Critical Race Theory – The Cutting Edge* (Temple University Press, 2nd ed, 2000) 21, 25.

²¹ Altman, J., 'Remote jobs proposals are incoherent and inadequate' (2015) January *Land Rights News – Northern Edition* 4-5; Altman, J., 'Tracking Indigenous Policy, 2011-2014' (2015) *Journal of Indigenous Policy* 1, 46-48; Bielefeld, S., 'Compulsory Income Management – Exploring Counter Narratives amidst Colonial Constructions of Vulnerability' (2014) 36(4) *Sydney Law Review* 695-726; Bielefeld, S., 'Conditional Income Support under SEAM: Human Rights Compatibility Issues' (2013) 8(9) *Indigenous Law Bulletin* 17-21; Bielefeld, S., 'Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples: Exploring the Limits of Benevolent Language' (2014) 8(15) *Indigenous Law Bulletin* 22-26.

²² Gibson, P., 'Return to the Ration Days — The NT Intervention: Grass-roots Experience and Resistance' (Jumbunna Indigenous House of Learning, University of Technology, 2009) 11–13

international criticism over the human rights violations involved in the 2007 Intervention, the incoming Rudd Federal Government sought to formally reinstate the RDA through the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth). This legislation meant that income management was also capable of being applied to non-Indigenous welfare recipients. Several new income management categories were created: voluntary income management; and compulsory income management categories for 'disengaged youth', 'long-term' or 'vulnerable' welfare recipients, and where there is a child protection issue.²³ For voluntary income management, 'disengaged youth', 'long-term' or 'vulnerable' welfare recipients 50 per cent of their welfare payments are subject to income management via a BasicsCard with a PIN number. Where there is a child protection issue 70 per cent of a person's welfare payment is quarantined. Any lump sum payments are subject to 100 per cent income management.

However, in the context of income management, it is reasonable to say that the government has strategically deployed 'formal antidiscrimination rhetoric'²⁴ whilst simultaneously ensuring that income management laws and policies, which are racially discriminatory in their effect, continue unabated.²⁵ The most recent report on income management in the Northern Territory indicates that 90.2 per cent of the 18,300 people subject to income management in the Northern Territory are Indigenous.²⁶ Close to 80 per cent of these are subject to compulsory forms of income management,²⁷ regardless of the actual capacity of individuals and families to budget. The assessment made by government that all those on welfare have poor budgetary capacities, irrespective of structural constraints such as living at remote homelands, is already an issue of discrimination.

The findings of a report released in December 2014 indicate that income management does not meet the objectives for which it was introduced and is expensive to operate.²⁸ The practical effect of the new income management laws is that they continue to disproportionately apply to

<<http://www.jumbunna.uts.edu.au/pdfs/JIHLBP11.pdf>>; Altman, J., 'Arguing the Intervention' (2013) 14 *Journal of Indigenous Policy* 1, 94-97; Bielefeld, S., 'Compulsory Income Management and Indigenous Australians – Delivering Social Justice or Furthering Colonial Domination?' (2012) 35(2) *University of New South Wales Law Journal* 522-562; Cox, E., 'Evidence-Free Policy Making? The Case of Income Management' (2011) 12 *Journal of Indigenous Policy* 1, 87; AIDA, above n 19, 23-25; Australian Law Reform Commission, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, Report No 117 (2011) 260, 267-268; Equality Rights Alliance, above n 19, 35.

²³ *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth) s 25.

²⁴ Pether, P., 'Reading the Northern Territory 'Intervention' from the Margins: Notes Toward a Feminist Social Psychoanalytic Ethics of Governmentality' (2010) 33 *Australian Feminist Law Journal* 19, 32.

²⁵ PJCHR, above n 13, 60-62.

²⁶ Bray, J.R., et al, *Evaluating New Income Management in the Northern Territory: The Final Report* (Social Policy Research Centre UNSW, September 2014) xx.

²⁷ *Ibid.*

²⁸ *Ibid* 306.

Indigenous peoples. There is an exemption process which can be pursued by those defined as long-term welfare recipients or disengaged youth. However the exemption process is complex and time consuming to navigate and Indigenous people have had little success obtaining exemptions.²⁹ The human rights violations involved in the extension of income management as part of the Stronger Futures legislative package in 2012 were highlighted by the Parliamentary Joint Committee on Human Rights in 2013.³⁰

SEAM – punishing parents and families

The Improving School Enrolment and Attendance through Welfare Reform Measure (SEAM) initially commenced under the *Social Security and Veterans' Entitlements Legislation Amendment (Schooling Requirements) Act 2008* (Cth). It has since been extended as part of the Stronger Futures legislative package, under Schedule 2 of the *Social Security Legislation Amendment Act 2012* (Cth). This punitive measure can result in suspension of welfare payments where parents do not ensure that their children enrol and attend school. This has been referred to as 'starving the children's families in an effort to force them to go to school'.³¹

Although the government claims the purpose of SEAM is to improve educational outcomes for Indigenous peoples,³² in 2013 SEAM left over 300 Northern Territory Indigenous families with no income for up to thirteen weeks.³³ Evaluations of SEAM are not promising. Whilst 'there were some small improvements in school attendance levels, these often proved temporary'.³⁴ The human rights violations involved in SEAM have also been criticised by the Parliamentary Joint Committee on Human Rights.³⁵

The program logic for SEAM is most unclear: will punishing parents ensure greater school attendance or will it jeopardise the wellbeing of children in homes with no income? SEAM also asks no serious questions about non-attendance, it just assumes it is a result of dysfunction. The reasons for low school attendance in the Northern Territory are complex, and SEAM fails to address such complexities. There is an expert view that non-attendance is linked to the distinct western focus in pedagogical methods and curricula that some find culturally

²⁹ Ibid xx.

³⁰ Extended under the *Social Security Legislation Amendment Act 2012* (Cth). PJCHR, above n 13, 49, 60-62.

³¹ Editorial, 'When medicine doesn't work, double the dose', Canberra Times, 12 November 2011 <<http://www.canberratimes.com.au/federal-politics/editorial/when-medicine-doesnt-work-double-the-dose-20111112-1v1gf.html>>.

³² Explanatory Memorandum, *Social Security Legislation Amendment Bill 2011* (Cth) 12.

³³ Australian National Audit Office, *The Improving School Enrolment and Attendance through Welfare Reform Measure* (Audit Report No. 51, 2013–14) 18, 42.

³⁴ Ibid 19. Hence the introduction in early 2014 of the Remote School Attendance Strategy by the Abbott Government to 'get the kids to school'.

³⁵ PJCHR, above n 13, 74.

inappropriate.³⁶ Non-attendance can also be affected by a social and political divide between school and community. In addition, in some contexts there is a cultural proclivity to child autonomy that does not allow parents to easily discipline their children, which is the fundamental assumption behind penalising them for their children's non-attendance. There is also evidence that where education is relevant, as in the Learning on Country pilot program, attendance levels improve.³⁷

Remote work for the dole – precarious labour

The government claims that the Remote Jobs and Communities Program (RJCP) dispenses with 'training for training's sake', makes the unemployed 'work ready' and 'helps them to get real jobs'.³⁸ The RJCP also imposes stiff financial penalties for non-compliance with government set targets such as attending meetings and job interviews, referred to as 'No Show No Pay'.³⁹ Although purportedly not an overtly racialised measure, Indigenous Australians constitute approximately 85 per cent of those in the 60 remote regions covered by the RJCP.⁴⁰ The government has been transitioning those on the previous voluntary, productive and community-controlled Community Development Employment Program (CDEP) to RJCP. Although imperfect, CDEP empowered communities by letting them decide how work was defined, allowed culturally-appropriate activities to provide income support, and developed local social and commercial enterprise under local control.

In December 2014, the Abbott government announced that it would reform the RJCP. These proposals embody below-award working conditions arguably akin to a form of indentured labour or slavery for remote living welfare recipients, 30,000 of whom are Indigenous.⁴¹ Under the Abbott government's proposed reform 'job seekers who are formally unemployed and aged eighteen to 49 years will be required to continuously engage in Work for the Dole activities five hours a day, five days a week, 52 weeks in the year'.⁴² This will be at below award rates, all to conditionally 'earn' the Newstart Allowance, which violates the right to social security enshrined in several international human rights treaties by which Australia has agreed to be bound.⁴³ The

³⁶ Fogarty, F., 'Country as Classroom' in Altman, J., and Kerins, S., (eds), *People on Country – Vital Landscapes – Indigenous Futures* (Federation Press, 2012) 86-87.

³⁷ One of the authors of the Learning on Country evaluation, in its final stages and due for formal completion in April 2015, has indicated that the school attendance trajectory associated with the trials to date is looking very positive (pers comm Dr W Fogarty 17 February 2015).

³⁸ Australian Government, 'Remote Jobs and Communities Program – Frequently Asked Questions', July 2013, 1, 2, 7 <<https://docs.employment.gov.au/node/31969>>.

³⁹ Ibid 7.

⁴⁰ Ibid 3.

⁴¹ Altman, J., 'Remote jobs proposals', above n 21, 4.

⁴² Ibid.

⁴³ The right to social security is contained in Article 9 of the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); and Article 5(e)(iv) of the *International Convention on the Elimination of All Forms of*

RJCP proposals also impose heavier obligations on remote living welfare recipients than for unemployed people living in non-remote areas, violating the right to 'equality before the law'.⁴⁴ Those living in non-remote areas are to 'work up to twenty hours a week for ... six months in the year'.⁴⁵ The problems here are manifest. First people will be engaged in what Minister Scullion calls 'work-like' activity 'for below award wages of less than \$10 per hour'.⁴⁶ Second, for most at least 50 per cent of this will be income managed, effectively paid in kind with spending limited to licenced stores. Third, it is discriminatory vis-à-vis non remote Australia so that a nominal criterion of remoteness is being applied whereas the effective criterion is 'Indigeneity', as almost all remote work for the dole participants will be unemployed Indigenous people. Also, problematically, the state will delegate policing of these draconian measures to community based organisations in many cases. The RJCP reforms propose a harsh disciplinary approach to Indigenous unemployment, and like income management and SEAM, they embody racialised hyper-regulation of the Indigenous unemployed rather than alleviation of structural unemployment and associated poverty. However, '[i]f Indigenous welfare is truly a serious concern, then what is needed is realistic assessment of what kind of meaningful activity is both sought by, and available to, Indigenous people in remote Australia'.⁴⁷

Sacrificing human rights to reinforce state power?

State power can be readily exercised over Indigenous subjects in the Northern Territory because they remain highly dependent on the state for a range of historical, structural, cultural and locational reasons, as they are politically dispersed and demographically weak. In such circumstances, the exercise of state power is often entangled in the language of 'rights' increasingly connected with 'responsibilities'.⁴⁸ This shows the influence of new paternalism, a welfare philosophy originating in the United States which is now seen in Australian welfare reforms.⁴⁹ New paternalism is predicated on disciplining the poor who are deemed to be

Racial Discrimination, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('ICERD').

⁴⁴ Altman, J., 'Remote jobs proposals', above n 21, 5; Article 5 of the ICERD, above n 43.

⁴⁵ Altman, J., 'Remote jobs proposals', above n 21, 5.

⁴⁶ Ibid.

⁴⁷ Altman, J., 'Indigenous Policy "Reform"' (2015) 134 *Arena Magazine* 10, 12.

⁴⁸ Moreton-Robinson, A., 'Imagining the Good Indigenous Citizen – Race War and the Pathology of Patriarchal White Sovereignty' (2009) 15(2) *Cultural Studies Review* 61, 67, 69, 70.

⁴⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 2 (Minister Malcolm Brough, Minister for Families, Community Services and Indigenous Affairs and Minister Assisting the Prime Minister for Indigenous Affairs); Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2009, 12783 (Minister Jennifer Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs).

deficient in character and/or competence.⁵⁰ This rationale underpins each of the welfare reforms discussed here.

The law and policy issues highlighted thus far indicate that the Federal Government maintains hierarchical understandings of human rights whereby some rights are routinely sacrificed allegedly to achieve others deemed more significant. Amongst the casualties are the right to be free from racial discrimination, rights to self-determination and rights to autonomy for Indigenous peoples. This tendency has led Irene Watson to question ‘whose concept of human rights and equality applies?’⁵¹ The Intervention is an instructive illustration of the manner in which ‘State powers massage rights to their definition and purpose’.⁵² Yet robust protection of rights for Indigenous peoples remains crucial. This is why constitutionally entrenching a principle of non-discrimination on ethnic grounds is so vitally important.⁵³

Such a constitutionally entrenched safeguard against racial discrimination, worded in a manner that will provide an effective check on oppressive exercises of parliamentary power by benevolent despots,⁵⁴ is needed. In our view, the formulation proposed by the Expert Panel in 2012 is unlikely to meet this need.⁵⁵ Their proposed s 116A(2) exception to racial discrimination, where it is for the purpose of ‘overcoming disadvantage’, could be used to constitutionally authorise and thereby legitimise policies like income management, SEAM and the proposed reformed RJCP. So long as the government claims such policies are for overcoming disadvantage the possibilities for coercive assimilation continue. Constitutionally entrenched procedural protections are necessary to ensure that Indigenous peoples have more than merely an opportunity to comment upon the government’s unilaterally imposed policies.⁵⁶ Indigenous peoples should have a key role in defining policy for their communities,⁵⁷

⁵⁰ Mead, L., ‘The Rise of Paternalism’ in Mead L., (ed), *The New Paternalism: Supervisory Approaches to Poverty* (Brookings Institution Press, 1997) 4, 33-34; Bielefeld, S., ‘Compulsory Income Management’, above n 21, 711.

⁵¹ Watson, I., ‘In the Northern Territory Intervention what is Saved or Rescued and at what Cost?’ (2009) 15(2) *Cultural Studies Review* 45, 47.

⁵² Goldberg, D.T., *The Racial State* (Blackwell Publishers, 2002) 273.

⁵³ Davis, M., ‘Political Timetables Trump Workable Timetables’: Indigenous Constitutional Recognition and the Temptation of Symbolism over Substance’ (2014) 8(15) *Indigenous Law Bulletin* 6, 10.

⁵⁴ Mill, J.S., *On Liberty and Utilitarianism* (Bantam Classic, first ed 1859, republished by Bantam 1993) 14-15.

⁵⁵ Altman, J., ‘Will constitutional recognition advance Australia fair?’, *Crikey* (online), 10 February 2012 <<http://www.crikey.com.au/2012/02/10/will-constitutional-recognition-advance-australia-fair/>>; Bielefeld, ‘Constitutional Recognition’, above n 21, 22-26.

⁵⁶ Rollback the Intervention, Submission No 40 to the Senate Standing Committee on Community Affairs, Parliament of Australia, *Inquiry into the Stronger Futures in the Northern Territory Bill 2011 and two related Bills, 2012*, read by Rev Dr Djinyini Gondarra OAM and Rosalie Kunoth-Monks OAM <<http://www.respectandlisten.org/submission/stronger-futures.html>>.

⁵⁷ Australian Human Rights Commission, *Aboriginal and Torres Strait Islander Peoples Engagement Toolkit 2012* (2012) 19; Articles 3 and 19 of the *United Nations Declaration on the Rights of*

a role which cannot be legitimately usurped by the government-appointed largely government-partisan members of the Indigenous Advisory Council.⁵⁸

The state should play a vital role in discouraging discrimination. If Australia aspires to be a post-racist state, our governments and laws must vigorously refuse to perpetuate racial discrimination. This includes racially discriminatory expression by governments in their characterisation of Indigenous peoples' character and capacities. Despite the benevolent intentions the government attributed to its actions, the Intervention demeaned the character of all Indigenous peoples in the Northern Territory, irrespective of their socio-economic status. The law can have a profound impact upon culture and social norms.⁵⁹ Yet there is much denial in Australia of the persistence of ongoing discrimination in law and policy. Denial and persistence of discrimination are interconnected. As Critical Race Theorist Peggy Davis points out, '[i]t is difficult to change an attitude that is not acknowledged'.⁶⁰ This explains the ongoing nature of racial discrimination in Stronger Futures measures in continuing key aspects of the Intervention. That the Intervention was based largely upon negative and damaging stereotypes of Indigenous peoples' characters and capacities, has not been acknowledged by government. It seems politically inconvenient that it should do so – despite the resulting havoc created in many Indigenous people's lives.⁶¹

Conclusion

John Stuart Mill asserted that '[d]espotism is a legitimate mode of government in dealing with barbarians, provided the end be their improvement, and the means justified by actually effecting that end'.⁶² We are opposed to such a liberal view, which represents the 'Janus-face' of Australian governance of Indigenous affairs.⁶³ We make three observations. First, in so far as such liberal views were the philosophical underpinnings of the Intervention, they have failed to deliver. The 2015 *Closing the Gap Report* shows limited improvements at the national level in meeting the government's unilaterally imposed statistical targets measured using its own official statistics.⁶⁴ Outcomes for Indigenous people in the Northern Territory are even

Indigenous Peoples, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).

⁵⁸ Kitch, J., 'Constitutional Recognition: Recognising the Flaws in Indigenous Affairs' (2014) 8(15) *Indigenous Law Bulletin* 18, 20.

⁵⁹ Goldberg, D.T., above n 52, 146.

⁶⁰ Davis, P., 'Law as Microaggression' in Richard Delgado and Jean Stefancic (eds), *Critical Race Theory – The Cutting Edge* (Temple University Press, 2nd ed, 2000) 141, 144.

⁶¹ Watson, I., 'Aboriginal Women's Laws and Lives: How Might We Keep Growing the Law?' (2007) 26 *Australian Feminist Law Journal* 95, 104, 107; Macoun, A., 'Aboriginality and the Northern Territory Intervention' (2011) 46 *Australian Journal of Political Science* 519, 519.

⁶² Mill, J.S., above n 54, 14-15.

⁶³ Anthony, T., *Indigenous People, Crime and Punishment* (Routledge, 2013) 27.

⁶⁴ Australian Government, *Closing the Gap Prime Minister's Report 2015* (Commonwealth of Australia, 2015) 1, 5.

more concerning. Census data from 2006 and 2011 showed that many gaps have been inching further apart since the government committed itself to addressing these issues with the Intervention.⁶⁵ There is no or limited improvement in sight. Second, by allowing special discriminatory measures to occur, Australian governments have opened up a Pandora's box for further discriminatory measures. Hence the absence of improvement is being interpreted by those in power as a need to both continue and escalate discriminatory measures on ideological rather than evidence-based grounds. Thus, on Saturday 14 February 2015 it was reported in the Australian that the government is looking to implement the *Forrest Review* recommendations for an even more paternalistic and intrusive Healthy Welfare Card, 'a cashless welfare card system' with 100 per cent income management.⁶⁶ This exemplifies the notion that 'if the medicine does not work, it is time to double the dose'.⁶⁷ Third, there is no evidence that discriminatory measures work globally so one has to ask why is the Australian government taking such a course of action? What is clear is that Australia will attract international opprobrium if it continues to implement discriminatory measures that do not work in the name of a recolonising project of improvement.

We end by returning to Lionel Murphy's inspirational and aspirational intent for the *Racial Discrimination Act* in 1975, 40 years ago. The Australian government has just released its seventh 'Closing the Gap Report' to considerable articulated commentary that state power is ineffective in closing state-defined gaps in Indigenous socio-economic status. There is a considerable body of research that demonstrates that a proportion of this discrepancy can be explained by racial discrimination.⁶⁸ The RDA may not be the ideal instrument to address such discrimination but it is the best that Australia has. The Australian government is currently considering 'new' policy approaches like below-award wages and payment of income-in-kind that are reminiscent of the discredited assimilation era preceding the RDA. In the present, the RDA is an instrument that needs strengthening rather than dilution, and that clearly still has much important work to do that is of practical and symbolic value to Indigenous Australians.

⁶⁵ Altman, J., 'Tracking Indigenous Policy', above n 21, 70.

⁶⁶ Martin, S., 'Scullion flags income control', *The Weekend Australian*, 14 February 2015, p 2. For further detail on the Healthy Welfare Card see Commonwealth of Australia, *The Forrest Review* (2014) 100-108; for problems with this proposal see Shelley Bielefeld, 'Income Management' in Elise Klein (compiler), 'Academic Perspectives on the Forrest Review', *CAEPR Topical Issue No. 2/2014*, Australian National University, 14-16.

⁶⁷ Editorial, above n 31.

⁶⁸ Biddle, N., 'Methodology of the review' in Klein, E., (compiler), 'Academic Perspectives on the Forrest Review', *CAEPR Topical Issue No. 2/2014*, Australian National University, 5-6; Nielsen, J., 'Whiteness at Work' (2013) 26 *Australian Journal of Labour Law* 300, 300-1, 304, 320.

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Luke McNamara is Professor in the School of Law and a member of the Legal Intersections Research Centre at the University of Wollongong. He has been researching racial vilification laws and other hate speech laws for two decades, most recently in collaboration with Professor Kath Gelber. He is the author of *Regulating Racism: Racial Vilification Laws in Australia* (2002) and *Human Rights Controversies: the Impact of Legal Form* (2007). His Australian Research Council funded research with Kath Gelber on the impact of s 18C of the *Racial Discrimination Act 1975* (Cth), and equivalent state/territory laws, has produced publications in the *Australian Journal of Political Science* (which was awarded the Australian Political Studies Association's 2014 Mayer Prize), the *Australian Journal of Human Rights* and *Civil Justice Quarterly*. He served as Dean of the Faculty of Law at the University of Wollongong from 2007-2012.

Tracey Raymond

Tracey Raymond is the Director, Investigation and Conciliation with the Australian Human Rights Commission. Tracey has an academic background in psychology, social work and law, is a Churchill Fellowship recipient and has over twenty years of experience in the investigation and conciliation of human rights/discrimination complaints. Tracey is an accredited mediator and has undertaken comparative international research on Alternative Dispute Resolution and published papers on the theory and skills of statutory conciliation. Tracey is currently responsible for management of the AHRC's national Investigation and Conciliation Service. Tracey is also an accredited trainer who has conducted training in statutory investigation and conciliation for various agencies in Australia as well as human rights/anti-discrimination institutions in Hong Kong, Malaysia, Fiji, Sri Lanka, Indonesia, South Africa, Mongolia, South Korea, Trinidad & Tobago and the Philippines.

Daniel Reynolds

Daniel Reynolds is a research assistant at the Gilbert + Tobin Centre of Public Law, Faculty of Law, University of New South Wales.

Tim Soutphommasane

Dr Tim Soutphommasane is Race Discrimination Commissioner at the Australian Human Rights Commission.

Gillian Triggs

Emeritus Professor Gillian Triggs is the President of the Australian Human Rights Commission.

Mariam Veiszadeh

Mariam Veiszadeh has established herself as one of most energetic and resourceful young leaders of the Australian Muslim community. Driven by her Islamic faith and deep sense of responsibility of enjoining good and forbidding evil, Mariam has worked tirelessly in her various advocacy roles. Her advocacy has attracted the support of senior politicians, journalists, decision makers and other ordinary Australians.

Mariam is a skilled social media campaigner, she was the original founder of both the viral social media campaign Women In Solidarity with Hijabis (#WISH) and the Islamophobia Register Australia. In all of these campaigns, Mariam has used the extensive media attention generated to highlight some of the injustices suffered by Australian Muslims and the often ignored prejudices within Australian society.

Peter Wertheim

Currently the Executive Director of the Executive Council of Australian Jewry, Peter Wertheim AM was a lawyer for 32 years. His major clients included trade unions and other not-for-profit organisations, and he has also acted as honorary solicitor for a number of charities, including the Aboriginal Medical Service Co-operative Ltd, Redfern, Aboriginal Health and Medical Research Council of New South Wales, East Timor Relief Association Inc., Australian International Fund for Disadvantaged Children in Vietnam Limited and numerous Jewish community organisations. In July 2010, Peter was appointed by the Australian Government as a member of its *Australian Multicultural Advisory Council* and in 2011 to its successor body, the *Australian Multicultural Council*. Peter is also a Statutory Board Member of the NSW Anti Discrimination Board, a New South Wales State government body.

George Williams

George Williams AO is the Anthony Mason Professor at the University of New South Wales. He has written and edited 31 books, including *Australian Constitutional Law and Theory* and *The Oxford Companion to the High Court of Australia*. As a barrister, he has appeared in a number of High Court cases over the past two decades, including the *Hindmarsh Island Bridge Case* on racial discrimination. He has served on several public inquiries, such as the chair of the consultation that produced Australia's first State bill of rights, the Victorian Charter of Human Rights and Responsibilities. He is a columnist for the *Sydney Morning Herald*.

Appendix

Psychological dimensions of racial vilification and harassment

Winnifred R. Louis & Matthew J. Hornsey

Appendix 1

List of submissions analysed for CRaCR project

Acronym	Organisation	Date of Submission	Type	Position
ACOSA	African Community Organisation of South Australia	None provided	Ethnospecific	Against
ATN	All Together Now	17-April-2014	Advocacy/Policy	Against
AI	Amnesty International	24-April-2014	Advocacy/Policy	Against
ACA	Arab Council Australia	30-April-2014	Ethnospecific	Against
AASW	Australian Association of Social Workers	01-April-2014	Workplace	Against
ACANS W	Australian Chinese Association of NSW	28-April-2014	Ethnospecific	Against
ACHRA	Australian Council of Human Rights Authorities	01-April-2014	Human Rights	Against
ACTU	Australian Council of Trade Unions	30-April-2014	Workplace	Against
AHRI	Australian Human Resources Institute	30-April-2014	Workplace	Against
-	Australian Human Rights Commission - Wilson addendum	28-April-2014	Human Rights	For

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AHRC	Australian Human Rights Commission (AHRC)	28-April-2014	Human Rights	Against
ALA	Australian Lawyers Association	30-April-2014	Legal	Against
AMC	Australian Multicultural Council	16-April-2014	Political	Against
ATC	Australian Tamil Congress	29-April-2014	Ethnospecific	Against
-	Authors, writers, journalists, editors, publishers, directors, artists, filmmakers, academics and supporters	14-April-2014	Various	Against
CYI	Cape York Institute	29-April-2014	Advocacy/Policy	Against
CCHRL	Castan Centre for Human Rights Law	30-April-2014	Education/Research	Against
CPJC	Catholic Peace and Justice Commission	No date	Religious	Against
CAWLS	Central Australian Women's Legal Service	01-April-2014	Legal	Against
CGD	City of Greater Dandenong	29-April-2014	Political	Against
CLA	Civil Liberties Australia	30-April-2014	Advocacy/Policy	Balanced
CTG	Closing the Gap Campaign Steering Committee	30-April-2014	Advocacy/Policy	Against
CRaCR	Cyber-Racism and Community Resilience Research Group	28-April-2014	Education/Research	Against
DCA	Diversity Council of Australia	30-April-2014	Workplace	Against
-	Dr Sev Ozdowski - Former Human Rights Commissioner	28-April-2014	Human Rights	For

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ECAJ	Executive Council of Australian Jewry	29-April-2014	Religious	Against
FECCA	Federation of Ethnic Communities' Councils of Australia	29-April-2014	Ethnospecific	Against
HC	Hellenic Council	30-April-2014	Ethnospecific	Against
HRLC	Human Rights Law Centre	30-April-2014	Human Rights	Against
IPA	Institute for Public Affairs	30-April-2014	Advocacy/Policy	For
-	Joint Submission from 31 Victorian Multicultural, Faith and Community Organisations	11-April-2014	Various	Against
LCA	Law Council of Australia	02-May-2014	Legal	Against
LIV	Law Institute of Victoria	30-April-2014	Legal	Against
LV	Liberty Victoria	30-April-2014	Advocacy/Policy	Balanced
MBL	Maurice Blackburn Lawyers	30-April-2014	Legal	Against
MCNT	Multicultural Council of the Northern Territory	30-April-2014	Advocacy/Policy	Against
MLN	Muslim Legal Network	02-May-2014	Legal	Against
NATSILS	National Aboriginal and Torres Strait Islander Legal Services	30-April-2014	Legal	Against
NCAFP	National Congress of Australia's First People	30-April-2014	Advocacy/Policy	Against
NIECBN	National Indigenous Education Consultative Bodies Network	02-May-2014	Education/Research	Against

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NUS	National Union of Students	30-April-2014	Education/Research	Against
NAAJA	North Australian Aboriginal Justice Agency	29-April-2014	Legal	Against
NSWBA	NSW Bar Association	30-April-2014	Legal	Against
NSWSLL	NSW Society of Labor Lawyers	30-April-2014	Legal	Against
OHPI	Online Hate Prevention Institute	30-April-2014	Advocacy/Policy	Against
PPA	Pirate Party Australia	30-April-2014	Political	Balanced
-	Prof. Ben Saul (University of Sydney)	30-April-2014	Education/ Research	Against
-	Prof. Simon Rice (Australian National University)	30-April-2014	Education/ Research	Against

Acronym	Organisation	Date of Submission	Type	Position
-	Professors Neilsen, Clark & Burns (Queensland University of Technology & Southern Cross University)	30-April-2014	Education/ Research	Against
PIAC	Public Interest Advocacy Centre	30-April-2014	Advocacy/Policy	Against
PLPRU	Public Law and Policy Research Unit, University of Adelaide	29-April-2014	Legal	Against
QLDADC	QLD Anti-Discrimination Commission	30-April-2014	Human Rights	Against

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QLDILS	QLD Association of Independent Legal Services	30-April-2014	Legal	Against
RA	Reconciliation Australia	30-April-2014	Advocacy/Policy	Against
RLC	Redfern Legal Centre	30-April-2014	Legal	Against
RCA	Refugee Council of Australia	30-April-2014	Advocacy/Policy	Against
-	Robert Corr	09-April-2014	Legal	Against
SCA	Save the Children Australia	30-April-2014	Advocacy/Policy	Against
-	Shadow Attorney-General Mark Dreyfus	30-April-2014	Political	Against
SVP	St Vincents de Paul	30-April-2014	Religious	Against
-	Terri Butler (MP - Labor)	12-May-2014	Political	Against
UC	Uniting Church	30-April-2014	Religious	Against
UNSWKL C	UNSW Kingsford Legal Centre	30-April-2014	Education/Research	Against
UNSWLS	UNSW Law Society	30-April-2014	Education/Research	Against
VACCH	Victorian Aboriginal Community Controlled Health	30-April-2014	Advocacy/Policy	Against
VAEAI	Victorian Aboriginal Education Association Inc.	30-April-2014	Education/Research	Against
VEOHRC	Victorian Equal Opportunity and Human Rights Commission	15-April-2014	Human Rights	Against
WSLS	Western Suburbs Legal Service	30-April-2014	Legal	Against

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WLSNS W	Women's Legal Services NSW	29-April-2014	Legal	Against
-	Wright and Di Natale (Senate - The Greens)	30-April-2014	Political	Against

Appendix 2

Attorney General Department Community Resilience projects 2010-2014.

List of Grant Projects

Nos	Grant date	SPONSORING BODY	TITLE - Project Name
1	2010-11	Anglicare Sydney	Aussie Youth Connect
2	2010-11	Australian Multicultural Foundation (AMF)	Australian Muslim Youth Leadership and Mentorship Program
3	2010-11	Centre for Multicultural Youth	Unite 4 Justice
4	2010-11	Hume City Council	Hume Anti-Violent Extremism Youth (HAVEY) Project
5	2010-11	Islamic Women's Welfare Council of Victoria	Aman – Youth for Peace Building
6	2010-11	JobQuest	Mentoring and Resiliency Development (MARD) Project
7	2010-11	Multicultural Media Exchange	Media Makers
8	2010-11	Spectrum Migrant Resource Centre	Voices for Change
9	2011/12	Auburn Community Development Network	Dream Big Project
10	2011/12	Australian Somali Community Association	Somali Community Resilience Project
11	2011/12	Bali Peace Park Association	Beyond Bali Education Kit

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12	2011/12	Burwood Council	Different People Different Voices Project
13	2011/12	City of Darebin	Salam Alaykum – Darebin’s Muslims Reaching Out
14	2011/12	Federation of Ethnic Communities Council of Australia (FECCA)	Teaching Democracy – political extremism, global lessons for local educators
15	2011/12	Footscray Football Club (Western Bulldogs – SpiritWest Services)	More than a Game
16	2011/12	Forum for Australia’s Islamic Relations (FAIR)	Southern Crescent Online Peace Initiative
17	2011/12	Horn of Africa Relief Development Agency	Somali Youth Outreach Project
18	2011/12	InterAction	iAct Interfaith Youth Leadership Program
19	2011/12	Islamic Council of Queensland	Empowering Youth to Say No to Radicalisation
20	2011/12	Islamic Council of Victoria	Audio/Film Production for Youth Engagement and Training
21	2011/12	La Trobe University	Young Australian Muslim Leadership Program
22	2011/12	Lebanese Moslem Association	Sharing Humanity
23	2011/12	North Melbourne Football Club	Connect @ THE HUDDLE
24	2011/12	Pace-e-Bene	Building Community Capacity in Nonviolent Leadership: An Interfaith Program for Young People

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25	2011/12	University of New South Wales (Football United)	Fairfield-Liverpool Youth Exchange
26	2011/12	Victorian Arabic Social Services	Curbing Radicalisation through Youth Resilience
27	2011/12	Youth Centre – UNSW	Building Resilience to Violent Extremism in the Canterbury-Bankstown Region: A Focus on our Youth
28	2011/12	Youth Development Australia (YouthWorx)	inSite Projects
29	2012/13	All Together Now	Building Resilience to Extremism: Planting a seed of doubt among young men
30	2012/13	The Association of Hazaras in Victoria Incorporated	Tackling Extremism in the Afghan community
31	2012/13	Australian Football League	Bachar Houli Cup: Islamic Schools and Leadership Program
32	2012/13	Australian Multicultural Foundation	Peer to Peer: Building Capacity and Resilience
33	2012/13	Burwood Council	Different People Different Voices – Stage Two
34	2012/13	Centacare Cairns	International Human Rights Day 2012
35	2012/13	The City of Newcastle – The Loft Youth Arts & Cultural Centre	Welcome Stranger
36	2012/13	Fellowship of Australian Writers (FAW)	Hive Television
37	2012/13	Football United	South Western Sydney – Youth United

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38	2012/13	Western Bulldogs SpiritWest Services	Generation M
39	2012/13	Horn of Africa Relief and Development Agency (HARDA)	Somali Youth Outreach Project
40	2012/13	The Huddle @ North Melbourne Football Club	Connect 2
41	2012/13	Institute for Judaism and Civilisation Incorporated	A teaching manual of the shared values of the major world religions—Judaism, Christianity and Islam
42	2012/13	Islamic Council of Victoria	The Community Reconnect Project
43	2012/13	The Islamic Society of South Australia Incorporated	Defining Moderate Islam to Muslims and non-Muslims
44	2012/13	Lebanese Muslim Association	The Positive Intellect Project (Pi Project)
45	2012/13	Macarthur Diversity Services Initiative	Respect You... Respect Me
46	2012/13	Metro Migrant Resource Centre	Development of Building Community Resilience Educational DVD Resource
47	2012/13	Multicultural Council of the Northern Territory	Asylum Seekers Community Education Project
48	2012/13	Townsville Intercultural Centre	Building a Resilient Refugee Community in Townsville
49	2012/13	University of South Australia	Everything You Always Wanted to Know About Muslims but Were Afraid to Ask

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50	2012/13	Victorian Immigrant and Refugee Women's Coalition	Women Against Violent Extremism (WAVE): Women building respectful and resilient communities
51	2013/14	All Together Now	Exit White Power
52	2013/14	Australian Football League	Bachar Houli Islamic Program
53	2013/14	Australian Multicultural Foundation Limited	Community Awareness Training Manual – Building Resilience in the Community
54	2013/14	Australian Muslim Women's Centre for Human Rights	Dialogue Across Sectarian Divide
55	2013/14	Eelam Tamil Association of Victoria	Filling the Gap
56	2013/14	Football United (FUn)	Youth Connected, Youth United
57	2013/14	People Against Violent Extremism (PAVE)	PAVE website and Walk Away From Extremism
58	2013/14	SalamCare	From Rage to Salam
59	2013/14	Spectrum Migrant Resource Centre Inc	Lead to Achieve

Papers presented at RDA Conference 2015

Appendix 3

Papers presented on Thursday 19 February 2015 (in order):

Dr Gwenda Tavan, *Better late than never? Australia's long, slow road to the Racial Discrimination Act 1975*

Professor Andrew Markus, *Negotiating change in the immigrant nation: public opinion and the transformation of Australia*

Professor Sarah Joseph, *The RDA from a 1970s perspective*

Professor George Williams, *The Constitution and the RDA*

Professor Beth Gaze, *The RDA after 40 years: advancing equality, or sliding into obsolescence?*

Professor Marcia Langton, *Indigenous people, native title and the RDA*

Professor Hilary Charlesworth, *Translating international standards at the national level: the Koowarta case and the RDA*

Professor Duncan Ivison, *Toleration and solidarity*

Associate Professor Geoffrey Brahm Levey, *Why the proposed RDA reforms were lost*

Dr Peter Balint, *Racial discrimination and racial tolerance: a location and defence*

Professor Adrienne Stone, *The Constitution, freedom of speech and the RDA*

Peter Wertheim, *Freedom and social cohesion: a law that protects both*

Associate Professor Winnifred R. Louis & Professor Matthew J. Hornsey, *Psychological dimensions of racial vilification and harassment*

Papers presented on Friday 20 February 2015 (in order):

Professor Andrew Jakubowicz, *Who are the racists in cyberspace? Understanding how to build communities of race hate and the implications for resilience in target communities*

Professor Kevin M. Dunn & Rosalie Atie, *Cyber racism: experiencing racism on the internet, what do people feel and do?*

Professor Gail Mason, *Regulating cyber-racism*

Kate Eastman SC, *Mere definition? The race and religion intersection in the application of the Racial Discrimination Act*

Mariam Veiszadeh, *Muslims and the RDA*

Diana MacTiernan, *English language testing – is there systematic discrimination?*

Professor Simon Rice, *It's only law: the gulf between the RDA and equality*

Professor Luke McNamara & Professor Katharine Gelber, *The impact of hate speech laws on public discourse in Australia: 1989-2009*

Tracey Raymond, *Alternative Dispute Resolution: an effective tool for addressing racial discrimination?*

Dr Sarah Pritchard SC, *Special measures, RDA and CERD*

Jonathon Hunyor, *Alcohol, racial discrimination, special measures and human rights*

Dr Shelley Bielefeld & Professor Jon Altman, *NT intervention and constitutional recognition*