



Australian
Human Rights
Commission

Freedom from Discrimination:

Report on the 40th anniversary

of the Racial Discrimination Act

NATIONAL CONSULTATION REPORT • 2015

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Racial Discrimination Act



**Australian
Human Rights
Commission**

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Foreword



Dr Tim Soutphommasane
Race Discrimination Commissioner

Forty years ago, the Commonwealth Parliament enacted the first federal human rights and discrimination legislation. The *Racial Discrimination Act 1975* (Cth) was a landmark in Australian race relations. Enacted shortly after the formal abandonment of the White Australia policy, it was a legislative expression of a new commitment to multiculturalism – and reflected the ratification by Australia of the *International Convention on the Elimination of All Forms of Racial Discrimination* and its commitment under that Convention. As described by Prime Minister Gough Whitlam at a ceremony for its proclamation in October 1975, the Act was ‘a historic measure’, which aimed to ‘entrench new attitudes of tolerance and understanding in the hearts and minds of the people’.

The Act’s anniversary has presented an opportunity to reflect on how the legislation has fulfilled its purpose. What effect has it had in eliminating racial discrimination? How successful has it been in entrenching ‘new attitudes of tolerance and understanding’? What remains to be done in combating prejudice, bigotry and discrimination?

These were some of the questions posed through the commemorative activities we have conducted throughout the year. A conference held in February (‘RDA@40’) saw academic experts and community leaders provide critical reflections about the Act’s impact on Australian public law and multiculturalism. A series of public consultations held in each of the states and territories gave us the opportunity to learn about individual and community experiences of racial discrimination and of using the Act. Through it all, we have been guided by two aims: promoting public understanding of the Act and the protections it affords all Australians against racial discrimination, and investigating the lived experience of racial discrimination in today’s society.

This report documents the activities and findings of this year's anniversary activities. It follows two other publications this year: *Perspectives on the Racial Discrimination Act*, which collated a selection of the papers presented at 'RDA@40'; and *I'm Not Racist But... 40 Years of the Racial Discrimination Act*, a book published by NewSouth Publishing in partnership with the Australian Human Rights Commission. The main findings of this report relate to the public consultations conducted about the Act, though they also draw upon the research generated by the 'RDA@40' conference.

As this report shows, the experience of racial discrimination continues to affect many Australians, in spite of our success as a multicultural society. It is a genuinely complex phenomenon – not born of any one cause, not confined to any one setting and not limited to any one community. It is also something that can be overt as well as covert, revealed in identifiable individual acts but also more insidiously in institutional form.

The Act plays an important role in countering racial prejudice and discrimination, whether as an instrument for making complaints or as a tool of community advocacy. As the consultations revealed, the Act also provides sets a standard for how we live together, providing public assurance that those who experience racism will have the law on their side. At the same time, the consultations reminded us that legal protections are by no means sufficient in eliminating prejudice and discrimination. There remains room for improvement in our society's response to racism.

I thank staff at the Commission who have been involved in this year's anniversary activities: Ting Lim, Rivkah Nissim, Anna Nelson, Katie Ellinson, Samantha Schubert, Kristian Barron, Lucian Tan, Angela Dorizas. I also acknowledge the support of my state and territory colleagues at the Victorian Equal Opportunity and Human Rights Commission; Anti-Discrimination Commission Queensland; Equal Opportunity Commission of South Australia; Equal Opportunity Commission – Western Australia; Office of the Anti-Discrimination Commissioner, Tasmania; ACT Human Rights Commission; and Northern Territory Anti-Discrimination Commission.

Most of all, I thank those who have participated in our anniversary activities. In particular, I am grateful to those who joined our consultations across the country; in sharing your stories and experiences, you have given voice to what racism means in Australia today.



Dr Tim Soutphommasane

Race Discrimination Commissioner

Australian Human Rights Commission

November 2015

Executive Summary

This report documents the activities conducted to mark the 40th anniversary of the *Racial Discrimination Act 1975* (Cth). It is primarily based on a series of public consultations led by the Race Discrimination Commissioner, though it also draws upon some of the research presented at a conference held in February 2015.

The public consultations were conducted between February and April 2015, and were held in the capital cities of each of the states and territories. They aimed to promote the understanding and acceptance of the Act and to gain an understanding of individual and community experiences with racial discrimination and vilification. The consultations paid special attention to participants' views about the value of the Act in protecting people against racial discrimination, awareness and understanding of the Act's operation, and the role of the Race Discrimination Commissioner and the Australian Human Rights Commission.

The public consultations identified the persistence of the following forms of racial prejudice and discrimination:

- discrimination in employment;
- racial vilification and bigotry; and
- social exclusion.

Participants also highlighted the particular role that media reporting and commentary plays in sensationalising matters concerning race and religion – a role regarded as feeding negative stereotypes about some communities and as counter-productive to racial tolerance.

The consultations demonstrated widely shared recognition of the significance of the Act in protecting Australians against racial discrimination and vilification. However, the consultations also revealed a lack of awareness about the Act and its operation among some sections of the Australian community – particularly newly arrived migrants and young people. This may explain to some extent why there may be an under-reporting of racism, with many people declining to lodge complaints when they experience racial discrimination or vilification.

The systemic impact and operation of the Act is has more than one aspect. In addition to the conciliation of complaints and litigation in the courts, there is the advocacy and educational work conducted by the Race Discrimination Commissioner and the Australian Human Rights Commission under the Act. The consultations revealed some community support for a more expansive role for the Commissioner and Commission than currently defined in the *Racial Discrimination Act 1975 (Cth)* and the *Australian Human Rights Commission Act 1986 (Cth)*.

There were two other factors identified as affecting the Act's systemic impact in combating discrimination.

One concerned the Act's coverage – namely, the limited ability of the Act to protect Muslim Australians against prejudice and discrimination involving expressions of 'cultural racism'. While the current interpretation of the Act stops short of considering the Muslim faith as encompassing an 'ethnic group', many Muslim Australians regard religious vilification as abuse implicating race and culture.

The other concerned the institutional discrimination experienced by Aboriginal and Torres Strait Islander people – particularly in employment, education and government policy. The consultations indicated a strong community belief that institutional racism against Aboriginal and Torres Strait Islander people highlights the incomplete protection that current legislation offers against racism.

The findings from the public consultations highlight the importance of recognising and giving voice to the lived experiences of racism, and of maintaining and developing efforts to promote public understanding of the rights and freedoms protected by the Act. Based on the findings, the Race Discrimination Commissioner will:

- convene an annual national forum on racial tolerance and community harmony;
- advocate for the national school curriculum to ensure adequate education about racism and strategies for embracing diversity and inclusion;
- explore work to improve the treatment of cultural diversity in the media;
- investigate enhancing connections between the Act and current educational work under the National Anti-Racism Strategy; and
- continue the Kep Enderby Memorial Lecture to promote public understanding and debate about racism.

1 Historical background to the *Racial Discrimination Act 1975* (Cth)

The *Racial Discrimination Act 1975* (Cth) ('Act') came into effect on 31 October 1975, having received royal assent on 11 June 1975.¹ It was the first human rights and anti-discrimination legislation enacted by the Commonwealth Parliament. Its advent was significant. Prior to the Act's existence, there were few remedies available for acts of racial discrimination. The Act provided protection for people who experienced unfair treatment based on their race, colour, descent, or national or ethnic origin or immigrant status.²

The Act has been described as 'akin to the Civil Rights Act 1964 in the US'.³ Yet its significance can easily be overlooked. Unlike the United States, where civil rights legislation was introduced as the culmination of a rights struggle, Australian legislation on racial equality was not accompanied by an equivalent social movement. To some extent, the motivation behind the Act's introduction lay in Australia's commitment to implement its international obligations following ratification of the *International Convention on the Elimination of all Forms of Racial Discrimination* (ICERD).⁴

There was nonetheless some local urgency to racial equality in the period leading to the Act's introduction. The 1970s saw the formal demise of the White Australia policy and the beginnings of an official multicultural policy.⁵ By that time – among other things, as a result of the Freedom Ride of 1965 and the 1967 referendum – Australian society was also more conscious about injustices faced by Aboriginal and Torres Strait Islander people.⁶

However, the passage of federal legislation on racial discrimination was met with difficulty. During the Whitlam Government, a Racial Discrimination Bill was introduced by Attorney-General Lionel Murphy on three occasions in November 1973, April 1974 and October 1974 – lapsing on each occasion.⁷ Success required a fourth attempt, beginning with the introduction of a bill in February 1975 by Murphy's successor as Attorney-General, Kep Enderby.⁸

This fourth bill was passed in June 1975, following amendments sought by the Senate.⁹ The parliamentary debate, as commentators have noted, revealed some divided opinions about the bill among legislators.¹⁰ Ultimately, though, it passed with the agreement of both sides of Parliament.

Today's Australian society is a significantly different one from the one that existed when the Act came into force. The current population of 24 million is considerably more ethnically and culturally diverse than Australia's 1975 population of 13.8 million. Whereas in the immediate years following the Second World War, migrants overwhelmingly came from countries in Europe, there has been significant migration from countries in Asia and the Middle East in more recent decades.

There is, though, wide public acceptance of cultural diversity. For example, the Scanlon Foundation's survey of social cohesion in 2014 found that 85 per cent of respondents agreed that multiculturalism is good for the country, and that 58 per cent of respondents agreed that the immigration intake is about right or too low.¹¹ The Act has played an important role in such multicultural success, providing the legislative architecture of racial tolerance and equal opportunity.¹²

2 Commemorating the 40th anniversary of the Act

The 40th anniversary year of the Act has been an important opportunity to reflect on what has been achieved in race relations since 1975, and on what remains to be achieved.

Throughout 2015, the Australian Human Rights Commission ('the Commission') has conducted a number of activities to commemorate this anniversary. It has:

- held community consultations in the capital cities of each State and Territory between February and April 2015;
- hosted a conference on 40 years of the Racial Discrimination Act (the 'RDA@40' conference) in Sydney on 19 and 20 February 2015;¹³
- published, in partnership with NewSouth Publishing, the book *I'm Not Racist But... 40 Years of the Racial Discrimination Act* (June 2015);¹⁴
- held a public event on 11 June 2015 to mark the occasion of the Act receiving royal assent in 1975;
- convened the Australian Public Service Human Rights Network on *Race, Multiculturalism and the Constitution* in June 2015;
- through Race Discrimination Commissioner, Dr Tim Soutphommasane, made regular public statements about the Act;¹⁵
- developed and released an educational video about the Act;
- hosted the inaugural Kep Enderby Memorial Lecture delivered by the Hon. Robert French AC, Chief Justice of the High Court of Australia, in Sydney on 22 October 2015; and
- co-sponsored a panel discussion, 'Race, multiculturalism, equality and non-discrimination in the context of the Racial Discrimination Act's 40th anniversary', with the Federation of Ethnic Communities Councils of Australia (FECCA) at its national biennial conference on 5 November 2015.

These activities have not merely been celebratory in purpose. Rather, they have been directed towards research and education, broadly understood. The anniversary has been an occasion to develop public understanding of the Australian experience of racial discrimination and of the operation of the Act.

2.1 Public consultations

The primary anniversary activity has involved a series of public consultations about racial discrimination during February-April 2015 in each state and territory.¹⁶ The consultations were held in partnership with respective state and territory human rights, equal opportunity and anti-discrimination authorities.

These consultations were aimed to shed light on individual and community experiences of racial discrimination, racial vilification and utilising the Act. They have generated the main body of evidence from which this report is drawn.

From a research perspective, adopting this approach reflected a number of factors. In light of constrained resources, the Commission had limited ability to conduct any substantial survey of public opinion concerning racial discrimination.¹⁷ There has also been very little qualitative research on the lived experience of racial discrimination in Australia.

From another perspective, the consultations were an opportunity to educate participants about racial discrimination. Among other things, they enabled the Commission to educate individuals and communities about its work in administering the Act.

In terms of methodology, the consultations involved group discussions, led by the Race Discrimination Commissioner. The discussions were prompted by the following questions:

- What has been your individual and community experiences concerning racism and racial discrimination?
- What do you consider to be the value of the Act in protecting communities against racial discrimination?
- How do you believe the Act could be better promoted or used within communities to protect them against racial discrimination?
- What do you believe are the key priority areas for addressing racial discrimination and how would this best be done?
- How do communities respond to media and public commentary on issues surrounding race?
- What is the role of the Race Discrimination Commissioner and the Australian Human Rights Commission in protecting communities from racial discrimination? How is this best achieved?

The participants included members of community and advocacy organisations, local government, state, territory and federal government departments, community legal centres and universities.

Participants' permission to record each consultation was requested and granted. In addition to the consultation meetings, participants were provided with a feedback form which included the same questions asked in discussion. This provided participants with the option to provide written responses to the Commission.

2.2 RDA@40 conference

On 19 and 20 February 2015, the Commission hosted in Sydney a scholarly conference that was addressed by leading scholars and experts in human rights, public law and multiculturalism. Governor-General Sir Peter Cosgrove also delivered a special address at the conference.¹⁸

The conference was attended by more than 100 people on each of the two days. Conference participants included academic researchers, lawyers, advocates and representatives from government, civil society, and multicultural and Aboriginal and Torres Strait Islander communities.

The conference reflected a multi-disciplinary assessment of the *Racial Discrimination Act 1975* (Cth).¹⁹ They covered issues concerning the historical background and evolution of the legislation, the Act's impact on public law and human rights, the ongoing role of the Act in addressing racism (including racial vilification and cyber-racism), and systemic outcomes achieved through conciliation and litigation.

The speakers at the conference included Gwenda Tavan, Andrew Markus, Sarah Joseph, George Williams, Beth Gaze, Marcia Langton, Hilary Charlesworth, Duncan Ivison, Geoffrey Levey, Peter Balint, Andrew Jakubowicz, Kevin Dunn, Gail Mason, Kate Eastman, Mariam Veiszadeh, Diana MacTiernan, Simon Rice, Luke McNamara, Kath Gelber, Tracey Raymond, Sarah Pritchard, Jonathan Hunyor and Shelley Bielefeld (see Appendix 3).

The Commission published a selection of conference papers, *Perspectives on the Racial Discrimination Act 1975* (Cth), on 26 August 2015.²⁰ Some presenters at the conference have also published, or are planning to publish, their research in academic peer-reviewed journals – reflecting the role the conference has played in facilitating and encouraging academic research on racial discrimination.



Dr Tim Soutphommasane with Governor-General Sir Peter Cosgrove, RDA@40 conference, 2015

I think it's really important for us to remember what the Racial Discrimination Act has created for us and how far we have come in 40 years ... because 45 or 50 years ago, kids at school were being abused, people were [called] wogs, people were [subject to] all sorts of insults and slurs, and new migrants had a really bad time. The Act has enabled us some protection ... we need to appreciate that this legislation has transformed Australia ... it's given us the safety net of being able to challenge anyone who wishes to, through racist behaviour, attack us personally or us collectively.

– Victoria consultation, 10 March 2015

2.3 Book: *I'm Not Racist But... 40 Years of the Racial Discrimination Act*

The Commission, in partnership with NewSouth Publishing (an imprint of the University of New South Wales Press), published *I'm Not Racist But... 40 Years of the Racial Discrimination Act* in June 2015.

Written and edited by the Race Discrimination Commissioner, the book reflects on the national experience of racism and the progress that has been made since the introduction of the Act. It provides an account of the history of racism, the limits of free speech, the dimensions of bigotry and the role of legislation in our society's response to discrimination.

The bulk of this book is based on speeches and articles the Commissioner delivered and had published during 2013-2015.²¹ The book also includes contributions from a number of prominent writers and artists: Maxine Beneba Clarke, Bindi Cole Chocka, Benjamin Law, Alice Pung and Christos Tsiolkas.

Former federal minister Fred Chaney AO launched *I'm Not Racist But...* at an event in Sydney on 11 June 2015, which coincided with the date the Act received royal assent in 1975. The event included speeches by parliamentarians Craig Laundy MP, Mark Dreyfus QC MP and Senator Penny Wright – and was attended by several other federal parliamentarians. Reverend James Houston AM, who served as Assistant Community Relations Commissioner (1975-1981) under Community Relations Commissioner Al Grassby, also spoke at the event.

The Commission has deposited copies of the book with public libraries in all capital cities (city and state libraries) and the National Library of Australia. Neither the Race Discrimination Commissioner nor the Commission is receiving royalties from this book.

TIM SOUTPHOMMASANE

**I'M NOT
RACIST**

but...

**40 YEARS OF THE
RACIAL
DISCRIMINATION ACT**

MAXINE BENEBA CLARKE, BINDI COLE CHOCCA,
CHRISTOS TSIOLKAS, BENJAMIN LAW, ALICE PUNG



*'... a poignant analysis of the development of freedom of speech, the fight against bigotry and an incisive account of Australia's response to racism over several decades.'*²²

– Daily Telegraph, 2 July 2015

*'This is a timely publication ... Tim Soutphommasane, Race Discrimination Commissioner, gives a measured overview of race in Australia, from the First Fleet, through such landmark legislation as the White Australia Policy, the racial discrimination Act of 1975, the Cronulla riots and the recent of debate over section 18C of the act.'*²³

– Sydney Morning Herald and The Age, 29 August 2015

*'... reasoned and thoughtful ... What is on offer here is an informed and intelligent effort to grapple with complex issues and debates. Soutphommasane's training as a philosopher shines through, but he wears his scholarship lightly. He captures and conveys the evolution of complex ideas with clarity and precision.'*²⁴

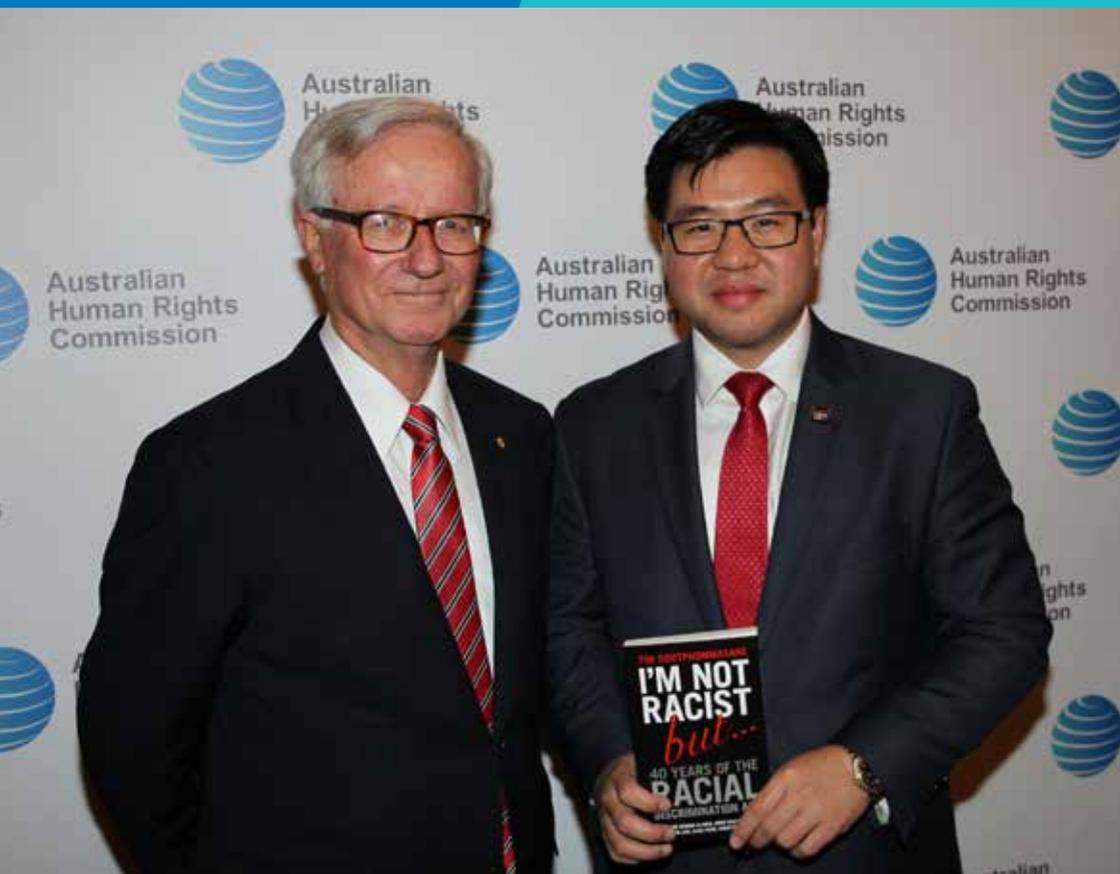
– Australian Book Review, September 2015

'A fascinating and timely study of the evolution of Australian attitudes to race and racism... A must-read for any Australian who cares about our place in history and the true importance of empathy, friendship, civic virtue and multiculturalism.'

– Law Society of New South Wales Alternative Law Journal, July 2015

‘... a poignant analysis of the development of freedom of speech, the fight against bigotry and an incisive account of Australia’s response to racism over several decades.’²²

– *Daily Telegraph*, 2 July 2015





2.4 Public statements and engagements

Over the course of 2015, the Race Discrimination Commissioner spoke at a number of events in various cities across Australia as part of the 40th anniversary commemoration of the Act.²⁵

His speaking engagements included conversations at bookstores, panel discussions at events, seminars at universities and keynote speeches at academic and professional conferences. On 7 July 2015, he delivered a speech titled, ‘Race relations: how much have we learned?’, at the National Press Club in Canberra.²⁶

In addition to *I’m Not Racist But...*, numerous articles reflecting on the Act’s anniversary were also published in newspapers, other media and professional and scholarly journals, including *The Age*,²⁷ *ABC Religion and Ethics*,²⁸ *Law Society of NSW Journal*,²⁹ *Australian Law Journal*,³⁰ and the *Alternative Law Journal*.³¹

2.5 Kep Enderby Memorial Lecture

As part of the legacy of the Act’s 40th anniversary, the Race Discrimination Commissioner and the Commission have established a lecture, named in honour of the Hon. Kep Enderby QC (1926–2015), who as Attorney-General introduced the Racial Discrimination Bill to the Commonwealth Parliament in February 1975.

In his second reading speech for the Racial Discrimination Bill, Enderby noted that ‘the Bill will perform an important educative role’ in combating racial discrimination.³² It is in this spirit of education that the Commission will each year invite a leading figure to deliver a public lecture to advance public understanding and debate about racism, race relations and the Racial Discrimination Act.

The Hon. Robert French AC, Chief Justice of the High Court of Australia, delivered the inaugural Kep Enderby Memorial Lecture on 22 October in Sydney.

2.6 Educational video

The Commission is, at the time of writing, finalising work to create a short educational video aimed to promote public understanding of the Act. The video, which features a sequence of illustrations, was developed with the assistance of media organisation *UserActive*, and will be hosted on the Commission's website and Youtube channel.

The creation of the video in part reflected findings from the national public consultations: some participants expressed the view that there was little information about the Act in the community and those who knew about it did not understand how it could be used to protect against racial discrimination.



3 Overview of the Act

The Act makes it unlawful to treat a person unfairly because of their race, colour, descent, national or ethnic origin or immigrant status.³³ Since 1995, the Act has also made it unlawful to commit an act constituting racial hatred (commonly referred to as ‘racial vilification’).³⁴

Racial discrimination and vilification may be unlawful, but they do not constitute criminal offences that attract penalties. Reflecting the civil character of the legislation, no one can be prosecuted or convicted for breaching the Act.³⁵ Where someone believes they have experienced racial discrimination or vilification, they may lodge a complaint with the Commission.³⁶ Where appropriate, the Commission will then seek to conciliate the complaint between the parties,³⁷ only when a complaint is terminated may the complainant take the matter to court.³⁸

Since the Act has commenced, more than 6000 complaints about racial discrimination have been successfully conciliated.³⁹ During the year 2014-2015, the Commission finalised 405 complaints under the Act, of which only 12 proceeded to court (the Commission successfully resolved 67 per cent of complaints where it attempted conciliation).⁴⁰ Reflecting the conciliatory and educative character of the Act, there have been fewer than 300 reported decisions relating to the legislation made by a court or tribunal since 1975.⁴¹

The impact of the Act has gone beyond the conciliation of complaints. The legislation has also established a national standard of racial non-discrimination. It has served as a significant limitation on discriminatory legislative and executive action by governments.⁴² The Act has been used to assist in securing land rights for Aboriginal and Torres Strait Islander people – for example, in defeating discriminatory legislation in *Mabo v State of Queensland (No 1)*.⁴³

At the same time, the Act has its limitations. As it has on a number of occasions, the Commonwealth Parliament may pass legislation which derogates from, or suspends the operation of, the Act.⁴⁴ Most recently, in June 2007 the Federal Government announced the introduction of the Northern Territory National Emergency Response (‘the Intervention’), which suspended the operation of the Act as it applied to the measures outlined in the *Northern Territory National Emergency Response Act 2007* (Cth). Existing legislative protections against racial discrimination are incomplete and vulnerable, to the extent that they may be overridden by Parliament.⁴⁵

3.1 Racial discrimination

Part II of the Act contains a broad prohibition of racial discrimination. Section 9(1) of the Act provides:

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

Section 9(1A) also makes it unlawful to ‘indirectly discriminate’ on racial grounds – namely, to require a person to comply with a term, condition or requirement that has the effect of discriminating against someone because of their race, colour, descent or national or ethnic origin.⁴⁶

Section 10 provides a guarantee of equality before the law. Where a law does not allow a person of a particular race to enjoy a right enjoyed by persons of another race, the section provides that the former ‘shall ... enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin’.⁴⁷

While the Act primarily refers to the attributes of race, colour, descent or national or ethnic origin, it does not define ‘race’. Courts have generally taken the view that ‘race’ is a broad term and should be understood in the popular sense rather than as a term of art.⁴⁸ The courts have held that the term ‘race’ under the Act does not involve a biological test, the real test is whether the individuals or the group regard themselves and are regarded by others as having a particular historical identity, which relates to their colour, race or ethnic or national origin.⁴⁹

Section 5 of the Act does, however, also incorporate ‘immigrant status’. This provision makes it possible for persons who experience unfair treatment due to their immigrant status, a relatives or an associates, to obtain protections under the Act.

Part II of the Act also specifically prohibits racial discrimination in a number of areas of public life:

- Access to public places and facilities (section 11);
- Disposal or acquisition of land, housing, and accommodation (section 12);
- Provision of goods and services (section 13);
- Joining trade unions (section 14);
- Employment (section 15);
- Advertisements (section 16); and
- Inciting or assisting the doing of an act which is unlawful by reason of the foregoing prohibitions (section 17).

3.2 Racial vilification

In 1995, the Act was amended to include a new Part IIA, which is concerned with the prohibition of acts of racial hatred.⁵⁰ This followed a number of major inquiries and reports, which recommended the introduction of legislative protections against racial vilification.⁵¹

Section 18C of the Act makes it unlawful to do a public act that is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate a person or group of people because of their race, colour, or national or ethnic origin. The section does not apply to acts that occur in private. For the purposes of section 18C, an act is not regarded as private if it involves words, sounds, images or writing that is communicated in public.⁵² This includes anything in a public place or in the sight or hearing of people who are in a public place.⁵³

Section 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.
- (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.

The Act aims to strike a balance between the right to freedom of expression and the right to live free from racial vilification.⁵⁴ Section 18D provides for a number of categories of acts which are exempt from section 18C. Namely, anything that is said or done in artistic work, academic or scientific inquiry, and fair reporting or comment on a matter of public interest is protected conduct provided it is done reasonably and in good faith.

The case law around Part IIA during the twenty years of its operation has established the following interpretations of sections 18C and 18D of the Act.⁵⁵

First, the test of whether an act was ‘reasonably likely, in all the circumstances’ to offend, insult, humiliate or intimidate another person because of their race is an objective test.⁵⁶ It is not necessary for someone to actually have been racially offended, insulted, humiliated or intimidated. Any conduct must be assessed against an objective standard, judged from the perspective of a reasonable or ordinary person from the relevant racial group.⁵⁷

I saw my son go through the same thing, my daughters. And no doubt I look into the eyes of my beautiful grandchildren and I see a grandson who is going to face the same type of racism ...

– Western Australia consultation, 9 April 2015

Second, the courts have emphasised that a contravention of section 18C must involve acts that cause ‘profound and serious effects’.⁵⁸ ‘Mere slights’ are not enough to constitute a breach of the law.⁵⁹

The courts have also made clear that section 18C must be read alongside section 18D.⁶⁰ The exemptions contained in section 18D have been interpreted broadly. Within the case law, section 18D has overridden section 18C on numerous occasions.⁶¹

Section 18D:

Section 18C does not render anything said or done reasonably and in good faith in:

- an artistic work or performance
- a statement, publication, discussion or debate made for genuine academic or scientific purposes.
- making a fair and accurate report on a matter of public interest
- making a fair comment on any event or matter of public interest if the comment is an expression of a person’s genuine belief.

Bropho v Human Rights and Equal Opportunity Commission (2004) 135 FCR 105 involved a complaint of racial vilification under section 18C of the Act made in relation to a cartoon published in the West Australian Newspaper entitled 'Alas Poor Yagan'. The cartoon concerned the attempts by a group of Aboriginal elders to recover the remains of the Aboriginal leader Yagan, who had been killed in 1833, and whose head had been smoked and removed to England for display.

It was found at first instance by Commissioner Innes, and was not at issue in the proceedings before the Federal Court, that the cartoon was in breach of section 18C as being offensive to Nyungar people specifically, and Aboriginal people generally. However, the Commissioner had gone on to find that the cartoon (an 'artistic work') was published 'reasonably and in good faith' and was therefore not unlawful under the Act by virtue of the exemption in section 18D(a).

Bropho appealed Commissioner Innes' decision to the Federal Court where the decision was upheld. *Bropho* further appealed to the Full Court and was again unsuccessful (French and Carr JJ dismissing the appeal, Lee J dissenting).

The Full Court found that 'reasonably and in good faith' contained in section 18D requires an objective assessment of the alleged conduct, balanced with considerations of proportionality including a person's state of mind (a subjective assessment).

In March 2014, the Federal Government released an exposure draft of the Freedom of Speech (Repeal Section 18C) Bill, which would have amended the Act's provisions with respect to racial vilification.⁶² The main proposed changes concerned the removal of sections 18C and 18D.

The Bill proposed a new provision which would have made unlawful only anything that was reasonably likely to 'vilify' or 'intimidate' on the grounds of race.⁶³ This was to be 'determined by the standards of an ordinary reasonable member of the Australian community, not by the standards of any particular group within the Australian community'.⁶⁴ A new category of exception would have effectively replaced section 18D, providing for anything in the course of public discussion to be excepted from being considered unlawful vilification or intimidation (regardless of whether it was done reasonably and in good faith).⁶⁵

These proposed amendments were later withdrawn in August 2014, following widespread public concern and criticism including from Aboriginal and Torres Strait Islander and multicultural communities, lawyers, human rights advocates, public health experts and psychologists.⁶⁶ A Nielsen poll published in Fairfax newspapers in April 2015 also found that 88 per cent of respondents did not support the proposed amendments.⁶⁷

***Eatock v Bolt* [2011] FCA 1103** involved a complaint made under section 18C of the Act about two newspaper articles written by Bolt, and published in the Herald Sun by the Herald and Weekly Times (HWT). Eatock claimed that the articles conveyed racially offensive messages about fair-skinned Aboriginal people and was a breach of section 18C of the Act. Bolt and HWT denied that the elements of section 18C were satisfied but even if they were, their conduct was exempted by section 18D of the Act.

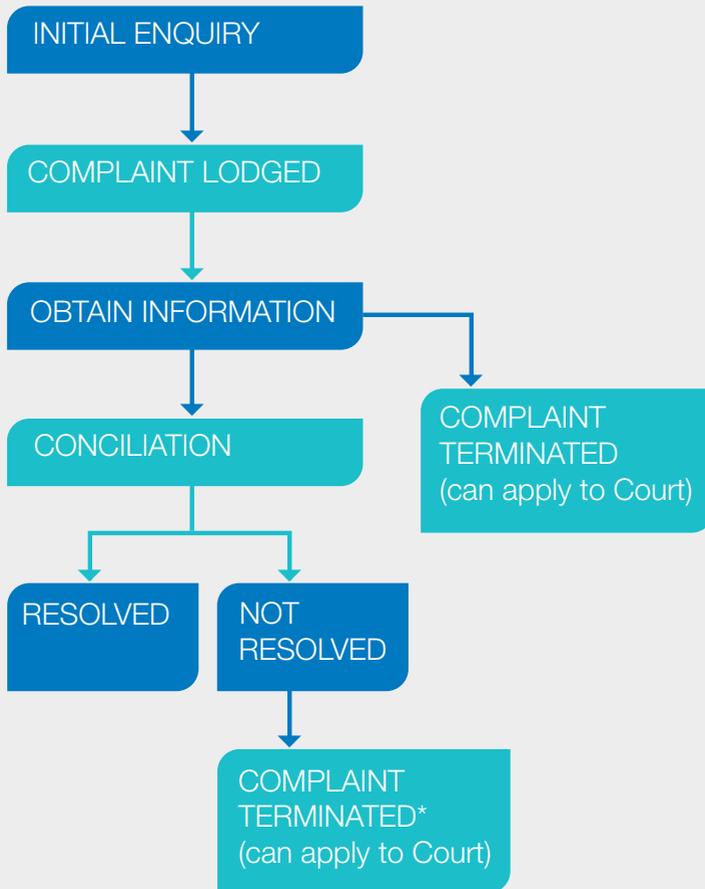
Justice Bromberg found that Bolt and HWT had contravened section 18C of the Act, by reason of writing and publishing the articles in question. Justice Bromberg found that the exemptions outlined in section 18D of the Act did not apply.

Justice Bromberg was satisfied that fair-skinned Aboriginal people (or some of them) were reasonably likely, in all the circumstances, to have been offended, insulted, humiliated or intimidated by the imputations conveyed by the articles. Further, Justice Bromberg was satisfied that the causal nexus required by section 18C was satisfied because the articles were calculated to convey a message about the race, ethnicity or colour of fair-skinned Aboriginal people, including as to whether those people were sufficiently of Aboriginal race, colour or ethnicity to be identifying as Aboriginal people.

In relation to the construction of section 18D of the Act, Justice Bromberg concluded that the articles were not written 'reasonably and in good faith', as required by section 18D of the Act.



The Complaint Process



* The Commission may ask for further information before terminating the complaint.

3.3 Complaints under the Act

The Commission has the power to investigate and conciliate complaints made under the Act.⁶⁸ As noted above, an unlawful act under the legislation is not a criminal offence that attracts penalties. If a person believes they have experienced racial discrimination or racial vilification, they are free to lodge a complaint with the Commission.⁶⁹

When the Commission receives a complaint about something that is covered by the Act, the President of the Commission (or the President's delegate) can investigate the complaint and attempt a resolution.⁷⁰ Where appropriate, the Commission will invite the complainant and the respondent to participate in conciliation.⁷¹ Conciliation is an informal process that allows the complainant and the respondent to discuss their issues, with the aim of resolving their dispute.

In its current work, the Commission succeeds in resolving the majority of complaints where it attempts conciliation. Agreements achieved at conciliation vary in nature. Many include apologies or statements of regret, while some include monetary settlements and/or changes in policy for respondent parties.⁷²

Case Study

Two workers of Nigerian ethnic background made a complaint to the Commission alleging that their factory supervisor had subjected them to racist remarks and victimisation.

Following conciliation, the company agreed to provide the complainants with written apologies and with a payment of \$17,550 to each complainant. The company also agreed to establish an anti-discrimination policy, provide anti-discrimination training to all staff members and encourage the supervisor in question to attend counselling.

If a complaint is not resolved or it is discontinued for another reason, the complainant will be issued with documentation which will provide him or her with the option to take the complaint further to the Federal Court of Australia or the Federal Circuit Court.⁷³ It should be noted that the Commission's role is limited to conciliating complaints: the Commission is not a court and cannot determine whether unlawful discrimination has occurred.⁷⁴

3.4 The role of the Race Discrimination Commissioner

The operation of the Act also includes the office of the Race Discrimination Commissioner.⁷⁵ The functions of the Commissioner, which are set out in section 20 of the Act, can be broadly characterised as involving advocacy, research and education. They include promoting understanding and acceptance of the Act; developing and conducting research and educational programs to combat racial discrimination; and preparing guidelines for the avoidance of infringements of the Act.⁷⁶

Notably, the *Australian Human Rights Commission Act 1986* (Cth) and the Act do not provide a mechanism for the Race Discrimination Commissioner to be able to investigate and conciliate complaints that are received by the Commission.⁷⁷ The President's office is charged with this task.⁷⁸ The Commissioner also does not have a function of initiating any legal proceedings (although the officer may, through the Commission, intervene in proceedings that involve racial discrimination matters, with the leave of the court).⁷⁹

Section 20 Functions of Commission

The following functions are hereby conferred on the Commission:

- (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.

The advocacy, educational and research functions of the Race Discrimination Commissioner are evident in some of the current work of the Commission. For example, the Commissioner chairs the National Anti-Racism Partnership and leads the National Anti-Racism Strategy, which aims to improve public understanding of racism, and to empower Australians to respond to prejudice and discrimination.⁸⁰ Some of the educational work conducted under the strategy includes the 'Racism. It Stops with Me' campaign.⁸¹ At the time of writing, more than 380 organisations have been involved as supporters of the campaign (which has been running since 2012).⁸²

4 Experiences of racial prejudice and discrimination

The experience of racism is one felt by many members of Australian society.

The Scanlon Foundation's 2014 social cohesion study indicated that about one-fifth of the population have experienced racial or religious discrimination during the past twelve months.⁸³ It also found that the settings where people most commonly experienced discrimination included the neighbourhood, shops and shopping centres, and in the workplace.⁸⁴

The following sections primarily document the findings of the public consultations conducted by the Commission. While the consultations did not involve any quantitative surveys about the incidence of racism, it did inquire into the settings where individuals and communities have experienced it. The responses underlined that racism is something that occurs in the realm of everyday life – and for some people, it is a constant feature of their daily interactions.

4.1 Employment

The consultations identified racism in employment as a particular concern among many participants.⁸⁵ This included discrimination occurring in job applications. Numerous participants reflected that not having an Anglo-Celtic or Anglo-Saxon name was a disadvantage in securing employment, as in the following example:

*I can tell you, I mean this actually happened with my daughter. My daughter's name is ... a very classical Indian name. When she applied under that name, when she was a university student, [the employer] didn't want to call her for an interview. What she did, she took her mother's name who is Australian, she put Alison, and within three hours she was called for an interview, for the same identical job ...*⁸⁶

Some academic research does indicate that having an English-sounding name appears to provide job applicants with a discernible advantage.⁸⁷ Arguably, this is a symptom, of unconscious bias as much as conscious discrimination against those of non-English speaking background.⁸⁸

It was also reported that prejudice and discrimination were barriers to people of non-English speaking backgrounds participating in the workplace. Some highlighted that this could take the form of co-workers excluding others: ‘you see your workmates having meetings without informing you’.⁸⁹ Others expressed concerns about discrimination – of a nature not easily identifiable – preventing those from minority backgrounds being promoted in the workplace.⁹⁰ As explained by one participant, reflecting on the experience of the Chinese community:

*... the discrimination towards that community tends to be a little bit more subtle, so all the reports that I get from people or stories I hear [involve] very subtle discrimination. [People] can't even tell whether or not it's actually discrimination, but they get treated very differently ... opportunities are not given to them, but it's something that they can't really prove ...*⁹¹

For some, the problem of racism in employment is symptomatic of particular workplace cultures. One participant referred to the unspoken hierarchies he encountered working in a transport and logistics company, where ‘migrants’ appeared to be excluded from some relatively well-paid jobs and managerial positions in the company.⁹² Another participant, reflecting on their personal experience working in a university, suggested that ‘unspoken rules apply’, such that ‘people of colour ... [are considered] inferior to the dominant majority culture’.⁹³ Moreover, where a cohort of decision-makers or managers in an organisation are drawn predominantly from the same cultural background, there can be ‘discomfort’ in relating to cultural diversity.⁹⁴

Whatever the forces at play, those who say they have experienced racial discrimination at work emphasise its destabilising, even debilitating effect. One social worker of African cultural background reported in the Melbourne consultation that, ‘I’ve changed five jobs, five jobs in eight years, not because I don’t love the job or what I do, but because I just couldn’t put up with discrimination’.⁹⁵ As a participant of Muslim background in Perth noted, ‘when you are discriminated in the workplace, it is very difficult for people to be productive and feel safe and do what the rest are doing’.⁹⁶

Case study

The complainant is of Indian national origin and was employed with the respondent government department. He claimed that co-workers physically assaulted him, called him a 'nigger' and 'curry muncher' and referred to him as a 'monkey'. He also claimed that these colleagues made adverse comments about him taking time off work to care for his wife who was ill. Additionally, he said he was required to perform duties that were inconsistent with medical restrictions arising from a back injury.

On being advised of the complaint the respondents indicated a willingness to participate in conciliation.

The complaint was resolved with an agreement that the department pay the complainant \$32,000 as general damages and write to him apologising for the unacceptable behaviour he experienced. The department also agreed to deliver additional cultural diversity awareness training for all staff and supervisory training for managers. The individual respondents agreed to write to the complainant apologising for the comments and actions which gave rise to the complaint. The complainant remained employed with the department.

4.2 Racial vilification and bigotry

Many participants recalled incidents of racial abuse and harassment in public – for instance, on streets and on public transport. Some community representatives highlighted episodes that were prominently reported in the media, such as violent anti-Semitic attacks in October 2013 and August 2014 in eastern Sydney.⁹⁷ Other participants shared their personal encounters of racial vilification. Some involved exchanges of racial abuse seemingly unprovoked:

I was driving into the drive-thru of KFC and this white Australian guy was driving out. Now, he was driving in my lane, so I just stopped my car and waited for him, and was looking at him. Then he rolled his window down and he said, "You black dog, go back to your country."⁹⁸

Other reported encounters involved racial abuse that occurred as a result of some personal interaction. One participant in Perth, of Aboriginal background, reported being on the receiving end of a racist tirade after confronting another female passenger who had moved to take an unattended bag on a train carriage:

*there was nothing but scathing vitriol, the likes of which I hadn't experienced before ... everything from 'you boong Abo coon, you're nothing but trash' and 'you c*** don't belong here' ...*⁹⁹

Representatives of Muslim and Arab organisations also reported that members of their communities experienced racial and religious vilification with regular frequency – not only in verbal form, but also through offensive letters and pamphlets.¹⁰⁰ Much of this is linked to the issue of terrorism and national security. According to various participants, the raising of the official terror alert in August 2014 has made many Australian Muslims feel a sense of 'us versus them'.¹⁰¹

Such sentiment intensified following the siege in Sydney's Martin Place in December 2014.¹⁰² As one participant of Muslim background reflected: 'I came to Australia two years ago ... after what happened in Martin Place, I get asked, "are you a terrorist?"'¹⁰³ Another participant from Sydney shared that they had been asked, shortly after the Martin Place siege in December 2014, to accompany a young female Muslim colleague on a train journey to a work Christmas function in the city:

*On the train, I noticed the odd hostile look from two passengers sitting opposite us and whispering to themselves. When they alighted at Town Hall station the woman commented in just enough volume to be heard, 'all Muslim women should remove their veils as a sign of respect'. It troubles me that a young Muslim woman feels anxious about her own safety, and that a vast number cannot process for themselves, what actually happened at Martin Place, a criminal action conducted by a deranged person with a gun.*¹⁰⁴

As made clear in this example, the experience of racial vilification – or the apprehension of such an experience – can be an intimidating one. Various participants confirmed that Muslim women, particularly those who wear visibly identifiable religious garb such as a hijab, felt fearful of being abused on public transport.¹⁰⁵

At the same time, such concerns were not confined to any single ethnic or cultural group. One participant of African background in Hobart, for example, spoke about how another person of the same background warned her that she should always sit in the front of the bus just behind the driver where possible, because it was the place in the bus where one would be least likely to be harassed.¹⁰⁶ A community leader in Melbourne also noted that some groups had pulled out of even attending a multicultural festival he had organised because they feared they would risk being abused or targeted if they travelled to the venue by train.¹⁰⁷

Numerous participants also highlighted the damaging social and civic effects of racial vilification. In addition to the harm that it can inflict on a person's wellbeing and sense of freedom, it can also undermine a sense of belonging to the community.¹⁰⁸ For those on the receiving end, the experience of racial abuse can alienate them from Australian society – and feed a sense of disillusion and disempowerment.¹⁰⁹ This accorded with the description of one community leader, who has observed that racial vilification is 'a direct attack on the target's humanity and dignity', which undermines not only their 'basic sense of safety and security' but also the 'good standing' of targets in the broader community.¹¹⁰

Such findings are consistent with the research literature, which has considered and documented the harmful effects of racism. While it is difficult to measure or quantify, sociologists and social psychologists have highlighted the emotional trauma to individuals and communities that experience racial vilification.¹¹¹ A considerable body of research has also identified links between discrimination and health effects including cardiovascular ill health, depression, smoking, diabetes and substance abuse.¹¹²

Case study

The complainant's son is Aboriginal and worked as an apprentice in the respondent's shop. The complainant's son claimed that in referring to Aboriginal people, his boss said "just shoot'em, just shoot the f***ing c***s". The complainant's son left his apprenticeship.

On being advised of the complaint the business agreed to participate in conciliation. The complaint was resolved with an agreement that the business would pay the complainant's son \$5,000 in compensation for hurt and distress, introduce an anti-discrimination policy and undergo Aboriginal cultural awareness training.

4.3 Exclusion, ignorance and power

Racism need not involve overt expression. The potency of racial prejudice may in fact lie in its subtlety and insidiousness. This was something emphasised by younger participants in the consultations. As described by one youth, racism assumed the form of social exclusion rather than outright abuse:

*I find it's really subtle things, like on trains or even at school when I was at high school. It was subtle things like people wouldn't come and talk to me ... or they wouldn't really want to associate with the black kids in the school. But it's more subtle than outright.*¹¹³

Another young participant, of non-Anglo background, responded with a degree of ambivalence when they were asked if they have experienced racial prejudice or discrimination. As this person explained, 'it's kind of hard because it's more ignorant comments'. Namely, they had been the subject of comments that they believed were 'racist', even though they were said without people realising they would be taken in that way:

... with my name I have quite an English [sounding] name, so when I apply for jobs or if I have a doctor's appointment people will call my name and I will, like, say, "Hey", and then they kind of look around me at someone else'.¹¹⁴

Such a reflection highlighted the care with which many participants took before labelling something 'racist'. It is possible that some of this reflects the fraught nature of speaking about racism. Those who identify instances of it frequently feel that they have to justify themselves, or otherwise respond to comments that they have wilfully misunderstood a situation. Yet examples like the one above point out how seemingly benign interactions can put some people ill at ease – without other parties necessarily sensing they have done so.

The contested nature of racism does appear to shape people's interpretation of their experiences. It was reported that there may be confusion from time to time about whether something 'is a bit iffy' or 'genuine racism'.¹¹⁵ One participant asked whether it would be considered an act of racial discrimination if someone were to tell another that they should speak English rather than their native language in public:

One young man was recently arrived to Australia and was speaking in his native language, and was told to stop speaking in that language because, "you are in Australia now, and you should start speaking English". This was new for the young man, and he didn't know what to say or do.¹¹⁶

For many attending the consultations, this would have readily been meaningfully described as racist. Yet there may well be some who would refrain from describing it in such terms – in particular, those for whom the term racism should be reserved only for a belief in racial superiority or for acts of racial violence.

That so many participants raised incidents where they felt unwelcome is itself revealing. The experience of racism is one that is bound up with expressions of social power.¹¹⁷ It can take the form of acts where some may be asserting that others do not belong, or be discerned in attitudes about who is or who is not really a true member of society.

Power also goes to the heart of the systemic or institutional racism, which was identified as a concern in nearly all consultations. Such racism was something identified predominantly in the lack of diversity in public institutions and government. One youth participant in Melbourne noted that, while they saw police regularly on the streets, 'I've never met an African police officer ... it's just white men'.¹¹⁸ It was felt by this participant, and others, that more representative institutions would lead to better understanding of communities' experiences.¹¹⁹

Those of Aboriginal and Torres Strait Islander background articulated this sentiment most strongly. There was agreement among Aboriginal and Torres Strait Islander participants in Perth, Darwin and Brisbane, for example, that systemic or institutional discrimination was the main challenge in combating racism.¹²⁰ Participants claimed this was reflected in the alarming incarceration rates experienced by Aboriginal and Torres Strait Islander people.¹²¹ Some noted that there was a need for a more 'representative' judiciary if courts were to be able to understand racism.¹²² Indeed, this was a lament voiced by many participants, who believed that government decision-making failed to include Aboriginal and Torres Strait Islander people's perspectives:

*... there is often a disillusioned, disrespectful and discriminatory attitude at decision-making levels of all stages of government ...*¹²³

*... there is not enough active effort from leaders to engage with diverse communities. More proactive interaction with Aboriginal people and others would be extremely helpful for leaders to see 'where they are coming from' and address issues in a sensitive manner.*¹²⁴

4.4 Media

The relationship between racism and the media was a consistent theme in consultation discussions.

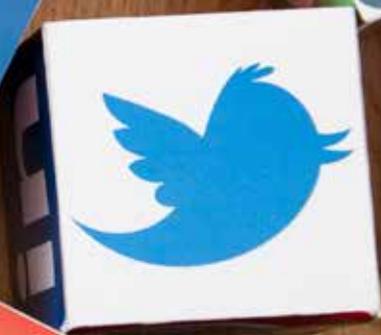
In one respect, media was regarded as a site for the expression of existing racial prejudice. A representative of one Jewish community organisation, for example, highlighted that anti-Semitic sentiments were readily found on social media and in readers' comments on news media websites.¹²⁵ More generally, many participants felt that racial bullying and abuse were being exacerbated by the growth of social media:

*Things have got a lot worse, because people have a platform to air racist views in the comfort of their living room. There is a lack of accountability.*¹²⁶

This underlines how racial hostility can be expressed without the need for direct, physical confrontation. If racial vilification in the past may have required someone to reveal themselves in public to their target, today it does not. Anyone in the possession of a mobile phone or laptop, and with access to an internet connection, can direct racism at someone with the safety of distance and even with the benefit of anonymity. As social scientists Kevin Dunn and Rosalie Atie note, 'a significant number of internet users are at risk of harm as a result of racism' because of internet users who 'are publishing racist content on the internet and broadcasting to a wider audience than was ever possible before'.¹²⁷

At the same time, the internet is regarded as facilitating racism offline. One participant highlighted their organisation had been the subject of physical intimidation by white supremacist groups, which was instigated by online activity (including some linked to groups outside the country):

we had an event last year where people from an extremist forum organised for someone to do a drive past and take photographs of people attending one of our meetings ... we've been targeted by [international websites] ... so what we're seeing is a globalisation of the attacks but with the local people then getting involved and I think that does make people feel unsafe'.¹²⁸



This picture accords with what sociologist Andrew Jakubowicz has identified within 'internet communities' that engage in racist acts:

*Internet communities are constantly forming and dissolving, people interact, stick around, or depart, with some sites stagnating and decaying, while others revitalise or rapidly expand, going viral. The community metaphor helps us understand the process of cyber racism as a continuum. These are communities that seek to traumatise their targets either directly or indirectly, either more or less consciously. Their informal members range from the activist core, which advances the arguments, defends the space, and often advocates off-line action, to the regular attendees who gain sustenance from community membership, to the occasional participants, to the lurkers, and accidental visitors.*¹²⁹

This does not nullify some of the positive aspects of social media and the internet. For example, the 'I'll ride with you' viral campaign, which began shortly following the Sydney Lindt café siege in December 2014, was cited as an instance of social media being used to combat prejudice. Some younger participants were especially heartened by the potential for social media to shift power towards those in marginalised positions in society: 'we definitely have a voice; communities have a voice'.¹³⁰ Indeed, there is research that indicates that people are more likely to respond to racist content online than they would elsewhere.¹³¹

The dominant sentiment across the various consultations was not so sanguine. This was so in light of the perceived tendency for mainstream media to sensationalise matters concerning race and religion. There was a marked concern that sensationalism fed unhelpful stereotypes about certain communities.

Things have got a lot worse, because people have a platform to air racist views in the comfort of their living room. There is a lack of accountability.

– Tasmania consultation, 20 April 2015

One frequently heard complaint was that television and print media outlets focused overwhelmingly on negatives. Many believed this was especially the case with media coverage of Muslims, terrorism and national security:

With the whole terrorism thing, because there are so many, especially Muslims, who are trying to make sure their kids don't end up going to Syria, there are programs out there for them. You never hear that in the news, you just see this Australian kid went to Syria and blew up these people. So they never really show what the communities are helping to do to prevent these kids. Well, they never actually come up with a solution. Rather, they just show [the negatives].¹³²

Another source of concern was the heavy news coverage and commentary on asylum seeker issues. Many participants agreed that this was having a counter-productive effect on racial tolerance. Again, there was a strong view that the balance of coverage on such issues was tilted towards the negative.¹³³

In the experience of one Chinese community advocate, media reporting about Chinese investors in the property market was also beginning to have a negative impact on community relations. According to this view, with increased prominence given to Chinese investors, some stereotypes were beginning to take hold about Chinese people – with little distinction being made between Chinese nationals and Australians of Chinese heritage:

... even for Chinese Australians who've been here for a long time, trying to purchase a property, they're seen as Chinese investors with a lot of money and get ripped off ...¹³⁴

For others, the role of the media in shaping race relations was more systemic. There was concern expressed about a lack of cultural diversity being represented on television screens, in particular. Referring to the overwhelmingly Anglo composition of television presenters, one participant noted 'there is always a particular look on the TV'.¹³⁵ As another participant noted, 'you have the subtle messages and obvious exclusions in our media that create a normative view of what Australia should be'.¹³⁶

... the discrimination towards that community tends to be a little bit more subtle, so all the reports that I get from people or stories I hear [involve] very subtle discrimination. [People] can't even tell whether or not it's actually discrimination, but they get treated very differently ... opportunities are not given to them, but it's something that they can't really prove ...

– Victoria consultations, 10 March 2015

Case study

The complainant advised her husband is Aboriginal. She alleged that a page on the respondent social networking site contained comments and images demeaning to Aboriginal people and she claimed that this amounted to racial hatred.

The social networking site expressed a strong commitment to freedom of speech and expression. However, it indicated a willingness to block access to the specific page in Australia and the complaint was resolved on this basis.

5 The value of the Racial Discrimination Act

There was widely shared recognition among those attending the consultations of the significance of the Racial Discrimination Act, and its impact on racial discrimination.

Many of the perspectives were informed by participants' various historical experiences. Among more mature-aged participants, there was reflection about the changes in Australian society that have occurred as a result of successive waves of immigration since the end of the Second World War.¹³⁷ The Act was regarded by many from this cohort as embodying Australia's transition to an open and multicultural society. As one participant in the Melbourne consultation, born to postwar migrants from the former Yugoslavia, noted of their experiences growing up in the 1960s and 70s:

*I think it's really important for us to remember what the Racial Discrimination Act has created for us and how far we have come in 40 years ... because 45 or 50 years ago, kids at school were being abused, people were [called] wogs, people were [subject to] all sorts of insults and slurs, and new migrants had a really bad time. The Act has enabled us some protection ... we need to appreciate that this legislation has transformed Australia ... it's given us the safety net of being able to challenge anyone who wishes to, through racist behaviour, attack us personally or us collectively.*¹³⁸

More specifically, there was a shared belief among consultation participants that legislation served to set a standard for conduct in society on matters of race. This was articulated in a number of ways, with some subtle variations.

For some, the Act 'has value in assuring communities and individuals that there is recourse for discrimination', and in '[playing] a role in deterrence'.¹³⁹ The Act was vital in 'creating a sense of empowerment [and] hope'.¹⁴⁰ Others emphasised that the value of the Act lies partly in its mere existence: 'the fact that we have Racial Discrimination Act communicates that if you want to discriminate, then you are on the other side of the majority'.¹⁴¹

However, such sentiments should not be taken to mean that the value of legislative protections against racial discrimination was regarded as purely or primarily symbolic. It is not the case that participants felt that the legislation does its work all on its own. Many participants highlighted their experiences in actively utilising the Act in responding to instances of discrimination or vilification.

The instrumental uses of the legislation can be categorised in a number of ways.

First, the legislation provides a mechanism for making and resolving complaints about racial discrimination. The consultations highlighted that many communities and organisations have used the Act to lodge complaints – or are at least aware of the complaints process.¹⁴² In recent years, as highlighted above, the majority of complaints under the Act have been successfully conciliated by the Commission. The outcomes of many such conciliations include actions that will have benefits for people beyond the individual complainant.¹⁴³

The positive value of the Act is not confined, though, to successfully resolved complaints; a complainant may benefit even when a conciliation fails to deliver a mutually agreed outcome.¹⁴⁴ For example, one community organisation in Sydney mentioned their experience in lodging a complaint against a broadcaster for offensive language directed at their members. While the community organisation failed to receive the apology it had sought from the broadcaster, it nonetheless felt that the complaint had a demonstrably educative effect on the respondent broadcaster. The broadcaster, it was noted, never repeated the use of racially offensive language – and it was felt that the experience of having to attend a conciliation made a significant contribution.¹⁴⁵

Second, where conciliation does fail, complaints may also pursue suits claims of discrimination in court.¹⁴⁶ This has been the means through which the Act has vindicated some individuals and communities that have experienced discrimination or vilification.

Finally, there is the use of the Act as a tool of advocacy and a tool of education. One participant in Sydney highlighted how the Greek community had invoked section 18C of the legislation – which prohibits racial vilification – in making representations about a prospective visit to Australia from a member of the far-right wing Golden Dawn political party in Greece.¹⁴⁷ In that case, the Act was used to support the community's view that an extremist politician should not be allowed into the country to promote hate speech. Such an example illustrates how invoking the Act can have the effect of putting people on notice that they may be held to account for any unlawful conduct.¹⁴⁸

Here, we again see the educative quality so crucial to the Act's effectiveness – a point which many participants reiterated. In general, participants regarded conciliation as an effective means of responding to discrimination. Staff from the Department of Education in Tasmania, in particular, reported positive experiences in getting students to use a complaints process under anti-discrimination law (including state legislation):

*[Conciliation] has been brilliant in assisting our students ... [it] often leads to perpetrators confronting their victims and showing remorse for what they are doing.*¹⁴⁹

Some also believed that giving criminal force to the Act may mean 'higher levels of accountability'.¹⁵⁰ The current form of the Act, as highlighted earlier, means that it is not possible for anyone to be held criminally liable for acts of discrimination or vilification. Calls for 'higher levels of accountability' were tempered, though, by a recognition of the potential difficulties of achieving criminal prosecutions. Such difficulties have arguably been demonstrated by the operation of various state criminal provisions concerning serious acts of racial vilification – the most notable recent example being the failure to bring forward a prosecution under the NSW Anti-Discrimination Act in response to a call from a Hizb-ut Tahrir preacher calling for racial violence against Jews.¹⁵¹

6 Community awareness and utilisation of the Act

It is not always the case that the Act is used by those who experience racism. While many community organisations, particularly representative ones, were familiar with using the Act, this was not by any means universal. Many of those who experience racism often do not know to whom they should complain, and do not know what can be done about it.¹⁵²

While recent debates about the proposed repeal of section 18C appear to have increased public awareness of the Act, there are nonetheless some sections of the Australian community that are not familiar with the legislation. This was captured by the reflections of one participant in Melbourne, who has worked for more than a decade as a community worker, predominantly with multicultural youth:

*Until today, I'd never heard of this legislation ... through the communities in all the years ... I've been working in the community, not heard of it. People I talk to don't mention it; we've not come across it. And you know, being introduced to it today, I'm, like, oh my gosh, this is amazing. I can't believe it's actually legislation ...*¹⁵³

For understandable reasons, many newly arrived migrants may not know about their rights to be free from racial discrimination. Yet it also appears that younger people may have a particularly low awareness of the Act. This may reflect a relative absence of discrimination law within school curricula – and indeed of matters concerning race, multiculturalism and human rights more generally.

As noted by some community workers, the protection against discrimination provided by the Act is not fully realised when there is a lack of awareness of these protections. One consequence is that episodes of racism simply go unreported by those who experience it. For some of those on the receiving end of racism, it is felt that there is very little that others can do to help. One participant who worked with refugee clients noted that people 'come to accept racism as part of life', and regard it as something that cannot be definitely dealt with by legislation.¹⁵⁴

Even so, under-reporting of racism – and the under-utilisation of the Act – occurs because of numerous reasons. Fear, of various kinds, can inhibit the reporting of racial discrimination to the Commission and other authorities. For example, it was reported that many migrants are reluctant to make complaints because they feared repercussions or retaliation from respondents.

The act of making a complaint about racial discrimination does require wherewithal. One participant in the Adelaide consultation, for example, reflected that he was reluctant to report a manager who said he would never employ an African because he knew his other managers ‘wouldn’t like it’.¹⁵⁵

If there may be a reluctance to use the protections provided by the law, it may have something to do with the relative power that targets of racism may possess. One participant noted that, ‘the majority of people [who experience racism] are traumatised, so how are they going to talk back?’ As another participant observed, ‘fighting racism is a tough task’.¹⁵⁶ Making a complaint about an act of discrimination or vilification requires someone to be prepared to put something in writing, attend a conciliation (assuming the respondent agrees to turn up), and then to revisit what is often a deeply unpleasant and painful experience.

The task is made even harder in some cases by the historical experiences of some groups. The experience of some migrants with governments in their homelands may contribute to a higher level of distrust of public authorities in Australia. This was compounded in some cases by experiences and perceptions of discrimination by authorities, including police. It should be noted that this latter point was raised by numerous participants of Aboriginal and Torres Strait Islander background.

Then there are the possible economic barriers to using the law. Many of those who experience discrimination come from lower socio-economic backgrounds and, while there is no direct cost associated with making a complaint, economic considerations may be an important factor for some people. Pursuing a complaint may involve indirect costs such as requiring time off work to attend conciliation – something that is not always easy to obtain. If a matter proceeds to court, parties must bear their own costs, something that people may consider when they weigh up whether to lodge a complaint in the first place.

7 Systemic impact and operation of the legislation

The public consultations, along with the academic conference held in February 2015, raised some important questions about the systemic impact and operation of the Racial Discrimination Act.

Measuring the effectiveness of legislative prohibitions on racial discrimination and vilification is an admittedly complex task. It is notoriously difficult to establish cause and effect between the introduction of legislation and change in social conduct.¹⁵⁷ This is made more complicated by the very nature of legislation such as the Racial Discrimination Act. As noted above, part of the Act's importance lies in setting an aspirational standard for attitudes and conduct – and giving expression to certain social values.¹⁵⁸

It is helpful to distinguish between the different respects in which the Racial Discrimination Act operates to counter prejudice and discrimination. While the Act in a fundamental sense provides a mechanism for people to seek a remedy against discrimination – through conciliation and litigation that can take place under the legislation – its functions are not confined to that. It also plays an important role in providing an institutional architecture for advocacy, research and education about racial discrimination. These are explicitly provided for in the functions attached to the office of the Race Discrimination Commissioner (and the Commission).

7.1 Advocacy and education

It was clear from the consultations that the Commissioner and the Commission were regarded as playing a significant role in facilitating understanding of racism and promoting community harmony.

One participant noted, for example, that the consultation was a safe environment for her to voice concerns: 'In this room, it is nice to feel safe to talk about experiences of racism.' She commented that people have on occasions dismissed her view: 'it is often seen as subjective or personal opinion rather than factual and actual discrimination'.¹⁵⁹

Clearly, for some, the value of having an office of the Race Discrimination Commissioner lies in its role in bearing witness to experiences of racial discrimination – experiences that may not always be understood by society, and that are frequently ignored or dismissed by those who do not experience it.

There was also a leadership role in advocacy that was associated with the Act. Leadership of the Commissioner as a statutory officer, in the words of one participant, was ‘very valuable’ for communities.¹⁶⁰ Various participants in the consultations observed the Commissioner’s role in defending and explaining the importance of the Act in recent debates about section 18C.

This advocacy role was understood to be one not narrowly confined to race, but also to extend to broader issues of social cohesion and community harmony.¹⁶¹ This was apparent in many of the consultation discussions on issues concerning Muslim communities and national security. While religion is not something covered by the Racial Discrimination Act – an issue that will be considered in further detail on Section 10 below – there was an evident belief among communities that the Commissioner had a role to play, as there were often racial dimensions.¹⁶²

In addition, some participants emphasised a need to ‘promote a positive conversation’.¹⁶³ The role of the legislation should be framed, that is, by an aspiration for social cohesion and equality.

Many communities felt, however, that it was vitally important that such leadership also come from other sources. Numerous participants noted that having political leaders sending a strong message on racism would help to support the messages coming from the Commission. There was a commonly voiced concern that the current political environment was focussed on ‘fear’. Perhaps related to this, it was also observed that ‘the media can be unhelpful and cancel out most of the good work that [the Commission] is doing’.¹⁶⁴

Closely associated with advocacy was education and research. A participant from the consultation in Sydney stated that the research produced by the Commission is authoritative and it should publicise the research which is being done in the area.¹⁶⁵ It was broadly recognised that the presence of legislation alone could never be sufficient in combating racism: ‘An Act of Parliament can only do so much’, though ‘it is better that it is there than not there’, as one participant observed.¹⁶⁶ The only means of achieving improvement would be through education.

Many participants believed that the advocacy and educative roles of the Commissioner and Commission could be more expansive. There was appetite for more frequent consultations and forums to be convened by the Commission across the country. It was believed that there was scope for more work to be done in educating communities about the Act and how people could use the law.¹⁶⁷

This was particularly so with respect to young people. According to one representative from a youth organisation, ‘young people commonly identify racism and discrimination as the most important issue impacting upon their lives, with implicit and explicit experiences of racism and discrimination being pervasive’.¹⁶⁸ This view was supported by many youth participants in the consultations.

There was some indication that schools would be better trained to deal with conversations about racism:

*There is a lot of resistance from schools. This is possibly due to fear from principals who think they may be seen as racist, whereas we want to get the work in so that they can be pro-active.*¹⁶⁹

Some participants believed there should be compulsory teaching about anti-discrimination law in schools. Some suggested, in addition, that the work of education needed to start, in early childhood, with the Commission possibly focusing attention on childcare employees and parents.¹⁷⁰

Educational efforts might also need to be targeted at newly arrived migrants and refugees. According to some settlement service providers, racism was a daily lived experience for many of their clients.¹⁷¹ As noted above, members of emerging communities may not necessarily be aware that racial discrimination is prohibited by law. There were numerous suggestions that there should be community information sessions to disseminate information about the Act, including in non-English languages.¹⁷²

Yet others emphasised that the educational task needed to be directed simultaneously at the general community. As put by one participant, 'if this Act was more public, people would think about the consequences [of their conduct]'.¹⁷³ While there was recognition of initiatives such as the 'Racism. It Stops with Me' campaign, many believed education in the area required further support or deepening. In addition to schools, the public service was nominated by some as being a possible area of focus for the campaign.¹⁷⁴

Others, though, highlighted the need for proper resourcing for the Commission if it were to be effective in its role. It was evident that many participants perceived the Commission to be more handsomely resourced than it is. Particularly given the Commission's national role, it was assumed that the organisation had a national presence with an ability to do extensive grassroots education.¹⁷⁵ For some with long familiarity with the Commission, this may be a product of having worked with the state offices that existed under the previous Human Rights and Equal Opportunity Commission.

7.2 Investigation, conciliation and litigation

The public consultations revealed a mix of sentiments from the community concerning the handling of complaints, litigation in the courts and the overall enforceability of the Act.

In the first place, there appeared to be a degree of confusion about the precise roles of the Commission and the Race Discrimination Commissioner. For example, it is commonly assumed that the Commissioner played some role in handling complaints or in initiating legal action against infringements of the Act. There is also a perception that the Commission made legal determinations about the Act. As noted above, the Commission does not have the power to make legal determinations; the Race Discrimination Commissioner also does not have a function to investigate or resolve complaints about racial discrimination or vilification.

[Conciliation] has been brilliant in assisting our students ... [it] often leads to perpetrators confronting their victims and showing remorse for what they are doing.

– Tasmania consultation, 20 April 2015

Some of this misunderstanding may reflect history. Until about 1995, the Human Rights and Equal Opportunity Commission (the forerunner to the Commission) did have a function in convening hearings.¹⁷⁶ A more general explanation may be that there is limited public understanding or familiarity with the machinery of the Commission and federal human rights legislation. It is worth noting, for example, that some quarters of the national media presume that the Commission plays some role as a ‘judge’ or tribunal in administering the Act.¹⁷⁷

Second, even among those who are familiar with the complaints process, there was a degree of ambivalence about whether lodging complaints was the most effective way of holding perpetrators of racial discrimination and vilification to account.¹⁷⁸ While the Commission’s complaints process does not involve costs to parties, it does require a complaint to be made in writing and for a complainant to be prepared to attend a conciliation.¹⁷⁹ As noted in Section 8 above, this can present some obstacles for complaints from vulnerable or marginalised backgrounds. Some participants observed that funding cuts to legal aid services appear to be impacting people’s ability to exercise their rights under anti-discrimination law.¹⁸⁰

Some consultation participants also believed that the process can often lead to people feeling more distressed about their experience of discrimination – partly because it can compound fears that complaints may attract retribution from respondents.¹⁸¹ Others noted that the complaint process presumes a certain level of legal sophistication: various participants suggested that young people and people from non-English speaking backgrounds are less likely to pursue a complaint with the Commission because they are uncomfortable with the legal formality implied.¹⁸² In the case of some Aboriginal and Torres Strait Islander participants, particularly in the Northern Territory, it was observed that the ‘woeful’ use of interpreters meant that complaints were unlikely to be lodged because people felt the process was ‘fundamentally racist’.¹⁸³

Such responses provide an interesting juxtaposition with those from others who have used the Commission’s complaints process or made complaints using state legislation (see section 7 above). Evaluation of those who use the complaints process reveals a high level of satisfaction: in 2013-2014, 97 per cent of those who completed the Commission’s service feedback survey, reported that they were satisfied with the service provided and 77 per cent rated the service they received as ‘very good’ or ‘excellent’. In relation to complaints under the Act that were conciliated, 100 per cent of those who completed the survey reported that they were satisfied with the service and 76 per cent rated the service as ‘very good’ or ‘excellent’.¹⁸⁴

It is to some extent unclear whether this reveals a gap between the experience of those who have used the Act and those who have not. However, the critical views expressed about the accessibility of the complaints process highlight a possible shortcoming of the legislation’s current operation. For many participants, the mechanisms for ensuring compliance with the Act remain limited. As a staff member of a community migrant resource centre in Sydney observed, even clients aware of their rights under the Act often do not make a complaint as they think, ‘What are they [AHRC] going to do about it?’¹⁸⁵

This may also be borne out by the relatively low numbers of cases litigated under the Act. While on one hand, this can be interpreted as part of the success of the Act's operation – the successful resolution of most complaints through conciliation – it may also be interpreted as reflecting a limited level of enforceability.¹⁸⁶ Some lawyers who participated in the consultations noted the difficulty in satisfying the legal and evidentiary requirements of pursuing matters in the Federal Court stage.¹⁸⁷ Litigation in the federal courts is often seen as too risky, stressful and unlikely to be provide an attractive remedy for those who have experienced discrimination.¹⁸⁸ Participants in more than one consultation observed that the judiciary lacks cultural diversity, implying that some may be more reluctant to pursue litigation because they believe courts may lack the insight to understand racism and its nuances.¹⁸⁹

Among some quarters, there was a belief that the roles of the Commission and Race Discrimination Commissioner were too limited. As one consultation participant in Perth put it, 'the Act itself is more of a defensive mechanism. It protects people against ... attacks [but] it needs to be more on the offence.'¹⁹⁰ Another participant in Brisbane noted that, 'relying on community members to make a complaint is a problem'.¹⁹¹

Indeed, some expressed frustration that the Commission's functions did not include standing to bring an action on its own initiative and the enforcement of compliance with the Act's prohibitions on discrimination. The operation of the Act and the *Australian Human Rights Commission Act 1986* (Cth) provides only for a complaint to be lodged by or on behalf of an aggrieved party.¹⁹² The Commission does not have the power either to initiate a complaint or proceedings in court on behalf of a party that has experienced racial discrimination (though it may apply to intervene as an *amicus curiae* in legal proceedings).¹⁹³

Within some international jurisdictions equivalent bodies to the Commission have greater scope to institute legal action. For example, the *Race Relations Act 1976* in the United Kingdom provides the Commission for Equality and Human Rights with broad powers to conduct an investigation into a suspected breach of the Act.¹⁹⁴ The UK Commission may then issue an ‘unlawful act notice’, compelling a recipient to specify how future acts of discrimination will be avoided. Such powers do not need to be enlivened by a complaint. Indeed, on certain matters, such as discriminatory advertising or instructions or pressure to discriminate, the UK Commission has sole responsibility to bring complaints before a relevant court or tribunal. The UK Commission also has powers to enforce certain positive duties placed on public bodies.¹⁹⁵

As observed in a 2008 report from the Commission, it is one of the ‘most notable differences’ between the Australian human rights regime and that of other jurisdictions, that the Commission ‘does not have standing to bring an action for discrimination on its own initiative’:

*This capacity ... to instigate complaints may be a valuable tool for combating systemic discrimination, establishing legal precedent through test cases and responding to situations where no individual has standing, or where the persons affected lack the resources and initiative to make a complaint on their own behalf. For these reasons, recent reviews of both the Canadian and British legislation have strongly recommended that it be retained. At the same time, the Canadian experience demonstrates that it is important that this power should be consistent with the other roles of the Commission, particularly where the Commission is involved in the adjudication of disputes. Since the adjudicative role of the Australian Commission has, for constitutional reasons, significantly declined in the years since the RDA was originally passed, this could potentially allow scope for the Commission to adopt a larger advocacy role, with greater power to investigate systemic issues and instigate legal action.*¹⁹⁶

8 Race and religion

Discrimination and vilification directed at Muslim Australians was consistently raised as significant concerns in the consultations. Many participants labelled anti-Muslim discrimination a daily or regular occurrence, particularly following the Sydney Lindt café siege in December 2014 and heightened concerns about national security.¹⁹⁷

The level of anti-Muslim sentiment in Australia is highlighted by the Scanlon Foundation's 2014 Mapping Social Cohesion report, which indicated that 25 per cent of respondents self-report as having 'somewhat negative' or 'very negative' attitudes towards Muslims (compared to 4.3 per cent of respondents who had negative attitudes towards Christians).¹⁹⁸ Other research suggests that this number may be as high as 50 per cent.¹⁹⁹

As with discrimination experienced by other groups, the hostile treatment towards Muslim Australians has had demonstrable negative effects, impinging upon the exercise of their freedoms. For example, a participant in Darwin stated that anti-Muslim abuse had led Muslim women to 'change where they shop, how they shop, their participation in public life...'.²⁰⁰ At the Melbourne consultation, one participant reported that a group of Muslim musicians cancelled a public music performance due to fear they would be attacked or abused on public transport on their way to the event.²⁰¹

Restrictions on participation in public activities are not just self-imposed, nor are the effects of anti-Muslim feeling limited to Muslim Australians. For example, it was reported by members of one community in Queensland that anti-Muslim sentiment led a local council to refuse to grant a permit for a multicultural event to be held in a local park because there 'had been issues in the past with a Muslim youth group hosting events at these grounds' (even though the event in question did not involve a Muslim community organisation).²⁰² Similarly, a participant in the Melbourne consultation noted the impact of anti-Muslim attitudes on non-Muslim Australians, such as Christian Arabs or Sikhs, who are abused on account of being mistaken to be followers of the Muslim faith.²⁰³

The causes of such anti-Muslim feeling were generally identified by consultation participants as political – namely, they have reflected national political debates focused on the threat of terrorism to national security.²⁰⁴ Related to this, there was concern about how inflammatory media reporting and commentary on such issues can impact upon the quality of life experienced by Muslim Australians. Such observations echo the findings of the Commission’s ‘Isma – Listen’ consultations on eliminating prejudice against Arab and Muslim Australians (2003), which found increased racial and religious intolerance following 11 September 2001 and the Bali bombings of October 2002.²⁰⁵

There was some scepticism about the relevance of the Act, however, in protecting Muslim Australians. One participant in Melbourne, for example, said that racial discrimination legislation was ineffective in protecting against anti-Muslim abuse because perpetrators would simply claim, ‘I’m not a racist; Islam is not a race’.²⁰⁶ One participant in the Sydney consultation criticised the absence of religion as a protected attribute in the Act, arguing that this represented a ‘big deficiency’ in the Act’s scope.²⁰⁷

For many Muslim Australians, there was little distinction to be drawn between religious discrimination and racial discrimination. Being on the receiving end of anti-Muslim sentiment was often described in terms of racism.²⁰⁸

This reflects how many Muslim Australians regard anti-Muslim sentiment as an expression of ‘cultural racism’. Some contemporary expressions of racism have been based upon beliefs that particular cultures are incompatible with a national identity or way of life; beliefs which draw on racialised tropes and stereotypes.²⁰⁹ For example, in some media commentary about Muslims in Australia, there is very little distinction drawn between ‘Islamic’, ‘Middle Eastern’ or ‘Arabic’ – little distinction between religion, race, ethnicity and culture.²¹⁰

It is not surprising that Muslim Australians would take such a view, when certain stereotypes about Muslims are aired or perpetuated in public discourse: for example, that Muslim women are oppressed, that Muslims are terrorists or terrorist sympathisers, and that Muslims are intent on establishing Sharia law in Australia.²¹¹ Within the rehearsal of such stereotypes, some believe that anyone who looks like a Muslim will be a bearer of a certain culture – a presumption that does not, for instance, distinguish between a Lebanese-Australian Muslim or an Egyptian-Australian Coptic Christian or an Iranian-Australian Ba’hai.

It is also true that the ability of the Act to protect Muslim Australians against discrimination or vilification is limited – at least, based on the interpretation of the law to date. As mentioned in Section 5 above, the Act covers discrimination and vilification only on the basis of race, colour, ethnic or national origin, descent, and immigrant status. Religious identity is not an attribute that is dealt with by the Act. Complaints about racial discrimination made by Muslim Australians will not be accepted by the Commission unless there is some racial or ethnic element to the complaint.²¹² There have been no cases which identify Muslims as an ‘ethnic group’ for the purposes of the Act.

There are examples in existing case law in which a religious group has been regarded as being covered by the Act where the group can establish a common ‘ethnic origin’.²¹³ In *Macabenta*, the Court stated that the following questions are relevant when considering ‘ethnic origin’:

*Is there a long shared history?, is there either a common geographical origin or descent?, is there a common language?, is there a common literature?, is there a common religion or a depressed minority? One can easily appreciate that the question of ethnic origin is a matter to be resolved by those types of factual assessments.*²¹⁴

Based on this understanding, the Federal Court has accepted that Jewish Australians have a common ‘ethnic origin’ and can thus be owed protection under the Act.²¹⁵ The Court has indicated that Jewish people constitute an ethnic group on account of their shared customs, beliefs, traditions and characteristics derived from a common history and identity.²¹⁶

However, the Federal Court has not directly considered whether other religious groups – including Muslims – fall within the scope of the Act. Some commentators, including barrister Kate Eastman SC, have argued that a person’s religious affiliation ‘may be a marker of his or her ethnic origin’. According to Eastman, ‘if asked, the Federal Court may find that a Sikh, Muslim or member of another minority religious community has an ‘ethnic origin’ for the purpose of the RDA’.²¹⁷

The experience in other common law jurisdictions has been different.²¹⁸ The court in the UK, for example, has held that Muslim Britons do not represent an ethnic group due to the absence of a common language, nationality or colour.²¹⁹ Similarly, in the NSW case *Khan v Commissioner, Department of Corrective Services and Anor*²²⁰ the Administrative Decisions Tribunal held that a Muslim complainant could not obtain protection under the *Anti-Discrimination Act 1977* (NSW):

*There are Muslims in every continent and of many different racial and ethnic backgrounds. It is common knowledge for example that there are South Asian, South-East Asian, African, Middle-eastern and European communities of Muslims. Many African-Americans, most famously Muhammad Ali, are Muslims, and that while Muslims are all adherents to Islam, they do not share common racial, national or ethnic origins.*²²¹

As noted, there has been no case law to indicate that Muslim Australians would be protected under the Act for acts relating to their Muslim identity (as distinct from race, colour, ethnicity or national origin). The approach that the Commission takes to complaints that it receives is that it is insufficient for the complainant merely to assert unfair treatment on the basis of their Muslim faith to fall within the definition of 'ethnic origin' under the Act. But if the complainant can show that he or she is part of a group with a sufficient combination of shared customs, traditions and beliefs derived from a shared history, this may be sufficient for them to constitute an ethnic group.²²²

Until the Federal Court considers the issue, it is unclear whether anti-Muslim discrimination or vilification would be covered by the Act. Those who experience discrimination because of their Muslim identity may need to find other legal avenues through which to obtain redress.

Table: Protections for religious discrimination in Australia

	In all areas of public life	Vilification	Only in Employment	Religious appearance or dress
Commonwealth	✗	✗	✓*	✗
New south Wales	✗	✗	✗	✗
Queensland	✓	✓	✗	✗
Victoria	✓	✓	✗	✗
Tasmania	✓	✓	✗	✗
Northern Territory	✓	✗	✗	✗
South Australia	✗	✗	✗	✓**
Western Australia	✓	✗	✗	✗

* the Commission can investigate and conciliate complaints of religious discrimination in employment but the parties do not have access to the Federal Court should the matter not be resolved at the Commission.

** only in circumstances in work and study.

9 Institutional racism and Aboriginal and Torres Strait Islander peoples

As noted above, the various public consultations highlighted the systemic nature of racial discrimination: racism was something not only experienced through contact between people, but also between people and institutions.

This was most pronounced, though, among Aboriginal and Torres Strait Islander participants. One participant articulated this in the following way: ‘our systems are Anglo-designed’.²²³ The suggestion, one echoed by Aboriginal and Torres Strait Islander participants in other consultations, was that racism takes the forms of cultural assumptions, which condition social practices to which others must conform.²²⁴

This experience of institutional racism was frequently articulated in general or abstract terms, reflecting the often elusive character of institutional racism. As one participant said, ‘racism is framed in the Australian collective imagination’ and has a ‘structural, political, cultural and economic’ character.²²⁵ This participant believed that this was frequently overlooked, with public discourse focussing mainly on individual acts of racism.²²⁶

There were a number of settings identified by the consultations as being of special concern, including employment and education. These findings match those of other studies, where employment and education have featured among the five most common settings for Aboriginal and Torres Strait Islander people to experience discrimination (the others being shops, public spaces and sport).²²⁷

In the employment setting, it was reported that racial discrimination remained a persistent but hidden phenomenon. It was reported that being readily identifiable as Aboriginal and Torres Strait Islander peoples had led to problems in securing employment. Some highlighted that work programs in some remote communities saw Aboriginal and Torres Strait Islander workers being underpaid compared to non-Indigenous workers.²²⁸ Others noted the need for more targeted recruitment of Aboriginal and Torres Strait Islander people in ‘mainstream’ roles. This appeared to refer to two things: the low levels of Aboriginal and Torres Strait Islander representation in general employment; and a perception that Aboriginal and Torres Strait Islander employees may be concentrated within some organisations in areas dedicated to the advancement of Aboriginal and Torres Strait Islander people.²²⁹

In 2012-2013, it was reported that the proportion of Aboriginal and Torres Strait Islander adults who received income from employment was 41 per cent and almost two-thirds of employed Aboriginal and Torres Strait Islander people were in full time employment (65 per cent). While the proportion of Aboriginal and Torres Strait Islander people employed full time has increased from 54.5 per cent in 2002 it is still less than the proportion of non-Indigenous Australians who are employed (69.6 per cent).²³⁰

There were frequent references to racism occurring to Aboriginal and Torres Strait Islander people in schools. In the words of one participant, their experience in school involved 'the most immediate prejudice I've encountered in my life'.²³¹ Many Aboriginal and Torres Strait Islander participants highlighted the ongoing experiences of their children, who they felt were subject to discrimination by other children as well as teachers. As captured by one participant in Perth:

*I saw my son go through the same thing, my daughters. And no doubt I look into the eyes of my beautiful grandchildren and I see a grandson who is going to face the same type of racism ...*²³²

Case study

The complaint was lodged by a father on behalf of his two sons who are 7 and 8 years of age. The complainant claimed that his sons were being bullied at the respondent government school because of their Aboriginality. He said that the bullies were not disciplined but when his sons retaliated, they were punished. The complainant claimed that the school Principal had not handled the matter appropriately.

On being notified of the complaint, the school indicated a willingness to try to resolve the matter. The complaint resolved through a conciliation process with an agreement that the school would carry out an assessment of the support needs of Aboriginal students at the school and develop options to meet those needs. The school also agreed to appoint an Aboriginal Community Education Counsellor and arrange further cultural awareness training for staff.

... there is often a disillusioned, disrespectful and discriminatory attitude at decision-making levels of all stages of government ...

– Northern Territory consultation, 27 April 2015

This participant continued to note the connections between such experiences in childhood and the systemic disadvantages faced by Aboriginal and Torres Strait Islander people:

*When we've got the sort of death rates that we have and the mental health issues, it all stems from a form of racism, that only Aboriginal people, only Indigenous people themselves can understand, because it's not only institutionalised racism, it's bold, it's graphic, it's personalised ...*²³³

Such reflection highlighted the socialisation that many Aboriginal and Torres Strait Islander people have, one in which racism becomes a part of the background of their interactions. There is what some scholars have called 'internalised racism', where individuals who experience racism incorporate into their worldview assumptions that support the unequal distribution of power between racial, ethnic or cultural groups.²³⁴ Such an internalisation of racism – perhaps in the form of expectations and stereotypes – was identified by one participant in Darwin:

*I work with the Department for Children and I go out to communities. Out there, discrimination is almost the norm. It's like people don't even know they're being discriminated against until you tell them.*²³⁵

Internalised racism was not distinct from institutional racism, though – it was intimately connected to it. For many participants, it concerned how government decision-making towards Aboriginal and Torres Strait Islander people involved a systemic form of discrimination. It was considered a distinct form of racism that government decisions were being made with very little or no consultation with Aboriginal communities – and often by people of non-Aboriginal backgrounds.²³⁶ The experience of the Northern Territory Intervention was frequently cited as an example, not only of institutional racism but also how such racism may have been beyond the reach of legislative protection:

*I think the systemic discrimination is there constantly, in the sense that the 'solutions' that are imposed on communities for problems that are identified are not coming from the community themselves. They're coming from a bureaucrat somewhere ... that's a whole systemic problem that I think the Act doesn't address ... if something like the Intervention can happen, what hope is there?*²³⁷

*Your office should talk to the government that all decisions that are made should be on the basis of the various cultures that are in this country. At the moment they are [made] on the values of just one type of people and that in itself is discriminatory.*²³⁸

The suspension of the Act during the NT Intervention unequivocally highlighted the vulnerability of the Act, but also a sense that Aboriginal and Torres Strait Islander people were particularly susceptible to losing out from such vulnerability. As one Aboriginal participant noted, while the Act has been suspended on three occasions, each time it has involved Aboriginal issues (namely, in relation to the *Native Title Act 1993* (Cth), the Hindmarsh Island Bridge and the NT Intervention).²³⁹

This contingent nature of the legislation reflects the absence of constitutional protections against discrimination. The Constitution currently contains two provisions which, in fact, allow racial discrimination. Section 25 of the Constitution contemplates the states may deny people the vote in state elections on the basis of their race, while section 51 (xxvi) empowers the Commonwealth Parliament to pass laws with respect to ‘the people of any race, for whom it is deemed necessary to make special laws’ – regardless of whether it is for their benefit or detriment.²⁴⁰

If there is a systemic, institutional dimension to racial discrimination – as evidently there is towards Aboriginal and Torres Strait Islander people – one place to begin may be with Australia’s Constitution. As one Aboriginal and Torres Strait Islander advocate in Adelaide stated, Constitutional recognition of Aboriginal and Torres Strait Islander people would be an important step towards non-discrimination of Australia’s first peoples and perhaps provide some explicit protections against racial discrimination.²⁴¹

10 Conclusions and future work

This year's activities marking the 40th anniversary of the Act have aimed to raise public understanding of the legislation, as well as provide some insights into individual and community experiences of racial discrimination.

10.1 Conclusions

It was clear from the public consultations that many Australians continue to experience racial discrimination, which diminishes their freedom and quality of life. Many of those who experience racism regard the Act as valuable legislation: it is an instrument for seeking redress, it is used as a tool for advocacy, and it helps set a standard for conduct in society. The value of the Act was not confined to the complaints process but also extended to the educational, advocacy and research functions performed by the Race Discrimination Commissioner and the Commission. In these respects, the systemic impact of the Act is multi-faceted.

The public consultations revealed a number of other points that warrant further consideration.

10.1.1 The lived experience of racism

Those who have been on the receiving end of racial prejudice and discrimination can experience a sense of trauma. While some may enjoy support from networks of family, friends and colleagues, it is clear that some others may not.

The consultations demonstrated, among other things, the importance of bearing witness to the lived experience of racism and to give voice to such experiences. Some of the public consultations had an ostensibly empowering effect for participants: it encouraged some to gain confidence in speaking about their individual or community experiences and it helped some to find that their experience was not aberrant. This seems to be the case particularly for members of some newly arrived communities or those communities who may be relatively isolated or marginalised.

10.1.2 Public awareness and understanding of the Act

While there is strong support for the Act's protections against racial discrimination and vilification, there appears to be some variable awareness and understanding of its provisions. The high level of technical familiarity with the Act possessed by many community organisations, particularly representative ones, was by no means universal. Based on the views expressed at various public consultations, there may be a lower level of knowledge about the Act especially among newly arrived immigrant groups and among young people.

This has some bearing upon the reporting of racism. A lack of understanding about the investigation and conciliation process under the Act may contribute to people being unlikely to lodge complaints about racial discrimination. Confusion about statutory functions may also contribute to misplaced expectations about the kind of actions the Race Discrimination Commissioner and the Commission can take in responding to racism.

10.1.3 The locations of prejudice and discrimination

The experience of racial discrimination and vilification is varied, but appears concentrated in a number of social settings, including employment and the workplace, public spaces and the media. The lived experience of racism, however, is tied to a sense of exclusion and subjection to social power. While much public discussion of racism focuses on highly visible expressions, it was clear that the subtlety of racism is something many people feel is poorly understood – especially by those who may never have been marginalised by racial prejudice.

One realm where there may be particular room for improvement is that of media. In addition to the emergent phenomenon of cyber racism, it was a frequent complaint that reporting and commentary from television and print media outlets has contributed to a possible deterioration in social cohesion and community harmony.

10.1.4 The relationship between race, culture and religion

As noted, many participants in the public consultations observed a rise in anti-Muslim sentiments, reflecting increased public attention on terrorism and national security. For many Muslim Australians, such sentiment seems to be regarded as an expression of ‘cultural racism’, in which there is an unacknowledged conflation of race, culture and religion. In its current form, the Act covers discrimination and vilification only on the basis of race, colour, ethnic or national origin, descent and immigration status.

To date, there has been no case law to establish that a Muslim identity can be regarded as relating to a common ‘ethnic origin’ under the Act (although the Federal Court has accepted that a Jewish identity involves a common ‘ethnic origin’, and Australian anti-discrimination law has also recognised that a Sikh identity may involve an ethno-religious identity).

It is beyond the scope of this report to make recommendations into the question of legislative protections against ethno-religious or religious vilification, given the limited scope of the consultations conducted (see section 4.1). However, the public consultations – and indeed, the RDA@40 conference held in February – indicated community concerns about the current adequacy of protections enjoyed by Muslim Australians against discrimination and vilification.

10.1.5 Institutional discrimination against Aboriginal and Torres Strait Islander people

The experience of institutional discrimination by Aboriginal and Torres Strait Islander people was prominently reported within the public consultations – particularly in the realms of employment, education and government. The suspension of the Act during the NT Intervention highlighted the vulnerability of legislative protections against racial discrimination. There appeared to be broad support for enshrining some prohibitions against racial discrimination within the Australian Constitution in order to rectify this vulnerability.

10.2 Future work

The findings of the public consultations and other activities conducted to mark the 40th anniversary of the Act will inform the future work of the Race Discrimination Commissioner and the Commission.

10.2.1 National forum on racial tolerance and community harmony

The Commission recognises the importance of giving voice to the lived experience of racism and of understanding the concerns of individuals and communities about racism. Accordingly, the Race Discrimination Commissioner will convene a national forum on racial tolerance and community harmony. To be held annually, this forum will complement the Commission's current efforts by providing communities and other interested parties a standing forum to raise issues of concern about the state of race and community relations.

10.2.2 National Curriculum and education about racism

The Commission recognises the importance of education about racism, including in curricular form in schools – an issue raised by various parties within the public consultations. Under the auspices of the National Anti-Racism Strategy, the Commission released curriculum resources concerning anti-racism for primary and secondary teachers in the subjects of history and health/physical education. The Race Discrimination Commissioner will make representations about the ongoing need to include education about racism and strategies for embracing diversity and inclusion in the Australian Curriculum, noting that Harmony Day and NAIDOC week were removed from the curriculum.

10.2.3 Cultural diversity and media

The Race Discrimination Commissioner recognises community concerns about the impact of media on race relations – including the impact of reporting and commentary on sensitive political issues and the impact of limited representation of diversity within media. The Commissioner will investigate possible collaboration with partners in the Australian media to develop greater understanding and representation of cultural diversity.

10.2.4 Public understanding of the Act and National Anti-Racism Strategy

The Race Discrimination Commissioner notes the under-reporting of experiences of racial discrimination and the reluctance of some individuals and communities to lodge complaints under the Act. There appears to be a gap between some community perceptions of the complaints process and the ostensibly positive experience of complainants who have used the process. The findings of the public consultations indicate the need for ongoing promotion of public understanding about the Act, its protections and its operation.

The Race Discrimination Commissioner will, in consultation with the National Anti-Racism Partnership, explore enhancing connections between the Act and current educational work under the National Anti-Racism Strategy.

The Second Phase of the National Anti-Racism Strategy (launched in July 2015) also provides some opportunities for responding to some of the concerns expressed about discrimination in employment, discrimination against migrants and discrimination against Aboriginal and Torres Strait Islander people: among other things, Reconciliation Australia, Australian Chamber of Commerce and Industry and Migration Council Australia have been invited to become formal members of the National Anti-Racism Partnership, which supports the implementation of the Strategy and the 'Racism. It Stops with Me' campaign.

10.2.5 Kep Enderby Memorial Lecture

The Race Discrimination Commissioner and the Commission will continue to hold the Kep Enderby Memorial Lecture as an annual event, with the aim of advancing public understanding and debate about racism, race relations and the *Racial Discrimination Act*.

Appendix 1 – Schedule of national consultations

State/Territory	Location	Date
Australian Capital Territory	Pilgrim House 69 Northbourne Ave CANBERRA	12 February 2015
New South Wales	Australian Human Rights Commission Level 3, 175 Pitt Street SYDNEY	3 February 2015
Northern Territory	Danila Dilba Emotional & Wellbeing Centre Unit 1, 3 Malak Place Malak DARWIN	27 April 2015
Queensland	Anti-Discrimination Commission Queensland 53 Albert Street, BRISBANE	26 March 2015
South Australia	Migrant Resource Centre South Australia 59 King William Street ADELAIDE	13 March 2015
Tasmania	Lower Level Room, Mathers House 108-110 Bathurst Street HOBART	20 April 2015
Victoria	Victorian Human Rights and Equal Opportunity Commission 204 Lygon Street Carlton MELBOURNE	10 March 2015
	Centre for Multicultural Youth 304 Drummond Street CARLTON VIC 3053	23 April 2015
Western Australia	Equal Opportunity Commission Level 2, Westralia Square 1431 St George Terrace PERTH	9 April 2015

Appendix 2 – Participating organisations

Australian Capital Territory

Aboriginal and Torres Strait Islander Elected Body
ACT, Corrective Services
ACT Human Rights Commission
Canberra Estonian Community
Canberra Multicultural Community Forum Inc.
Community Services Directorate
Federation of Ethnic Communities' Councils of Australia
Health Care Consumers Association Inc.
St John the Apostle – Kippax
Women's Legal Centre (ACT and Region) Incorporated
Women with Disabilities, ACT

Queensland

Aboriginal and Torres Strait Islander Legal Service
Aboriginal and Torres Strait Islander Public Health Journal
Access Community Services Ltd
Amparo Advocacy
Anti-Discrimination Commission Queensland
Bahloo Women's Youth Shelter
Black Drum Productions Pty Ltd
Centre for Philippine Concerns Australia
Club Inti Peru – Peruvian Club Brisbane
Ethnic Communities Council of Queensland Ltd
Federation of Indian Community of Queensland
Islamic Women's Association of Queensland
Multicultural Affairs Queensland
Murri Ministry – Aboriginal Catholic Ministry
Public Safety Business Agency
Queensland Association of Independent Legal Services
Queensland Chinese Forum
Queensland Law Society
Queensland University of Technology
Redland City Council
University of Queensland

New South Wales

Asian Australian Alliance – Project 18C
Australian Hellenic Council
Australia / Israel & Jewish Affairs Council
Chinese Australian Forum
Diverse Australasian Women’s Network
Executive Council of Australia Jewry
Hindu Council of Australia
Korean Women’s International Network
Lebanese Muslim Association
Liverpool City Council
Liverpool Migrant Resource Centre
Metro Assist
Multicultural NSW
Muslim Women Association
Muslim Women’s Association
National Congress of Australia’s First Peoples
Refugee Council of Australia
Settlement Council of Australia Multicultural Youth Advocacy Network NSW
Settlement Services International

Northern Territory

Animal Management in Rural & Rural Indigenous Communities
Catholic Church
Commonwealth Department of Social Services
Damila Dilba Health Service
Darwin Asylum Seeker Support and Advocacy Network
Darwin Community Legal Services
Indonesian Community
Larrakia Nation
Melaleuca Refugee Centre
Multicultural Council Northern Territory
Northern Australian Aboriginal Family Violence Legal Service
North Australian Aboriginal Justice Agency
Northern Territory Anti-Discrimination Commission
Northern Territory Legal Aid Commission
Persian Community
Ruby Gaea: Darwin Centre against Rape Inc.

South Australia

Aboriginal Legal Rights Movement
Anglicare South Australia
Australian Hotels Association
Burmese Community
Chinese Association South Australia
Ethnic Schools Board
Equal Opportunity Commission South Australia
Migrant Resource Centre South Australia
Multicultural South Australia
Muslim Women’s Association of South Australia
Reconciliation South Australia
United Nations Association of Australia
Welcome to Australia

Tasmania

Australia China Friendship Society
China Community Association of Tasmania
City of Hobart
Croatian Senior Citizens Association
Department of Education, Tasmania
Department of Human Services
Department of Social Services
LGBTI community
Migrant Resource Centre Inc (Tasmania)
Migrant Resource Centre (Southern Tasmania) Inc
Multicultural Council of Tasmania
Office of the Anti-Discrimination Commissioner Tasmania
Sport and Recreation Tasmania
Students against Racism, TAFE Hobart
TAFE
Tasmanian Health Service
Tasmania National Park
The Passion of Purpose Group
Red Cross

Victoria

Adult Migrant English Service (AMES)
African Australian Multicultural Youth Employment Services
Anglican Diocese of Melbourne
Australian Baha'i Community
Australian Oromo Community Association in Victoria
Australian Red Cross
Baptcare Sanctuary
Bhutanese Community in Australia
City of Melbourne
Cultural Intelligence
Darebin Ethnic Communities Council Inc.
Institute of Public Affairs Australia
Jewish Community Council of Victoria
Law Institute of Victoria
Local Government Managers Australia
Monash City Council
New Civilisation Builders
Office of Multicultural Affairs & Citizenship
Online Hate Prevention Institute
Victorian Equal Opportunity and Human Rights Commission
Victorian Multicultural Commission
Victoria Police
Wyndham Community & Education Centre Inc.

Western Australia

Aboriginal Legal Service Western Australia
Association for Services to Torture and Trauma Survivors
CE Consulting
CR Consultancy
Curtin University
Deaths in Custody Watch Committee (WA) Inc.
Dumbartung Aboriginal Corporation
Equal Opportunity Commission Western Australia
Hungarian Community
MLA Member for Mirrabooka
Office of Multicultural Interests
Yamatji Marlpa Aboriginal Corp

Appendix 3 – Papers presented at RDA Conference 2015

Papers presented on Thursday 19 February 2015 (in order):

Dr Gwenda Tavan (La Trobe University), *Better late than never? Australia's long, slow road to the Racial Discrimination Act 1975*

Professor Andrew Markus (Monash University), *Negotiating change in the immigrant nation: public opinion and the transformation of Australia*

Professor Sarah Joseph (Monash University), *The RDA from a 1970s perspective*

Professor George Williams (University of NSW), *The Constitution and the RDA*

Professor Beth Gaze (University of Melbourne), *The RDA after 40 years: advancing equality, or sliding into obsolescence?*

Professor Marcia Langton (University of Melbourne), *Indigenous people, native title and the RDA*

Professor Hilary Charlesworth (Australian National University), *Translating international standards at the national level: the Koowarta case and the RDA*

Professor Duncan Ivison (University of Sydney), *Toleration and solidarity*

Associate Professor Geoffrey Brahm Levey (University of NSW), *Why the proposed RDA reforms were lost*

Dr Peter Balint (University of NSW), *Racial discrimination and racial tolerance: a location and defence*

Professor Adrienne Stone (University of Melbourne), *The Constitution, freedom of speech and the RDA*

Peter Wertheim, *Freedom and social cohesion: a law that protects both*

Associate Professor Winnifred R. Louis & Professor Matthew J. Hornsey (University of Queensland), *Psychological dimensions of racial vilification and harassment*

Papers presented on Friday 20 February 2015 (in order):

Professor Andrew Jakubowicz (University of Technology, Sydney), *Who are the racists in cyberspace? Understanding how to build communities of race hate and the implications for resilience in target communities*

Professor Kevin M. Dunn & Rosalie Atie (Western Sydney University), *Cyber racism: experiencing racism on the internet, what do people feel and do?*

Professor Gail Mason (University of Sydney), *Regulating cyber-racism*

Kate Eastman SC, *Mere definition? The race and religion intersection in the application of the Racial Discrimination Act*

Mariam Veiszadeh, *Muslims and the RDA*

Diana MacTiernan, *English language testing – is there systematic discrimination?*

Professor Simon Rice (Australian National University), *It's only law: the gulf between the RDA and equality*

Professor Luke McNamara & Professor Katharine Gelber (University of Wollongong), *The impact of hate speech laws on public discourse in Australia: 1989-2009*

Tracey Raymond, *Alternative Dispute Resolution: an effective tool for addressing racial discrimination?*

Dr Sarah Pritchard SC, *Special measures, RDA and CERD*

Jonathon Hunyor, *Alcohol, racial discrimination, special measures and human rights*

Dr Shelley Bielefeld & Professor Jon Altman (Western Sydney University), *NT intervention and constitutional recognition*

Appendix 4 – Speaking engagements for the 40th anniversary of the RDA

23 March 2015	Lecture at Queensland University of Technology, Brisbane
9 April 2015	<i>'What role does the law play in eliminating racism?'</i> lecture at Curtin Public Policy Forum, Curtin University, Perth
14 May 2015	<i>'We need to talk about race'</i> , lecture, Cranlana Alumni Programme, Melbourne
20 May 2015	Seminar on the <i>Racial Discrimination Act</i> and free speech, Juris Doctor course on 'Philosophical Foundations of Law', Melbourne Law School, Melbourne
21 May 2015	Panellist at Sydney Writers' Festival: <i>'Freedom of speech: A loaded gun?'</i> , Sydney
11 June 2015	Anniversary event: <i>'40 years of the Racial Discrimination Act'</i> , Sydney Launch of <i>'I'm not a racist but... 40 years of the Racial Discrimination Act'</i> , authored by Dr Tim Soutphommasane, Sydney
17 June 2015	In conversation with Jeremy Fernandez, Gleebooks, Sydney
19 June 2015	Australian Lawyers for Human Rights Seminar, University of Adelaide, Adelaide Australian Refugee Association 40th Anniversary Oration, University of South Australia, Adelaide
23 June 2015	Australian Public Service Human Rights Network, <i>'Race Multiculturalism and the Constitution'</i> seminar, Canberra
25 June 2015	Presentation to Melbourne Forum Limited, Melbourne <i>'In conversation with...'</i> , Readings Bookshop, Melbourne
7 July 2015	<i>'Race relations: how much have we learned?'</i> National Press Club address, Canberra
5 August 2015	<i>'I'm not a racist but...'</i> discussion at Eltham Community Centre, Melbourne
22 August 2015	<i>'Inside Australia's Immigration Policy'</i> , panel discussion, Melbourne Writers Festival, Melbourne

Appendix 5 – *Racial Discrimination Act 1975 (Cth)*

Racial Discrimination Act 1975 (Cth)

(Excerpts from the Act)

Part II – Prohibition of Racial Discrimination

SECTION 8 Exceptions

- (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).

SECTION 9 Racial discrimination to be unlawful

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

(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.
- (3) The succeeding provisions of this Part do not limit the generality of this section.

SECTION 10 Rights to equality before the law

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

SECTION 11 Access to places and facilities

It is unlawful for a person:

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

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

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

SECTION 12 Land, housing and other accommodation

- (a) 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.

- (1) 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.
- (2) 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.

SECTION 13 Provision of goods and services

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 or she 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.

SECTION 14 Right to join trade unions

- (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.

SECTION 15 Employment

- (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 or her 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.

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- (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.

SECTION 16 Advertisements

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.

SECTION 18A Vicarious liability

- (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

SECTION 18C Offensive behaviour because of race, colour or national or ethnic origin

- (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 46P of the *Australian Human Rights Commission Act 1986* allows people to make complaints to the Australian Human Rights 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.

SECTION 18D Exemptions

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

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- (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.

SECTION 18E Vicarious liability

- (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.

PART III Race Discrimination Commissioner and functions of Commission

SECTION 19 Race Discrimination Commissioner

For the purposes of this Act there shall be a Race Discrimination Commissioner.

SECTION 20 Functions of Commission

The following functions are hereby conferred on the Commission:

- (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.

Note: For the provisions about inquiries into complaints of discrimination and conciliation of those complaints: see Part IIB of the *Australian Human Rights Commission Act 1986*.

Endnotes

- 1 The Racial Discrimination Bill was introduced into the House of Representatives on 13 February 1975 by the late Kep Enderby, Attorney-General during the Whitlam government.
- 2 Section 9 of the *Racial Discrimination Act 1975* (Cth). The Act makes it unlawful to discriminate against a person because of his or her race, colour, descent, national origin or ethnic origin or immigrant status.
- 3 Pearson, N., Eulogy for Gough Whitlam, 5 November 2015 at <http://www.smh.com.au/comment/noel-pearsons-eulogy-for-gough-whitlam-in-full-20141105-11haeu.html> (viewed 24 September 2015).
- 4 *ICERD* was one of the first human rights treaties to be adopted by the United Nations. Australia ratified *ICERD* on 30 September 1975.
- 5 The White Australia Policy ended in 1973, when the Whitlam Labour government implemented a series of amendments preventing the enforcement of racial aspects of immigration law.
- 6 In February 1965 a group of University of Sydney students organised the 'Freedom Ride', a bus tour of western and coastal New South Wales Towns, in order to draw attention to the poor state of Aboriginal health, education and housing. On 27 May 1967, a Federal referendum was held in relation to whether two references in the Australian Constitution which discriminated against Aboriginal and Torres Strait Islander peoples should be removed. More information about the referendum can be found here: <http://www.naa.gov.au/collection/fact-sheets/fs150.aspx> (viewed on 24 September 2015).
- 7 Murphy, L., *Racial Discrimination Bill 1973* 2nd reading speech 21 November 1973; Murphy, L., *Racial Discrimination Bill 1974*, 2nd reading speech 4 April 1974; Murphy, L., *Racial Discrimination Bill 1974* (No. 2), 2nd reading speech 31 October 1974.
- 8 *Racial Discrimination Bill 1975* – Senate's Amendments: The House, according to order, resolved itself into a committee of the whole to consider the amendments made by the Senate.
- 9 The Racial Discrimination Bill 1975 passed in June 1975 and it received its assent on 11 June 1975.
- 10 Joseph, S., 'The Racial Discrimination Act: a 1970s perspective' p 32 from *Perspectives on the Racial Discrimination Act*, Australian Human Rights Commission, August 2015.
- 11 Markus, A., *Mapping Social Cohesion: The Scanlon Foundation surveys 2014*, Scanlon Foundation, 2014.
- 12 For a more detailed discussion of the history of the Act, see Soutphommasane, T., *I'm Not Racist But... 40 Years of the Racial Discrimination Act*.
- 13 Details of which can be found here: <https://www.humanrights.gov.au/our-work/race-discrimination/projects/rda40-conference-2015-40-years-racial-discrimination-act> (accessed 24 September 2015).
- 14 Soutphommasane, T., *I'm Not Racist But... 40 Years of the Racial Discrimination Act*.
- 15 See Appendix 4 for speaking engagements Dr Soutphommasane completed in 2015 in light of the 40th anniversary of the Racial Discrimination Act.
- 16 See Appendix 1 – Schedule of national consultations.
- 17 This is research, which in any case, is already conducted by others engaged in ongoing longitudinal research on social cohesion: see Markus, A., *Mapping Social Cohesion: The Scanlon Foundation surveys 2014*, Scanlon Foundation, 2014.
- 18 Address by the Governor-General, Conference marking the 40th anniversary of the Racial Discrimination Act, <https://www.gg.gov.au/speech/conference-marking-40th-anniversary-racial-discrimination-act> (accessed 24 September 2015).
- 19 The Australian Human Rights Commission, *Perspectives on the Racial Discrimination Act: Papers from the 40 years of the Racial Discrimination Act 1975* (Cth) Conference, Sydney 19–20 February 2015, <https://www.humanrights.gov.au/our-work/race-discrimination/publications/perspectives-racial-discrimination-act-papers-40-years> (accessed on 24 September 2015).
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