

**Race Discrimination Commissioner**

**The Racial  
Discrimination Act**

**A REVIEW**

**December 1995**

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## ***FOREWORD***

The Commonwealth Attorney-General, the Hon. Michael Lavarch, launched the review of the *Racial Discrimination Act* (RDA) on 7 August 1995. Along with a number of academics, practitioners and experts in the field of anti-discrimination law, Mr Lavarch addressed a seminar held by the Race Discrimination Unit of the Human Rights and Equal Opportunity Commission in conjunction with the Human Rights Centre at the University of New South Wales to discuss future legislative directions for combatting racial discrimination in Australia. The papers presented at the seminar are the core of this publication.

Why review the RDA now? Enacted in 1975, in response to Australia's international obligations under the *Convention for the Elimination of All Forms of Racial Discrimination* the RDA has been operating for 20 years providing, among other things, individual redress for complaints of racial discrimination. There have been a number of individual success stories and some landmark court cases. However, as the first piece of anti-discrimination legislation enacted by the Commonwealth, the RDA is showing its age. In the Act's 20th anniversary year and in this International Year for Tolerance it is timely and necessary to review the legislation in the context of modern Australian society, a society quite different to that of 1975.

This review focuses on the practical problems in the operation of the Act and its broader conceptual deficiencies in light of developments in both international and domestic law. Key questions are addressed to determine how the Act can better reflect contemporary social justice thinking. We know that few complaints have been lodged under the Act's indirect discrimination provision, and its transformative potential remains unrealised. How do we utilise the RDA to tackle systemic race discrimination more effectively and what role can 'special measures' play in this process? It is important to grasp the complexities of racial discrimination, such as where issues of race and gender intersect. Is it possible to balance both the human rights of individuals and the collective rights of distinct communities? Should the RDA encompass the notion of self-determination for indigenous Australians? If so, how?

I recognise the limits inherent in the legal system in altering racist behaviour and the entrenched attitudes that underlie systemic discrimination. However, the law does have a vital role to play in delegitimising racial discrimination and ensuring an avenue for redress.

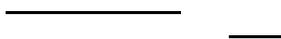
This publication contributes to the academic literature on the RDA and racial discrimination in Australia. It also forms the basis for further discussion on the

Act's future. Community groups for whom the RDA should be a tool of empowerment must have their say on the appropriateness of legislative reform and remedies. Consultations are therefore planned for early 1996 to inform the next stage of the review process. Ultimately, we plan to produce a list of proposed policy and legislative amendments aimed at creating a more effective and accessible means of challenging racial discrimination in contemporary Australia.

In preparing this publication, I am very grateful to Melinda Jones and George Zdenkowski of the Human Rights Centre for their efforts in co-hosting the RDA Review Seminar at the University of NSW and for their additional editorial assistance. The seminar was the focal point of the initial phase of the review, providing an important forum for the development of a more interactive relationship between the Commission and those who are experienced in the workings of race-related public policy and anti-discrimination law throughout Australia.

I am indebted to all of the participants at that event for their invaluable insights, and particular thanks go to the speakers whose papers make up the bulk of this publication. We are lucky to have the benefit of a collection of such eminent academics and practitioners as Margaret Thornton, Phillip Tahmindjis, Sarah Pritchard, Garth Nettheim, Natan Lerner, Hilary Astor, Chris Sidoti and Greta Bird. I would also like to acknowledge the contribution of Mick Dodson and the staff of the Aboriginal and Torres Strait Islander Social Justice Unit to the seminar and the ongoing review process, as well as acknowledging Kate Eastman, Melinda Jones, Deborah Nance and Sarah Pritchard who each provided additional and much appreciated comments on various sections of the background papers.

My thanks of course also go to the indefatigable staff of the Race Discrimination Unit. All have been involved but I am particularly grateful to Saku Akmeemana and Teya Dusseldorp who have been responsible for drawing together the seminar proceedings, writing the additional background papers and raising issues for further consideration. My thanks also to Ian Hazeldine and Tina McCormack for providing research and other assistance.



ZITA ANTONIOS  
Race Discrimination Commissioner  
December 1995





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## BACKGROUND TO THE REVIEW

The *Racial Discrimination Act 1975* (Cth) (RDA) was the first piece of anti-discrimination legislation enacted by the Commonwealth Parliament. Prior to the passage of the RDA, the common law provided few effective remedies against discrimination based on race or any other grounds.<sup>1</sup>

In the last twenty years, all states and territories except Tasmania have enacted comprehensive anti-discrimination legislation which, among other things, renders racial discrimination unlawful.<sup>2</sup> While these pieces of legislation do not proscribe all forms of discrimination, they attempt to ensure that people are not disadvantaged economically, socially or politically because of invidious distinctions based on race. There are undoubtedly limits to the redress that law can provide. Nonetheless, the legislation has had tremendous normative and symbolic significance and a considerable influence in moderating behaviour.

This review has been prompted by the fact that, while ad hoc amendments have been made to the RDA, a comprehensive review of the effectiveness of the Act has not been undertaken. It is necessary to evaluate the adequacy of the Act in meeting the needs of those for whom it should be a tool of empowerment. This chapter will briefly survey the history of the RDA and some of the major amendments that have been made to the Act. It also outlines the background, scope, and methodology of the Review.

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1. Further, the Australian Constitution provides few explicit guarantees of fundamental human rights or freedoms, and the only reference to racial minorities was inserted with the intention of restricting their rights, not with enhancing them: Joske, *Australian Federal Government*, Butterworths, 1967, p 225. See Chapter 4.
  2. The first statute in Australia to specifically deal with racial discrimination, or indeed discrimination against any group, was the *Prohibition of Discrimination Act 1966* in South Australia. This statute was limited in its scope and was eventually repealed and replaced by the *Racial Discrimination Act 1976* (SA). However, New South Wales was the first jurisdiction to enact comprehensive anti-discrimination legislation with the passage of the *Anti-Discrimination Act 1977*. The other states and territories have followed suit, except Tasmania: *Equal Opportunity Act 1984* (Vic); *Equal Opportunity Act 1984* (SA); *Equal Opportunity Act 1984* (WA); *Anti-Discrimination Act 1991* (Qld); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1992* (NT).

It is hoped that this review will encourage scholarship in the area of race discrimination, of the depth and sophistication which is apparent in feminist scholarship in Australia. The rights discourse, from which anti-discrimination law emerged, has been a powerful force of social change in both political and legal spheres. Sarah Pritchard and Margaret Thornton both note the influence of critical race theory in the United States. Together with some landmark race discrimination cases in the United States, critical race theory has contributed to a sophisticated theorisation of racial discrimination, which is lacking in contemporary Australian scholarship. Particular perspectives of outsider groups do not consistently emerge to challenge dominant views, understandings and definitions in public debate.<sup>3</sup> One effect of outsider voices remaining marginalised is that they do not influence the determination of what is 'reasonable' in indirect discrimination cases. The cultivation of Australian critical race theory, with a distinctive theorisation of race and ethnicity that is relevant to Australian society, is therefore essential for racial discrimination law to be perceived and used as a tool of social change.

## THE RACIAL DISCRIMINATION ACT

The RDA received Royal Assent on 11 June 1975. The provisions which enabled ratification by Australia of the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD) came into effect on Assent. The remainder of the RDA came into force on 31 October 1975, after the Convention was ratified on 30 September 1975. In making discrimination unlawful, the Act follows the definition used in CERD.

The central proscription in section 9 of the RDA renders unlawful "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 the enjoyment of fundamental rights or freedoms.<sup>5</sup> The Act guarantees equality before the law without distinction as to race. It also deals specifically with racial discrimination in relation to access to places and facilities; the provision of land, housing and other accommodation; the provision of goods and services; employment; and the right to join trade unions.

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3. See Margaret Thornton, Introduction, *The Liberal Promise*, Oxford University Press, Melbourne, 1990.

4. R Hunter, *Indirect Discrimination in the Workplace*, The Federation Press, 1992, p 262.

5. Section 9(2) of the RDA incorporates the rights and freedoms stipulated in Article 5 of CERD.

The RDA established formal administrative machinery for enquiring into complaints of racial discrimination, and for settling complaints by conciliation, through what was then known as the Office of the Commissioner for Community Relations. Where settlement could not be achieved, the Act provided for the Commissioner for Community Relations to issue a certificate to enable a complainant to pursue specified remedies through civil court processes.<sup>6</sup> The RDA also invested the Commissioner for Community Relations with the function of developing education, research and other programmes to combat racial discrimination and to promote understanding and tolerance between racial and ethnic *groups*.

The emphasis on conciliation has continued to the present day, although the administrative machinery for handling complaints has changed over the years. The autonomy of the Commissioner for Community Relations came to an end on 10 December 1981, when the *Human Rights Commission Act 1981* (Cth) came into effect. Under the new legislation, the previous functions of the Commissioner were conferred on the Commission by the then section 20 of the RDA. Nonetheless, the function of inquiring into alleged infringements of the RDA was performed by the Commissioner on behalf of the Commission.<sup>7</sup>

Since 1986, complaints under the RDA have been administered by the Human Rights and Equal Opportunity Commission<sup>8</sup> (HREOC), of which the Race Discrimination Commissioner is a member. Recourse is no longer available to the civil courts if conciliation fails. Rather, there is provision for the Race Discrimination Commissioner to refer a complaint that is unable to be resolved by conciliation to a public inquiry by HREOC, which will make an appropriate determination if the complaint is substantiated. If the parties do not comply with a determination, fresh proceedings must be instituted in the Federal Court and the matter proceeds by way of a hearing *de novo*. The current dispute resolution

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6. Section 24 of the original RDA provided that if conciliation failed, a complainant was issued with a certificate which entitled him or her to sue in a court of appropriate jurisdiction.

7. Except where the office of the Commissioner was vacant or the Commissioner was absent from duty: the then section 20A of the RDA.

8. Established by the *Human Rights and Equal Opportunity Commission (Transitional Provisions and Consequential Amendments) Act 1986* (Cth).

framework is discussed in greater detail in Chapter 3, while the problems in the enforcement machinery are comprehensively examined by Chris Sidoti in Chapter 12.

It should be noted that state legislation proscribing racial discrimination operates concurrently with the RDA. The RDA was amended in 1983 after the High Court decision in *Viskauskas v Ndand*,<sup>9</sup> where it was held that the racial discrimination provisions of the *Anti-Discrimination Act 1977* (NSW) were inconsistent with the RDA. While there was no direct inconsistency between the two Acts, the High Court considered that both the terms and the subject matter of the Commonwealth Act were intended to cover the field of racial discrimination.<sup>10</sup> As a response to the decision, section 6A was inserted into the RDA,<sup>11</sup> to provide that the Act is not intended to exclude or limit the operation of a state law which furthers the objects of the CERD, and is "capable of operating concurrently with (the federal) Act".<sup>2</sup>

## Amendments

A number of significant substantive amendments were made to the RDA in 1990. A new section 9(1A) was inserted, the purpose of which was to clarify that the RDA extends to acts of indirect racial discrimination. The effect of subsection 9(1A) is that where a term, condition or requirement which is imposed on a person and which is not reasonable in the circumstances, impairs the equal enjoyment of any human right by persons of that person's race, then the imposition of the term, condition or requirement will be treated as involving a distinction based on, or done by reason of, the person's race.<sup>13</sup>

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9. (1983) 153 CLR 280.

10. *Viskatukas* at 292 per Gibbs CJ; Mason, Murphy, Wilson, Brennan JJ.

11. Parallel provisions were inserted into the *Sex Discrimination Act 1984* (Cth) in sections 10 and 11.

12. Where the same conduct is unlawful under both state and federal law, the clear purpose of section 6A is that a complainant should be able to take action under either law, subject to section 6A(2) which excludes the lodgement of a complaint under the Commonwealth Act if one has been lodged under the state legislation.

13. The operation of subsection 9(1A) involves an examination of whether the imposed term condition or requirement impacts disproportionately on persons of the same race as the person on whom the term is imposed. For further discussion of sub-section 9 (1A), refer to Chapter 7.

Section 18 was also amended to provide that the RDA encompasses the situation where a racially discriminatory reason is one of a number of reasons for doing an act. Where an act is done for two or more reasons and one of the reasons is the race, colour, descent or national or ethnic origin of a person (whether or not it is the dominant reason or a substantial reason for doing the act), then the act is done for that reason.

The issue of vicarious liability was also addressed by a new section 18A. The section confirms the liability of a person for racially discriminatory acts done by a person's agent or employee in the course of their employment.<sup>14</sup>

The RDA was amended in 1992 to provide that where the Race Discrimination Commissioner decides not to inquire into a complaint because it is frivolous, vexatious, misconceived or lacking in substance or because those aggrieved by the act do not wish the Commissioner to hold an inquiry, a review of that decision may be conducted by the President of the Commission. The Commissioner's decision not to inquire could be reviewed "on the papers".<sup>16</sup>

The *Sex Discrimination and Other Legislation Amendment Act 1992* (Cth) made, *inter alia*, a number of amendments to the RDA. These included provisions which established a new mechanism for enforcing determinations made by HREOC. The provisions were subsequently found to be constitutionally invalid in *Brandy v Human Rights and Equal Opportunity Commission*<sup>17</sup> in that they purported to enable the Commission to exercise the judicial power of the Commonwealth. The *Human Rights Legislation Amendment Act 1995* (Cth) reinstated the pre-1992 enforcement procedures as an interim measure pending the adoption of a permanent, constitutionally sound mechanism<sup>18</sup> for the

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14. However, section 18A(2) exempts the person from liability where the person took all reasonable steps to prevent the racially discriminatory act being done by the employee or agent.

15. *Law and Justice Legislation Amendment Act 1992* (Cth).

16. Decisions by the Commissioner not to inquire into a complaint are still to be referable to HREOC for inquiry in cases where the Commissioner's decision is based on a finding that the act, which is the subject of the complaint, was not unlawful.

17. (1995) 127 ALR 1.

18. A Joint Review Committee consisting of representatives from the federal Attorney-General's Department, the Human Rights and Equal Opportunity Commission and the Department of Finance is finalising details of its recommendations for such an enforcement mechanism.

enforcement of HREOC determinations. This issue is discussed in greater detail in Chapters 3 and 12.

The 1992 Amendment Act also inserted a new clause 19A to provide that where victimisation of a person involved in an action under the RDA occurs, that person will be able to lodge a complaint which can be dealt with by the Commission through conciliation. This does not affect any criminal proceedings that may be taken under section 27.

Finally, the representative complaints provision of the RDA was replaced by new provisions which draw, where appropriate, on the representative proceedings provisions of Part WA of the *Federal Court of Australia Act 1976* (Cth). The amendments provide for a more comprehensive regime for representative complaints by defining when a representative complaint may be lodged, specifying the criteria for when a complaint is not to continue as a representative complaint, providing for replacement of the complainant by another member of the class in certain circumstances and for more appropriate determination powers in regard to the complaints.

The most recent amendments to the RDA were effected by the *Racial Hatred Act 1995* (Cth), which inserted a new Part IIA into the Act. The amendments render unlawful public acts which are reasonably likely to offend, insult, humiliate or intimidate a person or group of people, where the act is done because of the race, colour or national or ethnic origin of the person or group.<sup>19</sup>

## THE REVIEW

### The passage of twenty years

Since its passage, there have been substantial changes in the political, legal and social landscape in which the RDA operates, both domestically and internationally. The Government's response to changing demographics and increasing cultural diversity was to gradually shift policy away from the assimilationist approach of the 1950s and 1960s, which required conformity to the Anglo-Australian world

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19. For further discussion, see Chapter 8.

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view, to a policy of multiculturalism first expounded at the time that the RDA was being drafted.<sup>21</sup>

### *Demographic changes*

Between 1971 and 1991, the total population grew from just over 13 million to 17 million people, while the percentage of the population born overseas increased from 2.6 million to 4.1 million people. Of the overseas born, those born in a non-English speaking country more than doubled between 1971 and 1991 from 1.3 million people to more than 2.6 million people.<sup>22</sup> Today, at least one-quarter of Australians were born overseas in a "non-English speaking" country or have at least one parent born in such a country. The number of Australians who identify as Aboriginal and Torres Strait Islander peoples has also increased from 116,000 people in 1971 to over 303,261 people in 1994.<sup>23</sup>

### *Changes in public policy*

The policy of multiculturalism marked an official acceptance of cultural pluralism, but tended to ignore its structural implications.<sup>24</sup> Structural pluralism—the idea that the delivery of social justice is integral to multiculturalism—has only developed in the 1980s.<sup>25</sup> Over the last 20 years, the consultative mechanisms with indigenous Australians and people of non-English speaking background appear to have improved. Government organisations, units within government departments and non-government organisations representing the rights or protecting the interests of indigenous people and those of non-English speaking

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20. Human Rights and Equal Opportunity Commission, *Anti-Racism: A Handbook for Adult Educators*, 1986, p 15.
  21. Al Grassby, the then Minister for Immigration, introduced the concept of multiculturalism in Melbourne, on 11 August 1973, in a speech entitled "A Multicultural Society for the Future".
  22. Australian Bureau of Statistics, *Social Indicators*, AGPS, 1980 and 1995.
  23. Australian Bureau of Statistics, *Aboriginal and Torres Strait Islander Survey*, AGPS, 1994.
  24. Noted social commentator, the late Jean Martin, observed how early forms of multiculturalism were little more than an acceptance of cultural pluralism accompanied by a "fear of structural pluralism" in S Encel, *The Ethnic Dimension*, Allen & Unwin, 1989, p 145.
  25. In *Sharing our Future*, AGPS, 1989, the National Agenda for a Multicultural Australia wrote of the "basic right of freedom from discrimination on the basis of race, ethnicity, religion or culture", p 1, and that this should include "not only overt or conscious discrimination at the personal level, but also that unwitting systemic discrimination", p 15.

background have proliferated.<sup>26</sup> The last five years have witnessed a genuine political commitment to Aboriginal reconciliation and attempts to address various aspects of Aboriginal dispossession<sup>27</sup> and socio-economic disadvantage. The Australian Government has enunciated self-determination as a key concept in federal indigenous affairs policy, and has taken an important role in the development of the *Draft Declaration on the Rights of Indigenous Peoples*<sup>28</sup> in the international arena.

Despite these positive measures, there is ample evidence of continuing indigenous and immigrant disadvantage in the labour market, education and access to public services, among other things.<sup>29</sup> Attempts to address such inequities through Access and Equity policy initiatives—with the aim of ensuring that responsibility for service provision for indigenous Australians and people of non-English speaking background is shared across all government departments—has met with mixed

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26. (a) The formal representation of ethnic interests has been facilitated by the establishment of publicly funded groups, such as Ethnic Communities' Councils (ECCs) and the Federation of Ethnic Communities' Council (FECCA), in the 1970s.
- (b) The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), the first effort by the Commonwealth to create statutory land rights for Aboriginal people, established Aboriginal Land Councils to manage the land and represent Aboriginal people in negotiations relating to the economic use of their land. Similar Land Councils were established under state legislation which created statutory land rights schemes.
- (c) There are a number of other structures such as the Aboriginal Legal Services which emerged to represent indigenous interests in the 1970s.
- (d) The Aboriginal and Torres Strait Islander Commission was established in 1990.
27. Signalled by the Prime Minister's "Redfern speech", 10 December 1992, the Government's response to the High Court decision in *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1, the launch of the Council for Aboriginal Reconciliation and the passage of *Aboriginal and Torres Strait Islander Commission Amendment (Indigenous Land Corporation and Land Fund) Act 1995*.
28. UN Working Group on Indigenous Populations, *The Australian Contribution: A Survey of the positions put to the Working Group by representatives of the Australian Government, the Aboriginal and Torres Strait Islander Commission, and the Australian Non-Government Organisations*, Tenth Session, 20-31 July 1992, Geneva, Switzerland, p 6.
29. For labour market and employment issues see the reports of the *Royal Commission into Aboriginal Deaths in Custody*, 1991; F Jones, "Unlucky Australians: Labour Market Outcomes among Aboriginal Australians" (1993) *Ethnic and Racial Studies* 16; and Race Discrimination Commissioner, *State of the Nation: A Report on People of Non-English Speaking Backgrounds*, 1995, Chapters 4 and 5. For health issues, see the National Health Survey, *Removing Cultural and Language Barriers to Health*, Issues Paper No 6, 1993 and Aboriginal and Torres Strait Islander Social Justice Commissioner, *Second Report*, 1994, Chapter 3.

success. Despite the efforts of the Office of Multicultural Affairs and the National Multicultural Advisory Council, there has been increasing disenchantment with the slow rate of progress.<sup>30</sup>

### *Legal developments*

By providing federal statutory protection against racial discrimination, the RDA has not only performed a role in the resolution of individual complaints lodged under its dispute resolution mechanism. The Act has proved to be an essential tool for indigenous peoples in the struggle for rights to their land by rendering discriminatory state legislation invalid by virtue of section 109 of the Constitution. In so doing, the RDA has been the catalyst for some significant developments, in legal, social and historical terms.

In the case of *Koowarta v Bjelke Petersen*,<sup>31</sup> the Queensland Minister for Lands refused to approve the transfer of a Crown lease of pastoral property to the Aboriginal Land Fund Commission, for the benefit of the plaintiff and other members of the Winychanam Group. When an action was brought by Mr Koowarta, alleging breaches of sections 9 and 12 of the RDA, the Queensland Government challenged the validity of the Act as being outside Commonwealth legislative competence.

In upholding the validity of the RDA, the High Court affirmed the Commonwealth's power to implement international treaty obligations into domestic law, and provided authority for the development of the external affairs power in subsequent cases such as *Commonwealth v Tasmania*.<sup>32</sup> The development of the law in this area has impacted on the federal balance of powers, through a significant enhancement and expansion of the Commonwealth's legislative power, and has facilitated the advancement of federal human rights law more generally in Australia.<sup>33</sup>

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30. In a recent submission to the Standing Committee of Community Affairs of the House of Representatives, 1995-6, FECCA has suggested that Access and Equity policy needs to be strengthened by a charter or a legislative base and that Commonwealth funding to states or agencies be tied to the observance of access and equity principles.

31. (1982) 153 CLR 168.

32. (1983) 158 CLR 1. The judgment of Mason, Murphy and Brennan JJ in *Koowarta* was used as authority by the majority in the *Tasmanian Dams Case*.

33. These developments are discussed in more detail in Chapter 4.

The RDA has operated as a safety net against attempts by state governments to extinguish indigenous land rights, such as in the case of *Mabo v State of Queensland (No. 1)*.<sup>34</sup> In *Mabo (No. 1)*, the High Court held by a majority of 4-3 that the *Queensland Coast Islands Declaratory Act 1985* was invalid because it was inconsistent with the RDA. The Queensland Act purported to retrospectively abolish any rights and interests that the Meriam people may have had to the Murray Islands under native title. It thus discriminated on the basis of race in relation to the human rights to own and not to be arbitrarily deprived of property, and to enjoy equality before the law.

This case confirmed that the RDA could render subsequent discriminatory state legislation invalid. The conclusion in *Mabo (No. 1)* was relied upon by the High Court when upholding challenges based on the RDA to the validity of the *Western Australian Land (Titles and Traditional Usage) Act 1993*.<sup>35</sup> This Act purported to extinguish native title in Western Australia, substituting "rights of traditional usage" as a form of statutory title, subordinate to most other interests.

Most importantly, *Mabo (No.1)* enabled *Mabo (No. 2)* to proceed, and thus ensured the recognition of native title at common law and the rejection of the doctrine of *terra nullius*. This decision has in turn provided some political impetus for the Government to address the wider issues of Aboriginal dispossession and socio-economic marginalisation.<sup>36</sup> However, as the papers in this publication suggest, the RDA has been inadequate as an agent of significant and systemic social change outside the area of land rights.

### *Limitations*

The RDA has proved to be an inadequate means of addressing structural discrimination. In administering complaints under the legislation, it has become apparent that there is a paucity of indirect discrimination complaints and that the RDA has been underutilised in assisting the realisation of social justice policies. This may be the result of the unnecessarily complicated and legalistic indirect discrimination provision, and of the significant failure by commentators and legal practitioners to identify structural discrimination in terms of its unlawfulness under

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34. (1988) 166 CLR 186.

35. *Western Australia v Commonwealth* (1995) 128 ALR 1.

36. See Aboriginal and Torres Strait Islander Social Justice Commissioner, *First Report*, AGPS, Canberra, 1993.

the RDA,<sup>37</sup> in addition to the very nature of systemic discrimination. The individual complaint-based mechanism places the onus of promoting equality upon individual victims of discrimination. The potential to achieve systemic change is therefore minimal.

The drafting and interpretation of the RDA could clearly benefit from international developments in the understanding of equality. By examining the practice of international human rights treaty bodies and the legal developments in other jurisdictions under municipal anti-discrimination legislation and constitutional equality clauses, legal practitioners and reformers may gain a more sophisticated understanding of the non-discrimination principle than has been propounded in Australian jurisprudence to date.

## Scope of the Review

The scope of this review is very broad. It will address 'big picture' issues such as systemic discrimination, collective rights, special measures, the cultural appropriateness of the current legislative regime, effective remedies and enforcement, the conciliation framework and the means by which to enhance effective dispute resolution. It will also examine in detail the substantive provisions in the RDA.

Many of the limitations and inadequacies of the RDA recently became apparent during the preparation of the *Alcohol Report*.<sup>38</sup> There are some significant gaps in coverage and anomalies that have arisen when compared with more recent federal anti-discrimination enactments, and these will be examined. Other pieces of legislation, which have significant implications for the Act's operation, such as the *Native Title Act* 1993 and the *Industrial Relations Reform Act* 1993 have been enacted and will also be explored.

Nonetheless, HREOC is keen not to duplicate the work of other related reviews of federal human rights legislation and the institutional framework. For a number of

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37. See S Akmeemana and T Dusseldorp, "Race Discrimination: Where to from here?" (1995) 20(5) *Alternative Law Journal* at p 208.

38. Race Discrimination Commissioner, *Alcohol Report*, AGPS, Canberra, 1995.

## BACKGROUND TO THE REVIEW

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years, an interdepartmental committee consisting of the Attorney-General's Department, the Department of Finance and HREOC, has been engaged in a Joint Review of HREOC.<sup>3</sup>

The review of the RDA is not likely to foreclose any of the options suggested by the Joint Review, and in fact, will further the interests of standardising HREOC's legislative framework by:

- adopting the 'best' provisions of state and federal legislation; and
- ensuring that the coverage available under each Act and the functions of the Commissioners are as similar as is appropriate and possible.

Further, a report was released in 1994 by the Steering Committee of the *National Review of Complaint Handling*, an internal HREOC review. Its objectives were to ensure the effectiveness, flexibility and responsiveness of complaint handling including where necessary recommendations for legislative and procedural change, to improve the quality and co-ordination of complaint data collection and to recommend a co-ordinated training package for staff involved in complaint handling.

There have been suggestions that the Federal Attorney-General's Department embark on a review of Commonwealth human rights legislation in light of the need for this legislation to be simplified and rewritten according to principles of plain English drafting. In view of the inconsistencies between the current pieces of legislation, there should be amendments to standardise definitions and put in place common procedural provisions which reflect best practice.<sup>40</sup> It should also be noted

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39. The terms of reference of the Joint Review were as follows:

- (a) To examine the appropriate role and function of HREOC and its relationship to other bodies;
- (b) To address the appropriate structure and operating arrangements for HREOC and Commissioners in the future taking into account: - the efficiency and effectiveness of HREOC's performance of its work to date; - the performance of HREOC to date in relation to financial and resource management.

40. This process will involve the referral of legislation to the Law Revision Unit in the Office of Parliamentary Counsel in the Attorney-General's portfolio, for review in consultation with human rights organisations.

that there is currently a proposal which is under consideration for consolidating the federal human rights Acts to form one federal piece of legislation.<sup>41</sup>

While it is inevitable that a comprehensive review of the RDA will traverse some of the ground which is covered by these reviews, it will not comprehensively examine those issues which relate to the institutional framework within which the Act is situated nor to internal issues relating to HREOC's management or resource allocation. Rather, this Review will focus on legislative changes to the RDA which can improve its efficacy in combatting racial discrimination in Australia.

## **Methodology**

The Commission's approach to the review of the RDA will essentially involve research and consultation.

During 1995, the Race Discrimination Unit undertook research and consulted with academics, key practitioners and relevant government departments, through informal liaison and a seminar on 7 August 1995. It also conferred internally within HREOC and with key stakeholders.

This publication will be accompanied by the release of a community guide incorporating an issues paper, which will be written in plain English and be aimed at the key target groups of the RDA and their advocates. Both of these publications will inform the consultation processes which are planned to be undertaken through the first half of 1996. With the release of the discussion paper, HREOC will call for public submissions, through advertisements in state, territory, and targeted ethnic newspapers.

In the first half of 1996, a steering committee will be established to guide the Review process. This committee will consist of representatives from government departments and statutory authorities such as the Attorney-General's Department, the Department of Immigration Local Government and Ethnic Affairs, the Australian Law Reform Commission and the Aboriginal and Torres Strait Islander

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41. There are two broad models which a consolidated piece of legislation could follow: *Anti-Discrimination Act 1992 (Qld)* or the *Anti-Discrimination Act 1977 (NSW)*.

Commission, together with representatives of non-government organisations. Public seminars and community consultations will be conducted in capital cities, some regional centres and remote communities around Australia.

HREOC staff will undertake formal meetings and informal discussions with a wide range of community organisations, particularly those representing and working with indigenous people and those from non-English speaking backgrounds. While consulting with relevant target groups, HREOC will also discern the level of public awareness and understanding of the legislation and develop strategies to enhance awareness of legislative rights and responsibilities, especially among access and equity target groups. Based on the above, HREOC will prepare a report, containing recommendations for reform.

## **The Seminar**

A seminar held on 7 August 1995, in conjunction with the Human Rights Centre at the University of New South Wales, was the focal point of the initial phase of the Review. The seminar was addressed by a number of the leading academics in fields of anti-discrimination, indigenous land rights and international law, and was launched by the federal Attorney-General. It was attended by around 75 participants who had particular expertise in discrimination law or race relations, as academics, practitioners or through working in public policy. The seminar papers addressed 'big picture' issues such as systemic discrimination, collective rights, special measures, cultural appropriateness of the current legislative regime, effective remedies and enforcement and the conciliation framework. The speakers at the seminar were (in order of presentation) Natan Lerner, Sarah Pritchard, Garth Nettheim, Margaret Thornton, Neil Lofgren, Rosemary Hunter, Hilary Astor, Greta Bird and Chris Sidoti.

## **THIS PUBLICATION**

The seminar focused on some key issues that have arisen in relation to the operation of the RDA. However, due to time and resource constraints, the seminar could not address all of the issues which a review of the RDA must examine. This publication includes the papers which were delivered at the seminar, together with an additional paper on the key area of racial hatred. It also includes a number of background papers on topics which were not addressed at the seminar, together with some further issues for consideration. Background papers are included on Part II of the RDA, constitutional issues, international influences and the current dispute resolution framework.

## The Papers

The papers contained in Chapters 6 to 13 form the bulk of this publication.

Margaret Thornton's paper highlights the limitations of the legal form in addressing historically entrenched racism. Professor Thornton argues that, although racism is diffused throughout the social fabric of Australian society, the RDA recognises only the contained act of discrimination. To be legally cognisable, an act of discrimination requires a complainant and a respondent who can be linked by an unbroken causal thread. The ad hoc, individualised, complaint-based mechanism is a limited tool to deal with racism, whether we are considering the resolution of complaints through conciliation or through public hearings. The paradoxes of conciliation are considered, focusing particularly on the confidentiality prescript. Professor Thornton argues that the lure of a damages settlement within conciliation underscores the atomism of the process.

In considering the public hearing level, Professor Thornton shows how a system dominated by technical experts favours corporate respondents and is a very effective device for disguising racism. She also compares reported race decisions under the RDA, with state and territory decisions. It is clear that the direct discrimination complaint that is close to the surface, namely, denial of service to the Aboriginal people in hotels, is easier to prove, than an employment complaint where the discrimination is intertwined with elusive notions of merit and 'best person'. It is argued that the problem of proof further separates the act of race discrimination from racism.

Phillip Tahmindjis examines the four principal elements which need to be established in Australian law for a case of indirect racial discrimination. It is argued that the approach in Australia has been aligned with the principles of statutory interpretation rather than with the fundamental principles of human rights. Other jurisdictions are contrasted in this respect. The practical applications (and some judicial misapplications) of these rules are considered in the light of some of the ideas of critical race theorists. Associate Professor Tahmindjis concludes that, despite the many problems and shortcomings associated with this area of law, it is not beyond redemption. Three levels of strategies, ranging from minimalist through to radical, are suggested.

Sarah Pritchard engages in a comprehensive analysis of section 8(1) of the RDA, which exempts 'special measures' from the prohibition of racial discrimination in Part H of the Act. Her paper commences with a review of some international texts

## BACKGROUND TO THE REVIEW

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which express significant developments in the concept of equality in international law and proceeds to examine practice under the 'special measures' provisions of CERD.

It is argued throughout that a distinction should be made between circumstances in which it is discriminatory to apply different rules to the members of a particular group because of their 'indigenoussness', race or ethnic origin, and situations in which it is reasonable and necessary to provide for measures to eliminate discrimination or to have regard to special cultural characteristics.

Dr Pritchard suggests that the High Court's conceptualisation of racial discrimination in *Gerhardy v Brown* is unduly formalistic, and at odds with the practice of international human rights treaty bodies as well as practice under the *Canadian Charter of Rights and Freedoms*. She concludes by referring to the difficulties of a complaints-based approach in eliminating systemic discrimination and with consideration of prospects for invoking the 'special measures' provision of the RDA in anything other than a defensive manner.

Garth Nettheim, in his response, echoes these concerns and suggests that special measures may not provide the most appropriate conceptual vehicle for recognition of the distinctive rights of indigenous Australians. Professor Nettheim closely examines the interaction between the RDA and the *Native Title Act*, and discusses the problems in relying upon the 'special measures' provision to support indigenous land rights legislation.

Natan Lerner discusses CERD, its present status and influence, and the close relationship between its main provisions and the issue of collective rights. He explores the distinction between collective rights and group rights; draws a tentative catalogue of such rights; and discusses the limits of collective and group rights. Professor Lerner conducts the above analysis within the context of the intensification of the discussion on cultural relativism.

A most glaring gap in the coverage of the RDA was recently closed by the passage of the *Racial Hatred Act 1995* (Cth). Melinda Jones and Saku Akmeemana discuss laws against racial vilification and incitement to racial hatred. The authors examine the international standards in this area, argue the case for the passage of comprehensive legislation against racial hatred, rebut the arguments against such legislation, and critically analyse the provisions of the *Racial Hatred Act*.

Hilary Astor considers the issue of the intersection of race and other aspects of identity. She examines whether Australian human rights law presently protects those whose experience of oppression is greatest because their identity embodies more than one ground of discrimination. The focus is substantially but not exclusively on the intersection of race and gender. Associate Professor Astor also considers the practical potential of federal human rights legislation to address this double discrimination in a way which respects the experience of the targets of discrimination.

Chris Sidoti examines the remedies provided by the current legislative framework. During its 20 year life, the RDA has provided three different approaches to the enforcement of rights. Recently, the third approach was abandoned after being found to be constitutionally invalid in the High Court and the second has been revived as an interim measure. A fourth approach will be attempted within the next year. Why has it been so difficult to find an effective way to enforce laws against racial discrimination? How effective have the past methods of enforcement been? Commissioner Sidoti describes some of the options for remedies under the RDA and suggests principles against which those options can be tested.

Greta Bird turns our attention to access and equity issues. She argues that while Australia appears well served in the area of racial discrimination with its federal and state legislation and the bureaucracies administering the laws, this is futile if it is not accessible to those in need of it. Accessibility is linked to a variety of factors. It lies in physical factors, such as hours of opening and location. It is connected to issues of knowledge, such as how information about the law is communicated to client groups. Importantly, accessibility is linked to empowerment. Do client groups feel that they 'own' the law and the processes set up to implement the laws? Who is monitoring the legal response to discrimination? The author argues that to ensure equality of delivery, there must be reliable data about client groups, about the level and nature of racial discrimination in the community and about the effectiveness (or otherwise) of current processes.

## **To the future**

This publication is the culmination of the initial phase of the Review. It will be followed by a community guide incorporating an issues paper in plain English, which will inform the consultations that are planned for the first half of 1996. Details of how to make a submission are found in Chapter 15. It is anticipated that the final report of the Review will be released by mid-1997.



## INTERNATIONAL INFLUENCES ON DOMESTIC RACE RELATIONS

In the aftermath of World War II, as the international community came to realise the full extent of the atrocities committed by Nazi Germany, the doctrine of natural rights' was significantly revived<sup>2</sup> and stimulated the development of international human rights law. The Holocaust, apartheid in South Africa, the civil rights movement in the United States, and the historical legacies of slavery and colonialism have led to a relatively high consciousness<sup>3</sup> of the fundamental injustice of racism and racial discrimination<sup>4</sup> in the latter half of the 20th century. The norm of racial equality now appears to be accepted as part of customary international law.<sup>5</sup>

1. For a historical survey, see AS Rosenbaum, "The Editor's Perspectives on the Philosophy of Human Rights" in AS Rosenbaum (ed) *The Philosophy of Human Rights - International Perspectives*, Greenwood Press, USA, 1980, p 1.
2. The belief in the existence of a higher form of law against which the laws of a society can be measured, and the influence of Locke's notion of individual natural rights, diminished in the nineteenth century with the rise of legal positivism.
3. M Thornton, *The Liberal Promise*, Oxford University Press, 1990, p 47.
4. 'States members of the United Nations attach special importance to the fight against racial discrimination, thus stressing one of the most urgent and crucial problems that have arisen in the matter of protecting fundamental human rights' - President of the General Assembly, Amintore Fanfani, 21 December 1965.
5. See Judge Tanaka's dissenting opinion in the *South West Africa (Second Phase)* [1966] ICJ Rep.6 at 284; *Namibia* [1971] ICJ Rep.31 at 51; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 218-220; See also E Schwelb, "International Court of Justice and the Human Rights Clauses of the Charter" (1972) 66 *American Journal of International Law* 337, pp 338-341; W McKean, *Equality and Discrimination in International Law*, Clarendon, 1985, p 276; JP Humphrey, "The Universal Declaration of Human Rights: Its History, Impact and Juridical Character" in BG Ramcharan (ed), *Human Rights Thirty Years after the Universal Declaration 1979*, p 29; P Sieghart, *The Lawful Rights of Mankind*, OUP, Oxford, 1986, p 64; AH Robertson, *Human Rights in the World*, Manchester University Press, 1982, p 28; K. Suter, *Protecting Human Rights*, UN Association of Australia, Sydney, 1978, p 23; *Restatement of the Foreign Relations Law of the United States (Revised)*, 1982, para 702.

## CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

The *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD) is the primary international instrument propounding the equality of all races and requiring observance of human rights and fundamental freedoms without distinction as to race.<sup>6</sup> One hundred and forty three countries had ratified CERD as at June 1995<sup>7</sup>—over three quarters of the membership of the United Nations (UN)—reflecting the near-universal acceptance of the contents and objectives of the Convention and the readiness of states to comply with its provisions. CERD gives greater content to the prohibition of racial discrimination contained in the *Universal Declaration of Human Rights* (UDHR), the *International Covenant on Civil and Political Rights*<sup>8</sup> (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).<sup>9</sup>

In 1960, the General Assembly of the United Nations adopted Resolution 1510 (xv), condemning all manifestations and practices of racial, religious and national hatred in the political, economic, social, educational and cultural spheres of life, as violations of the *Charter of the United Nations* (UN Charter) and the UDHR. The immediate stimulus was an outburst of anti-Semitic incidents in 1959-60, the so-called 'swastika epidemics',<sup>113</sup> and other manifestations of racial, national and religious hatred and intolerance. The Sub-Commission on Prevention of Discrimination and Protection of Minorities adopted a resolution in which it condemned these incidents as violations of the UDHR and the UN Charter, and suggested that the General Assembly should undertake the preparation of an international convention which would impose specific obligations to prohibit manifestations of racial intolerance. An additional impetus lay in the persistent

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6. See also Articles 1(3) and 55 of the *Charter of the United Nations*.

7. United Nations, International Instruments Chart of Ratification, as at 30 June 1995. UN Doc ST/HR/4/Rev.12.

8. For instance, Articles 2 and 26.

9. For instance, Article 2(2). See generally N Lerner, *The United Nations Convention on the Elimination of All Forms of Racial Discrimination*, Sijthoff & Noordhoff, 1980, p 7 ff.

10. N Lerner, "Curbing Racial Discrimination - Fifteen years Later", (1983) *Israel Yearbook on Human Rights* 170, pp 171-2.

efforts of India and Pakistan to direct world attention to the human rights abuses caused by South Africa's apartheid policies."

By 1963, growing international concern led the United Nations General Assembly to take the formal step of adopting the *Declaration on the Elimination of All Forms of Racial Discrimination*.<sup>12</sup> The strong political support of African, Asian and other developing nations resulted in a high priority being given to the preparation of a convention by the relevant United Nations bodies. CERD was drafted and adopted by the end of 1965,<sup>13</sup> and entered into force on 4 January 1969. It has been described as "the international community's only tool (against racial discrimination) which is at one and the same time universal in reach, comprehensive in scope, legally binding in character, and equipped with built-in measures of implementation".<sup>14</sup> Referring to the adoption of CERD in 1965, the representative of Ghana stated that this was the General Assembly's finest hour,<sup>15</sup> whereas the French representative had expressed the opinion that no convention of equal scope or significance had been adopted before.<sup>16</sup>

While racial, ethnic and religious intolerance and prejudice are often inseparable, and frequently it is impossible to determine the precise element of group identity which results in the relevant impugned behaviour,<sup>17</sup> CERD does not prohibit discrimination on the grounds of religion. It was anticipated that a separate draft declaration and convention would be prepared on the elimination of religious intolerance.<sup>18</sup> This compromise was "intended to overcome the opposition to a

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11. Specifically, the Sharpeville and Langa killings focused world attention on the position in South Africa in 1960.
  12. Resolution No. 1904 (xvm).
  13. The Sub-Commission began work in January 1964, and the Convention was adopted by the General Assembly and opened for signature and ratification on December 21, 1965.
  14. UN Doc A/33/18.
  15. UN Doc A/PV.1406.
  16. UN Doc A/C.3/SR.1345.
  17. N Lerner, as above fiz 9, p 8.
  18. The separate instrument dealing with religious discrimination is the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief* It was adopted by the United Nations' General Assembly on 25 November 1981 by Resolution 36/55, 36 UN GAOR Supp. (No 51) at 171, UN Doc A/36/51 (1981). A convention is yet to be drafted.

joint instrument, emanating primarily from Arab delegations",<sup>19</sup> reflecting the Arab-Israeli conflict, in addition to that from East European representatives, who did not consider issues relating to religion to be as important as those of race. However, in the intervening 30 years, no other subject has been so neglected at international level, with the drafting of instruments on the topic being described as "a tale punctuated by hypocrisy, procedural jockeying, and false starts".<sup>20</sup>

### **Mechanisms created by CERD**

Apart from articulating the obligations of States Parties, CERD established the Committee on the Elimination of Racial Discrimination,<sup>21</sup> the first human rights treaty body.<sup>22</sup> The Convention establishes three procedures to enable the Committee to monitor and review actions taken by individual States to fulfil their obligations to combat racial discrimination.

The first is the requirement that all States which ratify CERD must submit periodic reports to the Committee. The Committee itself submits annual reports to the General Assembly, which may include suggestions and general recommendations based on the examination of the periodic reports and information received from States Parties.<sup>23</sup>

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19. N Lerner, as above *fn* 9, p 2. See also E Schwelb, "The International Convention on the Elimination of All Forms of Racial Discrimination", (1966) 15 *International and Comparative Law Quarterly* 996, p 997 ff.

20. RS Clark, "The United Nations and Religious Freedom", (1978) *New York University Journal of International Law and Politics* 197.

21. The Committee is, in the words of Article 8 of the Convention, composed of "18 experts of high moral standing and acknowledged impartiality". The members in their personal capacity are elected for a term of four years by the States Parties to CERD. The composition of the Committee takes into account a fair representation of the geographical regions of the world, the "different forms of civilisation", in addition to the principal legal systems.

22. Subsequently, the following committees have been established: the Human Rights Committee (responsibilities under the *International Covenant on Civil and Political Rights*); the Committee on the Elimination of Discrimination against Women; Committee on Economic, Social and Cultural Rights; Committee against Torture; and the Committee on the Rights of the Child.

23. Article 9.

A second procedure provides for complaints to be submitted by one State Party against another, alleging violations of CERD.<sup>24</sup>

A third procedure makes it possible for an individual or a group of persons within the jurisdiction of a State Party who claim to be victims of racial discrimination to lodge a complaint with the Committee against that State.<sup>25</sup>

The Committee may interpret the Convention insofar as is required for the performance of its functions.<sup>26</sup> Such interpretations are not *per se* binding on States Parties, but shapes the practice of States in applying the provisions of CERD, and may establish and reflect the agreement of States Parties regarding CERD's interpretation.<sup>27</sup> It affects the reporting obligations of the States Parties and their domestic and international policies.<sup>28</sup>

## **CERD's Implications for Domestic Law and Policy**

The adoption of CERD provided the impetus for Australia to undertake domestic legislative and policy reforms. Australia voted for the adoption of the Convention in the General Assembly. The Convention was signed on behalf of Australia by the then Minister for External Affairs, Paul Hasluck, on 13 October 1966, after which consultations with Australian authorities were initiated.<sup>29</sup>

The consultations were concerned mainly with the removal of discriminatory elements in both Commonwealth and state laws. Racially discriminatory provisions were removed from legislation over time, although progress was slow in several

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24. Articles 11-13.

25. Article 14.

26. 28 UNGAOR Supp (No 18) paras 46-48; UN Doc A19018 (1973).

27. T Meron, "The Meaning and Reach of the International Convention on the Elimination of all Forms of Racial Discrimination", (April 1985) 79 *American Journal of International Law* 283, p 285.

28. Meron, as above, *fn* 27, p 285.

29. Commissioner for Community Relations, *First Annual Report*, 1976, p 3.

states including Queensland and Western Australia.<sup>30</sup> However, positive legislative action was not undertaken to prohibit racial discrimination, except in South Australia.<sup>31</sup>

In 1969, the then Prime Minister, John Gorton, stated that his Government was committed to the abolition of discriminatory legislation against indigenous Australians "in the life of the next Parliament".<sup>32</sup> By 1970, there still remained "some twenty-three Acts of Parliament discriminating against Aborigines in those states most concerned for their welfare".<sup>33</sup> Nonetheless, the Prime Minister pledged his Government's commitment to end all forms of racial discrimination in Australia, and to undertake the necessary action for Australia to ratify the Convention.<sup>34</sup>

Scholarship about racism in Australia emerged in the early 1970s. The United Nations completed its first comprehensive world-wide study on racial discrimination in 1970, which made specific reference to indigenous Australians for the first time<sup>35</sup> in a chapter concerning the rights of indigenous peoples. In Australia, an influential three volume anthology was produced on *Racism: The Australian Experience*,<sup>36</sup> which examined the position of indigenous and immigrant Australians and the issue of colonialism, particularly Australia's role in Papua New Guinea.

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30. For a state by state analysis until the late 1960s, see F Stevens 'Parliamentary attitudes to Aboriginal affairs' in F Stevens (ed) *Racism: The Australian Experience*, Australia and New Zealand Book Company, Sydney, 1973, Vol 2, p 110. For developments in the 1970s, refer to the annual reports of the Commissioner for Community Relations.

31. The first statute in Australia to deal with racial discrimination, or indeed discrimination against any group, was the *Prohibition of Discrimination Act* 1966 in South Australia. This statute was limited in its scope and was eventually repealed and replaced by the *Racial Discrimination Act* 1976, which in turn was superseded by the *Equal Opportunity Act* 1984.

32. Commissioner for Community Relations, *Annual Report*, 1976, p 3.

33. F Stevens, as above *fn* 30, p 139.

34: Commissioner for Community Relations, *Annual Report*, 1976, p 4.

35. This study, which was commissioned by the General Assembly in 1965 and completed in 1970 (E/CN.4/Sub.2/307/Add 2, 23rd July, 1970.), is recorded by J Skuse, "Australia's voting patterns at the United Nations," in F Stevens, *Racism: The Australian Experience*, Australia and New Zealand Book Company, Sydney, Vol 3, pp 217-218.

36. The three volumes, edited by Frank Stevens, appeared in print between 1973 and 1977 and were sponsored by the United Nations Association of Australia and a committee to celebrate the International Year for Action to Combat Racism and Racial Discrimination.

A major turning point in the public consciousness of racism within Australia occurred through an increased awareness of racism in international sport. In 1971, the South African Government rejected a request from the country's Rugby Union Association for two non-white players to tour Australia with the Springbok team. When the composition of the tour party was announced, the Australian Prime Minister expressed his disappointment but allowed the tour to proceed. The tour generated considerable controversy, with huge public demonstrations held in many capital cities.<sup>37</sup> There were significant reverberations in South Africa:

It came as a tremendous shock that this little outpost was reacting against apartheid ... In fact, the Australian demonstrations have had greater impact than those in Britain or any other country, because the South Africans see us as an all-white country with some aspects of their apartheid policy.<sup>38</sup>

It is noteworthy that many of those demonstrating against apartheid drew strength and solidarity from this experience, and extended their efforts to advancing the rights of indigenous Australians.<sup>39</sup>

These events culminated in Australia's ratification of CERD on 30 September 1975, and the implementation of the Convention at the domestic level through the enactment of the RDA.<sup>40</sup> Australia expressed a reservation to Article 4(a) of CERD, which deals with incitement to racial hatred, discrimination or violence and the dissemination of ideas based on racial superiority or hatred. In light of the removal of the clause dealing with racial vilification during debate on the *Racial Discrimination Bill* 1974,<sup>41</sup> Australia expressed a reservation to the Article but

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37. There were clashes between demonstrators and police; the Queensland Government declared a State of Emergency to cover the tour; the Federal Government was forced to consider offering Royal Australian Air Force aircraft to transport the South African players; tour boycott announcements were made by two State Labor Governments, the Australian Council of Trade Unions and the Australian Council of Churches.

38. R Buchorn, "The campaign against racialism in sport" in F Stevens (ed), *Racism: The Australian Experience*, Vol 3, as above *fn* 35, p 219.

39. As above.

40. A summary of the Act and the amendments which have been made over the years is contained in Chapter 1, whereas the reliance on CERD in the exercise of Commonwealth legislative power is discussed in some detail in Chapter 4.

41. House of Representatives, *Hansard*, 9 April 1975, pp 1408-1409.

indicated its intention "*at the first possible moment, to seek from Parliament legislation specifically implementing (its) terms (emphasis added)*".<sup>42</sup> The fact that such a moment is yet to eventuate is examined in detail in Chapter 8.

## CONTINUING INTERNATIONAL INFLUENCES

Since the passage of the RDA, international influences have continued to have a significant impact on Australia's human rights law and policy in the area of racial discrimination. The active role of the CERD Committee has placed Australia's record on domestic race relations under international scrutiny, especially in relation to indigenous affairs. Further, the Committee's persistent questioning about Australia's reservation to Article 4(a) of CERD has been a significant influence on the present Government's attempts to enact legislation against racial vilification.<sup>43</sup>

### Individual complaint procedures

The CERD Committee's recommendations, the interpretation of the notions of equality and non-discrimination by international bodies, and the need for comprehensive domestic implementation of the obligations contained in CERD, have acquired a new significance in Australia since 28 January 1993. On that date, Australia lodged a declaration with the United Nations, recognising the competence of the CERD Committee to receive communications from individuals or groups concerning violations of the rights set forth in CERD.<sup>44</sup> This follows Australia's accession to the First Optional Protocol to the ICCPR,<sup>45</sup> which allows individuals who claim that their rights under the ICCPR have been violated to complain to the UN Human Rights Committee. It has thus become imperative that the RDA adequately implements CERD's provisions into domestic law.

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42. *Status of International Instruments*, New York: UN, 1987.

43. See Chapter 8.

44. See Article 14 of CERD. As at November 1995, two complaints have been lodged with the UN. On 28 January 1993, Australia also accepted a similar complaint procedure under Article 22 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).

45. Australia acceded to the First Optional Protocol on 25 September 1991, and the Protocol came into force for Australia on 25 December 1991.

In the context of native title, commentators have raised the possibility that a complaint could be lodged by an Aboriginal group adversely affected by the validation provisions in the *Native Title Act* 1993 (Cth).<sup>6</sup> Further, it appears unlikely that the Government will remove its reservations to Article 4(a) of CERD and Article 20(2) of the ICCPR, in light of the inadequacies of the *Racial Hatred Act* 1995 (Cth) in implementing the obligations contained therein. The removal of these reservations would leave the Commonwealth open to possible individual complaints.

The influence of international human rights law is an inevitable consequence of submitting Australia's legal system to the scrutiny of the international community through the individual complaints procedures under the Optional Protocol to the ICCPR and CERD, the effects of which are already apparent.<sup>47</sup>

## **Influence on statutory interpretation and judicial law-making**

Australia's international obligations may be used as a tool of statutory interpretation, and as an important influence in the development of the common law by the courts. In the process of statutory interpretation, a court will, if relevant, and unless there is a clear indication to the contrary, presume that Parliament did not intend to violate international law.<sup>48</sup>

For a number of years, some judges have taken the applicable provisions of international covenants as the starting point of analysis where the common law offers no binding authority on an issue, or when a domestic statute is ambiguous:<sup>49</sup>

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46. Professor Nettheim raises this issue in his paper in Chapter 9 of this publication. The plaintiffs could argue that Australia was contravening its treaty obligations under CERD in as far as they have suffered racial discrimination under its terms, unless the *Native Title Act* 1993 (Cth) is accepted as a 'special measure' within Article 1(4).

47. *Toonen v Australia*, Communication No 488/1992, UN DOC CCPR/C/50/D/488/1992.

48. The courts may also use international standards in the course of statutory interpretation to protect rights in two ways: by the interpretation of value laden expressions in statutes so as to protect rights, and by the use of presumptions. As early as 1908 it was said that "every statute is to be interpreted and applied as far as its language admits as not to be inconsistent with the comity of nations or with the established rules of international law": *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 per O'Connor J at 363.

49. Australian courts are belatedly following developments which are well-established in courts in, *inter alia*, England, India, Sri Lanka, Canada, and the United States.

## INTERNATIONAL INFLUENCES

where the inherited common law is uncertain, Australian judges, after the *Australia Act* 1986 (Cth) at least, do well to look for more reliable and modern sources for the statement and development of the common law. One such reference point may be an international treaty which Australia has ratified and which now states international law.<sup>50</sup>

In recent years, the High Court has recognised the important influence of international law and its condemnation of doctrines based on racial discrimination on the development of the common law. In *Mabo v State of Queensland (No 2)*,<sup>51</sup> Brennan J (with whom Mason CJ and McHugh J agreed) insisted that the common law must conform to international law's condemnation of doctrines based on racial discrimination, even if it would involve overruling previous decisions:

The common law does not necessarily conform with international law, but *international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights*. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration ... It is contrary to both international standards and to the fundamental values of the common law to entrench a discriminatory rule, which ... denies (the indigenous inhabitants) a right to occupy their traditional lands (emphasis added).<sup>52</sup>

The Court relied on the ICCPR to overrule well-established authority or a 'settled' area of the common law, the doctrine of *terra nullius*; international law was not simply used to resolve ambiguity or fill a lacuna in the common law. Three members of the Court<sup>53</sup> acknowledged the significance of the availability of international remedies to individuals following Australia's accession to the Optional Protocol to the ICCPR,<sup>54</sup> by stating that it brought "to bear on the common law the powerful influence of the Covenant and the international standards it imports".<sup>55</sup>

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50. *Jago v District Court of New South Wales* (1988) 12 NSWLR 558 at 569, per Kirby J. See also *Daemar v The Industrial Commission of New South Wales & Ors* (1988) 12 NSWLR 45; *S & M Motor Repairs Pty Limited & Anor v Caltex Oil (Australia) Pty Limited* (1988) 12 NSWLR 358; *Gradidge v Grace Bros Pty Limited* (1988) **FLR** 414; *Cachia v Haines & Anor* (1991) 23 NSWLR 304 at 312; *Dietrich v The Queen* (1992) 177 CLR 292; *Minister for Foreign Affairs and Trade v Magno* (1992) 37 SCR 298; *Young v Registrar, Court of Appeal* [No 3] (1993) 32 NSWLR 262.

51. *Mabo & Ors v State of Queensland (No 2)* (1992) 170 CLR 1.

52. *Mabo (No 2)*, as above *fn* 51, at 42 per Brennan J.

53. Brennan J, with whom Mason CJ and McHugh J concurred.

54. The case was heard before Australia lodged a declaration with the United Nations, accepting the competence of the CERD Committee to hear complaints pursuant to Article 14.

55. *Mabo (No 2)*, as above *fn* 51, at 42.

## Influence on administrative decision-making

The High Court recently affirmed the significance of international conventions in the process of administrative decision-making in *Minister of State for Immigration and Ethnic Affairs v Teoh*.<sup>56</sup> Mason CJ and Deane J stated that:

the ratification of a convention is a positive statement by the Executive Government of this country to the world and to the Australian people that the Executive Government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention.<sup>57</sup>

Even where the terms of a convention have not been incorporated into Australian law by statute, if a decision maker proposes to make a decision inconsistent with the legitimate expectation, then procedural fairness requires that the persons affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course.

*Teoh's case* is not directly relevant to the RDA, as it concerned the extent to which an administrative decision maker is obliged to take into account an international human rights instrument which Australia has ratified, but which has not been implemented into domestic legislation (viz, the *Convention on the Rights of the Child*). Because section 6 of the RDA states that the Act binds the Crown,<sup>58</sup> the principles of CERD as implemented in the Act are binding on federal and state administrative decision makers. Further, the Federal Government is proposing legislation to negate the principles enunciated in *Teoh*. Nonetheless, the case is an illustration of the increasing influence of international standards on the processes of government in Australia.

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56. (1995) 128 ALR 353.

57. As above, at 365.

58. "In right of the Commonwealth, of each of the States, the Northern Territory and of Norfolk Island".

## **IMPLEMENTING INTERNATIONAL STANDARDS: THE DRAFT MODEL LAW**

In 1985, the General Assembly invited the Secretary-General of the United Nations to prepare and issue, as soon as possible, model legislation to guide governments in enacting legislation against racial discrimination.<sup>59</sup> In preparing the model legislation, national instruments against racial discrimination adopted in over 40 countries were analysed. The final draft of the model legislation was revised in the light of comments made by the members of the CERD Committee at its fortieth and forty first sessions. The General Assembly took note of the final draft in 1993.<sup>60</sup>

Several papers will refer to the Draft Model Law, which provides some guidance as to what is considered 'best practice' at the international level, and for that reason it forms Appendix C of this publication.

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59. Resolution 40/22, 29 November 1985.

60. Decision 48/426, 20 December 1993.

## Further reading

Lerner N, *The United Nations Convention on the Elimination of All Forms of Racial Discrimination*, Sijthoff & Noordhoff, 1980.

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# HOW DOES THE RACIAL DISCRIMINATION ACT OPERATE?

## OVERVIEW\*

The *Racial Discrimination Act 1975* (Cth) (RDA) currently provides for complaints alleging unlawful racial discrimination to be lodged with the Human Rights and Equal Opportunity Commission (HREOC). If a complaint appears to fall within the terms of the legislation, the Race Discrimination Commissioner (the Commissioner) investigates and attempts to conciliate the complaint.

Over 10,000 complaints have been lodged since the RDA commenced operation. Over 3,000 of these have been successfully conciliated and resulted in formal agreements, while many others have been conciliated informally. Only 59 complaints have proceeded to public hearing and have resulted in determinations by HREOC since its establishment in December 1986<sup>1</sup>.

The conciliation framework has many advantages in that it allows for a complaint handling process that is accessible, private, inexpensive and flexible. The complainant also has a significant degree of control over the process. Some commentators have argued that the utilisation of an alternative dispute resolution framework, where complaints can be resolved with no public admission of fault on the part of the respondent, renders the anti-discrimination jurisdiction less important or serious than those utilising more public means of legal redress. Despite this perception, many complaints have been satisfactorily resolved for the complainant by an apology and an assurance that the action which is the subject of the complaint will not be repeated. In other instances, significant settlements have been agreed upon, including financial compensation, reinstatement to a job, agreement to stop a particular procedure or practice and the introduction of training programs, *grievance* procedures or policies to prevent future discrimination.

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\* This chapter provides a preliminary overview of the complaint handling process. Chapter 14 contains a more detailed critique of the dispute resolution framework and other issues relating to the practical operation of the legislation.

1. The matter of *D'Souza v Department of Education* is currently awaiting decision.

Under section 25Y, the Commission or the President alone may make an interim determination, to preserve the status quo or the rights of the parties to a complaint. The Commissioner or any of the parties may make an application for an interim determination. The interim determination lasts for the duration of the inquiry.

If a complaint cannot be settled by conciliation, or conciliation has been attempted and has been unsuccessful, the Commissioner can refer it to the Commission for a public inquiry. Enforcement proceedings may be pursued in the Federal Court.

It should be noted that, as a Commonwealth statutory authority, HREOC operates within the framework of federal administrative law. Therefore a 'decision' made by the Commission while administering the RDA must accord with the requirements of procedural fairness and may be subject to review pursuant to the provisions of the *Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act)*.<sup>2</sup> Decisions that are reviewable under the ADJR Act are those which finally determine a person's rights, where there are no further internal avenues of review.<sup>3</sup> A person may challenge such administrative action taken under the RDA on a number of specified grounds.<sup>4</sup> The Federal Court has the power to make a number of orders in relation to an application under the ADJR Act.<sup>5</sup> Further, section 39B of the *Judiciary Act 1903 (Cth)* accords jurisdiction to the Federal Court with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. However, this avenue is rarely used, given the existence of the ADJR Act.

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2. Section 5 of the ADJR Act provides for judicial review of decisions that have been made. Section 6 is concerned with the review of conduct engaged in for the purpose of making a decision. An application for review may be brought under section 7 where there has been a failure to make such a decision.

3. *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.

4. Including: a failure to take into account matters which the legislation requires to be taken into account; an error of law; the absence of sufficient evidence to justify the decision; an improper exercise of power; or an exercise of power which is unreasonable, uncertain or an abuse of that power.

5. See section 16 of the ADJR Act.

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## THE DISPUTE RESOLUTION FRAMEWORK

### Lodging a complaint

Section 22 of the RDA provides that a complaint must be made by an 'aggrieved person' or a trade union of which an aggrieved person is a member. In *Cameron v HREOC*,<sup>6</sup> the Federal Court held that an aggrieved person must have a 'special interest' in the subject matter of the complaint over and above ordinary members of the public, the determination of which involves a mixed question of fact and law. She or he must be:

likely to gain some advantage other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his (sic) action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his (sic) action fails.<sup>7</sup>

Section 25L outlines the conditions for making a representative complaint under section 22(1)(c), where the complaints of a class of people are against the same respondent, arise out of the same or similar circumstances and give rise to a common issue of law or fact.

Section 22(1) provides that a complaint must be lodged in writing. However, as many complainants have little knowledge of their legal position with regard to the alleged incident of discrimination and may have difficulty in providing a comprehensive written statement in English, HREOC provides assistance in formulating the complaint in writing where necessary. The Commission can also provide translation and interpreter services where required.<sup>8</sup>

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6. *Cameron v HREOC* (1993) 119 ALR 279, at 284-288.

7. *Cameron v HREOC* (1993) 119 ALR 279 at 285, Full Bench quoting and approving Davies J, the judge at first instance.

8. Some offices issue a lodgement form at first contact and find that these are well utilised. The South Australian Equal Opportunity Commission has stated that 95% of complaints are lodged on forms issued by officers at first contact: Human Rights and Equal Opportunity Commission, *National Review of Complaint Handling*, Final Report of the Steering Committee, AGPS, 1994, p 11.

## Assessment of complaints

Section 20(1) requires that the Commissioner "inquire into alleged infringements of Part II" of the RDA, although the process is not further defined. Once a complaint is lodged, it is assessed by the Commission to ensure that the person complaining is 'aggrieved' and has supplied adequate information. Once this has been done, the Commissioner and her staff must determine how to proceed with the matter. An attempt may be made at this stage to deal with the matter by informal contact with the complainant and respondent to discuss the issues and attempt to resolve the matter.

In some cases, the mere involvement of HREOC at this stage may expedite a resolution between the parties. For example, a number of complaints were lodged with the Commission by Aboriginal people who complained about a poster that had been displayed in the front office of a police station. The poster allegedly insinuated that the office was the headquarters of a 'whites only' organisation. On notification of the complaints to HREOC, representatives of the Police Department independently met with a large number of the complainants. The Department apologised for the harm the poster had caused, and outlined proposals for improved liaison between police and the Aboriginal community. A direction was given to all police stations in the region forbidding the display of such material, and the Department initiated an internal investigation of the matter and a review of its policy on discriminatory practices. In view of these results, the complainants did not seek any further action from HREOC.<sup>9</sup>

The Commissioner may decline complaints under section 24(2), when she considers that the complainant does not wish to proceed with the complaint, where a period of more than twelve months has elapsed since the relevant act took place, when she considers that the complaint is frivolous, vexatious, misconceived or lacking in substance or is not unlawful. If the Commissioner dismisses a complaint as 'not unlawful', section 24(4)(a) provides the complainant with the right to refer the complaint to the Commission for a public inquiry. Section 24(4)(b) gives complainants the right to seek review of decisions to decline on the other grounds by the President of the Commission.

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<sup>9</sup> HREOC, *Annual Report, 1990-91*, p 67.

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## Self-initiated complaints

Section 23 of the RDA gives the Race Discrimination Commissioner power to initiate a complaint and to proceed as the complainant where it appears that an unlawful act has occurred under the RDA. This power has not been widely used by the Commissioner to date, due in part to the tension created by a Commissioner bringing public proceedings that are heard by the Commission. However, section 23 does represent an important supplement to the individual complaints-based model, which requires an aggrieved person or a class of aggrieved persons. A matter referred to public hearing under section 23 by the Commissioner might take the burden off individuals who do not wish to be identified or who are unable to bring a complaint themselves. Although possible remedies under section 25Z of the RDA are limited to declarations of unlawful conduct, cases brought by the Commissioner have the potential to achieve a more extensive assault upon systemic discrimination and to provide a further educative function.

## The Conciliation process

Where a complaint appears to fall within the terms of the legislation, it is the duty of the Commissioner, under section 24(1), to attempt to resolve the complaint by conciliation. The aim of the conciliation process is for a third party (the conciliator) to intervene in a dispute between the complainant and respondent and, wherever possible, facilitate a satisfactory resolution in light of the principles of the RDA.

Conciliation is not defined in the Act, and in practice tends to vary widely in style and practice. The conciliator's task is not to form an opinion on the validity or otherwise of the complaint, but rather to uncover evidence which can be used to show the complainant and respondent where they stand with regard to their rights and obligations under the legislation. This could include interviewing witnesses, examining documents, inspecting premises, or looking at procedures and practices of an organisation. Anything said or done in the interests of conciliation is confidential,<sup>10</sup> thus enabling negotiations to be conducted more freely and openly.

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10. Section 24E(3) of the RDA.

To ensure compliance with the conciliation process, the RDA provides the Commissioner with the power to call a compulsory conference<sup>11</sup> and to make an order requiring the production of information or documents relevant to the inquiry.<sup>12</sup>

In the case of *Koppen v The Commissioner for Community Relations*,<sup>13</sup> the Federal Court held that, although a conciliator is unable to directly affect the rights of the parties or to make a determination as to liability, the principles of natural justice must still be applied. This, the Court held, was due to the fact that the failure of the conciliation process might expose the respondent to possible civil litigation.<sup>14</sup> Thus, the conciliator is under a duty to act with impartiality throughout the conciliation proceedings, and to accord procedural fairness to the parties.

The case of *Koppen* involved an Aboriginal conciliator in a complaint lodged by a number of indigenous people, who alleged that they had been excluded from a club because of their race. The conciliator stated during the proceedings that her children had also been denied entry to the respondent club. Spender J set aside the result of the conciliation conference on the grounds that the rules of natural justice had been breached by this display of possible bias. The judge further stated that a conciliator may bring 'her own knowledge and experience to bear in the discharge of her statutory duty' as long as this allows a fair and unbiased handling of the matter.

In contrast to the adversarial model, where determinations are imposed upon parties, conciliation aims to enable parties to negotiate in a private and informal setting. This requires a flexible approach from HREOC in examining the complaint fully and assisting the parties to reach the most appropriate resolution for each situation. A successfully conciliated complaint is one where both parties have agreed on the outcome and which eliminates or prevents a repetition of the act.

It should be noted, however, that most complaints involve parties in unequal positions of power. While it is intended to be a private and non-threatening alternative to a public hearing, a conciliation conference may in fact suffer from

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11. Section 24C of the RDA.

12. Section 24B of the RDA.

13. *Koppen v The Commissioner for Community Relations* (1986) 11 FCR 360.

14. This is also the case under the current dispute resolution mechanism. A failed conciliation may expose the respondent to a public hearing and then possible Federal Court enforcement proceedings.

similar problems of power imbalance. There are no explicit powers for HREOC to address power imbalances under the present legislation. The conciliator needs to be aware of this problem and to ensure that the parties are not pressured into accepting inadequate resolutions. This could be done by explaining the law, previous HREOC determinations and the ramifications of not settling during the conciliation process.<sup>15</sup>

In some instances, significant settlements have been agreed upon through conciliation. One case involved a young Aboriginal man who was refused employment, as arranged, because he was considered by the management to be 'too Aboriginal'. Through conciliation, the parties settled the matter, with the respondent agreeing to place public apologies in two metropolitan newspapers and to provide a written apology and \$15,000 damages for loss of dignity to the complainant.<sup>16</sup> Another case involved a worker of Indian Muslim origin whose employment had been terminated after racist harassment. The matter was conciliated, with the respondent agreeing to pay \$10,000 to the complainant and providing her with a reference.<sup>17</sup>

Conciliation may also result in remedies which address problems of a systemic nature. For instance, a complainant of Greek background claimed that his supervisor subjected him to racist remarks in front of his workmates and overlooked him when allocating overtime opportunities for a number of years. The matter was settled during conciliation, with the supervisor providing a written apology to the complainant. Further, the organisation commenced a review of the process of overtime allocation and initiated anti-discrimination training for all its staff.<sup>18</sup>

In another case, a conciliation conference was held between the niece of a woman who had died and the hospital at which the death had occurred. The aunt, who could not speak English, had remained overnight in casualty where doctors and staff made no attempt to communicate with her by use of an interpreter service. Nine hours after admission, doctors discovered that she required emergency surgery, but she died soon after the diagnosis was made. The family did not pursue

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15. HREOC, as above *fn* 8, p 71.

16. Human Rights Commission, *Annual Report*, 1983-84, p 41.

17. HREOC, *Annual Report*, 1992-93, p 92.

18. HREOC, *Annual Report*, 1993-94, p 143.

legal proceedings for negligence, but rather chose to lodge a complaint under the RDA. Through conciliation, the hospital agreed to pay compensation and also to amend hospital practices to improve conditions for people of non-English speaking background.<sup>19</sup>

A recent complaint, lodged by an Aboriginal woman concerning a taxi driver's racist remarks, resulted in significant systemic change after conciliation. At the initial conciliation conference, the taxi driver refused to accept any responsibility for his actions or to provide a written apology. However, after an additional conciliation conference between the complainant and the employer taxi company, the company agreed to instigate disciplinary proceedings against the taxi driver and further, to implement a training program in cross-cultural issues, conducted by an Aboriginal woman, for all current and future taxi drivers associated with the company.

### **The Hearing process**

Where the conciliation process fails, or the Commissioner is of the opinion that a complaint cannot be settled by conciliation, the matter may be referred to the Commission for public hearing.

A public inquiry is held by HREOC under section 25A of the RDA and a hearing Commissioner is appointed to exercise the inquiry powers of the Commission under section 25B. Legal representation is granted as of right if the Commission has arranged for counsel to appear at the inquiry to assist the Commission, or with the leave of the Commission in other cases.<sup>20</sup> The Commission may summon witnesses and documents, and evidence is taken on oath from witnesses who may be cross-examined.<sup>21</sup> The rules of natural justice apply to the public hearing procedure.<sup>22</sup>

As with conciliation, the Act does not prescribe the hearing procedures in detail. However, the Commission must minimise the formality and technicality of such proceedings as far as possible as stated in section 25V. The Commission is not bound by the rules of evidence, and may inform itself of any matter in such a

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19. HREOC, *Annual Report*, 1992-93, pp 94-95.

20. Section 25G of the RDA.

21. Section 25S of the RDA.

22. *Koppen*, above *fn 13*; see also *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.

manner as it thinks fit. It may also give directions aimed at reducing delay or the costs of the hearing.<sup>23</sup> The hearing is conducted at a venue convenient to the parties and may be held in private where appropriate. Under section 25Q, the Commission can adjourn the proceedings at any stage to allow further negotiation between the parties with a view to settling the complaint.

If the complaint is substantiated, the Commission will make a determination,<sup>24</sup> declaring that the respondent engaged in the discriminatory conduct and should not do so again, and that the respondent should perform some reasonable act to redress any loss suffered by the complainant. The Commission may also make a declaration that the respondent pay compensation to the complainant, or take some other appropriate action such as a public apology.

### **Some significant decisions under the RDA**

Since HREOC was established in 1986, 62 complaints of racial discrimination have been the subject of public inquiry, 19 of which were upheld. Only three of these determinations involved indirect discrimination.<sup>25</sup> As Margaret Thornton argues in Chapter 6, even in the case of direct discrimination, the burden of proof on the complainant creates significant obstacles in establishing racial discrimination in all but its clearest manifestations. The majority of cases upheld by the Commission have involved direct racial discrimination in the provision of goods and services where the evidential burden is relatively easy to satisfy.

In one case, *Bull & Bull v Kuch & Kuch*,<sup>26</sup> the respondent's business was to provide caravan accommodation, and yet the expressed policy was not to rent to Aboriginal persons "under any circumstances whatsoever". The refusal to rent a caravan to an Aboriginal couple, even in the dire situation of seeking emergency housing, was found by the Commission to be a "serious and significant case of blatant racial discrimination", and the respondents were ordered to pay compensation of \$20,700 to the aggrieved complainants.

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23. Section 25V(1Xc) of the RDA.

24. Section 252 of the RDA.

25. *Siddiqui v Australian Medical Council and the Minister for Health* (1995) EOC 92-730; *Sali v CSIRO*, unreported decision of Commissioner Crennan, 8.2.95; *Mark Tocigl v Aitco Pty Ltd trading as the "Adelaide Casino"*, a decision of Sir Ronald Wilson was handed down on 18 December 1995, as this publication was being finalised..

26. (1993) EOC 92-518.

Many cases before the Commission have involved the discriminatory refusal of service in hotels to Aboriginal and Torres Strait Islander people.<sup>27</sup> In one such case, *White & White v Gollan*,<sup>28</sup> the complainants were Aboriginal people who were refused service without reason in the public bar of the Tattersall's Hotel in Toowoomba. The licensee of the hotel was held directly responsible for the refusal of service and the complainants were awarded \$2,000 and \$1,000 respectively. The respondents were also ordered to make a public apology in writing to the complainants and to publish the apology in the local newspaper. In the case of *Mungaloon & Others v Stemron Pty Ltd & A nor*,<sup>29</sup> each complainant was awarded \$1,000 damages after lodging a complaint against a hotel that had the policy of barring Aboriginal people from being served. The hotel manager was ordered to publish a notice stating that unlawful discrimination had occurred, in addition to providing written apologies to the complainants.

Employment has been the most frequent area of complaint under the RDA,<sup>30</sup> although the success rates at public hearing have been low. This is due, in part, to the difficulty of separating discriminatory elements in employment decisions from genuine considerations of 'merit'.

In the case of *Kordas v Plumrose (Australia) Ltd*,<sup>31</sup> the employer was held to be responsible for the discriminatory actions of the complainant's fellow employees, including derogatory remarks and severe racist harassment. The Court stated clearly that employers have a duty to take steps to prevent racial discrimination or harassment from occurring, and to provide a work environment that is not racially hostile. The Greek-born complainant was awarded \$23,800 damages for his dismissal, which was held to be the result of discrimination, and for discrimination in relation to his working conditions prior to the dismissal. 32

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27. See the Race Discrimination Commissioner's *Alcohol Report*, AGPS, 1995, as to the issues involved where community groups themselves choose to have alcohol restrictions imposed.

28. (1990) EOC 92-303.

29. (1991) EOC 92-345.

30. Section 15 of the RDA makes it unlawful to refuse or fail to offer a person the same terms of employment or conditions of work by reason of the person's race.

31. (1989) EOC 92-256.

32. Because this complaint was made under the RDA prior to its amendment in 1986, the complainant was able to have the case heard in the Victorian County Court and obtain an enforceable order for damages.

In the case of *Djokic v Sinclair & Central Old Meat Export Co Pty Ltd*,<sup>33</sup> allegations by a female meat packer of racial and sex discrimination in the workplace, were found to be substantiated by the Commission. The complaints were lodged under the RDA and the *Sex Discrimination Act 1984 (Cth) (SDA)*, and were heard simultaneously as they related to "interwoven events occurring in the same period of time". The Commission found that the complainant was subjected to "deplorable" conditions in the workplace and, as a result of the continuing discrimination, her health was severely impaired. It held that the unlawful conduct, which ultimately resulted in the termination of the complainant's employment, was "the culmination of a history of discrimination..., on the ground of both her sex and her race". The complainant was awarded \$22,000 damages for extreme pain, suffering and humiliation. The Commission emphasised that management and the union movement must take note of "the widespread enlightenment of recent times of the dignity, equality and worth of all human beings... (and ensure)... in the workplace... the principles of fairness and equal opportunity".

As Phillip Tahmindjis notes in Chapter 7, a paucity of indirect race discrimination complaints have been lodged, due in part to the overly legalistic provisions in the RDA. However, in the recent case of *Siddiqui v Australian Medical Council and the Minister for Health*,<sup>34</sup> the Commission found in favour of Dr Siddiqui, an overseas trained doctor, who alleged that he had been discriminated against on racial grounds.

The Commission held that the accreditation regime imposed by the Australian Medical Council (AMC) on the complainant and other overseas trained doctors, amounted to a 'requirement or condition' under section 9(1A) of the RDA. In addition to testing the minimum requisite medical knowledge of applicants, the AMC had formulated a quota system. This quota system required applicants, who had successfully completed the test, but had failed to fall within the prescribed quota, to again sit and pay for the test, until they fell within the quota. This was held by the Commission to be unreasonable and therefore indirectly discriminatory.<sup>35</sup> The Commission awarded the complainant \$50,000 in damages,<sup>36</sup> and declared that the AMC and the Minister for Health had engaged

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33. (1994) EOC 92-643.

34. (1995) EOC 92-730.

35. The case is now on appeal to the Federal Court.

36. \$25,000 of which, was awarded for legal expenses.

in unlawful conduct which it should not repeat. This case has significant systemic implications for all candidates who had satisfied the test of minimum requisite medical knowledge.

### ENFORCEMENT OF DETERMINATIONS

Determinations of HREOC do not have the force of law. If the parties do not comply with the terms of the determination, fresh proceedings must be instituted in the Federal Court to enforce the determination, and the matter proceeds by way of a hearing *de novo*. This procedure has been adopted as an interim measure in the wake of the decision in *Brandy v Human Rights Commission*,<sup>37</sup> where the High Court held that the enforcement provisions which had been in operation since 13 January 1993 were unconstitutional.<sup>38</sup> The Court found that the scheme of registering Commission determinations with the Federal Court effectively gave HREOC the judicial power of the Commonwealth, thus infringing the separation of powers doctrine.<sup>39</sup> Judicial power can only be exercised by a federal court constituted in accordance with Chapter III of the Constitution. HREOC, as an administrative body, is therefore precluded from making binding determinations.

The present regime for the enforcement of Commission determinations is that which existed prior to 1993. The shortcomings of this regime, as emphasised by Wilcox J in *Maynard v Neilsen*,<sup>40</sup> include the costs involved in duplicating the hearing and the danger that a party will fail to disclose relevant evidence until the matter reaches the Federal Court. The intractable problems of the federal enforcement regime are examined in detail by Chris Sidoti in Chapter 12.

A Review Committee<sup>41</sup> is currently finalising a scheme which aims to establish a constitutionally sound, permanent mechanism for the enforcement of HREOC determinations.

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37. (1995) 127 ALR 1.

38. The mechanism provided for a process whereby a determination made by HREOC was to be registered in the Federal Court Registry as soon as practicable. Unless proceedings were instituted within 28 days to challenge the determination, it was to take effect as if it were an order of the Federal Court.

39. The separation of powers doctrine was enunciated in *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

40. *Maynard v Neilsen* (1988) EOC 92-226.

41. Consisting of the Federal Attorney-General's Department, HREOC and the Department of Finance. John Basten QC, Dr Sue Kenny and Chris Sidoti were added to the Review Committee in the wake of the *Brandy* decision.

## Further reading

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# REDRAFTING THE ACT: ARE THERE ANY CONSTITUTIONAL LIMITATIONS?

## INTRODUCTION

The Australian Constitution emerged from a legal tradition which has not given priority to the constitutional entrenchment of human rights. As a result, the Constitution provides few explicit guarantees of fundamental human rights and freedoms.<sup>1</sup> Commonwealth legislative activity in the area of human rights has been based primarily on section 51(xxix) of the Constitution, together with the incidental power, and is very much a creature of Australia's international human rights obligations. Section 51(ocix) gives the Commonwealth Parliament the power to make laws with respect to external affairs.

Australia ratified the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD) on 30 September 1975. The power to ratify conventions<sup>2</sup> is an executive power, within the preserve of the Federal Government, and is not dependent on legislative authority. Thus, while the ratification of treaties by the Executive creates international obligations binding on Australia, those obligations are not automatically incorporated into domestic law. They must be implemented specifically by the passage of domestic legislation.<sup>4</sup>

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1. Section 51 (xxxi) provides that the acquisition of property by the Commonwealth can only be done on just terms; section 80 provides for trial by jury for offences against Commonwealth laws and to trials on indictment; section 92 provides for freedom of 'trade, commerce and intercourse among the States'; section 116 provides for religious freedom in the sense that the Commonwealth is prohibited from legislating in respect of religion; section 117 provides that the States cannot discriminate against residents of other States. The original proposal to adopt an 'equal protection clause' was rejected, and all references to equality before the law and equal application of the law were removed in the drafting of section 117: N O'Neill and R Handley, *Retreat from Injustice: Human Rights in Australian Law*, The Federation Press, Sydney, 1994, pp 68-69.
  2. The terms 'treaty', 'convention' and 'agreement' are used interchangeably in this chapter.
  3. Except in rare cases such as a treaty of peace.
  4. *Bradley v Commonwealth* (1973) 128 CLR 557.

In enacting the *Racial Discrimination Act 1975* (Cth) (RDA), the Commonwealth adopted CERD as the basis for exercising the external affairs power. While the Commonwealth's competence to legislate in the area of human rights is now firmly established, it was uncertain at the time that the RDA was enacted. As the first federal anti-discrimination statute, the RDA bears the hallmarks of a pioneering piece of legislation. The Act was drafted cautiously, closely following the wording of CERD, so as to withstand possible constitutional challenge.

This challenge came from the Queensland Government in *Koowarta v Bjelke Petersen*.<sup>5</sup> In that landmark case, the High Court upheld the Commonwealth's power to implement international treaty obligations into domestic law and affirmed the constitutional validity of the RDA.

The subsequent case law has significantly expanded the ambit of the external affairs power. It appears that implementing legislation need not adhere closely to the precise wording of the international convention. Nevertheless, the High Court has held that such legislation must be reasonably appropriate and adapted to giving effect to the terms of the convention.<sup>6</sup> Accordingly, the Commonwealth is now in a position to reform the RDA in conformity with current human rights thinking. The aim of this Review is to develop more effective and less complex legislation whilst adhering to the substance of CERD.

## THE EXTERNAL AFFAIRS POWER

### Scope of the power

In the last 15 years, the High Court has interpreted the external affairs power expansively so that, in the words of Chief Justice Mason, "Australia is fully equipped to play its part on the international stage., ."<sup>7</sup> This stage is increasingly shaped by rights consciousness and universal standard-setting. In the leading cases of *Koowarta* and *Commonwealth v Tasmania*<sup>8</sup> (*Tasmanian Dams*), the High Court held

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

6. *Commonwealth v Tasmania* (1983) 158 CLR 1, at 131 per Mason J.

7. An extra-judicial address cited in (1988) 62 AU J 752, at 755.

8. The judgment of Mason, Murphy and Brennan JJ in *Koowarta* was used as authority by the majority in *Commonwealth v Tasmania* (1983) 158 CLR 1.

that the power in section 51(xxix) of the Constitution enables the Commonwealth to make laws in respect of any international obligation imposed upon Australia by a *bona fide* international treaty, even though the subject matter of the obligation is otherwise outside the direct constitutional powers of the Commonwealth. It is immaterial that the matters covered by the agreement were previously the subject of powers exercised by the states or territories.<sup>9</sup> The law relating to the external affairs power has been further developed in cases subsequent to *Tasmanian Dams* such as *Richardson v Forestry Commission*,<sup>10</sup> *Queensland v Commonwealth*,<sup>11</sup> and *Polyukhovich v Commonwealth of Australia*.<sup>12</sup>

The present position appears to be that irrespective of whether Australia has ratified and accepted obligations under a treaty, or the treaty is merely representative of an international concern, the very existence of that treaty is a sufficient basis upon which the Commonwealth may rely in order to implement domestic legislation.

Further, the exercise of section 51(xxix) is not limited by the existence of an international agreement. In fact, a treaty or convention is not necessary, provided that the subject matter of the relevant law is of international concern or assists in promoting friendly international relations<sup>13</sup> or it involves principles of customary international law.<sup>14</sup> Section 51(xxix) may also be engaged where there merely exists an international recommendation, request, consensus or objective.<sup>15</sup> Thus, any treaty, convention or agreement, whatever its subject, or the recommendations of an international organisation, could provide sufficient basis for the Commonwealth to enact legislation under the external affairs power.

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

10. *Richardson v Forestry Commission* (1988) 164 CLR 261.

11. *Queensland v Commonwealth* (1989) 167 CLR 232.

12. *Polyukhovich v Commonwealth of Australia* (1991) 172 CLR 501.

13. *Richardson v Forestry Commission* (1988) 164 CLR 261, at 289, 309, 322-3.

14. *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, at 220, 234.

15. Mason, Murphy and Deane JJ in *Commonwealth v Tasmania* (1983) 158 CLR 1, at 171-2, 177, 258-9.

## **Limitations on the power**

While the external affairs power has been interpreted expansively, the High Court has emphasised that the Commonwealth does not, by entering into a convention, acquire plenary power over the subject matter of the convention.<sup>16</sup> There are a number of limitations that restrain the Commonwealth's power.

It has been suggested that, in order to fall within the external affairs power, the treaty must not be a mere device for attracting jurisdiction.<sup>17</sup> Of course, the power is subject to those express<sup>18</sup> and implied<sup>19</sup> constitutional limitations that restrict federal power generally.

In so far as the validity of a law under section 51(xxix) depends on its implementation of an international agreement, the law must be a reasonably appropriate means for giving effect to the object of that agreement.<sup>20</sup>

## **Implementation**

The Commonwealth has a wide discretion to choose the legislative measures by which an international convention is implemented. It is for the High Court to determine the validity of such legislation, by examining whether it conforms to the terms of the convention and carries the convention's provisions into effect. While such conformity is essential, the High Court has not required a strictly literal approach to the implementation of the terms of a convention.

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16. Mason J in *Commonwealth v Tasmania* (1983) 158 CLR 1, at 131-132.

17. *Koowarta v Bjelke-Peterson* (1982) 153 CLR at 200, 217, 231, 260.

18. Express limitations in the Commonwealth Constitution include: sections 51(xxxi), 80, 92, 116 and 117.

19. Implied limitations include: the separation of powers doctrine; the general principles adopted by the High Court in *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, which prevent the Commonwealth discriminating against the states or threatening their existence or capacity to function; and the implied freedom of political communication first articulated in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 and *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 (see Chapter 8 for further discussion).

20. *Tasmania Dams* (1983) 158 CLR 1.

The Court has held that the Commonwealth may enact a law giving effect to only part of a treaty or providing for matters which go beyond that which is contained in the treaty.<sup>21</sup> The domestic law must only conform to a convention "in substance" or "within reason".<sup>22</sup> It must give effect to "principles stated in the Convention"<sup>23</sup> and must be "reasonably conducive" to its main purpose.<sup>24</sup> The law "must be capable of being reasonably considered to be appropriate and adapted" to the object of the convention.<sup>25</sup>

In *Richardson v The Forestry Commission*, a majority of the High Court affirmed this approach in determining whether Commonwealth legislation went beyond a legitimate implementation of the UNESCO *Convention for the Protection of the World Cultural and Natural Heritage*.<sup>26</sup> The *Lemonthyme and Southern Forests (Commission of Inquiry) Act 1987* (Cth) established a Commission to inquire into whether any part of the Lemonthyme and Southern Forests area should be classified as a world heritage area. The effect of the legislation was to provide interim protection of this area, constituting 4.5% of Tasmania, pending the outcome of a 12 month inquiry.

In contrast to the situation in the *Tasmanian Dams* case, the area of Tasmania covered by the Commonwealth legislation in *Richardson* had not been identified on the World Heritage List. The Convention therefore imposed no specific obligation to inquire into, or protect, the subject area. Rather, the Commonwealth relied upon the general commitment in the Convention to take measures to preserve the world's cultural and natural heritage. It was argued that this was an illegitimate implementation of the Convention and an incursion upon the State's capacity to govern.

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21. Murphy J in *Commonwealth v Tasmania* (1983) 158 CLR 1, at 172; Brennan J in *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, at 261.

22. *R v Poole; ex parte Henry* (1939) 61 CLR 634, at 644, 648.

23. *Aldridge v Booth* (1988) 80 ALR 1, at 12.

24. Brennan J in *Commonwealth v Tasmania* (1983) 158 CLR 1.

25. *Commonwealth v Tasmania* (1983) 158 CLR 1, at 259.

26. *Richardson v Forestry Commission* (1988) 164 CLR 261, per Mason CJ and Brennan J at 289; Wilson J at 300; Deane J at 312; Gaudron J at 342.

The majority judgments confirmed the broad latitude of the Commonwealth's power in treaty implementation. Adopting the 'reasonable proportionality' test,<sup>27</sup> the High Court went further than in *Tasmanian Dams*, finding that the external affairs power could cover action 'incidental' to the provisions of the Convention. The Court now looks to the purpose of the law, requiring that the measures chosen by Parliament to achieve a legitimate object must be proportionate to that object. Provided that Commonwealth action is not unnecessary or excessive, the external affairs power could support a law "calculated to discharge not only Australia's known obligations but also Australia's reasonably apprehended obligations".<sup>28</sup> This approach was confirmed in *Queensland v Commonwealth*.<sup>29</sup>

## IMPLICATIONS FOR LEGISLATIVE REFORM OF THE RACIAL DISCRIMINATION ACT

Twenty years after its drafting, the constitutional validity of the RDA is no longer in doubt. In light of the expansive interpretation of the external affairs power by the High Court, it is possible to reform the RDA to better implement the obligations imposed by CERD.<sup>30</sup>

The RDA Review highlights a number of deficiencies in the operation of the Act. As a tool of empowerment for people suffering racial discrimination in Australia, the RDA has proven to be complex and legalistic. A significant problem with the Act is its antiquated drafting, which mirrors the provisions as they appear in CERD. With the current move towards plain English in legislation, the convoluted legalese of the RDA is not optimal. International agreements are intentionally broad, expressing a negotiated statement of universal aspirations. It is necessary for the Parliament to consult the standards as expressed in the Convention and then formulate a workable and relevant piece of legislation to address the particular socio-political context of Australian society.

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27. This test was first propounded by Deane J in *Tasmanian Dams* at 266-7, and later applied by several justices in *Richardson v Forestry Commission* (1988) 164 CLR 261: per Mason CJ and Brennan J at 291; Wilson J at 301-2; Deane J at 311-2; Gaudron J at 346-7.

28. Mason CJ and Brennan J in *Richardson v Forestry Commission* (1988) 164 CLR 261, at 295.

29. *Queensland v Commonwealth* (1989) 167 CLR 232.

30. For further discussion of CERD, see Chapter 2.

## CONCLUSION

The current interpretation of the external affairs power gives the Commonwealth the freedom to implement its obligations under CERD in a more effective manner. The review of the RDA will examine the means by which the objects of CERD can be better implemented. The High Court has affirmed that the Commonwealth has a broad discretion to choose the legislative measures by which a convention is implemented, provided only that the means chosen are "appropriate and adapted" and "reasonably proportionate" to the objects of the convention. These issues are expected to be re-examined by the High Court in a number of proceedings which were heard jointly in September and in which judgment has been reserved.<sup>5</sup>

### Further reading

Constitutional Commission, *Final Report of the Constitutional Commission*, Vol 2, AGPS, Canberra, 1988.

Fitzgerald B, "Proportionality and Australian Constitutionalism", (1993) 12(2) *University of Tasmania Law Review* 263.

Gibbs H, "The Decline of Federalism?", (1994) 18 *University of Queensland Law Journal* 1.

Mathew P, "International Law and the Protection of Human Rights in Australia: Recent Trends", (1995) 17 *Sydney Law Review* 177.

Rothwell D R, "The High Court and the External Affairs Power: A consideration of its outer and inner limits", (1993) 15 *Adelaide Law Review* 209.

Senate Legal and Constitutional References Committee, *Treaties and the External Affairs Power*, Discussion Paper, March 1995.

Zines L, *The High Court and the Constitution*, 3rd edition, Butterworths, Sydney, 1992.

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31. *State of Victoria v Commonwealth*, M 46/94; *State of South Australia v Commonwealth*, A 18/94; *State of Western Australia v Commonwealth*, P 16/94. The proceedings were heard together on 5-8 September 1995, and involved challenges to the validity of the *Industrial Relations Reform Act 1993* (Cth).



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# PART II OF THE RACIAL DISCRIMINATION ACT

## INTRODUCTION

Part II of the *Racial Discrimination Act 1975* (Cth) (RDA) contains the substantive prohibitions on racial discrimination, and closely follows the wording of Article 1(1) of the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD). The provisions of CERD in turn draw upon the concept of non-discrimination in international law. This chapter examines how the various provisions of Part II interact with each other, the substantive content of the rights protected by Part II and how its provisions have been interpreted by courts and tribunals. This chapter also makes some suggestions for legislative change.

The RDA is binding on the Crown in the right of the Commonwealth and of the States. In its general application to the states, the RDA is broader than the *Sex Discrimination Act 1984* (Cth) (SDA), which excludes significant areas of activity such as state employment from its operation. The broad application of the RDA is due in part to the prevailing view at the time of its passage "that on certain issues it would be necessary to coerce the States to comply with international standards to which Australia had adhered".<sup>2</sup> Decisions made by the federal or state executive can be the subject of a complaint under the RDA, or subject to judicial review by way of prerogative writ or under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). In its 20 years of operation, the RDA has operated in a manner akin to an equality clause in a Bill of Rights to invalidate discriminatory legislative and executive action by state governments. It was crucial in defeating subsequently passed discriminatory legislation in *Mabo v State of Queensland (No 1)*<sup>3</sup> and *Western Australia v Commonwealth*<sup>4</sup>

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1. Section 6 of the RDA.

2. P Bailey, *Human Rights : Australia in an International Context*, Butterworths, 1990, p 188.

3. (1988) 166 CLR 186.

4. (1995) 128 ALR 1.

The principle of parliamentary sovereignty means that the Commonwealth Parliament may pass legislation which derogates from, or suspends the operation of, the RDA—for instance, section 7(2) of the *Native Title Act* 1993 (Cth).<sup>5</sup> However, the maxim *generalia specialibus non derogant* suggests that a later *general* Act or provision will not be interpreted as impliedly repealing the RDA, notwithstanding that the RDA is directly contradicted by the later Act or provision.<sup>6</sup> A corollary of the presumption against implied repeal is that a later Act will always be interpreted, if possible, so as not to contradict an earlier Act. To this extent, the RDA will operate as a guide to the interpretation of later Acts. Further, it is generally accepted that human rights legislation should be interpreted broadly to give effect to the objects of the legislation.

## THE PROSCRIPTIONS

The central proscription in section 9(1) makes it 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 9 is an extremely broad provision, unique in Australian anti-discrimination law for its breadth of coverage, resulting from its 'rights-based' approach. All other state and federal anti-discrimination legislation is restricted in its operation to specific areas of activity such as employment, accommodation and the provision of goods and services. This section has been described as the "most important... and

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5. See Garth Nettheim's paper in Chapter 9.

6. The general and overriding rule governing the interpretation of statutes is that, in the event of inconsistency, the later Act overrides the earlier. This general rule is subject to a strong presumption against the implied repeal of one Act by another Act: *Austereo v TPC* (1994) 115 ALR 14 at 24; *SA v Tanner* (1989) 166 CLR 161 at 168-171; *Butler v AG(Vic)* (1961) 106 CLR 268 at 275 per Fullagar J.

7. *Waters & Ors v Public Transport Corporation* (1991) 173 CLR 349 at 359 per Mason CJ and Gaudron J; *Street v Queensland Bar Association* (1989) 168 CLR 461 at 487, 508, 566, 581; *Re Ontario Human Rights Commission v Simpson-Sears Ltd* (1958) 23 DLR (4d) 321 at 329; *Waugh v Kippen* (1986) 160 CLR 156.

the most interesting"<sup>8</sup> provision in Commonwealth human rights legislation, with a former Chief Justice of the High Court commenting that section 9 creates a legislative bill of rights of limited extent.<sup>9</sup> The potential of the section is as yet unrealised.

Section 10(1) deals with the situation where a law does not allow a person of a particular race to enjoy a right to as great an extent as a person of another race. In such circumstances:

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 provision appears to allow a declaration of invalidity to be issued by the courts without resort to the dispute resolution processes contained in the RDA. The provision directly affects the legislation by conferring compensatory rights ('to the same extent') on those who do not enjoy an equal right under its terms. There is no parallel provision in the SDA or the *Disability Discrimination Act 1992* (Cth) (DDA).

## Specific Prohibitions

Sections 11 to 17 of the RDA prohibit specific types of discrimination in the following areas:

- access to public places and facilities (s 11);
- disposal or acquisition of land, housing, and accommodation (s 12);
- provision of goods and services (s 13);
- joining trade unions (s 14);
- employment (s 15);
- advertisements (s 16);
- inciting or assisting the doing of an act which is unlawful by reason of the foregoing prohibitions (s 17).

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8. Bailey, as above *fn 2*, p 188.

9. H Gibbs, Eleventh Wilfred Fullagar Memorial Lecture, "The Constitutional Protection of Human Rights", (1982) 9 *Monash University Law Review* 1, p 13.

Discrimination for the purposes of these specific prohibitions occurs when one person is treated *less favourably* than another by reason of the first person's race. Section 9(4) states that the provisions in sections 11-17 complement, but do not limit the generality of section 9(1).

The provisions in sections 11-17 are far less detailed than the corresponding provisions in the SDA and the DDA. For instance, there are seven provisions in the area of employment alone in the SDA. The SDA and the DDA also cover discrimination in the areas of education, the administration of clubs and the administration of Commonwealth laws and programmes. In light of the breadth of section 9, the utility of including more specific prohibitions lies primarily in their normative value. It has been argued that this would also expand the coverage of the RDA, in that contract workers and partnerships do not appear to be covered by the Act.<sup>10</sup> However, one could argue that the breadth of section 9 would catch such circumstances, if CERD does in fact provide the Commonwealth with the legislative power to cover them in the first instance. This argument is strengthened by the interpretation of the UN General Assembly, as reflected in clause 38 of the *Draft Model Law on Racial Discrimination (Draft Model Law)*,<sup>11</sup> which provides that the proscriptions in the area of employment also apply to individuals who provide their labour under contract to another person or business.

Section 9 is the only provision in the RDA which reproduces the definition of discrimination contained in Article 1(1) of CERD. The other sections of Part II do not include 'descent' as a ground of discrimination, an omission seemingly derived from that in Article 5 of CERD. As with other anti-discrimination legislation, the RDA does not require an intention to discriminate, simply that the *effect* of the discriminator's actions is discriminatory.<sup>12</sup>

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10. Bailey, as above *fn* 2, p 191.

11. See Chapter 2. The *Draft Model Law* forms Appendix C of this publication.

12. This point has been discussed in *Australian Iron & Steel Proprietary Limited v Banovic and Others* (Banovic) (1989) 168 CLR 165: "the intention or motive of the intention to discriminate... is not a necessary condition to liability" (per Deane and Gaudron JJ at 176, approving *R v Birmingham City Council; ex parte Equal Opportunities Commission* [1989] AC 1155, at 1193-1194); see also Mason CJ and Gaudron J at 359 in *Waters v Public Transport Coloration* (Waters') 173 CLR 349.

## Interaction of section 9 and the subsequent prohibitions

In light of the breadth of section 9, the question arises as to the need for specific areas of operation. On the one hand, there is considerable normative value in having a specific section which, while not detracting from the general proscription, renders discrimination unlawful in a particular area of operation. In fact, the RDA takes a similar form to the *Draft Model Law*, which contains specific proscriptions in the areas of employment, education, housing, and the provision of goods, facilities and services, in addition to the general proscription.

While the omission of 'descent' from sections 11-15 will not have serious ramifications, in that the general proscription in section 9 covers discrimination based on descent, there may be some circumstances in which this inconsistency results in injustice.

For instance, sections 11, 12, 13, and 15 proscribe discrimination on the grounds of the race, colour or national or ethnic origin of a person or of a relative or associate of that person, whereas section 9 does not apply to discrimination based on the race of a relative or associate. This means that a complaint cannot be brought under the more expansive definition of discrimination in section 9 if a relative or associate is unable to frame their complaint under one of the subsequent provisions of Part II. This exclusion seems somewhat arbitrary.

There may also be perceived advantages in lodging a complaint under sections 11-15 in a given case as "less favourable treatment", rather than relying on section 9, which utilises a 'rights analysis'. For instance, in the context of section 15, the typical course appears to have been for a complainant's case to be initially considered under section 15 rather than section 9. Section 9(1) follows as a general fall-back provision if the elements of section 15 cannot be established.<sup>13</sup>

## Exceptions

Section 8(1) provides that the proscription of racial discrimination in Part II of the RDA does not apply to special measures "taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring

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13. R Hunter, *Indirect Discrimination in the Workplace*, The Federation Press, Sydney, 1992; see p 68, and cases listed at note 176.

such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms .<sup>14</sup> Section 8(2) also exempts charitable benefits conferred on persons of a particular race, colour or national or ethnic origin from the operation of Part II.

### DEFINITION OF DISCRIMINATION

Sections 9 and 10 do not define discrimination. Rather, section 9 renders unlawful a "distinction, exclusion, restriction or preference" which nullifies or impairs the recognition of the human rights or fundamental freedoms enumerated in Article 5 of CERD.<sup>15</sup> Section 10 confers compensatory 'rights' as defined in Article 5 where they are interfered with by a state or territory law.

In contrast to other federal anti-discrimination legislation, the RDA does not define direct discrimination,<sup>16</sup> although section 9 was amended in 1990 to contain a definition of indirect discrimination in sub-section (1A). Section 9(1A) has no effect as a prohibition but provides a definition of indirect discrimination to be read into sub-section (1) and succeeding sections of Part II of the Act.

The formula "a distinction based on, or an act done by reason of" is used to define indirect discrimination as unlawful under both section 9(1), which covers "distinctions based on" race etc., and under sections 11-15, which cover acts done "by reason of" the race etc. of a person.<sup>17</sup> Through the device of using the same key terms, the definition in sub-section 9(1A) is imported into these sections. A detailed discussion and critique of the indirect discrimination provision is contained in Phillip Tahmindjis' paper in Chapter 7.

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14. Article 1(4) of CERD.

15. Section 9(2) of the RDA provides that "a reference in this section to a human right or fundamental freedom in the political, economic, social, cultural or any other field of human life includes any right of the kind referred to in Article 5 of the Convention (CERD)". Section 10(2) similarly provides that a right includes a right of any kind referred to in Article 5.

16. There are piecemeal definitions of specific forms of racial discrimination in sections 11-17.

17. See Hunter, as above *fn* 13, pp 68-69.

Prior to the amendment in 1990, there was a persuasive body of opinion that the language of section 9(1) and the specific prohibitions were wide enough to cover indirect racial discrimination.<sup>18</sup> An American case, *Griggs v Duke Power Co*,<sup>19</sup> recognised that legislation containing general prohibitions of discrimination cover both direct and indirect discrimination, which were described respectively as 'disparate treatment' and 'disparate impact'. Section 9(1A) was inserted to remove doubt that section 9(1) and the succeeding provisions might not cover indirect discrimination, rather than because its terms were not general enough to do so.<sup>20</sup> Thus, it may arguably be categorised as a declaratory provision, adding no new law but clarifying the ambit of section 9(1).<sup>21</sup> However, this question has never been determined by the High Court.<sup>22</sup>

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18. See for example Bailey, as above *fn* 2, p 189; Rowe, G "*Maynard v Neilson: Goods and Services Discrimination Against Aboriginal People*" (1988) 35 *Aboriginal Law Bulletin* 12, p 13.
  19. (1971) 401 US 424.
  20. House of Representatives, *Hansard*, 17-20 (1990) at 2339-40, (Commonwealth Attorney-General, Second Reading Speech on *Law and Justice Amendment Bill* 1990).
  21. *cf Tocigl v Aitco Pty Ltd trading as the "Adelaide Casino"*, H94149, decision of the President of HREOC, Sir Ronald Wilson. The decision was delivered on 18 December 1995, as this publication was being finalised.
  22. The High Court has considered the proposition that a provision in anti-discrimination legislation containing a general prohibition and a definition of indirect discrimination in different sub-sections may nevertheless allow the interpretation that both sub-sections can define indirect discrimination. In *Banovic*, as above *fn* 12, most of the bench rejected this argument, although the relevant Act in that case was the *Anti-Discrimination Act* 1977 (NSW), s 24 of which contained sub-sections (1), defining direct discrimination, and (3), defining indirect discrimination: at 170-171 per Brennan J; at 175 per Deane and Gaudron JJ, who stated that "the presence of s 24(3) in the act takes much of the force from the argument that s 24(1) should be given a broad application"; at 184 per Dawson J; and at 196 per McHugh J. In *Waters*, as above *fn* 12, McHugh J at 400 affirmed the reasoning of Dawson and Brennan JJ in *Banovic*. *Waters* involved the *Equal Opportunity Act* 1984 (Vic), with ss7(1) and 17(5) containing separate definitions of direct and indirect discrimination. The RDA, on the other hand, contains no definition of direct discrimination *per se*, and has only defined indirect discrimination since the 1990 amendment.

## Indirect Discrimination Outside the Section 9(1A)

### Definition

In *Waters*, while considering Victorian legislation which was drafted in different terms to the RDA,<sup>23</sup> Chief Justice Mason and Justice Gaudron stated that indirect discrimination falling outside the ambit of the sub-section expressly dealing with indirect discrimination might nevertheless fall within the general provision. Their judgment involves reasoning which suggests that section 9(1) should be interpreted broadly despite the provision which defines indirect discrimination, and thus catches residual indirect discrimination which falls outside the definition in section 9(1A).<sup>24</sup>

Referring to the Victorian statute, they stated that "indirect discrimination ... may occur otherwise than by the imposition of a 'requirement or condition'".

Sections 9 and 9(1A) are expressed in terms of rights. The terms of sections 11-15 only require *less favourable treatment*. If section 9(1A) is an exhaustive statement of what constitutes indirect discrimination, then the specific prohibitions in the RDA require an analysis of impaired or nullified rights when they apply in an indirect context. The possibility of framing an indirect discrimination argument by importing the principles from *Griggs* (as members of the High Court have done when construing similar legislation), rather than in terms of human rights under CERD, may have been removed with the 1990 amendment. Pending judicial interpretation, the relationship between the sections is uncertain.

A commentator in the employment field has argued that it is unlikely that the question of the residual operation to indirect discrimination of section 9(1) beyond 9(1A) will be of practical importance, because the terms of section 9(1A) are more flexible than other Australian legislative provisions defining indirect discrimination.<sup>25</sup>

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23. *Waters*, as above *fn* 12.

24. (1991) 173 CLR 349 at 358. McHugh J at 410 recorded his disagreement with this analysis.

25. Hunter, as above *fn* 13, p 69.

## Indirect Discrimination and Special Measures

Theoretically, under the terms of Part II of the RDA, a measure which is indirectly discriminatory may be saved as a 'special measure' despite being unreasonable. The test of whether discriminatory impact is unlawful depends on reasonableness,<sup>26</sup> while the special measures exception depends on the satisfaction of both a sole purpose and a necessity test.<sup>27</sup> This dual test is different in its terms. In practice, however, the scope for the residual operation of the special measures provision may be limited. If a condition was found not to be reasonable in all the circumstances, then it would be less likely to constitute a special measure.

## THE NON - DISCRIMINATION PRINCIPLE

Section 9 proscribes a "distinction, exclusion, restriction or preference" which has the purpose or effect of nullifying any of the human rights and fundamental freedoms included in Article 5 of CERD. In light of the fact that Sarah Pritchard conducts a comprehensive and exacting analysis of the notion of non-discrimination in her paper on special measures, this work will not be duplicated.<sup>2</sup> Nonetheless, any examination of Part II of the RDA necessitates some discussion of the definition of discrimination contained therein. Fundamental to this discussion is the dichotomy between formal and substantive equality. Formal equality prescribes equal treatment. On the other hand, the notion of substantive equality attempts to take corisance of factors outside purely formalistic criteria, to ensure equality of result.<sup>2-)</sup> The CERD Committee appears to regard equality of result as the principal object of the Convention,<sup>3</sup> and this is reflected in several provisions of the Convention such as Articles 1(4) and 2(1)(c).<sup>31</sup>

This interpretation is also reflected in the extensive international jurisprudence on the topic. First and foremost, it has been recognised that equality does not mean

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26. See Chapter 7.

27. See Chapter 9.

28. We are indebted to Sarah Pritchard for her paper, *Special Measures*, in Chapter 9 of this publication.

29. See M Thornton, *The Liberal Promise*, Oxford University Press, 1990, p 15ff.

30. 33 UNGAOR Supp. (No 18) at 108, 110; UN Doc, A133118 (1978).

31. See further: T Meron, "The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination", (1985) 79 *American Journal of International Law* 283, p 287 ff.

equal treatment.<sup>32</sup> Recognition of the distinct cultural identity of minority groups is consistent with the notion of equality.<sup>33</sup> Further, the mere use of race as a classifying criterion does not render a distinction discriminatory, but rather it lies in the invidious purpose or effects of that distinction.<sup>34</sup> Not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Article 26 of the *International Covenant on Civil and Political Rights*.<sup>35</sup> Finally, special measures or affirmative action programmes are sometimes required in order that historically subordinated groups achieve equality in the enjoyment of core human rights, and to diminish or eliminate conditions which cause or help to perpetuate discrimination.

Despite this international jurisprudence, Australian courts and tribunals have failed to display either a sophisticated or accurate understanding of the idea that the principles of equality and non-discrimination do not require equal treatment.

In *Gerhardy v Brown*,<sup>36</sup> the High Court considered the validity of the *Pitjantjatjara Land Rights Act 1981 (SA) (Land Rights Act)*, which attempted to grant control over certain lands to the Pitjantjatjara people. Section 18 of the *Land Rights Act* provided that "all Pitjantjatjaras have unrestricted rights of access to the lands." Section 19 of the *Land Rights Act* provided that persons who were not Pitjantjatjaras, and who entered the lands without the permission of the Anangu Pitjantjatjara,<sup>37</sup> were guilty of an offence and liable to a penalty. On 27 February 1982, Robert Brown entered land which was the subject of the *Land Rights Act*. Brown was Aboriginal but not a Pitjantjatjara, and was present on the lands without having applied for permission to enter. On the complaint of David Gerhardy, he was charged with a breach of section 19.

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32. See Judge Tanaka's dictum in the *South West Africa Case (Second Phase)*, (1966) ICJ Rep 6 at 305-6.

33. *Minority Schools in Albania* (1935) PCIJ, Ser A/B, No 64 at 17.

34. Committee on the Elimination of Racial Discrimination. General Recommendation XIV on Article 1(1) of the CERD, forty-second session, 1993.

35. HRI/GEN/1/Rev 1. General comments adopted by the Human Rights Committee, p 26.

36. (1985) 159 CLR 70.

37. The *Land Rights Act* constituted as a body corporate the Anangu Pitjantjatjaraku, of which all Pitjantjatjara were members.

The action against Brown was heard by a special magistrate who stated a case, raising a number of questions of law for the Supreme Court of South Australia. One of those questions was whether section 19 of the *Land Rights Act* was invalid or restricted in its operation by reason of the RDA. Justice Millhouse of the South Australian Supreme Court held that section 19 of the *Land Rights Act* was invalid, as it conflicted with section 9 of the RDA. Gerhardy, the complainant, appealed to the Full Court of the Supreme Court of South Australia.

On the application of the Attorney-General for South Australia and the complainant, the matter was removed to the High Court. The Full Bench of the High Court unanimously reversed the decision of Justice Millhouse on the basis that the *Land Rights Act* was a special measure within the meaning of section 8(1) of the RDA, and accordingly section 19 of the *Land Rights Act* was a valid law of the Parliament of South Australia.

Five members of the Court considered the question of discrimination. Chief Justice Gibbs and Justices Mason and Murphy held that section 19 of the *Land Rights Act* would have been rendered inoperative by section 10 of the RDA, had the State Act not been a special measure, because the right of unrestricted access to the lands was a right within the scope of section 10. Justice Brennan held that if the *Land Rights Act* had not been a special measure, section 19 would have been both inconsistent with section 9 of the RDA, and subject to section 10. Justice Deane held that the inconsistency would have been with section 9 of the RDA, and did not pursue the applicability of section 10.

Under the reasoning adopted by Justices Wilson and Brennan in *Gerhardy*, sections 9 and 10 of Part II apply to all forms of distinctions based on race and not merely to invidious, unjustified or arbitrary discrimination. It was argued in *Gerhardy* that 'discrimination' for the purposes of the RDA does not include benign distinctions. According to this argument, a legitimate rights-based justification for a distinction, exclusion, restriction or preference would remove the activity from the ambit of sections 9 or 10. The argument was rejected by Justices Brennan and Wilson on the basis that section 9 refers to *any* distinction, and that if it had been intended to limit discrimination under the RDA to invidious discrimination then it would not have been necessary to provide for special measures as an exception under the legislation.<sup>38</sup>

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38. Per Wilson J at 113-114 and Brennan J at 131.

Brennan J recognised that formal equality before the law is an "engine of oppression destructive of human dignity if the law entrenches inequalities",<sup>39</sup> but nonetheless concluded that the South Australian Act discriminated on the basis of race, and was 'saved' only by recourse to the special measures exception in section 8(1) of the Act. By relegating land rights to the status of special measures, an impermanent exception to the non-discrimination principle, the Court failed to lay judicial foundation for a full understanding of genuine equality for Australia's indigenous people. The reasoning in *Gerhardy*, particularly the conceptualisation of discrimination, has been the subject of widespread criticism.<sup>40</sup>

Further problems in the understanding of the principle of non-discrimination are illustrated in the decision of the Human Rights and Equal Opportunity Commission (HREOC) in *Aboriginal Students' Support and Parent Awareness Committee, Traeger Park Primary School, Alice Springs v Minister for Education, Northern Territory*.<sup>41</sup> The Traeger Park School was unique in the region of Alice Springs, with Aboriginal students constituting 98% of the student body. The school's focus was on providing mainstream educational programmes within an environment that recognised the Aboriginal students' languages, history and cultural identity. Despite the recognition of the school as a leader in the field of Aboriginal education, the Northern Territory Minister for Education announced its closure in 1991 as part of the government's official cost-cutting measure. Unofficially, he expressed the view that Traeger Park, as an Aboriginal "enclave" school, was "against the long term interests of Aboriginal children". Local parents sought to challenge the closure of the school, claiming that the Minister's decision breached section 9(1) of the RDA.

The Commission found the decision to close the school to be based on race. However, by finding that the existence of alternative schooling ensured that the students' rights to equality of education would not be impaired by the closure of Traeger Park, it failed to comprehend the special needs of Aboriginal students to a culturally appropriate education within the concept of equality.

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39. (1985) 159 CLR 70 at 129.

40. See W Sadurski, "*Gerhardy v Brown*: Reflections on the Landmark Case that Wasn't", (1986) 11 *Sydney Law Review* 5, 30; I Brownlie, "Rights of Peoples in International Law" in J Crawford (ed), *The Rights of Peoples*, 1988; G Nettheim, "Indigenous Rights, Human Rights and Australia", (1987) 61 *Australian Law Journal* 299.

41. (1992) EOC 78, 955.

These two cases reveal different weaknesses in the RDA with respect to the special measures exception and its interpretation. The special measures provision may be appropriately invoked in the context of affirmative action programmes. However, concerns have been expressed about relying on the special measures exception to validate land rights legislation.<sup>42</sup> The RDA requires that the special measures have the "sole purpose" of securing the adequate advancement of particular groups, and contains the proviso that the measures be of limited duration. This does not sit well with the "air of permanence" of land rights legislation such as that in *Gerbardy*.

Further problems arise from the requirement that such measures be "necessary" in order to ensure the equal enjoyment or exercise of human rights and fundamental freedoms to such groups or individuals. As long as there was an assumption that indigenous land rights were not protected under Australian common law as in *Gerbardy*, legislation to acknowledge such land rights was accepted as being necessary.<sup>43</sup>

It may no longer be so easy to assert that land rights legislation is necessary after *Mabo (No 2)*, where the High Court declared that the Australian common law recognises native title.

As discussed earlier, the understanding of non-discrimination in international law suggests that a law can make a distinction based on race but not be racially discriminatory so as to offend the RDA or CERD.<sup>44</sup> On one analysis, Article 1(1) of CERD, the basis of sections 9 and 10, uses a definition of discrimination under which only a distinction based on race which "has the purpose or effect of nullifying or impairing ... the recognition, on an equal footing, of any human right or fundamental freedom" is discriminatory. A racial distinction is therefore outside the ambit of 'discrimination' within the terms of Article 1(1) if this invidious effect or purpose is lacking.

The special measures provision, on this analysis, is included merely to *confirm* that measures which make amends for past invidious discrimination are not the intended targets of the RDA. Section 8(1) is thus not a defence which must be relied upon when any racial distinction is made, but merely a corollary to the

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42. See Garth Nettheim's paper in Chapter 9 of this publication.

43. *Gerhardy v Brown* (1985) 159 CLR 70 at 133.

44. Sadurski, as above *fn* 40; McKean, *Equality and Discrimination under International Law*, 1993, p 288; Brownlie, as above *fn* 40, p 10; Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31, AGPS, 1986, paras 147-148, 150.

proposition that it is invidious discrimination which is unlawful. Such an interpretation would be facilitated by the special measures provision being moved from the section headed 'Exceptions' into section 9.

In light of the availability of individual complaints to the CERD Committee under Article 14 of CERD<sup>45</sup> since 1993, and the fact that the validity of the RDA depends on the external affairs power, the understanding of non-discrimination in international law should be incorporated into the Act. Recently, there has been some indication that the High Court may be inclined to depart from its formalistic interpretation of non-discrimination in *Gerhardy*.<sup>46</sup> If this interpretation were abandoned, measures aimed at the improvement of the situation of disadvantaged groups that still suffer the effects of discrimination would not constitute discrimination under the RDA. Nonetheless, it would be wise to redraft section 9 in order to clarify the appropriateness of differential treatment as a mandatory part of the non-discrimination principle.

If this analysis is not adopted, the legislation inevitably appears to embrace an assimilationist model which is inappropriate to current thinking on indigenous and minority rights.<sup>47</sup> Formal equality will not be appropriate if it results in the imposition of dominant group standards on indigenous peoples and ethnic minorities. For example, rights to land involving a racial distinction are of a permanent nature. They involve separate rights, not an interim measure. They do not easily fit within the notion of a special measure, which theoretically must be temporary, but they arguably involve a racial distinction which is not intended to contravene the RDA.

## **WHICH RIGHTS MUST BE INFRINGED FOR THE RDA TO APPLY?**

Sections 9 and 10 require the infringement of a right or freedom in Article 5 of CERD. Article 5 contains an extensive catalogue of civil, political, economic, social

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45. See Chapter 2.

46. *Western Australia v Commonwealth* (1995) 128 ALR 1 at 62.

47. See, for example, G Nettheim, "Indigenous Rights, Human Rights and Australia" (1987) 61 *Australian Law Journal* 291 at 299.

and cultural rights. While not all of the rights contained in the *Universal Declaration of Human Rights* are contained in this catalogue, some rights in Article 5 are additional to those rights.

The breadth of Article 5 has been praised, but also raises a number of problems of interpretation.<sup>48</sup> In particular, problems in interpretation arise from the prohibition of racial discrimination contained in Article 1, which is different in a number of respects to the statement that appears in Article 5. For instance, Article 1 covers political, economic, social and cultural rights, in addition to which Article 5 lists a series of 'civil' rights such as freedom of movement, expression, religion and association and the right to equal treatment before the organs administering justice.

There has been some question among commentators whether Article 5 places a positive obligation on States Parties to recognise the rights that are listed or merely imposes an obligation on States that recognise those rights to ensure their enjoyment "before the law" in a non-discriminatory fashion.<sup>49</sup> Partsch, a former CERD Committee member, has cited the reservations made by States upon accession and the indications in the *travaux préparatoires* of CERD, as evidence of the understanding that Article 5 confers substantive rights. However, at its 46th session in March 1995, members of the Committee discussed the drafting of a General Recommendation on Article 5. The reported debate suggests that the Committee is of the opinion that Article 5 does not create rights other than that of non-discrimination.<sup>50</sup>

A further issue of debate is whether the rights listed in Article 5 are exhaustive or indicative. The CERD Committee appears to have interpreted the open-ended language of the text as being consistent with the view that the catalogue in

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48. T Meron, "The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination", (1985) 79 *American Journal of International Law* 283.

49. M O'Flaherty, "The International Convention on the Elimination of All Forms of Racial Discrimination: The Substantive Provisions", paper presented at the *UN Human Rights Procedures and Indigenous Australians* Conference, Sydney, 28-30 June 1995, pp 13-15; K Partsch, "Elimination of Racial Discrimination in the Enjoyment of Racial Discrimination in the Enjoyment of Civil and Political Rights", (1979) 14 *Texas International Law Journal* 228.

50. UN Doc.CERD/C/SR. 1080.

Article 5 is no more than indicative.<sup>51</sup> The question then arises as to how the non-enumerated rights may be identified. Are such rights confined to those in customary international law and international instruments, or do they extend to any rights which are recognized by a State Party? In the case of rights contained in international instruments, are they restricted to the rights in legally binding instruments or do they extend to matters covered by non-binding instruments such as Declarations of the UN General Assembly?<sup>52</sup> The CERD Committee has interpreted the general obligation "to eliminate racial discrimination in all its forms" as suggesting that Article 5 applies to all rights recognised by the State regardless of whether they are listed in Article 5 itself.

In *Gerhardy v Brown*, Justice Mason expressed the view that group rights came within the ambit of Article 5. He considered the expression 'human right' to include claims of individuals as members of a racial or ethnic group to "the protection and preservation of the cultural and spiritual heritage of that group".<sup>53</sup> His Honour also considered that:

Although section 10(2) *includes* rights of a kind referred to in article 5, *it is not confined to the rights actually mentioned in that article*. What then are the other rights, if any, to which section 10(1) relates? The answer is the human rights and fundamental freedoms with which the Convention is concerned, the rights enumerated in article 5 being particular instances of those rights and freedoms, without necessarily constituting a comprehensive statement of them (emphasis added).<sup>54</sup>

On this analysis, it may be argued that the expression "human right or fundamental freedom" also includes rights and freedoms such as those set out in the *International Covenant on Civil and Political Rights*, which is annexed to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), and which includes group rights such as the right of minorities to enjoy their own culture contained in Article 27. This reasoning would apply equally to the inclusive definition of "rights and freedoms" in section 9(2).

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51. O'Flaherty, as above in 49, p 14; K Partsch, "The Racial Discrimination Committee" in P Alston (Ed), *The United Nations and Human Rights*, Oxford University Press, 1992, p 360.

52. O'Flaherty, as above *fn* 49, p 14.

53. (1985) 159 CLR 70 at 101-102.

54. As above *fn* 53 at 101.

Another matter which should be noted is that a balancing exercise may be necessary in the event of competing rights and interests. If one of the rights enumerated in Article 5 is infringed so that other enumerated rights cannot be enjoyed, has unlawful discrimination occurred? This question has provoked controversy among commentators. Further the tension between collective and individual rights arose for consideration in the *Alcohol Report*.<sup>55</sup> Sections 9 and 10 require that a right be nullified, impaired or enjoyed to a lesser extent. If a measure favours group rights implied in CERD over the individual rights that are explicitly enumerated, the question arises as to whether unlawful discrimination has occurred under the RDA. If the rights contained in section 9 and 10 include group rights, then a balancing exercise is required.

## STATUTORY DISCRETIONS

Where a discretion is exercised under a law in a discriminatory manner, the question arises as to whether section 9 or 10 of the RDA applies.<sup>56</sup> Section 9 provides that "it is unlawful for a person to do any act" that is racially discriminatory. In *Gerhardy*, those Justices who considered section 9, decided that an exercise of a statutory discretion was an "act".<sup>57</sup> The use of the expression "by reason of, or of a provision of a law" in section 10 introduces some doubt as to the ambit of the section. Although a discretion may be exercised under a law, it is probably not exercised "by reason of, or of a provision of a law". Thus, it appears to be the case that section 9 is the applicable section where an otherwise inoffensive discretion is exercised in a racially discriminatory manner.

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55. See Chapter 4 of the Race Discrimination Commissioner's *Alcohol Report*, AGPS, 1995; see also Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, as above *J n* 44, pp 95-96.
56. *Gerhardy* was argued in the Supreme Court of South Australia, on the basis that section 9 of the RDA applied to the *Land Rights Act*. In argument before the High Court, section 9 was again the basis of the main submission, with section 10 being relied upon in the alternative. Only Brennan and Deane JJ ultimately found that section 9 could apply to the state law, with Brennan J finding that both sections 9 and 10 applied. Deane J did not then proceed to consider the application of section 10.
57. Brennan J at 120-121 held that the discretionary grant of land authorised by s 15 of the *Land Rights Act* was the requisite 'act', and so s 19 of the *Land Rights Act* would be invalid because it conflicted with s 9 via s 15. Gibbs CJ at 81 and Mason J at 93 held that there was no discretionary act and so s 9 did not apply. Deane J at 146 stated that particular discretionary 'acts were not required for the application of s 9, as enforcement of the discriminatory provision entailed such 'acts' as action by courts and law enforcement agencies.

## **State Legislation Authorising The Exercise of a Discretion**

If a state law makes lawful the doing of an act which is proscribed by Part IIA of the RDA, and there is no special measures justification, there will be a direct inconsistency for the purposes of section 109 of the Commonwealth Constitution. The relevant state legislation will be invalid to the extent that it confers authority to exercise a discretion in a way that is unlawful under the RDA.<sup>58</sup> To the extent that the state law authorises discretionary acts which do not breach the RDA, the section conferring a discretion would not be invalid. Thus, if the exercise of a discretion resulted in or gave effect to a special measure, or was indirectly discriminatory but reasonable, it would not breach the RDA and the question of inconsistency would not arise.

An action may be brought by a plaintiff seeking a declaration that the exercise of a discretion in a manner which directly discriminates against, or impacts disproportionately on people of a particular race, involves a direct inconsistency between the RDA and the relevant state legislation. A court may remit the matter to the relevant statutory body with an order that a decision is made which is consistent with the RDA.

## **DEFINITION OF "RACIAL" DISCRIMINATION**

Section 9 of the RDA proscribes discrimination on the basis of race, colour, descent or national or ethnic origin. The Act does not define 'race' or any other ground of discrimination, the common law definition being broad and flexible. Courts and tribunals in Australia, England and New Zealand have taken the view that 'race' as defined in anti-discrimination legislation is used in the popular sense rather than as a term of art. The test is not biological, but rather relates to whether the relevant individuals or group regard themselves and are regarded by others in the community as having a particular identity in terms of their colour or their racial, national or ethnic origins. Thus, it is interpreted as a socio-cultural construct. The CERD Committee has, in its most recent session, adopted a very broad definition in dealing with distinctions against Roma gypsies, indigenous peoples, linguistic and national minorities, immigrants and religious groups which are culturally distinct.<sup>59</sup>

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58. *Clyde Engineering Co. Ltd v Cowbarn* (1926) 37 CLR 466 at 490, approved in *Gerhardy* at 93 per Mason J, and 121 per Brennan J.

59. O'Flaherty, as above *fn* 49, p 3; UN Doc. CERD/C/SR 1070 to 1098.

## 'National Origin'

Throughout Part II of the RDA, one of the prohibited grounds of discrimination is 'national origin'. Article 1(2) of CERD states that the Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party between citizens and non-citizens. Thus it would seem that non-citizens are excluded from protection where the State Party makes distinctions on the basis of citizenship, other than where they are subjected to legislation which discriminates against particular nationalities. This exclusion does not extend to discriminatory practices against non-nationals where they are based on categories other than citizenship. Further, immigration and citizenship laws are not capable of being challenged under CERD nor the RDA. However, it should be noted that Articles 1(2) and (3) refer to States Parties, and not to private individuals. If the term 'national origin' were interpreted to encompass discrimination on the basis of citizenship, respondents other than the Federal Government could not engage in any citizenship-based distinctions.

It is a matter of some conjecture whether the RDA applies to discrimination on the basis of citizenship. Although there is some overlap, courts in England have held that the term "national origins" in the *Race Relations Act* 1968 (UK) is not necessarily co-extensive with present nationality. In *Ealing London Borough Council v Race Relations Board*,<sup>60</sup> the House of Lords distinguished between the term 'national' in the sense of citizenship and in the sense of a race, with 'national origins' referring to the latter. For instance, while English people and Scottish people are of British nationality as regards citizenship, they are of different nationality as to race. The *Race Relations Act* was subsequently amended to include "nationality" as a ground of discrimination. State anti-discrimination legislation in New South Wales, Victoria, Queensland, South Australia, Western Australia and the Australian Capital Territory specifically include nationality in the definition of "race". Further, the *Draft Model Law* refers to "nationality" rather than to "national origin".

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60. [1972] AC 34.

There has been one<sup>61</sup> case that considered the meaning of 'national origin' under the RDA. In *Henderson v NBL Management Limited & Anor*,<sup>62</sup> the complainant challenged the rule of the National Basketball League (NBL) which required that naturalised citizens must wait three years before being eligible for selection to an NBL team. The NBL and the other respondent argued that this was simply a reflection of an international rule that a player could not play for his (sic) country unless naturalised for at least three years, and that it made sense because national teams are drawn from NBL teams.

The Commission found it unnecessary to decide precisely what was meant by 'national origin', and thus to confirm or depart from the *Ealing* decision. Commissioner Worthington dismissed the complaint, holding that the rule was not based on national origin either in the sense of race or citizenship, but rather was based on the fact that a basketball player had changed nationality. He noted that an Australian-born player who had US citizenship and was playing in the US NBL would, if he returned to Australia, similarly face a three year wait. Accordingly, it could not be the case that the rule distinguishes on the basis of national origin. There appears to be a flaw in this line of argument. Regardless of whether a player was originally an Australian citizen, the basis of discrimination was the fact that he had acquired US citizenship, and thus on the basis of his previous nationality. The reasoning treats each person as having only one national origin, whereas a person of Australian birth who acquired US citizenship, could be said to have two separate national origins, one of which formed the basis of discrimination. Further, an argument would have been available with regards to indirect discrimination on the basis of national origin, even if the narrow interpretation of 'national origin' favoured in *Ealing* was applied.<sup>63</sup> A person born overseas is more likely to change her or his nationality to acquire Australian citizenship than an Australian born person.

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61. As this publication was being finalised, the Human Rights and Equal Opportunity Commission handed down its determination in *Tocigl v Aitco Pty Ltd trading as the 'Adelaide Casino'*, as above *fn* 21. The matter involved discrimination on the basis of "national origin".

62. (1992) EOC 92-435.

63. While the complaint was lodged before the enactment of section 9(1A), there was a persuasive body of opinion that Part II of the RDA covered indirect discrimination: see above, pp 61-62.

In *Ellenbogen v HREOC and Ors*,<sup>64</sup> the complainant asked the Federal Court to find that HREOC had erred in law by rejecting his complaint that he had been denied certain rights at a meeting of the Blue Mountains Local Council (allegedly because of his non-citizenship). By the time that the Court heard the case, HREOC had accepted the complaint, but the judge remarked that this course seemed proper. However, it would appear that Articles 1(2) and (3) only refer to distinctions by States Parties, not by private individuals. If this is the case, and if the term 'national origin' encompasses current nationality before recourse to the 'exemptions' effected by Articles 1(2) and (3) of CERD, it would appear that the RDA covers discrimination by private individuals based on citizenship.

Further, it is not clear that the limitation clauses in Article 1(2) and (3) have the effect of depriving non-citizens of the benefit of Articles 5 and 6 in that these articles guarantee the rights to 'everyone'. Meron argues that 'everyone' is subject to the express limitations in Article 1. However, the CERD Committee's recent reports and recommendations suggest that non-citizens are fully covered by Article 5. In General Recommendation No 11,<sup>65</sup> the Committee stated that CERD should not be construed as limiting human rights obligations to non-citizens which have been undertaken pursuant to other international instruments. In General Recommendation 13, the Committee restated the obligation in Article 5 as being to ensure rights 'to everyone', without reference to any limits imposed by Article 1. O'Flaherty has also written of the Committee's draft General Recommendation at its 46th session in 1995, where it proposed that the protection of Article 5 extends to non-citizens when categories of rights which could be deemed 'universal' are at issue.<sup>66</sup> Thus, if the CERD Committee's recent interpretation is followed, then the rights in Article 5 apply to all citizens.

## **'Ethnic Origin'**

The term 'ethnic origin' has been interpreted broadly by courts in a number of jurisdictions. In *King-Ansell v Police*,<sup>67</sup> the New Zealand Court of Appeal held that Jews in New Zealand formed a group with common ethnic origins within the meaning of the *Race Relations Act 1971*. Richardson J held that:

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64. (1994) EOC 92-564.

65. UN Doc. HRI/GEN/Rev.1 at p66

66. O'Flaherty, as above *fn* 49, p 6.

67. [1979] 2 NZLR 531

a group is identifiable in terms of its ethnic origins if it is a segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past, even if not drawn from what in biological terms is a common racial stock. It is that combination which gives them an historically determined social identity in their own eyes and in the eyes of those outside the group. They have a distinct social identity based not simply on group cohesion and solidarity but also on their belief as to their historical antecedents.<sup>68</sup>

In *Mandla v Dowell Lee*,<sup>69</sup> the House of Lords held that Sikh people had a common ethnic origin. According to Lord Fraser, for a group to constitute an "ethnic group" for the purpose of the legislation in question, it had to regard itself and be regarded by others as a distinct community by virtue of certain characteristics, two of which were essential: "a long shared history of which the group was conscious as distinguishing it from other groups and the memory of which it kept alive"; a "cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance".<sup>70</sup>

Prior to the amendment of the *Anti-Discrimination Act 1977* (NSW) to include ethno-religious origin as a ground of complaint, the NSW Equal Opportunity Tribunal in *Phillips v Aboriginal Legal Service*<sup>71</sup> followed the New Zealand and English decisions and held that a Jewish person was a member of a 'race' for the purposes of the Act. In *Commission for Racial Equality v Dutton*,<sup>72</sup> the English Court of Appeal relied on *Mandla* to hold that gypsies were a racial group within the definition of the *Race Relations Act 1976* (UK) with common geographical origin, distinct customs and a common dialect. By way of contrast, Rastafarians have not been recognised as a racial group. In *Crouss Suppliers (PSA) v Dawkins*<sup>73</sup> the Employment Appeal Tribunal found that Rastafarians were a religious cult, and failed to meet the two essential characteristics for ethnic groups stipulated in *Mandla*.

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68. [1979] 2 NZLR 531

69. [1983] 1 All ER 1062

70. [1983] 1 All ER 1069. The following factors were considered to be relevant: either a common geographical origin, or descent from a small number of common ancestors; a common literature peculiar to the group; a common religion different from that of neighbouring groups or from the general community surrounding it; being a minority or being an oppressed group within a larger community, for example a conquered people.

71. [1993] EOC 92-502

72. [1989] IRLR 8

73. [1991] IRLR 327.

It is a matter of conjecture as to whether Muslims comprise a group with common ethnic origins within the RDA. It does not appear that *Mandla* and *KingAnsell* have been applied to hold that Muslims comprise an 'ethnic' group. The English Employment Appeal Tribunal in *Nyazi v Rymans Ltd*<sup>74</sup> held that, following the principles enunciated by the House of Lords in *Mandla v Dowell Lee*, Muslims are a group defined mainly by religion and thus do not fall within the *Race Relations Act* 1976. Although Muslims profess a common religion, a common cultural, historical and other background, and have a common literature in the Holy Quoran, other characteristics of an ethnic group are lacking and there are Muslims in many countries and of many colours and languages. The common denominator was said to be religion and a religious culture.

This being said, reliance could be made by a court on the Attorney General's second reading speech<sup>75</sup> and explanatory memorandum during the recent passage of the *Racial Hatred Act* 1995,<sup>7</sup> pursuant to section 15AB of the *Acts Interpretation Act*, such that the broad definition of 'ethnic' could include Jews, Sikhs and Muslims. It would be likely that HREOC would adopt a broad interpretation at first instance, and accept a complaint, but it is ultimately a matter for the courts. An amendment to the RDA, which clarifies that ethno-religious groups fall within the Act's ambit may be appropriate. Such an amendment would be akin to the amendment of the *AntiDiscrimination Act* 1977 (NSW) which confirmed that 'ethno-religious origin' formed part of the definition of race.<sup>77</sup>

## Religion or Ethno-religion as a Ground?

The exclusion of religion as a ground is particularly noteworthy in the context of the racial hatred provisions of the RDA.<sup>8</sup> It should be noted that even a broad interpretation of the RDA to encompass ethno-religious groups will not result in the Act applying to vilification based purely on religion. The *National Inquiry into Racist Violence* recommended that the RDA be amended to provide that "discrimination against or harassment of a person on account of that person's

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74. [1988] EAT 86.

75. House of Representatives, *Hansard*, 15 November 1994, p 3336.

76. The *Racial Hatred Act* 1995 (Cth) forms a new Part IIA of the RDA.

77. Anti-Discrimination Amendment Act 1994 (NSW).

78. See Chapter 8.

religious belief be prohibited where the religious belief is commonly associated with persons of a particular race or races or a particular ethnic group or groups, and is used as a surrogate for discrimination or harassment on the basis of race or ethnicity".<sup>79</sup>

In Australia, religion is included as a ground of complaint in anti-discrimination legislation in Victoria, Queensland, Western Australia, the ACT and the Northern Territory (although not a ground of vilification). The ICCPR places an international obligation to prohibit discrimination on the basis of religion and incitement to religious hatred.

## CONCLUSION

Part II of the RDA contains the broadest proscription of discrimination in any anti-discrimination statute in Australia. However, its potential remains unrealised. The breadth and generality of the central proscription may in fact have its negative aspects. While legally expansive, the limits of its ambit are not immediately apparent, thus rendering it somewhat inaccessible to those who use the Act.

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79. Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia*, 1991, AGPS.

## Issues for consideration

- Should the specific prohibitions in Part II of the Act:
  - be expanded? Why? Which additional areas of operation should be included?
  - be removed, in light of the generality of section 9? Why?
- Should section 9 be redrafted in order to clarify that:
  - benign distinctions do not constitute discrimination?
  - provisions which take into account cultural difference do not infringe Part II of the Act?
- Should the special measures provision in section 8 be moved to form a subsection of section 9?
- Should the RDA attempt to cover religious discrimination, in light of the fact that religion is often a surrogate for race?
- The *Anti-Discrimination Act 1977* (NSW) covers discrimination on the grounds of 'ethno-religious origin'. Should the RDA be amended in this manner?
- To what extent does the RDA cover discrimination on the basis of nationality or citizenship? Should the Act be amended to facilitate its application to such discrimination?
- Is the prohibition of racial discrimination in the RDA appropriate for Australia's indigenous population, which seeks not only equality, but a right to difference?



# REVISITING RACE

**Margaret Thornton\***

*Colour, the gift of nature  
To mankind,  
Is now the contentious bone,  
And black-white hatred sustains itself  
On the rotting, putrid flesh  
That once was man.*

Oodgeroo of the tribe Noonuccal.<sup>1</sup>

## The Discourse of Racism

The discourse of race has changed significantly over the two decades since the enactment of the *Racial Discrimination Act 1975* (Cth) (RDA). However, we should not allow ourselves to be seduced by a liberal notion of progressivism in which all change is understood as being for the better. Discourse theory, as developed by Foucault, recognises the uneven and dialectical notion of social change in which cognisance must be taken of discontinuities, breaks, thresholds and limits.<sup>2</sup> This notion of discourse is one that transcends language, although the role of discourse, in the narrow sense, in the production and reproduction of racism should not be gainsaid.<sup>3</sup> The bidecadal celebratory moment must therefore be understood as one facet of race politics in Australia, not as an unequivocal statement of success. Despite the caveat, the RDA has been an important site of contest that has facilitated the development of an Aboriginal and multicultural consciousness

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1. In *Voices of Aboriginal Australia: Past, Present, Future* (Compiled by Irene Moores), Butterfly Books, Springwood, 1995, p 149.
2. Michel Foucault, *The Archaeology of Knowledge*, trans. A. M Sheridan Smith, Tavistock, London, 1972, p31 *etpassim*.
3. For a thoroughgoing analysis of the role of speech in producing racism, see Teun A. van Dijk, *Communicating Racism: Ethnic Prejudice in Thought and Talk*, Sage, London, 1987.

within the mainstream.<sup>4</sup> This consciousness is now reflected in government programmes and policies,<sup>5</sup> as well as in social institutions, including the media, education, business and sport. Aboriginality and multiculturalism simultaneously signify pluralism, diversity and inclusion, as well as marginality, alienation and exclusion.

Complexity and ambiguity also impact on the meaning of race in other ways. It is now recognised that race mediates our understanding of sex, sexuality, impairment, political and religious conviction, and age. For example, 'women' can no longer be referred to as a one-dimensional category, without adverting to differences among women, particularly racial, cultural and religious differences.<sup>6</sup> To do so is to face a charge of essentialism. Nevertheless, although we know that the life experiences of non-urban Aboriginal women are dramatically different from those of middle-class, urban, white women, we have difficulty theorising difference, as well as imagining how it might be incorporated with legislative instruments designed to have general effect.<sup>7</sup> The myriad elements that constitute a person's identity shade into one another in elusive and complex ways.<sup>8</sup> The multi-layered nature of racial discourse

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4. *Mabo v Queensland (No 2)* (1992) 175 CLR 1 is clearly a watershed.

5. The bicentenary of white settlement has given rise to a great deal of soul searching about the multiplicitous nature of Australian identity, republicanism, post-colonialism and citizenship. See, for example, Moores, *Voices of Aboriginal Australia*; Report of the Civics Expert Group, *Whereas the People...: Civics and Citizenship Education*, AGPS, Canberra, 1994; Parliament of the Commonwealth of Australia (Joint Standing Committee on Migration), *Australians All: Enhancing Australian Citizenship*, AGPS, Canberra, 1994.

6. For discussion and theorisation of the intersections, see Elizabeth V. Spelman, *Inessential Woman: Problems of Exclusion of Feminist Thought*, The Women's Press, London, 1988; Jan Pettman, *Living in the Margins: Racism, Sexism and Feminism in Australia*, Allen & Unwin, Sydney, 1992.

7. The substantive issue in *Dao v Australian Postal Commission* (1984) EOC 92-107 (NSW EOT), (1986) EOC 92-148 (NSW CA), (1987) EOC 92-193 (HCA), involving discriminatory treatment arising from the height and body weight of Vietnamese women, illustrates the race/sex intersection aptly, although *Dao* was quickly transmitted into a jurisdictional tussle. Few intersectional complaints have been reported, but see *Djokic v Sinclair* (1994) EOC 92-643 (HREOC) in which a woman was called a 'stupid wog bitch'. The complaint was upheld and damages of \$22,000 awarded.

8. Said has demonstrated compellingly how the Oriental identity has been consistently constructed as an 'other' to the dominant norm of the West. See Edward W Said, *Orientalism: Western Conceptions of the Orient*, Penguin, London, 1978. For percipient personal accounts, see (1995) 21 *Australian Feminist Studies: Third International Women Playwrights Conference*, especially Tes Lyssiotis, p 105 and Venetia Gillot, p 108.

can allow us to become overly sanguine by focusing on small victories and ignoring the latent racism that resides just beneath the social surface ever ready to erupt, particularly when the economy declines and competition for jobs is sharpened.<sup>9</sup> Pax Australiana is a fragile one. The spate of anti-Semitism in Adelaide in 1995, including the desecration of Jewish graves, reminds us of this.

At a twentieth anniversary conference on the RDA, intended to be both critical and reflexive, I was asked to critique the RDA and the conciliation model in the light of ideas I developed in *The Liberal Promise*.<sup>10</sup> As this is an extensive brief, I have confined myself to the disjuncture between racism and a cognisable act of discrimination. While some weaknesses within the RDA can be ameliorated by improved drafting, I wish to address the elusive and intractable problem of legal form.

## Legal Form

The constraints of legal form limit the effectiveness of anti-discrimination legislation as a mechanism for dealing with racism. In the individual complaint-based model, the responsibility rests with a particular complainant to recognise an *act* of racism, about which he or she can complain to the Human Rights and Equal Opportunity Commission (HREOC) or a delegated State agency. When I stress an act, I am drawing attention to the difficulty of separating an overt manifestation of discrimination from the phenomenon of racism. Racism, a sub-test of the discourse of race, includes the interplay of power, linguistic sub-texts and cultural practices that have been responsible for the construction of Aboriginality and ethnicity. Although such factors constitute the environment of racism that fosters racist behaviour, it is necessarily only the discriminatory behaviour that is recognised by and tractable to amelioration through the RDA. Indeed, ss 9(1) and (1A) expressly specify the necessity of an 'act'.

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9. For example, a disproportionate number of employment complaints were lodged in Victoria under both the RDA and the *Sex Discrimination Act* 1984 (Cth) (SDA) in 1993-94. See Human Rights and Equal Opportunity Commission *Annual Report* 1993/94, AGPS, Canberra, 1994 (HREOC *Report*), pp 81, 141. The Kennett Liberal government passed new industrial legislation only one month after coming into office, which sought to abolish State awards in favour of enterprise bargaining. See *Employee Relations Act* 1992 (Vic).
  10. Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia*, Oxford University Press, Melbourne, 1990.

Legal form necessitates an identifiable complainant, on the one hand, and a respondent, a suable entity, on the other hand. These two parties, the complainant and the respondent, who constitute the essential elements of any civil action, must be linked by an unbroken causal thread. Racism, however, by its very nature, is endemic, that is, it is diffused throughout the social fabric. There is no clearly identifiable tortfeasor who can be held liable for a harm that is buried deep within the social psyche and that has developed the status of a self-serving 'truth' as a result of replication and longevity. The disjuncture between racism and an act of racial discrimination is a major limitation of the RDA or, indeed, any legislative schema based on an individual complaint-based model, as a mechanism for effecting change. Analogising with medical treatment, it means that the individual symptoms of the disease alone can be addressed, and never the causative factors within the body politic. Legalised remediation, as is generally the case with modern medicine, is wary of prophylaxis.

I am not suggesting that the individual complaint-based mechanism of resolving disputes has no place in a legislative schema, but to point out its limited efficacy as a social tool of remediation. The underlying rationale for the individualised approach within a compensatory model is based on the belief that the resolution of each individual complaint will exercise a positive ripple effect and deter other potential discriminators. The gradualist approach encapsulates the essence of liberal progressivism, with its somewhat naive belief that each reformist step constitutes an unqualified good. It may well be that the lodgement of complaints does lead to the inhibition of overt *acts*, but the lodgment of a complaint and its resolution may have relatively little impact on *racism*. Indeed, the severance of legally cognisable acts of racial discrimination from racism may insidiously operate to legitimise racism. That is, if the manifold requirements of legal form have not been satisfied, discrimination will be found not to have occurred. The progressivist ripple theory discounts not only the discursive effects of countervailing movements, but also the privatised practices of conciliation. Even if the complaint were not resolved at the conciliation level, the public nature of the HREOC hearing and publication of the decision in the CCH Reporter (*Australian & New Zealand Equal Opportunity Law and Practice*) would hardly suffice to exert an educative effect on the community and a deterrent effect on would-be discriminators. Equal Employment Opportunity and some legal practitioners may read such reports, as do a few academics and students, but the ripple effect is such that the ocean of racism is barely disturbed. The media may pick up an issue and run with it for a while, but only if the details are salacious or dramatic, or can be made to appear so. The individual complaint-based mechanism is therefore clearly limited as an educative tool.

The issue of legal form further dilutes the educative effect of the RDA. The ordinary person cannot be expected to comprehend the way in which jurisdictional and constitutional issues can be used to defeat legitimate complaints of discrimination. Even if the focus is on the substance of discrimination within superior courts, a narrow, precise and technical definition of the concept is sought in the interests of predictability and stability. The rule of law itself, therefore, is subtly complicit in sustaining racism through its privileging of technocratic law. Legal form constitutes a major hurdle in combatting racism, as it necessitates compressing every complaint into a form that is both substantively and procedurally hedged in with requirements that consistently operate to blanch the complaint of its racist substance and to sustain the status quo.

### **The Confidentiality of Conciliation**

The conciliation of complaints under the RDA does not require strict adherence to legal form, although the basic legislative requirements need to be satisfied in order to invoke the jurisdiction of HREOC. An informal mode of dispute resolution, however, does not necessarily dissolve the line of demarcation between racism and race discrimination in other than an individualistic sense, if at all, for the confidentiality of conciliation indubitably thwarts the aim of deterrence. Those most likely to feel empowered by knowledge of the resolution of complaints analogous with their own are denied access to this knowledge by the confidentiality prescript. Hence, the absence of connection between complainants conduces to the atomisation of complaints and a societal denial of racism. At the practical level, it carries a 'chill factor' for the prospective complainant who may feel intimidated in complaining to a state agency about an uncertain harm.

Although the HREOC annual reports do contain some information about the resolution of complaints, government publications are not readily accessible to other than the well-educated. Even then, confidentiality dictates that the published material be presented in an abstract and unrecognisable form. This necessitates bland statistics and composite stories designed to disguise the identity of complainants and respondents. Despite what may be the positive dimension of conciliation for the parties, the overall public effect is to accentuate the dichotomy between race and racism because the occasional complaint that attracts media publicity is likely to be presented as the aberrant act of a social deviant. Furthermore, the liberal idea that the confidential lodgment of each complaint exercise a ripple effect is shown to be a fiction.

The 1993-94 HREOC *Report* presents a brief overview of conciliation with tables, including ground of complaint, location and ethnicity (all non-English speaking background complainants appear as a single category), sex of complainants and outcomes.<sup>11</sup> Two brief cameo case studies of alleged racial discrimination in employment are presented: one dealing with racial harassment, which was settled, and another which was declined as lacking in substance because the complainant was unable to substantiate her complaint that she was refused re-employment because of her race, rather than because of her unsatisfactory responses at the interview. In regard to outcomes, we are informed that, of the 458 complaints lodged with the federal agency on the ground of race, 35.4% of complaints were resolved through conciliation and 6.7% were referred to the Commissioner for a formal hearing.<sup>12</sup> This leaves almost 60 per cent of complaints unaccounted for, which were withdrawn, referred elsewhere or lapsed. The details of this large number of complaints remain invisible to us.

The paradoxes of conciliation first confronted me when I set out to undertake a study of it in 1987. I had the co-operation of both the President of the NSW Anti-Discrimination Board and the Commissioner for Equal Opportunity in South Australia to sit in on conciliation conferences and to observe the process, as well as to read files. In Victoria, I was permitted to interview personnel, and complaint summaries were made available to me. Victoria otherwise took the view, along with Western Australia, that to permit me access to conferences and files would constitute a statutory offence under Equal Opportunity legislation. I did not include HREOC, as its structure and procedures were in a state of flux. It was moving from Canberra to Sydney, and it was in the process of appointing new staff.

Like Janus, the confidentiality prescript looks both ways, for it has positive, as well as negative implications for complainants (and respondents). On the positive side, it is capable of fostering a supportive and non-threatening environment in which complaints can be resolved cheaply and expeditiously, and there is no limitation on the nature of a settlement that might be effected, provided that the parties agree. Discriminators are able to avoid the public disapprobation that accompanies a formal finding and may be more willing to co-operate. On the negative side, the inequality of bargaining power, which typifies discrimination complaints, can be exacerbated within the private setting without us knowing anything about it. It is

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11. HREOC, *Report*, pp 140-43.

12. For breakdown, see HREOC, *Report*, p 142.

this public interest issue that cuts across individual interests, for confidentiality immunises the process against scrutiny. The lifting of the bureaucratic veil to observe the process of conciliation is precluded, so that we are compelled to accept the blandness of a few statistics as the extent of public knowledge about the process.

There is significant tension between the public's right to know how effective the process is, on the one hand, and the confidentiality prescript, on the other. However, the ostensible consensuality of conciliation renders process irrelevant. Thus, we never have to confront the multifaceted reality of conciliation and the fact that its morphology is dependent upon the role of both the individual conciliation officers and the prevailing culture of the particular agency.

The invisibility of conciliation precludes us from commenting on its methodology. However, as with the cognate case of mediation, no conciliation can be totally neutral.<sup>13</sup> The power of the conciliation officer to construct the narrative of events and to shape the outcome is neutralised by the immunity. In exploring the theoretical underpinnings of conciliation at the pyramidal base of the conflict resolution hierarchy, as I did in *The Liberal Promise*, it is also apparent that conciliation can reify the idea that real justice is obtainable only in a formal court or quasi-judicial setting. However, the constraints of legal form are such that they may have the effect of insidiously immunising racism.

It is in the settlement that the atomism of the process is most sharply captured. If offered a financial pay-out, it takes a very determined and altruistically minded complainant to resist the offer and hold out for a classwide remedy, such as a policy or organisational change that will benefit others than the complainant.<sup>14</sup> The settlement, particularly if it is of a financial nature, can induce a separation between the individual complaint and the phenomenon of racism.

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13. George Verghese Kurien, 'Critique of Myths of Mediation' (1995) 6 *Australian Dispute Resolution Journal* 43, 46. Compare Greg Tillet, *The Myths of Mediation*, The Centre for Conflict Resolution, Macquarie University, 1991. See also the post structural critique of neutrality by Sara Cobb & Janet Rifkin 'Practice and Paradox: Deconstructing Neutrality in Mediation' (1991) 16 *Law and Social Inquiry* 35.
  14. Hunter and Leonard, in their empirical study of the outcomes of conciliation in sex discrimination cases in several Australian jurisdictions showed that the most likely outcome for a complainant was to receive nothing. However, of conciliation agreements, approximately 35 per cent secured a policy change and approximately 30 per cent received financial compensation, although the numbers in the survey sample were small. See Rosemary Hunter and Alice Leonard, *The Outcomes of Conciliation in Sex Discrimination Cases*, Centre for Employment and Labour Relations Law, University of Melbourne, Melbourne, 1995 .

I reject a simplistic either/or finding as to whether one should favour conciliation over litigation. The probative burden at the formal inquiry level is such that few complainants are able to bridge the gap between racism and a legally cognisable act of discrimination. Thus, while one might surmise that *some* complainants who agreed to an unduly modest settlement in conciliation would have fared better at formal hearing, an unequivocal conclusion cannot be reached because of the possibility of legal costs, stress, the heavy burden of proof to be discharged, and because of the multifarious ways in which the respondent can use its superior resources to engage counsel to construct defences and to engage in delaying tactics, such as constitutional challenges, to its advantage. Although the structural inequality between the employer and employee is undeniable, educated, middle class complainants are able to use their cultural capital to their advantage to effect a better settlement in conciliation. The point is that those who are poor, ill-educated and of non-English speaking background are likely to be disadvantaged in whatever forum their disputes are being resolved.

The significance of class for the application of the non-discrimination principle, regardless of institutional setting, cannot be gainsaid. The discourses of post-communism and economic rationality have rendered advertence to class ideologically questionable, if not ineffable. However, class is a crucial variable in understanding the discourse of racism in Australia, as is sex. Indeed, it is those whom I have dubbed 'benchmark men', that is, those who are Anglo-Celtic, heterosexual, able-bodied and middle class, the ubiquitous comparators of discrimination law who, from their self-proclaimed Archimedian point of neutrality, predominate amongst discriminators. They are the 'haves' of our society who possess the material and cultural power to discriminate and who continue to do so. They dominate corporations, businesses and universities, which are the invariable respondents in discrimination complaints. Unsurprisingly, the same benchmark men are also disproportionately represented amongst legislatures, government bureaucracies, the legal profession and the judiciary. Hence, they shape legislative, administrative and juridical texts in their own image and to their own advantage. Legality's norms of neutrality and procedural equality nevertheless serve to obfuscate and deny partiality and power. Liberal legalism is a hegemonic mechanism, and anti-discrimination legislation is predicated on the same liberal myth that power is irrelevant with an adversarial legal system.

## Public Hearings

Because of a constitutional impediment precluding an administrative body from exercising judicial power, there was originally a cumbersome bifurcation of the inquiry/enforcement process. Subsequently, a short-lived amendment to the RDA endowed HREOC with the power to effect binding orders. This was struck down in *Brandy v Human Rights and Equal Opportunity Commission* (1995) EOC 92-662 (HCA) on the basis that it violated Chapter 3 of the Constitution. The legalistic finding as to the limit of HREOC's powers was a blow to those favouring rationalisation of procedures. Intrepid complainants are once again expected to withstand conciliation, a HREOC hearing and a Federal Court hearing *de novo*, if the respondent does not voluntarily comply with the declaration made by HREOC that damages be paid, for example. *Brandy* is an example of a discontinuity within the discourse of race to which I adverted at the outset, the effect of which is likely to lead to a re-assertion of formalism, a phenomenon which favours respondents. Following Galanter, it is apparent that corporate respondents are more likely to be RPs (repeat players) than complainants, who are invariably OSs (one shotters).<sup>15</sup> Respondents are consequently more interested in the prospective operation of rules than the substantive outcome of the instant case. Hence, the greater the degree of formalism, the greater the advantage to the corporate respondent. Formalism, or technocratic law, with its effective veneer of neutrality, can be invoked by the corporate respondent with the aid of inventive lawyers, which superior resources allow. Technocratic law privileges procedure so that the substance is rendered peripheral or irrelevant. Ironically, individual complainants with legitimate grievances, who are unable to counter with a comparable display of legal pyrotechnics, may then find themselves ordered to pay the substantial costs of the respondents for clever advocacy, in addition to their own costs of representation. Jurisdictional and constitutional challenges are familiar as ploys in the operation of anti-discrimination legislation. Technocratic law is consequently a very effective mechanism for occluding racism.

Although it is not possible to assess the merits of complaints with any degree of precision from reported decisions (particularly as the CCH Reporter has moved to condensing many of its reports), it is obviously very difficult for a complainant to be successful within a formal hearing. I will now seek, by means of a brief overview

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15. Marc Galanter, 'Why the "Haves" come out ahead: Speculations on the Limits of Legal Change' (1974-5) 9 *Law & Society Review* 95. Alternatively, see the edited version of this essay in Richard L. Abel (ed.), *The Law and Society Reader*, New York University Press, London, 1995.

of the reported decisions from 1984 to June, 1995, to provide further illustrations of my thesis that racism may be immunised by the processes of legal formalism. While it would be theoretically possible to produce "percentage success rates of all race cases settled in favour of the complainants.., after conciliation has failed",<sup>16</sup> such an attempt at systematisation, could add a misleading scientific gloss to the actual position.

When we examine the reported decisions under the RDA, it will be seen that the only clear act of racism which is consistently recognised is that of denial of service to Aboriginal people in hotels. On the other hand, employment complaints, from whence the preponderance of complaints emanate, are notoriously difficult, for the alleged racism quickly becomes interwoven with bona fide considerations of merit, including formal qualifications, experience, workplace practices and relations with one's peers. Unless the conduct is unequivocal, such as including a written component, the burden of proof on the complaint is virtually insuperable. Indeed, many of the complaints that proceed to formal hearing are unable to overcome the threshold jurisdictional obstacles.

Area	RDA 1984-95		Appealed
	Upheld	Dismissed	
Special Measures	2		
Service		6	
Service in Hotels	11		1 (R)
Employment	5	17	4(2C; 2R)
Education		2	1(R)
Property/Accommodation	2	1	
Sport		2	
Other		3	1(R)
Total	20	31	7
C: complaint successful; R: respondent successful <b>NB:</b> all appeals by respondents were successful; all by complainants unsuccessful			

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16. See Martin MacEwen, 'Promoting Equal Opportunity: the Role of the Regulatory Agency in Racial Discrimination' (1995) 1 *International Journal of Discrimination and the Law* 54.

For the purpose of comparison, I also include a breakdown of formal race decisions under State and territory legislation for the same period:

State and Territory Legislation 1984-95: Race Complaints	ITpheld	Dismissed	Appealed
Service	2	3	
Service in Hotels	4	3	2(R)
Employment	14	9	4(R)
Education	4	2	6 (2C) (4R)
Accommodation		2	1(R)
Clubs		1	
Other	1	3	
Total	25	23	13

NB: 10 of the education decisions dealt with closure of the Northland Secondary College in Melbourne. The complainant was successful in one of the appeals; the respondents in all others.

While these figures must be approached with considerable caution in light of the low numbers and the element of chance determining the pursuit of some complaints and not others at formal hearing, it is possible to draw some inferences regarding the disjuncture between race discrimination and racism with particular regard to the RDA. First of all, the 11 substantiated complaints dealing with denial of or differential service in hotels all involved Aboriginal complainants. Denial of service is one of the clearest manifestations of discrimination. The ability to pay is really the only legitimate consideration. If dress standards and behavioural norms are raised, it is because they are likely to be used as proxies for race discrimination.<sup>17</sup>

In view of the inequitable distribution of social goods to benchmark men, it is not surprising to find that the preponderance of discrimination complaints under all legislation, including the RDA, emanate from the area of employment. The social

17. It might be noted that dress standards have been successfully raised by a respondent hotelier on appeal. See *Maynard v Neilson* (1988) EOC 92-226 (FCA).

and organisational choices that are designed to maintain homogeneity are rationalised as being conducive to workplace harmony and efficient managerialism. Despite contemporary rhetorical phrases, such as 'managing diversity', bureaucratic structures, hierarchies and norms operate to disguise the organisational and institutional antipathy towards 'otherness'. The concept of merit—a central value in determining the 'best person for the job'—conveys a veneer of neutrality because of its assumption of genuine job-relatedness but, in fact, is capable of disguising racism (as well as sexism, homophobia, etc.). As respondents have an evidentiary burden to adduce evidence of a bona fide, job-related reason for not appointing or promoting the complainant, racism can be effectively masked. The employer, who is deemed to know best the requirements of the job and the ability, or otherwise, of the complainant to fit the bill automatically occupies a position of structural superiority. The mere articulation of a rational explanation can carry a probative weight which is difficult for the complainant to rebut.

When we look at the employment figures arising from hearings (the HREOC Annual Reports no longer provide a breakdown of complaints conciliated by area), we see that only five were upheld in the first instance, whereas 17 were dismissed. Respondents successfully challenged two decisions, which left three successful and 19 unsuccessful employment decisions. This compares with ten successful—four having been appealed—and nine dismissals in the case of State jurisdictions. (I reiterate my caution in view of the paucity of hearings). Nevertheless, one is struck by the difficulties encountered by complainants. While jurisdictional and constitutional arguments can be raised as shields by respondents, such tactics are more likely to occur within State jurisdictions (perhaps not surprising in a federal system),<sup>18</sup> although the recent *Brandy* case is a notable example under the RDA. Unless the evidence is incontrovertible, and it rarely is in employment complaints, the respondent is able to raise a bona fide explanation for the less favourable treatment and confound the proof problematic. The racist narrative told by the complainant then becomes inextricably intertwined with the respondent's rational explanation for subjecting the complainant to the alleged detriment. It is therefore not surprising that the preponderance of complaints were dismissed because of the complainant's failure to satisfy the burden of proof.

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18. For example, in my second table, four of the fourteen employment complaints that were upheld simply established the threshold question of jurisdiction.

Concern has been expressed regarding the fact that the burden of proof rests with the complainant, according to the usual convention in civil litigation.<sup>19</sup> Mitigating this burden by requiring the complainant to make out no more than a prima facie case, as has been suggested from time to time,<sup>20</sup> would help in some categories of cases, but would be less likely to do so in employment complaints because of the difficulty involved in separating the discriminatory and the bona fide variables. Allow me to illustrate by a couple of examples from RDA hearings.

In *Lotfi v Dept. of Primary Industry* (1994) EOC 92-594 (HREOC), the complainant, in applying for a position as a veterinary officer, was asked whether he was an Australian citizen, as well as whether he was a Moslem. Even though one might express scepticism as to whether all applicants were asked these questions and whether they were relevant, they were held by HREOC to be relevant. The respondent argued that, in regard to the first question, citizenship was relevant in Public Service appointments, and, in respect of the second question, religion was relevant as the position involved the handling of meat. To clinch the matter in favour of the respondent, the complainant's application was found to be 'less meritorious' than that of other applicants. Merit is not an objective variable, but a category of indeterminate reference, the neutral veneer of which can occlude racism, as well as animus against those who differ significantly from the decision makers themselves.<sup>21</sup> Thus, how could the complainant, or one similarly situated, prove that he was *more* meritorious, given the undeniably subjective and evaluative dimensions of the concept?

If the burden were to be reversed, the complainant would have easily satisfied the requirement for a prima facie case by adducing evidence of the facially discriminatory questions. Based on the American model of the shifting burden in disparate impact cases,<sup>22</sup> the burden would then shift to the respondent for adduction of a rational explanation. Public Service employment and the handling of

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19. For example, *Ellenbogen v Federated Municipal & Shire Council Employees Union of Australia* (1989) EOC 92-252 (HREOC), per Einfeld, at 77, 451.

20. The SDA has recently been amended to permit a shifting of the burden in some cases.

21. I have considered the vagaries of merit elsewhere and argued that it is more elusive in professional and high-status positions, see Thornton, 'Affirmative Action, Merit and the Liberal State' (1985) 2 *Australian Journal of Law & Society* 28.

22. See, for example, Major Charles B HERNICZ 'The Civil Rights Act of 1991: From Conciliation to Litigation - How Congress Delegates Lawmaking to the Courts' (1993) 141 *Military Law Rev* 1.

meat would be raised. The burden would shift to the complainant who would adduce evidence that the reasons given by the respondent were pretextual. HREOC would then assess the persuasiveness of that evidence. The burden in respect of the asseveration that the complainant was 'less meritorious' would also make little difference, since it is the respondent employer who has a monopoly on the information regarding the other candidates. As Bindman says in discussing the English legislation:

The burden on the respondent needs to be more than an evidential burden if there is to be a real inducement to avoid discrimination. For it is too easy to find a plausible subjective ground, especially in recruitment or promotion cases, for choosing one candidate rather than another.<sup>23</sup>

The real significance of shifting the burden to the respondent is that it is supposed to make it easier for HREOC to make a finding of discrimination in favour of the complainant. However, if it continues to accept the conventional presumption in favour of the respondent employer, employment complaints will continue to display skewed results as manifested in my table of outcomes. I shall illustrate the point by reference to another reported decision.

In *Murry v Forward*,<sup>24</sup> the Aboriginal complainant had been the unanimous choice of a Public Service selection committee, the conduct of which was subsequently impugned. She complained to the Merit Protection Agency, which allegedly handled her complaint in a discriminatory manner. In dismissing the complaint, the Commissioner (Sir Ronald Wilson) said:

I am sensitive to the possible presence of systemic racism, when persons in a bureaucratic context can unconsciously be guided by racist assumptions that may underlie the system. But in such a case there must be some evidence of a system and the latent or patent racist attitudes that infect it. Here there is no such evidence to establish the weight to be accorded to the alleged stereotype.<sup>25</sup>

The burden on the complainant to prove not just the relevant instance of direct discrimination, but the existence of systemic discrimination, a concept not formally

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23. Geoffrey Bindman, 'Proof and Evidence of Discrimination' in Bob Hepple & Erika M Szyzszak (eds), *Discrimination: The Limits of Law*, Mansell, London, 1992, p 58.

24. HREOC No H92/53, 10 September 1993 (unpublished). For edited CCH version, see (1993) EOC 92-545 (HREOC).

25. HREOC H92/53, p 6.

recognised by the RDA, would seem to be extraordinary. Systemic, or classwide, discrimination is a synonym for racism which is embedded in the social psyche and which, as I have argued, constitutes the backdrop for all discriminatory conduct; it is clearly a concept that transcends the individual complaint. This subtle elevation of the burden of proof to a requirement that a complainant prove *racism*, in addition to an act of discrimination, as seems to be the case in Murry, may help to explain why so many employment complaints have been dismissed.

While the smallness of my sample could skew the results, the low success rate at formal hearing level strongly supports the idea that the public impact of the legal complaint-based mechanism is slight.<sup>26</sup> Note that we are talking about no more than 20 successful hearings in public out of approximately 5,000 race complaints lodged under the RDA over a decade or so. The educative value of the successful hearings is therefore necessarily limited.

My suspicion is that the novelty of employment hearings on the ground of race (all post-1990 under the RDA) has meant that appropriate knowledge practices have not yet developed. (I reject the use of the word 'jurisprudence' in the HREOC context, despite the relentless incursion of 'creeping legalism').<sup>27</sup> Thus, Commissioners—or at least some of them—are not yet attuned to the meaning of the burden of proof in a non-judicial forum, or they are overly deferential to the hierarchy of appellate courts, ever ready to condemn deviations from legal form. In making this criticism, I am not adverting to ostensibly radical measures, such as a reversed burden of proof but to a fair application of the civil burden. A requirement that a complainant prove the existence of systemic discrimination as one prong of a race discrimination complaint, for example, would seem to represent an elevation of the burden to one approximating the criminal burden. That is, a complainant would have to prove beyond all reasonable doubt that a respondent had discriminated against her in, say, failing to promote her, rather than on the balance of probabilities.

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26. Compare Bindman, 'Proof of Evidence of Discrimination', p 62, appraising the United Kingdom position.

27. A further irony arising from the *Brandy* case, in light of the trend towards legalisation, is its reminder that HREOC is an administrative body.

Longevity of experience cannot be expected to resolve the problematic of proof. Indeed, time is more likely to cause creeping legalism to calcify, the evidence for which is becoming increasingly apparent. The congruence between the formalistic barrier and a conservative political climate is starkly revealed by the American Supreme Court experience of the late 1980s, when a resiling from the gains of the past two decades occurred.<sup>28</sup>

This brief overview of the handling of RDA complaints highlights the difficulties posed by the problematic of proof for individual complainants, particularly in employment complaints. This is despite the fact that the RDA was amended in 1990 so that race need no longer be the dominant or a substantial reason for the doing of an act, but merely one of the reasons (RDA s18).

## Conclusion

The fact that the preponderance of successful complaints under the RDA have dealt with the relatively trivial issue of service in hotels supports the view that, in Australia, race discrimination theory and practice is less sophisticated than that of sex discrimination.

In regard to race, we are still at the point of access more than 20 years after the first criminal prosecutions for refusal of service to Aboriginal people.<sup>29</sup> I am not

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28. See, in particular, *Patterson v McLean Credit Union* 491 US 164 (1989); *Lorance v AT&T Technologies* 490 US 900 (1989); *Wards Cove Packing v Atonio* 490 US 755 (1989). These cases led to the agitation for a new *Civil Rights Act* in order to contain legislatively the impetus of an increasingly conservative court. This is not to suggest that the passage of the Act was unproblematic, for the 1990 Bill, although passed by both the Senate and the House of Representatives, was vetoed by President Bush. The Clarence Thomas Supreme Court confirmation debate caused the Bush Administration to be far more amenable to compromise. Perhaps, as a result, the 1991 Act has been extensively criticised. HERNICZ, for example, describes the 1991 Act as 'schizophrenic' because, while intended to overturn *Wards Cove* and present clear guidance to courts, it is simultaneously harsher and softer on both plaintiffs and respondents in respect of proof requirements. For discussion, see Reginald C Govan, 'Framing Issues and Acquiring Codes: An Overview of the Legislative Sojourn of the Civil Rights Act of 1991' (1992) 41 *DePaul Law Rev* 1057; HERNICZ, 'The Civil Rights Act of 1991' 26; Robert Belton, 'The Civil Rights Act of 1991 and the Future of Affirmative Action: A Preliminary Assessment' (1992) 62 *DePaul Law Rev* 1085.

29. *Port Augusta Hotel Ltd v Samuels* [1971] SASR 139, arising from the *Prohibition of Discrimination Act*, 1966 (SA); *Samuels v Traeger* (1978) SA Law Society Judgement Scheme 445, arising from the *Racial Discrimination Act*, 1976 (SA). The criminal model of anti-discrimination legislation preceded the currently favoured compensatory model.

suggesting that sex discrimination is simpler; it is not. Indeed, the American judicial experience has produced many trailblazing race cases. The different approaches have to be understood in light of the prevailing historical and political circumstances. In the United Kingdom, Hepple has noted that 'the judiciary have been far more liberal and sympathetic to women's claims than to those of ethnic minorities'.<sup>3</sup> My qualification would be that many of the early instances of sex discrimination were so overt that a finding of discrimination has been virtually incontrovertible. The more covert instances of sex discrimination, like instances of race discrimination, continue to produce sites of contestation. However, in Australia, and possibly also in the United Kingdom,<sup>31</sup> the intellectual dynamism of the feminist movement, in conjunction with feminist legal scholarship, has contributed to sophisticated theorisation of sex discrimination, whereas critical race theory appears to have exerted relatively little impact on human rights.<sup>32</sup> The differential treatment of race and sex underscores the social construction of discrimination so that legal positivism's pious hope for 'right answers' remain elusive.

It should be noted, furthermore, that I have addressed only direct discrimination, not indirect discrimination, which poses an even more onerous burden of proof.<sup>33</sup>

Indirect discrimination has rarely been relied upon under the RDA since its formal inclusion was effected in 1990. Although lacking the potential for the statistical gymnastics fostered by the proportionality requirement of the SDA, RDA s9(1A) does contain a ubiquitous 'reasonableness' provision, used to defeat the Aboriginal

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30. Bob Hepple, 'Have Twenty-five Years of the Race Relations Acts in Britain Been a Failure?' in Hepple & Szyszczak, *Discrimination*, p 30.

31. Nicola Lacey, 'From Individual to Group?' in Hepple & Szyszczak, *Discrimination*.

32. For Australian examples, see Archana Parashar, 'Essentialism or Pluralism: The future of Legal Feminism' (1993) 6 *Canadian Journal of Women and Law* 328; Pheng Cheah, 'Stagings of the Margin: The Limits of Critical Race Theory' (1994) 2 *Australian Feminist Law Journal* 13. For United States examples, see Alan Freeman, 'Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay' (1988) 23 *Harvard Civil Rights-Civil Liberties Review* 295; Angela P. Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 42 *Stanford Law Rev* 581; Marnie Kline, 'Race, Racism, and Feminist Legal Theory' 12 *Harvard Women's Law Journal* 115; Patricia Williams, *The Alchemy of Race and Rights*, Virago, London, 1993.

33. For analysis, see Rosemary Hunter, *Indirect Discrimination in the Workplace*, Federation Press, Sydney, 1992.

complainants' claim in the *Traeger Park Primary School* case.<sup>34</sup> Suffice it to say that the complexity and formalism of the indirect discrimination provision is such that not only does it skirt around systemic discrimination but it legitimises direct discrimination, the simple case close to the surface, as the *sine qua non* of the RDA. I also agree with Bindman's questioning of the need for a sharp distinction between direct and indirect discrimination.<sup>35</sup> Not only can the formal separation be conceptually inappropriate, but it operates as a device for cordoning off instances of discriminatory conduct from systemic discrimination. The strict separation represents yet another instance of liberal legalism's artificial attempts to label and categorise in order to delimit the substantive effect of the non-discrimination principle.

I have drawn attention to the disjunction between systemic sex discrimination and the legislative requirements for indirect discrimination elsewhere.<sup>36</sup> In this essay, I have shown that the legislative framework is barely able to accommodate overt instances of direct racial discrimination, let alone the subtleties of indirect discrimination.

Racism largely remains terra incognita so far as the RDA is concerned—certainly at the formal hearing level. Legal formalism subtly deflects our attention from the 'multitude of oppressions... effected by the mundane and the obvious'.<sup>37</sup>

Although I have suggested that one should treat data on the outcomes of formal hearings with caution, one might be less circumspect in speculating on their social impact. I have adverted to the immunity regarding conciliated outcomes, whether positive or not, so that the only public knowledge pertaining to actual complaints is the negative outcomes of hearings which, in turn inevitably shape racial discourse negatively. Burstein and Edwards, in a study of Equal Opportunity decisions in the United States appellate courts, go so far as to argue that there is a correlation

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34. *Aboriginal Students' Support and Parents' Awareness Committee, Traeger Park Primary School, Alice Springs v Minister for Education, Northern Territory* (1992) EOC 92-415 (HREOC); but see *contra Siddiqui v Australian Medical Council* (1995) EOC 92-730 (HREOC).

35. Bindman, 'Proof and Evidence of Discrimination', p 62.

36. Margaret Thornton, 'The Indirection of Sex Discrimination' (1993) 12 *University of Tasmania Law Rev* 88.

37. Peter Fitzpatrick, 'Racism and the Innocence of Law' (1987) 14 *J Law and Socy* 119, p 123.

between such decisions and blacks' relative earnings.<sup>38</sup> While the authors engage in a great deal of fancy footwork to establish such a correlation, the point is that the publicity associated with hearings generating positive outcomes has the potential to effect enduring social reform in a way that is not possible with complaints conciliated in private. Thus, the paucity of successful RDA complaint outcomes at the public hearing level, other than in regard to service to Aboriginal persons in hotels, can also serve to condone racism. First, the public message reinforces a stereotypical congruence between Aboriginality and alcohol. Secondly, it deflects attention away from the extent of racism in other areas of public endeavour, particularly employment.

Bureaucratic and legal discourses of race and multiculturalism therefore cannot be accepted at face value. Acknowledgement of the existence of racism is a significant step in shaping the contemporary discourse and realpolitik of race. At present, however, racism is effectively occluded by the confidentiality prescript in conciliation and adherence to traditional legal form at the hearing level.

Rather than conclude with a wish list of grandiose reforms of a legalistic nature, which may serve only to compound the problem, my suggestion is more modest. I would exhort a concerted campaign directed to lifting the veil on conciliation and publicising its (positive) outcomes, as well as publicising (positive) hearing outcomes. Even if the positive outcomes are of the 'drinking in hotels' kind, public scrutiny could put pressure on Commissioners, as primary change agents, as well as on the controllers of public goods, to develop new ways of seeing. I suggest that a greater focus on public knowledge could transmute the RDA into a more effective conduit for change. Secrecy in complaint handling can only foster racism.

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38. Paul Burstein and Mark Evan Edwards, 'The Impact of Employment Discrimination Litigation on Racial Disparity in Earnings Evidence and Unresolved Issues' (1994) 28 *Law and Society Rev* 79.

## Issues for consideration

- Professor Thornton describes the difficulty of linking an identifiable act of discrimination to racism. Can the legislation be amended to address this problem? If so, in what ways?
- Should 'serial' respondents be assured confidentiality in the conciliation process or should they be named in publications (with the identity of the complainant being kept confidential)?
- The *Sex Discrimination Act* 1984 (Cth) was recently amended to permit a shift of the burden of proof in cases of indirect discrimination where a prima facie case has been established. Should the RDA also adopt this model?

# THE LAW AND INDIRECT RACIAL DISCRIMINATION: OF SQUARE PEGS, ROUND HOLES, BABIES AND BATH WATER?

Phillip Tahmindjis\*

## Preliminary Observation

When I was preparing this paper, and thinking about the law and policy issues surrounding the topic of indirect racial discrimination, I wanted to devise a (sub)title to encapsulate my conclusions. I hit upon the one above to illustrate that, while section 9 (1A) of the *Racial Discrimination Act 1975* (RDA) has distinct problems, it is not totally beyond redemption and should not be written off as being useless. That is, one would get that impression if the reader were able to satisfy the requirement or condition of having had the sort of education (ie Anglo-based) which would enable the identification of the connotations of the ellipsised clichés used...

## Introduction

The Commonwealth of Australia, when Federation occurred in 1901, exhibited a fundamental racism which was in fact enshrined in its Constitution. Section 51 (3ocvi) of the Constitution gives the Commonwealth Parliament the power to make special laws with respect to the people of any race. However, until a referendum in 1967, the provision expressly did not apply to Australian Aborigines. They were left to the tender loving care of the states. In addition, the purpose behind the introduction of this power was to enable the Commonwealth Government to exclude Kanaka labourers who were being imported to work on Queensland's sugar cane farms. This head of power enabled the Commonwealth Government to override Queensland's desire for cheap labour and was based as much on racist concerns for a 'white Australia' as on the economic ramifications of cheap labour,

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but left issues such as the care of the indigenous population to the former colonies. Indeed, the leading contemporary commentary on the Constitution makes it plain that discrimination under this provision was a distinct possibility.<sup>1</sup>

Through the entire history of Australian federation there have been examples of both blatant and subtle forms of indirect racial discrimination practiced both by governments and private enterprise. For many years the 'white Australia' policy was endorsed by the Government and supported operationally by the *Immigration Act* 1901. One method of implementing this policy was the use of a dictation test prescribed by section 3(a) of that Act. The section provided that aliens could be tested in any "European language" and if they failed the test, they could be excluded from Australia. Language fluency did not necessarily have to be in English, but in any European language. A non-English speaking person from France, Germany, Italy or Greece could be admitted; the provision was designed to keep Asians out of Australia. It was also used against other 'undesirables', such as communists.<sup>2</sup>

While the more blatant examples such as these are comparatively rare in Australia today,<sup>3</sup> more subtle examples of discrimination, and especially the potential for indirect discrimination, are in fact commonplace. Thus, for example, the former Human Rights Commission reported that in 1982 it received complaints representing 2000 aggrieved parties relating to the recognition (or non-recognition) of overseas medical qualifications.<sup>4</sup> Similarly, employers have been

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1. Quick and Garran, *The Annotated Constitution of the Australian Commonwealth 1901*, Legal Books, Sydney, 1976, pp 622-623.
  2. Thus, for example, in 1934 the High Court upheld the right of a Czechoslovakian communist, who had been declared a prohibited immigrant under the *Immigration Act*, to enter Australia. The man, Egon Kisch, was a gifted linguist who spoke several European languages. When he was subjected to (several) dictation tests under the *Immigration Act* he was able to pass them all until the examining police were able to find a sergeant who was a Scottish immigrant and who could remember sufficient Gaelic to be able to administer the test to Kisch in that language. Kisch failed the test. The majority of the High Court, however, held that Gaelic was not a "European language" and so the test was invalid: *R v Wilson and Another; Ex parte Kisch* (1934) 52 CLR 234.
  3. Although critics of Australia's refugee policy would argue differently: see Penelope Mathew, "Sovereignty and the Right to Seek Asylum: The Case of Cambodian Asylum-Seekers in Australia", (1994) 15 *Australian Yearbook of International Law* 35.
  4. Human Rights Commission, *Annual Report 1981-82*, AGPS, Canberra, 1982, p 11.

known to assess compliance with job requirements by testing lung capacity merely by taking a chest measurement, or by testing job competency by means of oral examinations requiring familiarity with slang terms, or by imposing dress regulations purely for the sake of appearance, or by imposing standardised leave policies which may create difficulties for people whose observances differ from those of Christians. All such instances have at least the potential to result in indirect discrimination on the basis of race.

In general, the common law in Australia does not cope well with concerns of a human rights nature.<sup>5</sup> Despite some recent High Court pronouncements finding implied rights in the Constitution and using human rights principles in the common law, this situation has not substantially changed.<sup>6</sup> Sometimes, an outcome which in effect promotes human rights has been consequential rather than purposive, the preponderance of judicial approaches favouring the arcane rules of statutory interpretation rather than a truly rights-based approach, as in the *Kisch* case.<sup>7</sup> Sometimes, it is alleged, Australian courts completely misconstrue fundamental rights.<sup>8</sup>

Balanced against what we consider to be our strong Australian traditions of equality and justice is the social and historical fact that the attitudes of many white Australians (then and now) to Aboriginal Australian and immigrants (especially now to Asian immigrants) are at best elitist and at worse appallingly racist. In addition, it is a lamentable fact that most Australians, including lawyers, judges, academics and journalists, have only a superficial understanding of human rights. It is not cause for celebration, but it should equally be little cause for wonder, that the legal approaches to these questions in Australia substantially turn on a statutory

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5. See generally, N O'Neill & R Handy, *Retreat from Injustice: Human Rights in Australian Law*, The Federation Press, Leichardt, 1994.
  6. See P Tahmindjis, "Implied Human Rights in the Australian Legal System: An Extra Dimension for Anti-Discrimination Law?", *Australian and New Zealand Equal Opportunity Law and Practice Reporter*, CCH, Australia, Volume 2, pp 76051-76066.
  7. *I b i d*.
  8. In *Gerhardy v Brown* (1985) 159 CLR 70, the High Court found that certain Aboriginal land rights legislation infringed the *Racial Discrimination Act* as a matter of direct discrimination, but that it was saved by the affirmative action principles in s 8. For a critical commentary, see W Sadurski, "Equality Before the Law: A Conceptual Analysis", (1986) 60 *Australian Law Journal* 131.

interpretation rather than fundamental principle. With the introduction by statute of the concept of indirect discrimination in Australia, it must still be questioned whether there has been any fundamental break with the past in this regard.

## **The Law of Indirect Racial Discrimination in Australia: Putting Square Pegs into Round Holes?**

In essence, laws dealing with indirect discrimination attempt to combat practices which appear to be 'facially neutral' but which adversely affect a person or group of people who share a common attribute, such as race. One of the earliest cases, which provides a good illustration of the concept, is the United States (US) decision in *Griggs v. Duke Power Co.*<sup>9</sup> In that case the US Supreme Court held that the requirement laid down by an employer that job applicants have a high school diploma (where this did not relate in a substantial way to the ability of the applicant to perform the jobs in question) in effect excluded black applicants from those jobs at a higher rate than whites because of higher drop-out rates for blacks in education in the US. Even though the employer's requirement did not stipulate that blacks would not be hired, the effect of the requirement eliminated blacks in a high proportion than white applicants. It is thus the effect of a requirement or condition which is important, rather than its express wording or the intention behind it.

Until 1990, the RDA did not have a specific provision dealing with indirect discrimination. The provisions of section 9 of the RDA were usually regarded as being broad enough to imply such coverage.<sup>10</sup>

Section 9 (1A) of the Act now provides:

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

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9. (1971) 401 US 424.

10. See, for example, P Bailey, *Human Rights: Australia in an International Context*, Butterworths, Sydney, 1990, p 189.

- (b) the other person does not or cannot comply with the term, condition of 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, 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; 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.

The meaning of this provision is not immediately obvious. Indeed, with the thrust of legislative drafting today being towards plain English, together with the fact that it is now clear that legislation based on treaties (in this case, the *Convention on the Elimination of All Forms of Racial Discrimination*) does *not* have to follow the exact working of the treaty to be valid,<sup>11</sup> such a convoluted provision is no longer acceptable. It can, however, be dissected into four component elements, each of which brings with it its own particular problems.

#### (i) A term, condition or requirement

The respondent must impose on the complainant a term, condition or requirement. The words "term, condition or requirement" are not defined in the Act. In the context of indirect sex discrimination, the High Court has held that a similar phrase should be construed broadly so as to cover any form of prerequisite.<sup>1</sup> This construction was approved of by five members of the High Court in the context of indirect disability discrimination.<sup>13</sup> There is no reason why the same construction will not apply to cases involving indirect racial discrimination, and the few reported

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11. *Commonwealth v Tasmania and Ors* (1983) 46 ALR 625; *Richardson v The Forestry Commission and Anor* (1988) 77 ALR 237; overturning *R v Burgess; Ex arte Henry* (1936) 55 CLR 608 on this point.

12. *Banovic v Australian Iron and Steel* (1989) 168 CLR 165, per Dawson J at p 185.

13. *Waters v The Public Transport Coloration of Vittoria* (1991) 173 CLR 349. The judges specifically approving this construction were Mason CJ and Dawson, Toohey, Gaudron and McHugh JJ.

cases in this area appear to be replicating this broad approach.<sup>14</sup> The concept is thus a wide one which does not necessarily have to relate specifically to race, but rather can relate to anything at all which impacts adversely on members of any race (and the latter is a wide concept in the Act). The examples given in the introduction to this paper indicate this potential width of application. Moreover, a requirement or condition need not be made explicit, but can be implicit in the alleged discriminatory conduct.<sup>15</sup>

This, however, does not mean that problems with respect to this element cannot arise. It is the essential element around which indirect discrimination turns, as the other three elements are qualifications upon it. Thus, for example, in *Public Transport Corporation v. Waters* a complaint had been brought by people with disabilities concerning the introduction of driver-only trams in Melbourne and a ticketing system based on the purchase of tickets at retail outlets, with the validation of them by means of a "scratch-it" system. Ultimately, the High Court held that this did relate to a requirement or condition for the use of trams in Melbourne. However, at an earlier stage of litigation, Phillips J in the Supreme Court of Victoria found that the introduction of driver-only trams did not amount to a requirement or condition, whereas the introduction of a scratch ticketing system did. His Honour held that a requirement or condition that people with disabilities use trams without the assistance of conductors did not "describe the removal of conductors".<sup>16</sup> In other words, the issue as Phillips J saw it, was whether it was the *use* of trams by a section of the public or the *removal* of the conductors which was the requirement for condition. This interpretative quagmire is also apparent at each stage of the litigation in the *Banovic* case, where confusion reigned as to whether an actual cut-off *date* or a *system* of reverse-gate seniority amounted to a requirement or condition.<sup>17</sup> Such differences in approach could

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14. For example, in *The State of Victoria v Sinnapan & Ors (No. 2)* (1995) EOC 92-663, the Supreme Court of Victoria held in a case alleging indirect discrimination because of the closing down of the only school providing ethnically sensitive education, that the requirement or condition was to make use of public education without resort to the particular school that had been closed, and that this requirement or condition had continued after the date on which the school was closed so that the complainants had a current grievance.

15. *Waters, op cit.*

16. (1991) EOC 92-334, at p 78319.

17. For a detailed analysis of the *Banovic* case, see P Tah.mindlis, "Indirect Discrimination in Australia: The High Court decision in *ALS v Banovic*", *Australian and New Zealand Equal Opportunity Law and Practice*, CCH Australia, Volume 2, p 76003, particularly at pp 76004-76008.

cause problems with respect to indirect racial discrimination in the recognition of overseas qualifications, where the distinction may be drawn between the possession of a particular standard of qualification and the process by which its comparative standing is assessed.<sup>18</sup>

Considering the fundamental importance of this element to a finding of indirect discrimination, the requirement or condition should be formulated with some precision. It is questionable whether the courts are doing so. Australian courts have held that taking an entire process into account may be possible.<sup>19</sup> The element is necessarily a broad one, but this brings with it problems of indeterminacy. For example, an employer may hire employees taking into account language ability, nationality, personality and potential. Any of these may or may not disparately impact upon people on the basis of their race. But, as Hunter has pointed out,<sup>20</sup> as this element is necessarily linked to the others, and some sort of comparison of the way in which the requirement or condition impacts on people of different races is needed, the requirement or condition cannot be framed in so general a manner that such a comparison cannot be made. This means that it must be a requirement or condition with which members of both racial groups are notionally required to comply. But in cases such as the recognition or non-recognition of overseas qualifications just mentioned, the problem of the distinction between a requirement of having a common standard of achievement (with which both race pools must notionally comply) and the process by which foreigners are assessed as being of this standard (which does not apply to people in the locally-qualified pool) indicates that an essential part of the requirement or condition creating the discrimination may be the part where comparison is inapplicable. The Act demands a particular conceptualisation of the problem, privileging abstract norms over social

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18. A recent unreported determination of the Human Rights and Equal Opportunity Commission involved indirect racial discrimination in the admission of doctors who had overseas qualifications to practice in Australia. The doctors had to pass an exam and come within a quota to be admitted. It was the combination of these which led to unreasonable results, but the determination (which found in favour of the complainant doctor) tends to tread these as two separate requirements and only considers them together for the purpose of deciding the element of reasonableness: *Siddiqui v Australian Medical Council & Commonwealth Minister for Health*, (1995) EOC 92-730.

19. *Kemp v Minister for Education* (1991) EOC 92-340

20. R Hunter: *Indirect Discrimination in the Workplace*, The Federation Press, Leichardt, 1992, pp 199-200.

reality, and there are aspects of actual or potential indirect racial discrimination where this manner of conceptualising the problem begins to take on an air of unreality.<sup>21</sup>

By way of contrast, when the comparable US legislation<sup>22</sup> lacked a specific definition of indirect discrimination there was no necessity for a complainant to identify a requirement, test or condition. Although an allegedly discriminatory practice must be identified,<sup>23</sup> the approach of the US cases tends to be one of generating statistical analyses to identify a pattern of uneven racial treatment and then identifying the practices or policies responsible for this,<sup>24</sup> an apparently reverse approach to the Australian where the requirement or condition is the essential starting point of the investigation because the other three legislative elements hang from it.

### Unreasonableness

The second element of indirect racial discrimination is that the term, condition or requirement is not reasonable having regard to the circumstances of the case. It should be specifically noted that it is the complainant who bears the onus to prove that the term, condition or requirement is unreasonable, rather than it being for the respondent to prove its reasonableness. This contrasts with the amendments to the *Sex Discrimination Act 1984 (Cth)(SDA)* which have shifted the onus of proving the reasonableness of the requirement or condition onto the respondent.<sup>25</sup>

The reasonableness question is a vital one, as an overly broad interpretation of it can effectively write the prohibition on indirect discrimination out of existence. In Australia, it has been made clear that this concept means more than mere convenience. Thus, for example, in *Banavic* it was stipulated at all stages of the litigation that the criterion of reasonableness is not satisfied merely because a particular system of retrenchment is one which leads to fewer industrial relations

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21. See, for example, the discussion of indirect discrimination in the Race Discrimination Commissioner's *Alcohol Report*, AGPS, Canberra, 1995, Chapter 12, where restrictions on the sale of alcohol in selected areas to contain drunken violence is discussed.

22. Discussed below.

23. *Wards Cove Packing Co. Inc v Atonio* (1989) 490 US 642.

24. See Hunter, *op cit*, Chapter 12.

25. *Sex Discrimination Amendment Act 1995 (Cth)*.

problems. Similarly, the Australian cases have made it clear that factors such as expense and tidiness of administration are not decisive.<sup>26</sup> This is quite different to the approach in the United Kingdom, where the defence is that the requirement or condition is objectively justified and where the courts have held that economic factors and administrative efficiency can be determinative of this element.<sup>27</sup> In Australia, the approach to the reasonableness element is one of balancing relevant factors: the nature and extent of the discriminatory effect produced by the requirement or condition must be weighed against the respondent's reasons for implementing it.<sup>28</sup>

The High Court has vacillated between a narrow and a broad approach to the issue of reasonableness and has held, not very helpfully, that the broad approach requires that "all the circumstances of the case must be taken into account".<sup>29</sup> But this can lead to apparent inconsistencies. For example, in *Styles* it was held that promotions based on seniority were reasonable, whereas in *Kemp v Minister for Education*<sup>30</sup> it was held that promotions based on seniority were not reasonable. The difference was whether the court saw the seniority as being based on merit or merely on length of service. This can be a question of perception as well as fact. Determinations of this issue by tribunals of Anglo-Australians in racial discrimination cases may smack of paternalism, being based on what some critical race theorists call "the hierarchy of credibility."<sup>31</sup>

Some Australian jurisdictions have introduced statutory guidelines with respect to reasonableness. Factors which can be taken into account include the nature and extent of the disadvantage suffered, the feasibility of overcoming or mitigating the disadvantage,<sup>32</sup> the cost of introducing alternative conditions or requirements and the financial circumstances of the respondent.<sup>33</sup> While section 9(1A) expressly

26. *Styles v The Secretary of the Department of Foreign Affairs and Trade* (1989) EOC 92-265.

27. *Rainey v Greater Glasgow Health Board* (1987) 1 AC 224.

28. *Styles, op cit.*

29. *Waters v Public Transport Corporation, ante*, per Dawson and Toohey JJ at p 383. The narrow approach to this issue can be found in the judgement of Mason CJ and Gaudron J.

30. *Ibid.*

31. See J Gregory; *Sex, Race and the Law: Legislating for Equality*, Sage Publications, London, 1989, p 83; Hunter, *op cit*, Chapter 14.

32. *Discrimination Act* (ACT), s8(3).

33. *Anti-Discrimination Act* 1991 (Qld), s11(2).

provides for "having regard to the circumstances of the case" (ie the broad view) it is unlikely that these factors can eliminate the potential problem of patronism or lack of sufficient insight mentioned above. Thus, in the sole reported case to discuss section 9(1A), the closing of a primary school in Alice Springs which had an almost totally Aboriginal student population was held not to amount to unlawful indirect discrimination because the closure was reasonable.<sup>34</sup> It was the only school in the area to be closed. The circumstances adverted to were poor attendance records, cost savings in the closure and the Education Department's promise that a culturally appropriate style of education would be made available in other schools. The (white) Hearing Commissioner had to make a difficult decision based on the evidence before him and weighing up the factors to the best of his ability and experience. There is no guarantee that an Aborigine sitting as Hearing Commissioner on that case would have decided it differently. However, as a legal concept, "reasonableness" can tend to mask the value choices which are essential to arriving at a decision in cases such as this, and sorting the factors into a hierarchy of relevancy. This can sterilise relevant facts by abstracting them from the context in which their meaning *for the complainants* can be appreciated.<sup>35</sup>

In an unreported decision dealing with section 9(1A),<sup>36</sup> the Human Rights and Equal Opportunity Commission (HREOC) did take all relevant circumstances into account when holding, in a case concerning overseas-qualified medical practitioners, that while the setting of a quota for admission of such people to practise in Australia was not unreasonable, the requirement to resit the qualifying examinations when a person failed to meet the quota, regardless of whether she or he had passed the examination at an earlier attempt, was unreasonable. A broadly-based, multi-factored, approach is necessary for any tribunal to be able to approximately appreciate the impact a requirement or condition has had on a complainant. What also may have helped in this case was that the three highly-educated Hearing Commissioners could easily relate to the burden of having to resit exams.

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34. *Aboriginal Students' Support and Parents Awareness Committee, Traeger Park Primary School, Alice Springs v Minister for Education, Northern Territory* (1992) EOC 92-415.

35. See Richard Delgado, "Storytelling for Oppositionists and Others: A Plea for Narrative", (1989) 87 *Michigan Law Review* 2411, especially at 2428.

36. *Siddiqui, op cit.*

## Non-compliance

The third element of indirect racial discrimination is that the complainant does not or cannot comply with the term, condition or requirement. This factor is usually obvious, although it has been held to mean that the complainant must be unable to comply in practice rather than unable to comply physically with the requirement.<sup>37</sup>

The approach is fact-based and specifically excludes issues of causation. Any question of an introduction into this area of a notion analogous to contributory fault has been emphatically excluded.

Non-compliance has also been found to exist in cases where the requirement or condition has not yet been put into effect.<sup>38</sup>

But what this element also means is that while class actions may be possible under the RDA,<sup>39</sup> a well-intentioned representative of people of a particular race who does not herself or himself suffer a disadvantage from the requirement or condition cannot institute a complaint. This can cause difficulties in cases where it may not be culturally appropriate for some groups (such as Moslem women) to institute complaints personally before a stranger.<sup>40</sup>

### (iv) The effect or purpose of the requirement to comply

The fourth element stipulates that compliance with the term, condition or requirement must have the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, by persons of the same race as the complainant, of any human right such as those stipulated in Article 5 of CERD. Article 5 is particularly broad, relating to equal treatment before tribunals,

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37. *Mandla v Dowell Lee* (1983) 2 AC 548, where it was held that a Sikh boy who wore a turban could not comply with the requirement of wearing a school uniform which included a cap, even though he could physically remove the turban. This approach has been approved of in Australia and expressly followed by Einfeld J in *The Australian Public Services Association v The Australian Trade Commission* (1988) EOC 92-228 at p 77162, and by Wilcox J in *Styles, op cit*, p 77238.

38. *Waters v Public Transport Corporation, op cit*.

39. Section 22(1Xc).

40. See Hunter, *op cit*, p 254.

security against violence, the right to vote, civil rights such as the rights to freedom of movement, residence, marriage, property ownership, thought, conscience, religion, opinion, expression, assembly and association, and economic rights such as the rights to work, housing, public health, education and the enjoyment of cultural activities. In other words, all the major social issues which still confront racial minorities in Australia, particularly Aborigines, and with respect to which the RDA is structurally weak, are implicitly imported into the legislative prescription.

The first obvious distinction between this fourth element and all other current Australian provisions dealing with indirect discrimination is that it eliminates the difficult (if not impossible) task of determining whether a disproportionate rate of compliance exists between people in the same class as the complainant compared to others. That statistical pursuit involved two tasks: first, determining the base pools for comparison and, secondly, determining whether there was a difference (and in the case of some legislation, a substantial difference)<sup>41</sup> between those rates of proportionate compliance. I have written elsewhere that this exercise, approached in different ways in the Australian cases, may be an exercise in futility.<sup>42</sup> This exercise has been eliminated in the RDA and more recently in the SDA.<sup>43</sup>

The Explanatory Memorandum to the amending legislation when this sub-section was introduced into the RDA in 1990 cryptically notes that the operation of section 9(1A) will not require it to be established that the term, requirement or condition impairs the enjoyment of a human right of every person of the complainant's race. Presumably, what will be required will be an exercise along the lines of judicial notice that the requirement to comply has either the purpose or the effect of eliminating or lessening the qualitative and quantitative delivery, and application, of human rights equally to persons of the complainant's race as to others. While this description has the advantage of breadth as well as the elimination of dubious statistical analysis, there remain complexities and problems with it.

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41. SDA, ss5(2Xa), 6(2Xa), 7(2Xa); *Disability Discrimination Act, 1992* (Cth) (DDA) s 6(a).

42. See Tahtnindjis, *op tit*, at pp 76008-76014.

43. *Sex Discrimination Amendment Act, 1995* (Cth).

First, because this provision mirrors section 9(1) of the RDA, the difficulties inherent in that provision will also apply here. Thus, the public/private dichotomy is expressly entrenched in cases of indirect racial discrimination, thus potentially lessening its effectiveness and scope.

Second, even though arithmetical calculations have been sensibly dropped, some degree of comparison is necessarily involved. There is no indication how this is to be done other than it being recognised that there is some difference between races with respect to the enjoyment of human rights. This in itself is not new in Australian law as the statistical calculations are sometimes impossible to perform and have been in fact the result of judicial notice (or guess work) before.<sup>44</sup> Presumably, any differential impact will be enough to satisfy this section, particularly considering the use of the terms "nullifying or impairing" and "on an equal footing" in it.<sup>45</sup> The problem, however, and what is not made explicit in the section, is with what or whom this comparison is to be made. In practice, this is likely to be overwhelmingly the standards, beliefs and practices of the white Anglo-Celtic population of Australia. What this means is that these standards have been implicitly imported into the legislation to provide the "norm" against which the unlawfulness of the treatment is to be tested. This can again mask the true impact of a requirement or condition.<sup>46</sup>

Third, and related to the second point, the phrase "on an equal footing" is itself likely to cause problems. Australian courts, even at the highest levels, have so far been largely incapable of exercising either sophisticated or accurate pronouncements on the notion of equality as it applies to human rights law.<sup>47</sup>

44. See, for example, *Waters v Public Transport Coloration* where statistical evidence of the numbers of people with disabilities in Melbourne likely to use trams was non-existent and at each stage of the litigation the tribunals simply took judicial notice of the fact that there must have been some disparate impact of the removal of conductors from trams on people with disabilities when compared to others.
45. This particular issue was not addressed in the *Traeger Park case*, *op cit*, which found that there was no impairment of a right to education at all. This may have been the approach in *Siddiqui*, *op cit*, although the decision refers to a "substantial" difference, which may be a finding of fact rather than an expression of a legal requirement. This finding was based on judicial notice.
46. As may have happened in the *Traeger Park case*, *op cit*, where the right to education seems to have been taken to be a right to a white-oriented education: see p 78968.
47. See, for example, *Gerbardy v Brown*, *op cit*.

Equality in this sense does not necessarily mean equal treatment. It means, as Judge Tanaka pointed out in the *South West Africa* case, treating likes alike and different things differently." This is a crucial point if the law of indirect racial discrimination is to operate without the problems of patronism mentioned above. What is required, but what is not expressed in this provision, is a contextual approach to this issue. Unless care is taken here, these laws may produce assimilation rather than a recognition of, and a tolerance for, difference.<sup>41</sup>

This element therefore contains a twin problem which is both conceptual in nature and a problem of proof. Removing the phrase "on an equal footing" may go some way to addressing the former problem, but not the latter.

(v) Overall

Section 9(1A) is a deeming provision. It provides that if the four elements mentioned above are satisfied, the requirement to comply "is to be treated ... as an act involving a distinction based on, or an act done by reason of, a person's race". The use of the phrases "based on" and "an act done by reason of" are references to the broadly-based section 9(1) in the case of the former, and to the more substantive sections 11-15 in the case of the latter. Section 9(1A) is clearly meant to apply to both. Because of the breadth of section 9(1) compared to the provisions in sections 11-15, it has been the practice of HREOC (at least, it has been the practice of the Brisbane office of the Commission) to treat section 9(1) as a safety-net provision, catching instances of discrimination which might fall outside the strict terms of the other sections. Usually, both section 9(1) and another section of the RDA are written into the formal complaint and the file is handled on that basis. Indirect racial discrimination can thus be as wide, or as narrow, as the RDA allows. Some discussion has arisen in the literature as to whether the rights-based approach of section 9(1) and the differential treatment (formal equality) approach of the other sections will pose difficulties with respect to the application of indirect discrimination.<sup>50</sup> My own opinion is that this is unlikely to amount to a significant

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48. *South West Africa Cases (Second Phase)* (1966) I.C.J. Reports 6, pp 305-6.

49. See generally, Hunter, *op cit*, p 5, and Sadurski, *op cit*. See also M Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia*, Oxford University Press, Melbourne, 1990, Chapter 1.

50. Compare, for example, the Race Discrimination Commissioner's *Alcohol Report*, *op cit*, pp 128-129, which considers this to be a potential problem, with Hunter, *op cit*, at pp 68-69, who does not see this to be a significant problem.

problem, not only because of the breadth of the wording of section 9(1),<sup>51</sup> but also because the words of the phrase "on an equal footing" mentioned above, if interpreted and applied correctly, should not produce a dissonance between these two approaches but should provide a bridge between them. Hopefully, this will mean that a purposive rather than a restrictive application of all of the provisions of the RDA will result.

The problem, however, is that the complaint-based approach of the RDA is not attuned to the essentially standard-setting exercise that is required to create real equality in cases where indirect discrimination has been operating.

## Other Jurisdictions

While it is commonly accepted that the essence of indirect discrimination is the disparate impact of the imposition of terms, requirements or conditions, the statutory schemes by which this is put into effect are by no means uniform.

Thus, while there is agreement as to general principles, there is no agreement as to their implementation, and there is no necessary magic formula in any jurisdiction.

With respect to other Commonwealth legislation, both the SDA and the DDA proscribe indirect discrimination in the same way as does the RDA, with the exception (already mentioned) that the fourth element requires that it be shown that a substantially higher proportion of people of a different status to the complainant are able to comply with the requirement or condition. The *Sex Discrimination Amendment Act 1995* has amended the SDA by withdrawing the element relating to the different rates of proportionate compliance and also altering the reasonableness element by removing it from the definition of indirect discrimination and making it a part of a defence to such a complaint, (ie. the onus will be on the respondent to prove the reasonableness of the requirement or condition). To the best of my knowledge, there are no similar amendments in train for the *Disability Discrimination Act 1992 (Cth)* (DDA). The *Human Rights and Equal Opportunity Commission Act 1986* (HREOCA) contains no specific provisions at all relating to indirect discrimination.

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51. Hunter, *op cit*, p 69.

With respect to the legislation in the states and territories, all jurisdictions which have anti-discrimination legislation (which, at the moment, are all except Tasmania) contain provisions relating to indirect discrimination. Apart from minor differences, the legislation in New South Wales, Queensland, Victoria, South Australia and Western Australia are in similar or identical terms to the current provisions in the SDA and DDA.

The current provision in the Northern Territory does not specifically mention indirect discrimination but instead has a provision which reads similarly to section 9(1) of the RDA.<sup>52</sup> This is presumably on the belief that it will cover matters of indirect discrimination. The provision in the Australian Capital Territory (ACT) has an effect similar to that of the RDA in that instead of having to show disproportionate rates of compliance, all that need be shown is that the condition or requirement has the effect of disadvantaging people.<sup>53</sup> In the ACT, in addition, it is also for the respondent to prove that the requirement or condition is reasonable rather than for the complainant to prove the reverse.

With respect to overseas jurisdictions, the British *Race Relations Act 1976* is in similar terms to the current SDA and the DDA, although the differential compliance there has to be shown to be "considerably smaller" for the complainant's class and the respondent has to show that the condition or requirement is not justifiable.<sup>54</sup>

In the US, Canada and New Zealand on the other hand, indirect discrimination has been primarily developed through the courts rather than in legislation. This has been largely the result of a purposive approach to the legislation. Thus, in the US the concept of indirect discrimination was read into Title VII of the *Civil Rights Act 1964*, although this was in part based on discrimination guidelines issued by the Equal Employment Opportunities Commission.<sup>55</sup> The defence developed by the US Supreme Court was that of justification because of business necessity (at least in employment cases). The approach of the Canadian Supreme Court, in interpreting

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52. *Anti-Discrimination Act 1992*, (NT) s20.

53. *Discrimination Act 1991*, (ACT) s8.

54. Section 1(1)(b).

55. *Griggs v Duke Power Company*, *op cit*.

the Ontario *Human Rights Code* and the *Canadian Human Rights Act*, adopted a similar approach, indicating the special status of human rights legislation which requires courts to seek out the purpose of the legislation and give effect to it.<sup>56</sup> The defence developed by the Canadian courts has been one of reasonable accommodation of the complainant, rather than business necessity.<sup>57</sup> Later legislative definitions of indirect discrimination in Canada are similar to those current in Australia except that, instead of being expressed in terms of a disproportionate impact of a requirement or condition, there must rather be shown to be an exclusion restriction or preference of a group of persons identified by a prohibited ground of discrimination.<sup>58</sup> In New Zealand, the *Human Rights Commission Act 1977* has been interpreted by the Equal Opportunities Tribunal as encompassing indirect as well as direct discrimination in provisions which, on their face, only appear to relate to direct discrimination.<sup>59</sup>

What strikes the reader when pursuing these cases, when compared to the Australian case law, is the lack of obsession with the words of legislation and a greater concern with its purpose and effect. While the High Court of Australia has started to show some sensitivity to the effect of human rights norms in domestic Australian law,<sup>60</sup> this does not appear to be a hallmark of cases involving indirect discrimination in Australia generally. In addition, reliance on judicial development can be a double-edged sword: a court's approach may swing from purposive or developmental to conservative, as has appeared to happen in the US.<sup>61</sup> Some critical analyses of the US system in fact conclude that this approach has been ineffective in reducing prejudice and discrimination because most judges and lawyers adopt a "perpetrator" rather than a "victim" perspective, that is, they look for abstract norms unsullied by history or social

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56. *Ontario Human Rights Commission and O'Malley v Simpsons-Sears Ltd* (1985) 2 SCR 536 p 547

57. *Ibid.* p 558.

58. *Ontario Human Rights Code* 1981, s10.

59. *The Proceedings Commissioner v Air New Zealand* (1989) EOC 92-258. This case involved interpretation of the *Human Rights Commission Act* which does not apply to race discrimination. Race discrimination is made unlawful in the *Race Relations Act 1971*. There have been no cases requiring the interpretation of the provisions of the latter with respect to indirect discrimination.

60. A recent example is *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) EOC 92-696.

61. See, for example, *Wards Cove Packing Co. v Atonio* 490 US 642 (1989).

reality, thus ignoring the actual status of black Americans and serving to validate a generally unjust social system.<sup>62</sup>

In Australia, with the judgements on indirect discrimination in the SDA and DDA, we have vague legislative elements mediated by sometimes confusing judicial guidelines. With respect to the RDA, we have even vaguer legislative elements mediated by virtually nothing. There has only been one reported case dealing with section 9(1A) which it did not dwell on the precise meaning of the section,<sup>63</sup> and another unreported case.<sup>64</sup> While it would be tempting to suggest that it might have been better to leave section 9 well enough alone and wait for the judiciary to formally interpret indirect discrimination into it, the experience in the US indicated that this is not necessarily a satisfactory approach.

## Applications and Critiques

The first thing that must be noted about the application of laws relating to indirect racial discrimination in Australia is the dearth of reported cases dealing with this concept.<sup>65</sup>

While the number of reported cases of indirect discrimination generally in Australia is not large, there nevertheless have been several, with laws relating to both indirect sex discrimination and indirect disability discrimination going to the High Court for determination.<sup>66</sup> The answer to this question cannot be that there simply is not much indirect racial discrimination occurring in Australia. For example, the 1991 HREOC report on the provision of health and medical services to the Aboriginal communities of Cooktown and other places indicated that one of

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62. A D Freeman, "Legitimising Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine" (1978) 62 *Minnesota J'm Review* 1049. See also Neil Gotanda, "A Critique of Our Constitution is Coloured Blind" (1991) 44 *Stanford Law Review* 1.

63. *Aboriginal Students' Support and Parents Awareness Committee, Traeger Park Primary School, Alice Springs v Minister for Education, Northern Territory* (1992) EOC 92-415.

64. *Siddiqui, op cit.*

65. There are two dealing specifically with s9(1A): the *Traeger Park* case, *op cit* and *Siddiqui, op cit*, and only a handful from other Australian jurisdictions.

66. *Australian Iron and Steely Banovic, op cit; Waters v Public Transport Corporation, op cit.*

the problems with the delivery of health programs for Aborigines is that most of these programs are directed from a white middle class perspective.<sup>67</sup> The 1991 report on discrimination against immigrant workers in Australia highlighted not only labour market issues but also discrimination in the areas of education and training, and the recognition of overseas skills and qualifications.<sup>68</sup> Also in 1991 the Administrative Review Council produced its report on access to administrative review by members of ethnic communities in Australia, highlighting both the direct and indirect discrimination which occurs in this area of service delivery.<sup>69</sup> Chris Cunneen's 1990 study of Aboriginal juveniles and police violence indicated that while a senior staff member at a juvenile detention institution in New South Wales contended that no discrimination against Aboriginal juveniles occurred because "they're all treated the same", the specific programs available at best devalued and at worst actively repressed Aboriginal culture due to the Anglo-Celtic presumptuous of those devising and implementing them.<sup>70</sup>

Similarly, the report of the Royal Commission into Aboriginal Deaths in Custody, in Recommendation 212, suggested that the area of indirect discrimination should be examined in any attempts to curb Aboriginal deaths in jails and police lock-ups.<sup>71</sup>

However, the second report of the Aboriginal and Torres Strait Islander Social Justice Commissioner, when addressing this recommendation, implies the limitations inherent in the law of indirect discrimination by not mentioning it at all, but emphasising instead the educational strategies needed to implement this

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67. *The Provision of Health and Medical Services to the Aboriginal Communities of Cook Town, Hopevale and Wodgil*, HREOC, 1991, pp 24ff.

68. L Foster, A Marshall and L S Williams, *Discrimination Against Immigrant Workers in Australia: A Report Prepared by the Bureau of Immigration Research for the International Labour Office*, AGPS, Canberra 1991.

69. Administrative Review Council, *Access to Administrative Review by Members of Australia's Ethnic Communities: Report to the Attorney-General*, Report 34, AGPS, Canberra, 1991.

70. C Cunneen, *A Study of Aboriginal Juveniles and Police Violence*, a report commissioned by the National Inquiry into Racist Violence, Human Rights Australia, Sydney, 1990, p 48.

71. *Three Years On: Implementation of Commonwealth Government Responses to the Recommendations of the Royal Commission into Aboriginal Deaths in Custody*, Volume 2: Reports on Programs and Recommendations AGPS, Canberra, 1995.

recommendation properly.<sup>72</sup> The Race Discrimination Commissioner's 1991 Report on the accreditation of overseas trained doctors also illustrated instances of indirect discrimination,<sup>73</sup> but her 1995 report on alcohol canvasses not only the possibilities of the uses of indirect discrimination with respect to the limitation of alcohol consumption in Aboriginal communities, but also the possibly negative effects of the application of the principles of indirect discrimination to these issues.<sup>74</sup>

All laws against discrimination, whether direct or indirect, have as their goal social equity. The problems relevant to indirect discrimination highlighted by the reports referred to above indicate that there is a frequent confusion between equity and equality in this regard. As Sandra Berns has pointed out: "terms such as ... 'equality' resonate with meaning only when and to the extent that they are situated within concrete narratives, narratives which lay bare the history, the structures and the values which sustain and support them".<sup>75</sup> For example, the *Alcohol Report* points out the existence of alcoholism in indigenous communities that is grounded in the history of the mistreatment of Aboriginal and Torres Strait Island peoples in Australia since colonisation and in the contemporary experience of most indigenous people's lives. There is a direct link between alcoholism and unemployment, poverty, education and high rates of imprisonment.<sup>76</sup> A major problem is that these indigenous narratives are often being silenced in the legal system. The 'perpetrator' and 'victim' perspectives mentioned above with respect to US approaches are not unique to that country. The institutional structure and processes into which Article 5 of CERD is put by legislation such as the RDA not only attempt to regulate racial discrimination, but actually construct the notion of 'race' as something other than Anglo-Australian and encourage the perception of advantage and disadvantage in white terms. Recognising this fact is fundamental to any strategy of change.

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72. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Second Report*, AGPS, Canberra, 1995, pp 192ff.

73. *The Experience of Overseas Medical Practitioners in Australia: An Analysis in the Light of the Racial Discrimination Act 1975*, HREOC, Sydney, 1991.

74. *Race Discrimination, Human Rights and the Distribution of Alcohol*, A Report by the Race Discrimination Commissioner, AGPS, Canberra, 1995, Chapter 12.

75. S Berns, "Tolerance and Substantive Equality in Rawls: Incompatible Ideals" (1990) 2 *Laws in Context* 112, p 120.

76. *The Alcohol Report*, *op cit*, Chapter 1.

In the specific context of indirect discrimination, inability to comply with a requirement or condition can often be the result of socio-cultural factors, as the *Griggs* case from the United States illustrated. The fact, however, is that according to recent Australian census statistics, only 25% of Aborigines aged over 15 had any formal educational qualifications, compared with 40% of all Australians.<sup>77</sup> The precise factors leading to indirect discrimination in the leading US case apply currently in Australia. In addition, the statistics indicating a much higher rate of Aboriginal incarceration, compared to the Australian community generally, indicate another area of indirect discrimination which is often overlooked: employers sometimes seek out employees' conviction records when determining who to hire. At federal level, discrimination on the basis of criminal record is only proscribed by HREOC, which is Australia's most toothless human rights instrument. It is only otherwise proscribed in Australia in the Northern Territory. However, considering the statistics of Aboriginal incarceration, there may in fact be an issue of indirect racial discrimination in these circumstances which has not yet been appreciated or considered.<sup>78</sup>

There can be practical reasons for the under-utilisation of laws and the procedures directed to indirect discrimination. For example, some form of implicit statistical analysis is required to indicate the existence of indirect discrimination in the legal sense. Indirect discrimination is concerned with group patterns rather than individual relationships. Gathering the evidence may therefore be extremely difficult, if not impossible. The approach of section 9(1A) of the RDA, which does not specifically require statistical analyses of disproportionate compliance with a requirement or condition, does not totally overcome this problem, as discussed above.

There can also be resistance to change: changing employment promotion practices by requiring advertising for positions to be directed to people outside the existing personnel of an organisation, thus breaking down the homosocial profile of the organisation, may be resisted by trade unions who have fought hard for the job security of their members.

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77. Figures from the 1985 Census, quoted in Hunter, *op cit*, p 144.

78. Cf Hunter, *op cit*, pp 163-164.

As has already been pointed out, the RDA does not allow complaints to be initiated by an agent of the complainant (although trade unions may do so),<sup>79</sup> making it difficult for some people to lodge complaints in the first place. What might be added to this is the fact that the conciliation process itself may be culturally inappropriate for some groups or may perpetuate the biases already mentioned with respect to the law generally.<sup>80</sup>

Also, the RDA can only deal with discrimination on the basis of race. As the Second Report of the Aboriginal and Torres Strait Islander Social Justice Commissioner succinctly points out, the issues of discrimination for indigenous women may involve matters of both sex and racial discrimination.<sup>81</sup> The problem is that the law must be adapted to fit the needs of racial groups, rather than the problems of racial groups being recast to fit the existing laws and the procedures under them.

Critical race theorists are divided as to the usefulness of the law in combating racial discrimination. Thus, for example, Derrick Bell maintains that the law is of little use in this regard.<sup>82</sup> On the other hand, John Powell argues that equality-based arguments can promote the cause of racial justice and equality and that the very act of making those arguments can prove to be transformative, whether or not they effect immediate results.<sup>83</sup>

The problem inherent in talking about legal equality in the terms in which I have used it in this paper is that the assumption that legal norms are colour-blind is almost certainly a false one. If this is so, law has at best difficulties and at worst finds it impossible to achieve neutrality because our culture and experience lead us to organise and process information in a race-conscious way—and also because white culture will continue to be seen as superior.<sup>84</sup> Moreover, if the law is to work

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79. Section 22(1)(d).

80. See Thornton, *op cit*, Chapter 5.

81. *The Second Report, op cit*, pp 195-196, which points out that the number of indigenous women who died through family violence exceeds the number of Aboriginal deaths in custody.

82. D A Bell Jr, "Racial Realism", (1992) 24 *Connecticut Law Review* 363.

83. J A Powell, "Racial Realism or Racial Despair?", (1992) 24 *Connecticut Law Review* 553.

84. T. A Aleinikoff, "A Case for Race-Consciousness", (1991) 91 *Columbia Law Review* 1060.

towards real rather than merely formal equality, the insistence on the existence of a 'colour-blind' jurisprudence silences the very voices that must be heard in this context.<sup>85</sup> As Richard Delgado has written:

...many in the majority hold that any inequality between blacks and whites is due either to cultural lag, or inadequate enforcement of currently existing beneficial laws—both of which are easily correctable. For many minority persons, the principal instrument of their subordination is neither of these. Rather, it is the prevailing *mindset* by means of which members of the dominant group justify the world as it is.. •86

But law cannot be ignored precisely because of its power to define. Equally we must not privilege the law in this regard (as some approaches, such as that in parts of the *Alcohol Report*, seem to do) and the net must therefore be cast wider to use the law in conjunction with other strategies. Law is a site of political struggle. It is a form of power—although only one form—but, precisely because of this, it is still useful.<sup>87</sup> We must not throw the baby out with the bath water.

## Conclusion

Recent studies indicate that the instances of indirect racial discrimination may be enormous, occurring in areas of employment (and unemployment), education and training, health and justice.<sup>88</sup> It cannot any longer be said that concepts of discrimination, including indirect discrimination, are unknown in the Australian community, particularly to large employers. This is shown by the growing awareness of indirect discrimination as it impacts upon women. Nevertheless, the concept of indirect racial discrimination appears to be much less understood or recognised. This occurs both in the community and in the cases. A striking feature of indirect racial discrimination in Australia is that it has hardly ever been litigated, and section 9(1A) of the RDA itself has never been the subject of extensive judicial

85. See A E Cook, "The Temptation and Fall of Original Understanding" (1990) *Duke Law Journal*, p 1163

86. R Delgado, "Storytelling ... ", *op Cu*, p2413.

87. See R Delgado, "The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?", (1987) 22 *Harvard Civil Rights - Civil Liberties Law Review* 301.

88. See *State of the Nation: A Report on People of Non-English Speaking Backgrounds*, Report by the Federal Race Discrimination Commissioner AGPS, Canberra, 1994, Updates pp 91ff.

consideration even though it has been in existence for five years. Moreover, there is not only a lack of case law in this area, but there also exist cases, in both discrimination law and in other areas, where indirect discrimination could have

been raised as an issue but was not.<sup>89</sup> Education thus seems to be an essential stratagem to employ together with the law. This will have to occur not only in the Australian community generally (and from the point of view of potential complainants as well as potential respondents) but also within the legal profession, at all levels.

While this should include an assault on the structural discrimination which has now been well recognised as arising from organisational norms, rules and procedures which historically reflect the behaviour patterns and values of the dominant group in public life,<sup>90</sup> the issue, in my view, is that education will need to be far more basic than this to overcome the pervasive Australian ignorance of both the issues and the law.

Race is essentially a cultural construct.<sup>91</sup> The Royal Commission into Aboriginal Deaths in Custody, in examining the extent to which racial discrimination was operating, found that the factors contributing to deaths in custody (and a high rate

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89. See, for example, *Chief General Manager, Department of Health v Arumugam* (1987) EOC 92-195, where an Indian doctor was passed over for the job of hospital superintendent despite having qualifications superior to those of the successful Anglo-Celtic applicant. It was found by the Supreme Court of Victoria that the selection panel had been looking for a "dynamic and articulate" superintendent and considered the complainant to be less articulate and aggressive than the successful candidate. Indirect discrimination did not appear to have been argued in this case. In addition, in the Family Court of Australia in *Sajdak and Sajdak* (1993) FLC 92-348, the non-English speaking mother of a child made an application to take the child overseas. She had no legal representation. She did have an interpreter, but did not make an application for an adjournment of the matter because she was uncertain what to do and did not understand the procedures. Her application was refused. On appeal, the Full Court of the Family Court ordered a new trial on the basis that the original hearing had not accorded her a fair trial. The bases that the Full Court relied upon to come to this conclusion were the fact that the wife was without legal advice, had not time to consider her position and had no real prospect of successfully challenging the husband who had legal representation and was in a vastly superior position. The issue that the process itself might have amounted to indirect discrimination against her was entirely overlooked.

90. See Hunter, *op cit*, pp 5ff.

91. See M De Lepervanche and G Bottomley (eds), *The Cultural Construction of Race*, Sydney Association for Studies in Society and Culture, Sydney, 1988.

of incarceration in the first place) included the criminal justice system itself and the way it defines criminality, socio-economic disadvantage, the experience of racism, the role of the family and home life, cultural factors and a range of other associated factors.

These, and the issues dealing with indirect discrimination discussed above, are systemic problems, but the RDA does not have a systemic impact. It attacks causes rather than systems. Section 9(1A) is essentially an exercise in damage control rather than in the prevention of racism despite its links with the wide-ranging rights-based Article 5 of the Convention. The structure hampers the principle. Strategies like the Victorian Aboriginal Employment Strategy<sup>92</sup> and the work of the federal and state bodies dealing with the recognition of overseas skills may do more than the RDA can in this regard.

Remedial strategies, as I see them, are essentially at three levels. At a minimalist level, we could retain the existing legislation dealing with indirect racial discrimination and put in place wide-ranging educational programs. We could also amend the structure of the legislative definition of indirect discrimination by recasting the identification of the requirement or condition so that it is no longer the pivotal element on which everything else hangs. We could also eliminate the reasonableness element from the definition and recast it as a defence for the respondent to prove.

At a medium level, we could introduce into the legislation (and ultimately the case law based upon it), the broader perspectives offered by critical race theory.<sup>93</sup> This would help to embrace the multi-faceted approach deemed necessary in the reports of both the Royal Commission into Aboriginal Deaths in Custody and those of the Aboriginal and Torres Strait Islander Social Justice Commissioner, freeing the legal consideration of race discrimination from the bounds of race alone and promoting a consideration of other factors and other grounds of discrimination which the system at present finds difficult to cope with as a coherent whole.<sup>94</sup> Precisely how this is to

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92. Public Service Board of Victoria, *Aboriginal Employment Strategy for the Victorian Public Sector, 1991-94*, Melbourne, 1991,

93. See R Delgado, "Recasting the American Race Problem" (1991) 79 *California Law Review* 1389.

94. For example, *Dao & Anor v Australian Postal Commission* (1984) EOC 92-107 involved sex discrimination as well as race discrimination, and it was these factors taken together which were crucial in this case. These combinations can be significant in other areas as well: see *Bell v Galea* (1994) EOC 92-579 (a case involving sexual harassment and impairment).

be achieved is a difficult question, but a specific reference might be made to expert evidence. We insist on environmental impact statements being compiled in cases involving land use. Why not a cultural impact statement so that legislation and case law are no longer used to screen out relevant racial perspectives?

At the third and most radical level, we could recast the law of indirect racial discrimination from a complaints-based approach, relying on the paradigm of differential treatment, to a standards-based approach. This is in itself not new in Australian discrimination law, it is already (in part) incorporated in section 31 of the DDA where the Minister can set disability standards which then have a direct effect on the operation of the Act. It is time that as a community we bit the bullet and expressly injected policy considerations into the legislation to make it work as it should and as it might. These considerations are already implicitly in the current legislation on indirect discrimination, going to the heart of crucial questions such as the issues of reasonableness and the recognition of discriminatory effects of requirements or conditions. But for structural reasons in the Act, and process reasons in its implementation and application, they are lying dormant.

The law at present cannot do this job on its own. We must help it along. In *Tarumi v Bankstown City Council*,<sup>95</sup> a decision of the Land and Environment Court of New South Wales, the issue was a development application for the building of a Moslem school which had been refused by the local Council. HREOC had been granted leave to intervene in the case so that it could present issues of human rights and racial discrimination before the court. After noting that he was "anxious that this Court did not become a forum for the sniffing out of heresy",<sup>96</sup> Cripps J then said:

I was invited to suggest some judicial guidelines concerning the *Human Rights and Equal Opportunity Commission Act 1986*, and the *Racial Discrimination Act 1975* in its general application to planning laws in New South Wales. I declined to respond to the invitation. To embark upon such an exercise would be, at best, to impose an onerous burden not only on the Court but to other parties to the litigation and, at worst, may well divert the Court from its true function in these proceedings which is to determine whether development consent should be granted or withheld.<sup>97</sup>

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95. (1987) EOC 92-214.

96. *Ibid*, p 77005.

97. *Ibid*, p 77006.

One day Australian society, including its judiciary, may have a different appreciation of the "true function" of a court. The RDA may help in this process, but not on its own and not as it presently stands.

### Issues for consideration

- Currently the burden of proof under the RDA is on the complainant to show that a term, requirement or condition is 'unreasonable'. Should the RDA be amended along the lines of the SDA where the burden is transferred to the respondent after a prima facie case has been established?
- Should section 9(1A) be redrafted to clarify the various requirements to establish a case of indirect discrimination. Would this facilitate the use of the indirect discrimination provision?
- How can public awareness of indirect discrimination be improved so that a greater number of cases can be identified?



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## FIGHTING RACIAL HATRED

Saku Akmeemana\* and Melinda Jones\*\*

*"Good gracious. Anybody hurt?"*

*"No'm. Killed a nigger."*

*"Well, it's lucky because sometimes people do get hurt"*

Mark Twain. *The Adventures of Huckleberry Finn*

The intense controversy that has recently surrounded the enactment of the *Racial Hatred Act* 1995 (Cth) emanates from the fact that regulation of racist speech presents an acute dilemma for a society which at once adheres to the values of diversity, equality, liberty and personal autonomy, and it poses fundamental questions about the role of law in a pluralist society. In presenting an intractable problem for free speech theory, this issue has divided civil libertarians on the one hand, and civil rights activists and critical race theorists on the other. In light of the development by the High Court of a free speech jurisprudence, it is inevitable that the constitutional validity of racial vilification laws will be challenged. However, the notion of freedom of speech must be understood in the socio-political context of Australian society and in light of international human rights norms, which now play a significant role in Australian political and legal thought. It is argued in this paper that not only does the philosophical and legal basis of a right to free speech allow for the possibility of restrictions on some types of speech, but that regulating racial vilification is essential to Australian cultural pluralism.

### I. A GAP IN THE IMPLEMENTATION OF CERD

The idea of racial supremacy is one that has been universally rejected. Collective experience tells us that slavery, genocide, colonialism and apartheid are antithetical to notions of human dignity and equality. As an idea that is linked to continued discrimination against historically subordinated groups, the notion of racial superiority is extremely harmful.

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The purpose and effect of racist propaganda is, after all, to lay the foundations for the mistreatment of members of the victimised group.<sup>1</sup> This has been accepted by the international community which has displayed a profound commitment to learn from the lessons of history, particularly the Holocaust. In fact, the immediate stimulus for the drafting of the *International Convention on the Elimination of All Forms of Discrimination* (CERD) was a reaction to the 'Swastika epidemics' and other manifestations of anti-Semitism and racial and religious hatred in 1959-60.<sup>2</sup>

Mindful of the legacies of racial vilification, the international debate has centred on how to control hate speech, not on whether it should be controlled. The debate has assumed contemporary significance because of the recent rise in xenophobic and genocidal activities, in places such as Cambodia, Rwanda and Bosnia-Herzegovina, and because of the increase in the dissemination of hate propaganda, at a level unprecedented since World War II.

The central international standards on the regulation of racial hatred are found in Article 4 of the CERD and Article 20(2) of the *International Covenant on Civil Political Rights* (ICCPR). These articles are aimed at preventing the publication of hostile or derogatory statements designed to bring group members into opprobrium or to promote hostility, invidious discrimination or violence against them. Despite the close adherence of the *Racial Discrimination Act 1975* (Cth) (RDA) to CERD, Australia did not implement Article 4 into domestic law.

Article 4 of CERD imposes a positive obligation on States Parties to:

- (a) ... declare as 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;

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1. K Mahoney, "Hate Vilification Legislation and Freedom of Expression: Where is the Balance?", (1994) 1 *Australian Journal of Human Rights* 353.

2. N Lerner, *The United Nations Convention on the Elimination of All Forms of Racial Discrimination*, Sijthoff & Noordhoff, 1980, p7 ff.

- (b) ... declare illegal and prohibit organisations, and also organised and all other propaganda activities, which promote and incite racial discrimination, and shall recognise participation in such organisations or activities as an offence punishable by law;
- (c) ... not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

## The Australian response to CERD

Australia ratified CERD on 30 September 1975, and expressed the reservation that:

The Government of 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 attempt. 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).

Such a moment is yet to arrive. Nonetheless, the enactment of federal legislation proscribing racist speech has been on and off the political agenda for over 20 years. The original *Racial Discrimination Bill* of 1973 contained clauses 28 and 29, which created offences relating to the incitement of racial disharmony and the dissemination of ideas based on racial superiority or hatred. The first of these was omitted from the *Racial Discrimination Bill* 1974, and the latter was removed during debate on the Bill.<sup>3</sup> In the meantime, several state parliaments have introduced legislation in an attempt to deal with the problem of racial vilification.<sup>4</sup> It should be noted that Australia also made a reservation to Article 20(2) of the ICCPR.<sup>5</sup>

3. House of Representatives *Hansard*, 9 April 1975, pp 1408-1409.

4. *Anti-Discrimination Act* 1977 (NSW) ss20B-22; *Discrimination Act* 1991 (ACT) ss65-67; *Criminal Code* (WA) ss76-80; and *Anti-Discrimination Act* 1992 (Qld) s126. Currently, there is legislation before the South Australian Parliament proposing both civil and criminal provisions in relation to racial vilification.

5. Australia expressed a reservation when it signed the covenant, to the effect that it interpreted the rights provided for by Articles 19 (freedom of expression), 21 (right of peaceful assembly) and 22 (right to freedom of association) as being consistent with Article 20.

Three reports at the Commonwealth level in recent years have recommended the need for federal racial vilification legislation: the *Report of the National Inquiry into Racist Violence*<sup>6</sup> (NIRV), the final Report of the Royal Commission into Aboriginal Deaths in Custody<sup>7</sup> and the Australian Law Reform Commission's (ALRC) report on *Multiculturalism and the Law*.<sup>8</sup> These were not the first reports to make such recommendations. In 1983, the former Human Rights Commission recommended the enactment of national legislation against the incitement of racial hatred and racial defamation.<sup>9</sup> This was prompted by the large number of complaints concerning the expression of racist ideas and racial denigration which were received by the Commission, despite these complaints being outside jurisdiction. From October 1975 until April 1982, there were some 1,193 formal complaints about racist speech,<sup>10</sup> with many other complaints where racist speech formed a secondary part of the complaint.

The Human Rights and Equal Opportunity Commission (HREOC) conducted the National Inquiry into Racist Violence from 1989 until 1991. The Inquiry had been motivated by widespread community perceptions that racist attacks, both physical and verbal, were on the increase, and attempted to define and quantify racist violence in our society. At the time there were indications of a possible resurgence of racist violence and an increase in organised violence by racist groups. In 1991, the Commission released its report of the Inquiry.

The Inquiry found that Australia was a relatively non-violent and socially cohesive nation. However, while racist violence on the basis of ethnic identity did not occur at the level found in many other countries, it was a serious cause for concern. Racism was found to pervade Australian institutions, both public and private. The

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6. Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia*, AGPS, 1991, at 389.
  7. Royal Commission into Aboriginal Deaths in Custody, *Final Report*, Volume 4, AGPS, 1991.
  8. Australian Law Reform Commission, *Multiculturalism and the Law*, Report 57, AGPS, 1992, paras 7.33-7.39.
  9. Human Rights Commission, Report No 7, *Proposal for Amendments to the Racial Discrimination Act to cover Incitement to Racial Hatred and Racial Defamation*, AGPS, Canberra, 1983, Chapter V, at 14 ff.
  10. This number amounted to almost one quarter of all complaints received under the RDA. There can be little doubt that only a small percentage of incidents involving racist speech resulted in complaints being lodged with the Human Rights Commission.

Inquiry reported that racism and racist violence were endemic to the daily lives of people of Aboriginal and Torres Strait Islander background, and Aboriginal-police relations were at a crisis point. People of non-English speaking background were being subject to racist intimidation and harassment because they were visibly different, and unfamiliarity with the English language could exacerbate the situation.

NIRV made a number of recommendations to combat racist violence, including the amendment of the state and federal Crimes Acts in order to enable courts to impose higher penalties where there is a racist motivation or element in the commission of an offence. It also recommended the development of uniform national procedures for the collection of statistics on racist violence, intimidation and harassment, and that such statistics be collected and analysed nationally by an appropriate federal agency. The Inquiry recommended an expansion of the civil remedies available under the RDA—similar to those already provided for racial discrimination—to prohibit racist harassment and the incitement of racial hostility, and that the RDA be amended to provide that discrimination against or harassment of a person on account of that person's religious belief be prohibited where the religious belief is commonly associated with persons of a particular race or of a particular ethnic group and is used as a surrogate for discrimination or harassment on the basis of race or ethnicity. The Inquiry also proposed an amendment to the *Crimes Act 1914* (Cth) to create a new criminal offence of racist violence and intimidation, and a clearly identified offence of incitement to racist violence and racial hatred which is likely to lead to violence.

The report of the Royal Commission into Aboriginal Deaths in Custody also recommended that racial vilification legislation be introduced along the lines of the New South Wales model, but restricted to creating a civil wrong. A majority of the Australian Law Reform Commission, in its report on *Multiculturalism and the Law*, was in favour of making incitement to racist hatred and hostility a civil wrong, susceptible to conciliation and civil remedies. Two Commission members dissented, proposing a new provision for the *Crimes Act 1914* (Cth) relating to the incitement of hatred and hostility. The ALRC, once again by majority, also recommended amendments to Commonwealth legislation regulating broadcasting, including a provision prohibiting the broadcasting of material likely to incite hatred or hostility on the grounds of race.

## Individual Communications Procedures

As a result of Australia's accession to the First Optional Protocol to the ICCPR (which took effect on 25 December 1991)<sup>11</sup> and the lodging of a declaration under Article 14 of CERD on 28 January 1993, it is imperative that the obligations contained in these instruments are adequately implemented into Australian law. The effect of Australia's accession to the Protocol is that the Human Rights Committee,<sup>12</sup> established under the ICCPR, is competent to receive and consider communications from individuals who claim to be victims of a violation by a State of any of the rights contained in the Covenant.<sup>13</sup> Applicants must first exhaust domestic remedies, but the Committee has taken the view that only remedies which are available and effective need to be exhausted. Similarly, the effect of the declaration made by Australia under Article 14 of CERD is that individual Australians can make complaints to the Committee for the Elimination of Racial Discrimination.<sup>14</sup> Australia is unlikely to remove its reservations to these instruments until it is able to enact legislation comprehensively implementing the obligations contained therein. Otherwise, it is vulnerable to complaints under the individual communications procedures.

As outlined in Chapter 2 of this publication, findings of both Committees are not legally binding on States Parties, and Australia could choose to ignore or implement any recommendations. However, a failure to act upon a finding by a UN Committee that there has been a breach of international obligations is likely to attract severe criticism.

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11. For a discussion of the implications of this see C Caleo, "Implications of Australia's Accession to the First Optional Protocol to the ICCPR", (1993) 4 *Public Law Review* 175.

12. In December 1991, a Tasmanian gay rights activist lodged a communication challenging a State law which makes homosexual sexual activity an offence in that State. In what is now known as the *Toonen* case, the Human Rights Committee found that ss122(a), 122(c) and 123 of the *Tasmanian Criminal Code* were in breach of Articles 17(1) and 2(1) of the ICCPR. This has caused the Australian Government considerable embarrassment and led to the enactment of the *Human Rights (Sexual Conduct) Act 1994* (Cth).

13. The significance of these international developments is not only the existence of a new remedy which may be available in the battle to counter racial discrimination, but in the indirect influence that the international law is having on the development of Australian common law.

14. See Chapter 2.

## International position

Australia's reputation as a leader in the field of human rights has been tarnished by criticism of its failure to withdraw the reservation to Article 4 and to enact legislation which implements its terms. The Committee on the Elimination of Racial Discrimination has insisted that reporting States have a duty to legislate in compliance with Article 4, irrespective of whether the prohibited activities or organisations constitute a significant issue for that jurisdiction.<sup>5</sup>

The Committee's understanding of Article 4 is forcefully stated in General Recommendation 15,<sup>16</sup> where States are reminded both of the mandatory nature of the article and of the obligation not only to establish certain criminal laws but also to ensure that the laws are effectively enforced. This is consistent with the prophylactic nature of the article, which "aims at prevention rather than cure; the penalty of the law is supposed to deter racism or racial discrimination as well as activities aimed at their promotion or incitement".<sup>17</sup> Some commentators have argued that the "with due regard",<sup>18</sup> clause tempers an absolutist reading of Article 4, in light of the right to freedom of expression contained in the *Universal Declaration of Human Rights*. This reasoning has not been followed by the CERD Committee, and the issue remains highly controversial.<sup>19</sup>

The CERD Committee recently considered the meaning of Article 4 in *LK v The Netherlands*.<sup>20</sup> In that decision, the Committee considered that the Netherlands had

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15. T Meron, "The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination", (1985) *The American Journal of International Law* 283 at 297. See also General Recommendation I, Dec. 3(v), 27 UNGAOR Supp. (No. 18) at 37.
  16. UN Doc. HRO/GEN/I/Rev 1 at 68.
  17. J Ingles, *Study on the Implementation of Article 4 of the International Convention on the Elimination of All forms of Racial Discrimination*, UN Doc A/CONF. 119/10 (1983).
  18. The introductory paragraph of Article 4 declares that "States Parties... undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, 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 Article 5 of this Convention."
  19. KJ Partsch, "Racial Speech and Human Rights: Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination", in S Coliver (ed), *Striking a Balance*, Article 19, Human Rights Centre, University of Essex, UK, 1992, p 21.
  20. Communication No 4/1991; UN Doc A/48/18, p 130.

violated Article 4 through its failure to prosecute a case involving racist intimidation and harassment. A small group of residents of a public housing scheme had told LK, a prospective neighbour of Moroccan origin, that no more 'foreigners' were welcome in the neighbourhood, and then organised a petition intimating that he would not be accepted in the area and recommending that the city find him alternative accommodation. Some of the protestors also threatened the property of LK. The Committee stated that, despite its recognition of the State's freedom to decide which cases to prosecute according to the dictates of public policy, prosecutions must be taken in each case of alleged racial discrimination in light of the guarantees laid down in the Convention. The Opinion in this matter may be considered to be inconsistent with that in the earlier matter of *Yimaz-Dogan v The Netherlandr*,<sup>21</sup> in which the State's decision not to prosecute a case involving alleged expressions of a racist nature was considered to be acceptable.<sup>22</sup>

In August 1994, the Committee welcomed Australia's intention to introduce civil and criminal provisions on racial vilification but "urged that the process of bringing Australian legislation into conformity with Article 4 of the Convention should be accelerated", especially in view of the Australia's declaration under Article 14.

The Human Rights Committee has accepted that legislation proscribing racial hatred was justified as proportionate to the end of balancing freedom of speech and the principle of equality under the ICCPR. *InJRT and WG Party v Canada*,<sup>23</sup> the relevant statute proscribed racist speech although it was clearly political: the speech of a racist political party in a liberal democratic society. This was held to be an appropriate and legitimate restriction on freedom of speech. The Committee said that Article 19 of the ICCPR, which protects freedom of speech, needs to be interpreted in the light of Article 20.

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21. Communication No 1/1984. UN Doc. A/43/18.

22. *InJersild v Denmark*, case 36/1993/431/510 (judgment of 23 September 1994), the European Court of Human Rights had to consider whether a criminal prosecution taken in Denmark pursuant to legislation enacted to implement Article 4 might be in contravention of the terms of the freedom of expression article of the European Convention on Human Rights. The Court reiterated that, under the European Convention, actions taken to limit or to punish the exercise of speech or other forms of expression must be proportionate to the goal of protecting the rights or reputations of others. This may suggest a disjuncture between the European Convention and the Committee's interpretation of Article 4.

23. DOC A/38/40 at 231.

## Legislation in other Jurisdictions

Many jurisdictions have met their international obligations by enacting restrictions on hate speech, including Canada,<sup>24</sup> the United Kingdom,<sup>25</sup> New Zealand,<sup>26</sup> Germany,<sup>7</sup> France, Denmark, Argentina, the Netherlands, India, and Israel.<sup>33</sup> All of these jurisdictions employ criminal provisions, with some using civil proceedings as an adjunct in the context of group defamation.

These pieces of legislation have taken a number of forms. Some jurisdictions have legislated against behaviour in a public place which is likely to incite racial hatred, on the grounds that this is a threat to public order.<sup>34</sup> For instance, Article 130(1) of the German *Criminal Code*, prohibits "inciting hatred against certain groups of the population" if it is done in a manner "liable to disturb the peace". Another type of offence involves the possession of material which is threatening, abusive or insulting, if it is intended or is likely to promote racial hatred.<sup>35</sup> Under Article 4(a), legislation may require racist statements to be of a certain intensity. The Committee has said, however, that legislation cannot require proof of an intention to incite racial hatred or proof that racial hatred was actually incited as a result.<sup>36</sup>

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24. Federal legislation such as the *Criminal Code*, sections 281.1 - 282.2; section 318 (promotion of hatred) and 319 (incitement of hatred which is likely to lead to a breach of the peace, wilful promotion of hatred); and the *Human Rights Act* 1984, sections 12 and 13. For provincial legislation, see for example, *Civil Rights Protection Act* 1981 (British Columbia); *Defamation Act* (Manitoba).
  25. Section 14 of the *Race Relations Act* 1976; Part III of the *Public Order Act* 1986 and section 3 of the *Football (Offences) Act* 1991.
  26. *Race Relations Act* 1971, section 25.
  27. Articles 130, 131 and 185 if of the German *Criminal Code*.
  28. *Penal Code*, articles 187 and 416.
  29. *Penal Code*, section 266B.
  30. Articles 1, 2 and 3 adopted by the Argentine Republic.
  31. Section 137 of the *Criminal Code*.
  32. Sections 153A and 153B of the Indian *Penal Code*.
  33. Sections 144A to 144E of the 1986 *Penal Law*.
  34. *Race Relations Act* 1965, section 6; *Public Order Act* 1986, section 18.
  35. *Public Order Act* 1986 (UK), section 23; *Criminal Code* (WA).
  36. K Partsch, as above *fn* 19, at 27.

The CERD Committee has welcomed the initiatives of France and the United Kingdom to abolish requirements to prove a subjective intention for acts of incitement.<sup>37</sup>

Many other democracies have enacted legislation against racist propaganda, with separate provisions addressing to specific manifestations of hate speech, such as Holocaust denial and the advocacy of genocide. In response to recent racist and xenophobic manifestations in Austria, France, Germany, Israel and Switzerland have enacted laws specifically designed to combat Holocaust denial.<sup>38</sup> Since 1992, Sweden, Austria, Italy, Estonia, Lithuania, Romania, Russia, Switzerland have also embarked on new legal strategies to deal this problem.<sup>39</sup>

### The Racial Hatred Act 1995

Despite the enactment of legislation against racist speech in most liberal and social democracies, intense debate has surrounded the present Government's attempts to enact such legislation. The *Racial Hatred Act 1995* (Cth) is the result of a protracted consultation process. In 1992, the *Racial Discrimination Amendment Bill 1992* (Cth), a bill which proposed to make racial vilification unlawful and racial incitement a criminal offence, was introduced into the House of Representatives but lapsed when Parliament was dissolved for the elections in March 1993. Throughout 1993, the Attorney-General's Department undertook national public consultations on the Bill.<sup>40</sup> The *Racial Hatred Bill 1994* (Cth) was the result of substantial redrafting, and proposed amendments to the *Crimes Act 1914* (Cth) and a new Part IIA of the RDA.

The first set of amendments proposed federal offences in relation to threats to cause physical harm to another person or group of people on the basis of race, colour, or national or ethnic origin; threats to destroy or damage property on the basis of race, colour or national or ethnic origin; and the intentional incitement of racial hatred through a public act which is reasonably likely in all the circumstances to

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37. Partsch, as above. See further, Committee on the Elimination of Racial Discrimination, *Positive Measures Designed to Eradicate All Incitement to, and Acts of Racial Discrimination* ("CERD Study") (1986), also referred to as CERD/2; UN DOC A/CONF 119/10, para 94 and 130.

38. Mahoney, as above *fn* 1, at 364.

39. Mahoney, as above.

40. Approximately 750 people attended public meetings convened in capital cities, and 571 written submissions were received.

incite racial hatred. The Bill proposed that racial vilification not involving threats of violence or the intentional incitement of racial hatred was to be dealt with under anti-discrimination legislation, rather than through criminal sanctions.

The 1994 Bill<sup>41</sup> was referred to the Senate Standing Committee on Legal and Constitutional Affairs for inquiry and report on 2 February 1995.<sup>2</sup> The Committee recommended, by majority, that the Bill as introduced be enacted. A dissenting report from Coalition senators recommended that the legislation be withdrawn and reconsidered.

The Bill was amended quite significantly in the Senate, with the criminal provisions being removed in their entirety. The Government decided to accept these amendments, although it affirmed its commitment to the introduction of further legislation to impose criminal sanctions for extreme racist behaviour if re-elected. *The Racial Hatred Act 1995* came into operation on 13 October 1995. The new Part HA of the RDA renders unlawful a public act which "is reasonably likely in all the circumstances to offend, insult, humiliate or intimidate another person or group of people on the basis of race", and contains a vicarious liability provision.

It is clear that the *Racial Hatred Act* fails to meet the requirements of Article 4(a) of CERD and Article 20(2) of the *International Covenant on Civil and Political Rights*. It appears highly unlikely that the Government will remove its reservations to these articles, particularly in light of its vulnerability to complaints under the individual communications procedures of both instruments.

## II. FREEDOM OF EXPRESSION

It has been said that the regulation of racial vilification is the "hardest free speech question of all".<sup>43</sup> Should a culture built on an ethos of tolerance, tolerate speech designed to spread intolerance? Should a multicultural society tolerate acts which are designed to undermine its goals? Two sets of human rights need to be considered: freedom of expression and association on the one hand and the equally

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41. Passed by the House of Representatives on 16 November 1994 and introduced into the Senate on 28 November 1994.

42. The Committee received 24 written submissions, and held public hearings to discuss the Bill on 17 and 24 February 1995.

43. RA Smolla, *Free Speech in an Open Society*, 1992, p 151.

compelling rights of equality, security and dignity on the other. In order to resolve this tension, one must consider the philosophical basis of freedom of speech to determine its limits.

In 1992, the concept of freedom of speech was elevated from a value cherished in Australian society to an implied constitutional guarantee. In a series of cases, known collectively as the Free Speech Cases,<sup>44</sup> the High Court changed the nature of the debate about freedom of speech in Australia when it found that the representative nature of Australian democracy was reflected in the Constitution, and that an inherent requirement of this structure was the protection of political speech and communication. The appropriate balance between freedom of speech relating to political or public affairs, and restrictions imposed by federal or state law, is now in part an issue of constitutional law—the focus has shifted from the question of whether the government should restrict hate speech, to the nature of permissible restrictions on such speech.

## **The Philosophical Rationale for the Right to Freedom of Speech**

The traditional justifications for freedom of speech involve the idea that this freedom is an essential ingredient in a liberal democracy for a number of reasons. First, a free society is generally taken to be one in which the governors are accountable for their actions, so citizens and the media must be guaranteed protection when they criticize or analyse the activities of government. Participation in social and political decision making is to be fostered and encouraged. Free and uninhibited political discussion supports, and is justified by, the operation of a liberal democracy.

Secondly, freedom of speech is believed to be crucial for the determination of truth, which in turn will bring progress: "truth is discovered in, or whatever results from, free and open discourse".<sup>5</sup> It is argued that the search for truth is best advanced by the 'market place of ideas', where different viewpoints compete for acceptance. The 'fresh air' approach to speech asserts that the process of exposing racist views to

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44. *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 (hereinafter *Nationwide*); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (hereinafter *ACTV*); *Stephens v West Australian Newspapers Ltd* (1995) 182 CLR 211; *Theophanous v The Herald & Weekly Times* (1995) 182 CLR 104; *Cunliff v Commonwealth of Australia* (1995) 182 CLR 272.

45. T Massaro, "Equality and Freedom of Expression: The Hate Speech Dilemma" (1991) 32 *William and Mary Law Review* 211 at p 229.

public scrutiny will result in the rejection of those ideas and in the ostracism of racists. It is argued that giving all points of view a hearing will allow a society to avoid making mistakes; when the expression of ideas is constrained, we risk 'getting it wrong' and censoring the wrong position. According to this view, there is "no such thing as a false idea"<sup>46</sup>—all ideas deserve to be heard and anti-democratic views should be combatted through counter-expression. It is argued that because yesterday's orthodoxy is today's heresy, and vice versa, we cannot say that certain ideas are unacceptable. We must protect all ideas because we do not have a basis for distinguishing the good from the bad.

Finally, freedom of speech is seen to be valuable, not just by virtue of the consequences it has, but because it enhances the personal fulfilment of the speaker, is a reflection of individual autonomy and a persons' right to make free choices in deciding what is good or bad, or what is true or false. As such, it is seen to be an essential and "constitutive feature of a just political society that government treat its adult members as responsible moral agents".<sup>47</sup>

The liberal theory of free speech is epitomised in the jurisprudence of the United States, where freedom of expression is a fundamental right protected under the First Amendment of the Constitution.

### *The harm principle*

According to liberal theory, a limit to freedom of speech is provided by the 'harm principle'. The harm principle indicates that government may not restrict expression unless it can justify the restriction by pointing to some palpable injury.<sup>48</sup> According to John Stuart Mill, the only occasions when it is legitimate for the state to interfere with the words or actions of citizens is when the relevant behaviour causes harm to another. When one refers to a 'right' of free speech, an assumption arises that such an activity is shielded from the ordinary operation of the harm principle, the calculus of benefits in terms of harm avoided, and cost in terms of speech restrained. According to this analysis, the limitation of speech requires a stronger justification than limitations on other forms of conduct.

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46. *Gertz v Robert Wekh, Inc.* (1974) 418 US 323, 339.

47. R Dworkin, "The Coming Battles over Free Speech" (January 1993) *Civil Liberty* 11 at p 13.

48. Smolla, as aboveft 43, at 159.

First Amendment jurisprudence recognises that certain forms of expression are qualitatively different from that deserving absolute protection: speech affecting national security, false statements about products,<sup>49</sup> misleading statements about the value of securities, speech which is invasive of privacy and defamation.<sup>50</sup> The liberal interpretation of the harm principle also accommodates regulation where speech is directed at the particular individual in a face-to-face confrontation, where there is a clear and immediate danger of retaliation by an individual to whom the communication was directed. The so-called 'fighting words'<sup>51</sup> exception to the First Amendment requires that the words must be likely to incite a person to physical violence<sup>52</sup> or to an unlawful act. The doctrine has been reduced to the point that only inflammatory speech intended to incite imminent violence and which is likely to bring about such violence falls wholly outside the First Amendment.<sup>51</sup> Infringement of public order is another protected area—thus a bomb threat or an incitement to riot falls outside the First Amendment.

When liberals confront the issue of hate speech, they reject the argument that the psychological and emotional harm caused to the targets of such speech is sufficient to warrant restrictions on speech. Thus, there is resort to the 'sticks and stones' argument, the idea that people should develop the "fortitude for penetrating destabilising and invasive verbal volleys".<sup>54</sup> Liberals also maintain that having a rule which allows for regulation of racial hate speech on the basis that it is psychologically wounding would be difficult to confine, and that tolerating racist speech is a price that must be paid for the protection of other types of speech.

*Content-based restrictions on free discussion of political and public affairs*

In the United States jurisprudence of freedom of speech, a critical distinction is made between restrictions on the content of communications, and restrictions upon

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49. *Central Hudson Gas and Electricity Corporation v Public Service Commission* (1980) 447 US 557, at 566.

50. While first amendment protection is present in the law of defamation and privacy, they do not totally override the protection as in the case of hate speech.

51. *Chaplinsky v New Hampshire* (1942) 315 US 568.

52. *Gooding v Wilson* (1972) 405 US 518.

53. *Brandenburg v Ohio* (1969) 395 US 444.

54. T Massaro, as above *fn* 45, at 229.

the time, place or manner of such communications. A far higher level of protection is afforded to expression where a law seeks to restrict communication of certain ideas, than when the manner of communication is at issue.

Recently, the United States Supreme Court held that hate speech laws are unconstitutional because they proscribe a particular type of speech on the basis of its content.<sup>55</sup> The principle of content neutrality explains the tolerance of hate speech and racist propaganda in the United States, which is unique among Western democracies. Content-based regulation of racist speech is seen to put the state into the role of censor. The general principle is that "restrictions that express a viewpoint on a given issue that is preferred by the government (or conversely disapproved by the government) should be subject to very strict scrutiny".<sup>56</sup> While content neutral regulations face a lenient test and content-based restrictions face an intermediate level of scrutiny, viewpoint based regulations are subject to strict scrutiny.<sup>57</sup>

### **Critique of the liberal analysis**

The principle of freedom of speech developed in the eighteenth century and is based, in large part, on a distrust of the ability of government to make the necessary distinctions, a distrust of governmental determinations of truth and falsity, an appreciation of the fallibility of political leaders, and a somewhat deeper distrust of government power in a more general sense".<sup>58</sup> It reflects assumptions of atomistic individual autonomy, the neutrality of law and of the state, and the idea that the state is powerful and a greater threat to individuals than people are to each other. Regulating hate speech runs against this strong distrust of government power. In the context of western liberal and social democracies in the twentieth century, there appears to be a more Benthamite faith in the efficacy of state intervention. The idea that governments are a constant threat to the freedom of citizens is certainly open to question.<sup>59</sup>

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55. *RAV v City of St Paul, Minnesota* (1992) 112 S.Ct. 2538.

56. W Sadurski, "Offending with Impunity: Racial Vilification and Freedom of Speech", (1992) 14 *Sydney Law Review* 138 at 170.

57. SH Williams, "Content Discrimination and the First Amendment", (1991) *U Penn L Rev* 615 at 655-56.

58. F Schauer, *Free Speech: A Philosophical Inquiry*, Cambridge University Press, 1982, at 86.

59. Mahoney, as above *fn 1*, at 358.

The strong distrust of government is further demonstrated by the 'slippery slope' argument: if government is "allowed to outlaw an admittedly dangerous type of speech or something on the margin of `speech'... then inevitably it will slide down the slope and start to ban some types of harmless speech".<sup>60</sup> This involves the belief that censorship, once admitted, will be out of control: admitting one exception will lead to others, until the government is free to stifle opposition in the name of protecting democracy. The peculiarity in this argument is that it reveals, in addition to a mistrust about the legislature, doubts about the capacity of the courts themselves to draw the right lines.<sup>61</sup>

The ideas which underlie free speech theory are appealing, yet must be tempered by an understanding of the historical and social context in which the theory was expounded. The notion of the marketplace of ideas fails to take into account distortions in markets. It assumes that "existing distributions in the market are broadly just and that it is right to protect them through the law, even to give them constitutional" protection.<sup>2</sup> However, it has long been acknowledged that, without government intervention, the distribution of power distorts markets. The speech of the powerful is not countered by that of the subordinated. A speaker who has access to the media cannot be equated with one who does not.<sup>63</sup> Racial vilification can exacerbate the distortion in the very marketplace of ideas that free speech theory seeks to foster, "by muting or devaluing the speech" of the subordinated.<sup>64</sup>

In justifying free speech, liberal writers have tended to concentrate on the beneficiaries of the right, ignoring those who stand little chance of enjoying the right, and who for the most part must bear its corresponding burden. Tolerance of

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60. E Barendt, "Free Speech in Australia: A Comparative Perspective" 16 *Sydney Law Review* 149 at 155.

61. Barendt, as above *fn* 60, at 155.

62. Barendt, as above *fn* 60, at 155. See generally: N. Chomsky, *Necessary Illusions: Thought Control in Democratic Societies*, Pluto, London, 1984; E Baker, "Scope of the First Amendment and Free Speech", (1977) 25 *UCLA Law Review* 965; B. DuVal, "Free Communication of Ideas and the Quest for Truth, Toward a Teleological Approach to First Amendment Adjudication", (1972) 47 *George Washington Law Review* 161; K Greenwalt, "Free Speech in the United States and Canada" (1992) 55 *Law and Contemporary Problems* 5.

63. See D Partlett "From Red Lion Square to Skokie to the Fatal Shore: Racial Defamation and Freedom of Speech", (1989) 22 *Vanderbilt Journal of Transnational Law* 431 at 459.

64. R Lawrence, "If he hollers let him go: Regulating hate speech on Campus", (1990) *Duke Law Journal* 431 at 470.

free speech is not borne by the community at large, but rather by a limited class—traditional victims of discrimination who have less access to effective counter speech, and who maybe further marginalised by the negative effects of racist speech. Free speech, without reference to historical context or uneven power relations burdens one group with a disproportionate share of the cost. It may be seen as an instrument of the established order—a rhetoric of shared values and neutral legal principles which merely disguises racist ideology and structure.

The marketplace of ideas allows the most vicious, destructive or irrational views to rank equally with others. The idea of racial superiority is simply not just another idea—it has been universally condemned and is antithetical to notions of equality and dignity.

The fresh air argument also asserts that silencing racists will result in a powerful 'black market of hate', where racist beliefs will spread and ignite the passion of a dangerous underclass. This view was expressed most clearly by Brandeis and Holmes JJ of the Supreme Court of the United States in *Whitney v California*:

order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.<sup>65</sup>

History and experience belie the 'fresh air' argument:

[t]o believe that all ugly ideas wither when aired is the height of naivete. It casts contempt upon history and ignores the most frightening paradox of our time: that Nazi philosophy was born as a legitimate expression of critical thought... and that it was embraced by the highly sophisticated German people.<sup>66</sup>

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65. (1926) 274 US 357 at 375.

66. K Lasson, "Racial Defamation As Free Speech: Abusing the First Amendment", (1985) 17 *Columbia Human Rights Law Review* 11 at 54.

### III. THE ARGUMENT FOR THE LEGAL REGULATION OF RACIST SPEECH: THE COMPETING PUBLIC INTERESTS - JUSTICE & EQUALITY

The right to free speech is not absolute in its application in any country in the world. As outlined earlier, many paradigm social and liberal democracies have extensive legislation dealing with vilification and the dissemination of racist ideas and propaganda. International covenants to which Australia is a signatory state that the right of free speech is not absolute, and suggest international standards in the process of striking a balance between free speech and the right of the individual not to be a victim of discrimination and prejudice. Article 19 of the ICCPR, for example, provides a right of free speech. Yet it states that the exercise of this right carries with it special duties and responsibilities, and may therefore be subject to certain restrictions where necessary for the respect of *inter alia*, the rights or reputations of others and the protection of public order. While Article 19 of the ICCPR permits limitations on freedom of expression, Article 20 places a positive obligation upon States Parties to prohibit by law any propaganda for war and "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence".<sup>67</sup> The international position is that competing interests are only met by some limitations on speech.

The fact that most jurisdictions have racial vilification laws is indicative of a general belief that the law is of some value in the battle against racism. As the experience in New South Wales illustrates,<sup>68</sup> racial vilification laws do not impose a significant burden on freedom of speech. The case in favour of legislating against racial vilification takes as its starting point the belief that all members of society are to be valued equally. Ultimately, the liberal position says that the goals of tolerance and equality cannot be accommodated within the framework of free expression; that the right of freedom of speech is more important than the right to be treated with

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67. As with CERD, Australia expressed a reservation when it signed the ICCPR to the effect that it interpreted the rights provided for by Articles 19 (freedom of expression), 21 (right of peaceful assembly) and 22 (right to freedom of association) as being consistent with Article 20.

68. See generally N Hennessy and P Smith, "Have we got it right? NSW Racial Vilification Laws Five years on", (1994) 1 *Australian Journal of Human Rights* 249.

equal concern and respect, more important than being able to live free of daily threat and abuse, more important than empowering those who have been historically subordinated.

Without dedicated anti-vilification laws, there is often no recourse for victims of racial hatred. Although there are laws which indirectly cover some of the ways in which racial vilification is expressed, they do not distinguish between actions which are harmful for very different reasons. The law needs to recognise that greater harm is caused by racially motivated criminal acts than by similar acts with no racist motivation, because they affect the entire targeted racial group to some extent. Racist violence, harassment and graffiti create fear, insecurity, inter-communal hatred and a sense of not belonging. There is a clear difference between a scratching one's name in a public phone booth and writing racist slogans and messages of hate on a place of worship. Yet both are treated in the same way by the law at present. There is a difference between drunken brawl, and specifically targeting, ambushing and beating members of an ethnic minority on the streets. Severe campaigns of racist violence may create a climate where communities are afraid to be associated with people belonging to an ethnic minority, as happened in Western Australia several years ago.

Laws against racial vilification empower the disempowered and give credence to a commitment to substantive equality. There are certain responsibilities and duties which come from freedom of expression—the freely aired views of one person may impede the rights of the other to go about his or her life 'unmolested'. Any infringement of free speech must be weighed against the protection of other rights, such as the right to live free from fear and harassment. An Australian perspective on racial vilification must take note of the distinctive values of our society, and impose an appropriate conception of 'responsibility' on the exercise of the right to freedom of speech.

## Injury of racist speech

The injury caused by hate speech has been the subject of extensive analysis which this paper cannot evaluate in any detail, and can only briefly survey. As outlined above in the discussion on the harm principle, not all expression is protected under liberalism. Mere moral outrage, offensiveness or causing distress to other people is not a sufficient basis for a legal prohibition. Injury to reputation or privacy is cited in contrast, as it interferes with a "relational interest" that goes beyond mere emotional or intellectual repulsion to the message. Thus:

The legal imagination has been able to contemplate what it feels like to hear lies spread about one's professional competency, to have one's likeness used for commercial gain without consent, or to hear unwanted obscenities on the radio.<sup>69</sup>

Yet until one finds a direct link between racial vilification and harm in the nature of physical violence, the liberal analysis will not accept that there is sufficient proximity between the speech and the harm to justify curtailing speech.

The work of Gordon Allport<sup>70</sup> is often cited as demonstrating a link between vilification and violence. The active dissemination of hate propaganda could arguably attract individuals to its cause and in the process create serious discord between various groups in society. While racist views can be freely disseminated, there is an environment which legitimises more serious acts, such as physically attacking members of these groups. Members of ethnic minorities have traditionally been major victims of 'hate crime', those crimes motivated by prejudice, bias or hatred towards a particular group of which the victim is assumed to be a member. The individual victim is rarely significant to the offender and is most commonly a stranger. The symbolic character of hate crime is most important—the words or actions are designed to intimidate an individual because of his or her race, and is aimed at intimidating all other people who belong to the same group as the victim.

However, even if one does not accept that a link exists between vilification and violence, the harm inflicted by racist speech has been well documented and should justify some restrictions on such speech. Psychosocial<sup>71</sup> and psycholinguistic<sup>72</sup> studies suggest that even when resisted by victims and sympathetic dominant group members, the idea of racial inferiority holds some truth in their minds when a society tolerates the dissemination of such ideas.

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69. M Matsuda, "Public Response to Racist speech: Considering the victim's story", (1989) 87, *Michigan Law Review* 2320 at 2336.

70. See for example R Delgado "Words that Wound: A Test Action for Racial Insults, Epithets and Name-Calling", (1982) 17 *Harvard Civil Rights - Civil Liberties Review* 133 at 140. Delgado cites two works by G Allport: *The Nature of Prejudice* (1954) and *The Bigot in Our Midst* (1944).

71. J Kovel, *White Racism: A Psychohistory*, 1970.

72. H Clark and E Clark, *Psychology and Language: An Introduction to Psycholinguistics*, 1977.

### *Harm to individuals*

Racial vilification deprives victims of their full humanity, undermining their right to subjective integrity and sense of self. On one level, the problems of racist speech are analagous to those of the dignitary torts of defamation, invasion of privacy and intentional infliction of emotional distress.<sup>73</sup> Some common consequences of serious injury to reputation include "devastating hurt, distress and even physical illness".<sup>74</sup> Defamation mediates between "the right of expression and the implicit right to a measure of personal integrity, peace of mind, and personhood".<sup>75</sup> The harm of defamation is exacerbated where the slander goes to the very core of the victim's being—not just to reputation but to identity.

The emotional damage caused by racist speech may be of significant, or even grave social and psychological consequence—it can lead to feelings of fear, alarm, humiliation, degradation, isolation and self-hatred,<sup>76</sup> and can have a negative impact on an individual's self worth and sense of acceptance. Physical symptoms such as "rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension and psychosis" have been documented.<sup>77</sup> Professor Patricia Williams has written that the reality of the injury caused by racism is one which so assaults the victim's self esteem and sense of personal security as to constitute "spirit murder".<sup>78</sup> However irrational racist speech may be, it affects the very emotional place where human beings feel the most pain—to be hated or despised is the ultimate fear of all human beings.<sup>79</sup>

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73. Catharine MacKinnon argues, in the context of pornography, that vilification is better understood as a form of discrimination than as defamation. The former can focus on impact of statements rather than their truth or falsity—which is not really the issue in racial vilification. See C MacKinnon "Pornography as Defamation and Discrimination" (1992) 71 *Boston University Law Review* 793 at 804.

74. *Theophanous*, as above *fn* 44, per Deane J at 183-4.

75. Matsuda, as above *fn* 69, at 2355. See also Hafner "Psychological Disturbances Following Prolonged Persecution" (1968) *Social Psychology* 79.

76. Delgado, as above *fn* 70, at 143.

77. Matsuda, as above *fn* 69, at 2336.

78. P Williams, "Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism", (1987) 42 *University of Miami Review* 127 at 151.

79. Matsuda, as above *fn* 69, at 2338.

Victims often modify their behaviour and restrict their personal freedom in order to avoid being confronted by messages of hate. They are sometimes forced to leave their jobs or to move house. They may alter their lifestyles, stay indoors, avoid certain streets and public places or alter their demeanour.

In addition to the pain and distress of being racially vilified, victims of racial hatred suffer an additional indignity—that of dispossession. As Matsuda writes:

The aloneness comes not only from the hate message itself, but also from the government response of tolerance. When hundreds of police officers are called out to protect racist marchers, when the court refuses to redress racist insult, and when racist attacks are officially dismissed as pranks, the victim becomes a stateless person. Target-group members can either identify with a community that promotes racist speech, or they can admit that the community does not include them.<sup>80</sup>

Beyond the harms to reputation and of insubordination, racist speech has an impact on the ability of victims to fully participate in Australian democracy. Just as racist speech denies to the victim the reality of his or her world-view, it also impedes the expression of any account of self or of the validity of the victim's perspective on the world.<sup>81</sup>

The speech of victims may be so resoundingly silenced by racism that it may even interfere with the assertion of their legal rights. Racial vilification often intimidates victims and discourages them from taking action to help themselves such as reporting crimes based on race to the police, because they feel that the general community does not support them. The *National Inquiry into Racist Violence* noted the "closure and silence" around police violence:

In addition to all the reasons for not reporting police assaults such as lack of knowledge, fear, intimidation and resignation, it is clear that when complaints are made the legal system itself appears to ensure that, on the basis of the most beneficial outcome to the client, it is a matter which is best left quite alone.<sup>82</sup>

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80. Matsuda, as above *fn* 69, at 2322.

81. C MacKinnon, *Feminism Unmodified*, Harvard University Press, 1987; R Post, "Racist Speech, Democracy, and the First Amendment" (1991) 32 *William and Mary Law Review* 267 at 310.

82. NIRV, as above *fn* 6, at 111. Cf P Davis "Law as Microaggression", (1989) 98 *Yale Law Journal* 1559 at 1568; and P Williams "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights", (1987) 22 *Harvard Civil Rights - Civil Liberties Law Review*, 401 comments at 405: "It is my belief that blacks and whites do differ in the degree to which rights-assertion is experienced as empowering or disempowering".

The assumption that tolerating hate speech is a reasonable cost for the victim to bear depends on an unrealistic account of human nature which permeates liberal accounts of the free speech principle. This is the assumption that we are atomistic individuals. Yet, realist accounts of political and social organisation focus on the complexities of relationships and interdependence. Feminist scholarship, in particular, has emphasised how our sense of who we are is—in part at least—determined by our location in, and our relationship to, society.<sup>83</sup>

*Harm to groups: the inferior status conferred on historically disadvantaged groups*

There are several types of harm that are inflicted on groups. Racial vilification reduces one's ability to enjoy pride in group membership. Speech that is "likely to cast contempt or ridicule on identifiable groups ought to be regulated to prevent injury to the status and prospects of the members of those groups".<sup>84</sup> The second harm arises from compounding the structural subordination of groups based on the idea of racial inferiority:

Racist speech is particularly harmful because it is a mechanism for subordination, reinforcing a historical vertical relationship.<sup>85</sup>

Racial vilification involves a ritual assertion of superiority, coupled with an arrogant comfort in the inferiority of others.<sup>86</sup> Expressions of hatred, racial taunts and racist jokes accompany other discriminatory tools to keep victims in inferior positions. When words are spoken they impart meanings well beyond the conjoining of syllables, and are never spoken in isolation.<sup>87</sup> There can be no parallel between the harm constituted by an attack on a member of the dominant group and the harm directed at a historically oppressed minority. Words take their meaning from

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83. See for example MacKinnon, as above fil 81; C Pateman, *The Sexual Contract*, Polity Press, 1988.

84. R Post, "Racist Speech, Democracy and the First Amendment" (1991) 32 (2) *William and Mary Law Review* 267 at 273.

85. Matsuda, as above *fn* 69, at 2358.

86. See R Delgado & J Stefancic "Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systematic Social Ills?", (1992) 77, *Cornell Law Review* 1288; D Kretzmer "Free Speech and Racism", (1987) 8 *Cardozo Law Review* 445 at 459.

87. See for example, J Austin, *How To Do Things With Words*, Oxford University Press, 1962.

history and context. For instance, painting the Star of David and the word 'Juden' on businesses owned by Jewish people is clearly intended to engender the fear of the Nazi Holocaust.<sup>88</sup>

Chief Justice Dickson of the Canadian Supreme Court commented in the context of discussing anti-Semitic speech that "the message of [racial vilification] is that members of identifiable groups are not to be given equal standing in society, and are not human beings equally deserving of concern, respect and consideration."<sup>89</sup> The process of dehumanisation of particular groups allowed 'civilised' Germans to participate in the Holocaust, and 'decent' Christians to engage in the wholesale murder of Aborigines.<sup>9</sup> Racist speech plays, and continues to play, a role in creating relationships of domination and subordination.<sup>9</sup>

### *Threat to social cohesion*

Racial vilification can constitute a threat to public order and social cohesion. It is often argued that Australia is socially cohesive, and thus does not require such legislation. Yet, there are unanticipated threats to social cohesion which arise from time to time—there is a need for legislative apparatus to deal with such incidents when they occur. For instance, the South Australian Government was generally opposed to the enactment of federal racial vilification legislation during the consultations on the federal Bill in 1992. In the intervening three years, there has been a very real threat to social cohesion and public order caused by extremist racist groups. Both political parties have proposed racial hatred legislation in South Australia, containing civil and criminal sanctions. The Government's *Racial*

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88. NIRV, as above *fn* 6, at 155.

89. *R v Keegstra* [1991] 2WWR 1, 50.

90. C Rowley, *Outcasts in White Australia*, ANU Press, 1971.

91. This harm is hard to quantify in terms of traditional liberal conceptualisations of harm. However, the parallel with the function of pornography in the structural subordination of women is overwhelming. In most cases the direct effect on an individual may be hard to gauge, but the evidence of the damage to women generally from the availability of pornography is extremely strong. See C Pateman, "Sex and Power" (1990), 100 *Ethics*, 398, at 405; MacKinnon (1993) as above *fn* 80; D Dyzenhaus "Pornography and Public Reason", (1994) 7, *Canadian Journal of Law and Jurisprudence* 261, at 268. Adrian Howe argues that a notion of social injury may be a better descriptor of the problem than the idea of harm. See "Social Injury' Revisited: Towards a Feminist Theory of Social Justice", (1987) 15, *International Journal of the Sociology of Law* 423, at 430.

*Vilification Bill* 1995 (SA) was introduced into the South Australian Parliament recently.<sup>92</sup> This is a response to general community concern about the rise in the activities of National Action in South Australia.<sup>93</sup>

## **The value of racial vilification legislation**

### *Giving effect to the promise of substantive equality: empowerment*

Racial vilification legislation goes some way towards reversing the inferior status conferred on historically disadvantaged groups, and gives credence to a commitment to substantive equality. Laws against incitement to racial hatred and hostility help to protect the dignity and security of the potential victims of racial vilification and harassment who are often among the most vulnerable members of society.

The very act of introducing such a law empowers the targets of racism. It lets minority groups know that the dominant groups in society accept their version of the truth, the reality of their pain, that they are entitled to the dignity and respect due to all members of the community. It further communicates the message that it is desirable that their voices be heard and that their participation in the society is valued. A law against racial vilification can reassure the victims that they have the support of the community, and encourage them to report acts or threats of violence.

### *Social cohesion and tolerance*

Racial vilification legislation may also reduce threats to social cohesion and threats to public order, by encouraging and preserving tolerance. In a multicultural society, values such as equality, tolerance and respect for cultural and group identity must be protected. Laws prohibiting incitement to racist hatred and hostility indicate a commitment to tolerance, to help prevent the harm caused by the spread of racism and foster harmonious social relations. The Commonwealth Advisory Council on Multicultural Affairs commented that:

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92. 29 November 1995.

93. "Race-hate offenders to face jail", *Advertiser* (SA), 29 November 1995, p 5.

Tacitly to allow such behaviour implies tolerance, to the point of acceptability. ... Outlawing such behaviour may eliminate ... provocation, reinforce the unacceptability of such behaviour, and allow individuals to live without overt prejudice, fear of harassment or unfair stereotyping.<sup>94</sup>

### *Normative power*

While legislation alone cannot change attitudes, the normative force of the law can be used to create an environment where certain behaviour is seen to be socially unacceptable. There is great symbolic and normative power in a clear legislative indication that the community will not tolerate racial vilification. In fact, the inclusion of vilification provisions in anti-discrimination legislation clearly implies that considerable weight has been given to the fact that the legislation is a formulation of clear community standards, which can positively influence behaviour. Laws can change attitudes over time and it is not necessary that an overall attitudinal change has to precede a change in the law, as has been demonstrated in the area of sexual harassment. The dual legislative and educative regimes have enabled a much clearer line to be drawn between what is acceptable and unacceptable behaviour.

Resolution of disputes through conciliation encourages the educative, prophylactic aspects of the legislation to moderate social behaviour. The conciliation framework allows for a complaint handling process that is accessible, confidential, inexpensive and flexible. Conciliation requires that the perpetrator confront the victim, and thus has an educative role. While many overseas jurisdictions have long outlawed hate speech, Australian racial vilification legislation attempts to use the mechanism of a government human rights agency rather than relying solely on the criminal law. Acquiescence to civil proscriptions will be by persuasion rather than by the threat of punishment.

Racial vilification laws can be used as an incentive for, and justification of internal programmes directed at combating racism in a variety of institutions and environments. For instance, in its submission to a review of the racial vilification provisions in New South Wales,<sup>95</sup> the NSW Department of School Education said

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94. Advisory Council on Multicultural Affairs, *Towards a National Agenda for A Multicultural Australia*, (Discussion Paper 1988).

95. Parliament of New South Wales. Legislative Council, *Report of the Review by the Hon. James Samios, The Operation of the Racial Vilification Law of New South Wales*, A report to the Minister for Ethnic Affairs and the Attorney General, August 1992.

that its efforts to combat racism in schools were enhanced considerably by its ability to point to the law, in setting both a community and legal standard. The NSW Anti-Discrimination Board has reported that its legislation has been very successful in achieving policy and practice change within media organisations. It is only by virtue of the existence of the racial vilification legislation that organisations such as the Board are empowered to promote compliance with the law through community education programmes.

Further, hate crime will fail to serve its function for the perpetrators if the prejudicial attitudes underpinning such violence are no longer supported by societal norms or by religious, legal or political doctrines. Racial vilification legislation in this context is an additional means of providing redress against vilifying speech or actions and signals a refusal to tolerate the public denigration of people on the basis of race.

### *Creating martyrs?*

It is sometimes argued that the suppression of racist speech will lead to the creation of martyrs, which will have the effect of increasing racial hatred rather than combating it.<sup>96</sup> The argument is essentially that where racist speech is outlawed, racists will be able to use the courts and the media as a forum from which to propagate their ideas with much greater impact than they could normally be expected to have. They will become martyrs because they will gain the sympathetic following of others who will consider that it is the racist who is being victimised for simply expressing his or her opinion. It is certainly true that in some jurisdictions the racist ideas of those being prosecuted have been given significant publicity. In one Canadian case, a dangerous precedent was set when a Court refused to take judicial notice of the Holocaust and pave revisionist 'historians' a credibility that they would not otherwise have had.<sup>9</sup> However, whether this type of problem has the potential to arise depends both upon the law that is drafted and the manner of its implementation.

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96. See D Kretzmer, as above *ft* 86, at 511. Cf M Gale "Reimagining the First Amendment: Racist Speech and Equal Liberty", (1991) 65 *St John's Law Review* 119 at 140.

97. *Re Zundel* 35 DLR (4th) 338 at 398. See D Fraser, "It's Alright Ma, I'm Only Bleeding", (1989) 14 *Legal Service Bulletin* 69, who argues that this case points to the inappropriateness of laws in regard to racist speech. It potentially provides a forum from which sophisticated racists, such as those who engage in Holocaust denial, are able to disseminate and legitimise their views, and it adds to the victim's burden by putting the burden of proof onto the plaintiff.

The New South Wales experience illustrates the type of legislation which has not provided the forum for the racist as martyr. Most cases are settled by conciliation, which is a confidential process. Of around 500 civil complaints that have been lodged, only two have been heard at the tribunal level. A respondent in a public hearing in a racial vilification complaint is no more a martyr for free speech than a defendant in a defamation action. In any event, the racist does not seek publicity in most cases.

No prosecutions have been initiated under the criminal provisions in New South Wales at this stage. However, where a criminal is brought to trial, it is always possible for that person to gain the sympathy of some sectors of the community. The fact that some men feel entitled to assault their wives, may result in support for a man who is prosecuted through the courts after an episode of serious domestic abuse. Those who assault drug addicts or gay men may be thought of as a martyrs by those who share that view of the world. But none of this hero-worship results in the legislature or the courts refusing to prohibit harmful action or to punish those who break the law. There is no reason why this argument should be invoked about racists who threaten violence or who incite others to violence or hatred.

## IV. FREE SPEECH AND THE CONSTITUTION

### a. The Free Speech cases

In *Nationwide News Pty Ltd v Wills*<sup>98</sup> and *Australian Capital Television Pty Ltd v The Commonwealth*,<sup>99</sup> the High Court held that there is an implied guarantee of freedom

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98. *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 (*Nationwide*). The case concerned the validity of s299 (1)(d)(ii) *Industrial Relations Act* 1988 (Cth) which outlawed the use of words calculated to bring into disrepute the Industrial Relations Commission or any member of the Commission. The Court were unanimous in finding the provision unconstitutional: Brennan, Deane & Toohey JJ, and Gaudron J because it breached an implied right to constitutional freedom of communication; Mason CJ, Dawson & McHugh JJ because the provision was not authorised by s51 (xxxv) of the Commonwealth Constitution as it was not reasonably incidental to the system of conciliation and arbitration.

99. *Australian Capital Television v The Commonwealth* (1992) 177 CLR 106 (*Australian Capital Television*) involved a challenge to Part IIID of the *Broadcasting Act* 1942 (Cth), as amended by *Political Broadcasts and Political Disclosures Act* 1992 (Cth). Part IIID was designed to restrict political advertising on broadcast media during election campaigns. The aim of the legislation was to foster a more open honest and sophisticated political system by the regulation of

of political communication in the Commonwealth Constitution. In developing the implied doctrine, the High Court took as its starting point, the idea of representative government as enshrined in the structure and provisions of the Constitution. Justice Brennan (as he then was) explained that:

...where a representative democracy is constitutionally entrenched, it carries with it those legal incidents which are essential to the effective maintenance of that form of government. Once it is recognised that a representative democracy is constitutionally prescribed, the freedom of discussion which is essential to sustain it is as firmly entrenched in the Constitution as the system of government which the Constitution expressly ordains.<sup>100</sup>

There has been considerable divergence among members of the Court as to the nature and extent of the implied right.<sup>101</sup> The Court has held that direct regulation of speech which involves information, ideas or argument about government during an electoral period falls foul of the constitutional guarantee.<sup>102</sup> In *Theophanous v The Herald and Weekly Times Ltd*, in which the High Court divided

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political advertising during election periods. By reducing the amount of money needed to fund an election campaign, the risk of corruption was reduced. The High Court held this legislation to be invalid. The majority (Mason CJ, Deane, Toohey & Gaudron JJ) held the whole of Part IIID of the *Broadcasting Act* 1942 (Cth) invalid on the grounds of the implied guarantee of freedom of speech; McHugh J invalidated the whole of Part IIID except in its application to Commonwealth Territories; Brennan J found the implied guarantee but held that Part IIID did not contravene the guarantee except with respect to State elections.

100. *Nationwide*, above *fn* 98, 48-49.

101. Mason CJ, Toohey and Gaudron JJ have stated that while the implication is drawn from the need to ensure the efficacious working of representative democracy, it is not tied to the text of the Constitution. In *Theophanous*, their Honours left unresolved the issue of whether the freedom gives rise to positive rights for individuals, rather than merely being a restriction on legislative and executive power. Deane J's conception of the implication is broader than that of the other members of the majority: see further G. Williams, "Engineers is Dead, Long Live the Engineers!" (1995) 17(1) *Sydney Law Review* 62 at 69. Some of the members of the Bench adopt a narrow conception of the implied guarantee. McHugh J adopts the view that the implied right is restricted to matters necessary to make sense of sections 7 and 24 of the Constitution. Brennan J accepts the constitutional implication, but considers that it is confined to limiting the legislative powers of Parliament, rather than giving rise to personal rights or affecting the common law: *Theophanous*, at 149. Dawson J does not accept that there is a constitutional implication of freedom of political discussion. The retirement from the bench of Mason CJ and Deane J, and the appointment of Gummow and Kirby JJ to the High Court may be of significance.

102. *Australian Capital Television* (1992) 177 CLR 106.

4:3, the implied guarantee was found to extend to material concerning the suitability of candidates for office in the Commonwealth Parliament, and material relating to the duties of Federal politicians.<sup>103</sup> The same majority held that this limitation applies in relation to state politicians.<sup>104</sup> In *Galli & v The Commonwealth*, a different majority held that the implied freedom did not invalidate a Commonwealth law which placed limitations on the provision of immigration advice.<sup>105</sup>

*Could racist speech constitute 'political discussion'?*

The first issue that needs to be considered is whether racist expression could possibly fall within the scope of protected communications. The majority of the High Court has adopted a broad definition of political discussion that is not limited to matters relating to the Government of the Commonwealth. In the *Theophanous* case, Mason CJ, Toohey and Gaudron JJ state that 'political discussion' is:

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103. In *Theophanous v The Herald & Weekly Times Ltd* (1995) 182 CLR 104, a federal Member of Parliament sued for defamation in relation to a letter that was published in a newspaper which alleged that he performed his duties in a biased manner. The majority of the Court (Mason CJ, Toohey & Gaudron JJ, and Deane J) held that the implied constitutional implication of freedom of communication provided a defence in defamation actions. The minority (Brennan J, Dawson J and McHugh J) rejected the application of the implied freedom to defamation laws, for different reasons.

104. In *Stephens v West Australian Newspapers Ltd* (1995) 182 CLR 211, an action for defamation had been brought by members of the Western Australian Legislative Assembly. A series of statements about their suitability for office were made in the context of a State election. The majority of the High Court (Mason CJ, Toohey, Gaudron and Deane JJ), held that the constitutional guarantee applied to State political activity in addition to Commonwealth political speech. This was found both as both a matter of logic and as a matter of construction of the Commonwealth and Western Australian Constitutions. Brennan, Dawson and McHugh JJ were in dissent.

105. *Cunio v The Commonwealth of Australia*, (1995) 182 CLR 272, involved a challenge to Part 2A of the *Migration Act 1958* (Cth), which regulated the provision of immigration assistance through a scheme of registration for migration agents and which limited the right of a non-registered persons to give advice to "aliens". It was argued that this interfered with the freedom to communicate advice to clients. The Court split 4:3 in favour of the validity of the legislation. Toohey J departed from the majority in both *Theophanous* and *Stephens* to find that the legislation was valid.

not limited to communication between the electors and elected. Because the system of representative government depends for its efficacy on the free flow of information and ideas and of debate, the freedom extends to all those who participate in political discussion.<sup>106</sup>

It is not possible to fix a limit" on the definition.<sup>107</sup> It includes "discussion of the conduct, policies or fitness for office of government, political parties, public bodies, public officers and those seeking public office".<sup>108</sup> The concept also includes "discussion of the political views and public conduct of persons who are engaged in activities that have become the subject of political debate such as trade union leaders, Aboriginal political leaders, political and economic commentators' ".<sup>0</sup>

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Mason CJ, Gaudron and Toohey JJ state that the concept extends to "public affairs", endorsing Professor Barendt's 'Millian' definition of political communication—"all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about".<sup>110</sup> Justice Deane takes freedom of political communication and discussion to extend to "all political matters".<sup>111</sup> Deane J was of the view that the ambit of "political discussion" was dependent on the degree to which it supports the constitutional principle of representative government.<sup>112</sup> Speech directed at those holders of high public office such as in *Theophanous* is central and essential to the function of Australian democracy, whereas speech directed elsewhere may not necessarily be protected as it is less significant to democratic processes. On this analysis, racist speech may not be valued in the same way as the core political speech identified by Deane J.

The understanding of political communication was extended by a majority of the Court in *Cunliffe*. Mason CJ, Deane, Toohey and Gaudron JJ found that the implied guarantee protected the provision of immigration assistance to non-citizens. "The connection with representative democracy, as the concept maybe

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106. *Theophanous*, per Mason CJ, Gaudron and Toohey JJ at 122.

107. *Theophanous*, at 123.

108. As above.

109. *Theophanous*, at 124.

110. *Theophanous*, at 124.

111. *Theophanous*, at 64; quoting Deane & Toohey JJ in *Nationwide*, at 75.

112. *Theophanous*, at 83-84.

understood from the Constitution, is tenuous and problematic".<sup>113</sup> If the majority's broad definition of political discussion is adopted, it is difficult to discern the difference between the implied freedom of political discussion and a general right of freedom of expression.<sup>114</sup>

It should be noted that, while the majority of the High Court have taken a broad view of the implied right, other members of the bench have adopted a far narrower view of protected communication which may not extend to racist speech. Even if some racist speech is considered to be political speech for the purposes of the constitutional implication, it does not follow that any law curtailing such speech will be invalid.

### *Justified limitations on political discourse*

The implied guarantee of freedom of political communication and discussion is not absolute. Each of the High Court Justices state that the guarantee will not always prevail over other interests, and suggest that the central issue is one of competing social interests.<sup>115</sup> However,

there is also frequent resort to legal categories ... in particular, the various approaches to justification with their different standards of proof, the distinction between the content of ideas and the mode of their expression and between the direct and indirect regulation of free speech.<sup>116</sup>

Mason CJ makes a distinction between restrictions which target the content of ideas, and those which merely regulate the means of communication, with the former requiring a higher standard of justification.<sup>117</sup> In his Honour's view "a law which targets information or ideas or which prohibits or regulates the content of communications ... would require compelling justification to sustain its

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113. Williams, as above *fn* 101, at 79.

114. Although the majority has insisted that there is no general right to freedom of expression. Further, Sir Anthony Mason has written that "the freedom does not extend to communication generally", "Trends in Constitutional Interpretation", (1994) 18(2) *UNSWLJ* 248.

115. *Theophanous* per Mason CJ, Toohey & Gaudron JJ at 126, (per Brennan J at 146-147) per Toohey J at 379.

116. A Glass, "Australian Capital Television and the Application of Constitutional Rights", (1995) 17(1) *Sydney Law Review* 29 at 41.

117. See Mason CJ, Toohey and Gaudron JJ in *Theophanous* at 122-3; Mason CJ in *Cunliffe* at 299-300.

validity".<sup>118</sup> For Brennan J, the impugned law is valid if the restrictions which it imposes are proportionate to the legitimate interests which the law is intended to serve.

In establishing the legitimate scope of laws curtailing political speech, Deane and Toohey JJ draw a distinction between those laws which impact directly on political communication and discussion and those which have an incidental effect:

[I]n a case where what is involved is a general prohibition or regulation of a particular kind of communication or discussion as such or where there is a likelihood that a prohibition or regulation of a particular kind of communication or discussion will involve a significant curtailment of the freedom of political communication and discussion... [then] reconciliation with the constitutional implication will be more difficult. That is also the case where the impugned law prohibits or controls a particular class or type of political communication or discussion which is either inherently political in its nature or is a necessary ingredient of effective political communication and discussion. In those cases, the law will be consistent with the implication only if its curtailment of the freedom of political communication and discussion can, according to the standards of our society, be justified in the public interest for one or other of the possible reasons identified... in *Nationwide News*.<sup>119</sup>

The possible reasons for justification are that the "curtailment is conducive to the overall availability of the effective means of political communication and discussion in a democratic society" or that "curtailment does not go beyond what is necessary either for the protection or vindication of the legitimate claims of individuals to live peacefully and with dignity in such a society".<sup>120</sup>

Justice Gaudron requires that the relevant law is "reasonably and appropriately adopted" to an end within Commonwealth power. A law which directly infringes on practical communication cannot be justified "unless it can clearly be seen to be serving some overriding and important public interest".<sup>121</sup>

It is our contention that racial vilification laws are clearly justifiable if they do, in fact, impact on political discussion. Limitations on political discourse may be

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118. *Cunliffi*, at 299.

119. *Cunliffe* at 339.

120. As above.

121. *Cunliffi* per Gaudron J at 388. Deane J characterises this as a law which is "necessary" in the sense of their addressing an existing and pressing social need, at 339-340.

justified where they do not go beyond what is reasonably necessary for the preservation of an ordered society, or for the protection or vindication of the legitimate claims of individuals to live peacefully and with dignity in society. It is arguable that there is sufficient evidence that the curtailment of racist speech is necessary for the above reasons, and is conducive to "the overall availability of the effective means of political communication and discussion in a democratic society".<sup>122</sup>

*Proportionality of the law*

How closely must the relevant restriction be related to the likely achievement of the social good? Lenient scrutiny means that any net surplus of benefit (however marginal) will justify restriction of a harmful action. Strict scrutiny means that even where there is a social good of very great importance, a strict relationship is required between the restriction and the achievement of this good.

The High Court is divided as to how closely it should scrutinise the impugned law. While Brennan J suggests that the legislature should be allowed a margin of appreciation,<sup>123</sup> Mason CJ, Deane and Gaudron JJ reject such an approach. Chief Justice Mason states that, "the court must determine whether the burden or restriction on the freedom is reasonably appropriate and adapted to the relevant purpose".<sup>124</sup> Thus, laws dealing with racial hatred must be reasonable in the sense that they appropriately address the injury of racial vilification. Toohey J commented that "proportionality is concerned, not with absolutes, but with the reasonableness of the balance struck by the legislation".<sup>125</sup>

A result of the doctrine of proportionality is that the validity of racial vilification laws will depend in part on the actual terms of the legislation. Some guidance may be found in the three part proportionality test outlined by the Canadian Supreme Court in *Canada v Taylor*.<sup>126</sup> Firstly, there must be a rational connection between

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122. *Cunliffi* per Deane J at 339.

123. *Australian Capital Television*, as above at 102, at 159.

124. *Cunliffi* per Mason CJ at 300.

125. *Cunliffi* per Toohey J at 384.

126. (1991) 13 CHRR 435.

the impugned measure and the objective. Secondly, the measure impairs the right to freedom of expression as little as possible. Thirdly, the effects of the measure are not so severe as to represent an unacceptable abridgment of the right.

Another method of establishing that proposed law is proportionate to the legitimate purpose of dealing with racist speech is to argue by analogy with existing law. The statute in *Nationwide*, which prevented criticism of the Industrial Relations Commission, went further than the common law of contempt of court. Justices Deane and Toohey stated that if:

a law prohibiting conduct that has traditionally been seen as criminal (eg. conspiring to commit, or inciting or procuring the commission of, a serious crime) will readily be seen not to infringe an implication of freedom of political discussion notwithstanding that its effect may be to prohibit a class of communications regardless of whether they do or do not relate to political matters.<sup>127</sup>

Similarly, Brennan J<sup>128</sup> considered censorship in wartime, the law of treason and the law of sedition to be examples of laws using means appropriate to achieving a legitimate purpose. It is hard to imagine that racial vilification laws would offend the constitutional guarantee if these laws do not so offend. Racial vilification legislation prohibiting threats of or incitement to, violence may readily be seen not to infringe a guarantee of freedom of political discussion, regardless of whether they restrict a class of communications relating to political matters. Inciting hatred and violence against persons on the basis of their race is surely not fundamental to participation in a representative democracy.

Laws regulating speech can only be upheld when they are the "least restrictive means" to bring about the compelling interest justifying its restriction. Justice Gaudron stated in *Cunliffe* that even if there were strong grounds for promoting legislation interfering with freedom of speech, the law would be invalid if the public interest could be served by less drastic measures.<sup>129</sup>

Thus, in order to satisfy the constitutional requirements for the protection of political speech and communication, a number of matters relating to racist speech must be clarified. To what extent is freedom of communication actually interfered

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127. *Nationwide News* per Deane and Toohey JJ at 76.

128. *Theophanous* at 149.

129. *Cunliffe* per Gaudron J at 388.

with by the law? To what extent does it restrict freedom of communication about political matters and public affairs? Does the restriction on speech serve some other legitimate public interest? Does this public interest in enacting legislation against hate speech override the public interest in freedom of speech? Is the law, in the form it is drafted, proportionate to the public interest it is designed to serve? Is the restriction reasonably necessary to satisfy the public interest, or could some other, less drastic strategy be employed in its place?

## **b. The development of Australian free speech jurisprudence**

While the United States has produced a profound body of free speech literature based on the political, legal and social status of First Amendment jurisprudence, its transferability to the Australian context should not be assumed. The concept of freedom of speech cannot operate in a vacuum divorced from the social, cultural, political and legal peculiarities of a particular society. McHugh J stated in *Nationwide* that the United States Constitution provides a more appropriate analogy for Australia than the Continental experience. However, the system that prevails in Australia, Canada, and many European countries, is very different from that in the United States for a number of political, historical and legal reasons. We simply do not have a First Amendment, nor the ideological baggage which accompanies it. The text of the First Amendment creates an explicit and general right to freedom of speech and the press, quite different from the Australian implied guarantee. Indeed, the fact that the implied guarantee derives from principles of representative government makes difficult any comparison with the United States or any other jurisdiction with an explicit constitutional right. Professor Barendt has written that "Australian lawyers should always consider what the United States Supreme Court says about freedom of speech, but it would also be advisable for them to consider other approaches to an understanding of that freedom".<sup>130</sup> First Amendment jurisprudence is simply inappropriate to the Australian socio-political landscape.

Aspects of free speech theory are intertwined with the history, politics and social fabric of the United States. Individualism and individual freedom from the

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130. See E Barendt, 1994, as above ¶ 60, at 165. See also E. Barendt, "Importing United States Free Speech Jurisprudence" in T Campbell and W Sadurski (eds), *Freedom of Communication*, Dartmouth, 1994, p 57.

dominant community is the pervasive theme of much First Amendment jurisprudence,<sup>131</sup> with socialist and egalitarian theory having little impact, and the notion of pluralism barely raised. While individual freedom is an important feature of Australian society, it has never been an overriding value. Further, Australian multiculturalism is a social and political reality. Structural pluralism, in addition to cultural pluralism, is receiving greater recognition in public policy.<sup>132</sup>

The distrust of government intervention is largely absent in the Australian socio-political context. The welfare state is firmly entrenched in Australia—whether in the form of financial assistance to industry or in the provision of welfare, Australians have accepted the need for state intervention to help 'level the playing field'. The government has also taken a lead in promoting values, as is reflected in the passage of anti-discrimination legislation at state and federal levels.

A number of criticisms can be made about the body of First Amendment jurisprudence. Among other things, it fails to take into account the notion of the responsibility which attaches to a right to freedom of expression. Professor Barendt has argued that a major defect in First Amendment jurisprudence is its refusal to accept virtually any steps by government to promote or enhance speech, without a corresponding suspicion of the private sector's capacity to corrupt the process of political communication. There is a "strong distrust of government action regulating speech, even when its intervention [is] intended to foster speech or to equalise opportunities for its dissemination, . . ."<sup>133</sup>

Many critics of an absolutist interpretation of the First Amendment also raise the principle of equality at the heart of the Fourteenth Amendment to the United States Constitution.<sup>134</sup> They argue that the:

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131. R Post, "Cultural heterogeneity and the Law: Pornography, Blasphemy and the First Amendment", (1988) 76 *California Law Review* 297, at 297.

132. For further discussion, refer to Chapter 1.

133. Barendt, as above *fn* 60, at 149.

134. Lawrence, as above *fn* 64, at 438-49.

speech by which society constructs a stigma picture of minorities may be regulated consistently with the First Amendment. Indeed, regulation may be necessary for full effectuation of the values of equal personhood we hold equally dear.<sup>135</sup>

The thrust of this argument is that a society committed to ideals of social and political equality cannot remain passive. It must issue unequivocal expressions of solidarity with vulnerable minority groups and make positive statements affirming its commitment to those ideals. Laws prohibiting racist speech must be regarded as important components of such expressions.<sup>136</sup>

'Fighting words' have been characterised as speech that has "a direct tendency to cause a violent response from the average recipient" and thus is essentially valueless for constitutional purposes.<sup>137</sup> However, a key point made by civil rights advocates is precisely that racist speech does not elicit a violent response but causes "silence or flight" and subordination.<sup>138</sup> The problem is that "racist speech is so common that it is seen as part of the ordinary jostling and conflict people are expected to tolerate, rather than as fighting words".<sup>139</sup> Often, targets of racist speech choose to avoid racist encounters if possible—"lack of a fight and admirable self-restraint then defines the words as non-actionable, 140

Freedom of speech has never been an absolute value in the Australian political and legal landscape. Laws dealing with defamation, blasphemy, copyright, obscenity, incitement, use of insulting words, official secrecy, contempt of court and of parliament, censorship, sedition and consumer protection place limits on speech. These laws recognise that there are countervailing interests that must take precedence over freedom of speech in some circumstances. Our current law reflects that the need for social cohesion and the need to maintain public order results in limits on freedom of speech where it may lead to a breach of the peace. It accepts that words can seriously injure individuals and their economic and social well-being through the law of defamation. Words are also prohibited where they cause, or

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135. R Delgado, "Campus Anti-racism rules: Constitutional narratives in collision", in S. Coliver, *Striking a Balance*, 284 at 292.

136. D Kretzmer, "Freedom of Speech and Racism", (1987) 8 *Cardozo Law Review* 445 at p 456.

137. *Chaplinsky v New Hampshire* (1942) 315 US 568 at 572-3.

138. Donald E Lively, "Protocols of Tokenism: Speech codes and the illusion of progress", at 11.

139. *Vaughan v Pool Offshore Co*, 683 F. 2d 922 (5th Circuit, 1982).

140. Matsuda, as above *fn* 69, at 2356.

threaten to cause, serious harm, such as personal injury, property loss and damage to an important institution. The criminal law recognises that it is a crime to counsel another to commit a crime, to commit perjury or to be in contempt of court. These widely accepted curbs on free speech still allow a great measure of freedom.

## **V. THE RACIAL HATRED ACT 1995: ISSUES FOR CONSIDERATION**

The amendments to the RDA which were effected by the *Racial Hatred Act 1995* came into operation on 13 October 1995, and form a new Part IIA of the RDA. The proscription in section 18C renders unlawful a public act which "is reasonably likely in all the circumstances to offend, insult, humiliate or intimidate" another person or group of people on the basis of their race, colour, or national or ethnic origin. Section 18D provides for a wide range of exemptions designed to achieve a balance between the rights to equality and dignity of the targets of racial vilification and freedom of speech. The amendments will be administered under the existing structures for the investigation and conciliation of complaints of racial discrimination.<sup>141</sup> As in the case of other complaints lodged under the RDA, they must be lodged by a 'person aggrieved'. Thus, an uninvolved bystander without connection to the vilified group who finds the comments offensive, cannot bring a complaint under the RDA.<sup>142</sup>

Those racial hatred complaints involving the media are particularly appropriate to be brought as representative complaints.<sup>143</sup> In such group libel complaints, where an entire ethnic group is vilified rather than a particular individual, the requirements in section 25L of the RDA appear to be met. All complaints would be against the same publisher, the complaints arise out of the same circumstances, and give rise to the same issues of law and fact.

### **Scope of the provisions**

At first glance, section 18C appears to catch a very broad range of conduct. Section 18C does not limit itself to the promotion of hatred or contempt, but

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141. See Chapter 3.

142. *Cameron v Human Rights and Equal Opportunity Commission* (1993) 119 ALR 279.

143. See Chapters 3 and 14.

catches merely offensive and insulting conduct directed at an individual and would seem to go further than that envisaged by government reports. The ALRC recommended that incitement to racist hatred and hostility should be unlawful. NIRV recommended that the RDA be amended to prohibit racist harassment and the incitement of racist hostility. In making its recommendation, the Inquiry was "not talking about protecting hurt feelings or injured sensibilities. Its concern [was] with conduct with adverse effects on the quality of life and well-being of individuals or groups who have been targeted because of their race".<sup>144</sup> In contrast to this sentiment, section 18C may catch a joke within its ambit if it reaches the threshold of being reasonably likely to offend, humiliate, intimidate or harass, although it could be exempted under section 18 D(a).

Section 18C requires that an act is "*reasonably likely in all the circumstances* to offend, insult, humiliate or intimidate". This formulation of words is similar to that which is found in sections 85S and 85ZE of the *Crimes Act* 1914 (Cth). The section requires an objective consideration of the context, of the circumstances or environment in which the act occurred. The question arises as to whether the evaluation of the offensive nature of the comments should be based on the view of the 'reasonable victim' as to what is offensive, or that of the reasonable person in the general public. Unless the 'reasonable victim' standard is adopted, the standards of the dominant class are merely perpetuated and there is no sensitivity to cultural difference. A recent Canadian Human Rights Tribunal decision adopted the 'reasonable victim' perspective in determining whether questions asked of the complainant in an interview constituted harassment.<sup>145</sup> The adoption of the 'reasonable victim' standard can be interpreted as a means of eliminating a systemic barrier. Complainants will no longer be subject to the views of the dominant group concerning the types of comments that are offensive.

The new Part IIA of the RDA makes it unlawful for a person to do a prescribed act 'otherwise than in private', which is defined in section 18C(2) to include an act which:

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144. at p 299.

145. *Stadnyk v Canada Employment and Immigration Commission*, unreported decision rendered 17 July 1993.

- (a) causes words, sounds, images or writing to be communicated to the public; or
- (b) is done in a public place; or
- (c) is done in the sight or hearing of people who are in a public place.

'Public place' is further defined to include "any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place". This wording may cause a problem for the resolution of some neighbour disputes. For example, an act perpetrated by a neighbour in an adjacent backyard would not be covered by the RDA, while the identical act in adjacent front yards would fall within the legislation if it is in the sight or hearing of people in a public place such as a footpath. Such a distinction could be logically justified if the provisions were directed, as in the case of the NSW provisions, at the incitement or promotion of racial hatred, rather than merely its expression. However, the exclusion of some complaints under the RDA appears to be arbitrary.

By way of contrast, clause 27 of the United Nations *Draft Model Law*<sup>146</sup> states that the prohibited actions are deemed to constitute an offence "irrespective of whether they were committed in public or in private." In qualification of clause 27, clause 28 provides that an action which occurs inside a private dwelling shall not constitute an offence. In light of the fact that 'neighbour disputes' constitute a high proportion of the NSW Anti-Discrimination Board's complaints under the racial vilification provisions of the *Anti-Discrimination Act*, the arbitrary exclusion of some neighbour complaints should be questioned.

A further problem arises from the peculiarity of the wording of section 18C. It renders unlawful a public act that is likely to offend if it 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. This is in contrast to the use of the words "based on" in section 9 and "by reason of" in sections 11-17. The issue arises as to whether the phrase "because of" imports an element of motive. If such an interpretation is adopted, all 'media complaints' are effectively excluded from the ambit of the provisions because it would be impossible to establish motive. Given that anti-discrimination legislation does not generally require motive, and the fact that the RDA is based on CERD, it is hoped that the legislation will be interpreted in a manner that is beneficial to those for whom it aims to provide redress.

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146. See Appendix C.

Part IIA proscribes racial vilification on the grounds of "race, colour, national or ethnic origin". It provides equal protection to all racial and ethnic groups. This presents a problem for those striving for equality in our society. As one of the purposes of laws regulating or proscribing hate speech is to remove institutionalised harm directed at subordinated minorities, the protection against racist speech should be designed to advantage the disadvantaged, not to support established power structures. It is our contention that racial vilification laws should arguably not be available for powerful groups to use as further weapons of oppression.<sup>147</sup> A focus on substantive equality should favour a "one way" vilification law, which would only restrict communications containing a "message of inferiority",<sup>148</sup> This law would not be palatable to a large section of the community and may give rise to a number of problems.<sup>149</sup> In any event, the terms of the RDA allow for an interpretation which makes it difficult for a dominant group member to use the law successfully, because the relevant act must be "reasonably likely in all the circumstances" to offend, insult, humiliate or intimidate. In practice, the severity and harm of an epithet will be defined in its social context, with the result that the law will be more readily available to members of minority groups. Racist speech "expresses contempt and hostility towards racial groups and contempt and hostility are social constructs, not just products of the individual intentions of the speaker .<sup>50</sup>

## Exemptions

As elaborated upon in Part III of this paper, adequate protection must be provided for rights of freedom of expression in a liberal democracy, particularly in light of the implied constitutional guarantee of freedom of political communication. Section 18D states that:

Section 18C does not render unlawful anything said or done reasonably and in good faith:

- (a) in the performance, exhibition or distribution of an artistic work; or
- (b) in the course of any statement, publication, discussion or debate made or held for any

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147. See W Sadurski, "Racial Vilification, Psychic Harm, and Affirmative Action", in W Sadurski and T Campbell (eds) *Freedom of Communication*, Dartmouth, Sydney, 1994, p 77.

148. Matsuda as above *fn* 69 at 2357.

149. See A Flavin, "Can Legislation prohibiting Hate Speech be justified in light of free speech principles?", (1995) Vol 18, *University of New South Wales Law Journal*, 327 at 339.

150. Sadurski, as above *fn* 147, at p 92.

- genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
- (c) in making or publishing:
- (i) a fair and accurate report of any event or matter of public interest; or
  - (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

A number of commentators have raised many issues concerning the breadth of the defences, which could be seen to undermine the protections given by section 18C.<sup>151</sup> The defences turn upon whether a relevant act is found to be "reasonable and in good faith", leaving much room—perhaps inevitably—for judicial interpretation. What is "unreasonable" in this context? Does section 18D require deliberate misinformation or an element of dishonesty to show that an act is not in good faith?

Section 18D(a) provides a defence for artistic works, which may provide a shield behind which to present material which would otherwise be unlawful. Courts will have to decide what constitutes an artistic work. A court would not be likely to introduce a distinction between 'real artistic works' and 'pseudo-artistic works'. This opens the possibility that politically motivated organisations will use art as a facade to cover racist material.

Much humour is drawn from stereotypes and generalising about patterns of behaviour. If a joke reaches the threshold of being an act reasonably likely in all the circumstances to offend etc, and is based on race, it may nonetheless fall within the exemption in section 18D(a). However, if a vehement attack is made against a particular racial group in the guise of humour, it would be a matter for determination whether it was done "reasonably and in good faith".

Section 18D(b) relates to genuine academic, artistic or scientific statements or publications. 18D(b) is very broad, and would rest on the interpretation of 'genuine'. It has been argued that such an exemption is a reflection of the reality that the discourse of social elites remains privileged, despite the fact that the harm which flows from such discourse may be far more pervasive and effective than that

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**151.** K Eastman, "Drafting Racial Vilification Laws: Legal and Policy Issues", (1995) 1 *Australian Journal of Human Rights* 285; T Solomon, "Problems in drafting legislation against racist activities", (1995) 1 *Australian Journal of Human Rights* 265.

occasioned by the crude racism of extremist groups, who are marginalised from mainstream society.<sup>152</sup>

Section 18D(c)(i) is similar to the defence in the law of defamation for fair reports of privileged matters. This exemption enables the media to convey details of any matter of public interest to the general public without being exposed to the risk of breaching the RDA. In the law of defamation, in order to rely on the qualified privilege accorded to fair reports of proceedings of public concern and official and public documents and records, the published material must clearly purport to be a report of the proceedings and relate what took place with substantial accuracy. If information from proceedings is adopted as a reporter's own statement, with or without attribution, qualified privilege does not apply. The fairness of a report is judged by comparing it with the event that it purports to describe:

Errors may occur; but if they are such as not substantially to alter the impression that the reader would have received had he been present... the protection is not lost.<sup>153</sup>

If adequate protection is to be given to the right to freedom of expression, there is a need for some form of a fair comment defence. In fact, it was the lack of a fair comment defence that contributed to the invalidity of the statute in the *Nationwide* case. Section 18D(c)(ii) states that section 18C does not render unlawful anything said or done reasonably and in good faith in making or publishing a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment". While the effect of the qualifiers "reasonably" and "in good faith" is to be determined by the courts, this defence appears to be very broad.

Both Kate Eastman and Tamsin Solomon have been very critical of the potential breadth of this exemption.<sup>154</sup> In defamation law, 'fairness' depends on honesty rather than reasonableness. If belief in truth is a defence, more importance is placed upon protecting the perpetrators' statements or acts, no matter how evil-intentioned or reckless, than upon the harm caused to the targeted persons or group and to society generally. These authors argue that the defence is potentially so far reaching that any public comment made by a person who genuinely believes

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152. M Thornton, *The Liberal Promise*, Oxford University Press, 1990, p49-50.

153. *Thom v Associated Newspapers Ltd* (1964) 64 SR (NSW) 376 at 380.

154. See above, *fn* 151.

what they are saying will be exempt. Thus, the exemption may effectively provide a defence for the most extreme racists, who are truly convinced of the truth of white supremacy. Some beliefs are simply not capable of falling within a true/false paradigm—can belief in their truth be held to be unreasonable?

However, the notion of fair comment within the RDA is not identical to that in defamation law. As with the other provisions of section 18D, the fair comment exemption is tempered by the expression "reasonably and in good faith". The defence may be better cast in terms of Article 281.2(3)(c) of the Canadian *Criminal Code* which provides as follows: "if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and it on reasonable grounds the accused believed them to be true".

### **Application to religious and ethno-religious groups**

The RDA proscribes certain acts of racial hatred on the grounds of race, colour, national or ethnic origin but makes no reference to religion or ethno-religious origin. As other papers in this publication argue,<sup>155</sup> it is often difficult to isolate which element of group identity results in discrimination or vilification, and the problems arising from the failure of the RDA to cover religious groups are compounded in this area of vilification. The failure to cover religious groups, or to explicitly cover ethno-religious groups, is contrary to the recommendations of both the ALRC and NIRV.

The ALRC recommended the creation of an offence of incitement to hatred, hostility or contempt on the ground of membership of an "identifiable group", which was defined as any section of the public distinguished in terms of "colour, race, religion or ethnic origin". It also recommended the creation of an offence of racist violence including violence against those identified by their religion. NIRV recommended that the RDA be amended to provide that "discrimination against or harassment of a person on account of that person's religious belief be prohibited where the religious belief is commonly associated with persons of a particular race or races or a particular ethnic group or groups, and is used as a surrogate for discrimination or harassment on the basis of race or ethnicity".

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155. Refer to Chapter 5.

The problem can be partially overcome by adopting the broad interpretation given to the term 'ethnic origin' by courts in other jurisdictions. In *Mandla v Dowell Lee* the House of Lords decided that Sikhs had a common 'ethnic' origin;<sup>156</sup> and in *King-Ansell v Police*<sup>157</sup> the New Zealand Court of Appeal held that Jews in New Zealand constituted a group with common ethnic origins within the meaning of the New Zealand *Race Relations Act 1971*.<sup>158</sup> The NSW Equal Opportunity Tribunal followed the New Zealand and English decisions in *Phillips v Aboriginal Legal Service*<sup>159</sup> and held that a Jewish person was a member of a 'race' for the purposes of the *Anti-Discrimination Act*. In *Commission for Racial Equality v Dutton*<sup>160</sup>, the English Court of Appeal relied on *Mandla* to hold that gypsies were a racial group with a common geographical origin, distinct customs and a common dialect.

NIRV documented Muslim Australians as primary targets of racial vilification. Yet, it is a matter of conjecture whether Muslims fall within even a broad interpretation of 'ethnic'. While it is likely that the above decisions will be followed, there do not appear to be any cases in which these decisions have been applied to hold that Muslims comprise an ethnic group. Muslims and Rastafarians<sup>1</sup> have not received the protection of racial laws in England. The English Employment Appeal Tribunal

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156. According to the House of Lords, for a group to constitute an 'ethnic' group for the purpose of the legislation, it had to regard itself and be regarded by others as a distinct community by virtue of certain characteristics, two of which were essential:

- (i) a long shared history of which the group was conscious as distinguishing it from other groups and the memory of which it kept this alive;
- (ii) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance.

157. [1979] 2 NZLR 531.

158. Richardson J held as follows: "a group is identifiable in terms of its ethnic origins if it is a segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past, even if not drawn from what in biological terms is a common racial stock. It is that combination which gives them an historically determined social identity in their own eyes and in the eyes of those outside the group. They have a distinct social identity in their own eyes and in the eyes of those outside the group. They have a distinct social identity based not simply on group cohesion and solidarity but also on their belief as to their historical antecedents."

159. (1993) EOC 92-502.

160. (1989) IRLR 8.

161. *Crouss Suppliers (PSA) v Dawkins* [1991] **IRLR** 327.

held in *Nyazi v Rymans Ltd*<sup>162</sup> that, following the principles enunciated by the House of Lords in *Mandla*, Muslims are a group defined mainly by religion and thus the *Race Relations Act* 1976 does not cover them. Although Muslims profess a common religion, share a common cultural and historical background, and have a common literature in the Holy Quoran, other characteristics of an ethnic group are lacking and there are Muslims in many countries and of many colours and languages. The common denominator is religion and a religious culture.

This being said, when the Australian courts are called upon to interpret the expression 'ethnic origin', the Attorney-General's second reading speech<sup>163</sup> and explanatory memorandum could be called upon, pursuant to section 15AB of the *Acts Interpretation Act*. This would allow for a broad definition of 'ethnic' to include Jews, Sikhs and Muslims. At first instance, HREOC would no doubt adopt a broad interpretation, and accept a complaint, but this is ultimately a matter for the courts. It should be noted, however, that even a broad interpretation of the RDA to encompass ethno-religious groups will not result in the Act applying to acts of vilification based purely on religion.

## VI. THE RDA AND AUSTRALIA'S INTERNATIONAL OBLIGATIONS

Despite limitations and potential problems with the racial hatred provisions of the RDA, the very enactment of these provisions is important. Racial vilification laws provide a basis for educating the community about the unacceptability of racism,<sup>164</sup> and provide positively for a society where individuals recognise the inherent dignity of each other and take the provision of human rights to be fundamental.

However, the *Racial Hatred Act* fails to adequately implement Australia's international obligations. The omission of religion as a ground means that Australia will not be implementing Article 20(2) of the *International Covenant on Civil and*

162. [19881 EAT 86.

163. House of Representatives, *Hanoard*, 15 November 1994, p 3336.

164. Law needs to be coupled with anti-racist education, such that the racist jokes are no longer funny and are therefore not worth telling; so that the racist 'art' is shunned as being of little merit or at least recognised for what it is; so that people who are the targets of teasing can believe that nothing sinister lies behind the racist remarks.

*Political Rights*, which requires that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence be prohibited by law. Some countries with laws on incitement of religious hatred and intolerance include Canada, Denmark, France, India, Portugal and Sweden. In Australia, religion is included as a ground of complaint in anti-discrimination legislation (although not a ground of vilification) in Victoria, Queensland, Western Australia, the Australian Capital Territory and the Northern Territory. Further, the NSW *Anti-Discrimination Act* includes the concept of ethno-religion as an aspect of race for the racial discrimination and vilification provisions.

While the RDA has prohibited incitement to racial discrimination since its enactment, Article 4(a) of CERD requires that a wider range of conduct is criminalised. It requires States to declare as punishable by law the dissemination of ideas based on racial superiority and hatred, incitement to racial discrimination, acts of violence against any race etc, incitement to such acts, and the provision of any assistance to racist activities including their financing.

The CERD Committee has rejected the argument that the reference to penalties in Article 4(a) includes civil remedies.<sup>165</sup> In principle, the Committee appears to require criminal sanctions for all of the offences mentioned in Article 4, although some Committee members have displayed some flexibility on this issue.<sup>166</sup>

The racial hatred amendments were enacted without criminal sanctions as the result of a political compromise. The Government is well aware that, without criminal sanctions, its legislation does not implement the requirements of CERD and the ICCPR. For this reason, it is most unlikely to remove Australia's reservations to these instruments. As a result, it may be subject to ongoing intense criticism by the international community and will deny Australians the opportunity to utilise the individual communication procedures under both instruments.

There are strong arguments in favour of specifically criminalising the incitement of racial hatred and acts of racist violence. The wilful promotion of hatred clearly contradicts the principles which recognise the dignity and worth

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165. K Partsch, "Racial Speech and Human Rights: Article 4 of the Convention on the Elimination of all Forms of Racial Discrimination" in S Coliver (ed) *Striking a Balance*, Article 19, Human Rights Centre, University of Essex, 1992, at p 28.

166. As above.

of identifiable groups, singly and collectively.<sup>167</sup> It negates the rights and freedoms of target groups. HREOC recommended (in the National Inquiry into Racist Violence) criminalising "racist violence and intimidation" and "the incitement to racial hatred and racist hatred which is likely to lead to violence".<sup>168</sup> The ALRC also recommended that racist violence should be made a specific offence under federal law. By excluding acts of racist violence from its ambit, the *Racial Hatred Bill 1994* failed to implement the recommendations of both NIRV and the ALRC.

In New South Wales there is a criminal proscription of more serious acts of racial vilification, which involve threats of physical violence or harm to property. To date, no prosecutions have commenced, although several matters have been referred by the President of the Anti-Discrimination Board to the Attorney-General. It must be noted that acts involving incitement to violence and threats of violence already constitute criminal offences in every Australian jurisdiction. It is a common law misdemeanour to incite or solicit another person to commit an offence, and there are many statutory offences relating to threats and incitement around the nation. It is only in the criminalisation of the incitement of racial hatred that anti-vilification legislation proposes to enter an area of conduct hitherto unregulated, and which create in any sense new restrictions on free speech.

From the perspective of the targets of racism, it is essential that the law acts clearly and decisively.<sup>169</sup> Statements in the law that a matter is one of high concern to the community are always contained in the criminal law. If the criminal law has the effect of deterring racists from expressing their hatred, the law must be commended. However, as Sterling and Mason state:

deterrence is not the sole purpose of criminal law, and no one suggests that there should not be penalties for murder or rape simply because these fail to deter. Criminal penalties serve the purpose of vindicating the victim and expressing social disapproval of the crime.<sup>170</sup>

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167. Australia Law Reform Commission, as above *fn* 7, paragraph 7.44.

168. NIRV, as above *fn* 6, at 298.

169. See M Jones, "Empowering Victims of Racial Hatred by outlawing Spirit - Murder", (1994) 1 *Australian Journal of Human Rights* 299.

170. K Sterling and D Mason, "Racism in the Media: If Legislation, What Kind?", (1988) *Migration Monitor* 16 at 17.

Thus it is essential that the most serious manifestations of racial hatred are treated as criminal offences. The law deals with the abuse of property rights by application of the criminal law of theft. The law deals with threats to the Australian state through the criminal law of sedition. However, as victims want more than statements of support, it is essential that the criminal law be supplemented with civil remedies to provide redress for the targets of vilification.

## CONCLUSION

The ambit of freedom of speech in the Australian context is yet to be determined. Given the multiplicity of reports that have recommended racial vilification legislation and the existence of binding international obligations, the High Court would be most unlikely to hold that all restrictions on racist speech are unconstitutional. The issue is whether the *Racial Hatred Act* goes too far down the line of restriction.

It should be noted that it is only in the United States, with its quasi-absolutist conception of freedom of speech, that the regulation of racist speech is held to violate the constitutional right of free speech. Free speech is a constitutional right in Canada and many European countries. Yet the highest courts in these countries have held provisions which prohibit racial incitement and the dissemination of racist ideas are reasonable and necessary exceptions to the right of free speech. In 1989, for instance, the Canadian Supreme Court upheld Canada's anti-hate speech legislation.<sup>171</sup> Interpretation of freedom of expression involves resort to the values and principles of a free and democratic society. As argued in Part IV of this paper, the High Court is free to resist the pitfalls of the liberal analysis of free speech in developing an Australian free speech jurisprudence.

As discussed earlier, racist expression could possibly fall within the scope of protected communications in light of the broad definition of 'political discussion' that has been adopted by a majority of the High Court. However, the *Racial Hatred Act* clearly responds to a pressing social need and to an overriding public interest.

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171. *R v Kegstra* [1990] 3 SCR 697; *R v Andrews* (1990) 3 SCR 870; *Canada (Human Rights Commission) v Taylor* [1990] 3 SCR 892.

It has nonetheless been argued that section 18C is inconsistent with the implied freedom of speech because it is too broadly drafted and disproportionate to any legitimate aim of Government. It has been suggested that the concept of hatred is wide, and that the law will not only outlaw:

what society regards as undesirable.... If speech is to remain free, offence, insult or humiliation cannot be banished. A certain force of expression and intensity of feeling are the inevitable characteristics of many forms of free expression and especially where political questions or historical antagonisms are being discussed or lie behind what is discussed. The [Act) amendment requires that no more than that the speech or writing is reasonably likely to offend, insult or humiliate and that a reason for the speech or writing is the race, colour or national or ethnic origin of another person or of some or all in a group.<sup>172</sup>

However, it must be remembered that the apparently wide restrictions on speech are tempered by the broad exemptions. Further, if the legislation is interpreted consistently with its purpose, it is clear that the law is proportionate to fit the legitimate end pursued by Government.

In Australia, we have a highly pluralistic society which acknowledges and celebrates group identity and heterogeneity. While freedom of expression is a highly valued principle, it also involves special responsibilities. Legislation proscribing racial vilification is justified by the democratic commitment to treat all people with equal concern and respect. We have argued in this paper that the racial hatred provisions of the RDA indicate a commitment to tolerance, pluralism, equality and individual dignity. While there are potential problems with the precise wording of Part IIA of the Act, it is in the power of the courts to interpret these provisions consistently with both the constitutional guarantee and the beneficial aims of the legislation.

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172. Sir Maurice Byers, "Free Speech a certain casualty of race law", *The Australian*, 21 November 1994, p 11.

## **Issues for consideration**

- Article 4(a) of CERD appears to require states to declare as an offence punishable by law:

dissemination of ideas based on racial superiority and hatred;

incitement to racial discrimination;

acts of violence against any race;

incitement to such acts; and

the provision of any assistance to racist activities including the financing thereof.

To what extent do the provisions of the RDA give effect to Article 4(a)? Should federal legislation attempt to implement all of these obligations?

- HREOC recommended (in the *National Inquiry into Racist Violence*) criminalising "racist violence and intimidation" and "the incitement to racial hatred and racist hatred which is likely to lead to violence"<sup>173</sup>. The ALRC recommended that incitement to racist hatred and hostility be made unlawful, but not a criminal offence. Should criminal sanctions be used against acts of racial vilification? If so, what types of behaviour should be criminalised? Should these offences be contained in the RDA or in the *Crimes Act 1914*?
- Could section Part IIA be better drafted in order to take into account the competing interests?
- The breadth of the exceptions in Part IIA of the RDA has led to concerns that the media is virtually untouched in reality by the provisions. It is also arguable that the exemption effectively provides a defence for the most extreme racists, who are truly convinced of the truth of their convictions. Do the defences strike an appropriate balance between competing rights and interests? If not, how could they be improved?

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<sup>173</sup>. NIRV at 298.

- The *Anti-Discrimination (Amendment) Act* 1994 (NSW) amended the *AntiDiscrimination Act 1977* (NSW) to include "ethno-religious origin" in the definition of "race".<sup>174</sup> Should the RDA be amended in the same way?
- Should acts of racist violence should be treated as distinctive serious criminal offences (as recommended by the ALRC and NIRV)?

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174. Even prior to the amendments, the Equal Opportunity Tribunal ("EOT") had confirmed in *Phihts v Aboriginal Legal Service*, (1993) EOC 92-502, that being Jewish is being "of a certain race" for the purposes of the race discrimination provisions of the Anti-Discrimination Act. The EOT accepted a broad reading of the notion of 'race' in line with decisions of the New Zealand and English courts.



# SPECIAL MEASURES

Sarah Pritchard\*

*If equality is about making me have the same values and the same priorities then I do not want it. I want access and equity. If the end result of equality is being like you white fellas, then I do not want it. I do not believe that is what our people want.*

*We have a separate identity. We know how to care for our land and that is why it is so important to us. We want to be able to do the right thing. The right thing is not destroying the land. It is not destroying the culture. It is not replacing it.<sup>1</sup>*

## 1. Introduction

The purpose of this paper is to examine experience with the application of section 8(1) of the *Racial Discrimination Act* 1975 (Cth) (RDA). Section 8(1) posits "special measures" as an exception to the general prohibition of racial discrimination in the Act. "Special measures" raise fundamental questions as to the justification for applying special or separate standards to members of particular ethnic communities. In a multicultural society such as Australia, which consists both of indigenous peoples and a large number of immigrant ethnic groups, issues of justification are varied and complex.<sup>2</sup> In recent years, there has been increasing

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1. Statement by Barry Fewquandie before the Joint Parliamentary Committee on Native Title, Mount Isa, 4 August 1994; see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report: January-June 1994*, (Sydney, 1995), p 40.
2. As public policy, multiculturalism encompasses government measures designed to respond to the cultural and ethnic diversity of Australia (see *Core Document Australia: prepared in accordance with the consolidated guidelines issued as an annex to United Nations Document HRIICOREI 1 of 24 February 1992* (Attorney-General's Department, Canberra, 19 April 1994, p 13). Multicultural Australia consists of persons from 140 different cultural backgrounds (Human Rights and Equal Opportunity Commission, *State of the Nation Report on People of Non-English Speaking Backgrounds* (Sydney, 1993), p 6). The 1991 Census found that 265,459 persons—1.6% of the total Australian population—identified as Aborigines or Torres Strait Islanders (Australian Bureau of Statistics, *Census of Population and Housing 1991: Australia's Aboriginal and Torres Strait Islander Population*, Canberra, 1993). For the purpose of the National Aboriginal and Torres Strait Islander Survey, released in February 1995, the ABS estimated the indigenous population at 30 June 1994 to be over 303,000: Australian Bureau

discussion of the need to recognise and accommodate cultural difference in 'dominant' legal and political structures. The discussion of cultural difference in Australia is informed by frequent reference to international human rights standards.

In Part 2 of the paper, it is proposed to review a number of texts which have been seminal in the development of international thinking about the concepts of equality and non-discrimination. It will be suggested that a distinction can be made between:

- circumstances in which it is discriminatory to apply different rules to the members of a particular group because of their indigenoussness, race or ethnic origin; and
- those situations in which it is reasonable and necessary to provide for special treatment to secure the equal enjoyment of human rights; or to have regard to special cultural characteristics.

In Part 3, the articles of the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD) which deal with special measures, and Australian practice in relation to those provisions, will be examined. In Part 4, section 8(1) of the RDA, its interpretation by the High Court of Australia in *Gerhardy v Brown*<sup>3</sup> and challenges to special measures which are currently before the Human Rights and Equal Opportunity Commission are considered. In Part 5, international legal practice in relation to the rights of ethnic minorities and indigenous peoples, and developments in Australia concerning the rights of ethnic communities and indigenous peoples are discussed. In Parts 6, 7 and 8, relevant experience in

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of Statistics, *National Aboriginal and Torres Strait Islander Survey 1994* (Canberra, 1995). Australians born overseas in countries other than the United Kingdom, Ireland and New Zealand made up 13.3% of the total population. Counting these immigrants and their children, as well as persons of non-English speaking background from English-speaking countries (like Maori and Pacific Islanders from New Zealand/Aotearoa) over a quarter of the total Australian population can be described as of non-English speaking background (Human Rights and Equal Opportunity Commission, *Annual Report 1993-1994* (Sydney, 1994), p 140). A disproportionate number of complaints under the RDA come from indigenous Australians. For the period 1993-1994, 22.5% of the total complaints received under the RDA were from Aboriginal and Torres Strait Islander persons (Human Rights and Equal Opportunity Commission, *Annual Report 1993-1994* (Sydney, 1994), p 140).

3. (1985) 159 CLR 70.

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relation to the *Sex Discrimination Act 1984* (Cth), *Anti-Discrimination Act 1977* (NSW) and the *Canadian Charter of Rights and Freedoms* are reviewed. In Part 8, a number of conclusions are offered.

## 2. The Concepts of 'non-discrimination' and 'protection of minorities'

The RDA was enacted in implementation of Australia's obligations under CERD. Section 8(1) of the RDA—the special measures provision—directly incorporates Article 1(4) of the Convention. The provisions of CERD are informed by reflection about the concepts of equality and non-discrimination which goes back at least to the adoption of a system of treaties for the protection of minorities as part of the Paris Peace Settlement at the conclusion of the First World War. In order to contextualise the special measures provision of the RDA, it is helpful to review some of the international texts which have been significant in the development of the concepts of equality and non-discrimination in international law.

The League of Nations' system for the protection of minorities produced a number of celebrated judgments. In its 1935 advisory opinion on *Minority Schools in Albania*, the Permanent Court of International Justice stated that the idea underlying the Minorities Treaties was to secure for the minorities concerned the possibility of living peaceably alongside the rest of the population whilst preserving their own characteristics. To attain this objective, two things were necessary:

The first was to ensure that members of racial, religious or linguistic minorities should be placed in every respect on a footing of perfect equality with the other nationals of the State.

The second was to ensure for the minority elements suitable means for the preservation of their own characteristics and traditions.<sup>4</sup>

According to the Court:

These two requirements are indeed closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority.<sup>5</sup>

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4. *Minority Schools in Albania* (1935) PCIJ Ser A/B No 64, at 17.

5. *Minority Schools in Albania* (1935) PCIJ Ser A/B No 64, at 17.

After the establishment of the United Nations, there was lively debate in the Commission on Human Rights and its Sub-Commission on Prevention of Discrimination and Protection of Minorities about the distinction between the concepts of 'protection of minorities' and 'equality and non-discrimination'. At its first session in 1947, the Sub-Commission suggested that the drafting of articles on the prevention of discrimination and protection of minorities might be facilitated by the following considerations:

1. Prevention of discrimination is the prevention of any action which denies to individuals or groups of people equality of treatment which they may wish.
2. Protection of minorities is the protection of non-dominant groups which, while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics they possess and which distinguish them from the majority of the population. ...It follows that differential treatment of such groups or individuals belonging to such groups is justified when it is in the interest of their contentment and the welfare of the community as a whole.

If a minority wishes for assimilation and is debarred, the question is one of discrimination and should be treated as such.<sup>6</sup>

A memorandum prepared in 1949 by the UN Secretariat refers to the text of the Sub-Commission and concludes:

Thus the prevention of discrimination means the suppression or prevention of any conduct which denies or restricts a person's right to equality.

The protection of minorities, on the other hand, although similarly inspired by the principle of equality of treatment of all peoples, requires positive action: concrete service is rendered to the minority group, such as the establishment of schools in which education is given in the native tongue of the members of the group. Such measures are of course also inspired by the principle of equality.<sup>7</sup>

In a famous dictum in the 1965 decision of the International Court of Justice in the *South West Africa Case*, Judge Tanaka stated:

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6. UN Doc E/CN.4/52 (1947), section V.

7. *The Main Types and Causes of Discrimination* UN Sales No 49.XIV.3 (1949), paras 6-7; see also United Nations, *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities*; by Francesco Capotorti, *Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities* UN Sales No E.91.XIV.2 (1977), para 239.

The principle of equality before the law does not mean the absolute equality, namely the equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal ...

To treat unequal matters differently according to their inequality is not only permitted but required.

Judge Tanaka then considered the criterion to distinguish a permissible discrimination from an impermissible one:

In the case of the minorities treaties, the norm of non-discrimination as a reverse side of the notion of equality before the law prohibits a State to exclude members of a minority group from participating in rights, interests and opportunities which a majority population group can enjoy. On the other hand, a minority group shall be guaranteed the exercise of their own religious and education activities. This guarantee is conferred on the members of a minority group, for the purpose of protection of their interests and not from the motive of discrimination itself. By reason of protection of the minority this protection cannot be imposed upon members of minority groups, and consequently they have the choice to accept it or not.<sup>8</sup>

In the 1977 *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities*, the Special Rapporteur of the Sub-Commission, Francesco Capotorti, observed that the concept of non-discrimination "implies a formal guarantee of uniform treatment... whereas the concept of protection of minorities implies special measures." Although distinct, the two concepts were closely linked: "The purpose of these measures is to institute factual equality between the members of the minority group and other individuals."<sup>9</sup>

The question of minority rights regimes will be further considered in Part 5 below. In the following, reference is made to a number of recent texts which explore, in particular, the concepts of equality and non-discrimination. These are comments adopted by UN human rights treaty bodies. Article 26 of the International Covenant on Civil and Political Rights (ICCPR) contains a guarantee of the equality of all persons before the law and of the equal protection of the law. The Human Rights Committee, the body established to supervise implementation of

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8. *South West Africa Case (Second Phase) [1966] ICJ Rep 6, 303-304, 305.*

9. *Ibid.*, para 241.

the ICCPR, has made clear that Article 26 is not infringed if the criteria for a differentiation are reasonable and objective and the aim is to achieve a purpose which is legitimate under the Covenant.

In a General Comment on Article 26 adopted in 1989, the Committee noted that "the application of the principle of non-discrimination contained in Article 26 is not limited to those rights provided for in the Covenant":

[The Committee believes that the term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground, ...and which has the purpose or effect of nullifying or impairing the enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.<sup>16</sup>

The General Comment confirmed that affirmative action by States Parties might sometimes be mandatory to implement the Covenant's prohibition of discrimination and to improve the status of disadvantaged groups:

The Committee also wishes to point out that the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to a part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.

Finally, the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.<sup>11</sup>

In an earlier General Comment on Article 3 of the ICCPR, adopted in 1981, the Committee noted that:

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10. General Comment 18 (1989), para 7; see *Compilation of General Comments and General Recommendations adopted by the Human Rights Treaty Bodies* UN Doc HRI/GEN/1/Rev 1(1994), p 27.

11. General Comment 18 (1989), paras 10, 13; see *Compilation of General Comments and General Recommendations adopted by the Human Rights Treaty Bodies* UN Doc HRI/GEN/1/Rev 1(1994), p 28.

Article 3, as articles 2(1) and 26 ...requires not only measures of protection but also affirmative action to ensure the positive enjoyment of those rights.<sup>12</sup>

In 1993, the Committee on the Elimination of Racial Discrimination adopted a General Recommendation on Article 1(1) of CERD, upon which section 9 of the RDA is based:

The Committee observes that a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within the scope of article 1, paragraph 4 of the Convention. ...In considering whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.<sup>13</sup>

From the foregoing statements, the following four conclusions can be drawn about the concepts of equality and non-discrimination in international law:<sup>14</sup>

1. Not all differences in treatment are discriminatory; that is, equality does not mean identical treatment.
2. A distinction is not discriminatory if the criteria for its adoption are objective and reasonable and it pursues a legitimate aim.

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12. General Comment 4 (1981), para 2; see *Compilation of General Comments and General Recommendations adopted by the Human Rights Treaty Bodies* UN Doc HRI/GEN/1/Rev 1(1994), p 4.
  13. General Recommendation XIV (1993), para 2; see *Compilation of General Comments and General Recommendations adopted by the Human Rights Treaty Bodies* UN Doc HRI/GEN/1/Rev 1(1994), p 68. According to Nowak, the extent to which the measures called for by Article 26 include affirmative action to establish *de facto* equality in a given situation has not yet been the subject of an individual communication. In connection with the State reporting procedure, however, States Parties are frequently asked about positive measures they have taken to counteract existing discrimination: M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Engel, Kehl/Strasbourg/Arlington, 1993) p 477. With reference to Article 26, an officer with the UN Centre for Human Rights has suggested that: "[I]t would... be conceivable that a member of a minority could submit a case demanding affirmative action, if such action is necessary for him or her to exercise Covenant rights on a basis of equality with members of the majority." A de Zayas, "The International Judicial Protection of Peoples and Minorities", in C Brolmann/, R Lefeber & M Zieck (Eds), *Peoples and Minorities in International Law* (Martinus Nijhoff, Dordrecht/Boston/London, 1993), 253, p 269.
  14. See also A Bayefsky, "The Principle of Equality or Non-Discrimination in International Law", (1990) 11 *Human Rights Law Journal* 1, p 27.

3. Positive action, that is, special measures or affirmative action, is sometimes required in order to redress inequality and to secure for the members of disadvantaged groups full and equal enjoyment of their human rights.
4. Special regimes of minority rights in recognition of distinct cultural identity are consistent with, and sometimes required by the notion of equality.

### **3. International Convention on the Elimination of All Forms of Racial Discrimination**

The Sub-Commission on Prevention of Discrimination and Protection of Minorities began working on the *International Convention on the Elimination of All Forms of Racial Discrimination* in January 1964. The Convention was adopted "with record speed"<sup>15</sup> in 1965. It entered into force on 4 January 1969.<sup>16</sup> As at 30 June 1995, CERD had been ratified or acceded to by 143 States. This makes it, second to the *Convention on the Rights of the Child*, the most widely ratified human rights instrument. Article 1(1) of the Convention defines as racial discrimination:

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.

As the Secretary to the Committee on the Elimination of Racial Discrimination recently commented, the wording of Article 1(1) leaves open the possibility that certain forms of racial discrimination are acceptable if they do not have an invidious

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15. T Meron, "The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination", (1985) 79 *American Journal of International Law* 283, p 284.

16. See M O'Flaherty, "The International Convention on the Elimination of All Forms of Racial Discrimination: The Substantive Provisions" paper delivered at the conference "UN Human Rights Procedures and Indigenous Australians", Sydney 28-30 June 1995, p 1; generally N Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination* (Sijthoff and Noordhoff, Alphen aan den Rijn/Rockville, 1980); N Lerner, "Curbing Racial Discrimination: Fifteen Years CERD", (1983) 13 *Israel Yearbook on Human Rights* 170; Meron, *op cit*, p 284; E Schwelb, "The International Convention on the Elimination of All Forms of Racial Discrimination", (1966) 15 *International and Comparative Law Quarterly* 996.

purpose.<sup>17</sup> The Convention further recognises that in order to ensure the equal enjoyment of human rights, special measures may be necessary to secure the adequate advancement or development of particular racial groups.

Article 1(4) provides:

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.

Article 2(2) states:

States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were undertaken have been achieved ."

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17. See O'Flaherty, "The International Convention on the Elimination of All Forms of Racial Discrimination: The Substantive Provisions", *op cit*, p 3.

18. Special measures provisions are also contained in the 1979 *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) and the International Labour Organisation's *Discrimination (Employment and Occupation) Convention* of 1958 (Convention No 111).

Article 4(1) of CEDAW provides:

Adoption by States of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

Article 2 of ILO Convention No 111 imposes an obligation upon ILO members for which the Convention is in force:

to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

Article 5(1) provides:

Special measures of protection or assistance provided in other Conventions or Recommendations adopted by the International Labour Conference shall not be deemed to be discrimination.

In a number of respects, the provisos attached to Article 2(2) are less stringent than those attached to Article 1(4). Article 2(2) contains neither the requirement that a measure be "necessary" nor the "sole purpose" requirement of Article 1(4). While Article 1(4) sanctions the continuation of affirmative action programs for groups which have suffered from discriminatory practices, Article 2(2) actually imposes an obligation on States Parties to institute such programs.<sup>19</sup> According to the Secretary of the Committee on the Elimination of Racial Discrimination:

The provision is of immense importance for racial or ethnic groups, and given the extent to which it surpasses the obligations in article 27 of the International Covenant on Civil and Political Rights in creating a regime of minority group rights, it is surprising that it has received so little attention from academics and non-governmental organisations.<sup>20</sup>

Alexander de Zayas, also an officer with the UN Centre for Human Rights in Geneva, has commented that Article 2(2) "goes further than the Political Covenant, and opens up new vistas for the implementation of minority rights."<sup>21</sup> The fact that racial minorities are yet to invoke the provision under the individual complaints procedure to CERD is "perhaps because they are yet unaware of its potential." Meron has suggested that the obligation of States to resort to affirmative measures should be determined "by the group's degree of access to political and economic resources":

While article 2(2) does not provide standards for determining when circumstances warrant special measures, the text suggests that the test is whether the group in question requires the protection and aid of the state to attain a full and equal enjoyment of human rights.<sup>22</sup>

Luis Valencia Rodriguez, a member of the Committee on the Elimination of Racial Discrimination, has commented that States Parties should pay attention to "the socio-economic and political situation" of ethnic or minority groups "in order to

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19. Bayefsky, *op cit*, p 27.

20. See O'Flaherty, "The International Convention on the Elimination of All Forms of Racial Discrimination: The Substantive Provisions", *op cit*, p 8; also Meron, *op cit*, p 306.

21. de Zayas, *op cit*, p 271.

22. Meron, *op cit*, p 308.

ensure that their development in the social, economic and cultural spheres takes place on an equal footing with that of the general population."<sup>23</sup>

Article 2(2) imposes upon States an obligation to take special and concrete measures "when the circumstances so warrant." The measure of necessity for the taking of affirmative measures is, so writes the Committee's Secretary, "an objective one and not dependent on the subjective views of the Government concerned."<sup>24</sup> Clearly, then, in order to perform their obligations under Article 2(2), States should be aware of the relevant characteristics, circumstances and needs of ethnic groups within their jurisdictions. The Committee on the Elimination of Racial Discrimination has found that many governments have not put in place the research and analysis tools for such work. The rectification of such situations would appear to be obligatory under the Convention.<sup>25</sup>

At its 46th session in March 1995, the Committee considered a draft decision on the nature of the right of self-determination of ethnic or religious groups or minorities. The draft decision contains discussion of Article 2(2). In the course of a protracted debate, the draft was revised five times and remains to be adopted by the Committee. It is unlikely that the text will be adopted without further revision. The fifth version of the draft does, however, provide an indication of the Committee's thinking with respect to Article 2(2). It provides:

Governments should, in accordance with article 2(2) of the [Convention], be sensitive towards the aspirations of ethnic groups, particularly their rights to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth and to play their part in the government of the countries in which their members are citizens. Governments should consider, within their respective constitutional frameworks, vesting ethnic or linguistic groups formed of their citizens, if appropriate, with the competencies to administer affairs which are particularly relevant to the preservation of the identities of such groups.<sup>26</sup>

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23. L Valencia Rodriguez, "The International Convention on the Elimination of All Forms of Racial Discrimination", in United Nations Centre for Human Rights, *Manual on Human Rights Reporting under Six Major International Human Rights Instruments* (Geneva/New York 1991), 127, p 131.
  24. See O'Flaherty, "The International Convention on the Elimination of All Forms of Racial Discrimination: The Substantive Provisions", *op cit*, p 9.
  25. *ibid*, p 10.
  26. See the summary record of the draft and debate in UN Doc CERD/C/SR 1084-85 (1995).

Australia's ninth periodic report under Article 9 of CERD was submitted to the Committee on the Elimination of Racial Discrimination in August 1993.<sup>27</sup> The section of the report dealing with Article 2(2) provides some insight into the sort of measures Australia currently undertakes in order to comply with the Convention. In relation to Aboriginal and Torres Strait Islander Australians, the report refers to the following special measures under Article 2(2):

- the Land Acquisitions Program of the Aboriginal and Torres Strait Islander Commission (ATSIC);
- a preparedness to consider the enactment of land rights legislation, "where a State or Territory is unable or unwilling to do so"; and
- the Task Force on Aboriginal and Torres Strait Islander Broadcasting.

In relation to migrants, this section of Australia's report refers to:

- the National Integrated Settlement Strategy;
- the Migrant Worker's Participation Scheme;
- the Workplace English Language and Literacy Program;
- the Adult Migrant English Program;
- the Human Rights and Equal Opportunity Commission's annual *State of the Nation Report on People of Non-English Speaking Backgrounds*; and
- the Special Broadcasting Service.

In connection with Article 5, the report provides further details of "special measures taken to assist groups who may be disadvantaged because of race or ethnic origin which complement existing criminal law and other protection for all Australian citizens." Measures addressing the needs of migrants include:

- consideration of the Australian Law Reform Commission's 1992 report on *Multiculturalism and the Law*; and

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27. *Ninth Periodic Report of Australia under Article 9 of the Convention on the Elimination of Racial Discrimination* UN Doc CERD/C/223/Add 1.

- a review of arrangements for access to interpreters in the Australian legal system.

Measures addressing the needs of Aboriginal and Torres Strait Islander Australians include:

- additional funding to Aboriginal Legal Services;
- concern about the implications of the *Crime (Serious and Repeat Offenders) Sentencing Act* (WA) 1992 for Australia's obligations under international human rights instruments; and
- special programs of assistance in acknowledgment of past and current discrimination against, and dispossession and dispersal of Aboriginal and Torres Strait Islander Australians, to enable access to full economic, social and cultural rights (including programs to give effect to the rights to employment, housing, health and social services, and education and training).

#### 4. Racial Discrimination Act 1975 (Cth)

Section 8(1) of the RDA contains a special measures exception to the general prohibition of racial discrimination in Part II of the Act. Section 8(1) provides:

This Part does not apply to, or in relation to the application of special measures to which paragraph 4 of article 1 of the Convention applies.

Articles 1(4) and 2(2) of CERD and their equivalent in section 8(1) RDA arose to be considered by the High Court of Australia in the case of *Gerhardy v Brown*.<sup>28</sup> The case concerned an alleged inconsistency between South Australian land rights legislation and the RDA. The *Pitjantjatjara Land Rights Act* 1981 (SA) vested the title to a large area of land in the north-west of South Australia in the Anangu Pitjantjatjaraku, a body corporate of which all persons defined by the Act to be Pitjantjatjaras are members. Section 18 of the Act provides that "[all] Pitjantjatjaras have unrestricted rights of access to the lands." Section 19 makes it an offence for non-Pitjantjatjara persons to enter Pitjantjatjara lands without a permit. Robert John Brown was charged with an offence under section 19. He argued that section 19 was inconsistent with the Commonwealth RDA and

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28. (1985) 159 CLR 70.

therefore, by reason of the operation of section 109 of the *Constitution*, invalid. In the Supreme Court of South Australia, Millhouse J accepted this argument.<sup>29</sup> The matter was appealed to the Full Court of the Supreme Court and removed into the High Court.

The High Court overturned the decision of Millhouse J. The Court held that whilst the South Australian legislation discriminated on the basis of race, it was saved as a "special measure" within the meaning of section 8(1) of the RDA. The High Court's decision contains detailed analysis of the indicia of special measures. The judgment of Brennan J identifies four characteristics to be satisfied in order to come within section 8(1):

- the special measure must "confer a benefit on some or all members of a class";
- membership of this class must be "based on race, colour, descent, or national or ethnic origin";
- the "special measure" must be for "the sole purpose of securing adequate advancement of the beneficiaries in order that they may enjoy and exercise equally with others human rights and fundamental freedoms"; and
- the protection given to the beneficiaries by the special measure must be "necessary in order that they may enjoy and exercise equally with others human rights and fundamental freedoms."<sup>30</sup>

Brennan J noted the particular relevance of the "wishes of the beneficiaries for the measure":

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 benefit are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement.<sup>31</sup>

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29. (1983) 34 SASR 452;. See G Nettheim and N Rees, "Discrimination and Land Rights", (1983) 9 *Aboriginal Law Bulletin* 2, p2.

30. (1985) 159 CLR 70, 133.

31. (1985) 159 CLR 70, 135.

On the approach of the majority in *Gerhardy* (Dawson J not deciding), the permit provisions of the *Pitjantjatjara Land Rights Act* would have been racially discriminatory, had they not been saved as special measures. The Court rejected the submission of the appellant that the State Act merely recognises and gives effect to traditional ownership and that there is no inconsistency between it and the Commonwealth RDA. The Solicitor-General of South Australia, for the appellant, had submitted that:

There is no discrimination within s 9 when there is an objective or reasonable justification in the distinction, exclusion, restriction or preference. For there to be discrimination the distinction or differentiation must be arbitrary, invidious or unjustified... The distinction here is not based upon race as such, but on the recognition of the traditional owners of the land."

Intervening in support of the appellant, the Solicitor-General for the Commonwealth had argued similarly:

Section 19 contains no provision, nor does it enter into any field, relating to racial discrimination. Rather, it provides legal recognition to a certain type of legal interests in land not previously recognized, namely traditional ownership. It is based on traditional ownership not race.<sup>33</sup>

Also intervening by leave, counsel for the Anangu Pitjantjatjara had described the State Act as:

a legislative restoration of rights, benefits and privileges in relation to those lands to those people who have, in accordance with Aboriginal tradition, social, economic and spiritual affiliations with, and responsibility for, the lands. ... It does not contain any provision, nor does it enter upon the field, relating to racial discrimination. The criterion employed is based not on race but on traditional ownership. There is no direct inconsistency.<sup>34</sup>

The High Court rejected the argument that a distinction or differentiation must be arbitrary, invidious or unjustified for there to be discrimination. Instead, the Court endorsed an approach according to which all references to race, however benign

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32. (1985) 159 CLR 70, 72.

33. (1985) 159 CLR 70, 72.

34. (1985) 159 CLR 70, 73.

and reasonable, are *prima facie* discriminatory, and invalid by reason of inconsistency with section 9 of the RDA, unless they come within the carefully circumscribed "special measures" exception in section 8. According to Mason J, for example:

I ... regard the conclusion as inevitable that the effect of the State Act is to discriminate by reference to race, colour or origin because eligibility to enjoy the right which the statute confers depends in the manner described on membership of the Pitjantjatjara peoples.<sup>35</sup>

The High Court's understanding of equality requires, in effect, identical treatment without regard to actual inequality. The fact that indigenous Australians have been subjected to appalling inequalities demonstrates, as Margaret Thornton has noted, "that formal equality is compatible with the grossest injustice."<sup>3</sup> A number of commentators have criticised the conceptual basis of the High Court's decision in *Gerhardy*.<sup>37</sup> In international legal usage, as exemplified by the practice of the Committee on the Elimination of Racial Discrimination and the Human Rights Committee, 'racial discrimination' refers not to any distinction or differential treatment, but only to that which is arbitrary, invidious or unjustified. References to race become discriminatory only where they lack an objective and reasonable basis or a legitimate purpose.

In international legal practice, the application of a test of reasonable or legitimate classification seeks to ensure substantive rather than merely formal equality before the law.<sup>38</sup> The Australian Law Reform Commission (ALRC) has endorsed an interpretation of CERD as prohibiting only invidious discrimination. The ALRC's 1986 report on *Recognition of Aboriginal Customary Law* refers to "the drafting history of the Convention, the pre-existing and widely accepted meaning of discrimination

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35. (1985) 159 CLR 70, 103.

36. M Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, Melbourne, 1990), p 16.

37. See I Brownlie, "Rights of Peoples in International Law", in J Crawford (Ed), *The Rights of Peoples*, (Clarendon Press, Oxford, 1988), 1, p 9; G Nettheim, "Indigenous Rights, Human Rights and Australia", (1987) 61 *Australian Law Journal* 291, p 299.

W Sadurski, "Gerhardy v Brown: Reflections on the Landmark Case that Wasn't", (1986) 11 *Sydney Law Review* 5, p 30; also S Pritchard, "International Law", in *Aborigines and Torres Strait Islanders, Laws of Australia*, (Law Book Company, 1993), pp 34-35.

38. W McKean, "The Meaning of Discrimination in International and Municipal Law", (1970) 44 *British Yearbook of International Law* 178, pp 185-186; also L Lustgarten, *Legal Control of Racial Discrimination* (MacMillan, London, 1980), pp 3-37; E Vierdag, *The Concept of Discrimination in International Law* (Martinus Nijhoff, The Hague, 1973), pp 86-89.

in international law, and the apparent consensus of writers."<sup>39</sup> The report prefers the view that Article 1(1) of CERD incorporates the general test for discrimination based on the reasonableness as opposed to the arbitrariness of particular classifications or distinctions and concludes that the prohibition of discrimination:

does not preclude reasonable measures distinguishing particular groups and responding in a proportionate way to their special characteristics, provided that basic rights and freedoms are assured to members of such groups. Nor does it preclude "special measures", for example for the economic or educational advancement of groups or individuals, so long as these measures are designed for the sole purpose of achieving that advancement, and are not continued after their objectives have been achieved.<sup>40</sup>

In many cases, the disadvantage and needs of particular racial groups may require the indefinite maintenance of special measures if the objectives for which they were taken are to be achieved.<sup>41</sup> The provisos in Article 1(4) and 2(2) of CERD suggest that special measures are envisaged as a temporary response to disadvantage, aimed at achieving a specified result within a more or less definite period of time.<sup>4</sup> The concept of special measures implies that certain historically disadvantaged racial groups may require some special assistance until they 'catch-up' with other groups. In *Gerhardy v Brown*, the High Court did not accept that special measures need to be temporary either in nature or in terms. Mason J said:

In the present case the legislative regime has about it an air of permanence. It may need to continue indefinitely if it is to preserve and protect the culture of the Pitjantjatjara peoples. ... [The proviso] does not insist on discontinuance if discontinuance will bring about a failure of the objects which justify the taking of the special measures in the first place.<sup>43</sup>

Ultimately, though, the concept of special measures is a defensive one, offering a defence to challenges to interventions in the interests of racial groups. A permanent avenue for judicial review will exist in order to ascertain when the objectives of the

39. The Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (Canberra, 1986), para 150.

40. *Ibid*, paras 150, 158, 41, J

Crawford, "International Law and the Recognition of Aboriginal Customary Laws", in B Hocking (Ed), *International Law and Aboriginal Human Rights* (Law Book Co, 1988), 43, p 55.

42. D Sanders, "The Re-emergence of Indigenous Questions in International Law", [1983] *Canadian Human Rights Yearbook* 16, p 23.

43. (1985) 159 CLR 70, 106.

special measures have been achieved,<sup>44</sup> or in the words of Gibbs CJ, when the special measures have "degenerate(d) into discrimination."<sup>45</sup> In *Gerhardy*, Gibbs CJ was concerned that the construction urged by the appellant might permit the provisions of the RDA to be easily evaded:

On this suggested construction, it would be possible, for example, for the law of a State effectively to provide that only persons of the white races might use certain public facilities, for

such a law would disadvantage, not persons of a particular race, but persons of many races.<sup>46</sup>

With respect, such a result is unlikely to arise. It would be extremely difficult, if not impossible, to point to any legitimate and objective purpose served by a law according preferential treatment to persons "of the white races". Such a law is hardly likely to be found to contribute to achieving effective and genuine equality for disadvantaged racial groups. Clearly, it is important to remain vigilant to the danger of less benign uses of racial classification. However, a more "substantive" interpretation of the RDA would hardly countenance the invidious use of racial classification to protect the interests of already advantaged racial groups.

In a number of decisions, the High Court has indicated that it might be persuaded to depart from its interpretation of discrimination in *Gerhardy v Brown*. The Court's decisions in *Street v Queensland Bar Association*<sup>o</sup> and *Castlemaine Tooheys Ltd v South Australia*<sup>48</sup> suggest a move away from a formalistic towards a more contextualised understanding of equality. *Street's case* involved the interpretation of section 117 of the Constitution, one of the few provisions of the Constitution concerned with the rights of individuals. Section 117 provides:

A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were the subject of the Queen resident in any other State.

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44. Crawford, *op cit*, p 58.

45. *Gerhardy v Brown* (1985) 159 CLR 70, 88-89 (Gibbs CJ), also 105-6 (Mason J), 108 (Murphy J), 113 (Wilson J), 139 (Brennan J).

46. (1985) 159 CLR 70, 83.

47. (1989) 168 CLR 461.

48. (1990) 169 CLR 436.

The judgment of Brennan J contains discussion of the necessity defence to a challenge to discrimination under section 117. Like the other Justices, Brennan J recognises that some discrimination against out-of-State residents is necessary, for example, in the franchise for electing representatives to the Senate. Brennan J states:

When it is necessary to treat a protected person differently on the ground of out-of-State residence..., that ground reflects the fact that the protected person is in a position which is relevantly and necessarily different from the position she or he would be in if she or he were an in-State resident... Such different treatment is not truly discriminatory.<sup>49</sup>

Justice Gaudron made the following observations on the general considerations which result in particular treatment being identified as discriminatory:

Although in the primary sense 'discrimination' refers to the process of differentiating between persons or things possessing different properties, in legal usage it signifies the process by which different treatment is accorded to persons or things by reference to considerations which are irrelevant to the object to be attained.

The question whether different treatment assigned by reason of a relevant difference is appropriate to that difference is one which is peculiarly apt to an identified and relevant circumstance.<sup>50</sup>

In *Castlemaine Tooheys Ltd v South Australia*<sup>51</sup> the High Court had to consider whether a legislative regime which conferred a competitive advantage in the South Australian market was discriminatory and therefore infringed section 92 of the Constitution. Section 92 provides:

On the imposition of uniform duties of customs, trade, commerce and intercourse among the States ... shall be absolutely free.

Justices Gaudron and McHugh referred to Gaudron J's discussion in *Street's case* of the general features of a discriminatory law and continued:

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49. (1989) 168 CLR 461, 513-514. See discussion in J Morgan, "Equality Rights: A Feminist Assessment", in P Alston (Ed), *Towards an Australian Bill of Rights* (Human Rights and Equal Opportunity Commission/Centre for International and Public Law, 1993), 123, pp 140-142.

50. (1989) 168 CLR 461, 570-571, 573.

51. (1990) 169 CLR 436.

A law is discriminatory if it operates by reference to a consideration which some overriding law decrees to be irrelevant or by reference to a distinction which is in fact irrelevant to the object to be attained; a law is discriminatory, if although it operates by reference to a relevant distinction, the different treatment thereby assigned is not appropriate and adapted to the difference or differences which support that distinction. A law is also discriminatory if although there is a relevant difference, it proceeds as though there is no such difference or, in other words, if it treats equally things that are unequal—unless, perhaps there is no practical basis for differentiation.<sup>52</sup>

Of course, in the cases of *Street* and *Castlemaine Tooheys*, the High Court was not concerned with the particular legislative regime of the RDA. In its recent decision in *State of Western Australia v Commonwealth; Wororra Peoples and Another v Western Australia; Biljabu and Others v State of Western Australia*, the High Court appeared to place a question mark over the conceptualisation of the *Native Title Act 1993* (Cth) (NTA) as a special measure within section 8(1) of the RDA.

In argument before the Court, the Commonwealth had submitted that the NTA was:

a seminal example of the way in which traditional cultural rights of indigenous minorities, especially their right to land, can be protected and accommodated in a way that ensures equal protection of the law for that minority.<sup>53</sup>

The NTA was, according to the Commonwealth's submission, "a specific measure designed to address a specific instance of lack of equality before the law in enjoyment of certain rights". This made it not a special measure within the sense of section 8(1) of the RDA and Articles 1(4) and 2(2) of CERD, but a "reasonable and proportionate means of achieving substantial equality" as required "as a matter of international obligation" by Article 5 of CERD and Article 27 of the ICCPR.<sup>54</sup> The High Court neither explicitly endorsed nor rejected the approach urged by the Commonwealth. The Court rejected the submission of Western Australia that the NTA discriminates in favour of Aborigines and Torres Strait Islanders and thus offends the RDA. In the first place, the Court had difficulty detecting any inconsistency between the two pieces of legislation. Even if there were any discrepancy in the operation of the two Acts, the NTA could be regarded:

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52. (1990) 169 CLR 436, 478.

53. *Western Australia v The Commonwealth; Wororra Peoples and Yawuru Peoples v Western Australia; Biljabu and others v Western Australia*, Transcript of Proceedings at Canberra on Monday 12 September 1994, p 370.

54. *ibid*, p 371.

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either as a special measure under s 8 of the *Racial Discrimination Act* or as law which, though it makes racial distinctions, is not racially discriminatory so as to offend the *Racial Discrimination Act* or the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>55</sup>

This dictum suggests that in its approach to the RDA, as in its approach to sections 92 and 117 of the Constitution, the High Court might not be disinclined to embrace an understanding of racial discrimination which refers not to any distinction or differentiation, but only to those which are arbitrary, invidious or unjustified. On such an analysis, measures adopted by reference to race would not constitute discrimination under the RDA, where the criteria for differentiation are reasonable and objective.

During the course of oral argument before the Court, some concern was expressed that an approach which regards as racially discriminatory only those measures, adopted by reference to race, which are arbitrary and invidious might do violence to the text of the RDA or leave section 8(1) without any work to do. With respect, such conclusions do not necessarily follow. On the approach advocated, section 8(1) would continue to have a role to play in relation to situations in which it is reasonable and necessary to provide for special treatment to eliminate disadvantage and to put the members of a disadvantaged group on a footing of equality with the rest of the population. That is, the special measures provisions of the RDA might continue to be invoked to support more conventional forms of affirmative action. In relation to Aboriginal and Torres Strait Islander peoples, in particular, who experience extreme disadvantage in the enjoyment of virtually all their human rights (particularly in the area of economic and social rights—health care, appropriate housing, education and employment opportunities, essential services and community infrastructure such as electricity, water, communications systems and public transportation), the value of the concept of special measures is not likely to decline in the foreseeable future.

Where, on the approach advocated here, section 8(1) is likely to have no work to do is in relation to situations in which special provisions are adopted in recognition of distinct cultural identity. Such provisions, which seek to secure the preservation and development of the diverse linguistic and cultural characteristics of ethnic groups, do not constitute racial discrimination and do not need to be saved as

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55. (1995) 128 ALR 1, 62.

special measures within section 8(1) of the RDA. In the context of the maintenance of the cultural and linguistic identities of Australia's ethnic communities, such provisions might relate to support for programs or schools in which instruction is given in ethnic community languages or the establishment of special broadcasting and publishing services. In recent years, it has become evident that Aboriginal and Torres Strait Islander peoples cannot be seen as temporarily disadvantaged racial groups in Australian society and their aspirations addressed by the adoption of temporary special measures of protection. Australia's indigenous peoples, as indigenous peoples around the world, are demanding recognition of their status as distinct peoples. Such status has implications for issues such as self-government, political participation, land rights, intellectual and cultural property rights and recognition of customary law. These are, with respect, issues in relation to which the concept of special measures is meaningless.

Apart from the decision of the High Court in *Gerhardy v Brown*, there is virtually no case law on special measures in the area of race discrimination.<sup>56</sup> The Race Discrimination Commissioner, it seems, has invoked section 8(1) in relation to a number of complaints. However, where complaints do not proceed to a public hearing, the Commission remains under a statutory duty of confidentiality in relation to them. This situation makes it virtually impossible to assess the application, in practice, of section 8(1).<sup>57</sup> The Race Discrimination Unit at the Human Rights and Equal Opportunity Commission (HREOC) has kindly provided a brief summary of current complaints involving section 8(1). As names of complainants and respondents and other identifying data have been deleted, the summaries of the facts are at times a little cryptic. They do, nonetheless, provide an indication of the sort of issues in relation to which the concept of special measures is applied.

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56. In *Pareroultja v Tickner* the Full Bench of the Federal Court found the *Aboriginal Land Rights Act 1976* (Cth) to be a special measure for the purposes of s8(1) of the RDA; (1993) 117 ALR 206. An application for special leave to appeal from the decision to the High Court was declined on 14 April 1994. See also *New South Wales Aboriginal Land Council v Worimi Local Aboriginal Land Council* (1994 84 LGERA 188) and *The Aboriginal Legal Rights Movement v The State of South Australia* (Full Court of the Supreme Court of South Australia, unreported, 25 August 1995) in which s 40D(1 Xb) of the *Aboriginal Land Rights Act 1983* (NSW) and the *Aboriginal Heritage Act 1988* (SA) were held to constitute special measures within s 8(1) of the RDA 1975 (Cth).

57. At the time of writing, the Race Discrimination Commissioner had recently referred a complaint for hearing.

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Current challenges to measures adopted by reference to the status of persons as Aboriginal or Torres Strait Islander involve the following scenarios:

- non-Aboriginal club members not entitled to be elected to the Board nor to vote in Board elections;
- person prevented from applying for a position because non-Aboriginal;
- allegation of discrimination in employment in recruitment programs for Aboriginal persons;
- employment of Aboriginal persons in designated positions;
- advertisement placed by Government department seeking an Aboriginal or Torres Strait Islander person for position as trainee book editor;
- complainant not granted admission to a Faculty of Medicine under special category for indigenous Australians;
- different parental means tests for Aboriginal and non-Aboriginal students;
- benefits provided under a scheme to non-Aboriginal students, compared with those provided to Aboriginal students;
- subsidies for Aboriginal children of costs incurred in attending sporting events;
- non-Aboriginal children not in receipt of Government funding;
- use of a more effective vaccine for Aboriginal and Torres Strait Islander children than for non-Aboriginal children; and
- refusal of service in context of agreements in a number of Aboriginal communities in the Northern Territory to restrict the supply of alcohol.

Challenges to measures adopted by reference to the status of persons as of non-English speaking background currently involve:

- a cadet program for persons of non-English speaking background; and
- the designation of positions for people of non-English speaking backgrounds.

## **5. Indigenous Peoples and Ethnic Minorities**

During the past decade, the international community has become aware of the need for recognition of indigenous rights and accommodation of indigenous forms of self-government.

There has been increasing recognition of the emergence or, more accurately perhaps, re-emergence of indigenous peoples as subjects of international law. In 1982, the United Nations Economic and Social Council adopted a resolution establishing a Working Group on Indigenous Populations (WGIP).<sup>58</sup> At its 12th session in 1994, the Working Group adopted a Draft Declaration on the Rights of Indigenous Peoples and submitted it to its parent body, the Sub-Commission on Prevention of Discrimination and Protection of Minorities.<sup>59</sup> In November this year, a Working Group of the Sub-Commission's parent body, the Commission on Human Rights, commenced its consideration of the Draft Declaration.

The international legal system has recognised that although in some respects the needs and aspirations of indigenous peoples and ethnic groups are not altogether dissimilar, in a number of critical respects they are quite distinct. In the context of the standard-setting activities of the WGIP, indigenous peoples have rejected attempts to equate their rights with those of ethnic minorities. They have argued that the status of ethnic minorities in integrated national settings is incompatible with the right of indigenous peoples to self-determination. The distinction has been accepted in the practice of the United Nations, which has established separate procedures to elaborate standards on minority and on indigenous rights.<sup>60</sup> In an address to a seminar in Sydney in April this year, the Chairperson/Rapporteur of the WGIP, Professor Erica Irene-Daes, noted 3 elements of the Draft Declaration on the Rights of Indigenous Peoples which distinguish it from other human rights instruments, in particular those dealing with minorities.

These are:

1. the distinct international legal personality which indigenous peoples continue to possess, and their equality under international law with other peoples, even where they have agreed to be incorporated into existing States;
2. the territorial security of indigenous peoples within historically defined territories; and

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58. ECOSOC resolution 1982/34 (7 May 1982).

59. UN Doc E/CN.4/Sub.2/1994/2/Add.1.

60. The Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities was adopted by the UN General Assembly on 18 December 1992 (General Assembly resolution 47/135).

3. the status of indigenous peoples as a matter of international responsibility, requiring that they have direct access to international bodies and legal mechanisms, as well as a role in the implementation of the Draft Declaration.<sup>61</sup>

Whilst "indigenous peoples" and "minorities" are not co-extensive categories, there is growing consensus that neither are they mutually exclusive. The jurisprudence of the Human Rights Committee has demonstrated that Article 27 of the ICCPR can be of assistance in compelling States parties to recognise and secure the special relationship of indigenous peoples with their territories, and to recognise the cultural importance and protect the enjoyment of indigenous economic activities.<sup>62</sup>

Article 27 provides that:

Members of ethnic, religious or linguistic minorities shall not be denied the right, in community with the members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

The Human Rights Committee has rejected a minimalist interpretation of Article 27 as imposing an obligation on States parties simply to refrain from activities interfering in the enjoyment of the rights under Article 27.

In a General Comment adopted in 1994, the Committee stated that:

[P]ositive measures by States may... be necessary to protect the identity of a minority and the rights of its members. In their reports, States parties should indicate the measures they have adopted to ensure the full protection of these rights. ...Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by

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61. EJA Daes, "The United Nations Draft Declaration on the Rights of Indigenous Peoples: Current Developments", paper presented at Aboriginal and Torres Strait Islander Commission seminar, Sydney, 29 April 1995; see also "Equality of Indigenous Peoples under the the Auspices of the United Nations—Draft Declaration on the Rights of Indigenous Peoples" (1995) *St Thomas Law Review* 493, pp 496-497.

62. See *Lovelace v Canada* (Communication No 24/1977; United Nations, *Selected Decisions of the Human Rights Committee under the Optional Protocol*, UN Doc CCPR/C/OP/1 (1988), 86-90); *Kitok v Sweden* (Communication No 197/1985, UN Doc CCPR/C/33/D/197/1985 (1988), paras 9.2, 9.3, 9.8), *Chief Ominayak v Canada* (Communication No 167/1984, *Report of the Human Rights Committee* UN Doc A/45/40 (1990), vol 2, at 1, para 32.2); *Lansmann v Finland* (Communication No 511/1922, UN Doc CCPR/C/52/D/511/1992 (1994), para 9.3).

States may also be necessary to protect the identity of the minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with other members of the group.<sup>63</sup>

The General Comment affirms the relevance of Article 27 for indigenous peoples:

[T]he Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, specially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.<sup>64</sup>

In his work as Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Dodson has invoked Article 27 in support of the following contentions:

- that extinguishment of native title would contravene, amongst other international standards, Article 27;<sup>65</sup>
- that Article 27 supports an obligation upon the Australian Government to recognise indigenous laws and customs;<sup>66</sup> and
- that Article 27 imposes upon Australia an obligation for the well-being of indigenous cultures.

As far as groups of non-English speaking background are concerned, the records of the committees which drafted the ICCPR reveal that recent immigrant groups were outside the intended protection of Article 27. The provision was elaborated with the situation of long-established European minorities in mind. A number of (in particular European) States Parties to the ICCPR still maintain this position.

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63. General Comment 23 (1994), para 6.2; see *Compilation of General Comments and General Recommendations adopted by the Human Rights Treaty Bodies* UN Doc HRI/GEN/1/Rev 1(1994), p40.

64. *Ibid*, para 7.

65. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report: January-June 1994* (Sydney, 1995), p 65.

66. *Ibid*, p 71.

67. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous Social Justice: Strategies and Recommendations: Submission to the Parliament of the Commonwealth of Australia on the Social Justice Package* (Sydney, 1995), p 7.

Australian practice, however, clearly considers ethnic communities to come within the scope of Article 27. Australia's periodic reports to the Human Rights Committee provide information on the application of Article 27 to ethnic groups.<sup>68</sup>

Recent developments in Australia reveal a considerable shift in attitude towards the rights and claims of minorities, particularly those of Australia's indigenous peoples. In its 1986 report on *The Recognition of Aboriginal Customary Laws*, the Australian Law Reform Commission (ALRC) recommended that certain principles of Aboriginal customary law be given recognition, in a manner acceptable to the Aboriginal people concerned and consistent with basic human rights.<sup>69</sup> As part of the National Agenda for a Multicultural Australia, the ALRC was asked to consider whether Australian family law, criminal law and contract law are "appropriate to a society made up of people from different cultural backgrounds and from ethnically diverse communities."<sup>70</sup> In its 1992 report on *Multiculturalism and the Law*, the ALRC was guided by, amongst others, the principle that "within the limits necessary in a free and democratic society, an individual should be free to choose, to maintain and to express his or her cultural or religious values."<sup>71</sup> Elizabeth Evatt has characterised the ALRC's *Recognition of Aboriginal Customary Laws* and *Multiculturalism and the Law* reports as "a significant attempt to free the law from its monocultural bias, and to open it up to the perceived needs of Aborigines and other cultural minorities which have resulted from immigration."<sup>72</sup>

An argument sometimes put forward against the recognition of Aboriginal customary law, and against special legislation for indigenous peoples, is that such measures might be seen as discriminatory to the extent that the cultural practices and laws of immigrant groups do not receive recognition and that special legislative

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68. For example, Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Second periodic reports of States Parties due in 1986: Australia* UN Doc CCPR/C/42/Add 2 (1987), paras 679-696.

69. The Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (Canberra, 1986), para 165.

70. The Law Reform Commission, *Multiculturalism and the Law*, Report No 57 (Sydney, 1992), para 1.2.

71. The Law Reform Commission, *Multiculturalism and the Law*, Report No 57 (Sydney, 1992), para 1.29.

72. E Evatt, "Cultural Diversity and the Law", in Alston (ed), *Towards an Australian Bill of Rights*, *op cit*, 79, pp 104-105.

provision is not made for them.<sup>73</sup> Increasingly, however, there is acceptance of the need and justification for distinguishing the situations of indigenous peoples and the many distinct migrant communities in Australia. Often, although not always, the customs and laws of immigrant groups do not differ significantly enough from those of the "dominant" Australian culture to create difficulties, except perhaps of language and interpretation. Further, groups which have come to Australia since its colonisation have come to a country with an established legal culture and laws.<sup>74</sup> Although such groups have a right to participate in the development of law and practice in Australia, their situation is significantly different from that of Australia's indigenous peoples. Colonisation took place without the invitation or consent of Australia's indigenous peoples and has had a devastating impact on their culture, traditions and laws.<sup>75</sup> Whilst multiculturalism does not involve separate, parallel development of major institutions, such as education, law and government, for immigrant groups,<sup>76</sup> recognition of the distinct status of Australia's first peoples might.

A number of significant developments have been informed by increasing debate about the recognition of the collective rights of Australia's indigenous peoples and, in particular, the right of Aboriginal and Torres Strait Islander peoples to self-determination.

## **Royal Commission into Aboriginal Deaths in Custody**

The work of the Royal Commission into Aboriginal Deaths in Custody (RCADIC) increased awareness amongst non-indigenous Australians about the impact of

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73. P Hyndman, "Cultural Legitimacy in Law and Policy in Australia", in A An-Na'im (Ed), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania Press, Philadelphia, 1992), 295, p 316.

74. The ALRC's report on *Recognition of Aboriginal Customary Laws* makes a distinction between Aborigines and immigrant groups who have come by choice to a community with its own laws and legal culture. Special reasons justifying the recognition of Aboriginal customary laws arise from their situation as "a prior community (or series of communities) to which the general community itself migrated (without their agreement)", and also from the disadvantages and injustices resulting from the impact of non-recognition: ALRC Report No 31 (Canberra, 1986), para 164.

75. Hyndman, *op cit*, p 316.

76. Australian Institute of Multicultural Affairs, *Multiculturalism for all Australians* (AGPS, Canberra, 1982), p 11.

dispossession upon, and the extent of violence and human rights violations suffered by indigenous Australians. The Royal Commission examined the extent to which Australia has met its international obligations with respect to Aboriginal peoples, in the custodial setting and generally. The Royal Commission acknowledged, in particular, assertions by Australia's indigenous peoples of a right of self-determination and noted that:

The anger in the demands for self-determination is so strong because the totality of control is so recent, and the effects of it are continuing and remain painful.<sup>77</sup>

The Royal Commission recommended that:

...governments negotiate with appropriate Aboriginal organisations and communities to determine guidelines as to the procedures and processes which should be followed to ensure that the self-determination principle is applied in the design and implementation of any policy or program or the substantial modification of any policy or program which will substantially affect Aboriginal people.<sup>78</sup>

## **Mabo v The State of Queensland**

The recognition of native title by the High Court in 1992 in *Mabo v The State of Queensland (No 2)* a basis for a reconsideration and renewal of relations between indigenous and non-indigenous Australia. Significantly, the High Court endorsed the development of Australian law in conformity with the expectations of the international community. In a much cited passage Justice Brennan, with whom Mason CJ and McHugh J agreed, said:

Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international

77. Royal Commission into Aboriginal Deaths in Custody, *National Report*, (Canberra, 1991), vol 2, para 20.1.5.

78. Recommendation 188.

79. (1992) 175 CLR 1.

law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.<sup>80</sup>

## **Appointment of Aboriginal and Torres Strait Islander Social Justice Commissioner**

Since his appointment in 1993 as Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Dodson has consistently emphasised the importance of international standards, in particular self-determination, to Aboriginal and Torres Strait Islander peoples. The Social Justice Commissioner's First Report 1993 provides:

The assertion of a claim to the right of self-determination immediately raises the question of our status to make the claim. The Aboriginal and Torres Strait Islander peoples assert that we have always possessed, and continue to possess, distinct identities; that we constitute distinct peoples for the purposes of international law and article 1, [International Covenant on Civil and Political Rights].

Our experience of the domestic laws of this country impels our peoples to look for the recognition and protection of our rights in accordance with international standards and through instruments which are not subject to the dictates of a political system founded on our dispossession and primarily responsive to the moods of the 95.5% majority, non-indigenous population.<sup>81</sup>

## **Mornington Report**

The Federal Race Discrimination Commissioner's 1993 Mornington Report arose from a request by Aboriginal residents of Mornington Island for an investigation of an incident involving Aboriginal people and the police. After a two and a half year investigation, the Commissioner recommended, amongst other things, the following:

In recognition of the fundamental right of self-determination for indigenous people, that the principles of self-determination be applied in future dealings between State and Federal bodies and the people of Mornington Island.

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80. (1992) 175 CLR 1, 42.

81. Aboriginal and Torres Strait Islander Social Justice Commissioner *First Report: 1993*, (Sydney, 1994), pp 41, 49.

That the Queensland State government respond fully to the Legislation Review Committee's recommendations to introduce self-government of Aboriginal and Torres Strait Islander communities.

That the State government implement a process whereby people on Mornington Island are given the opportunity to consider, discuss and implement a community government best suited to their needs.<sup>2</sup>

In their April 1995 follow-up *Mornington Island Review Report*, the Race and Social Justice Commissioners emphasise the importance of self-determination as a key principle underlying both Mornington Reports. They note:

Self-determination is both a process and a fundamental right, and every issue facing indigenous communities including status, entitlements, treatment and aspirations is part of the process of self-determination. ...

The political, economic and social problems which beset communities like Mornington Island will not be resolved until self-determination is taken seriously—until the resources, planning and decision-making processes are under indigenous control. ...At the broadest level, this Review Report shows the distance which must be travelled before self-determination has any meaning in the day-to-day lives of Aboriginal and Torres Strait Islander people.<sup>83</sup>

## Water Report

The *Water Report*,<sup>84</sup> prepared by the Race Discrimination Commissioner and tabled in May 1994 by the Attorney-General, contains the results of a study of the problems of inadequate water and sanitation services in Aboriginal and Torres Strait Islander communities. The issues addressed in the Water Report include Aboriginal self-determination and an Indigenous Bill of Rights. In her final Annual

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82. Human Rights and Equal Opportunity Commission, *Mornington: A Report by the Federal Race Discrimination Commissioner* (Sydney, 1993), recommendations 1, 90 and 91.

83. Human Rights and Equal Opportunity Commission, *Mornington Island Review Report: A Report by the Race Discrimination Commissioner and the Aboriginal and Torres Strait Islander Social Justice Commissioner* (Sydney, 1995), p v.

84. Human Rights and Equal Opportunity Commission, *Water: A Report on the provision of water and sanitation in remote Aboriginal and Torres Strait Islander communities* (Sydney, 1994).

Report statement as Race Discrimination Commissioner, Irene Moss notes that the *Water Report* "shows how far we have come on indigenous issues even in [her] term of office."<sup>85</sup>

## **Social Justice Package Submissions**

In 1994, Aboriginal and Torres Strait Islander organisations were invited to make submissions on measures to advance social justice for Aboriginal and Torres Strait Islander peoples as part of the Government's response to the High Court's decision on native title. The proposals of the Aboriginal and Torres Strait Islander Commission (ATSIC) relate to, inter alia, recognition of the rights of Aboriginal and Torres Strait Islander peoples as citizens; and recognition of their special rights and status as Indigenous peoples, possibly through constitutional reform, promotion of regional agreements, the development of a framework for a treaty and recognition of a self-government option.<sup>86</sup>

The recommendations of the Council for Reconciliation relate to, amongst other things, constitutional reform, a document or documents of reconciliation, an Indigenous Bill of Rights and regional agreements.<sup>87</sup> The submission of the Aboriginal and Torres Strait Islander Social Justice Commissioner refers to the recognition of distinct Indigenous rights, relating to, amongst other things, constitutional change and the negotiation of regional agreements.<sup>88</sup>

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85. Human Rights and Equal Opportunity Commission, Annual Report 1993-1994 (Sydney, 1994), p 136.

86. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Recognition, Rights and Reform: Report to Government on Native Title Social Justice Measures* (Canberra, 1995).

87. Council for Aboriginal Reconciliation, *Going Forward: Social Justice for the First Australians* (Canberra, 1995).

88. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous Social Justice: Submission to the Parliament of the Commonwealth of Australia on the Social Justice Package* (Sydney, 1995), (3 volumes).

## Native Title Report

In his recent *Native Title Report*, the Social Justice Commissioner argued that the basis for recognition of native title is the recognition of the human rights of Indigenous peoples. This requires "that respect be given to our lands and concepts of land ownership":

Equality and freedom from discrimination is not about uniformity, assimilation or conformity. It is about recognising and respecting the differences of people and allowing different cultures to flourish and to enjoy equally the human rights which belong to everyone.<sup>9</sup>

In the *Native Title Report*, the Social Justice Commissioner reiterates his frequently expressed view that:

[O]ur distinct and collective identity makes our classification as peoples inescapable. Accordingly, we are entitled to fully exercise the right to self-determination in the same manner as other peoples.<sup>90</sup>

## Alcohol Report

The Race Discrimination Commissioner's recent *Alcohol Report*<sup>91</sup> arose out of concern about the effect of alcohol abuse on Aboriginal communities in the Northern Territory. A major issue during the Commissioner's Inquiry was the contention that informal arrangements between licensees and Aboriginal communities in Central Australia to restrict alcohol sales to their members might limit the exercise by Aboriginal individuals in violation of the RDA. In the context of restrictions on alcohol sales and consumption in Aboriginal communities, the relevance and application of the special measures provision of the RDA, section 8(1), became a central issue. The *Alcohol Report* contains a number of observations on the notion of equality:

The principle of equality before the law does not require identical treatment. The promotion of equality does not require the rejection of difference ... Substantive equality which is achieved by

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89. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report: January-June 1994* (Sydney, 1995), pp 6, 63.

90. *Ibid*, p 72.

91. Human Rights and Equal Opportunity Commission, *Alcohol Report: Race Discrimination, Human Rights and the Distribution of Alcohol* (Sydney, 1995).

taking into account individual, and in this case, racially specific aspects of discrimination such as cultural difference, socio-economic disadvantage and historical subordination achieves equality of outcome between members of different races.<sup>92</sup>

The report cites section 8(1) of the RDA to support negotiated different treatment of community members by licencees. It also refers to the possibility that alcohol restrictions sought by communities are not discriminatory at all because they draw benign distinctions intended to advance the enjoyment of rights enumerated in Article 5 of CERD.<sup>93</sup> The report concludes that issues surrounding the distribution of alcohol in the Northern Territory centre around principles of self-determination and suggests that a review of the legislative regime of the RDA to take into account its shortfalls and weaknesses from an indigenous perspective is imperative.<sup>94</sup>

While the RDA can accommodate indigenous community initiatives such as alcohol availability measures, it is a flawed vehicle for doing so. The Race Discrimination Commissioner also recognises that the RDA is based on a formal equality model, and is an unsatisfactory means of accommodating the broader issues relevant to indigenous peoples, particularly their rights to self-determination and cultural integrity.<sup>95</sup>

## 6. Sex Discrimination Act 1984 (Cth)

Section 8(1) of the RDA finds its equivalent in section 33 of the *Sex Discrimination Act 1984 (Cth) (SDA)*. Section 33 of the SDA is based on Article 4(1) of the *Convention on the Elimination of All Forms of Discrimination Against Women* and provides:

Nothing in Division 1 or 2 renders it unlawful to do an act a purpose of which is to ensure that persons of a particular sex or marital status or persons who are pregnant have equal opportunities with other persons in circumstances in relation to which provision is made by this Act.<sup>96</sup>

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92. *bid*, p 25.

93. *bid*, p 118.

94. *Ibid*, p 38.

95. *Ibid*, pp 153, 148.

96. In an early complaint to the Human Rights Commission, it was alleged that the operation of a Commonwealth program discriminated against men by classifying one day a week at the program's office "women's day". The Human Rights Commission found the provision of women's only" services to be exempt under s33 as a measure designed to ensure equal

The scope of section 33 was first considered in the *Australian Journalists' Association case*. This case concerned a proposed alteration in 1986 to the rules of the Australian Journalists' Association (AJA) which sought to ensure the election of a prescribed minimum number of women delegates to its Federal Council. In 1987, the Deputy Industrial Registrar declined to certify the changes to the rules for the election of delegates. The Registrar took the view that the changes were oppressive, unreasonable or unjust" in contravention of section 140(1)(c) of the *Conciliation and Arbitration Act 1904 (Cth)*.<sup>97</sup> The AJA appealed the decision to the Conciliation and Arbitration Commission. In a decision handed down on 6 May 1988, Boulton J found that the Deputy Industrial Registrar's decision was not reasonably open to him as the proposed alteration appeared to reflect the wishes of the membership. However, whilst the proposed alteration was not contrary to the *Conciliation and Arbitration Act*, it was otherwise contrary to law in that it contravened the SDA. Boulton J adopted a narrow approach to what constitutes "equal opportunities" and rejected the argument that the changes to the rules were saved by section 33 of the SDA:

[U]ri my view women have the same opportunities as men to participate in the affairs of the AJA by standing for election to office. The fact that, in spite of this, women have been under-represented on the Federal Council may be the result of the structural factors referred to by Mr Nolan [secretary of the AJA]. ...However, I do not consider that it is appropriate to take those matters into account for the purposes of section 33 of the SDA given that women already have "equal opportunities" as men to participate in the affairs of the AJA by standing for election as Federal Council delegates.<sup>98</sup>

Boulton J disallowed the proposed changes to the rules. The AJA thereupon applied to the Human Rights and Equal Opportunity Commission for an exemption pursuant to section 44 of the SDA. Section 44 allows for administrative exemptions from the operation of the Act for periods of no more than five years. The Commission granted a two year exemption, observing that:

Quotas should not be used as a permanent method of achieving fair representation of women on the Federal Executive of the AJA but that the use of quotas may achieve temporary improvements in the proportionate representation of women members. The Commission notes that the AJA proposes to take steps to attempt to ensure that at the

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opportunities for women: *Worrall v Belconnen Community Youth Support Scheme* (1986) EOC 92-151.

97. See EOC 26-240.

98. *Re Australian Journalists Association*, in the matter of an appeal, (1988) EOC 92-224.

expiry of the period for which the exemption now granted operates the proportionate representation of women will be an accepted aspect of the elections conducted for appointments to the Federal Council of the AJA so that further reliance on quotas will not be required.<sup>99</sup>

Two more recent decisions under the SDA suggest a more purposive approach to the section 33 exception<sup>100</sup>. The *Municipal Officers' Association case* arose out of the amalgamation of the Municipal Officers' Association with the Transport Officers' Federation and the Transport Service Guild of Australia. It was proposed that the rules of the amalgamated union provide for positions of female branch and national vice-presidents, for which only women would be eligible to stand and to vote. Deputy President Moore of the Australian Industrial Relations Commission was required to consider whether the proposed rules complied with the *Industrial Relations Act 1988 (Cth)* and were not otherwise contrary to law, in particular to the SDA.<sup>101</sup> In a decision handed down on 6 February 1991, the Deputy President found the proposed alterations to the rules to breach section 19 of the SDA. He held:

{It seems to me that male members are, on the grounds of their sex, denied access to a benefit in relation to the particular position, or expressing it slightly differently, their access to a benefit is limited if one looks at the election of the body as a whole. The relevant benefit is the right to stand and to vote which is provided by the organisation through its rules.<sup>102</sup>

Deputy President Moore proceeded to consider the impact of section 33. The first approach to section 33 was to examine whether, under the existing rules, women enjoyed equal opportunities with men, in this case to stand and to vote for the executives of the organisation and branches. Approached this way, there would be no further room for application of section 33. The Deputy President considered such an approach, taken by Boulton J in the *AJA* case, to involve "an unnecessarily narrow construction of section 33". He observed that, as a matter of fact, women

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99. *Re application for an exemption by the Australian Journalists Association* (1988) EOC 92-236. See R Leon, "Whither Special Measures? How Affirmative Action for Women Can Survive Sex Discrimination Legislation", (1993) 1 *The Australian Feminist Law Journal* 89, p 95.

100. Leon, *ibid*, p 98.

101. *Municipal Officers Association of Australian and Another; Approval of Submission of Amalgamation to Ballot* (1991) EOC 92-344.

102. (1991) EOC 92-344, p 78, 403.

had been under-represented on governing bodies within the amalgamating unions. He referred to Brennan J's discussion of the concept of equality in *Gerhardy v Brown* and noted:

[I]R would be consistent with some of his Honour's more general observations and the judgments of other members of the court to treat section 33 of the SDA as permitting the creation of de facto equality. ... If this is its intended effect then measures which discriminate for the purpose of creating equality (viz proportional participation in union government) are protected by section 33. Such measures, however, would cease to be so protected when equality was achieved or where it was clear that constraints which operated, in fact, to limit female participation had been removed.<sup>103</sup>

The Deputy President concluded that a liberal interpretation of section 33 would protect the measures taken by the union. The 1992 decision of the Human Rights and Equal Opportunity Commission in *Proudfoot v Australian Capital Territory Board of Health* concerned an attempt by three men, two of them medical practitioners, to secure the closure of the ACT Women's Health Service and the Canberra Women's Health Centre. They argued that the provision of information, education and referral services only to women violated the SDA. After conducting an inquiry, the President, Sir Ronald Wilson, held that the exclusion of male persons from the services provided through the ACT Women's Health Service and Canberra Women's Health Centre amounted to discrimination within the meaning of the SDA and was prohibited, unless exempted under the Act. Sir Ronald found that:

[W]omen are significantly disadvantaged in their personal well-being and hence in their health. There are many socio-economic pressures - poverty, child care, single parenthood, lower wages, domestic violence, depression, drug addiction, etc - quite apart from child bearing and menopause which impact upon the health of a significant number of women in Australia.

As a result of this significant disadvantage, it was not unreasonable to try to give women equal opportunities to enjoy a better standard of health. The Service and Centre came within the exemption of section 33. Referring to the judgment of Dawson J in *Gerhardy v Brown*, the President stated:

Ultimately, it is not for the Commission to actually determine whether the challenged initiatives are in fact necessary or even wholly suitable for achieving the purpose of promoting equal opportunities as between men and women in the field of health care. All

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103. (1991) EOC 92-344 p 78, 404.

that section 33 requires is that those who undertake the measures must do so with that purpose in view and that it be reasonable for them to conclude that the measures would further the purpose.<sup>104</sup>

In *Proudfoot's case*, the respondent, the ACT Board of Health, had submitted that men and women are not in "circumstances that are the same or are not materially different". Accordingly, it could not be said that women and men were similarly situated and that men were discriminated against by the provision of women's health services.

To the disappointment of a number of commentators, the President rejected this argument on the basis that were it accepted, the SDA's exemption provisions would be rendered superfluous.<sup>105</sup> Sir Ronald's approach to section 33 of the SDA was evocative of the approach he had earlier adopted, as a member of the Bench in *Gerhardy v Brown*, to section 8(1) of the RDA. In *Gerhardy v Brown*, he had rejected an understanding of racial discrimination in CERD as confined to distinctions which are arbitrary, invidious or unjustified. Instead:

It refers to any distinction, etc... If the Convention did not intend "racial discrimination" to bear an inclusive meaning, there would be no need to make any provision for special measures.<sup>106</sup>

For the reasons stated above in Part 4, such a conclusion does not, with respect, necessarily follow from the language of section 8(1). Section 33 of the SDA, it could be submitted, is similarly open to an interpretation which recognises that, in certain contexts, the characteristics of men and women are different and that measures adopted in recognition of such difference are not discriminatory, but informed by a desire to achieve, what the Permanent Court of International Justice referred to in its advisory opinion on *Minority Schools in Albania* as, "effective, genuine equality".<sup>107</sup>

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104. *Proudfoot v Australian Capital Territory Board of Health* (1993) EOC 92-417, p 78, 984.

105. *Ibid*, p 78, 980. See generally Morgan, *op cit*, pp 136-8.

106. (1985) 159 CLR 70, 114.

107. *Minority Schools in Albania* (1935) PCIJ Ser A/B No 64, p 17.

## 7. Anti-Discrimination Act 1977 (NSW)

The *AntiDiscrimination Act 1977* (NSW)<sup>108</sup> makes it unlawful to discriminate on various grounds in major areas of public life. The grounds covered are race, sex, marital status, disability, homosexuality and age. The areas of public life covered are work, education, access to places and vehicles, provision of goods and services, accommodation and membership of registered clubs. Racial discrimination is dealt with in Part 2 of the Act. Section 21 states as a general exception to Part 2 that it does not apply:

to or in respect of anything done in affording persons of a particular race access to facilities, services or opportunities to meet their special needs or to promote equal or improved access for them to facilities, services or opportunities.<sup>109</sup>

A similar exception is contained in section 49ZYZ of the Act in relation to the ground of age.<sup>110</sup> In the discussion paper relating to its *Review of the AntiDiscrimination Act 1977* (NSW), the New South Wales Law Reform Commission identifies two issues for discussion: "Should 'special measures' be allowed for all other grounds?" and "Should the focus be on the concept of neglect of a special need, instead of excepting 'special measures'?"

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108. Exceptions to provisions prohibiting discrimination, where the discrimination results from the implementation of measures to achieve equality, are also found in: *Equal Opportunity Act 1984* (SA), ss 46, 47, 65, 82, 85p; *Equal Opportunity Act 1984* (Vic), s 39 (0); *Equal Opportunity Act 1984* (WA), ss 28, 31, 35K, 51, 66ZP; *Discrimination Act 1991* (ACT), s 27, 37; *Anti-Discrimination Act 1991* (Qld), ss 104, 105; *Anti-Discrimination Act 1992* (NT), s 57. For a summary of these exceptions see EOC 15-120. The UK *Race Relations Act* of 1976, which replaced the 1968 Act, permits a limited measure of positive action in favour of racial minority groups in the form of exceptions to the general prohibition of discrimination. Section 35 contains a general exception for conduct intended to meet the special needs of particular racial groups as regards education, training, welfare and ancillary benefits. In accordance with ss 37-38, employers, training bodies, trade unions and employers' organisations may operate systems of limited positive action. There is no obligation to engage in positive action See generally C McCrudden, "Racial Discrimination", in C McCrudden & G Chambers (Eds), *Individual Rights and the Law in Britain* (Oxford University Press, Oxford, 1995), 409, p 419; Lustgarten, "Legal Control of Racial Discrimination", *op cit*, pp 25-31.

109. Section 21 was substituted by No 28 of 1994, Sch 4(7).

110. Section 49ZYZ was inserted by No 91 of 1993, s3.

111. New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (NSW), Discussion Paper 30 (Sydney, 1993), questions 188-189, p 161.

The NSW Anti-Discrimination Board's response to the discussion paper states:

The Board supports the retention of a special needs provision (s21) but submits that there should be one special measures provision for the whole Act which applies to all grounds.<sup>112</sup>

The ADB's submission describes the concept as "important in redressing disadvantage and reaching towards equality" and argues that "there is little point in ensuring that all people are treated equally without taking into account the fact that people start from different positions of power and influence."

The submission continues:

The provision should be framed generally so that it will cover anything done to afford equal opportunity or to reduce disadvantage in the areas covered by the Act, as well as protecting the short term or ongoing special needs of groups. A general provision would refer to 'anything done' rather than to acts, practices or programs as this is simpler and does not require detailed argument about whether something will constitute a program, practice or act. It should cover all areas to which the Act applies.<sup>13</sup>

In its submission, the ADB notes that international instruments for sex and race discrimination (CERD and CEDAW) talk about special measures in terms of a disadvantaged group eventually catching up to equal status with a more advantaged group. The submission refers to the possible objection that "it is impossible to assign a specific time when discrimination and intolerance will be eliminated."<sup>114</sup>

The ADB's submission proposes therefore that:

Special needs provisions may also be needed to accommodate diversity which arises from the intrinsic nature of the group and its identity. The needs of the young may differ from those of the old in certain contexts. People with hearing impairments have specific language needs.<sup>115</sup>

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112. New South Wales Anti-Discrimination Board, *Balancing the Act: A Submission to the NSW Law Reform Commission's Review of the Anti-Discrimination Act 1977 (NSW)*, (Sydney, 1994), p 49.

113. *Ibid*, p 171.

114. *Ibid*, pp 171-172.

115. *Ibid*, p 172. In its *Report of the Inquiry into Equal Opportunity and Status for Women in Australia*, the Lavarch Committee also recommended consideration of an amendment to s33 of the

## 8. Canadian Charter of Rights and Freedoms

Under the *Canadian Charter of Rights and Freedoms* (the Charter), there has been a significant movement away from a strict equal treatment approach to equality. Section 15 of the Charter provides:

- (1) Every individual is equal before the law and under the law and has the right to equal protection before and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical ability.
- (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

An Australian commentator has described section 15 as "perhaps the most important provision of the Charter. It has the potential to improve significantly the position of disadvantaged people."<sup>116</sup> The concept of equality embedded in section 15 was first considered by the Supreme Court of Canada in the 1989 decision of *Andrews v Law Society of Canada*<sup>17</sup> In that case, the Supreme Court rejected identical treatment as the persuasive legal test. In a judgment in which he stated principles accepted by all members of the court, McIntyre J said:

It is not every distinction or differentiation in treatment at law which will transgress the equality guarantees of s 15 of the Charter. It is, of course, obvious that legislatures may—and to govern effectively—must treat different individuals and groups in different ways. Indeed, such distinctions are one of the main preoccupations of legislatures. The classifying of individuals and groups, the application of different rules, regulations, requirements and qualifications to different persons is necessary for the governance of modern society...

It must be recognised... that the promotion of equality under s 15 has a much more specific goal than the mere elimination of distinctions. If the Charter were intended to

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SDA, which refers only to equal opportunities, to cover measures designed to meet special needs: House of Representatives Standing Committee on Constitutional and Legal Affairs, *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Status for Women in Australia* (Canberra, 1992), recommendation 72.

116. M Wilcox, *An Australian Charter of Rights* (Law Book Co, 1993), p 159.

117. (1989) 1 SCR, 143.

eliminate all distinctions, then there would be no place for sections such as 27 (multicultural heritage); 2(a) (freedom of conscience and religion); 25 (aboriginal rights and freedoms); and other provisions designed to safeguard certain distinctions. Moreover, the fact that identical treatment may frequently produce serious inequality is recognised in s 15(2).<sup>118</sup>

Whilst section 15(2) merely permits affirmative action, a number of commentators have suggested that section 15(1) might provide the basis for a positive obligation to provide a right to receive ameliorative measures. According to Gordon, for example:

[T]he constitutional guarantee of a positive right to "equal benefit of the law" in s 15(1) establishes a legal obligation on the part of governments to ensure that those who do not enjoy equal benefits because they are members of groups that have been disadvantaged due to past discrimination or other circumstances are given the benefit of special measures designed to erase that historic disadvantage, and place members of the group on a truly equal footing with other members of society. That adds up to a positive obligation to make affirmative measures available where they are appropriate.<sup>119</sup>

## 9. Conclusions

In the United States, critical race theorists have offered a compelling critique of the limited liberal vision from which anti-discrimination law emerged in that country.<sup>120</sup> At the same time, critical race theorists, unlike many critical legal scholars, have been prepared to grapple with the problem of how to take advantage of the transformative potential of anti-discrimination legislation in addressing racial inequality. Critical race theorists have acknowledged the symbolic and the substantive impact of concrete rights victories. They have suggested that whilst rights at times legitimise racial inequality, they are also the means by which oppressed groups have been able to secure entry as formal equals into the dominant

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118. (1989) 1 SCR, 143, 163-176.

119. See generally D Gordon, *The Law of the Charter: Equality Rights* (Carswell Toronto/Calgary/Vancouver, 1990), pp 335-6; also R Anand, "Ethnic Equality", in A Bayefsky and M Eberts (Eds), *Equality Rights and the Canadian Charter of Rights and Freedoms* (Carswell, Toronto/Calgary/Vancouver, 1985), 81, p 117; D Gibson, "Accentuating the Positive and Eliminating the Negative: Remedies for Inequality under the Charter", in L Smith (Ed), *Righting the Balance: Canada's New Equality Rights* (Canadian Human Rights Reporter, Saskatoon, 1986), p 322.

120. See generally R Delgado & J Stefancic, "Critical Race Theory: An Annotated Bibliography", (1993) 79 *Virginia Law Review* 461.

social order. Crenshaw has referred to the limited range of options presented to Blacks "in a context where they were deemed 'other' and the unlikelihood that specific demands for inclusion would be heard if articulated in other terms."<sup>121</sup>

Patricia Williams has argued that although rights may not be ends in themselves, rights rhetoric has been and continues to be an effective form of discourse for Blacks.<sup>122</sup>

In the context of the struggle for racial equality for Australia, there has not yet emerged a distinctive body of critical race theory. The insights of critical race theorists in the United States suggest, however, that racial discrimination legislation might not be useless in challenges to the limited majoritarian perspectives currently reflected in the dominant Australian legal culture. Is it

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121. K Crenshaw, "Race, Reform and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law" (1988) 101 *Harvard Law Review* 1331; also R Delgado, "The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?", (1987) 22 *Harvard Civil Rights-Civil Liberties Review* 301, pp 306-07; M Matsuda, "Looking to the Bottom: Critical Legal Studies and Reparations", (1987) 22 *Harvard Civil Rights-Civil Liberties Review* 323; R Williams Jr, "Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Colour", (1987) 5 *Law & Inequality* 103; further J Calmore, "Critical Race Theory, Archie Shepp and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World" (1992) 65 *Southern California Law Review* 2129; K Crenshaw, "Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Anti discrimination Doctrine, Feminist Theory and Anti Racist Politics" [1989] *The University of Chicago Legal Forum* 139; J Culp, "Diversity, Multiculturalism and Affirmative Action: Duke, the NAS and Apartheid" (1992) 41 *DePaul Law Review* 1141; J Powell, "Racial Realism or Racial Despair", (1992) 24 *Connecticut Law Review* 533; G Torres, "Local Knowledge, Local Colour: Critical Legal Studies and the law of Race Relations", (1988) 25 *San Diego Law Review* 1043.

122. P Williams, *The Alchemy of Race and Rights* (Harvard University Press, Cambridge & London, 1991), pp 149, 165. Turpel has suggested that the scope for Aboriginal rights claims under s15 of the Canadian Charter is "limited because any theory of equality which the court is likely to accept will always be comparative". Equality rights analysis, she suggests, can only be sensitive with respect to cultural difference with respect to Aboriginal peoples if it is not comparative: "In order to be sensitive, the Court would have to allow for the fact that an entirely different conceptual framework may apply and that they (the judiciary) are not capable of knowing or reconciling differences. This .. requires a sensitivity to the relativity of cultural understandings". Turpel points to the high risks in formulating appeals for recognition of cultural difference in terms acceptable to the rights paradigm of the Canadian Constitution. This is a "question of strategy which [she is] certainly not in a position to resolve." M Turpel, "Aboriginal Peoples and the *Canadian Charter*: Interpretive Difficulties, Cultural Difference", (1989-90) 6 *Canadian Human Rights Yearbook* 3, pp 28-29.

possible, on the basis of experience to date, to draw any conclusions as to whether the RDA offers an avenue for incorporating the self-understandings, and securing increased representation, of Australia's indigenous peoples and excluded immigrant groups in legal and political structures? Clearly, more cases are needed before we can assess the potential of anti-discrimination legislation to help secure the sort of equality desired by different racial groups in Australia. Many of the developments reviewed in the present paper indicate that courts, human rights and equal opportunity bodies and law reform agencies in Australia are beginning to consider complex questions of cultural accommodation.

In seeking to address the aspirations of Australia's indigenous peoples and the diverse ethnic communities which have resulted from immigration, it will be necessary to clarify the notion of equality embedded in Australian anti-discrimination legislation. In responding to Australia's cultural diversity it will be important to clarify the significance and scope of the concept of "special measures" in section 8(1) RDA and its equivalents under similar legislative schemes. To facilitate more informed debate about, and effective use of special measures, there is a need for reliable statistical information about the demographic, social, health, economic and other relevant characteristics of ethnic communities in Australia. Concerned at the paucity of statistical information about indigenous Australians, the Royal Commission into Aboriginal Deaths in Custody recommended a special national survey.<sup>123</sup> The findings of the *National Aboriginal and Torres Strait Islander Survey* were published in February 1995.<sup>124</sup> The Survey confirms that Aboriginal and Torres Strait Islander peoples constitute the most disadvantaged groups in Australian society in the areas of health, housing, education and training, employment and income, and law and justice.<sup>125</sup> In a number of respects, immigrant communities do not fare much better. The Race Discrimination Commissioner's first *State of the Nation Report on People of Non-Speaking Backgrounds* confirms, for example, that the burden of unemployment and under-employment falls disproportionately on certain groups from non-English

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123. Recommendation 49.

124. Notwithstanding the National Survey, knowledge of characteristics and trends continues to be restricted by significant limitations on the availability of data: Aboriginal and Torres Strait Islander Commission, *Indigenous Australia Today: An Overview by the Aboriginal and Torres Strait Islander Commission* (Canberra, 1995), P 33.

125. For an overview of the most recent statistics, *ibid*, pp 38-52.

speaking background.<sup>126</sup> The second *State of the Nation Report* points to an under-representation of Australians born in non-English speaking countries in public housing, as well as a higher proportion of non-English speaking background people on waiting lists for public housing.<sup>127</sup>

Existing statistical information, as limited as it is, points to the need for special action to ameliorate the extreme disadvantage of indigenous Australians and of some other ethnic groups in Australia. Given the racist and xenophobic elements which exist in Australia, it would be cavalier to predict that the special measures provision of the RDA might decline in importance. Section 8(1) is likely to continue to be of value to repel challenges to action to promote substantive racial equality in Australia. The examples of complaints currently before HREOC (see Part 4 above) suggest that such challenges are not likely to dry up. In this respect, the view of the High Court in *Gerhardy v Brown* that special measures need not be end-dated is reassuring.

It is clear, however, that Article 2(2) of CERD is not intended merely as a shield against challenges to positive measures undertaken to redress past discrimination. Article 2(2) imposes an obligation on States Parties to undertake measures to ensure the adequate development of racial groups for the purpose of guaranteeing enjoyment of their human rights (Part 3 above). The language of section 8(1) of the RDA, on the other hand, suggests that special measures can be invoked only in a defensive fashion. Section 8(1) simply confirms that Part II of the RDA does not apply to the application of special measures; that is, it posits special measures as outside the RDA's general prohibition of discrimination. It is unlikely that section 8(1) could be relied upon by complainants seeking the adoption of remedial

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126. The unemployment rate for persons born in non-English speaking background countries is 6.2 percentage points higher than for persons born in Australia. For some immigrant groups (such as Vietnamese and Lebanese), the unemployment rate is 3-4 times the national average: Human Rights and Equal Opportunity Commission, *Annual Report 1993-1994* (Sydney, 1994), p 136; also Human Rights and Equal Opportunity Commission, *State of the Nation Report on People of Non-English Speaking Backgrounds* (Sydney, 1993), pp 24-25, 67,126. Disadvantages for workers from non-English speaking backgrounds include segregation with vulnerable manufacturing sectors, a lack of mobility within and between sectors and an absence of appropriate training schemes and labour market programs.

127. Human Rights and Equal Opportunity Commission, *State of the Nation Report on People of Non-English Speaking Backgrounds* (Sydney, 1994), pp 15-17.

measures to correct conditions impairing the enjoyment of their human rights. As part of the review of the RDA, there might be consideration of redrafting section 8(1) in conformity with the language of Article 2(2) of CERD.

It should be possible, in any event, to lodge a complaint under section 9(1) of the RDA concerning conditions which have the effect of impairing the enjoyment on an equal footing of a human right or fundamental freedom. It might then be possible, theoretically at least, to construe an obligation to undertake special measures as a proper inference from, rather than exception to the principle of non-discrimination in section 9(1). The lodging by Australia on 28 January 1993 of a declaration recognising the competence of the Committee on the Elimination of Racial Discrimination to receive communications concerning violations of the Convention has opened new possibilities for the submission of group based complaints, upon exhaustion of domestic remedies. The individual complaints based process under the RDA might be enhanced by the introduction of some form of class or group action. HREOC should also be encouraged to exercise its powers of initiation to undertake wide-ranging investigations. The Race Discrimination Commissioner is empowered to refer to the Commission any matters that come before her otherwise than as a result of making a complaint.<sup>128</sup> It is well-known that HREOC's Race Discrimination Commissioners have been most active in this respect, initiating inquiries into Aboriginal-Police Relations in Redfern, Racist Violence, Mornington Island, Distribution of Alcohol etc.<sup>129</sup>

Part II of the RDA is concerned more with reacting to individual cases of discrimination in an *ad hoc* way, rather than seeking out and attempting to address systemic disadvantage inhibiting substantive racial equality in Australia. As part of the review of the RDA, further thought might also be given to the need for a

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128. Section 23(a). The matter is then treated as if it had been the subject of a complaint (s 23(c)).

See R Hunter, *Indirect Discrimination in the Workplace* (Federation Press, Sydney, 1992), p 257.

129. As Peter Bailey has observed in relation to the SDA, the 1990's are likely to see increasing challenges for complaint-handling organisations: "Instead of handling large numbers of individual complaints against individual employers, the need may increasingly be for teams of research-oriented investigators who will identify, from a given complaint or range of complaints, the systemic or indirect forms of discrimination that are operating to provide injustice in individual cases and to suggest ways of changing the paradigm." P Bailey, *Human Rights: Australia in an International Context* (Butterworths, 1990), pp 170-71.

regulatory framework which supports a more systematic approach to increasing access to education, employment and economic development opportunities for indigenous Australians and Australians of non-English speaking background. It is noteworthy, for example, that Commonwealth legislation creating affirmative action obligations in the private sector only addresses the employment opportunities of women: *Affirmative Action (Equal Opportunity for Women) Act* 1986 (Cth). Whilst Aborigines and Torres Strait Islanders and migrants and the children of migrants from non-English speaking backgrounds are designated as groups to be subjects of EEO programs under the *Public Service Act* 1922 (Cth)<sup>130</sup> and the *Equal Employment Opportunity (Commonwealth Authorities) Act* 1987 (Cth), there is no Commonwealth legislative scheme which seeks to promote equal opportunity for indigenous Australians and persons of non-English speaking backgrounds in private sector employment.<sup>131</sup>

Ultimately, however, temporary special measures of protection are unlikely to provide an adequate vehicle for creating a multicultural society in which the special status of Australia's first peoples is firmly recognised. It is to be hoped that Australian courts will adopt a more contextualised understanding of equality which, rather than construing all race-conscious distinctions as *prima facie* unlawful and saving some, exceptionally, as remedial measures designed to eliminate disadvantage in the equal enjoyment of human rights, instead has regard to cultural identity as an important aspect of a commitment to equality. If the approach of the UN's human rights treaty bodies, the Canadian Supreme Court and the High Court of Australia to sections 92 and 117 of the Constitution were to be followed, the prohibition of discrimination would not preclude the accommodation of cultural difference and it would be unnecessary to characterise as "special measures" otherwise discriminatory action undertaken in recognition of

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130. As amended by the *Public Service Reform Act* 1984 (Cth).

131. This discrepancy was raised by the Human Rights Committee during its consideration of Australia's most recent report on implementation of the ICCPR. The list of questions prepared by the Committee sought further information on "plans to extend the federal Affirmative Action (Equal Employment Opportunity for Women) Act 1986 to Aboriginal peoples": UN Doc CCPR/C/SR 807 (8 April 1988), para 29. The representative of Australia replied that "there were no plans to extend the federal Affirmative Action (Equal Employment Opportunity for Women) Act 1986 to Aboriginals." Committee Member Roslyn Higgins asked "why the Australian Government appeared to believe that affirmative action was the appropriate way of dealing with discrimination against women but not, apparently, against Aboriginals": UN Doc CCPR/C/SR 807 (1988), paras 33, 38.

cultural diversity in Australia. As part of the review of the RDA, thought might be given to incorporating a definition of racial discrimination which refers only to those distinctions which are invidious and arbitrary.

Recognition of the distinct cultural needs of ethnic communities and the collective and distinct rights of indigenous peoples is also implicit in the concept of equality. During the review of the RDA, there might be consideration of legislative recognition of Article 27 of the ICCPR. Article 27 is recognised in New Zealand under the 1990 *Bill of Rights*. Section 27 of the *Canadian Charter of Rights and Freedoms* provides that the Charter "shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canada." As part of the review, there might also be consideration of options for the recognition of indigenous rights. In her recent *Alcohol Report*, the Race Discrimination Commissioner refers to the limited capacity of the RDA to accommodate notions of collective rights and self-determination.<sup>1 2</sup> In his *Second Report 1994*, the Social Justice Commissioner notes:

[M]any of the concerns brought to the Human Rights and Equal Opportunity Commission by Indigenous people are not appropriately dealt with under existing anti-discrimination legislation such as the *Racial Discrimination Act 1975*, and may in fact not be amenable to any available remedy. This is particularly the case with complaints brought by Indigenous peoples which are frequently of a collective or structural, and not an individual or instance specific nature. I could cite numerous examples where an individual has approached my Office with an undeniably valid grievance, but one which could not be pinned down to a clearly identifiable act of discrimination by one individual against another.<sup>133</sup>

Discussion of mechanisms for the protection and promotion of indigenous rights would, of course, be a major consultative task. It may well result in the adoption of an instrument which departs from the culturally specific conceptual and institutional framework of existing human rights and equal opportunity legislation in Australia. It should perhaps proceed in line with the principles contained in existing and emerging international instruments, including the UN's Draft Declaration on Rights of Indigenous Peoples, in the elaboration of which indigenous representatives from Australia have been involved for over a decade.

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132. Human Rights and Equal Opportunity Commission, *Alcohol Report: Race Discrimination, Human Rights and the Distribution of Alcohol* (Sydney, 1995), pp 39,34.

133. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Second Report 1994* (Sydney, 1995), P<sup>68</sup>.

## Issues for consideration

- Should section 8(1) be redrafted in line with the SDA, defining "special measures" as non-discriminatory rather than as an exception to the non-discrimination principle?
- A more sophisticated understanding of discrimination could avoid the problems associated with the special measures exception. How can this be encouraged?
- Should the Commissioner have the power to confirm the validity of non-discriminatory differential treatment?
- Should the special measures provision be amended to enable complainants to enforce the adoption of positive measures to correct conditions impairing the enjoyment of their human rights? How can Article 2(2) of CERD, imposing an obligation on State Parties to implement affirmative action measures, be better incorporated by the RDA?
- Should affirmative action legislation be enacted akin to public and private sector employers with regards to Aborigines and Torres Strait Islanders and people of non-English speaking background?



# SPECIAL MEASURES

## A Response

### Garth Nettheim\*

Sarah Pritchard has addressed the major matters for consideration in relation to "Special Measures" as referred to in *Racial Discrimination Act 1975* (Cth) (RDA) section 8 and Articles 1(4) and 2(2) in the *International Convention on the Elimination of All Forms of Racial Discrimination* (the Convention).

I found particularly illuminating the connections she traced in the evolution of international law between standards relating to minorities and standards relating to discrimination. I also appreciate the linkages she established between the jurisprudence of the Human Rights Committee under Articles 26 and 27 of the *International Covenant on Civil and Political Rights* and that of the Committee on the Elimination of Racial Discrimination in relation to Articles 1(4) and 2(2) of the Convention.

I agree substantially with her conclusions. In particular, I fully accept the value of affirmative action in the interest of those groups who experience significant discrimination and disadvantage.

The RDA and its State and Territory counterparts are of particular value to indigenous Australians. They encounter racial discrimination more than all other groups. Likewise the "special measures" exception in the RDA is totally necessary for Aborigines and Torres Strait Islanders in light of the fact that they continue to experience more disadvantage in social and economic indicators than any other groups in Australia.

I wish, however, to express several concerns which arise when the "special measures" exception is relied on, not just to overcome such disadvantage, but to meet other needs of indigenous Australians. I refer specifically to the claim that indigenous peoples have asserted for recognition of their traditional rights in relation to land.

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\* Professor of Law, University of New South Wales.

The "special measures" exception has been pressed into service in support of the case for land rights in Australian law. There are at least three points in the language of Article 1(4) which create difficulty in this regard:

- the requirement that special measures have the 'sole purpose' of securing adequate advancement of particular groups;
- the requirement that such special measures be 'necessary';
- the proviso that contemplates that special measures be of limited duration.

## "Sole purpose"

The special measures exception is alive and well in the *Native Title Act 1993* (Cth) (NTA).

During the 'Mabo debate' in 1993, the Government published in September its *Outline of Proposed Legislation*. What was being proposed at that stage included sweeping proposals to validate interests in land granted by governments since the commencement of the RDA on 31 October 1975. In a political operation designed to limit the damage to indigenous peoples' interests, Aboriginal negotiators made effective use of the argument that the validation proposals would displace the operation of the RDA. This struck a chord with other groups as a dangerous precedent, and was influential in the redesign of the legislation accepted by the Government in mid-October.<sup>1</sup>

By giving preference to post-1975 grants of interest in land over pre-existing native title that had survived colonisation, the proposed legislation clearly would offend the RDA. Land subject to native title would not have the legal protections available to land held under Australian title. That this would be contrary to the RDA was established in *Mabo (No 1)*.<sup>2</sup>

But "validation" of invalid "past acts" remained a feature of the ultimate legislation. Indeed, it was the primary political impetus for any Native Title legislation. States

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1. Murray Groot and Tim Rowse (eds), *Make a Better Offir. The Politics of Mabo*, Pluto Press, 1994, pp 124-25.

2. (1988) 166 CLR 186.

and Territories that have since passed their own complementary native title legislation have all given highest priority to validating "past acts" attributable to them under the authority conferred by NTA section 19.<sup>3</sup>

The NTA attempts to deal with the problem in the Preamble and in section 7. The Preamble begins by citing the history of dispossession and the consequent disadvantage endured by indigenous Australians. It states that the Australian Government "has acted to protect the rights of all its citizens, and in particular its indigenous peoples, by recognizing international standards" for the protection of human rights through the ratification of *inter alia*, the Race Discrimination Convention and the two Covenants, and the enactment of legislation such as the RDA. The Preamble goes on to summarise the effect of the High Court's decision in *Mabo (No 2)*<sup>4</sup> including the holding that native title is extinguished by valid government acts inconsistent with the continuation of native title.

Then the non-indigenous political imperative is spelled out: "The needs of the broader Australian community require certainty and the enforceability of acts potentially made invalid because of the existence of native title. It is important to provide for the validation of those acts".

The Preamble goes on to state the case for minimising extinguishment of native title; for providing for compensation on just terms, with a "special" right to negotiate its form; for enhancing the status of native title not hitherto extinguished; to provide in respect of future acts for levels of protection comparable to those enjoyed by holders of freehold title plus a "special" right to negotiate; by provision of a "special" procedure to ascertain native title; by the encouragement of regional agreements; by funding for representative Aboriginal/Torres Strait Islander bodies; and by provision of a "special" fund for purchase of land for those who are unable to assert native title.

The Preamble proceeds to state Parliament's intention that the law will be a "special law" for the descendants of the original inhabitants of Australia. The final paragraph expressly invokes the "special measures" exception:

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3. Not all of them have gone further to establish their own "recognised state/territory bodies" or "arbitral bodies" for "future act" determinations. See "Native Title: State and Territory Legislation Summary", (1996) 1 *Australian Indigenous Law Reporter* 53-60.

4. (1992) 175 CLR 1.

The law, together with initiatives announced at the time of its introduction and others agreed on by the Parliament from time to time, is intended, for the purposes of paragraph 4 of Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination and the Racial Discrimination Act 1975, to be a special measure for the advancement and protection of Aboriginal peoples and Torres Strait Islanders, and is intended to further advance the process of reconciliation among all Australians.

The second relevant aspect of the NTA in this regard is section 7:

1. Nothing in this Act affects the operation of the *Racial Discrimination Act 1975*.
2. Subsection (1) does not affect the validation of past acts by or in accordance with this Act.

So the prioritisation remains of titles granted between 1975 and 1994 under Australian law over any prior native title in respect of the same land, and is acknowledged as a departure from the RDA.

In *Western Australia v The Commonwealth*,<sup>5</sup> WA challenged the validity of the NTA. The attempt was clearly doomed to fail, and it did fail.

One of the several grounds of challenge was that the NTA went beyond the Commonwealth Parliament's "races power" in section 51(xxvi) of the Constitution—the power to make laws with regard to "the people of any race for whom it is deemed necessary to make special laws". The High Court surveyed its previous analyses of the "races power" and concluded that the NTA

is "special" in that it confers uniquely on the Aboriginal and Torres Strait Islander holders of native title (the "people of any race") a benefit protective of their native title. Perhaps the Act confers a benefit on all the people of those races. The special quality of the law thus appears.<sup>7</sup>

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5. (1995) 128 ALR 1.

6. Garth Nettheim, "September Showdown - Validity of Native Title Legislation", (1994) 3(69) *Aboriginal Law Bulletin* 8; Garth Nettheim, "The Native Title Act of the Commonwealth" and Craig Redhead, "The Land (Title and Usage) Act of Western Australia: Conflict with the Commonwealth", in Richard H Bartlett and Gary D Meyers (eds), *Native Title Legislation In Australia*, Centre for Commercial and Resources Law, Perth, 1994, pp 7 and 26.

7. (1995) 128 ALR 1, 44.

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Another ground for WA's challenge was that the NTA was inconsistent with the RDA. The High Court found no substance to the argument.<sup>8</sup> But it had no difficulty in finding that WA's own legislation, the *Land (Titles and Traditional Usage) Act* 1993 (WA), was invalid for inconsistency with the RDA and the NTA.

Let us assume a challenge by an Aboriginal group affected by the validation provision in—or authorised by—the NTA. Such a plaintiff might be able to establish that native title had survived to 31 October 1975 and beyond, but that a title had subsequently been granted over the land the effect of which, prior to the RDA, would have been to extinguish native title. While the RDA would have protected the native title, the NTA validation confirmed the validity of the superimposed title and spelled out that the effect of the validation was to extinguish native title. The plaintiffs are thus denied equal protection as required by the RDA.

For the purposes of Australian law, the NTA clearly displaces the RDA to the extent of any inconsistency, and action in Australian courts would probably fail. What if our plaintiffs file a communication with the Committee on the Elimination of All Forms of Racial Discrimination under Article 14 of the Convention? Would Australia be held in breach of its treaty obligations with particular reference to Articles 2, 5(d)(v) and 6? The plaintiffs/authors would appear to have suffered racial discrimination *unless* the NTA is accepted as a "special measure" within Article 1(4).

The NTA is, as mentioned, described in its Preamble as intended, with other initiatives, to be a "special measure". On the macro level it may be. The negative aspect, in the provision for validation of past acts, may be compensated for by the future act regime, by the special procedures for ascertaining native title, and by the other positive aspects of the NTA. Is it enough that for Aboriginal people and Torres Strait Islander generally there are more pluses than minuses? Or are particular indigenous Australians who experience only the minuses entitled to claim that, *for them*, the discrimination is adverse?

Under the Convention a special measure must be for the "sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring

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8. (1995) 128 ALR 1, 61-2.

such protection as may be necessary in order to ensure" their equal enjoyment or exercise of human rights and fundamental freedoms. But a major purpose of the NTA is to prefer non-indigenous interests over indigenous interests.

It may well turn out that no indigenous Australians suffer detriment from the validation provisions, particularly as the Bill was amended in the Senate. This may depend on judicial interpretation of the NTA provisions and judicial clarification on whether the effect of the RDA would have been to invalidate titles granted between 1975 and 1993.

### "Necessary"

My second concern about relying on the "special measures" exception to support indigenous land rights arises from the requirement that such measures be "necessary" in order to ensure to such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms. As long as the assumption continued that indigenous rights in relation to land had no protection under Australian common law, legislation to acknowledge such land rights was accepted as being "necessary". Statutory title under land rights acts was taken to be the only means by which the indigenous relationship to land might be recognized. Thus, when the permit requirements of the *Pitiantjatjara Land Rights Act* 1981 (SA) were challenged for inconsistency with the RDA, the High Court held that they amounted to racial discrimination within the meaning of Article 1(1) of the Convention but were saved by the special measures exception in Article 1(4). Brennan J (as he then was) particularly stressed the requirement that a "special measure" needs to be "necessary".<sup>9</sup>

It may no longer be so easy to insist that land rights legislation is necessary after 3 June 1992 when the High Court declared that Australian common law *does* recognise native title.<sup>10</sup>

In the course of his wide-ranging judgment in *Mabo (No 2)*, Brennan J speculated that in the event of a grant of title to Aboriginal or Torres Strait Islander people under land rights legislation which was inconsistent with native title, the RDA might not be available to protect the native title because the land rights legislation

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9. *Gerhardy v Brown* (1985) 159 CLR 70 at 133.

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

might fall within the special measures exception.<sup>11</sup> An argument to similar effect in relation to a proposed grant under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) was rejected by the full Federal Court in *Pareroultja v Tickner*.<sup>12</sup> In rejecting special leave to appeal, the High Court expressly reserved its position on the issue.

The relationship between statutory title and native title is a complex one, and requires specific legislated solutions such as those enacted in the *Native Title (Queensland) Act 1993* and the *Native Title (New South Wales) Act 1994*. It is made more complex by the "special measures" conundrum suggested by Brennan J in *Mabo (No 2)*.<sup>13</sup>

### **The limited duration proviso**

There is the further problem arising from Article 1(4) of the Convention and RDA section 8. Article 1(4) imposes a proviso "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". These words caused difficulty for the High Court in *Gerhardy v Brown*<sup>14</sup> in relation to the *Pitjantjatjara Land Rights Act 1981* (SA) because the Act was clearly designed to be of indefinite duration. The High Court upheld the Act's provisions while stating that it might be open in a future challenge to establish that such an Act was no longer necessary to ensure equal enjoyment of human rights, etc.

### **Conclusion**

I would not wish to be misunderstood. The RDA and the special measures exception in section 8 is of very considerable importance for Aboriginal people and Torres Strait Islanders in their struggle to achieve some degree of equality with other Australians in the enjoyment of the core human rights, be they civil, political, economic, social and cultural.

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11. *Ibid*, 74.

12. (1993) 117 ALR 206.

13. Garth Nettheim, "The Relationship between Native Title and Statutory Title under Land Rights Legislation", in MA Stephenson (ed), *Mabo: The Native Title Legislation* UQP, 1995, p 183.

14. (1985) 159 CLR 70.

But the aspirations of indigenous peoples in Australia, and indeed worldwide, go well beyond the achievement of mere equality. They insist on recognition of their distinct "peoplehood" as the first peoples of the land, they require respect for their fundamental relationship with their lands, and they demand the right to maintain their own cultural traditions, languages, religions and laws.<sup>15</sup>

These broader goals do not sit well with the equality goals of the RDA and the Convention, fundamental though the latter are. In particular, to try to accommodate recognition of indigenous land rights within the "special measures" exception stretches it beyond its essential concerns and creates needless complexities.

A more sophisticated approach to the definition of racial discrimination, as suggested by Sarah Pritchard, would obviate the need to rely on the special measures exception. In *Western Australia v The Commonwealth* the High Court indicated, very briefly, that legislation which distinguishes between indigenous and non-indigenous people might not, for that reason alone, amount to racial discrimination so as to require, for its validity, resort to the special measures exception.<sup>16</sup> If that view is adopted the problems arising from the express terms of Article 1(4) of the Convention may be avoided.

The RDA has proved to be an essential federal safety net against State and Territory attempts to deny<sup>17</sup> or to extinguish<sup>18</sup> indigenous land rights though it also came close to defeating one State's attempt to recognize land rights.<sup>19</sup>

The RDA has needed to be supplemented by the more specific provisions of native title legislation. Achievement of the other specific goals of indigenous peoples in areas such as community government and protection of culture will also require specific legislation. A similar development at the international level has testified to

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15. Garth Nettheim, "Indigenous Rights, Human Rights and Australia", (1987) 61 *Australian Law Journal* 291.

16. (1995) 128 ALR 1, 62.

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

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

19. *Gerbardy v Brown* (1985) 159 CLR 70.

the need to supplement the Convention with such indigenous-specific instruments as ILO Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries and the UN Draft Declaration on the Rights of Indigenous Peoples.

Within its proper domain the "special measures" exception is of immense importance to indigenous Australians. It is only when it is pressed into service to achieve wider objectives that the problems emerge.

### **Issues for consideration**

- Can the NTA be justified as a "special measure" for the advancement of Australia's indigenous peoples when one of its major purposes is to prefer non-indigenous interests over indigenous interests?
- After the High Court's decision in *Mabo (No2)*, can land rights legislation be justified as a "necessary" measure?



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# RACIAL DISCRIMINATION, COLLECTIVE RIGHTS AND GROUP RIGHTS

**Natan Lerner\***

Before addressing the specific subject that I was asked to deal with, several general remarks on the Convention, its present status and influence, and the close relationship between its main provisions and the issue of collective rights seem to be necessary.

When the Committee on the Elimination of Racial Discrimination, the implementation organ established by the 1965 *Convention on the Elimination of all Forms of Racial Discrimination* (CERD), met in February-March of the present year, 143 states had already ratified the Convention, an unusually high proportion of UN Member States.<sup>1</sup>

The last additions to the list of ratifying states were Antigua/Barbuda and the United States (US). Before ratification, an illuminating debate took place in the US, particularly in relation to the proposed reservations, understandings and declarations to the Convention. That debate is certainly relevant to several of the issues on the agenda of this seminar, showing the extent to which they involve matters of principle. Some of them are directly related to the collective and group rights dimension of discrimination, racial or otherwise motivated.

A first reflection should be on the connection between discrimination and democracy and pluralism. When urging the US Senate to give its consent to ratification, and explaining the proposed reservations, declarations and understandings regarding the Convention, the Acting Secretary of State referred to the "various ways in which these issues can be successfully addressed within the context of an open, pluralistic democracy. There are lessons and experiences which the US can usefully share with other nations which are now having to come to

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1. This paper was prepared before receiving the official report of CERD for 1995. The information is based on *UNNEWS*, No. 5, April 1995, a publication of the International Movement Against All Forms of Discrimination and Racism, Geneva.

terms with their own long-standing racial, ethnic and nationalistic divisions, many of which have deep-seated historical roots but have been hidden beneath politically repressive regimes throughout most of the twentieth century.<sup>2</sup>

But the trend to hide long-standing causes of discrimination did not exist only under repressive regimes. Also democracies have been reluctant—and still are—to touch the delicate but obvious connection between discrimination and group consciousness, the needs derived from that connection, as well as its abuse in some cases. Australia is one of the pluralistic democracies that have rather quickly and frankly addressed the issue of discrimination as a whole, without trying to hide the issues or to postpone dealing with them.

Another remark concerns terminology. We are used to the term "racial discrimination", which has acquired in recent times a clear legal meaning. Most anti-discrimination instruments, as does the *Racial Discrimination Act 1975* (Cth) (RDA), follow the language of Article 1 of the Convention. But recent texts, such as the *Draft Model Law Against Racial Discrimination*,<sup>3</sup> drafted by the United Nations Secretariat after analysing provisions against racial discrimination in the legislation of 42 countries, are employing terminology different to that of the Convention. This probably reflects criticism of the traditional definition and some nuances regarding terminology that developed lately. For instance, at its last session, on 23 December 1994, the United Nations General Assembly adopted Resolution 49/147 on "contemporary forms of racism, racial discrimination, xenophobia and related intolerance." On the same day, by Resolution 49/188, on the "elimination of all forms of religious intolerance", the General Assembly expressed its alarm at "the acts of violence, of intolerance and of discrimination on the grounds of religion or belief" and condemned "all instances of hatred, intolerance and acts of violence, intimidation and coercion motivated by religious extremism and intolerance."<sup>4</sup>

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2. See statement submitted by Strobe Talbott, Acting Secretary of State, to the Committee on Foreign Relations of the US Senate, April 26, 1994. Also, International Human Rights Law Group, *US Ratification of the International Convention on the Elimination of all Forms of Racial Discrimination*, Washington, May 1994.

3. UN Doc. A/48/558 (1993); See Appendix C.

4. For both resolutions, UN Press Release GA/3860, 31 January, 1995.

One may, perhaps, see in this terminology an attempt to broaden the notion of discrimination, racial or other, beyond its technical meaning as a "distinction, exclusion, restriction or preference"—also "omission" according to the draft Model Law—which has some specific purpose or effect. If we evoke the rather forgotten origins of CERD we should keep in mind the fact that all started with Resolution 1510 (XV),<sup>5</sup> condemning all manifestations and practices of racial, religious and national hatred in the political, economic, social, educational and cultural spheres of the life of society." This terminology is closer to the one employed in Article 20 of the *International Covenant on Civil and Political Rights* (ICCPR), prohibiting the "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence."

I may be wrong and overstating such a trend. In any case, the horrendous manifestations of group hatred that the world is going through in recent years, and presently, seem to justify the advocacy of comprehensive formulae regarding inter-group enmity. The 1990 Charter of Paris for a New Europe went further and urged states "to combat all forms of racial and ethnic hatred, anti-Semitism, xenophobia, and discrimination against anyone, as well as persecution on religious and ideological grounds." In any case, if an attempt as the indicated one really exists, the collective ingredient in its results is quite evident.<sup>6</sup>

In this connection, I also feel the need to introduce a few comments on the intensification of the discussion on "cultural relativism." I accept the need to contemplate special situations in which cultural, historical, religious or otherwise motivated strong adhesion to traditional forms of collective behaviour may justify a difference in the understanding of the rule of a minimum standard valid for all. The issue was debated at the Vienna Conference on Human Rights and at some regional encounters.

My view is that the different backgrounds must be borne in mind, provided that the universal nature of human rights and the acceptance of a universal minimum standard are recognized. It is difficult to ignore this discussion whenever instruments on discrimination are under review, but it is particularly relevant in

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5. For the history of the Convention, Natan Lerner, *The UN Convention on the Elimination of all Forms of Racial Discrimination*, 2nd ed., Alphen aan den Rijn, 1980.

6. For the CSCE work in general, Arie Bloed, (ed.), *The Conference on Security and Co-operation in Europe: Analysis and Basic Documents*, 1993.

connection with the question of collective and group rights, and other presently debated issues such as the draft declaration on the rights of indigenous peoples, or the problem of affirmative action, with all the philosophical, moral, legal and practical, sometimes political, implications. Affirmative action, or special measures, will specifically be discussed later on, but it may be important to stress now the importance of society's attitude regarding the relationship between group identity and social balance. It is probably in the area of religious human rights, and possible clashes with other rights, that this subject may come up rather sharply.<sup>7</sup>

Another remark concerns the way in which the issue of group-membership and collective rights is affected by the main controversy around CERD, namely the balance between Article 4 and the system of countries where freedom of speech and association are paramount considerations. The mentioned ratification process by the US again put Article 4 in evidence. In this respect it is important to recall General Recommendation xv (42), adopted by the Committee on the Elimination of Racial Discrimination, in 1993, in the spirit of its General Recommendations I and VII in which the Committee stated that the provisions of Article 4, all the time regarded as central to the struggle against racial discrimination, are of a mandatory character.<sup>8</sup> The Committee's Special Rapporteur Jose Ingles advanced this view forcefully and many of the ratifying States followed this orientation.<sup>9</sup> I have taken the same approach consistently since the first edition of my commentary on CERD, in 1970, for reasons that seem close to those prevailing upon the Committee.<sup>10</sup>

The Committee felt the need to issue this general recommendation because it has received "evidence of organized violence based on ethnic origin and the political exploitation of ethnic difference." Implementation of Article 4 is therefore "now of increased importance." "States parties have not only to enact appropriate legislation but also to ensure that it is effectively enforced." "Only immediate intervention can meet the obligations of effective response", so preventing the atmosphere of hostility likely to be generated by threats and acts of racial violence.

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7. See Natan Lerner, "Religious Human Rights under the United Nations" in Johan van der Vyver and John Wine, Jr, (eds.) *Religious Human Rights in Global Perspective: Legal Perspectives*, Nijhoff, 1995, forthcoming.

8. For the general recommendation, UN Doc. A/48/18 (1994), p 114.

9. UN Doc. A/Conf. 119/10, Sales No. E/85.XIV.2.

10. *Supra* note 5. Also, Natan Lerner, *Group Rights and Discrimination in International Law*, Dordrecht, 1991, p 45ff.

The Committee reiterated its view that the prohibition of the dissemination of ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression, as embodied in Article 19 of the *Universal Declaration of Human Rights* and recalled in Article 5 (d) (viii) of the Convention itself. Attention is drawn to Article 20 of the ICCPR, on the prohibition of any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

Fully appreciating the centrality and significance of Article 19 of both the *Universal Declaration* and the *Civil and Political Covenant*, Article 20 is certainly of no less weight in the world of our days, with the intensification of group tensions, violence and war.

The Committee also found it appropriate to call upon States Parties to investigate whether their national law and its implementation meets the requirement to penalize the financing of racist activities, an issue not easy for some legal systems. Certain States have maintained that it would be inappropriate for them to declare illegal an organization before its members have promoted or incited racial discrimination. The Committee was of the opinion that Article 4(b) places a greater burden" upon a State to be vigilant in its action against such organizations and proceed as early as possible. The organizations have to be declared illegal and prohibited, and participation in such organisations is to be punished.

The Committee was obviously prompted to issue this new general recommendation by the developments in several parts of the world. Group incitement and violence have reached enormous proportions, no less than in the late 50's or early 60's. They can not be ignored, whatever their motivation may be. Inquiries into the nature of the attacked group are secondary. The main consideration should be the fact that a *group* is being discriminated against, persecuted or otherwise attacked, irrespective of the nature of the group. It is not decisive if the victim-group is a racial, ethnic, religious, colour-defined, aboriginal or otherwise identified group. Important is its self-perception as a group and its perception as such by the general society.<sup>11</sup> Judicial and legislative decisions on group-hatred and 'hate crimes' followed lately this pattern. Penalties can be increased, or enhanced, when the perpetrator intentionally selects the victim because of some qualities such as race, colour, religion, national origin or ancestry.

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11. Lerner, *Group Rights*, *ibid*, ch. 2.

In the US, for instance, the subject required a pronouncement on the constitutionality of state statutes allowing enhancement of the penalty when the victim is singled out because of one of such characteristics. In *Wisconsin v Todd Mitchell*, in 1993, the Supreme Court stated that the judge must take into account racial animus when sentencing bias-inspired conduct.<sup>12</sup>

Legislative developments in some countries are now allowing consideration of racism, religious hatred, or likewise phenomena, as an "aggravating circumstance" justifying a more severe treatment of offenders. Such legislation was enacted in Spain, in May 1995, modifying the Spanish Penal Code. Racist, anti-Semitic, or other motives related to the ethnic or national origin, or to the ideology, the religion or the convictions of the victim, will now be considered "aggravating circumstances".<sup>13</sup> A similar approach to racist motives was introduced in an Israeli law adopted in early 1995.

Italy followed a similar approach in 1992.<sup>14</sup> Of course, Article 18(b) of the RDA is pertinent in this respect.

It is relevant to underline that Article 4 of CERD aims at counteracting incitement to hostility or hatred against individual persons and collectivities. Article 4(a) refers to acts against "any race or group of persons". As in the case of genocide, the concrete victim is always an individual, but the illegal act is directed towards the group as such. It is the colour of his or her skin, the ethnic or racial origin of the person, the religion in which the person was born or professes, the culture to which he or she belongs, that causes the discriminatory or persecutory behaviour. Whatever philosophical view one may take on the controversy around group rights, what seems beyond doubt is that membership in a particular group is an essential ingredient in the development of prejudice or bigotry. Besides, it is a fact that, frequently, ethnic, cultural and religious characteristics present themselves combined in inextricable forms. What are Jews, Arabs, Sikhs, Kurds, Armenians and similar complex identities? Are there clear-cut borderlines between ethnicity, religion or culture, in these, and in similar cases? The meaning of notions such as 'identifiable class', 'ancestry', 'ethnic characteristics', 'race' and others has been discussed in many judicial decisions that can not be analysed here.<sup>15</sup>

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12. *Wisconsin v Todd Mitchell*, No. 92-515, USLW, June 8, 1993, 61,46.

13. Law 4/1995, BOE No. 113, 12 May, 1995.

14. Amendment No. 40 to the Penal Law 1977, July 26 1994.

15. Lerner, *Group Rights*, *supra*, note. 10, pp 33-34.

Permit me now to address specifically the issue of collective rights.

Adopted two decades after the *United Nations Charter* and 17 years after the *Universal Declaration on Human Rights*, CERD shows in its text more sensitivity to the issue of collective and group rights than the Covenants, adopted in 1966. The Covenants were the result of a slow process of elaboration and remained close to the spirit and the letter of the *Universal Declaration*. The 1965 Convention reflects, mildly, it is true, the fact that the international society began to understand that a purely individualistic approach to the subject of discrimination was not enough at a time when group consciousness and group conflict became so central to the international order. This would be the case even if Article 27 of the ICCPR, dealing with minorities, is interpreted in a liberal way, as meaning something more than a joint exercise of a right by several persons.<sup>16</sup>

CERD is not group-oriented, but does not reflect reluctance to the use of terms such as "collectivities" or "groups". It shows that the international society was already aware of the fact that the non-discrimination rule and an individual-centred system alone were not enough to protect the rights of individuals as members of a group, their collective needs and certainly not the group as such, particularly in the case of multi-ethnic, multi-religious or multi-cultural societies. Prior to CERD, only the 1948 Convention on Genocide contemplated the need to protect the group *as such*. After the Convention, international instruments, as well as municipal law, took serious note of collective rights:

The reason for this is the fact that it is impossible to fight discrimination and prejudice adequately without understanding that discrimination is, almost without exception, the consequence or result of group-membership and seldom of specific qualities or defects of a strictly individual nature. As stated in a document produced by the United Nations in 1949, discrimination "deals with prejudice, dislike, enmity, or hatred of one person towards another because the latter belongs to a particular race or ethnic group; has a certain colour of skin; belongs to the male or female sex; speaks a certain language; professes a particular religion; stands for a political opinion; maintains a certain scientific opinion; prefers certain artistic style; is a foreigner, etc".<sup>17</sup>

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16. *Ibid*, ch.2.

17. *Ibid*.

Not all of these grounds for discrimination have the same weight, and this enunciation may involve an overly broad concept of 'group'. But it is important to note that it is membership in the group that engenders discrimination, namely—in the words of another authoritative UN document—distinctions "made on grounds of natural or social categories, which have no relation either to individual capacities or merits or to the concrete behaviour of the individual person".

Of course, the law permits discrimination in some cases; not every aggregate of human beings is a group deserving protection of the law, or enjoyment of collective rights. Only groups "based upon unifying and spontaneous (as opposed to artificial or planned) factors essentially beyond the control of the group"—also described, in an already mentioned UN document, as "communities"—are entitled to be considered the bearers of collective or group rights. Those are the entities that share a feeling of belonging together, of having a common destiny, a 'we/they sense'. It is this element that involves the main difference with conventional, voluntary, deliberate associations or societies. The list of such groups includes families, tribes, peoples, nations, cultural groups, religious groups. In all of them, although in different degrees, the elements of unity, spontaneity, permanence, and the lack of alternative—relative in some cases—are present and decisive.

Although some lists are long—groups based on race, colour, sex, ethnic origin, cultural circle, language, religion, political or other opinion, national or social origin, property, birth, caste, social status—a strict scrutiny permits us to reduce them to three basic groups:

- (1) Ethnic or racial groups, including groups based on colour, descent, and national groups (in a sociological and not legal sense).
- (2) Religious groups—difficult to define when the reference is not to major, historically, well-established religious.
- (3) Linguistic or cultural groups. There may be some reservations as to the element of permanency in the case of religion, but, from the viewpoint in which we are interested, there is little doubt that religious groups are certainly bearers of collective rights. As to linguistic or cultural groups, permanency is also not always the case for all individuals, but in general it remains immutable. The issue of gender escapes the scope of these remarks.<sup>18</sup>

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18. *Ibid.*

After clarifying which groups we consider to be the main title-holders of collective rights and group rights, a tentative catalogue of such rights should be drawn. Before doing it, it may be useful to elaborate on the distinction between collective rights and group rights. Collective rights are those that a person can only exercise in conjunction with other persons. For the exercise of some religious rights a special quorum is necessary. Linguistic and cultural rights are inconceivable without a number of persons eager to speak a given language or to engage in some specific culture. Special measures, or affirmative action, require a number of persons related to others that have been the victim of past discrimination. A typical expression of collective rights is Article 27 of the ICCPR, which deals with rights of persons to be exercised together with other persons.

Group rights are the rights of the group *qua* group. It is the organized group, the community, the collectivity, that can, or cannot, do some things. Only groups or communities can federate with other similar entities, or establish institutions, speak for their members and represent them, or impose duties on them. Individuals enjoy freedom of association and can establish societies for specific purposes. But in some cases the group pre-exists the wishes of its members and can even be the bearer of rights that a voluntary association would never enjoy.

The difference between collective rights and group rights should not be over-emphasized. It may be useful to consolidate the notion of what a group is and to single out the institutional rights that require the existence of a formal structure, with some legal personality, some capacities of a constitutional and representative character, and some *locus standi* for different purposes.

Which are then the basic collective and group rights? Let us try to compound a tentative list:<sup>19</sup>

- (1) First of all, and paramount, the right to the existence of the group, equivalent to (and including) the right to life of the members of the group. The United Nations dealt early with this issue and, one day before adopting the Universal Declaration on Human Rights, produced the Convention on Genocide, which emphasizes the group - protection purpose by stressing what the intention of the genocidal offenders is. The Convention does not include implementation measures and its role is

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19. *Ibid.*

therefore limited, although important. In present days, the two international tribunals established by Security Council resolutions to deal with 'ethnic cleansing' in former Yugoslavia and Rwanda will have to clarify the meaning of this horrible crime applying existing international humanitarian law. In some cases, 'ethnic cleansing' overlaps with genocide; in some others, it is a different sort of crime. In all the cases, the existence, the life, of ethnic or religious or linguistic groups is in danger, and should be protected.

This first right of the group may perhaps be more the subject of international than of municipal law, because of its massive character. But internal penal law should not avoid the issue, and 'normal' prevention and punishment of homicide is not enough to deal with this horrible nightmare at the end of the 20th century. Penalty enhancement based on racist motives is relevant.

The right to existence includes thus the individual right to life and the preservation of the collective entity. Religious and cultural genocide by non-violent means are not dealt with by the 1948 treaty, which concentrated on the physical destruction of the group, although it also contains provisions on forcible measures not involving extermination of persons.

- (2) The right to *equality*, or, if preferred, the rule of non-discrimination. It implies of course not only formal equality, but substantive, material, real, effective equality. Constitutional law as well as international law have developed abundant clarification of what this means, and already in 1935, in the well known Greek Schools in Albania case,<sup>20</sup> the Permanent court of International Justice ably defined that meaning. However, not all municipal legal systems have adopted similar approaches to this basic issue, to which the complicated matters of cultural relativism and special treatment are related.
- (3) The right to *special measures*, or affirmative action, will be discussed separately in this seminar. From the specific angle of my own presentation, beyond the seminal questions of justice and equity involved, such special measures are important to help to preserve the identity of the group, their nature and reach depending on the constitutional system and specific circumstances. The advantage of discussing special measures with a

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20. *Minority Schools in Albania case* (1935), PCIJ, Set. A/13, No.64, p 17.

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group-oriented view, is that in this approach the difficult problems of past discrimination and time limitation become secondary. Theoretically, the subject is open; individual country experiences may be inconclusive.

- (4) Among what may be called group rights properly, or institutional rights of groups, the first one is probably the right to decide who is entitled to *membership* in the group and what are the conditions, if at all, to remain within the group, to opt out or to be readmitted. The issue is particularly complicated in countries where family law is tied up with religious law and where membership in a religious community is particularly meaningful and involves legal consequences. But also in countries where personal status legislation does not exist the issue may come up. Permit me just to recall the interesting *Sandra Lovelace* case, with all its implications for Canadian domestic legislation and for the interpretation of the ICCPR. In this case, the Human Rights Committee had to decide whether an Indian woman had lost her status under the Canadian Indian Act because of her marriage to a non-Indian Canadian. Although sex discrimination was also involved, the group-individual relationship was a main ingredient in this case.<sup>21</sup>

Of course, one may claim that the best way of avoiding these kinds of problems is excluding the group dimension from the legal system. But the second part of the 20th century has already put into evidence that such an approach does not agree with the spirit of our time. I must say that I could never understand why the acknowledgement of the group dimension is considered illiberal by some scholars, who perceive in it a threat to democracy. While I can see the risks of abuses, it is not the recognition of group rights, but ignoring them, which became the root of conflict and persecution.

- (5) The right to establish *institutions*, in conformity with the laws of the State, is an individual and collective right, of great importance for religious and cultural or linguistic groups. Recent international and regional instruments dealing with minorities and with indigenous populations stress this right, which goes further than the indisputed right to establish associations according to municipal law. Groups linked to similar ones by ethnic, religious or cultural ties are entitled to communicate, federate and cooperate at the local and international levels.

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21. See Human Rights Committee, Fifth Report, UN Doc. A/36/40, Annex XVIII.

- (6) The indicated institutions should be able to collect *duties* from the members of the group. In some countries, such prerogatives have been recognized, but a mandatory system in this respect may face obstacles under other legal systems. To what extent the general State may be expected to provide such institutions with a share of public funds for their development and functioning may be a difficult matter that came up particularly in connection with religious education in some countries.
- (7) I do not intend to discuss here the question of the *legal personality* of intermediate groups in society, beyond the provisions incorporated in most constitutions. This is related to the status of minorities, controversial at this stage. Recent instruments on minorities contain provisions to this effect, but there is still a strong reluctance on the part of States to acknowledge such personality, which was not recognized even under the minority treaties signed under the League of Nations. There are many possible answers, in the framework of internal public law. As for the international scene, it has been suggested that it grant such groups, at least some *locus standi*, before human rights monitoring bodies.<sup>22</sup>
- (8) I am also not going to discuss the existence of a third 'generation' of human rights that are seen by some scholars as overlapping to a large extent with the rights of collectivities. The first generation are the civil and political rights; the second generation, the economic, social and cultural rights, and the controversial third generation would include rights based on the idea of solidarity or fraternity, such as the rights to development, to peace, to a balanced environment, to the 'common heritage of mankind' and to humanitarian assistance. The list is not final.

In my view, the differences between the mentioned rights and those I describe as collective and/or group rights are obvious. The bearers of collective and group rights are natural social groups that can easily be identified, although sometimes the borderlines of those groups are not hermetic. Their rights can be claimed vis-a-vis their own States, and vis-a-vis the international community of States, once

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22. A renewed interest in minority issues can be perceived in recent years. Among many new works, P Thornberry, *International Law and the Rights of Minorities*, 1991; Brolmann et al., (eds), *Peoples and Minorities in International Law*, 1993; Y Dinstein and M Tabory, (eds), *The Protection of Minorities and Human Rights*; F Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, 1991, prepared for the United Nations.

recognized and once procedural rights are granted to the group. The rights to peace, environment, development, 'common heritage of mankind', to whom do these rights belong? To individuals, States, such groups, the entire humankind? And who is supposed to guarantee them and protect victims of violations? I prefer to concentrate on the minimum common denominator to which I am referring and avoid this issue.

- (9) I left for the end of the list the issue of vilification, also known as "group libel". This is an individual, collective and group right, and all three categories should enjoy substantive and procedural rights to start legal actions, civil and criminal, whenever, to use the words of Article 23 of the *Draft Model Law*, "a person or group of persons are threatened, insulted, ridiculed or abused by words or behaviour which cause, or attempt to cause, racial discrimination or racial hatred, or to incite a person or group of persons to do so".

The right to be protected against vilification belongs to every person or group of persons attacked because of their membership in the group. But the group as such should also be in a position of defending itself against vilification, to which effect rules on representation and *locus standi* should be elaborated.

Now, what are the limits of collective and group rights? Any attempt to build a catalogue of collective rights likely to be incorporated into legal instruments dealing with discrimination and racism can not avoid reference to matters such as the rights of self-determination, secession from existing States, the notion of 'peoples', the relationship of internal self-determination to democracy, and related, complicated matters such as minority rights, autonomy or regionalism. All these issues do not belong to the topic being discussed in a seminar on the review of a Racial Discrimination Act. The notion of sovereignty is undergoing transformations, although it seems quite premature to speak about the 'end of sovereignty', the subject of a round table in one of the last annual meetings of the American Society of International Law, coupled by a discussion on the rise of nationalism and the breakup of States.<sup>23</sup> It is the confusion between collective and group rights, on the one hand, and the matters mentioned above, with all that they

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23. See The American Society of International Law, *Proceedings of the 88th Annual Meeting*, 1994, pp 1-87.

imply for the territorial integrity of existing States, on the other, that induces some legal scholars to speak about "postmodern tribalism", an assault on the principle of *uti possidetis*, and the breakup of States and nations in different parts of the world.

This confusion does harm to the whole idea of collective rights, projecting upon it a shadow of illiberality. But group rights do not have to lead to monolithic, uncultural, unireligious or uninational States, which exclude minorities. On the contrary, group rights should be a way of creating stability and harmony in modern societies by acknowledging the fact that, in addition to the State and its divisions, and in addition to individuals, also natural and spontaneous intermediate groups have rights (and duties) that can not be ignored if we are interested in a stable, balanced and really democratic society. As stated by UNESCO in its 1978 Declaration on Race and Racial Prejudice:

All individuals and groups have the right to be different, to consider themselves as different and to be regarded as such. The right to be different may not, in any circumstances, serve as a pretext for racial prejudice; it may not justify either in law or in fact any discriminatory practice whatsoever.

For that reason:

Special measures must be taken to ensure equality in dignity and rights for individual and groups wherever necessary... (P)articular attention should be paid to racial or ethnic groups which are socially or economically disadvantaged, so as to afford them, on a completely equal footing and without discrimination or restriction, the protection of the laws and regulations and the advantages of the social measures in force...

This, and not the 'cleansing' of societies to make them homogeneous and monolithic, is the essence of collective and group rights. The aim of the acknowledgement of the group dimension is not 'purity' or 'homogeneity'. The aim is equal footing.

A few remarks on the question of the collective rights of indigenous populations, or Aboriginal inhabitants. In these very days governments are sending to the United Nations their comments on the draft declaration on the rights of indigenous peoples prepared by a working group, the sessions of which were attended by a large number of government observers, representatives of non-governmental bodies, indigenous organisations and communities and numerous independent experts. I hesitate to refer to the fascinating, and controversial, problems involved. Permit me just to indicate that all the group rights I have mentioned, in addition to all the fundamental human rights, are dealt with in the draft, which also contains some provisions that will most definitely originate conflicting views. Such

may be the provisions on autonomy or self-government, on citizenship, treaty-enforcement, legal traditions and procedures, and property of lands and resources. Some of these problematic issues are obvious group rights. Others go beyond that and fall into the category of public international law properly and do not belong to our discussion today.<sup>24</sup>

Recent instruments on minority rights, which I have mentioned, may also be of interest in a seminar like ours. But I felt that I should limit myself to the minimum common denominator of collective rights that have to be kept in mind whenever race relations legislation is under review. Minorities rights, as well as the rights of indigenous populations, or of migrant workers, frequently overlap with general group rights.

International instruments and municipal law have shown great caution in incorporating references to group rights. Such a specific document as a Draft Model Law against Racial Discrimination, which one may have expected to be more sensitive to the relation between racial discrimination and group membership, went only as far as referring to "groups of individuals", to the promotion and encouragement of "good relations between different racial groups", or to the outlawing of defamation against "an individual or group of individuals".

The 1992 United Nations Declaration on Minorities is a step forward in comparison to Article 27 of the ICCPR and is helpful to some extent to clarify the distinction between individual human rights, collective human rights and the rights of the group as such. The group dimension is acknowledged, although less than in documents on minorities elaborated at the European level or by the Conference on Security and Co-operation in Europe.<sup>25</sup> Mention should also be made in this context of the 1981 *Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief* Article 6 of this interesting document includes some rights embodying unmistakable collective and group rights. But, naturally, we are referring only to a declaration and not an obligatory treaty, and the same is valid for the 1978 UNESCO statement that was quoted.<sup>26</sup>

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24. For the draft declaration, UN Doc. E/CN.4/Sub.2/1994/2/Add.1.

25. For commentary on the Declaration see Natan Lerner, "The 1992 UN Declaration on Minorities", *Israel Yearbook on Human Rights*, vol. 23, 1993, p 111.

26. *Supra*, note 7.

As to domestic legislation, in recent years several countries felt the need to adopt measures to fight discrimination and racial incitement. Some of them granted locus standi to organizations representing victims of discrimination. The Italian law of 1993, modifying a 1975 law to give effect to the Racial Convention, added religion to the prohibited grounds of discrimination or target of incitement. Also in New Zealand, the 1993 Human Rights Act amended the 1977 Race Relations Act including now religious belief (or its absence) among the prohibited grounds of discrimination. The new Russian Constitution of 1993 has a comprehensive list of prohibited grounds of discrimination. This is also the case with the new South African Constitution of 1993. A reference to ethnic or national communities or minorities was included in the new Croatian Penal Code in preparation. Several countries adopted laws on group libel, and, as mentioned, some legislated on punishment enhancement when discriminatory motives exist behind an offence or crime.<sup>27</sup> I cannot deal, of course, in a detailed way with individual legislation, but it may be worthwhile to mention that Switzerland approved, in 1994, by a very small majority (54.7%), the prohibition of incitement to racial and religious hatred and discrimination. What was the other almost half of the population afraid of?

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Australia should be congratulated on joining the still rather exclusive club of States that made the declaration under Article 14, on individual complaints, thus setting an example for others to follow. As for the *New South Wales Anti-Discrimination (Amendment) Act* 1989, the innovative adoption of terms such as "ethno-religious origin" among the motives for discrimination, the improvements regarding vilification and the incorporation of the right of representative bodies, with a genuine concern, to make submission on behalf of victims of libel, constitute important contributions to the struggle against discrimination and incitement. Allow me to wish you full success in your imaginative efforts to review your racial discrimination legislation and to look into the future.

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27. See Stephen J Roth, "The Legal Fight Against Anti-Semitism", in *Israel Yearbook on Human rights*, vol. 25, 1995, Supplement.

## Issues for consideration

- In the context of Australia's indigenous peoples, how can the RDA better accommodate collective rights?
- The tension created between the individual focus of the RDA and its attempts to accommodate collective rights was apparent in the *Alcohol Report*. How can the RDA, as a tool of empowerment, better meet the demands of certain groups to have control over their own affairs?
- The Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989) and the Draft Declaration on the Rights of the World's Indigenous Peoples place an emphasis on collective rights, self determination and self management, in addition to individual human rights and equal opportunity. Can indigenous rights be upheld within a framework which safeguards human rights and equal opportunity (which is essentially in the domain of individual rights), or does the collective protection of the group require a new legal basis?
- Some commentators have argued that the broader needs and aspirations of Australia's indigenous peoples should be encompassed in a separate piece of legislation. Do you agree? If not, why not?



# A QUESTION OF IDENTITY: THE INTERSECTION OF RACE AND OTHER GROUNDS OF DISCRIMINATION

**Hilary Astor\***

This paper raises the problem of the intersection of discrimination on the ground of race with other grounds of discrimination. It confronts the issues raised by those people whose experience of discrimination is shaped by an identity which does not fit neatly into only one category of discrimination, but which intersects the grounds of discrimination in Australian legislation. Work on this subject has been done by a number of scholars in other jurisdictions<sup>1</sup> and its significance has already been stressed by Australian academics and legal reformers. It is important and timely that we take the opportunity to consider the intersection of race with other grounds of discrimination in the context of a review of the *Racial Discrimination Act 1975* (RDA).

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1. Nitya Dudos, "Disappearing Women: Racial Minority Women in Human Rights Cases", (1993) 6 *Canadian Journal of Women and the Law* 25; Kimberley Crenshaw, "Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory and Antiracist Politics", (1989) *University of Chicago Legal Forum* 139. These articles on discrimination law are part of a developing body of scholarship on identity and intersectionality, some of which has informed this paper. See, for example Marlee Kline, "Race, Racism and Feminist legal Theory", (1989) 12 *Harvard Women's Law Journal* 115; Angela Harris, "Race and Essentialism is Feminist Legal Theory", (1990) 42 *Stanford Law Review* 581; Mari Matsuda, "Affirmative Action and Legal Knowledge: Planting Seeds in Plowed Up Ground", (1988) 11 *Harvard Women's Law Journal* 1; Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law*, Cornell University Press, Ithaca, 1990; Elizabeth V Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought*, Beacon Press, Boston, 1988; Patricia Williams, *The Alchemy of Race and Rights: Diary of a Law Professor*, Harvard University Press, Cambridge, 1991.
2. See for example Larissa Behrendt "Aboriginal Women and the White Lies of Feminism: Implications for Aboriginal Women in Rights Discourse" (1993) 1 *Australian Feminist Law Journal* 27; Julie Stubbs and Julia Tolmie "Battered Woman Syndrome in Australia: A Challenge to Gender Bias in the Law", in Julie Stubbs (ed) *Women, Male Violence and the Law*, Institute of Criminology Monograph Series, Sydney 1994; Australian Law Reform Commission, Report No 69, Part 1, *Equality Before the Law: Justice for Women*, 1994, pp 63-69.

Australian anti-discrimination law is neatly divided into different grounds which, in the federal jurisdiction, are represented by separate pieces of legislation. These separate statutes were enacted at different times as there was political readiness to provide protection for the groups covered.<sup>3</sup> State legislation includes all grounds in the same statute, but they are nevertheless stated as singular grounds, representing singular elements of identity.

However, as anyone who works in this area knows, people do not arrive with their problems neatly packaged according to the parameters of the statutory provisions. They arrive with experiences of discrimination which confound those boundaries. They are Aboriginal women, women who are recent immigrants and from non-English speaking backgrounds, Aboriginal people with disabilities, lesbians, gay men who are HIV positive. Their experience of discrimination involves more than one 'ground' of discrimination.

Does Australian anti-discrimination law deal adequately with the experience of people whose oppression is shaped by an identity which involves more than one ground of discrimination? It seems important that it should, since they are citizens who are perhaps most likely to be the target of discrimination, and the discrimination they suffer may be particularly severe. Does our law provide mechanisms which are responsive to the experiences and needs of such people, and which do justice to their experience of oppression? There are indications that Australian legislation could be more effective. Given the opportunity for improvement which is before us it seems a worthwhile endeavour to examine the nature of the problem and suggest ways in which it may be addressed.

## The problem of the divided identity

A classic Australian case which illustrates the problem is *Australian Postal Commission v Dao*<sup>4</sup> (*Dao*). Two women of Vietnamese origin were employed by the

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3. Federal legislation proscribing discrimination on the grounds of race, colour and national or ethnic origin was enacted in 1975 with the RDA. In 1984 the grounds of sex, marital status and pregnancy were covered by the *Sex Discrimination Act* (SDA). The ground of family responsibilities was added (with limited coverage) in 1992. Disability (including physical, intellectual and psychiatric disabilities) was added in 1992 with the *Disability Discrimination Act* (DDA). It would be possible to attribute the existence of separate statutes to Australia's response to international instruments, but that may be simply to transfer the consideration of political readiness to a different arena.

4. (1986) EOC 92-148; (1987) EOC 92-193.

Postal Commission as temporary employees. They wanted permanent posts, but in order to get them they were required to have a medical examination. They failed that examination because the medical officer used scales of required minimum body weight which were allegedly discriminatory. The two women complained of discrimination on the grounds of sex, race and national origin.

Before the case could be heard on the facts, problems of jurisdiction arose. The women had complained under New South Wales State legislation. Had they complained under federal legislation they could not have complained of sex discrimination, since the discrimination of which they complained occurred in 1981 and there was then no federal sex discrimination legislation. If they had used the federal legislation, therefore, they would have had to attribute their experience of discrimination only to their race, when their sex was clearly also implicated. They would have had a race, but no gender. Whether they would have succeeded on the ground of race is moot, since the RDA then had no provision for indirect discrimination.<sup>5</sup>

Unfortunately the two women fared no better under State legislation. Their complaint on the ground of race fell into the same trap as *Metwally's case*<sup>6</sup> in that it involved discrimination which occurred before the clash between federal and State legislation had been resolved by statutory amendment. Under State legislation therefore, they could have a sex, but no race. However, they failed on the ground of sex as well, because of a clash between the NSW *AntiDiscrimination Act* 1977 and the federal *Postal Services Act* 1975. I assume that their opinion of Australian human rights legislation is not high!

The two women in this case embodied, quite literally, the problem under discussion. They are the height and weight they are because of their gender and their race. They cannot say, "Well this part of me is the size it is because I am Vietnamese and this part because I am a woman." They are Vietnamese women. It is that identity, in its entirety, which produced the discrimination they confronted.

A person who was sceptical that there are problems arising from the intersection of aspects of identity might argue, however, that the difficulties the two women faced

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5. Section 9(1A) of the RDA which contains provisions about indirect discrimination, was inserted in 1990.

6. *University of Wollongong v Metwally* 6- Ors (1984) EOC 92-119.

in *Dao* were simply technical legal problems which have now been resolved. The women would now be advised to use the federal legislation where they would succeed on the grounds of both race and sex. Our sceptic would argue that the problem has been solved. However, I am not sure that we can be quite so complacent, for a number of reasons.

First, the women would still have to make two complaints under separate statutes. They would have to be fragmented, to separate out their experience into race and sex, before they could be considered as a whole person. Women from non-English speaking backgrounds expressed their dissatisfaction with this problem to the Australian Law Reform Commission (ALRC) during its reference on *Equality Before the Law*.<sup>7</sup> Further, the complainants in *Dao* were well advised and made their complaints on more than one ground. There is evidence, however, that other racial minority women do not do this—that they choose whether to have a race or a gender before they complain. Nitya Duclos examined all the human rights decisions in Canada over a ten year period, looking for cases involving racial minority women.<sup>8</sup> Out of 416 cases she found only three involving a complaint of race *and* sex. Two of those involved racial minority men. Only one case involved a woman and she lost on both grounds. Duclos concluded of her study:

First, I found it very hard to assess the system's responsiveness to racial minority women because I could not find them in the cases. Second, when I did find racial minority women complainants, the legal description and finding of discrimination distorted the women's experiences, analogizing what had happened to them to what would happen to raceless women or genderless racial minorities.

Duclos found in Canada what has been reported elsewhere<sup>9</sup>—that the system could deal with complainants who differed from the benchmark heterosexual white male in only one respect at a time. If the complainant was not white, they could pursue a complaint of race discrimination. If they were not male, they could pursue a complaint of sex discrimination. If their identity comprised more than one category—they were, for instance, a First Nations woman—part of their identity was distorted or disappeared.

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7. ALRC, above note 2, at para 3.63, p 65.

8. Duclos, above note 1.

9. *Ibid*, p 30.

10. For example by Crenshaw, above note 1.

One of the things I have learned by delivering papers around the world is that if there is a problem, it always occurs in another jurisdiction. Our sceptic could, therefore, argue that Duclos' research does not hold true for Australia. So far as I know, the research has not yet been replicated here. It may be, therefore, that complaints on more than one ground are more common in Australia, or that they are better dealt with. However, I would point to clear indications that we do face the same problem in Australia. Hunter and Leonard's survey of conciliation of sex discrimination cases, which examined 218 files in three Australian jurisdictions, also found very few Aboriginal and non-English speaking background users of sex discrimination legislation." The authors comment:

Agencies' difficulties in identifying sex discrimination in these cases may reflect a tendency to treat white, Anglo-Australian women's experience of sex discrimination as the norm or as 'pure' sex discrimination. Yet in all cases it is the particular intersection of race and sex (and class and sexuality) that shapes a complainant's experience of discrimination, and a particular privilege of Anglo-Australian women to be able to ignore their race.<sup>12</sup>

Women who made submissions to the ALRC's reference on gender commented on the difficulties created for women who are discriminated against on the basis of more than one factor.<sup>13</sup> The ALRC's report also noted that Aboriginal and Torres Strait Island women and women of non-English speaking backgrounds rarely lodge complaints under the Sex Discrimination Act (SDA) or the RDA and, indeed, that women lodge substantially fewer complaints than men.<sup>14</sup>

Further, examples of the distortion of identity described by Duclos can be found in Australian cases. *Bell v Galea*<sup>15</sup> is an excellent example of this. This case, in the NSW Equal Opportunity Tribunal, involved a woman with an intellectual disability who was sexually harassed at work. She complained on the grounds of sex and disability. Regrettably the judgment was digested by the CCH editors. However I was so interested to discover how the Tribunal had dealt with this complaint on two grounds that I requested the full judgment.

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11. R Hunter and A Leonard, *The Outcomes of Conciliation in Sex Discrimination Cases*, Centre for Employment and Labour Relations Law, Working Paper No 8, 1995, p 3.

12. *Mid*.

13. ALRC, above note 2, para 3.61, 3.63.

14. *Ibid*, para 3.61.

15. (1994) EOC 92-579.

Bell is a woman with a mild intellectual impairment. She was 17 years old at the time of the incident. Her employer exploited her gender, age, inexperience, suggestibility and willingness to please, and probably her fear of losing her job. He harassed her by making her reveal her breasts on a number of occasions, to him and to other employees, and he dismissed her from her job. The way in which the judgment deals with the two complaints is most interesting. The harassment is discussed as an issue of gender, and Bell's disability disappears. The dismissal is discussed as an issue of disability in which her gender disappears. Clearly Bell's experience of both harassment and dismissal was informed by her whole identity as a woman with an intellectual disability. However, that is not how her complaints are described. Her experience becomes distorted, even as the Tribunal finds in her favour.

Our favourite sceptic could argue that *Bell v Galea* is an aberrant example. It could be claimed, with great respect to the Tribunal, that it was misguided or mistaken in its approach in this case, whereas the majority of cases are dealt with appropriately. However, I do not believe this to be so. First, there are very few cases which proceed on more than one ground—which is why I was so excited by this one. Second, although the judgment fragments Bell's identity when it is discussing harassment and dismissal, when it is deciding damages it is perfectly capable of seeing Bronwyn Bell as a whole person. The judgement expresses the reason for the award of damages in a way which recognises all aspects of Bell's identity and their significance to the seriousness of her experience.

... the Tribunal took into account the age of the complainant, the fact that she was in her first job and the fact that she suffered from a degree of intellectual impairment which made her particularly vulnerable ... the Tribunal regards this as a serious case of sexual harassment ...<sup>16</sup>

The problem is thus more likely to be attributable to the structure of the legislation and the way it informs our thinking than it is to any inability of the Tribunal to see the whole person before it. Duclos also notes that tribunals in Canada making decisions about damages appeared to be able to see the whole person.<sup>17</sup>

One of the greatest problems with a unidimensional anti-discrimination law is that it privileges those members of outsider groups who most closely resemble members

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16. Transcript p 8-9, case number 26/1991.

17. Duclos, above note 1, p 41.

of the dominant group. The defining experience for any ground of discrimination tends to be the experience of those who are closest to the benchmark. It is their stories which are more often heard and therefore better understood, and which come to define the nature of oppression. The result of this is to reduce the lives of people who experience multiple forms of oppression to 'additional' problems. Consequently the experience of Aboriginal women, for example, becomes gender plus race, the experience of lesbians becomes gender plus homosexuality. To give one small example, I am constantly puzzled by seeing the phrase "lesbian women."

I may live in a restricted world, but all the lesbians I know are women.<sup>18</sup> I wonder if the phrase is used in recognition of the gender dimension of the oppression of lesbians. It may be so intended. I more often feel that it is used to try to understand the experience of lesbian discrimination as an experience of 'gender plus' in a way that does not recognise the particular oppression of lesbians.

The privileging of experience works in the area of race also, which is why one book was called *All the Women Are White, All the Blacks Are Men, But Some of Us Are Brave*.<sup>19</sup> If an Aboriginal woman is sexually harassed, we may focus on her experience as one of gender. Whilst her race is integral to her experience of harassment, we tend to understand harassment as a gender issue and the benchmark woman is white. If we do understand race as part of the experience of harassment we may understand it as gender plus race. However, the experience of Aboriginal women is not the same as the experience of white women with an added complication. It is a different experience derived from a whole and particular identity. Larissa Behrendt has commented on the importance of understanding and respecting the experience of Australian Aboriginal women. She shows how the history and present reality of the rape and sexual exploitation of Aboriginal women, combined with community perceptions of Aboriginal women, produce particular experiences.

Aboriginal women are stereotyped differently to white women. Sexual liberation for white women meant seeking the right to say "yes" to different sexual partners and different sexual relationships without condemnation. Aboriginal women are still seeking the right to say "no" and destroy the myth of the promiscuous oversexed black woman.<sup>20</sup>

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18. The writer is aware that there are transgender lesbians. However these are clearly not references to transgender lesbians.

19. Gloria Hull et al (eds), *The Feminist Press*, New York, 1982.

20. Larissa Behrendt, above note 2, p 30.

The experience of harassment is not an experience of race alone, or gender alone, or even gender plus race. It is an experience of being an Aboriginal woman, with the particular identity and social and individual history which that whole identity implies.

One of the concerns frequently raised when diversity is insisted upon is that the world appears to become impossibly complex—there are simply too many categories of experience to understand and respond to. All of the categories on which our human rights legislation and our thinking about discrimination is based appear to be threatened in favour of a particularity of experience which is too complex to comprehend. However, as Duclos and others point out, the categories do not need to go - they may well be intrinsic to the way we think.<sup>21</sup> But we do need to make them more flexible, dynamic and relational or we will continue to see the world through the lens of those who are *most* privileged. For legislation which seeks to protect those who are *least* privileged, assuming such a narrow perspective is a guarantee of failure. As Duclos puts it:

For racial minority women and for others who straddle the current categories of difference, complicating our human rights law.., is not one of several options for reform. It is the only way not to disappear.<sup>22</sup>

How might we seek to make the law more responsive to the needs of those whose identities involve more than one ground of discrimination?

### **Re-uniting the divided identity?**

There are a number of methods which have already been tried or suggested for responding to this problem.

One of these approaches is taken by the sexual harassment provisions of the Queensland *Anti-Discrimination Act* 1991. That Act contains a general proscription of sexual harassment at section 118. Section 119 defines sexual harassment as certain types of unsolicited or unwelcome sexual conduct engaged in either with the *intention* of offending, humiliating or intimidating the other person, or in circumstances where a *reasonable person* would have anticipated the possibility that the other person would be offended, humiliated or intimidated. Relevant

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21. Duclos, above note 1, p 50; see also Harris, above note 1, p 586.

22. Duclos, above note 1, p 51.

circumstances in determining whether a reasonable person would have anticipated the possibility that the target would be offended, humiliated or intimidated are defined in section 120 to include the sex, the age, the race and any impairment of the target. Also relevant is the relationship between the perpetrator and target, and any other circumstances of the target.

This definition of harassment has many good qualities. It broadens the ambit of harassment beyond the sites of employment and education and recognises that there are many components of identity which are relevant to sexual harassment---of which sex is only one. However, the question which the Queensland Act requires us to ask when taking into account these diverse elements of identity is, "Would a *reasonable person* anticipate the possibility that the target would be offended, humiliated or intimidated, taking into account the sex, race etc. of the target of the harassment?" This means that the viewpoint from which we take identity into account is that archetypal, faceless, identity free benchmark, the reasonable person. Is an Aboriginal woman a reasonable person? A man with an intellectual disability? Is this a test which will make people attend to the complexity of the identity and experience of the target of the discrimination? As one African-American writer has pointed out,<sup>23</sup> we are working in a discipline where abstraction and frozen categories are the norm. The reasonable person may be fairly described as the enemy of diversity.

The ALRC canvassed three suggestions for dealing with the complexity of identity<sup>24</sup>. The first two have been already tried and do not work effectively. One was the introduction of a single federal Act. This is a strategy which has not been generally effective for the states and there seems no reason why, without more, it should make a significant difference at federal level. It was not supported by the ALRC. The second was to allow the pursuit of more than one claim under the separate Acts. This strategy is possible presently. However, it does not appear to have succeeded in allowing the complexity of identity, and its impact on the experience of discrimination, to be revealed. As the ALRC pointed out, it does not really allow an integrated approach to identity and the necessity to pursue multiple complaints may add significantly to the complainant's costs.

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23. Harris, above note 1, p 586.

24. ALRC, above no 2, para 3.66, p. 68.

The third proposal, which the ALRC favoured, is to allow separate complaints under different statutes to be joined and heard together. This would involve statutory amendment. The ALRC considered that such amendments would allow the tribunal to "... consider the total harm suffered [and] ... to assess properly the true loss, damage or injury suffered by the complainant."<sup>25</sup> It believed that a provision allowing complaints to be joined would be effective and cited the evidence of *Fares v Box Hill College of TAPE (1992)* EOC 92-391<sup>26</sup> where a woman from a non-English speaking background made a complaint on the grounds of both sex and ethnicity. She complained of her treatment in the workplace and her failure to be promoted. The Victorian Equal Opportunity Board dealt with the two grounds together and found that there had been discrimination against the complainant. The decision demonstrates an understanding of the negative stereotypes which can be, and in this case were, applied to women from non-English speaking backgrounds.

The ALRC recommended that the RDA, the SDA, and DDA be amended so that, where a complainant formulates a complaint on more than one ground, the Human Rights and Equal Opportunity Commission or court must consider joining the complaints and must consider the interrelationship of the complaints and accord an appropriate remedy.<sup>27</sup> This would improve on the situation of the state statutes in that it would require the Commission to direct its mind to these issues and to be proactive.

However, the ALRC's suggestions are based on the assumption that the complainant will complain on more than one ground. The fact that this may not be the case is strongly suggested by the evidence cited above. Complainants are just as likely as anyone else to be influenced by the structure of the legislation and its apparent requirement to fragment their identity and may well believe that complaints of (for example) race and sex discrimination are alternatives. They are unlikely, unless they are properly advised, to know about amendments which make joinder possible. Further, the proposals of the ALRC are directed to 'the tribunal' and the hearing and determination of complaints. However, joinder of complaints needs to be considered at the commencement of the process, when a complaint is first lodged. Perhaps a broader provision, directed to the whole process of

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25. *Mid*, para 3.66.

26. *Ibid*, p 67.

27. *'bid*, recommendation 3.9, p 69.

complaint handling, might be considered. This is particularly important given the number of complaints to the Commission which do not go to a hearing but are dealt with by investigation and conciliation. If investigation and conciliation officers assist complainants at the stage of formulating their complaint<sup>28</sup> they are better placed to consider encouraging multiple complaints and their joinder in appropriate cases. The role of the complainant's legal advisers is also important. However, with the honourable exception of those comparatively few lawyers who have experience or who specialise, one might be sceptical about the likelihood that lawyers will understand the significance of amendments allowing joinder of complaints and advise their clients appropriately in this regard. There is an acute need for education of the profession.

It is also important to think about those cases which do not get to the Commission. The need to be proactive is crucial, since the impact of discrimination on the people under discussion may be such that they may not consider complaining, despite—or perhaps because of—the nature and severity of the discrimination they suffer.

Also, although we may declare an openness to identity issues, will we be able to see them when they arise and encourage complainants to express the true nature of their experience? The power of the narratives by which we presently understand the experience of discrimination is strong. People who make complaints of discrimination are likely to talk about their experiences in ways they believe will be heard. They will edit and amend their stories - not because they are untruthful or inauthentic but in order that they may be understood by their listeners. Our present understandings are limited and have difficulty accommodating more than one element of identity. The limits of our present understanding of discrimination need to be challenged by alternative stories—stories of the lived experience of those whose identities do not fit neatly into the present structure of anti-discrimination law. We need to find those stories and use them in the education of the public, lawyers, staff working in human rights agencies and decision makers. Only when we can hear and understand those stories will we be able to fashion and use anti-discrimination law to protect the human rights of those who most need it.

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28. Hunter and Leonard show variation in the practice of agencies in this regard; above note 11, p 11.

## **Issues for consideration**

- The ALRC recommended that the RDA be amended to allow for separate complaints under the RDA, DDA and SDA to be joined and heard together. Do you agree?
- How can HREOC better facilitate an understanding of the complexities of racial discrimination where women or people with disabilities are discriminated against?
- Aboriginal and Torres Strait Islander women and women of non-English Speaking background lodge few complaints with HREOC. What would be the most effective means of outreach to educate these women about their rights under the range of anti-discrimination legislation and encourage them to come forward where they have experienced discrimination?
- What should be done about educating the legal profession and judiciary. Should HREOC play a role in this process?

## REMEDIES

### Chris Sidoti\*

People seek a remedy under the *Racial Discrimination Act 1975* (RDA) or any other anti-discrimination legislation only when all attempts at conciliation have failed. Yet in many respects the efficacy or otherwise of remedies tells a great deal about the efficacy or otherwise of the legislation as a whole. Remedies come last logically but that does not make them any less important in the consideration of anti-discrimination legislation.

### Proceedings other than under the Racial Discrimination Act

The remedies available under the RDA are not restricted to those that are within the RDA itself; although that will be the principal focus of my discussion. In fact, the most significant achievements of the RDA have occurred because of proceedings other than those under the RDA itself. The *Koowarta* decision,<sup>1</sup> the first and second *Mabo* decisions,<sup>2</sup> and the case of *Western Australia v The Commonwealth*<sup>3</sup> that challenged the Western Australian Native Title legislation were all cases that brought significant developments in the way in which indigenous Australians had their rights respected. Yet none of those cases were actions under the RDA. In each of those cases, however, the RDA was absolutely critical to the successful conclusion of the proceedings in favour of indigenous litigants.

There is also another possible alternative approach to enforcement under the RDA by means of the *Administrative Decisions (Judicial Review) Act 1977* (ADJR). This legislation enables federal administrative decision making to be challenged, *inter alia*, on the ground of unlawfulness. I am not aware of any ADJR proceedings that

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\* Then Commissioner, Australian Law Reform Commission; currently Human Rights Commissioner, Human Rights and Equal Opportunity Commission.

1. *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168.
2. *Mabo v Queensland (No 1)* (1988) 83 CLR 14 and *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
3. *Western Australia v Commonwealth* (1995) 128 ALR 1.

have been based on a claim of unlawfulness because of the RDA. It seems, however, to be another effective way of challenging federal executive action that may be contrary to the RDA.

Therefore, any assessment of the value of the RDA should not be restricted by looking simply at enforcement proceedings under the RDA. Nonetheless it remains the case that most people look for enforcement through proceedings under the Act itself, and there they have problems.

### **Three approaches in 20 years**

There have been three very different approaches to enforcement in the RDA over its 20 year life.

The first approach is that found in the original RDA passed in 1975. It provided that the then Commissioner for Community Relations should attempt to conciliate complaints. If conciliation failed, the Commissioner would issue a certificate to enable an aggrieved person to pursue remedies through civil court processes. There was no right for the complainant to approach the court until and unless the Commissioner issued a certificate. It appears that few, if any, certificates were issued and complainants regularly argued that their right to obtain a remedy should not be subject to a decision by a Commissioner.

The second approach came with the establishment of the Human Rights and Equal Opportunity Commission (HREOC) in 1986. That approach provided consistency in remedies with the *Sex Discrimination Act* 1984 (Cth) (SDA). When the Commissioner formed the view that conciliation was not possible, she or he could refer a complaint to the Commission for hearing and determination. The Commission conducted a public inquiry into the complaint. However, the Commission's determinations were not binding or conclusive between the parties. If the Commission made a determination and the respondent refused to comply with it, the complainant was required to commence *de novo* proceedings in the Federal Court and the Federal Court would re-hear the case in its entirety and make whatever findings and orders it thought appropriate. It could do this on the basis of new evidence not presented to HREOC.

The third approach commenced on 13 January 1993 and sought to address the many deficiencies in approach two. It provided that a determination of HREOC, following a hearing of a complaint, could be registered in the Federal Court. Unless the respondent instituted proceedings within 28 days to challenge that

determination, the determination took effect at the end of that period as if it were an order of the Federal Court. If the respondent did challenge the determination, the Federal Court would undertake a *de novo* hearing, again starting from the very beginning and making such findings and orders as it thought appropriate having heard the evidence and arguments of the parties. New evidence could only be introduced with leave of the court. This approach has been found to be unconstitutional.

In many respects enforcement has been the most tortured and disputed issue with the RDA and it seems that as a community we have never been satisfied that we have got it right. It is certainly true that the RDA in this respect is still not right. The fact that the Act has reverted from approach three to approach two while an expert committee is trying to develop approach four is evidence of that.

## **Problems with enforcement**

Most of my comments dwell on the problems of the current (second) approach because they are the persistent problems that have to be addressed in developing a new, more effective approach—number four.

### ***Duplication***

Obtaining a binding decision under the RDA requires both a full hearing before HREOC and a full hearing before the Federal Court. It is not possible to have a HREOC determination enforced without obtaining new orders from the Federal Court after a full hearing and there is no access to the Federal Court without a HREOC determination.

In part this duplication arises from the way in which the Federal Court itself has interpreted the provisions in the legislation that require a *de novo* hearing. The President of HREOC has said:

Enforcement proceedings in the Federal Court are provided for. The Federal Court has held, however, that these are not strictly proceedings for enforcement of the Commission's order. The Federal Court is required to satisfy itself that unlawful conduct has occurred and determine for itself what order is appropriate, rather than relying on the determination of the Commission or on evidence to the Commission.<sup>4</sup>

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4. Paper delivered at the Australian Academy of Forensic Science, October 1991.

The Federal Court is not required by the legislation to hear all the evidence again or to accept new evidence. All it is required to do is to satisfy itself that unlawful conduct has occurred and determine for itself what order is appropriate. It could have done this in ways other than by full re-hearing but, in the earliest case under federal anti-discrimination legislation using this approach, it decided otherwise.<sup>5</sup> For that reason the complainant is required to undergo two full hearings under these provisions.

### *Costs*

Other problems flow from the required duplicated hearings. One is the problem of cost. In introducing the provisions that have just have been struck down, the Minister for Justice in 1992, Senator Michael Tate, referred to the "intimidatory prospect of having to pay a considerable sum of money to get into the Federal Court for a *de novo* hearing".<sup>6</sup> The cost of duplication of hearings is very significant for the parties. It is also a significant cost to the public purse which has to fund the initial hearing before HREOC and the second hearing before the Federal Court.

Costs are an issue quite apart from duplication. The increasing legalism in HREOC's proceedings has exacerbated this problem, for both HREOC (that is, the taxpayer) and for the parties. If the current revived provisions last for more than an insignificant period of time and HREOC continues to have a hearing function, it will have to address seriously the overly legalistic approach in hearings. In any event, whether a court has jurisdiction after a HREOC hearing or immediately, the costs of court action will have to be kept as low as possible. They are at present prohibitive, excessive both for the parties and for the taxpayer.

In its submission to the Australian Law Reform Commission (ALRC) inquiry into complex contact cases in the Family Court, the Law Institute of Victoria costed a one day hearing in a child contact case at about \$47,000. This included \$11,500 in court time, which is a cost to the taxpayer, and \$35,500 in costs to the parties and for the child's representative.<sup>7</sup> There is no reason to expect that the costs in a one day hearing before the Family Court in a custody matter should differ markedly

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5. *Aldridge v Booth* (1988) 80 ALR 1.

6. Evidence, Senate Standing Committee on Legal and Constitutional Affairs, 19 October 1990, p 12.

7. ALRC, *For the Sake of the Kids*, Report 73, p 2.

from costs before the Federal Court in a one day anti-discrimination case: that is, \$47,000 to parties and taxpayers. If there is a significant difference, I would expect that the Federal Court action would cost more than \$47,000.

A most serious issue in costs arises from financial inequality between parties. Those who are the primary focus of human rights and anti-discrimination legislation are those who are most disadvantaged in the community, who are usually poor. They are also the most disadvantaged or unequal in proceedings before HREOC and before the courts.

### *Emotional costs*

The third problem with the new revived provisions is that they add to the emotional trauma experienced by complainants. They require complainants to relate their experiences on at least three occasions—once in conciliation, once at a HREOC hearing, and once in the Federal Court hearing—before they can obtain an enforceable order.

The emotional trauma can be much greater for the complainant than for the respondent because of their inequality, particularly in sexual harassment cases, but also in race discrimination cases.

Anti-discrimination legislation is designed for the weak but only the strongest survive the ordeal by court. The victims of discrimination (women, Aborigines, migrants, gays, people with disabilities and those espousing non-mainstream religious and political beliefs) have been traditionally confined to the periphery of the legal system in any event. The financial and emotional costs attached to a formal court action to enforce their rights have a tendency to make a mockery of the very legislation which was enacted to alleviate subordinate social positions. Indeed, there is a reinforcement of an apparent social inferiority. This is the social cost for which we all pay.<sup>8</sup>

### *Different evidence and tactical advantages*

The fourth problem is that the existing approach enables different evidence to be presented to HREOC and the Federal Court. This can give rise to totally different results. This was shown strikingly in an early case, *Maynard v Neilsen*? There a matter went from HREOC to the Federal Court for enforcement, with a different

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8. Associate Professor Phillip Tahmindjis, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs*, 1992, pp 1-2.

9. *Maynard v Neilsen* (1988) EOC 92-226.

result simply because evidence was given to the Federal Court that was not available to HREOC at the first hearing stage. Justice Wilcox of the Federal Court commented strongly on the RDA's approach that could produce such a result.

The ALRC has said:

neither the complainant nor the respondent needs to present all available evidence at the initial hearing in the HREOC inquiry. There is no penalty necessarily imposed on them for presenting new evidence before the Federal Court. The respondent does not necessarily know the full extent of the case it may have to answer in enforcement proceedings. Nor does the complainant know the full extent of any defence.<sup>10</sup>

There is no tactical advantage for the complainant in withholding evidence from HREOC but there are many tactical advantages for the respondent in doing so. For a complainant, the need to succeed before HREOC will ensure that the strongest possible case is presented. For the respondent, it can be tactically desirable to keep some ammunition in reserve or even to shun the HREOC hearing entirely. Again, this particular problem with the current provisions disadvantages complainants and advantages respondents.

### ***Attrition***

All this—costs, duplication, trauma, delays—produces a very high attrition rate for complainants both in conciliation stages and particularly in the hearing stage.

In 1991-92, the last full year in which the current provisions were in operation, some 34% of complaints to HREOC were discontinued; that is, they were withdrawn or HREOC lost contact with the complainant. By contrast, in 1993-94, the first and only full year of operation of the third approach, that percentage was 28%; that is, a decline of around 18% in the number of complaints discontinued. I am not aware of any research to explain this difference but I consider that at least part is due to or associated with the less intimidatory path to resolution of a complaint that was possible under approach three. That approach has now been found unconstitutional.

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10. Australian Law Reform Commission, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs*, 1992, p 2.

Because of these problems, the pre-1992 provisions, now revived, encourage respondents to be recalcitrant and obstructive and withhold evidence to prolong hearings. They may also induce complainants to settle on less favourable terms (financial and other) than those to which they would be entitled.

## **Other problems**

There are three other problems with the enforcement provisions that were not addressed by the 1992 amendments to the legislation.

### *The difficulty of substantiation*

Complainants find it very difficult to prove race discrimination. Clearly it is harder to establish race discrimination than to establish sex discrimination. HREOC staff have assisted me with statistics on complaints for the purpose of my comments today. These statistics indicate that more than half of the SDA complaints going to hearing, around about 54%, are found substantiated at hearing. But less than one third of the race discrimination complaints going to hearing (29%) are found substantiated at hearing. It may be that RDA cases simply are not as good as those under the SDA. It is not possible to tell from the available evidence. However, there is a strong suggestion that complainants under the RDA find it harder to substantiate their allegations than those under the SDA.

There is need to amend the RDA to reduce obstacles to substantiation. Orders could be made on the basis of a reasonable inference of race discrimination. That, of course, has problems of its own and I do not express any concluded view on it at the moment. Certainly, something needs to be done to assist complainants to substantiate their cases more effectively.

### *Level of damages*

The second problem is the very low level of damages awarded under the RDA. This is a problem not only under the RDA, but for anti-discrimination legislation generally. It seems, however, a greater problem with the RDA than the SDA. Statistics prepared by HREOC staff indicate that only two complaints of racial discrimination have resulted in damages of or above \$20,000 in the 20 years that the RDA has been in operation.

Race discrimination seems to be considered more trivial than the other forms of discrimination. Of seventeen cases of race discrimination in which damages were awarded, ten awards were for less than \$2000. But only one of the forty-four sex

discrimination cases with damages awards resulted in an award of less than \$2,000. It would appear that Hearing Commissioners may not give the same weight to damage suffered in a complaint under the RDA as opposed to the SDA, but it is not possible to conclude that simply on the basis of the statistics. It is necessary to look at the cases themselves. Certainly the statistics give rise to concern.

Another difficulty in dealing with the inadequacy of damages under anti-discrimination legislation is the principle of comparability that is often referred to. Damages should be comparable across types of legislation and across jurisdictions so that equal harm receives equal compensation. The difficulty, though, is how to compare harm suffered as a result of race discrimination with other types of harm. How is it to be compared with harm resulting from physical injury, which has a very long history of judicial consideration and assessment?

### *Systemic discrimination*

The third problem not addressed in the 1992 provisions concerns systemic discrimination. Unlike the SDA and increasingly the DDA, the RDA has not been characterised by a significant number of representative complaints. The first case to go to hearing is the case concerning overseas medical qualifications where the complaint relates to a great deal more than the damage suffered indirectly by the complainant." Perhaps there are so few complaints of systemic discrimination because we in Australia have been so successful in eliminating it. Perhaps we only need to strike at the aberrant behaviour of individuals against individuals. That is possible but I think it unlikely.

## **Objectives for the next approach**

Drawing from these problems with the pre-1992, now revived, provisions, I can identify a number of objectives for the next approach, number four, to enforcement under the RDA. It must provide a low cost, accessible jurisdiction with as little duplication as possible, that is user friendly, emphasises informality, provides justice as speedily as possible while still being fair to each party's position, enables the award of damages that reflect the true harm to the complainant and allows remedies that challenge systemic discrimination and not only individual suffering. Now in trying to do this the *Brandy* case presents a major problem.<sup>12</sup>

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11. *Siddiqui v Australian Medical Council & Commonwealth Minister for Health* (1995) EOC 92-730.

12. *Brandy v HREOC* (1995) EOC 92-662.

## The *Brandy* problem

The problem presented by the *Brandy* decision is not simply the result but the fact that the judgment was unhelpful in developing an acceptable alternative approach.

### *Its brevity*

First, it is a very short decision, by High Court standards—two judgments totalling 27 pages in original form (12 pages in the Equal Opportunity Cases version). It is unsurprising therefore that they offer so little guidance.

### *No definition of judicial power*

The decision provides next to no help whatsoever in determining what is or is not 'judicial power' under Chapter III of the Australian Constitution. The joint judgment of three judges admits this:

... it has not been found possible to offer an exhaustive definition of judicial power.<sup>13</sup>

The first judgment quotes Dixon CJ and McTiernan J in *R v Davison*:<sup>14</sup>

The truth is that the ascertainment of existing rights by the judicial determination of issues of fact or law falls exclusively within the judicial power so that Parliament cannot confide the function to any person or body but a court constituted under sections 71 and 72 of the Constitution.

This judgment then puts a gloss on this quotation.

In that statement, the expression 'judicial determination' means an authoritative determination by means of the judicial method, that is, an enforceable decision reached by applying the relevant principles of law to the facts as found.<sup>15</sup>

The second judgment provides little more by way of assistance. Their Honours admit:

Difficulty arises in attempting to formulate a comprehensive definition of judicial power not so much because it consists of a number of factors as because the combination is not

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13. *Brandy v HREOC* (1995) EOC 92-662 at 78,056 (per Mason CJ, Brennan and Toohey M).

14. (1954) 90 CLR at 369.

15. *Brandy v HREOC* (1995) EOC 92-662 at 78,057 (per Mason CJ, Brennan and Toohey JJ).

always the same. It is hard to point to any essential or constant characteristic... One is tempted to say that, in the end, judicial power is the power exercised by the courts and can only be defined by reference to what courts do and the way in which they do it, rather than by recourse to any other classification or functions. But that would be to place reliance upon the elements of history and policy which, whilst they are legitimate considerations, cannot be conclusive.<sup>16</sup>

This judgment postulates a definition, rejects it and then applies it to judge the provisions under challenge. The definition—to the extent that there is one—is circular.

*No discussion of what constitutes acceptable default provisions*

Both judgments refer to the Commonwealth's argument that the challenged provisions are analogous with default judgement. The judgments reject the analogy but without any discussion of what constitutes acceptable default provisions. They do not say what provisions would be analogous and so acceptable.'

*No consideration of the broader context in which the provisions are to apply*

The Public Interest Advocacy Centre sought leave to argue points of law on behalf of women's disability and ethnic community groups (those most affected by the Acts in question) but was denied leave by the High Court without reasons being given. The High Court was therefore unable to hear arguments that other than a technical approach should be taken to the relationship between the challenged provisions and Chapter III of the Constitution.

*Responding to Brandy*

After the High Court decided *Brandy*, the Attorney-General appointed a committee to examine and report to him on options for enforcement in the light of the decision. Its work is not quite complete but there are a number of clear possibilities, some drawn from past provisions and other jurisdictions, as to how approach four might work. It has been a difficult task, however, to work out what might survive a challenge under Chapter III of the Constitution. The decision itself provides little assistance. One thing we are determined to ensure is that what we propose as approach four will have the best possible chance of surviving a

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16. *Brandy v HREOC* (1995) EOC 92-662 (per Deane, Dawson, Gaudron and McHugh JJ).

17. (1995) EOC 92-662, at 78,059 (per Mason CJ and Brennan and Toohey JJ) and at 78,064 (per Deane, Dawson, Gaudron and McHugh JJ).

constitutional challenge. How to do that while meeting the objectives I listed is very difficult. The last thing we want is to force complainants under anti-discrimination law to go into the courts as they are, with the procedures as they are and the costs and the formality as they are, in the hope of obtaining justice. One difficulty I have with the High Court's interpretation of Chapter HI of the Constitution is that it tends to focus on Chapter III as an end in itself rather than a means to an end, which should be to ensure justice. Unless we can find some way of ensuring justice within Chapter III as it is we should look at amending it. Anyway, Chapter III as it is binds us for now.

### **What are the options?**

The Family Court has established successfully a system of judicial registrars.<sup>18</sup> This system has been challenged but was upheld by the High Court.<sup>19</sup> It provides for officers within the court itself to hear and determine certain matters under delegation of the Court, subject to an appeal or review by a judge. The advantage of the judicial registrar system is that it enables an initial binding determination to be given, something that HREOC cannot do constitutionally. It provides an opportunity for more informal and less costly proceedings than in a full court hearing.

Another possibility left tantalisingly open by the Court in *Brandy* is the possibility of a default judgement system. This exists in almost all magistrates courts and many other courts. The High Court in *Brandy* said it had been argued that the post-1992 enforcement system was really a default system but the Court knew it was not. Regrettably, it did not then go on to say what a real default system is. All it said was that this was not one. Devising a real default system that will satisfy the Court is a challenging possibility.

Other possibilities include providing enforcement of arbitration awards or enforcement of conciliated agreements more directly than is available now. At the moment a party to a conciliated agreement can sue on it in contract, for example, if payment was agreed, as a debt. But there is no process by which the conciliated agreement can be registered in a court and enforced as an order of a court. There are provisions like that in the *Family Law Act 1975*<sup>20</sup> but they have not yet been

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18. *Family Law Act 1975*, section 37A.

19. *Harris v Caladine* (1991) 172 CLR 84.

20. Sections 19D, 19E.

used and so they have not yet been challenged. Again, there may be questions about whether they would survive a Chapter III challenge. Nonetheless, the registration of conciliated agreements and of private arbitration requires further discussion. It may give more teeth to the conciliation.

These options for approach number four are not going to address the issue of damages. There is need to consider guidelines in the RDA itself to assist decision makers in the assessment of damages for discrimination. I am not suggesting that the legislation should adopt a regime of punitive damages by prescription. I am not suggesting a rigid bill of maims either. But there should be guidelines that are open enough to allow discretion while still assisting proper assessment.

## **Conclusion**

The whole issue of enforcement under the RDA remains problematic. Clearly approach two was, and remains, seriously flawed. Approach three sought to address these flaws but has been found unconstitutional. The Attorney-General's Committee following the *Brandy* decision will shortly report to him on a new approach—approach four—but I do not think that should be seen as the last word on this subject. It will be necessary to continue to monitor the effectiveness of any approach, while realising that the structural difficulties created by Chapter III of the Constitution will continue to create problems. The present comprehensive review of the RDA should not ignore these difficulties or proceed as though the enforcement question has been addressed. Rather, the review should keep in mind the original aim of the legislation to provide expeditious and effective remedies to those denied equal opportunity on the basis of race. The review should certainly look at the problems of systemic discrimination and damages that, as I have indicated, will continue regardless of the recommendations of the remedies review committee. But, more broadly, the review should also ensure that enforcement procedures are consistent with aims and workings of the rest of the RDA. The twentieth anniversary of the RDA provides the appropriate framework for that comprehensive approach.

## **Issues for consideration**

- Would it be appropriate for the public hearing function to be carried out by the Federal Court in the first instance?
- If HREOC was to continue to perform this function, how can the problem of double hearings be avoided?



# ACCESS TO THE RACIAL DISCRIMINATION ACT

## Greta Bird\*

Access is linked to a number of factors.

Among these are:

- Information barriers
- Physical barriers of time and place
- Language/Culture Barriers
- Complexity of legal barriers
- Barriers linked to power and politics

We know that for indigenous peoples and the members of many 'minority' ethnic groups Australia is perceived as a racist country. As A Sivanandan writes: "Australia is two societies: one multicultural, the other racist".<sup>1</sup> The evidence of the monocultural face behind the multicultural mask is powerfully documented in reports such as the National Inquiry into Racist Violence, the Royal Commission into Aboriginal Deaths in Custody and the Multiculturalism and the Law reference. The self-reporting that occurs during public hearings at inquiries such as these and to researchers as we document peoples' experiences is consistent and compelling. My own research into indigenous people and the criminal justice system led me to assert that racism is "writ large" in white Australia and was directly linked to neo-colonial practices.<sup>2</sup> Other research, particularly in the Turkish and Vietnamese communities, convinced me that Australia could not be complacent; racial discrimination was a reality for many citizens.

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\* Associate Professor, Southern Cross University.

1. A Sivanandan, Introduction, (1994) 35(4) *Race and Class*. I would like for bringing this article to my attention.

to thank Neil Lofgren

2. See G Bird, 'The Civilising Mission: Race and the Construction of Contemporary Legal Issues', Faculty of Law, Monash University, Clayton.

of Crime', (1987) 4

Large numbers of people believe that they are being discriminated against on the grounds of their race and ethnicity. In nearly all cases they do not bring their complaints to Equal Opportunity Commissions or Anti-Discrimination Boards. Why do they refrain from acting? Is this failure to complain linked to a postmodern cynicism with 'the law'? I do not believe so. As Patricia Williams tellingly writes in *The Alchemy of Race and Rights*<sup>3</sup> it is the secure Anglo male who can afford to 'trash rights'. The minority citizen knows in their bones that legal rights are their only protection, the only thing that stands between their bodies and the violence, insults and humiliation offered by racially prejudiced citizens.

But the legal rights are hollow if they are not understood, if the procedures to implement them are not properly resourced and if the rights are defined by the dominant group on behalf of 'minority' citizens. It is of no use having a law to outlaw racial discrimination if those persons likely to be the target of discrimination are unable to use the law.

It is my contention that the current *Racial Discrimination Act 1975* (Cth) (RDA), does not provide access to Aboriginal peoples and Torres Strait Islanders nor to people of non-English speaking background.

The lack of access lies in physical aspects such as hours of opening, location of offices and non-availability of child-care, in the failure to tailor the service to client's needs, and ultimately, in the location of power in Australian society in the hands of what Margaret Thornton has called "benchmark men".<sup>4</sup>

If we are serious about ensuring that the provisions of the RDA are accessible, then there must be changes made to our structures, policies and programs.

## **Physical Barriers to Access**

I have visited the Human Rights and Equal Opportunity Commission (HREOC) in Sydney, and the Equal Opportunity Commissions (EOC) in Adelaide, Perth and

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3. P Williams, *The Alchemy of Race and Rights*, Virago Press, London, 1993.

4. For a description of the 'benchmark man', the white, middle-aged, middle-class, heterosexual able-bodied male see M Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia*, Oxford University Press, Melbourne, 1990.

Melbourne. All of these Commissions are situated in the Central Business District in 'impressive' buildings. This is important because it demonstrates a recognition by governments of the importance of the work carried out by Commissions.

However, the nature of these buildings, with their marble and 'Vogue' interiors, their plush carpets and high tech climate control, is a world away from the lives of many of their potential clients. Those who suffer racial discrimination, the indigenous peoples from "the block" in Redfern or towns like Burke or Wilcannia, or Vietnamese people from Cabramatta or Richmond, can feel alienated in these surroundings. They are more likely to make complaints in a familiar location, in a neighbourhood setting. This is why outreach programs which put Commission staff into local communities are vital. Although there are examples of these programs, especially those set up to work with Aborigines and Torres Strait Islanders, they are clearly inadequate for the demand.

Most Commissions do not have a separate outreach program. Rather, they expect this important role to be carried out by under-resourced information and education  
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units. This resource squeeze is linked to a steady reduction in funding in real terms. It is difficult to turn this around, given the fascination economic rationalism holds for many of our decision makers.<sup>6</sup>

I would urge governments to consider allocations of core funding to outreach programs. In Victoria some years ago, Ms Hanifa Dean-Oswald was seconded from the Ethnic Affairs Commission to the Equal Opportunity Commission. Her appointment was in response to evidence that non-English speaking background Australians were making few complaints of racial discrimination. While in this position, Hanifa developed an outreach program which led to a substantial increase in complaints. Part of the success of this appointment was due to its being at a senior policy level and the link it provided between the expertise in ethnic affairs and that in equal opportunity. It is regrettable that arrangements such as this have not been implemented on a permanent basis. Rather, there has been a 'downsizing' of both staff and financial resources.

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5. Fieldwork notes July, 1995. I am indebted to officers throughout Australia who shared with me their knowledge on the access question.

6. For a discussion of the strength of economic rationalism on the hearts and minds of senior Canberra bureaucrats see M Pusey, *Economic Rationalism in Canberra: A Nation Building State Changes Its Mind*, Cambridge University Press, Cambridge, 1991.

Further, physical barriers to access lie in the hours of opening which are the standard 9 to 5, Monday to Friday. This can be off-putting to people who are employed and cannot afford time off work. A young woman once said to me, in connection with public hearings for the Australian Law Reform Commission's reference on Multiculturalism and the Law; "My parents both work in factories from 7.30 in the morning, they do not speak English. How can they know about the law? How can they take part in the inquiry? How can they know their rights?".

Ringling up a Commission and asking about your rights is possible, though sometimes you must be very patient and hold through music and recorded messages. (I know because in doing research for this paper I hung up in frustration on a number of occasions!) Even then the phone will be answered in English. The Victorian BOG once put a series of advertisements in 'community' languages in Melbourne's trams. So successful was this initiative that the ads had to be withdrawn! The Commission was not resourced to handle the level of inquiries generated, nor did it have the capacity to handle questions in languages other than English. Today, in spite of strategies to strengthen the Access and Equity policy the underlying problem of under-resourcing remains.

As one Commission officer said to me: "You can have the best legislation in the world, but if you starve us of funds you can ensure that the legislation will fail". We must ask the questions: Is the level of funding in the area of race discrimination so inadequate that the law is a toothless tiger? Are we determined to make real headway in eliminating race discrimination or are we content with the illusion of commitment to this goal?

## Lack of Information

We are indebted to scholars such as Michel Foucault for the insight that knowledge is power.<sup>7</sup> Knowledge is not available equally to all citizens, therefore power is unevenly distributed. In the area of racial discrimination, the language of the law and the interpretation of the law, provide barriers to knowledge to people who could be empowered by an understanding of their rights.

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7 M Foucault, *Power/Knowledge*, Harvester Press, Brighton, 1980. Increasingly knowledge is wealth as 'we' enter the information rich era through technology like the Internet. It is depressing, but not surprising, that 'benchmark man' is at the forefront of this emerging technology!

As Sema Varova has written: "I would think that the complaints we receive each year (under the *Racial Discrimination Act*) are only the tip of the iceberg. It is quite likely that many incidents of racism go unreported because people fear the repercussions of doing so, or simply because they are unaware that the option to lodge a complaint exists".<sup>8</sup>

This fear and lack of awareness can only be combatted by a comprehensive, well-resourced education program which is primarily directed to indigenous and ethno-specific organisations, and the media serving these populations. As a result of talking with officers in a number of states, I can assert that this is not happening. As one officer said to me: "We are doing precious little in this area. We are encouraged to run education sessions on a user pays principle. This is fine for employers and lawyers, but it is difficult for people who are being discriminated against. We do not have core funding in our education unit and must 'catch as catch can'."

The printing of brochures and posters in languages other than English, while helpful, cannot replace the need for more 'user friendly' information. A number of research studies have shown that minority groups obtain their information from networks in their own communities and media outlets in their mother-tongue. With this in mind the federal Administrative Review Council<sup>9</sup> directed its education program about administrative law to the Turkish community via a Turkish soap-opera on 3CR (a community language station in Melbourne), and to the Vietnamese community via an agony column, 'Bao Gong', in a Vietnamese language weekly magazine. Evaluation of these pilot programs showed a large increase in knowledge of the law in the target groups. However schemes such as these are resource intensive and the law continually changes making it expensive to produce current information.

Another effective method of transmitting information is to target people working in 'community' organisations. These people are often employed on short-term, low wage contracts and are not given adequate training in the law. Without this knowledge they cannot assist clients in making decisions about whether to lodge a

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8. S Varova, 'Racism the Current Australian Experience', (1995) 8 *Without Prejudice* 11.

9. This was a project carried out as part of the national Agenda for a Multicultural Australia. See Administrative Review Council, *Report to the Attorney-General: Access to Administrative Review by Members of Australia's Ethnic Communities* (No 34), AGPS, Canberra, 1991.

racial discrimination complaint. They are often the first point of contact for 'minority' group members who may have complaints about racial discrimination or other aspects of the legal system. To address their needs for knowledge, HREOC produced the volume *Unlocking the System: Strategies for Community Workers in Victoria*. Irene Moss, then Race Discrimination Commissioner, pointed out: "We have taken the approach that it is not enough to know one's legal rights. It is also necessary to know how the system works and to have strategies for dealing with it. This is obviously correct, but again this initiative was confined to one state, and without a continuing allocation of funds the material will date. What these workers really need is a para-legal degree. We are running an excellent one externally from Southern Cross University!"<sup>10</sup>

We know then that there is a lack of awareness about legal rights and a strong indication of the best methods of remedying this, but the resources are not being directed in this area.

## Access and Equity

The Access and Equity policy was designed as part of the National Agenda for a Multicultural Australia and originally targeted non-English speaking background Australians. However the policy was extended to target indigenous Australians in 1989. The thrust of this policy is to ensure that all Australians obtain an equal access to and an equal share of government resources in the area of service delivery. In 1992 the strategy underwent a thorough review.<sup>12</sup>

A number of criticisms had been made of the Access and Equity policy, the most telling of these in the Federation of Ethnic Communities' Councils of Australia (FECCA) report *"They May Mean Well But..."*.<sup>13</sup> The report points out that departments were not collecting comprehensive ethnicity data on either their clients or their staff. In 1995 this is still true. My request for complaints data broken down into race/ethnicity and gender were met with the response that either

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10. This material was produced as part of the Commonwealth's Community Relations Strategy, 1992.
  11. I Moss, Foreword, HREOC, *Unlocking the System: Strategies for Community Workers*, Sydney, 1992.
  12. For details of this review see: Department of the Prime Minister and Cabinet *Access and Equity Evaluation Report*, AGPS, Canberra, 1992.
  13. Federation of Ethnic Communities' Councils of Australia Inc. (FECCA), *"They May Mean Well But...": An Examination of First-round Access & Equity Plans of Eight Commonwealth Government Departments*, Sydney, 1991.

the statistics had not been gathered or the data was incomplete. As one office reported, "statistics for the last three years... tell very little because the majority are marked 'not known' for ethnic/race background".

Further, there is not to my knowledge any sophisticated data on the level of racial discrimination occurring in the community. Without detailed information of discriminatory practices and the communities upon which they are impacting it is impossible to judge the extent to which access to the race discrimination legislation is being denied.

HREOC, in its 1993-94 Annual Report, points out that a major issue in terms of access and equity is the system of co-operative arrangements with the states which are under review. In Victoria, South Australia, and Western Australia the states handle complaints under the Commonwealth Act, while HREOC handles state/territory complaints in Queensland and the ACT. The report notes: "The initial stage of the review has raised numerous issues about the effectiveness of such arrangements in promoting access to justice,, .<sup>14</sup> Data which would provide information on HREOC's access and equity performance is not systematically collected.<sup>15</sup>

Advice received from HREOC is that, as at August 1995, "the computerisation of complaint records is still being developed". However recent analysis shows that "twice as many males as females utilised the RDA for all racial/ethnic backgrounds, non-English speaking background Australians brought 55% of complaints, while 20% were brought by Aboriginal and Torres Strait Islander peoples".<sup>16</sup> It is obvious from this data that more effort needs to be directed towards informing women of their rights in this area.

Given the high level of sex discrimination in Australian society it must often be difficult for a woman to determine whether she is being discriminated against because of her race/ethnicity or her gender. In all probability she is discriminated against on a combination of grounds, but is forced to choose one category to lodge her complaint by the nature of the legislative framework.

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14. HREOC, *Annual Report 1993-1994*, AGPS, Canberra, p235.

15. As above, p 236.

16. I am indebted to officers of the Human Rights and Equal Opportunity Commission for this information.

## The Location of Power

I referred in my opening to access to law being linked to an empowerment of racial/ethnic minorities. One way this can be done is to alter the current balance of power in sites such as Parliament and the bureaucracy to better reflect the cultural and gender diversity of Australian society. As FECCA has recommended, the "recruitment and promotion policy of Commonwealth departments (should) be geared to reflect the composition of the Australian population. In spite of the Access and Equity policy, which contains a commitment to a culturally diverse workforce, there is a vast under-representation of minority group members at the higher levels of the public service.

The Commonwealth Public Service Commission in a 1990 report<sup>18</sup> revealed that 6% of the Senior Executive Service (SES) were classified as NESB 1 (first generation migrants) and 10% as NESB 2 (second generation migrants). This was considerably below their representation in the general population. An Action Plan was set up as a result of the report's recommendations designed to improve the representation of people of non-English speaking background. Outcomes of the Action Plan as released by the Department of the Prime Minister and Cabinet in 1993 suggest that the level of such representation may have dropped below the 1990 levels! However there are problems with the data which was supplied voluntarily; 26% of respondents did not indicate their race/ethnicity.

We do have enough data from other sources to conclude that the White Anglo Australian Male (WAAM) is grossly over-represented in powerful positions in Australian society.<sup>19</sup> As Klaas Woldring writes: "'Egalitarianism' and 'mateship'... sit uneasily with the domination of WAAM in a multicultural society comprising 51% women, 22% foreign-born and 25% of the population who have at least one parent born outside Australia.... Egalitarianism must come to mean the inclusion of members of NESB, [of] women and Kooris in the senior decision-making bodies of their country 20

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17. See note 13.

18. Commonwealth Public Service Commission, *Maximising Diversity - A Report on the Employment of People of Non-English Speaking Background in the Australian Public Service*, AGPS, Canberra, 1990.

19. See K Woldring, *The Concrete Ceiling*, paper delivered at the Anzam '94 Conference, 7-10 December, Victoria University, Wellington, New Zealand, 1994.

20. As above, p 23.

The Multiculturalism and the Law reference paid attention to these matters. The report calls for institutions "to take positive steps to increase cultural awareness by adopting recruitment policies which ensure that staff profiles better reflect the class, racial and cultural composition of the general population".<sup>21</sup>

The Access and Equity strategy requires that representatives from indigenous and non-English speaking background communities be involved in advising the government on policy matters. However the 1992 evaluation of the policy concludes that: "departments and agencies find it difficult to demonstrate any concerted effort to recruit representatives of Access and Equity target groups to the various bodies designed for community participation in government processes". This representation is important as a means of creating policy 'from below' instead of from the 'top down'.

## Access and the Federal Structure

The complications for complainants inherent in the federal structure prevent access to the law in this area. All states and territories have their own laws outlawing racial discrimination. The federal *Racial Discrimination Act 1975* (Cth)(RDA) takes precedence where state or territory laws are inconsistent.<sup>23</sup> However it is difficult for complainants to decide what law to bring their complaint under. This is not surprising given that the question is a challenging one even for lawyers trained in the intricacies of constitutional and administrative law! The High Court decision in *Brandy v HREOC* created problems with complaints under the Commonwealth Act.<sup>24</sup> The court held that the sections in Part 1a of the RDA designed to make "a determination of the Commission binding, authoritative and enforceable invalidly invest[ed] judicial power in the Commission" and were therefore in breach of the Constitution.<sup>25</sup>

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21. Australian Law Reform Commission, *Multiculturalism and the Law*, Report 57, Sydney, para 2.26.
  22. Department of the Prime Minister and Cabinet, Office of Multicultural Affairs, *Access and Equity Evaluation Report Summary*, AGPS, Canberra, 1992, p 7.
  23. *University of Wollongong v Metwally* (1984) 158 CLR 447 and *Viskauskas v Niland* (1983) 153 CLR 280.
  24. *Brandy v HREOC* (1995) 127 ALR 1.
  25. As above per Deane, Dawson, Gaudron and McHugh JJ.

This decision prevented enforcement of orders made by the HREOC and led to a reliance on state and territory laws. Even without the *Brandy* decision however there was a preference for state laws. This may be linked to the nature of those laws or to the information given to prospective complainants by state officers. Co-operative arrangements between the Commonwealth and the States mean that state Commissions are often administering complaints under the RDA as well as complaints under state laws.

There is a problem with access to knowledge about the law which lies in the complexity of the federal system. In a paper of this size there is not time to canvass solutions to this problem. I will do no more here than to suggest that entrenchment of a Bill of Rights in the Constitution would be one way of clarifying rights. Indigenous peoples are at the forefront of the debate in this area.<sup>26</sup> The issue of a Bill of Rights and the concept of full citizenship in a plural society was on the agenda at the 1995 FECCA Conference.<sup>27</sup>

## Conclusion

We return to the central problem which is the dominance of an Anglo elite through all sectors of Australian society. It is this cultural imbalance that allows the dominant group to feel self-satisfied with the solutions 'we' are providing for 'them', 'them' being the minority citizen. If we look at the legal profession, whose expertise is heavily relied on in discrimination cases, we find that most lawyers come from a monocultural background. Their study of law has often occurred in an intellectually arid, 'black-letter' fashion in courses which avoid any analysis of race, ethnicity or gender. It is no wonder that these professionals are often unable to respond adequately to clients who tell 'stories' of racial discrimination.<sup>28</sup>

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26. See for example ATSIC, *Recognition, Rights and Reform: Report to Government on Native Title Social Justice Measures*, AGPS, Canberra, 1995. Recommendation 16 of this Report reads: "The Commonwealth Government should resource, in consultation with ATSIC, the establishment of a process for defining indigenous rights and the most appropriate ways of ensuring their enforcement, including consideration of a Bill of Rights".

27. The FECCA Conference was held at the World Congress Centre in Melbourne, 16-19 November, 1995.

28. For a fuller discussion of this issue see G Bird, "Race, Ethnicity, Class and Gender: Integral Issues for a Law Curriculum", in C Hedrick & R Holton, *Crosscultural Communication and Professional Education*, Centre for Multicultural Studies, Flinders University, Adelaide, 1990.

As I have argued elsewhere: behind the 'multicultural mask' of the Australian politico-legal system lies a white face. From its white mouth it sometimes speaks with a racist voice. Non-Anglo voices are muffled. These voices have limited access to academic positions, to research grants and to the media. Anglo-Australians interpret the experiences of 'the other' from their own location as bearers of Anglo culture; they are the 'authorised knowers' whose voices are legitimated.<sup>29</sup>

Until the sites of power in Australian society are reflective of the cultural diversity in the broader community we will not have the resources or the programs needed to tackle the fundamental access questions.

### **Issues for consideration**

- What steps could HREOC take to address access and equity issues? Specific issues include information for target groups, clear and well publicised procedures, alternatives to paper based communication, availability of information about outcomes of conciliations and hearings.
- Should the targeting of specific groups be a legislative requirement?
- Should HREOC appoint Aboriginal and Torres Strait Islander conciliators and conciliators from non-English speaking backgrounds to work with these target *groups*?
- Should the RDA be amended to incorporate community development and community education in all forms into the complaint handling area as a way of dealing with indirect discrimination?

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29. G Bird, "Power, Politics and the Location of 'the Other' in Multicultural Australia", paper delivered at the Australian Institute of Criminology Conference, May, 1993.



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## FURTHER ISSUES RELATING TO THE OPERATION OF THE LEGISLATION

Chapter 3 outlined the general dispute resolution framework of the *Racial Discrimination Act 1975* (Cth) (RDA). This chapter covers some of the specific issues which arise in the practical application of the current legislation, which were raised in preliminary consultations.

The *National Review of Complaint Handling* addressed many of the procedural, administrative and access and equity issues in the area of complaint handling.<sup>1</sup> Further, there is currently a Joint Review being conducted by the Attorney-General's Department, the Department of Finance and the Human Rights and Equal Opportunity Commission (HREOC) which is examining organisational and enforcement issues with respect to HREOC's legislative framework. The issues raised by those reviews will be addressed in the final report of this Review, which will also engage in a 'section by section' analysis of the provisions of the RDA and present a thorough qualitative and quantitative analysis of complaints. This chapter is therefore not intended to be conclusive or comprehensive, but aims instead to raise issues for further discussion.

### LODGING COMPLAINTS

It should be noted at the outset that Aboriginal and Torres Strait Islander people and women from non-English speaking backgrounds are clearly under-represented in the RDA complaints process. Public awareness of HREOC's role is low among many community groups. Even where its role is known, there are still numerous barriers confronting people who may wish to lodge a complaint. These include cultural barriers; lack of confidence in, or suspicion of, official agencies; language and other communication difficulties; and fears of or experience of, victimisation, harassment and intimidation.<sup>2</sup>

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1. Human Rights and Equal Opportunity Commission (HREOC), *National Review of Complaint Handling*, Final Report of the Steering Committee, AGPS, 1994.
  2. As above, p 20.

## What constitutes a complaint?

Section 22 of the RDA provides for complaints to be lodged with the Commission, and requires that a 'complaint' must be in writing and make an allegation that a person has done an act that is unlawful under Part II of the Act. The Commission must therefore determine what constitutes a complaint as a threshold issue. The question of whether any particular document amounts to a complaint has been a matter of some controversy.<sup>3</sup> The adoption of an expansive definition of a 'complaint', coupled with the limited powers of decline under the RDA, pose a substantial administrative burden on the Commission.

## Formulating complaints in writing

The statutory requirement that a complaint must be lodged in writing<sup>4</sup> can present significant difficulties for many people who seek redress through the RDA.<sup>5</sup> Further, with little knowledge of their legal rights, complainants may have considerable difficulty in formulating the appropriate details of alleged incidents of discrimination into a comprehensive written statement. However, as the complaints process determines legal obligations and outcomes, HREOC needs a permanent record of the complaint.

Although assistance in formulating complaints is usually offered by HREOC in practice, the RDA does not require Commission staff to provide translation or interpreter services, or assistance in formulating complaints in writing. Section 69(2) of the *Disability Discrimination Act* 1992 (Cth) (DDA) and section 20(5) of the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth) (HREOCA) impose a statutory duty on the Commission to "provide appropriate assistance" to complainants in the formulation of complaints. This could entail the use of interpreters and translators, and visiting the complainant at home where necessary.

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3. See *Proudfoot v HREOC* (1991) 100 ALR 557 and *Ellenbogen v HREOC* (1994) EOC 92-564.

4. Section 22(1).

5. HREOC, as above *fn* 1, p 40.

- Should the RDA be amended to allow complaints to be accepted in permanent forms other than writing ( eg audio or video tape)?
- Should a standard complaints initiation form be used to provide national consistency in initial data collection?
- Should a duty be imposed on the Commission to provide complainants with assistance akin to the duty imposed by provisions in the DDA and HREOCA? If so, should this include the use of interpreters, translators and assistance in formulating complaints in writing?

## Standing

Section 22 of the RDA specifies that a complaint must be lodged by an "aggrieved" person or a trade union of which an "aggrieved" person is a member.<sup>6</sup> Apart from ensuring a decidedly individualistic focus in the complaints process, this provision excludes members of the general public from lodging complaints where they witness racial discrimination or public interest groups bringing action under the RDA on behalf of persons aggrieved.<sup>7</sup>

Section 69(1)(c) of the DDA allows for a person to lodge a complaint on behalf of another person or persons. By way of contrast, the RDA only allows a person (or body corporate) to bring a complaint on behalf of another if they are themselves aggrieved or a trade union of which an aggrieved person is a member.

- Should the RDA be amended in conformity with the DDA to allow a person to make a complaint on behalf of another aggrieved person?

6. In *Cameron v HREOC* (1993) 119 ALR 279, the Federal Court held that an aggrieved person is one with greater interest in a matter than an "interested by-stander", at 285-288.

7. Of course, it does not prevent public interest groups from acting as advocates, nor does it prevent an incorporated body who could itself be categorised as a person "aggrieved" from bringing a complaint.

## Representative complaints

Section 25L of the RDA outlines the conditions for making a representative complaint under section 22(1)(c), where the complaints of a class of people are against the same respondent, arise out of the same or similar circumstances and give rise to a substantially common issue of law or fact.

Representative complaints have the advantage of removing the focus from the individual, and arguably carry greater weight with respondents in some cases:

employers are more willing to change their policies when failure to do so opens the prospect of a group action potentially involving sizeable compensation payments... Economic rationality dictates compliance with legislation if that would be less costly than defiance—and defiance becomes costly where group actions are available.<sup>8</sup>

Despite the potential benefits, few representative complaints have been lodged under the RDA since section 25L was introduced in 1992, with none being referred to public hearing. This is due in part to the legal complexity of the provisions, the difficulty for potential complainants and their advocates to identify the appropriate circumstances in which representative proceedings should be initiated, and the problems associated with remedies for class actions.

It is expected that the representative complaints provisions will be used more frequently under the new racial hatred provisions.<sup>9</sup> Representative complaints may be the most appropriate type of complaint to lodge in a group libel situation, particularly involving the media, where an entire ethnic group is targeted rather than an individual.

- What changes can be made to the legislative provisions and procedures to assist in the formulation and conduct of class actions?
- How should the current determination powers be amended so as to overcome any problems which arise in relation to remedies?

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8. R Hunter, *Indirect Discrimination in the Workplace*, The Federation Press, 1992, p 262.

9. *The Racial Hatred Act 1995* (Cth) came into operation on 13 October 1995. See Chapter 8 for further discussion.

## Commissioner's discretion to decline complaints

Section 24(2) gives the Commissioner the discretion to determine whether or not to inquire into a complaint. A decision by the Commissioner not to inquire into a complaint must be notified in writing to the complainant, who then has certain rights of referral and review under section 24(4).

Where the Commissioner exercises her discretion to decline a complaint on the grounds that it relates to an act that is "not unlawful",<sup>10</sup> the complainant has the right to require that the matter be referred to the Commission for a public hearing. On the other hand, where the Commissioner decides not to inquire into a complaint because it is frivolous, vexatious, misconceived or lacking in substance<sup>11</sup> or because those aggrieved by the act do not wish the Commissioner to hold an inquiry,<sup>12</sup> the complainant may seek review of that decision by the President of the Commission. The decision not to inquire may be reviewed 'on the papers'.<sup>13</sup>

Under the DDA, by way of contrast, a decision to decline a complaint on any ground is subject to review by the President. It has been suggested that the RDA be amended so that it is consistent with the DDA provisions.

The argument in favour of allowing complaints which are declined as "not unlawful" to be referred to a public hearing is essentially one of public interest. If the only available internal review mechanism is confidential, it may be argued that this detracts from the Commission's accountability. Referral to a public hearing could also provide case law on whether the relevant act is "unlawful" or otherwise. On the other hand, this ground of decline is inconsistent with the others. If the complainant exercises the right to a public hearing, a great deal of HREOC's resources may be expended on an inquiry into an act which may be clearly outside the jurisdiction of the RDA and is very much outside the spirit of the Act.

The DDA allows for complaints to be declined on the same grounds as the RDA. Further, the DDA provides that complaints can be declined where some other

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10. Section 24(2)(a).

11. Section 24(2)(d).

12. Section 24(20).

13. Section 24(4)(b).

remedy has been sought in relation to the subject matter of the complaint and it has been adequately dealt with, where there appears to be a more appropriate remedy available, where the subject matter of the complaint has already been dealt with by the Commission or another statutory authority, or where the complaint could be more effectively dealt with by another statutory authority.

- Should the grounds of decline contained in the RDA mirror those in the DDA?
- Should the decline review mechanisms in the RDA mirror those in the DDA?

## **THE COMPLAINTS PROCESS**

The RDA does not provide a well defined or comprehensive framework for complaint handling. Although section 20 of the RDA requires the Commissioner to "inquire" into complaints and to endeavour to resolve them by "conciliation", these terms are not defined. The flexibility and discretion which this affords the Commissioner in settling complaints may be advantageous in many cases. However, the absence of defined procedures allows for inconsistencies among the various agencies administering the legislation and makes any evaluation of the complaint handling process extremely difficult.

### **Conciliation**

There is no universally accepted model of conciliation, nor of quantifying and assessing outcomes. In practice, conciliation includes a wide range of approaches which often vary greatly between agencies and between conciliators. Flexibility is important in a jurisdiction which aims to do more than merely provide redress to an individual who has suffered a wrong. However, many complainants and respondents are not aware of what the conciliation process entails and do not properly understand the role of the conciliator.

- Should the RDA be amended to clarify what is meant by conciliation and define the relevant processes? If so, would this detract unacceptably from the flexibility of the current conciliation process?

## Confidentiality

The conciliation process is confidential; this derives from two sections of the Act. Section 24E(2) and (3) of the RDA prohibit the inclusion of anything said or done in the course of conciliation proceedings to be admissible as evidence in a public hearing. Thus, when complaints are not resolved through conciliation and are referred to public hearing, the conciliation process cannot be examined in subsequent proceedings. Further, section 27F prevents the Commission or any member of staff from disclosing private information relating to the details of complaints.

This guarantee of confidentiality can be said to be a double-edged sword.<sup>14</sup> On the one hand, it encourages complaints to be lodged and may also encourage respondents to co-operate. However, confidentiality then makes public scrutiny of the efficiency and effectiveness of the conciliation process virtually impossible.

Confidentiality is seen to be essential to the conciliation process, as many complainants and respondents may not participate without a guarantee of confidentiality. Complainants may be deterred from lodging complaints where sensitive and private information must be disclosed for the purposes of the complaint. Many respondents have little incentive to participate in conciliation proceedings apart from the assurance of confidentiality which protects them from adverse publicity, as they are guaranteed that what they did or said in conciliation is not admissible in a subsequent hearing.

Further, complainants and respondents are often in a continuing relationship and the privacy offered by conciliation can be important in preserving the relationship. Once a complaint is referred to public hearing, the process becomes more adversarial and the parties usually polarise. This could conceivably destroy an ongoing relationship, such as that in employment.

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14. M Thornton, *The Liberal Promise*, Oxford University Press, 1990, p 152.

Despite its benefits, the confidentiality of the conciliation process prevents a thorough analysis of the overall strengths and weaknesses of the process and of the methods employed. Further, it has been argued that a high conciliation rate is achieved at the expense of adequate publicity for, and exposure of, the legislative provisions. Without public details of previous complaints, it is difficult for prospective complainants to assess the merits of their complaints. Publicising a decided case can act as a forceful means of community education.<sup>15</sup> It may alert potential complainants to their rights, while having a deterrent effect on potential respondents.

Successful conciliation outcomes are only published in annual reports of anti-discrimination agencies, which have little impact on the broader community. This reduces the normative effect and educative value of conciliation outcomes and renders the work of anti-discrimination bodies largely invisible.<sup>16</sup> Further, the confidentiality aspect of conciliation might in fact stifle group empowerment, because there are no clear conciliation precedents nor statistics which can be used to lobby for change and to challenge existing policy or conditions.

- Should information gathered in the course of conciliation be admissible at a public hearing?
- Are there ways of monitoring the standards and methods employed in the conciliation process without compromising confidentiality?
- Should a national register of conciliation outcomes be established? What information needs to be kept confidential to protect the identities of the parties?

The advantages of the confidentiality prescript outlined above may be undermined by the parties themselves. On several occasions, both complainants and respondents have publicly disseminated information relating to a complaint which was in the process of being conciliated. This arises from the fact that, while section

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15. L Thornwaite, 'The Operation of Anti-Discrimination Legislation in New South Wales in Relation to Employment Complaints', (1993) 6(1) *Australian Journal of Labour Law* 31.

16. Thornton, as above *fn* 14, p 150.

27F prevents the Commission or any member of staff from disclosing private information relating to the details of complaints under the RDA, it does not prevent any public disclosure of the matter by the parties to the complaint.

- Should the Act be amended to ensure that both parties are bound to maintain confidentiality while conciliation is in progress? How should such an amendment be framed?

## COMPLIANCE

In addition to inquiring into complaints, one of the key functions of HREOC under the RDA is to secure compliance with the legislation and to educate the public about their rights and responsibilities. As outlined above, while confidentiality is a strength of the process of conciliation, the way in which it has operated has made it very difficult for prospective complainants to gain access to information and make informed decisions about their prospects. Decisions of the Commission provide some guidance to the parties. However, as the vast majority of complaints are resolved through conciliation (often without judicial determinations on the sections of the Act relied upon), an indication of the Commission's approach to various aspects of the legislation would be valuable. As noted above, within the bounds of confidentiality, more publicly available information on the use and outcomes of the conciliation process would greatly enhance the educative potential of the RDA.

## Codes of Practice

This review will primarily attempt to address the defects in the RDA. However, HREOC must also work vigilantly at promoting compliance with the RDA in whatever form it exists. Prescribing legislative standards is of no effect if the parties involved have no understanding of how to implement these standards. In particular, it has become increasingly apparent in recent years that indirect discrimination, which is often the cause of the structural and systemic inequality found in many areas of public life, is a highly sophisticated legislative concept, and may not be discernible to even the most well-intentioned respondent.

It appears that there is a need to develop guidelines in the form of codes which embody best practice for those groups upon whom obligations are imposed by the

RDA. For instance, employers receive little practical guidance as to how they can comply with the obligations imposed by the Act and in the means by which they can implement 'best practice'. In light of the fact that employers constitute the largest group of respondents, it is necessary to provide them with some certainty in the conduct of their affairs in terms of their legislative obligations. Further, media organisations could benefit from guidelines as to the operation of the racial hatred provisions in the RDA.

The area of occupational health and safety provides a good model because it is also an area in which education and prevention are key aims of the legislative regime. Codes of practice are issued by government agencies to advise employers and employees of acceptable ways of achieving compliance with occupational health and safety legislation. They are used in conjunction with statutes and regulations but can also be incorporated into legislation.

Codes of practice could include anti-harassment policies and grievance handling procedures, and could be industry specific or topic specific, dealing with issues such as recruitment and termination of employment. Codes could be developed by HREOC in consultation with respondent groups, organisations representing indigenous and ethnic communities, employers and unions. Codes could either be compulsory or voluntary.<sup>17</sup>

#### *Legal status of codes of practice*

There are two basic models upon which codes of practice could be based. The first involves that contained in section 38(2) of the *National Occupational Health and Safety Commission Act 1985* (Cth), which specifies that a national Standard Code of Practice is an instrument of an advisory character only. In general, a code of practice achieves legal status only when approved by the Minister according to the legislation. An approved code of practice is generally designed to be used in conjunction with the statute and regulations, but does not have the same legal force. An approved code of practice is designed to provide practical guidance,

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17. For a more detailed discussion of codes of practice, see M Smyth, "Getting down to tin tacks: Implementing discrimination law in the workplace" in Occasional Papers from the Northern Territory Anti-Discrimination Commissioner - Papers from the First National Conference of Legal and Policy Officers from Human Rights, Equal Opportunity/Anti-Discrimination Organisations, 10-11 August 1995; New South Wales Anti-Discrimination Board, *Implementing Discrimination Law in the Workplace*, Discussion Paper, August 1995.

should be followed unless there is a solution which achieves the same result or a better solution, can be used in support of a statute's preventative provisions and can be used to support prosecution for non-compliance.

A person or company cannot be prosecuted for failing to comply with an approved code of practice. However, in proceedings for contravention of the legislation, failure to observe an approved code of practice may be admissible as evidence. Take the position in South Australia, in proceedings for an offence against the *Occupational Health Safety and Welfare Act 1986* (SA). If it is proved that the defendant failed to observe the provisions of an approved code of practice dealing with the matter in respect of which the offence was alleged to have been committed, the defendant is, in the absence of proof to the contrary, taken to have failed to exercise the standard of care required.

Section 47 of *Race Relations Act 1968* (UK) follows a similar model. The section empowers the Commission for Racial Equality to issue codes of practice for the elimination of discrimination in the field of employment and for the promotion of equality of opportunity in that sphere between persons of different racial groups. The legal significance of the provision of codes of practice is that while a failure to observe such codes does not render a person liable to any proceedings, it is admissible in evidence and can be taken into account in a case before an industrial tribunal.<sup>18</sup>

The Sex Discrimination Commissioner is currently in the process of preparing codes of practice in the sex discrimination area, which follow this model and will be voluntary.

By way of contrast, under the DDA, sections 31-34 provide for the Minister to formulate standards in employment, education, accommodation, provision of services and facilities and the administration of Commonwealth laws and programs. Once such standards are approved by Parliament, then it is unlawful to breach them.

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18. Section 47(10) of the *Race Relations Act*.

- Do you agree that codes of practice should be developed? If not, why not?
- If you support codes of practice, would you prefer them to be designed on an industry basis or on specific topics? Which topics should such codes cover?
- What legal status should codes of practice take? Should they be voluntary or mandatory?
- Who should develop codes of practice?

## **INTERACTION WITH OTHER PIECES OF LEGISLATION**

In the 20 years since the RDA was enacted, several pieces of legislation have been passed at both federal and state levels, which have significant implications for its operation. As discussed in Chapter 1, the RDA has been instrumental in invalidating discriminatory state legislation through the operation of section 109 of the Constitution. The nexus between the RDA and the *Native Title Act 1993* (Cth) has been the subject of some considerable scholarship, and this issue is discussed by Garth Nettheim in Chapter 9 of this publication. The interaction of the RDA with state anti-discrimination legislation, and other federal legislation such as the *Industrial Relations Act 1988* (Cth) (IRA) and the HREOCA remains to be considered. This publication will raise some possible issues for discussion, which will be further explored in the final report of this Review, after the Commission has received submissions on the relevant issues.

### **Concurrent Operation of Federal and State Anti-discrimination Legislation**

As mentioned earlier, all states and territories except Tasmania have enacted comprehensive anti-discrimination legislation which, among other things, renders racial discrimination unlawful.<sup>19</sup> However, each of these laws differ as to the areas covered, and the nature and extent of the exceptions and exemptions contained therein.

Constitutional inconsistency may arise from a conflict between federal and state anti-discrimination legislation. Section 109 of the federal Constitution states that where a "law of a state is inconsistent with a law of the Commonwealth, the latter prevails, and the former is invalid to the extent of the inconsistency." The aspects of the state law which are inconsistent with the Commonwealth law become inoperative, while other aspects of the law continue to operate.

Inconsistency may occur where simultaneous obedience of both laws is impossible; where one law takes away a right conferred by another; or where the state law invades a field which the Commonwealth law was intended to cover. The first two instances involve direct inconsistency or 'textual collision', whereas the latter involves indirect inconsistency.

The difficulties arising from the concurrent operation of federal and state laws in the anti-discrimination area resulted in the amendment of the RDA in 1983. In the case of *Viskauskas v Niland*,<sup>20</sup> the High Court held that the racial discrimination provisions of the *Anti-Discrimination Act 1977* (NSW) were inconsistent with the RDA. While there was no direct inconsistency, the High Court considered that the Commonwealth Act was intended to cover the field of racial discrimination.<sup>21</sup> As a response to this decision, the federal legislature amended the RDA by inserting a new section 6A, which provided an indication that the Commonwealth Parliament's intention is not to cover the field. It provides that the RDA is not intended to exclude or limit the operation of a state law which furthers the objects of CERD, and is capable of operating concurrently with the federal Act.<sup>22</sup>

This provision reduces the scope of possible inconsistencies with the state Acts, but not the possibility of direct inconsistency.<sup>23</sup> The effect of section 6A was considered

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19. *Anti-Discrimination Act 1977* (NSW); *Equal Opportunity Act 1984* (Vic); *Equal Opportunity Act 1984* (SA); *Equal Opportunity Act 1984* (WA); *Anti-Discrimination Act 1991* (Qld); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1992* (NT).

20. (1983) 153 CLR 280.

21. *Viskauskas*, at 292 per Gibbs CJ, Mason, Murphy, Wilson, Brennan JJ.

22. Similar provisions were inserted into the *Sex Discrimination Act 1984* (section 10) and the *Disability Discrimination Act 1992* (section 13).

23. *R v Credit Tribunal ; Ex parte General Motors Acceptance Corp Australia* (1977) 137 CLR 545 at 563 per Mason J and Barwick CJ; Gibbs, Stephen and Jacobs JJ, concurring.

by the High Court in *University of Wollongong v Metwally*,<sup>24</sup> where a majority of the Court held that the provisions of section 6A could not operate retrospectively to remove inconsistency.

The same conduct may constitute a breach of both the state and Commonwealth Acts. Where this is the case, the clear purpose of section 6A is that a complainant should be able to take action under either law, subject to section 6A(2), which prevents a person lodging a complaint under the RDA once it has been lodged under the state Act. It is clear that the intention of the amendment is that the complainant must directly choose between state and federal law, and a person should not be compensated twice for the same matter, nor should a respondent be subject to double jeopardy. It should be noted that state anti-discrimination legislation does not contain a provision that corresponds to section 6A. Therefore, if an action does not succeed under Commonwealth legislation, recourse may be had under state legislation, although such recourse is at the discretion of the relevant state body.

Section 6A(2) has the potential to lead to some injustice if applied literally. If one considers that the provision is triggered by the lodging of a document which satisfies the formal requirements of a state law, it could operate to deny a complainant a remedy. The interpretation of section 6A(2) turns on the meaning of the words "made a complaint", "instituted a proceeding" or "taken any other action under (state) law".

In the absence of a definition of these terms in state anti-discrimination legislation, the scope and meaning of these phrases must be determined by applying the ordinary rules of statutory interpretation. The only requirements which state legislation prescribe is that a formal complaint be lodged in writing and within time limits. Where a 'complaint' to a state anti-discrimination body is beyond jurisdiction, it is arguably not the case that a double remedy was ever possible, and thus proceedings under the Commonwealth law may well be permissible. This interpretation is strengthened by the fact that the RDA should be regarded as remedial legislation. Further, the Act refers to a law of a state or territory that deals with a "matter dealt with by this Act". One may well argue that a matter outside jurisdiction is not a matter dealt with by the relevant state law.

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24. (1984) 56 ALR 1.

However, if a complainant has elected to use the state law and proceeded with this course of action, and later has a change of heart, it is unlikely that a complaint can be lodged under the federal legislation. It has been held in relation to similar provisions in the *Sex Discrimination Act* (SDA), that one of the purposes of section 6A is that the "Commonwealth processes and investigative powers not be triggered where a complaint has been made under State or Territory law".<sup>25</sup> This purpose would be subverted if a person aggrieved by apparently unlawful discrimination, having utilised the facilities of the state law, were then able to commence proceedings under the Commonwealth Act.<sup>26</sup> Mere lack of success under the state Act would not, of course, give the plaintiff the right to proceed under the federal legislation.

In reality, if accurate and sound advice is given at the time that the choice of jurisdiction is made, the potential difficulties arising from the operation of concurrent jurisdictions will be outweighed by the advantages of flexibility. In states where there is a choice, and where the state administrative body processes complaints under both state and federal law, prospective complainants should have access to advice on which jurisdiction to use when lodging a complaint. However, it should be noted that where poor advice has been given, and proceedings should have been instituted in the federal jurisdiction, a prospective complainant's only remedy maybe against the person who has given the negligent advice.

### **Possible areas of constitutional invalidity**

#### *State law "extends" the federal law*

State legislation may go further than the federal legislation in two general ways:

- state laws may extend beyond the scope of the Convention ( for instance, laws dealing with religious discrimination);
- state provisions may go beyond the RDA but not beyond the scope of the Convention (for instance, the serious racial vilification provisions in Division 3A of Part 2 of the *Anti-Discrimination Act*, which are based on Article 4 of CERD and Article 20 of the ICCPR<sup>27</sup>).

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25. *Finance Sector Union on behalf of Georgia MacPhail v Mercantile Mutual Holdings Ltd*, decision of HREOC, Commissioner John Basten QC, reasons for decision, 10 January 1995, p4.

26. As above.

27. See Chapter 8 for further discussion.

Neither case will lead to constitutional inconsistency. In the former case, the state law will rely on the plenary legislative power of the states for its validity. In the latter case, where the state Act furthers the objects of the Convention, and is capable of operating concurrently, it will remain valid through the operation of section 6A.

*State law "narrower than" federal law*

In certain instances, a state law will not define as unlawful that which is unlawful under the RDA, particularly in light of the breadth of section 9. State legislation could not make lawful that which Commonwealth legislation makes unlawful. The most that a state law could do would be to fail to provide a remedy in respect of conduct which was unlawful by reason of a federal law. The federal legislation provides remedies in respect of such Acts. States do not have to provide a remedy in relation to conduct not within the ambit of state law, notwithstanding that the conduct is in some sense unlawful under federal law. This is subject to the proviso that it is not one of a range of limitations which together detract from the objects of the relevant Convention.

*Equal operation*

Some commentators have raised the possibility of a further ground of constitutional invalidity in relation to section 6A. They point to some judicial support for the view that the Commonwealth, when legislating under the external affairs power, should ensure that laws giving effect to treaty obligations are uniform in their operation within the states. A majority of the High Court said in *Viskauskas* that:

The Commonwealth Parliament has chosen the course of itself legislating to prohibit racial discrimination and having done so it can only fulfil the obligation cast upon it by the Convention if its enactment operates equally and without discrimination in all the States of the Commonwealth. It could not, for example, admit the possibility that a State law might allow exceptions to the prohibition or might otherwise detract from the efficacy of the Commonwealth law.<sup>28</sup>

This dictum was repeated by Chief Justice Gibbs in *University of Wollongong v Metwally*<sup>29</sup> with considerable force:

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28. *Viskauskas* per Gibbs CJ, Mason, Murphy, Wilson and Brennan JJ, at 292.

29. (1984) 158 CLR 447.

If the Amendment Act brought about the result that the Commonwealth Act operated unequally throughout the Commonwealth—and whether it did so might depend not only on the law of New South Wales but on that of other states and territories as well—the consequence might be either that the Amendment Act would be invalid or that the entire Commonwealth Act could be invalidated, although if either of these consequences were to ensue, the former would be more likely than the latter. These questions were not argued before us because those States had not been given an opportunity to be heard in relation to them.<sup>30</sup>

It has been argued that the statement with regard to the way in which a Convention is to be implemented seems applicable generally to conventions whose terms or subject matter require equal operation.<sup>31</sup> According to this argument, if a provision of the Commonwealth law attempts to preserve the operation of the state anti-discrimination legislation, then it is ensuring that the Commonwealth laws do not have equal operation, and is thus likely to be invalid.<sup>32</sup>

Other commentators have looked upon this argument with some scepticism. The constitutional basis of the doctrine is unclear. There is no general constitutional rule (apart from explicit provisions such as sections 51(ii) and 51 88, 99 and 117) that Commonwealth laws should produce a uniform 'operation' throughout the Commonwealth. Further, there does not appear to be any stipulation in the text of CERD for this requirement of 'equal operation'.

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30. *Metwally* at 455.

31. J Macken, GJ McCarry and C Sappideen, *The Law of Employment*, 3rd edition, Law Book Company, Sydney, 1990, p 529. For a general discussion of constitutional inconsistency, see pp 527 ff.

32. Macken, McCarry and Sappideen suggests two possible ways of analysing the way in which what is said about equal operation in *Viskauskas* might apply to the relevant sections in the *Racial Discrimination Act*. One argument is that the Commonwealth sections cannot operate to preserve the operation of any state laws in those states which do legislate with respect to those topics, for to do so would necessarily produce uneven laws throughout the country. In other words, the Commonwealth laws would be the only operative laws on the topics. Alternatively, the need for equal operation might be analysed by reference to the 'lowest common denominator' approach. It may be the case that the only provisions of the state laws dealing with sex, race and disability discrimination are those which in substance, if not in form, are identical to the provisions in the relevant Commonwealth Acts and which are common to all states which have legislation on the topic. In the states with laws capable of preservation, some law (which is common to the states and the Commonwealth) would operate as 'preserved' state law, rather than as Commonwealth law. Thus, on this view, the only operative state laws would be those of the Commonwealth in the relevant areas of operation.

Section 6A does not reduce the coverage of the provisions of the RDA which give effect to CERD. The twin requirements for a state law to be valid (viz furthering the objects of the Convention and being capable of concurrent operation with the federal law) appear to ensure that the relevant Conventions are complied with. Further, it is quite inconsistent with the apparent acknowledgment of the High Court in *Metwally* that, apart from questions of retrospective operation, section 6A was effective to validate the *Anti-Discrimination Act*. In fact, the three dissenting judges in *Metwally* held that section 6A was not beyond the power of the Commonwealth Parliament, even in so far as the provisions purported to have retrospective effect or operation. Two of the three dissenting judges were part of the majority in *Viskauskas* (Mason and Wilson JJ), and yet did not mention the issue of equal operation. In fact, it is only Chief Justice Gibbs who has mentioned the dictum in any case subsequent to *Viskauskas*.

### **Industrial Relations Act: some areas of interaction**

In the anti-discrimination arena, employment has always been a significant area of complaint. Of 712 race discrimination complaints received by HREOC in 1994-5, 382 related to employment.<sup>33</sup> The past 15 years have witnessed discrimination and equal employment opportunity issues become matters within the mainstream industrial arena, as the notions of unfair treatment and managerial efficiency have widened to include these principles. This is nowhere more apparent than in the passage of *Industrial Relations Reform Act 1993* (Cth) (IRRA), which effected amendments to the *Industrial Relations Act 1988* (Cth) (IRA) and commenced operation on 30 March 1994. It was a radical piece of legislation which made significant changes to Australian industrial law, and is based on a number of instruments of the International Labour Organisation (ILO).

Major amendments contained in the IRRA provide, among other things, for a group of statutorily prescribed minimum entitlements: protection against unfair termination, a regime for minimum wages, equal remuneration for work of equal value and provisions dealing with parental leave and family care leave. The Act requires an employer to terminate employment 'fairly' and in accordance with the minima it sets down, or face the possibility of an award of compensation or an order of reinstatement, and a penalty of up to \$1,000 in the event of such a breach.

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33. In the previous financial year, 263 out of 458 complaints related to employment.

The overlap between the industrial relations and discrimination jurisdictions is significant in a number of areas: the termination<sup>34</sup> particularly of employment in circumstances which involve discrimination, the review of awards under section 150A of the IRA, and the certification of enterprise agreements and enterprise flexibility agreements.<sup>35</sup> However, while anti-discrimination and industrial legislation may both deal with discrimination in employment, they are very different in their historical and philosophical foundations, and the practical operation of the jurisdictions varies markedly.

The precise nature of interaction of the RDA and the IRA is unclear. The IRA was enacted subsequently to the RDA, and therefore may arguably impliedly repeal provisions of the RDA in the case of an inconsistency between the two Acts. On the other hand, section 93 of the IRA states that:

In the performance of its functions, the Commission shall take account of the principles embodied in the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984* and the *Disability Discrimination Act 1992*, relating to discrimination in relation to employment.

Further, the operation of the maxim of statutory interpretation, *generalis specialibus non denogant*—which provides that a later general Act or provision will not be interpreted as impliedly repealing an earlier specific Act or provision—suggests that the IRA will be interpreted, if possible, so as not to contradict the RDA.

## **Termination of Employment: overlap with discrimination law**

An employee whose employment has been terminated in circumstances which involve racial discrimination may pursue remedies in both the discrimination and industrial jurisdictions. Division 3 of Part VIA of the IRA states, for the first time in Australian law, specific requirements which must be satisfied when dismissing an employee.

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34. More so than with other forms of detriment in employment.

35. There are a multiplicity of jurisdictions in which a complainant may pursue a complaint involving discrimination in employment. In addition to the choice of jurisdiction issues which confront a complainant in deciding whether to pursue a claim in the state or federal human rights tribunal in relation to race discrimination, he or she must also decide whether to pursue the complaint in the industrial relations rather than the discrimination jurisdiction. A further decision is whether the state or federal industrial relations regime should be utilised.

When these requirements are not met, section 170EA allows a dismissed employee<sup>36</sup> to seek a remedy from the Industrial Relations Court of Australia.<sup>37</sup> Section 170DE states that an employer must not terminate employment unless there is a valid reason connected with the employee's capacity or conduct or based on the employer's operational requirements. A reason is not valid if, having regard to capacity, conduct or operational requirements, the termination is harsh, unjust or unreasonable. There are some reasons for termination that are listed in section 170 DF which can never be valid. These include race, colour, religion, national extraction or social origin. The prohibition of termination on these grounds will not apply if the reason for termination is based on the inherent requirements of the particular position, or to avoid offending religious susceptibilities where the employee is on the staff of a religious based institution.<sup>38</sup>

The Court may order reinstatement to the employee's former position or to another position on terms and conditions that are no less favourable than those received immediately before his or her dismissal. Where the Court feels that reinstatement of the employee is impracticable (for instance, the employer-employee relationship has broken down to the extent that it would be futile to order reinstatement), it may make an order for the payment of compensation "of such an amount as (it) thinks appropriate".<sup>39</sup>

The Industrial Relations Court must decline an application in respect of an unlawful dismissal if it is satisfied that there is "an adequate alternative remedy" available to the employee under existing machinery that satisfies the requirements

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36. Alternatively, a trade union entitled to represent the industrial interests of a person may apply on that person's behalf. In general, an application must be made within 14 days of the employee receiving written notice of the termination, although the Court is given the power to entertain applications made outside this period.

37. These provisions apply to all workers (including non-unionised workers) except workers on fixed term contracts; workers engaged under a contract for a specified task (consultants); workers serving probationary or qualifying periods, determined in advance and of reasonable duration; workers engaged on a casual basis for a short period; and non award employees earning over \$60,000. The Act will therefore allow employees who are not covered by awards, those governed by federal awards, and those covered by state awards to seek reinstatement or compensation in the Industrial Court.

38. Sections 170DF(2) and (3) of the IRA.

39. Compensation is limited to six months' wages in the case of award employees, and the lesser of six months' wages or \$30,000 in the case of non-award employees.

of the *Termination of Employment Convention*, ILO 158. In *Toop v Commonwealth Bank of Australia*, Parkinson JR was not satisfied that recourse to HREOC under federal anti-discrimination legislation was an "adequate alternative remedy".<sup>40</sup>

It must be noted that the remedies available in the industrial forum are designed to put the employee in the place in which he or she would have been, had the employment not been terminated. These remedies are not as wide as the potential remedies available under anti-discrimination legislation, which can include apologies and appropriate workplace training. Further, damages in the discrimination jurisdiction are analogous to tort rather than contractual damages—pain and suffering, injury to a complainant's feelings and humiliation are compensable. The anti-discrimination jurisdiction appears better able to deal with systemic discrimination and is a more appropriate forum for sensitive issues. However, the industrial relations arena provides a far more expeditious remedy, in which a complainant is more likely to obtain reinstatement.

## Awards

Under section 150A of the IRA, new awards must be reviewed within three years of coming into force, and awards already in force must be reviewed within three years of the commencement of section 150A. If the IRC considers that an award is "deficient in that it contains a provision which discriminates against an employee because of, or by reasons including, race", then it must take whatever steps are prescribed by the regulations "in order to remedy the deficiency".<sup>41</sup>

## Certified agreements

Determining whether a specific provision breaches the IRA is a matter for the Industrial Relations Commission, and ultimately for the Industrial Relations Court. Section 170MD(5) of the IRA makes it mandatory for the Industrial Relations Commission to refuse to certify an agreement "if it thinks that a provision of the agreement discriminates against an employee because of, or for reasons including, race". Section 170 MD(6) qualifies section 170MD(5), allowing discrimination based on race where it is based on the "inherent requirements" of a position. The following discussion raises a specific example of uncertainty which may arise in relation to the interaction of the IRA and RDA.

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40. Decision unreported, Parkinson JR, VI 2818 of 1994, 3 May 1995, 188/95.

41. Section 150A(3) of the IRA.

Sections 170 MD(5) and (6) are based on the international instruments scheduled to the IRA and to other "Anti-Discrimination Conventions", including *inter alia*, ILO Recommendation 111 and ILO Convention 111. ILO Convention 111 prohibits discrimination based on, *inter alia*, race. The following are not deemed to be discrimination within the meaning of the Convention: measures based on the inherent requirements of a particular job; measures warranted by the protection and security of the state; and measures of protection and assistance, including those provided for in other Conventions or Recommendations of the International Labour Conference.

However, the 'special measures' provisions in both the Convention and the Recommendation do not include race. It does include 'cultural status', but one would find it difficult to argue that this encompasses race or descent when there is a specific special measures provision for other grounds of discrimination such as age and sex. This issue has yet to be raised in the Industrial Relations Commission, but could represent a possible inconsistency between the IRA and the RDA.

## Human Rights And Equal Opportunity Act

HREOC may conciliate complaints of discrimination in employment or occupation on the grounds of, among other things, race, colour, national extraction and nationality under HREOCA. Also included are imputations of any of these grounds, in addition to discrimination based on any of these grounds which have ceased to exist. Thus, HREOCA may extend the coverage of the RDA in a number of ways. There are also broader standing rules—the complaint merely has to be made in writing to the Commission alleging that an act or practice constitutes discrimination. "Nationality" is also stipulated as a ground of discrimination, which may possibly extend the ground of "national origin" contained in the RDA.<sup>42</sup> However, in contrast to the RDA, discrimination on these grounds is not unlawful. This means that if the conciliation of a complaint is unsuccessful, no further processes (such as a public hearing or resort to the Federal Court) are available to the complainant under the Act.

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42. See Chapter 5.

## Further reading

Human Rights and Equal Opportunity Commission, *National Review of Complaint Handling, Final Report of the Steering Committee*, 1994.

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Thornton, M, *The Liberal Promise: Anti-Discrimination Legislation in Australia*, Oxford University Press, 1990.

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## WHERE TO FROM HERE?

This publication is the culmination of the initial phase of the review. It will be accompanied by a community guide incorporating an issues paper in plain English, which will be aimed at the key target groups of the RDA and their advocates. Both of these publications will inform the consultation processes which are planned to be undertaken through the first half of 1996. With the release of these publications, the Commission will call for public submissions, through advertisements in State, Territory, and targeted ethnic newspapers.

In the first half of 1996, a steering committee will be established, with representatives from government departments and statutory authorities such as the Attorney-General's Department, the Department of Immigration Local Government and Ethnic Affairs, the Australian Law Reform Commission and the Aboriginal and Torres Strait Islander Commission, and with non-government organisations. Community consultations will be conducted in capital cities, some regional centres and remote communities around Australia.

Consultations will be both formal and informal, and will be conducted with a wide range of community organisations, particularly those representing and working with indigenous people and those from non-English speaking backgrounds. While consulting with relevant target groups, HREOC will also gauge the level of public awareness and understanding of the legislation and develop strategies to enhance awareness of legislative rights and responsibilities, especially among access and equity target groups.

Based on the above, HREOC will prepare a report, containing recommendations for reform. It is anticipated that the final report of the Review will be released by mid-1997.

## HOW TO MAKE A SUBMISSION OR COMMENT

HREOC welcomes any submission or comments, from any source, about matters raised in this publication or in the subsequent community guide and issues paper. You may send a written submission addressed to:

Zita Antonios  
Race Discrimination Commissioner  
Human Rights and Equal Opportunity Commission  
GPO Box 5218  
SYDNEY NSW 2001  
or by fax to: (02) 284 9611

If you prefer, you may call (02) 284 9600 or toll free on 1800 021 199, and ask to speak to a member of the Race Discrimination Unit to make a submission by telephone.

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# APPENDIX A

## RACIAL DISCRIMINATION ACT 1975

### TABLE OF PROVISIONS

Section

#### **PART I - PRELIMINARY**

1. Short title
2. Commencement
3. Interpretation
4. Extension to external Territories
5. Additional operation of Act
6. Act binds the Crown
- 6A. Operation of State and Territory laws
7. Ratification of Convention

#### **PART II PROHIBITION OF RACIAL DISCRIMINATION**

8. Exceptions
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10. Rights to equality before the law
11. Access to places and facilities
12. Land, housing and other accommodation
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PART IIA - PROHIBITION OF OFFENSIVE BEHAVIOUR BASED ON  
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## **RACIAL DISCRIMINATION ACT 1975**

An Act relating to the Elimination of Racial and other Discrimination

WHEREAS a Convention entitled the "International Convention on the Elimination of all Forms of Racial Discrimination" (being the Convention a copy of the English text of which is set out in the Schedule) was opened for signature on 21 December 1965:

AND WHEREAS the Convention entered into force on 2 January 1969:

AND WHEREAS it is desirable, in pursuance of all relevant powers of the Parliament, including, but not limited to, its power to make laws with respect to external affairs, with respect to the people of any race for whom it is deemed necessary to make special laws and with respect to immigration, to make the provisions contained in this Act for the prohibition of racial discrimination and certain other forms of discrimination and, in particular, to make provision for giving effect to the Convention:

### **PART I - PRELIMINARY**

#### **Short title**

1. This Act may be cited as the Racial Discrimination Act 1975.

#### **Commencement**

2. (1) Sections 1, 2 and 7 shall come into operation on the day on which this Act receives the Royal Assent.

(2) The remaining provisions of this Act shall come into operation on a day to be fixed by Proclamation, being a day not earlier than the day on which the Convention enters into force for Australia.

#### **Interpretation**

3. (1) In this Act, unless the contrary intention appears:

"**Aboriginal**" means a person who is a descendant of an indigenous inhabitant of Australia but does not include a Torres Strait Islander;

"**Chairman**" means Chairman of the Council;

"Class member" in relation to a representative complaint, means any of the persons on whose behalf the complaint was lodged, but does not include a person who has withdrawn under section 25MA;

"Commission" means the Human Rights and Equal Opportunity Commission established by the Human Rights and Equal Opportunity Commission Act 1986;

"**Commissioner**" means the Race Discrimination Commissioner appointed under section 29;

"**Commonwealth agency**" means an agency within the meaning of the Privacy Act 1988;

"**Conciliation committee**" means a conciliation committee established under the regulations;

"**Convention**" means the International Convention on the Elimination of All Forms of Racial Discrimination that was opened for signature on 21 December 1965 and entered into force on 2 January 1969, being the Convention a copy of the English text of which is set out in the Schedule;

"**Council**" means the Community Relations Council established by section 28;

"**Deputy Chairman**" means Deputy Chairman of the Council;

"**dispose**" includes sell, assign, lease, let, sub-lease, sub-let, license or mortgage, and also includes agree to dispose and grant consent to the disposal of;

"**employment**" includes work under a contract for services, and cognate expressions have corresponding meanings;

"**Federal Court**" means the Federal Court of Australia;

"**member**" means a member of the Council and includes the Chairman and the Deputy Chairman;

"**President**" means President of the Commission;

"**principal executive**", in relation to a Commonwealth agency, has the same meaning as in Part V of the Privacy Act 1988;

"**registered organisation**" means an organisation registered pursuant to the Conciliation and Arbitration Act 1904;

"**relative**", in relation to a person, means a person who is related to the first-mentioned person by blood, marriage, affinity or adoption and includes a person who is wholly or mainly dependent on, or is a member of the household of, the first-mentioned person;

"**representative complaint**" means a complaint where the persons on whose behalf the complaint was made include persons other than the complainant, but does not include a complaint that the Commission has determined should no longer be continued as a representative complaint;

"**residential accommodation**" includes accommodation in a dwelling-house, flat, hotel, motel or boarding-house or on a camping ground;

"**services**" includes services consisting of the provision of facilities by way of banking or insurance or of facilities for grants, loans, credit or finance;

"**Torres Strait Islander**" means a person who is a descendant of an indigenous inhabitant of the Torres Strait Islands;

"**vehicle**" includes a ship, an aircraft and a hovercraft.

(2) A reference in this Act to an Australian ship or aircraft shall be construed as a reference to a ship or aircraft registered in Australia or belonging to or in the possession of the Commonwealth or a State.

(3) For the purposes of this Act, refusing or failing to do an act shall be deemed to be the doing of an act and a reference to an act includes a reference to such a refusal or failure.

(4) A reference in this Act to the doing of an act by a person includes a reference to the doing of an act by a person in association with other persons.

#### **Extension to external Territories**

4. This Act extends to every external Territory.

#### **Additional operation of Act**

5. Without prejudice to its effect apart from this section, this Act also has, by force of this section, the effect it would have if:

- (a) there were added at the end of sections 11 and 13 the words "or by reason that that other person or any relative or associate of that other person is or has been an immigrant";

- (b) there were added at the end of subsections 12(1) and 15(1) the words "or by reason that that second person or any relative or associate of that second person is or has been an immigrant";
- (c) there were inserted in subsection 14(1), before the words "is invalid", the words "or by reason that that person is or has been an immigrant";
- (d) there were added at the end of subsection 14(2) the words "or by reason that that other person is or has been an immigrant";
- (e) there were added at the end of subsection 15(2) the words "or by reason that the person so seeking employment or any relative or associate of that person is or has been an immigrant"; and
- (f) there were inserted in section 18, after the word "person", the words "or by reason that a person is or has been an immigrant".

#### Act binds the Crown

6. This Act binds the Crown in right of the Commonwealth, of each of the States, of the Australian Capital Territory, of the Northern Territory and of Norfolk Island, but nothing in this Act renders the Crown liable to be prosecuted for an offence.

#### Operation of State and Territory laws

6A. (1) 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.

(2) Where:

- (a) a law of a State or Territory that furthers the objects of the Convention deals with a matter dealt with by this Act; and
- (b) a person has, whether before or after the commencement of this section, made a complaint, instituted a proceeding or taken any other action under that law in respect of an act or omission in respect of which the person would, but for this subsection, have been entitled to make a complaint under this Act;

the person shall be deemed never to have been, and is not, entitled to make a complaint or institute a proceeding under this Act in respect of that act or omission and any proceedings pending under this Act at the commencement of this section in respect of such a complaint made before that commencement are, by force of this subsection, terminated.

(3) Where:

- (a) a law of a State or Territory that furthers the objects of the Convention deals with a matter dealt with by this Act; and
- (b) an act or omission by a person that constitutes an offence against that law also constitutes an offence against this Act;

the person may be prosecuted and convicted either under that law of the State or Territory or under this Act, but nothing in this subsection renders a person liable to be punished more than once in respect of the same act or omission.

### **Ratification of Convention**

**7. Approval** is given to ratification by Australia of the Convention.

## **PART II- PROHIBITION OF RACIAL DISCRIMINATION**

### **Exceptions**

**8. (1)** This Part does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies except measures in relation to which subsection 10(1) applies by virtue of subsection 10(3).

(2) This Part does not apply to:

- (a) any provision of a deed, will or other instrument, whether made before or after the commencement of this Part, that confers charitable benefits, or enables charitable benefits to be conferred, on persons of a particular race, colour or national or ethnic origin; or
- (b) any act done in order to comply with such a provision.

(3) In this section, "**charitable benefits**" means benefits for purposes that are exclusively charitable according to the law in force in any State or Territory.

### **Racial discrimination to be unlawful**

**9. (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.

(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; 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.

(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.

(3) This section does not apply in respect of the employment, or an application for the employment, of a person on a ship or aircraft (not being an Australian ship or aircraft) if that person was engaged, or applied, for that employment outside Australia.

(4) The succeeding provisions of this Part do not limit the generality of this section.

#### Rights to equality before the law

10. (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.

(2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.

(3) Where a law contains a provision that:

- (a) authorizes property owned by an Aboriginal or a Torres Strait Islander to be managed by another person without the consent of the Aboriginal or Torres Strait Islander; or
- (b) prevents or restricts an Aboriginal or a Torres Strait Islander from terminating the management by another person of property owned by the Aboriginal or Torres Strait Islander;

not being a provision that applies to persons generally without regard to their race, colour or national or ethnic origin, that provision shall be deemed to be a provision in relation to which subsection (1) applies and a reference in that subsection to a right includes a reference to a right of a person to manage property owned by the person.

#### Access to places and facilities

11. 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 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 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.

#### **Land, housing and other accommodation**

**12. (1)** It is unlawful for a person, whether as a principal or agent:

- (a) to refuse or fail to dispose of any estate or interest in land, or any residential or business accommodation, to a second person;
- (b) to dispose of such an estate or interest or such accommodation to a second person on less favourable terms and conditions than those which are or would otherwise be offered;

- (c) to treat a second person who is seeking to acquire or has acquired such an estate or interest or such accommodation less favourably than other persons in the same circumstances;
- (d) to refuse to permit a second person to occupy any land or any residential or business accommodation; or
- (e) to terminate any estate or interest in land of a second person or the right of a second person to occupy any land or any residential or business accommodation;

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

(2) It is unlawful for a person, whether as a principal or agent, to impose or seek to impose on another person any term or condition that limits, by reference to race, colour or national or ethnic origin, the persons or class of persons who may be the licensees or invitees of the occupier of any land or residential or business accommodation.

(3) Nothing in this section renders unlawful an act in relation to accommodation in a dwelling-house or flat, being accommodation shared or to be shared, in whole or in part, with the person who did the act or a person on whose behalf the act was done or with a relative of either of those persons.

#### Provision of goods and services

13. It is unlawful for a person who supplies goods or services to the public or to any section of the public:

- (a) to refuse or fail on demand to supply those goods or services to another person; or
- (b) to refuse or fail on demand to supply those goods or services to another person except on less favourable terms or conditions than those upon or subject to which he would otherwise supply those goods or services;

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.

#### Right to join trade unions

14. (1) Any provision of the rules or other document constituting, or governing the activities of, a trade union that prevents or hinders a person from joining that trade union by reason of the race, colour or national or ethnic origin of that person is invalid.

(2) It is unlawful for a person to prevent or hinder another person from joining a trade union by reason of the race, colour or national or ethnic origin of that other person.

#### Employment

15. (1) It is unlawful for an employer or a person acting or purporting to act on behalf of an employer:

- (a) to refuse or fail to employ a second person on work of any description which is available and for which that second person is qualified;
- (b) to refuse or fail to offer or afford a second person the same terms of employment, conditions of work and opportunities for training and promotion as are made available for other persons having the same qualifications and employed in the same circumstances on work of the same description; or
- (c) to dismiss a second person from his employment;

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

(2) It is unlawful for a person concerned with procuring employment for other persons or procuring employees for any employer to treat any person seeking employment less favourably than other persons in the same circumstances by reason of the race, colour or national or ethnic origin of the person so seeking employment or of any relative or associate of that person.

(3) It is unlawful for an organization of employers or employees, or a person acting or purporting to act on behalf of such an organization, to prevent, or to seek to prevent, another person from offering for employment or from continuing in employment 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.

(4) This section does not apply in respect of the employment, or an application for the employment, of a person on a ship or aircraft (not being an Australian ship or aircraft) if that person was engaged, or applied, for that employment outside Australia.

(5) Nothing in this section renders unlawful an act in relation to employment, or an application for employment, in a dwelling-house or flat occupied by the person who did the act or a person on whose behalf the act was done or by a relative of either of those persons.

## Advertisements

16. It is unlawful for a person to publish or display, or cause or permit to be published or displayed, an advertisement or notice that indicates, or could reasonably be understood as indicating, an intention to do an act that is unlawful by reason of a provision of this Part or an act that would, but for subsection 12(3) or 15(5), be unlawful by reason of section 12 or 15, as the case may be.

## Unlawful to incite doing of unlawful acts

17. It is unlawful for a person:

- (a) to incite the doing of an act that is unlawful by reason of a provision of this Part; or
- (b) to assist or promote whether by financial assistance or otherwise the doing of such an act.

## Acts done for two or more reasons

18. Where:

- (a) an act is done for two or more reasons; and
- (b) one of the reasons is the race, colour, descent or national or ethnic origin of a person (whether or not it is the dominant reason or a substantial reason for doing the act);

then, for the purposes of this Part, the act is taken to be done for that reason.

## Vicarious liability

18A. (1) Subject to subsection (2), if:

- (a) an employee or agent of a person does an act in connection with his or her duties as an employee or agent; and
- (b) the act would be unlawful under this Part if it were done by that person;

this Act applies in relation to that person as if that person had also done the act.

(2) Subsection (1) does not apply to an act done by an employee or agent of a person if it is established that the person took all reasonable steps to prevent the employee or agent from doing the act.

## PART IIA - PROHIBITION OF OFFENSIVE BEHAVIOUR BASED ON RACIAL HATRED

### Reason for doing an act

#### 18B. If:

- (a) an act is done for 2 or more reasons; and
- (b) one of the reasons is the race, colour or national or ethnic origin of a person (whether or not it is the dominant reason or a substantial reason for doing the act);

then, for the purposes of this Part, the act is taken to be done because of the person's race, colour or national or ethnic origin.

### Offensive behaviour because of race, colour or national or ethnic origin

#### 18C. (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.

**Note:** Subsection (1) makes certain acts unlawful. Section 22 allows people to make complaints to the Human Rights and Equal Opportunity Commission about unlawful acts. However, an unlawful act is not necessarily a criminal offence. Section 26 says that this Act does not make it an offence to do an act that is unlawful because of this Part, unless Part iv expressly says that the act is an offence.

(2) For the purposes of subsection (1), an act is taken not to be done in private if it:

- (a) causes words, sounds, images or writing to be communicated to the public;  
or
- (b) is done in a public place; or
- (c) is done in the sight or hearing of people who are in a public place.

(3) In this section:

**"public place"** includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

**Exemptions**

**18D.** Section 18C does not render unlawful anything said or done reasonably and in good faith:

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

**Vicarious liability**

**18E. (1)** Subject to subsection (2), if:

- (a) an employee or agent of a person does an act in connection with his or her duties as an employee or agent; and
  - (b) the act would be unlawful under this Part if it were done by the person;
- this Act applies in relation to the person as if the person had also done the act.

(2) Subsection (1) does not apply to an act done by an employee or agent of a person if it is established that the person took all reasonable steps to prevent the employee or agent from doing the act.

**State and Territory laws not affected**

**18F.** This Part is not intended to exclude or limit the concurrent operation of any law of a State or Territory.

**PART III INQUIRIES AND CIVIL PROCEEDINGS***Division 1 Preliminary***Race Discrimination Commissioner**

19. For the purposes of this Act there shall be a Race Discrimination Commissioner.

Part applies to victimisation offences

194. In this Part, a reference to an act that is unlawful under a provision of Part II includes a reference to an act that is an offence under subsection 27(2).

#### Functions of Commission

20. (1) The following functions are hereby conferred on the Commission:

- (a) to inquire into alleged infringements of Part II or Part IIA, and endeavour by conciliation to effect settlements of the matters alleged to constitute those infringements;
- (b) to promote an understanding and acceptance of, and compliance with, this Act;
- (c) to develop, conduct and foster research and educational programs and other programs for the purpose of:
  - (i) combating racial discrimination and prejudices that lead to racial discrimination;
  - (ii) promoting understanding, tolerance and friendship among racial and ethnic groups; and
  - (iii) propagating the purposes and principles of the Convention;
- (d) to prepare, and to publish in such manner as the Commission considers appropriate, guidelines for the avoidance of infringements of Part II or Part IIA;
- (e) where the Commission considers it appropriate to do so, with the leave of the court hearing the proceedings and subject to any conditions imposed by the court, to intervene in proceedings that involve racial discrimination issues;
- (f) to inquire into, and make determinations on, matters referred to it by the Minister or the Commissioner.

(2) The Commissioner shall not participate in any inquiry held by the Commission under Division 3 or attend any meeting of the Commission, be present during any deliberation of the Commission, or take part in any decision of the Commission, in connection with such an inquiry.

#### Function of Commissioner

21. The function of the Commission under paragraph 20(1)(a) shall be performed by the Commissioner on behalf of the Commission.

## Complaints

22. (1) A complaint in writing alleging that a person has done an act that is unlawful by virtue of a provision of Part II or Part HA may be lodged with the Commission by:

- (a) a person aggrieved by the act, on that person's own behalf or on behalf of that person and another person or other persons aggrieved by the act;
- (b) two or more persons aggrieved by the act, on their own behalf or on behalf of themselves and another person or other persons aggrieved by the act;
- (c) a person or persons included in a class of persons aggrieved by the act, on behalf of the persons included in that class of persons; or
- (d) a trade union of which a person or persons, or persons included in a class of persons, aggrieved by the act is a member or are members, on behalf of that person, those persons or persons included in that class of persons, as the case may be.

(1A) In the case of a representative complaint, this section has effect subject to section 25L.

(2) In this section, "trade union" means:

- (a) an organisation of employees that is a registered organisation;
- (b) a trade union within the meaning of any State Act or law of a Territory; or
- (c) any other similar body.

## Commissioner deemed to be a complainant

23. Where:

- (a) the Commissioner has referred to the Commission a matter that came before the Commissioner otherwise than as the result of the making of a complaint to the Commission; or
- (b) the Minister has referred a matter to the Commission under section 25;

then, for the purposes of any inquiry into the matter by the Commission, this Act has effect as if:

- (c) the matter had been the subject of a complaint;
- (d) the reference to the complainant in section 25F were a reference to the Commissioner; and
- (e) a reference to the respondent were a reference to the person who is, or each of the persons who are, alleged to have done the act to which the matter relates.

*Division 2 - Inquiries by Commissioner*

## Inquiries by Commissioner

24. (1) Where:

- (a) a complaint relating to an alleged unlawful act is made to the Commission under section 22; or
- (b) it appears to the Commission that a person has done an act that is unlawful by virtue of a provision of Part II or Part IIA;

the Commission shall notify the Commissioner accordingly and the Commissioner shall, subject to subsection (2), inquire into the act and endeavour, by conciliation, to effect a settlement of the matter to which the act relates.

(2) The Commissioner may decide not to inquire into an act, or, if the Commissioner has commenced to inquire into an act, decide not to continue to inquire into the act, if:

- (a) the Commissioner is satisfied that the act is not unlawful by reason of a provision of Part II or Part IIA;
- (b) the Commissioner is of the opinion that the person aggrieved by the act does not desire, or none of the persons aggrieved by the act desires, that the inquiry be made or continued;
- (c) in a case where a complaint has been made to the Commission in relation to the act, a period of more than 12 months has elapsed since the act was done; or
- (d) in a case where a complaint has been made to the Commission in relation to the act, the Commissioner is of the opinion that the complaint was frivolous, vexatious, misconceived or lacking in substance.

(3) Where the Commissioner decides not to inquire into, or not to continue to inquire into, an act in respect of which a complaint was made to the Commission, the Commissioner shall give notice in writing' to the complainant or each of the complainants of that decision, of the reasons for that decision 'and of the rights of the complainant or each of the complainants under subsection (4).

(3A) Subsection (3) does not apply in relation to a decision of the Commissioner that is made at the request of the complainant or all the complainants, as the case requires.

(4) Where the Commissioner has given a complainant a notice under subsection (3) relating to a decision, the complainant may, within 21 days after receipt of the notice, by notice in writing served on the Commissioner:

- (a) if paragraph (2)(a) applies - require the Commissioner to refer the complaint to the Commission; or
- (b) in any other case - require the Commissioner to refer the decision to the President.

(5) On receipt of a notice under paragraph (4)(a), the Commissioner shall refer the complaint to the Commission together with a report relating to any inquiries made by the Commissioner into the complaint.

(5A) If the Commissioner receives a notice under paragraph (4)(b), the Commissioner must refer the decision to the President together with a report about the decision.

(5B) A report for the purposes of subsection (5A) must not set out or describe anything said or done in the course of conciliation proceedings under this Division (including anything said or done at a conference held under this Division).

(6) The Commissioner may, for the purposes of this Act, obtain information from such persons, and make such inquiries, as the Commissioner thinks fit.

President may review a decision of the Commissioner not to hold an inquiry or to discontinue an inquiry

24AA. (1) This section applies if a decision of the Commissioner not to inquire into an act, or not to continue to inquire into an act, is referred to the President under subsection 24 (5A).

(2) The President:

- (a) must review the Commissioner's decision; and
- (b) must decide either:
  - (i) to confirm the Commissioner's decision; or
  - (ii) to set aside the Commissioner's decision and to direct the Commissioner to inquire into the act, or to continue to inquire into the act, in accordance with section 24.

(3) In spite of subsection (2), the President may refuse to review the Commissioner's decision unless the complainant gives the President such relevant information as the President requires.

(4) The President must give written notice of a decision of the President under paragraph (2)(b) to the complainant and to the Commissioner.

(5) The notice must set out the reasons for the decision.

(6) In spite of subsection 24 (2), the Commissioner must comply with a direction of the President under subparagraph (2)(b)(ii) of this section unless the complainant notifies, or all the complainants notify, the Commissioner that the complainant does not wish, or the complainants do not wish, the inquiry to be held or continued.

#### Review by President - interim determination

24AB. (1) This section applies if a decision of the Commissioner not to inquire into an act, or not to continue to inquire into an act, is referred to the President under subsection 24 (5A).

(2) If the President has not completed a review of the Commissioner's decision, the Commission or the President may make an interim determination of such a nature as would, if it were binding and conclusive upon the parties, preserve:

- (a) the status quo between the parties to the complaint; or
- (b) the rights of the parties to the complaint;

pending completion of the matter the subject of the complaint.

(3) The Commission or the President may vary or revoke an interim determination made under this section.

(4) The functions conferred on the Commission by subsection (2) or (3) may only be performed on an application made by the President.

(5) The functions conferred on the President by subsection (2) or (3) may only be performed:

- (a) on the President's own initiative; and
- (b) if the President thinks that it is expedient that the President should perform those functions.

(6) An interim determination under this section is not binding or conclusive between any of the parties to the determination.

#### Application for interim determination under section 25Y

24A. (1) The Commissioner, at any time after a complaint is lodged and before the Commissioner declines to entertain the complaint, resolves the complaint by conciliation or refers the matter to which the complaint relates to the Commission under subsection 24E (1), may apply to the Commission for the making of an interim determination under section 25Y or for the variation or revocation of any such determination.

(2) In relation to a matter arising under paragraph 24 (1) (b), the Commissioner may apply to the Commission for the making of an interim determination under section 25Y, or for the variation or revocation of any such determination, at any time.

#### Power to obtain information and documents

24B. (1) Where the Commissioner has reason to believe that a person is capable of furnishing information (in this subsection referred to as "relevant information") or producing documents (in this subsection referred to as "relevant documents") relevant to an inquiry under this Division, the Commissioner may, by notice in writing served on the person, require the person, at such place, and within such period or on such date and at such time, as are specified in the notice:

- (a) to furnish to the Commissioner, by writing signed by the person or, in the case of a body corporate, by an officer of the body corporate, such relevant information (if any) as is specified in the notice; and
- (b) to produce to the Commissioner such relevant documents (if any) as are specified in the notice.

(2) Where documents are produced to the Commissioner in accordance with a requirement under subsection (1), the Commissioner:

- (a) may take possession of, and may make copies of, or take extracts from, the documents;
- (b) may retain possession of the documents for such period as is necessary for the purposes of the inquiry to which the documents relate; and
- (c) during that period shall permit a person who would be entitled to inspect any one or more of the documents if they were not in the possession of the Commissioner to inspect at all reasonable times such of the documents as that person would be so entitled to inspect.

#### Directions to persons to attend compulsory conference

24C. (1) For the purpose of inquiring into an act, and endeavouring to settle the matter to which the act relates, in accordance with section 24, the Commissioner may, by notice in writing, direct the persons referred to in subsection (2) of this section to attend, at a time and place specified in the notice, a conference presided over by the Commissioner or a person appointed by the Commissioner.

(2) Directions under subsection (1) to attend a conference in relation to an act shall be given to:

- (a) where a complaint was made to the Commission in relation to that act - the complainant, or all the complainants, as the case requires;

- (b) the person who is alleged to have done the act; and
- (c) any other person who, in the opinion of the Commissioner, is likely to be able to provide information relevant to the inquiry or whose presence at the conference is, in the opinion of the Commissioner, likely to be conducive to the settlement of the matter to which the act relates.

(3) A person who has been given a direction under subsection (1) to attend a conference is entitled to be paid by the Commonwealth a reasonable sum for the person's attendance at the conference.

(4) The Commissioner may, in a notice given to a person under subsection (1), require the person to produce such documents at the conference as are specified in the notice.

#### Compulsory conference

24D. (1) The person presiding at a conference held under this Division may require a person attending the conference to produce a document.

(2) A conference under this Division shall be held in private and, subject to this Act, shall be conducted in such manner as the person presiding at the conference thinks fit.

(3) Subject to subsection (4), a body of persons, whether corporate or unincorporate, that is directed under section 24C to attend a conference shall be deemed to attend if an officer or employee of that body attends on behalf of that body.

(4) Except with the consent of the person presiding at a conference under this Division:

- (a) a natural person is not entitled to be represented at the conference by another person; and
- (b) a body of persons, whether corporate or unincorporate, is not entitled to be represented at the conference by a person other than an officer or employee of that body.

#### Reference of matters to the Commission

24E. (1) Where the Commissioner:

- (a) is of the opinion that a matter cannot be settled by conciliation;
- (b) has endeavoured to settle a matter by conciliation but has not been successful; or
- (c) is of the opinion that the nature of a matter is such that it should be referred to the Commission;

the Commissioner shall refer the matter to the Commission together with a report relating to any inquiries made by the Commissioner into the matter.

(2) A report for the purposes of subsection (1) shall not set out or describe anything said or done in the course of conciliation proceedings under this Division (including anything said or done at a conference held under this Division).

(3) Evidence of anything said or done in the course of conciliation proceedings under this Division (including anything said or done at a conference held under this Division) is not admissible in subsequent proceedings under this Part relating to the matter.

### *Division 3 - Inquiries by Human Rights and Equal Opportunity Commission*

Minister may appoint persons to participate in inquiries

24F. (1) The Minister may appoint a person to participate, in accordance with this section, in the performance of the functions of the Commission.

(2) The Minister may, under subsection (1), appoint such number of persons as the Minister considers necessary for the purposes of this section.

(3) A person who holds an appointment under subsection (1) may, at the request of the President, participate in the holding of an inquiry under this Division as if the person were a member of the Commission and, for the purposes of the application of this Act in relation to the inquiry, the person shall be deemed to be a member of the Commission.

(4) A person appointed under subsection (1):

- (a) holds the appointment for such period, not exceeding five years, as is specified in the instrument of the person's appointment, but is eligible for re-appointment; and
- (b) may resign the appointment by writing signed by the person and delivered to the Minister.

(5) The Minister may:

- (a) determine the terms and conditions of appointment, including remuneration, of a person appointed under subsection (1); and
- (b) at any time terminate such an appointment.

(6) The Minister may, for the purpose of appointing under subsection (1) a person who is the holder of a judicial office of a State, enter into such arrangement with the appropriate Minister of the State as is necessary to secure that person's services.

(7) An arrangement under subsection (6) may provide for the Commonwealth to reimburse a State with respect to the services of the person to whom the arrangement relates.

(8) The appointment under subsection (1) of the holder of a judicial office, or service by the holder of a judicial office pursuant to such an appointment, does not affect the person's tenure of that judicial office or the person's rank, title, status, precedence, salary, annual or other allowances or other rights or privileges as the holder of that judicial office and, for all purposes, the person's service pursuant to such an appointment shall be taken to be service as the holder of that judicial office.

(9) Unless the contrary intention appears, in this section:

**"judicial office" means:**

- (a) an office of Judge of a court created by the Parliament; or
- (b) an office the holder of which has, by virtue of holding that office, the same status as a Judge of a court created by the Parliament;

**"State" includes the Australian Capital Territory and the Northern Territory.**

**Reference of matter to the Commission by the Minister**

25. The Minister may refer any matter to the Commission for inquiry as a complaint under this Part.

**Inquiries into complaints**

**2 5A. ( 1)** Subject to subsection (2), the Commission shall hold an inquiry into each complaint or matter referred to it under subsection 24 (5) or 24E (1) or section 25.

(2) The Commission shall not hold, or shall discontinue, an inquiry into a complaint or matter referred to it:

- (a) in the case of a complaint or matter referred to it under subsection 24 (5) or 24E (1)—if the complainant notifies the Commission that the complainant does not wish the inquiry to be held or to continue; or

- (b) in the case of a matter referred to it under section 25 - if the Minister notifies the Commission that the Minister does not wish the inquiry to be held or to continue.

#### Exercise of inquiry powers by Commission

25B. (1) Subject to subsection 20 (2), the powers of the Commission to hold inquiries under this Act may, if the President so directs, be exercised by a single member of the Commission who is a legally qualified person, or by two or more members of the Commission, at least one of whom is a legally qualified person.

(2) Where the power of the Commission to hold an inquiry is being exercised by two or more members of the Commission:

- (a) if only one of those members is a legally qualified person - that member shall preside; or
- (b) if 2 or more of those members are legally qualified persons:
- (i) if one of those persons is the President - the President shall preside; or
- (ii) in any other case - those members shall elect one of those persons to preside.

(3) In this section, "legally qualified person" means a person who:

- (a) is or has been a Judge of a court created by the Parliament or of a court of a State or a person who has the same designation and status as a Judge of a court created by the Parliament; or
- (b) is enrolled as a barrister or solicitor, as a barrister and solicitor, or as a legal practitioner, of the High Court, of another federal court or of the Supreme Court of a State or Territory.

#### Single inquiry in relation to several complaints

25C. Where the Commission is of the opinion that two or more complaints arise out of the same or substantially the same circumstances or subject-matter, it may hold a single inquiry in relation to those complaints.

#### Joinder of parties by the Commission

25D. Where, before the holding of an inquiry, or at any stage during the holding of an inquiry, the Commission is of the opinion that a person ought to be joined as a party to the inquiry, it may, by notice in writing given to that person, join that person as a party to the inquiry.

### Notice of inquiry and rights of parties at inquiry

25E. (1) The Commission:

- (a) shall give a party to an inquiry, other than a person to whom the Commission grants leave to appear as a party to the inquiry, such notice in such manner as the Commission determines of the time and place at which it intends to hold the inquiry; and
- (b) shall give each party to an inquiry reasonable opportunity to call or give evidence, examine or cross-examine witnesses and make submissions to the Commission.

(2) If a party to an inquiry to whom notice has been given under paragraph (1)(a) fails to attend at the time and place specified for the inquiry, the Commission may hold the inquiry in the absence of that party.

### Parties to an inquiry

25F. The parties to an inquiry shall be the complainant, the respondent, any person joined by the Commission as a party to the inquiry and any person to whom the Commission grants leave to appear as a party to the inquiry.

### Right of appearance and to representation

25G. (1) A party to an inquiry:

- (a) shall appear personally or, where the party is a body of persons, whether corporate or unincorporate, by an officer, employee or agent of the body; and
- (b) may:
  - (i) if the Commission has made arrangements under subsection 25K (1) for counsel to appear at the inquiry to assist the Commission; or
  - (ii) in any other case—with the leave of the Commission;

be represented by a solicitor or counsel or an agent.

(2) A person, other than a solicitor or counsel, is not entitled to demand or receive any fee or reward for representing a party to an inquiry.

Inquiries may be held in private

25H. (1) Subject to subsection (2), an inquiry shall be held in public.

(2) The Commission may, of its own motion or on the application of a party to the inquiry, if it is satisfied that it is appropriate to do so, direct that an inquiry, or a part of an inquiry, be held in private.

Commission may prohibit publication of evidence etc.

25J. (1) The Commission may direct that:

- (a) any evidence given before it;
- (b) the contents of any document produced to the Commission; or
- (c) any information that might enable a person who has appeared before the Commission to be identified;

shall not be published, or shall not be published except in such manner, and to such persons, as the Commission specifies.

(2) Nothing in this section shall be taken to derogate from the Commission's powers under section 25H.

Counsel assisting the Commission

25K. (1) The Commission may make arrangements for counsel to appear at an inquiry to assist the Commission.

(2) Counsel assisting the Commission at an inquiry pursuant to arrangements made under subsection (1) shall, in relation to that inquiry, be subject to the control and direction of the Commission.

Conditions for making a representative complaint

25L. (1) A representative complaint may be lodged under section 22 only if:

- (a) the class members have complaints against the same person; and
- (b) all the complaints are in respect of, or arise out of the same, similar or related circumstances; and
- (c) all the complaints give rise to a substantial common issue of law or fact.

(2) A representative complaint under section 22 must:

- (a) describe or otherwise identify the class members; and
- (b) specify the nature of the complaints made on behalf of the class members; and
- (c) specify the nature of the relief sought; and

- (d) specify the questions of law or fact that are common to the complaints of the class members.

In describing or otherwise identifying the class members, it is not necessary to name them or specify how many there are.

(3) A representative complaint may be lodged without the consent of class members.

Commission may determine that a complaint is not to continue as a representative complaint

25M. (1) The Commission may, on application by the respondent or of its own motion, determine that a complaint should no longer continue as a representative complaint.

(2) The Commission may only make such a determination if it is satisfied that it is in the interests of justice to do so for any of the following reasons:

- (a) the costs that would be incurred if the complaint were to continue as a representative complaint are likely to exceed the costs that would be incurred if each class member lodged a separate complaint;
- (b) the representative complaint will not provide an efficient and effective means of dealing with the complaints of the class members;
- (c) the complaint was not brought in good faith as a representative complaint;
- (d) it is otherwise inappropriate that the complaints be pursued by means of a representative complaint.

(3) If the Commission makes such a determination:

- (a) the complaint may be continued as a complaint by the complainant on his or her own behalf against the respondent, unless the complainant is a trade union; and
- (b) on the application of a person who was a class member for the purposes of the former representative complaint, the Commission may join that person as a complainant to the complaint as continued under paragraph (a).

Additional rules applying to the determination of representative complaints

25MA. (1) The Commission may, on application by a class member, replace the complainant with another class member, where it appears to the Commission that the complainant is not able adequately to represent the interests of the class members.

(2) A class member may, by notice in writing to the Commission, withdraw from a representative complaint at any time before the Commission begins to hold an inquiry into the complaint.

(3) The Commission may at any stage direct that notice of any matter be given to a class member or class members.

#### Amendment of representative complaints

25N. (1) Where the Commission is satisfied that a complaint could be dealt with as a representative complaint if the class of persons on whose behalf that complaint is lodged is increased, reduced or otherwise altered, the Commission may amend the complaint so that the complaint can be dealt with as a representative complaint.

#### Class member for representative complaint not entitled to lodge individual complaint

25P. A person who is a class member for a representative complaint is not entitled to lodge a complaint in respect of the same subject matter.

#### Resolution of complaint by conciliation

25 Q. The Commission:

- (a) may endeavour, by all such means as to it seem reasonable, to resolve a complaint the subject of an inquiry by conciliation; and
- (b) shall take all such steps as to it seem reasonable to effect an amicable settlement of a complaint the subject of an inquiry and for this purpose may adjourn an inquiry at any stage to enable the parties to negotiate with a view to settlement of the complaint by amicable arrangements.

#### Evidence and findings in other proceedings

25R. In the course of an inquiry, the Commission may, in its discretion:

- (a) receive in evidence the transcript of evidence in any proceedings before a court or tribunal and draw any conclusions of fact from that transcript that it considers proper;
- (b) adopt any findings, decision or judgment of a court or tribunal that may be relevant to the inquiry; and
- (c) receive in evidence any report of the Commissioner if a copy of that report has been made available to every other party to the inquiry.

#### Powers of Commission to take evidence

25S. (1) The Commission may take evidence on oath or affirmation and for that purpose a member of the Commission may administer an oath or affirmation.

(2) A member of the Commission may summon a person to appear before the Commission to give evidence and to produce such documents (if any) as are referred to in the summons.

(3) A person to whom an inquiry under this Part relates or who is a party to proceedings before the Commission may call witnesses.

(4) A person appearing as a witness before the Commission may be examined, cross-examined and re-examined.

#### Fees for witnesses

25T. (1) A person summoned to appear before the Commission is entitled to be paid, in respect of the person's attendance, fees, and allowances for expenses, fixed by or in accordance with the regulations.

(2) Subject to subsection (3), the fees and allowances shall be paid:

- (a) in a case where the person was summoned at the request of a person other than the Commonwealth—by the person who made the request; or
- (b) in any other case—by the Commonwealth.

(3) The Commission may, in its discretion, order that the fees and allowances payable to a person summoned as mentioned in paragraph (2)(a) shall be paid, in whole or in part, by the Commonwealth.

#### Retention and copying of documents

25U. The Commission may retain for a reasonable period and may make copies of or of part of, any documents produced to the Commission in the course of an inquiry or proceedings.

#### Application of rules of evidence etc.

25V. (1) For the purposes of an inquiry, the Commission:

- (a) is not bound by the rules of evidence and may inform itself on any matter in such manner as it thinks fit; and
- (b) shall conduct the inquiry with as little formality and technicality, and with as much expedition, as the requirements of this Act and a proper consideration of the matters before the Commission permit; and

- (c) may give directions relating to procedure that, in its opinion, will enable costs or delay to be reduced and will help to achieve a prompt hearing of the matters at issue between the parties; and
- (d) may give such directions as to procedure as it considers are appropriate or necessary to ensure that justice is done.

(2) The member conducting, or presiding at, an inquiry shall determine any question relating to the admissibility of evidence and any other question of law or procedure.

#### Consideration of exceptions and exemptions

25W In determining whether an act is unlawful by reason of a provision of Part II or Part IIA, the Commission is not required to have regard to any exception or exemption provided for in those Parts unless there is evidence before the Commission that the exception or exemption is or may be applicable in relation to that act.

#### Commission may dismiss frivolous etc. complaints

25X Where, at any stage of an inquiry, the Commission is satisfied that a complaint is frivolous, vexatious, misconceived, lacking in substance or relates to an act that is not unlawful by reason of a provision of Part II or Part IIA, it may dismiss the complaint.

#### Making of interim determination

25Y. ( 1) The Commission, or, where the President is of the opinion that it is expedient that the President alone should perform the functions of the Commission under this section, the President, may, on the application of the Commissioner under section 24A or on the application of a party to an inquiry at any time after the lodgement of the complaint into which that inquiry is held, make an interim determination of such a nature as would, if it were binding and conclusive upon the parties, preserve:

- (a) the status quo between the parties to the complaint; or
- (b) the rights of the parties to the complaint;

pending completion of the matter the subject of the complaint.

(2) An interim determination under subsection (1) is not binding or conclusive between any of the parties to the determination.

(3) A reference in this section (other than the first reference) to a party includes a reference to a class member in the case of a representative complaint.

## Determination or other decision of the Commission

25Z. (1) After holding an inquiry, the Commission may:

- (a) dismiss the complaint the subject of the inquiry; or
- (b) find the complaint substantiated and make a determination, which may include any one or more of the following:
  - (i) a declaration that the respondent has engaged in conduct rendered unlawful by this Act and should not repeat or continue such unlawful conduct;
  - (ii) a declaration that the respondent should perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant;
  - (iii) a declaration that the respondent should employ or re-employ the complainant;
  - (iv) a declaration that the respondent should pay to the complainant damages by way of compensation for any loss or damage suffered by reason of the conduct of the respondent;
  - (v) a declaration that the respondent should promote the complainant;
  - (vi) a declaration that the termination of a contract or agreement should be varied to redress any loss or damage suffered by the complainant;
  - (vii) a declaration that it would be inappropriate for any further action to be taken in the matter.

(2) A determination of the Commission under subsection (1) is not binding or conclusive between any of the parties to the determination.

(3) The Commission may, in the making of a determination under subsection (1), state any findings of fact upon which the determination is based.

(4) The damage referred to in paragraph (1)(b) includes injury to the complainant's feelings or humiliation suffered by the complainant.

(5) A determination by the Commission under subparagraph (1)(b)(iv) on a representative complaint:

- (a) may provide for payment of specified amounts or of amounts worked out in a manner specified by the Commission; and
- (b) if it provides for payment in accordance with paragraph (a), must make provision for the payment of the money to the complainants concerned.

(6) If the Commission makes a determination under subparagraph (1)(b)(iv) on a representative complaint, the Commission may give such directions (if any) as it thinks just in relation to:

- (a) the manner in which a class member is to establish his or her entitlement to the payment of an amount under the determination; and
- (b) the manner for determining any dispute regarding the entitlement of a class member to the payment.

(7) In this section:

"complainant", in relation to a representative complaint, means the class members.

Determination must identify the class members who are to be affected by the determination

25ZA. A determination under section 25Y or 25Z on a representative complaint must describe or otherwise identify those of the class members who are to be affected by the determination.

Assistance in proceedings before Commission

25ZB. (1) Where:

- (a) a person has made a complaint in respect of which the Commission has held an inquiry under section 25A and the Commission has found the complaint to be substantiated; or
- (b) a person has done or is alleged to have done an act in respect of which an inquiry has been held by the Commission under section 25A and the Commission dismisses the complaint the subject of the inquiry;

the Commission may, in its discretion, recommend to the Attorney-General that assistance be given to the person in respect of expenses incurred by the person in connection with the inquiry.

(2) Where a recommendation is made by the Commission under subsection (1) in relation to a person, the Attorney-General may authorise the provision by the Commonwealth to that person, either unconditionally or subject to such conditions as the Attorney-General determines, of such financial assistance in respect of expenses incurred by the person in connection with the inquiry as the Attorney-General determines.

*Division 3A - Enforcement of determinations involving respondents other than Commonwealth agencies*

*Subdivision A - Determinations made after commencement of Division Proceedings in the Federal Court to enforce a determination*

25ZC. (1) The Commission, the complainant, or a trade union acting on behalf of the complainant, may commence proceedings in the Federal Court for an order to enforce a determination made under subsection 25Y(1) or 25Z(1) after the commencement of this Division, except where the respondent to the determination is a Commonwealth agency or the principal executive of a Commonwealth agency.

(2) If the Court is satisfied that the respondent has engaged in conduct or committed an act that is unlawful under this Act, the Court may make such orders (including a declaration of right) as it thinks fit.

(3) The Court may, if it thinks fit, grant an interim injunction pending the determination of the proceedings.

(4) The Court is not to require a person, as a condition of granting an interim injunction, to give an undertaking as to damages.

(5) In the proceedings, the question whether the respondent has engaged in conduct or committed an act that is unlawful under this Act is to be dealt with by the Court by way of a hearing *de novo*, but the Court may receive as evidence any of the following:

- (a) a copy of the Commission's written reasons for the determination;
- (b) a copy of any document that was before the Commission;
- (c) a copy of the record (including any tape recording) of the Commission's inquiry into the complaint.

(6) In this section:

"complainant":

- (a) in relation to a representative complaint—means any of the class members; and
- (b) in relation to a complaint made by a trade union on behalf of a person, not being a representative complaint—means the person on whose behalf the complaint was made;

"trade union" has the same meaning as in section 22.

### Assistance in proceedings before the Federal Court

**2 5ZCA. (1)** A person who:

- (a) has commenced or proposes to commence proceedings in the Federal Court under section 25ZC; or
- (b) has done or is alleged to have done an act in respect of which proceedings have been commenced in the Federal Court under section 25ZC;

may apply to the Attorney-General for the provision of assistance under this section in respect of the proceedings.

(2) If:

- (a) an application is made by a person under subsection (1); and
- (b) the Attorney-General is satisfied that:
  - (i) it will involve hardship to that person to refuse the application; and
  - (ii) in all the circumstances, it is reasonable to grant the application; the Attorney-General may authorise the provision by the Commonwealth to that person, on such conditions (if any) as the Attorney-General determines, of such legal or financial assistance in respect of the proceedings as the Attorney-General determines.

*Subdivision B Determinations made from 13 January 1993 to commencement of Division*

### Interpretation

**25ZCB.** In this Subdivision:

“**recovery proceedings**”, in relation to a Subdivision B determination, means proceedings before any court in which the respondent to the determination is seeking to recover an amount, or is seeking some other remedy, in respect of money paid, or conduct engaged in or not engaged in, by the respondent pursuant to the determination;

“**Subdivision B determination**” means a determination made under subsection 25Y(1) or 25Z(1) during the period starting on 13 January 1993 and ending on the commencement of this Division, other than a determination made in that

period pursuant to a representative complaint lodged before 13 January 1993, except where the respondent to the determination is a Commonwealth agency or the principal executive of a Commonwealth agency.

**Proceedings in the Federal Court in relation to a Subdivision B determination**

**25ZCC.** (1) A person referred to in subsection (2) may commence proceedings in the Federal Court for an order under this section in relation to a Subdivision B determination.

- (2) The following persons may commence proceedings under subsection (1):
- (a) the Commission;
  - (b) the complainant;
  - (c) a trade union acting on behalf of the complainant;
  - (d) the respondent to the determination.

(3) The Court must consider whether the respondent to the determination has engaged in conduct or committed an act that is unlawful under this Act, and may, subject to subsection (4), make such orders (including a declaration of right) as it thinks fit.

(4) In deciding what orders to make under subsection (3), the Court must take into account:

- (a) any money paid, or conduct engaged in or not engaged in, by the respondent to the determination pursuant to the determination; and
- (b) the outcome of any recovery proceedings in relation to the determination.

(5) The Court may, if it thinks fit, grant an interim injunction pending the determination of the proceedings.

(6) The Court is not to require a person, as a condition of granting an interim injunction, to give an undertaking as to damages.

(7) **In** the proceedings, the question whether the respondent has engaged in conduct or committed an act that is unlawful under this Act is to be dealt with by the Court by way of a hearing *de novo*, but the Court may receive as evidence any of the following:

- (a) a copy of the Commission's written reasons for the determination;
- (b) a copy of any document that was before the Commission;
- (c) a copy of the record (including any tape recording) of the Commission's inquiry into the complaint.

(8) In this section:

**"complainant":**

- (a) in relation to a representative complaint - means any of the class members; and
- (b) in relation to a complaint made by a trade union on behalf of a person, not being a representative complaint - means the person on whose behalf the complaint was made;

**"trade union"** has the same meaning as in section 22.

**Federal Court may vary order made under section 25ZCC if a court determines recovery proceedings**

**25ZCD. (1) If:**

- (a) the Federal Court makes an order under subsection 25ZCC(3) in relation to a Subdivision B determination; and
- (b) after the Federal Court makes the order, a court makes an order determining recovery proceedings in relation to the determination;

the person against whom the recovery proceedings were commenced may apply to the Federal Court for a variation of the order it made under subsection 25ZCC(3).

(2) The Court may vary the order it made if it thinks it appropriate to do so having regard to its reasons for making that order and to the order made in the recovery proceedings.

**Assistance in proceedings before the Federal Court**

25ZCE. (1) A person who is a party to proceedings in the Federal Court under this Subdivision, or who proposes to commence such proceedings, may apply to the Attorney-General for the provision of assistance under this section in respect of the proceedings.

(2) If:

- (a) an application is made by a person under subsection (1); and
- (b) the Attorney-General is satisfied that, in all the circumstances, it is reasonable to grant the application;

the Attorney-General may authorise the provision by the Commonwealth to that person, on such conditions (if any) as the Attorney-General determines, of such legal or financial assistance in respect of the proceedings as the Attorney-General determines.

Subdivision does not create right for respondent to determination to commence proceedings

25ZCF. This Subdivision (except section 25ZCC) does not create, and is not to be taken to create, any right of action in favour of the respondent to a Subdivision B determination.

*Division 4 - Review and enforcement of determinations involving  
Commonwealth agencies*

Application of Division

25ZD. This Division applies to a determination that is made under section 25Y or 25Z and has a Commonwealth agency, or the principal executive of a Commonwealth agency, as the respondent.

Obligations of respondent agency

25ZE. (1) If a Commonwealth agency is the respondent to a determination to which this Division applies that is made under section 25Y, the agency must comply with the determination.

(2) If a Commonwealth agency is the respondent to a determination to which this Division applies that is made under section 25Z:

- (a) the agency must not repeat or continue conduct that is covered by a declaration included in the determination under subparagraph 25Z(1)(b)(i); and
- (b) the agency must perform the act or course of conduct that is covered by a declaration included in the determination under subparagraph 25Z(1)(b)(ii), (iii), (v) or (vi).

Obligations of principal executive of agency

25ZF. (1) If the principal executive of a Commonwealth agency is the respondent to a determination to which this Division applies that is made under section 25Y, the principal executive must take all such steps as are reasonably within his or her power to ensure:

- (a) that the terms of the determination are brought to the notice of all members, officers and employees of the agency whose duties are such that they may engage in conduct of the kind to which the determination relates; and
- (b) that the determination is complied with.

(2) If the principal executive of a Commonwealth agency is the respondent to a determination to which this Division applies that is made under section 25Z, the principal executive must take all such steps as are reasonably within his or her power to ensure:

- (a) that the terms of the determination are brought to the notice of all members, officers and employees of the agency whose duties are such that they may engage in conduct of the kind to which the determination relates; and
- (b) that no member, officer or employee of the agency repeats or continues conduct that is covered by a declaration included in the determination under subparagraph 25Z (1) (b) (i); and
- (c) the performance of any act or course of conduct that is covered by a declaration included in the determination under subparagraph 25Z (1) (b) (ii), (iii), (v) or (vi).

#### Damages

25ZG. (1) If a determination to which this Division applies that is made under section 25Z includes a declaration that the respondent should pay damages to the complainant, the complainant is entitled to be paid the amount specified in the declaration.

(2) If the respondent is a Commonwealth agency that has the capacity to sue and be sued, the amount is recoverable as a debt due by the agency to the complainant. In any other case, the amount is recoverable as a debt due by the Commonwealth to the complainant.

(3) In this section:

“complainant”, in relation to a representative complaint, means a class member.

#### Review of determinations regarding damages

25ZH. (1) Application may be made to the Administrative Appeals Tribunal for review of:

- (a) a declaration of the kind referred to in subparagraph 25Z (1) (b) (iv) that is included in a determination to which this Division applies; or
- (b) a decision of the Commission refusing to include such a declaration in a determination to which this Division applies.

(2) A Commonwealth agency, or the principal executive of a Commonwealth agency, may not apply for review without the permission of the Minister.

(3) In exercising powers in relation to an application under subsection (1), the Tribunal must be constituted by a presidential member who is a Judge and 2 other members who are not Judges. This subsection has effect subject to subsection 21 (1A) of the Administrative Appeals Tribunal Act 1975.

(4) Terms used in subsection (3) that are also used in the Administrative Appeals Tribunal Act 1975 have the same meanings as in that Act.

#### Enforcement of determination against Commonwealth agency

25ZI. (1) If a Commonwealth agency fails to comply with section 25ZE, an application may be made to the Federal Court for an order directing the agency to comply.

(2) If the principal executive of a Commonwealth agency fails to comply with section 25ZF, an application may be made to the Federal Court for an order directing the principal executive to comply.

(3) The application may be made by the Commission or by the complainant. In the case of a representative complaint, "complainant" means a class member.

(4) On an application under this section, the Federal Court may make such other orders as it thinks fit with a view to securing compliance by the respondent.

(5) An application may not be made under this section in relation to a determination under section 25Z until:

- (a) the time has expired for making an application under section 25ZH for review of the determination; or
- (b) if such an application is made, the decision of the Administrative Appeals Tribunal on the application has come into operation.

## PART IV - OFFENCES

### Unlawful acts not offences unless expressly so provided

26. Except as expressly provided by this Part, nothing in this Act makes it an offence to do an act or agree with another person to do an act that is unlawful by reason of a provision of Part II or Part IIA.

### Offences relating to administration of Act

27. (1) A person shall not hinder, obstruct, molest or interfere with a person exercising or performing any of the powers or functions referred to in this Act.

Penalty for an offence against subsection (1):

- (a) in the case of a natural person—\$1,000; or
- (b) in the case of a body corporate—\$5,000.

(2) A person shall not:

- (a) refuse to employ another person;
- (b) dismiss, or threaten to dismiss, another person from the other person's employment;
- (c) prejudice, or threaten to prejudice, another person in the other person's employment; or
- (d) intimidate or coerce, or impose any pecuniary or other penalty upon, another person;

By reason that the other person:

- (e) has made, or proposes to make, a complaint under this Act;
- (f) has furnished, or proposes to furnish, any information or documents to a person exercising or performing any powers or functions under this Act; or
- (g) has attended, or proposes to attend, a conference referred to in section 24C.

Penalty for an offence against subsection (2):

- (a) in the case of a natural person—\$2,500 or imprisonment for 3 months, or both; Or
- (b) in the case of a body corporate—\$10,000.

Failure to attend conference

27A. A person who has been given a direction under subsection 24C (1) to attend a conference shall not, without reasonable excuse:

- (a) fail to attend as required by the direction; or
- (b) fail to attend and report from day to day unless excused, or released from further attendance, by the person presiding at the conference.

Penalty:

- (a) in the case of a natural person—\$1,000; or
- (b) in the case of a body corporate—\$5,000.

Failure to furnish information etc.

27B. A person shall not, without reasonable excuse, refuse or fail:

- (a) to furnish information; or
- (b) to produce a document; when so required pursuant to section 2413, 24C or 24D.

**Penalty:**

- (a) in the case of a natural person—\$1,000; or
- (b) in the case of a body corporate—\$5,000.

**Offences in relation to Commission**

27C. (1) A person served, as prescribed, with a summons to appear before the Commission as a witness shall not, without reasonable excuse:

- (a) fail to attend as required by the summons; or
- (b) fail to appear and report from day to day unless excused, or released from further attendance, by the Commission.

(2) A person appearing before the Commission as a witness at an inquiry shall not, without reasonable excuse:

- (a) refuse or fail to be sworn or make an affirmation;
- (b) refuse or fail to answer a question that is required by the member presiding at the inquiry to be answered; or
- (c) refuse or fail to produce a document that was required to be produced by a summons under this Act served on that person as prescribed.

(3) A person shall not:

- (a) interrupt an inquiry or proceedings of the Commission;
- (b) use insulting language towards a member of the Commission when the member is exercising any powers or performing any functions as a member;
- (c) make a publication in contravention of any direction given under section 25J;
- (d) create a disturbance or take part in creating or continuing a disturbance in or near a place where the Commission is meeting or holding an inquiry; or
- (e) do any other act or thing that would, if the Commission were a court of record, constitute a contempt of that court.

**Penalty:**

- (a) in the case of a natural person—\$1,000; or
- (b) in the case of a body corporate—\$5,000.

**Self-incrimination**

27D. (1) It is not a reasonable excuse for the purposes of section 27B for a person to refuse or fail to furnish information or produce a document that the furnishing of the information or the production of the document might incriminate the person, but evidence of the furnishing of the information or the production of

the document is not admissible in evidence against the person in any civil or criminal proceeding before a court, other than a proceeding for an offence under section 27E.

(2) Without limiting the generality of the expression "reasonable excuse" in section 27C, it is hereby declared for the removal of doubt that it is a reasonable excuse for the purposes of that section for a person to refuse or fail to answer a question put to the person at an inquiry, or to refuse to produce a document, that the answer to the question or the production of the document might incriminate the person.

#### False or misleading information

27E. A person shall not furnish information or make a statement to the Commission, to the Commissioner or to any other person exercising powers or performing functions under this Act, knowing that the information or statement is false or misleading in a material particular.

##### Penalty:

- (a) in the case of a natural person—\$2,500 or imprisonment for three months, or both; or
- (b) in the case of a body corporate—\$10,000.

#### Non-disclosure of private information

27F. (1) A person who is, or has at any time been, the Commissioner, a member of the Commission or a member of the staff assisting the Commission or is, or has at any time been, authorised to perform or exercise any function or power of the Commission or the Commissioner or any function or power on behalf of the Commission or the Commissioner, being a function or power conferred on the Commission or on the Commissioner under this Act, shall not, either directly or indirectly, except in the performance of a duty under or in connection with this Act or in the performance or exercise of such a function or power:

- (a) make a record of, or divulge or communicate to any person, any information relating to the affairs of another person acquired by the first-mentioned person by reason of that person's office or employment under or for the purpose of this Act or by reason of that person being or having been so authorised;
- (b) make use of any such information as is mentioned in paragraph (a); or
- (c) produce to any person a document relating to the affairs of another person furnished for the purposes of this Act.

Penalty: \$5,000 or imprisonment for one year, or both.

(2) A person who is, or has at any time been, the Commissioner, a member of the Commission or a member of the staff assisting the Commission or is, or has at any time been, authorised to perform or exercise any function or power of the Commission or the Commissioner or any function or power on behalf of the Commission or the Commissioner, being a function or power conferred on the Commission or on the Commissioner under this Act, shall not be required:

- (a) to divulge or communicate to a court any information relating to the affairs of another person acquired by the first-mentioned person by reason of that person's office or employment under or for the purposes of this Act or by reason of that person being or having been so authorised; or
- (b) to produce in a court a document relating to the affairs of another person of which the first-mentioned person has custody, or to which that person has access, by reason of that person's office or employment under or for the purposes of this Act or by reason of that person being or having been so authorised; except where it is necessary to do so for the purposes of this Act.

(3) Nothing in this section prohibits a person from:

- (a) making a record of information that is, or is included in a class of information that is, required or permitted by an Act to be recorded, if the record is made for the purposes of or pursuant to that Act;
- (b) divulging or communicating information, or producing a document, to any person in accordance with an arrangement in force under section 16 of the Human Rights and Equal Opportunity Commission Act 1986; or
- (c) divulging or communicating information, or producing a document, that is, or is included in a class of information that is or class of documents that are, required or permitted by an Act to be divulged, communicated or produced, as the case may be, if the information is divulged or communicated, or the document is produced, for the purposes of or pursuant to that Act.

(4) Nothing in subsection (2) prevents a person from being required, for the purposes of or pursuant to an Act, to divulge or communicate information, or to produce a document, that is, or is included in a class of information that is or class of documents that are, required or permitted by that Act to be divulged, communicated or produced.

(5) In this section:

**"court"** includes any tribunal, authority or person having power to require the production of documents or the answering of questions;

**"produce"** includes permit access to.

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## PART V - COMMUNITY RELATIONS COUNCIL

### Establishment and functions of Council

**28. (1)** For the purposes of this Act there is established a Community Relations Council.

(2) It is the function of the Council to advise, and make recommendations to, the Minister and the Commission, either of its own motion or upon request made to it by the Minister or the Commission, as the case may be, concerning:

- (a) the observance and implementation of the Convention;
- (b) the promotion of educational programs with respect to the observance of the Convention;
- (c) the promotion of studies and research programs with respect to the observance and implementation of the Convention;
- (d) the publication and dissemination of material to assist in the observance and implementation of the Convention;
- (e) the promotion of understanding, tolerance and friendship among racial and ethnic groups; and
- (f) any other matter related to the observance or implementation of the Convention.

## PART VI- ADMINISTRATIVE PROVISIONS

### *Division 1 Race Discrimination Commissioner*

#### **Appointment of Race Discrimination Commissioner**

**29. (1)** The Race Discrimination Commissioner shall be appointed by the Governor-General.

(2) A person is not qualified to be appointed as the Race Discrimination Commissioner unless the Governor-General is satisfied that the person has appropriate qualifications, knowledge or experience.

#### **Terms and conditions of appointment**

**30. (1)** Subject to this section, the Commissioner holds office for such period, not exceeding seven years, as is specified in the instrument of his or her appointment, but is eligible for re-appointment.

(2) A person who has attained the age of 65 years shall not be appointed or re-appointed as the Commissioner and a person shall not be appointed or re-appointed as the Commissioner for a period that extends beyond the day on which the person will attain the age of 65 years.

(3) The Commissioner holds office on such terms and conditions (if any) in respect of matters not provided for by this Act as are determined by the Governor-General.

### **Remuneration of Commissioner**

**31. (1)** The Commissioner shall be paid such remuneration as is determined by the Remuneration Tribunal, but, if no determination of that remuneration by the Tribunal is in operation, the Commissioner shall be paid such remuneration as is prescribed.

(2) The Commissioner shall be paid such allowances as are prescribed.

(3) This section has effect subject to the Remuneration Tribunal Act 1973.

### **Leave of absence**

**32. (1)** Subject to section 87E of the Public Service Act 1922, the Commissioner has such recreation leave entitlements as are determined by the Remuneration Tribunal.

(2) The Minister may grant the Commissioner leave of absence, other than recreation leave, on such terms and conditions as to remuneration or otherwise as the Minister determines.

### **Resignation**

33. The Commissioner may resign from the office of Commissioner by writing signed by the Commissioner and delivered to the Governor-General.

### **Termination of appointment**

**34. (1)** The Governor-General may terminate the appointment of the Commissioner by reason of misbehaviour or of physical or mental incapacity.

(2) The Governor-General shall terminate the appointment of the Commissioner if the Commissioner:

- (a) is absent from duty, except on leave of absence, for 14 consecutive days or for 28 days in any period of 12 months; or

- (b) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with creditors or makes an assignment of remuneration for their benefit.

#### Outside employment

35. The Commissioner shall not, except with the approval of the Minister, engage in paid employment outside the duties of the office of Commissioner.

#### Acting Commissioner

36. (1) The Minister may appoint a person to act in the office of Commissioner during any period, or during all periods, when the Commissioner is absent from duty or from Australia or during a vacancy in that office.

(4) Sections 32, 33 and 35 apply in relation to a person appointed to act in the office of Commissioner in like manner as they apply in relation to the Commissioner.

(6) The validity of anything done by a person appointed to act in the office of Commissioner shall not be called in question on the ground that the occasion for the person's appointment had not arisen or that the appointment had ceased to have effect.

#### Delegation

40. (1) The Commission may, by writing under its seal, delegate to a member of its staff, or to another person, all or any of the powers conferred on the Commission under this Act.

(2) The Commissioner may, by writing signed by the Commissioner, delegate to a member of the staff of the Commission approved by the Commission, or to another person approved by the Commission, all or any of the powers exercisable by the Commissioner under this Act.

### *Division 2 - Community Relations Council*

#### Constitution of Council

41. (1) The Council shall consist of such members (not being less than 10 or more than 20 in number) as the Minister appoints.

(2) One of the members shall be designated in the instrument of the member's appointment as the Chairman of the Council and another of the members shall be designated in the instrument of the member's appointment as the Deputy Chairman of the Council.

(3) The performance of the functions or the exercise of the powers of the Council is not affected by the number of members falling below ten for a period not exceeding three months.

### **Remuneration of members**

**42. (1)** Members shall be paid such remuneration as is determined by the Remuneration Tribunal, but, if no determination of that remuneration by the Tribunal is in operation, they shall be paid such remuneration as is prescribed.

(2) Members shall be paid such allowances as are prescribed.

(3) This section has effect subject to the Remuneration Tribunal Act 1973.

### **Meetings of Council**

**43. (1)** The Chairman, or, if the Chairman is unavailable, the Deputy Chairman, may convene meetings of the Council.

(2) At a meeting of the Council, six members constitute a quorum.

(3) The Chairman shall preside at all meetings of the Council at which the Chairman is present.

(4) If the Chairman is not present at a meeting of the Council but the Deputy Chairman is present, the Deputy Chairman shall preside at the meeting.

(5) If the Chairman and the Deputy Chairman are not present at a meeting of the Council, the members present shall appoint one of their number to preside at the meeting.

(6) Questions arising at a meeting of the Council shall be decided by a majority of the votes of the members present and voting.

(7) The member presiding at a meeting of the Council has a deliberative vote and, in the event of an equality of votes, also has a casting vote.

(8) The Council shall cause records to be kept of its meetings.

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## PART VII - MISCELLANEOUS

### Jurisdiction

44. (1) The several courts of the States are invested with federal jurisdiction, and jurisdiction is conferred on the several courts of the Territories, within the limits of their several jurisdictions, whether those limits are as to locality, subject-matter or otherwise, to hear and determine civil and criminal proceedings instituted in those courts under this Act.

(2) No proceedings under this Act shall be instituted in a court of a State or Territory before a day to be fixed by Proclamation as the day on which:

(a) that court shall commence to exercise its jurisdiction under subsection (1);

or

(b) a class of courts of that State or Territory in which that court is included shall commence to exercise their jurisdiction under that subsection; but nothing in this subsection prevents a court from exercising jurisdiction in a matter arising under this Act in a proceeding instituted in that court otherwise than under this Act.

### Protection from civil actions

45. (1) The Commission, a member of the Commission, the Commissioner or a person acting under the direction or authority of the Commission or of the Commissioner or under a delegation under section 40 is not liable to an action or other proceeding for damages for or in relation to an act done or omitted to be done in good faith in the performance or purported performance of any function, or in the exercise or purported exercise of any power or authority, conferred on the Commission or the Commissioner.

(2) Where:

(a) a complaint has been made to the Commission; or

(b) a submission has been made, a document or information has been furnished, or evidence has been given, to the Commission or the Commissioner;

a person is not liable to an action, suit or other proceeding in respect of loss, damage or injury of any kind suffered by another person merely because the complaint or submission was made, the document or information was furnished or the evidence was given.

**Commissioner to furnish information**

45A. The Commissioner shall furnish to the Commission such information relating to the Commissioner's operations under this Act as the Commission from time to time requires.

**Regulations**

47. The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters required or permitted by this Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to this Act and, in particular, prescribing the manner in which a member may resign from office and prescribing fees and allowances payable to members of conciliation committees.

**SCHEDULE**

International Convention on the Elimination of All Forms of Racial Discrimination See Appendix B.

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## APPENDIX B

### **International Convention on the Elimination of All Forms of Racial Discrimination**

#### **The States Parties to this Convention,**

**Considering** that the Charter of the United Nations is based on the principles of the dignity and equality inherent in all human beings, and that all Member States have pledged themselves to take joint and separate action, in co-operation with the Organization, for the achievement of one of the purposes of the United Nations which is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion,

**Considering** that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin,

**Considering** that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination,

**Considering** that the United Nations has condemned colonialism and all practices of segregation and discrimination associated therewith, in whatever form and wherever they exist, and that the Declaration on the Granting of Independence to Colonial Countries and Peoples of 14 December 1960 (General Assembly resolution 1514 (xv)) has affirmed and solemnly proclaimed the necessity of bringing them to a speedy and unconditional end,

**Considering** that the United Nations Declaration on the Elimination of All Forms of Racial Discrimination of 20 November 1963 (General Assembly resolution 1904 (xviii)) solemnly affirms the necessity of speedily 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,

Convinced that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere,

Reaffirming that discrimination between human beings on the grounds of race, colour or ethnic origin is an obstacle to friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples and the harmony of persons living side by side even within one and the same State,

Convinced that the existence of racial barriers is repugnant to the ideals of any human society,

Alarmed by manifestations of racial discrimination still in evidence in some areas of the world and by governmental policies based on racial superiority or hatred, such as policies of *apartheid*, segregation or separation,

Resolved to adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination,

Bearing in mind the Convention concerning Discrimination in respect of Employment and Occupation adopted by the International Labour Organisation in 1958, and the Convention against Discrimination in Education adopted by the United Nations Educational, Scientific and Cultural Organization in 1960,

Desiring to implement the principles embodied in the United Nations Declaration on the Elimination of All Forms of Racial Discrimination and to secure the earliest adoption of practical measures to that tend,

Have agreed as follows:

## PART I

### Article 1

1. In this Convention, 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.

2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.

3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

4. 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 of which they were taken have been achieved.

### Article 2

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

(b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by an persons, group or organization;

(e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

### **Article 3**

States Parties particularly condemn racial segregation and *apartheid* and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.

### **Article 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

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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 Article 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 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 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.

## Article 5

1. In compliance with the, fundamental obligations laid down in Article 2 of this Convention, States Parties, undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a)The right to equal treatment before the tribunals and all other organs administering justice;

(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;

(c)Political rights, in particular the rights to participate in elections—to vote and to stand for election---on the basis of universal and equal suffrage, to take part in the Government as well as in the 'conduct of public affairs at any level and to have equal access to public service;

(d) Other civil rights, in particular:

- (i) The right to freedom of movement and residence within the border of the State;
- (ii) The right to leave any country, including one's own, and to return to one's country;
- (iii) The right to nationality;
- (iv) The right to marriage and choice of spouse;
- (v) The right to own property alone as well as in association with others;
- (vi) The right to inherit;
- (vii) The right to freedom of thought, conscience and religion;
- (viii) The right to freedom of opinion and expression;
- (ix) The right to freedom of peaceful assembly and association;

(e) Economic, social and cultural rights, in particular:

- (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
- (ii) The right to form and join trade unions;
- (iii) The right to housing;
- (iv) The right to public health, medical care, social security and social services;
- (v) The right to education and training;
- (vi) The right to equal participation in cultural activities;

(f) The right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres and parks.

## **Article 6**

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

## **Article 7**

States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combatting prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnic groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.

## **PART II**

## **Article 8**

1. There shall be established a Committee on the Elimination of Racial Discrimination (hereinafter referred to as the Committee) consisting of eighteen experts of high moral standing and acknowledged impartiality elected by States Parties from among their nations, who shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as of the principal legal systems.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by the States Parties. Each State Party may nominate one person from among its own nationals.

3. The initial election shall be held six months after the date of the entry into force of this Convention. At least three months before the date of each election the Secretary-General of the United Nations shall address a letter to the States Parties

inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.

4. Elections of the members of the Committee shall be held at a meeting of States Parties convened by the Secretary-General at United Nations Headquarters. At that meeting, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

5. (a) The members of the Committee shall be elected for a term of four years. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these nine member shall be chosen by lot by the Chairman of the Committee;

(b) For the filling of casual vacancies, the State Party whose expert has ceased to function as a member of the Committee shall appoint another expert from among its nationals, subject to the approval of the Committee.

6. States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties.

## **Article 9**

1. The States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of this Convention:

(a) within one year after the entry into force of the Convention for the State concerned; and

(b) thereafter every two years and whenever the Committee so requests. The Committee may request further information from the States Parties.

2. The Committee shall report annually, through the Secretary-General, to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of the reports

and information received from the States Parties. Such suggestions and general recommendations shall be reported to the General Assembly together with comments, if any, from States Parties.

## **Article 10**

1. The Committee shall adopt its own rules of procedure.
2. The Committee shall elect its officers for a term of two years.
3. The secretariat of the Committee shall be provided by the Secretary-General of the United Nations.
4. The meetings of the Committee shall normally be held at United Nations Headquarters.

## **Article 11**

1. If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee. The Committee shall then transmit the communication to the State Party concerned. Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.
2. If the matter is not adjusted to the satisfaction of both parties, either by bilateral negotiations or by any other procedure open to them, within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter again to the Committee by notifying the Committee and also the other State.
3. The Committee shall deal with a matter referred to it in accordance with paragraph 2 of this article after it has ascertained that all available domestic remedies have been invoked and exhausted in the case, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged.
4. In any matter referred to it, the Committee may call upon the States Parties concerned to supply any other relevant information.

5. When any matter arising out of this article is being considered by the Committee, the States Parties concerned shall be entitled to send a representative to take part in the proceedings of the Committee, without voting rights, while the matter is under consideration.

## Article 12

1. (a) After the Committee has obtained and collated all the information it deems necessary, the Chairman shall appoint an *ad hoc* Conciliation Commission (hereinafter referred to as the Commission) comprising five persons who may or may not be members of the Committee. The members of the commission shall be appointed with the unanimous consent of the parties to the dispute, and its good offices shall be made available to the States concerned with a view to an amicable solution of the matter on the basis of respect for this Convention;

(b) If the States parties to the dispute fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission not agreed upon by the States parties to the dispute shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its own members.

2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States parties to the dispute or of a State not Party to this Convention.

3. The Commission shall elect its own Chairman and adopt its own rules of procedure.

4. The meetings of the Commission shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Commission.

5. The secretariat provided in accordance with Article 10, paragraph 3, of this Convention shall also service the Commission whenever a dispute among States Parties brings the Commission into being.

6. The States Parties to the dispute shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.

7. The Secretary-General shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States parties to the dispute in accordance with paragraph 6 of this article.

8. The information obtained and collated by the Committee shall be made available to the Commission, and the Commission may call upon the States concerned to supply any other relevant information.

### **Article 13**

1. When the Commission has fully considered the matter, it shall prepare and submit to the Chairman of the Committee a report embodying its findings on all questions of fact relevant to the issue between the parties and containing such recommendations as it may think proper for the amicable solution of the dispute.

2. The Chairman of the Committee shall communicate the report of the Commission to each of the States parties to the dispute. These States shall, within three months, inform the Chairman of the Committee whether or not they accept the recommendations contained in the report of the Commission.

3. After the period provided for in paragraph 2 of this article, the Chairman of the Committee shall communicate the report of the Commission and the declarations of the States Parties concerned to the other States Parties to this Convention.

### **Article 14**

1. A State Party may at any time declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

2. Any State Party which makes a declaration as provided for in paragraph 1 of this article may establish or indicate a body within its national legal order which shall be competent to receive and consider petitions from individuals and groups of individuals within its jurisdiction who claim to be victims of a violation of any of the rights set forth in this Convention and who have exhausted other available local remedies.

3. A declaration made in accordance with paragraph 1 of this article and the name of any body established or indicated in accordance with paragraph 2 of this article shall be deposited by the State Party concerned with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General, but such a withdrawal shall not affect communications pending before the Committee.

4. A register of petitions shall be kept by the body established or indicated in accordance with paragraph 2 of this article, and certified copies of the register shall be filed annually through appropriate channels with the Secretary-General on the understanding that the contents shall not be publicly disclosed.

5. In the event of failure to obtain satisfaction from the body established or indicated in accordance with paragraph 2 of this article, the petitioner shall have the right to communicate the matter to the Committee within six months.

6. (a) The Committee shall confidentially bring any communication referred to it to the attention of the State Party alleged to be violating any provision of this Convention, but the identity of the individual or groups of individuals concerned shall not be revealed without his or their express consent. The Committee shall not receive anonymous communications;

(b) Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

7. (a) The Committee shall consider communications in the light of all information made available to it by the State Party concerned and by the petitioner. The Committee shall not consider any communication from a petitioner unless it has ascertained that the petitioner has exhausted all available domestic remedies. However, this shall not be the rule where the application of the remedies is unreasonably prolonged;

(b) The Committee shall forward its suggestions and recommendations, if any, to the State Party concerned and to the petitioner.

8. The Committee shall include in its annual report a summary of such communications, and, where appropriate, a summary of the explanations and statements of the States Parties concerned and of its own suggestions and recommendations.

9. The Committee shall be competent to exercise the functions provided for in this article only when at least ten States Parties to this Convention are bound by declarations in accordance with paragraph 1 of this article.

## **Article 15**

1. Pending the achievement of the objectives of the Declaration on the Granting of Independence to Colonial Countries and Peoples, contained in General Assembly resolution 1514 (Xv) of 14 December 1960, the provisions of this Convention shall in no way limit the right of petition granted to these peoples by other international instruments or by the United Nations and its specialized agencies.

2. (a) The Committee established under Article 8, paragraph 1, of this Convention shall receive copies of the petitions from, and submit expressions of opinion and recommendations on these petitions to, the bodies of the United Nations which deal with matters directly related to the principles and objectives of this Convention in their consideration of petitions from the inhabitants of Trust and Non-Self-Governing Territories and all other territories to which General Assembly resolution 1514 (XV) applies, relating to matters covered by this Convention which are before these bodies.

(b) The Committee shall receive from the competent bodies of the United Nations copies of the reports concerning the legislative, judicial, administrative or other measures directly related to the principles and objectives of this Convention applied by the administering Powers within the Territories mentioned in subparagraph (a) of this paragraph, and shall express opinions and make recommendations to these bodies.

3. The Committee shall include in its report to the General Assembly a summary of the petitions and reports it has received from United Nations bodies, and the expressions of opinion and recommendations of the Committee relating to the said petitions and reports.

4. The Committee shall request from the Secretary-General of the United Nations all information relevant to the objectives of this Convention and available to him regarding the Territories mentioned in paragraph 2 (a) of this article.

## **Article 16**

The provisions of this Convention concerning the settlement of disputes or complaints shall be applied without prejudice to other procedures for settling disputes or complaints in the field of discrimination laid down in the constituent instruments of, or conventions adopted by, the United Nations and its specialized agencies, and shall not prevent the States Parties from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

## **PART III**

## **Article 17**

1. This Convention is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to this Convention.

2. This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

## **Article 18**

1. This Convention shall be open to accession by any State referred to in Article 17, paragraph 1, of the Convention.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

## Article 19

1. This Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twenty-seventh instrument of ratification or instrument of accession.

2. For each State ratifying this Convention or acceding to it after the deposit of the twenty-seventh instrument of ratification or instrument of accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or instrument of accession.

## Article 20

1. The Secretary-General of the United Nations shall receive and circulate to all States which are or may become Parties to this Convention reservations made by States at the time of ratification or accession. Any State which objects to the reservation shall, within a period of ninety days from the date of the said communication, notify the Secretary-General that it does not accept it.

2. A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties to this Convention object to it.

3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General. Such notification shall take effect on the date on which it is received.

## Article 21

A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

## Article 22

Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the

procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.

## **Article 23**

1. A request for the revision of this Convention may be made at any time by any State Party by means of a notification writing addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request.

## **Article 24**

The Secretary-General of the United Nations shall inform all States referred to in Article 17, paragraph 1, of this Convention of the following particulars:

- (a) Signatures, ratifications and accessions under Articles 17 and 18;
- (b) The date of entry into force of this Convention under Article 19;
- (c) Communications and declarations received under Articles 14, 20 and 23;
- (d) Denunciations under Article 21.

## **Article 25**

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States belonging to any of the categories mentioned in Article 17, paragraph 1, of the Convention.

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# APPENDIX C

## Model Law Against Racial Discrimination

1. The purpose of this Act is to prohibit and bring to an end racial discrimination by any person, group of persons, public authorities, public and private national and local institutions and organizations in the civil, political, economic, social and cultural spheres, *inter alia*, in employment, education, housing and the provision of goods, facilities and services.

### PART I

#### Definition

2. In this Act, racial discrimination shall mean any distinction, exclusion, restriction, preference or omission based on race, colour, descent, nationality or ethnic origin which has the purpose or effect of nullifying or impairing, directly or indirectly, the recognition, equal enjoyment or exercise of human rights and fundamental freedoms recognized in international law.

3. Racial discrimination shall not include special measures which have the purpose of ensuring adequate advancement of an individual or group of individuals of any particular race, colour, descent, nationality or ethnic origin, for the enjoyment or exercise of human rights and fundamental freedoms recognized in international law, provided that such measures do not result in the maintenance of separate rights for different racial groups and that they do not remain in force after the objective for which they were taken have been achieved.

### PART II

#### General Principles and Measures which a law may comprise

##### A. General Principles

4. Racial discrimination as defined above is an offence under this Act.

5. All human beings are entitled to equal protection of the law against racial discrimination; this includes the right to an effective remedy against racial discrimination, as well as the right to seek just and adequate reparation or other satisfaction for any damage suffered as a result of such discrimination.

6. The State shall take measures to promote governmental, national and local policies and programmes against racial discrimination, including special measures as described in paragraph 2 of the section on definitions.

7. The State shall adopt measures to combat racial discrimination in the civil, political, economic, social and cultural spheres, particularly in employment, education, housing, the provision of goods, facilities and services, health and nutrition, and with regard to any administrative action by public officials and other servants of the State as defined in Part Iii.section D.

#### **B. Penalties and Compensation**

8. The offences described in Part III, sections A, B, C, D, E, F and G, shall be subject to prosecution.

9. Victims of racial discrimination shall be entitled to just and adequate reparation or other satisfaction with regard to any harm suffered.

10. Offences shall be punished by:

(a) Imprisonment;

(b) Fines;

(c) Suspension of the right to be elected to a public office;

(d) Community service with a view to promoting good relations between different racial *groups*.

11. Reparation shall be made to victims of racial discrimination by means of restitution and/or compensation which may take the form of a payment for the harm or loss suffered, reimbursement of expenses incurred, provision of services or restoration of rights, as well as other measures taken within a specified period for the purpose of correcting or mitigating the adverse effects on the victims of any of

the offences referred to in Part III, sections A, B, C, D, E, F and G. Victims shall also be entitled to recourse to all other means of satisfaction, such as publication of the judicial decision in an organ having wide circulation at the offender's expense or guarantee of the victim's right of reply by a similar means.

12. Victims shall be duly informed of their rights with regard to seeking reparation.

#### C. Recourse Procedures

13. Individuals or groups of individuals shall be entitled to enter complaints alleging racial discrimination under this Act. Legal persons which came into existence prior to the commission of the offence and whose purpose is to combat racial discrimination shall also be entitled to enter complaints alleging racial discrimination under this Act, including complaints on behalf (or with the consent) of the victim or alleged victim.

14. Complaints regarding alleged acts of racial discrimination as defined in Part III may be submitted to the appropriate judicial bodies or be entered in accordance with other domestic recourse procedures. The judicial bodies shall have automatic jurisdiction with respect to acts of racial discrimination which threaten the public order.

15. This Act shall not prejudice the right of an alleged victim of racial discrimination to apply to appropriate regional and international bodies, where necessary, subject to the conditions of admissibility under international law.

16. Offences under this Act shall be subject to the same statute of limitation provisions as are applicable to (other offences of the same nature).

#### D. Independent National Authority Against Racial Discrimination

17. An independent national commission against racial discrimination (hereinafter referred to as "the Commission") consisting of experts of high moral standing and acknowledged impartiality shall be established.

18. The members of the Commission shall be appointed in such a way as to ensure its independence and equitable racial and geographic representation in its composition.

19. The Commission shall have jurisdiction to consider any matter relating to racial discrimination and to take decisions thereon.

20. The Commission shall have the following functions:

(a) To study and review the implementation of this Act;

(b) To give advisory opinions to private and public bodies or assist them in any other way in the implementation of this Act or in connection with any other measure for the elimination of racial discrimination;

(c) To prepare (or assist in the preparation of) codes of conduct concerning the implementation of this Act in certain areas of activity (such codes of conduct may become binding once they have been adopted by the competent legislative body);

(d) To propose to the competent legislative body any amendments to this Act or any other measures which would be necessary to combat racial discrimination;

(e) To provide information and education to promote and encourage good relations between different racial groups;

(f) To report annually on its activities (to the competent legislative authority);

(g) To receive complaints from alleged victims;

(h) To conduct inquiries either on behalf of a complainant or on its own behalf;

(i) To act as a mediator either on behalf of a complainant or on its own behalf;

(j) To bring legal actions either on behalf of a complainant or on its own behalf;

(k) To provide legal aid and assistance to alleged victims who have instituted court proceedings under this Act.

21. The Commission shall have jurisdiction over the entire country. It shall be represented at the local, intermediate and national levels in accordance with the domestic administrative organization of the enacting State (federal, confederate, centralised, decentralised...) and have as much specialised knowledge and experience in the various areas of activity.

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## PART III

### Offences and Penalties

A. Offence of racial discrimination committed in exercise of the freedom of opinion and expression

22. Under this Act and in accordance with international law, the freedom of opinion and expression and the freedom of peaceful assembly and association shall be subject to the following restrictions:

23. It shall be an offence to threaten, insult, ridicule or otherwise abuse a person or group of persons by words or behaviour which cause or may reasonably be interpreted as an attempt to cause racial discrimination or racial hatred, or to incite a person or group of persons to do so.

24. If an act described in this paragraph results in racial discrimination, any person who has instigated such an act or has threatened, insulted, ridiculed or otherwise abused a person or group of persons by words or behaviour which may reasonably be interpreted as an attempt to cause racial discrimination or racial hatred shall be considered an accomplice of the person who has committed the resulting act of racial discrimination.

25. It is an offence to defame an individual or group of individuals on one of the racial grounds referred to in Part I.

26. It is an offence to disseminate or cause to be disseminated in a publication, broadcast, exhibition or by any other means of social communication, any material that expresses or implies ideas or theories with the objective of incitement to racial discrimination.

27. The actions referred to in paragraphs 23 to 25 of this section are deemed to constitute an offence irrespective of whether they were committed in public or in private.

28. An action which occurs inside a private dwelling and is witnessed only by one or more persons present in that dwelling shall not constitute an offence.

**B. Acts of Violence and Incitement to Racial Violence**

29. It is an offence under this Act to commit any act of violence or to incite another person to commit any act of violence against an individual or group of individuals on racial grounds.

**C. Racist Organisations and Activities**

30. Any organisation which undertakes to promote, incite, propagate or organize racial discrimination against an individual or group of individuals shall be declared illegal and prohibited.

31. It is an offence to organize any activity with the purpose or effect of promoting racial discrimination against an individual or group of individuals.

32. With regard to paragraph 30 of this section, any person who at the time of commission of the offence of racial discrimination held the position of director or executive officer or an equivalent position in the organization, or who was acting or purporting to act in any such capacity, is deemed guilty of an offence under this Act, irrespective of whether or not the organization is a body corporate.

33. Persons who have committed offences under paragraph 32 of this section shall be deemed guilty unless they can prove that the act of racial discrimination was committed without their knowledge or consent and that they acted with due diligence to take the steps available to them which might have prevented the act of racial discrimination.

34. It is an offence knowingly to participate in the activities of prohibited organisations referred to in paragraph 30 of this section.

35. It is an offence knowingly to assist or support, whether financially or by any other means, any person, group of persons or organisation in the commission of an act of racial discrimination.

## D. Offences Committed by Public Officials or Other Servants of the State

36. It is an offence for any official or other servant of the State, or of a public establishment, national enterprise or a legal entity receiving financial assistance from the public authorities, to deny an individual or group of individuals access to a right, privilege or benefit on racial grounds.

## E. Offences According to the Field of Activity

### 1. Racial Discrimination in Employment

37. It is an offence, on racial grounds:

(a) To refuse to employ or refrain from employing an individual or group of individuals for a vacant post for which the persons concerned are qualified;

(b) To refuse to offer or provide or refrain from offering or providing an individual or group of individuals the same terms of employment, conditions of work and opportunities for training and promotion as are made available to other individuals or groups of individuals in the same circumstances and with the same qualifications;

(c) To dismiss an individual in circumstances in which other individuals employed by that employer for identical work are not or would not be dismissed.

38. The provisions of this section apply also to individuals or groups of individuals whose employer supplies their labour under contract to another person or business.

### 2. Racial Discrimination in Education

39. It is an offence, on racial grounds:

(a) To deny or limit the access of an individual or group of individuals to education of any type and at any level;

(b) To permit an individual or group of individuals to receive education of an inferior quality;

(c) To provide separate education to an individual or group of persons;

(d) To establish or maintain separate educational systems or institutions for an individual or group of individuals.

### 3. Racial Discrimination in Housing

40. It is an offence, on racial grounds:

(a) To deny, or restrict, the opportunity for an individual or group of individuals to rent, lease, purchase, sell or otherwise acquire or dispose of ownership of, or access to property whether in the terms on which the property is offered; or in the treatment of individuals or groups of individuals who are seeking such property;

(b) To distinguish between occupants in respect of the management of property, whether in the manner in which occupants are afforded access to any benefits or facilities, or in the denial of access to such benefits or facilities or any deliberate omission in relation to them, or in the eviction or any other measures taken against the occupants in respect of conditions of access to such property.

### 4. Racial Discrimination in the Provision of Goods, Facilities and Services

41. It is an offence to refuse to provide or deliberately refrain from providing goods, facilities or services to individuals or groups of individuals on racial grounds, or, for the same reasons, to fail to provide goods, facilities or services of the same quality or under the same terms to all individuals or groups of individuals.

42. The provisions of this section shall apply to facilities and services such as:

(a) Access to and use of any place which is open to members of the public or a section thereof;

(b) Accommodation in hotels, boarding houses or other similar establishments;

(c) Facilities such as banks and insurance companies and services such as loans, credit or financing;

(d) Facilities and places for entertainment, recreation or refreshment;

(e) Medical care, legal services and all other professional services.

#### F. Other Offences

43. Any act of racial discrimination defined in Part I for which no specific penalty has been established in Part III shall nevertheless be considered an offence under this Act.

#### G. Protection of Victims and Obstruction of Justice

44. It is an offence to threaten a victim or alleged victim of racial discrimination or in any way to obstruct his or her efforts to obtain redress through proceedings brought under this Act in accordance with recourse procedures in force.



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*Western Australia v Commonwealth* (1995) 128 AIR 1

*White & White v Gollan* (1990) EOC 92-303

## Acronyms

ADB	Anti-Discrimination Board
ADA	Anti-Discrimination Act 1977 (NSW)
ALRC	Australian Law Reform Commission
ATSIC	Aboriginal and Torres Strait Islander Commission
ATSI	Aboriginal and Torres Strait Islander
BIMPR	Bureau of Immigration, Multicultural and Population Research
CERD	Convention on the Elimination of Racial Discrimination
CEDAW	Convention on the Elimination of Discrimination Against Women
DDA	Disability Discrimination Act 1992 (Cth)
HREOC	Human Rights and Equal Opportunity Commission
HREOCA	Human Rights and Equal Opportunity Commission Act
ICCPR	International Covenant on Civil and Political Rights
ILO	International Labour Organisation
NTA	Native Title Act 1993 (Cth)
NESB	Non-English Speaking Background
NIRV	National Inquiry into Racist Violence
RDA	Racial Discrimination Act 1975 (Cth)
RDC	Racial Discrimination Commissioner
RCADIC	Royal Commission into Aboriginal Deaths in Custody
SAEOC	South Australian Equal Opportunity Commission
SDA	Sex Discrimination Act 1984 (Cth)
UN	United Nations
UDHR	Universal Declaration of Human Rights
WGIP	Working Group on Indigenous Populations

