Forty years of the Racial Discrimination Act: its impact on Australian legal and political culture

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In October 1975, at a ceremony for the proclamation of the Racial Discrimination Act, then Prime Minister Gough Whitlam described the legislation as ‘a historic measure’, which aimed to ‘entrench new attitudes of tolerance and understanding in the hearts and minds of the people’.¹ The Act was Australia’s first federal human rights and discrimination law. Enacted shortly after the formal abandonment of the White Australia policy, it was also a legislative expression of a new commitment to multiculturalism.

This year, on the occasion of the Racial Discrimination Act’s 40th anniversary, we reflect on the extent to which the legislation has fulfilled its original purpose. What effect has it had in eliminating racial discrimination over its four decades of operation? And how successful has it been in entrenching ‘new attitudes of tolerance and understanding’?

The RDA and race relations since 1975

Few would dispute that significant progress has been made in Australian race relations since 1975. To be sure, racism still exists. The Scanlon Foundation’s 2014 study on social cohesion, for example, found that 18 per cent of people have experienced discrimination on racial or religious grounds during the past twelve months.² A notable study conducted by economists at Australian National University found significant discrimination against those of non-Anglo backgrounds in employment.³ Institutional forms of racism against Aboriginal and Torres Strait Islander people remains entrenched.⁴

But Australia has largely been a successful multicultural society since the demise of the White Australia ideal. Whereas places like the United States and Britain have periodic race riots, such episodes here are rare: the Cronulla riot of 2005, for instance, stands as an aberration. For the most part, Australia has been untarnished by organised racism; it does not have the equivalents of the Ku Klux Klan, the Front National or the English Defence League. The country has also avoided the contagion of extremist movements that have gained significant popularity across Europe in response to immigration and the supposed ‘Islamification’ of the West.

The extent to which this can be attributed to legislation is open to question. It remains the ‘holy grail’ of law reform to be able to say when and how a law is effective in achieving social change.⁵ Identifying cause and effect on such matters is a notoriously inexact science.
There are a number of respects, though, in which the RDA has had an impact. First, it filled an important gap in Australian law. Prior to the legislation’s introduction, non-violent acts of racism were typically beyond the reach of the law. The general right to be free from being discriminated against on racial grounds – indeed on any ground – has never been developed in common law.\(^5\) It was only through the RDA that such a right was established. In addition to a general prohibition on racial discrimination (under section 9), the Act makes discrimination in the realms of employment, provision of goods and services, housing and accommodation, and access to public places unlawful.

As the first Commonwealth legislation concerning human rights and discrimination, the RDA set an important precedent. Since its introduction in 1975, all states and territories have enacted anti-discrimination legislation. The Commonwealth parliament has enacted legislation concerning sex discrimination, disability discrimination and age discrimination. The High Court case of Koowarta \textit{v Bjelke-Petersen}, which concerned the RDA, was also the first instance the courts recognised that domestic laws could be considered valid exercises of the external affairs power in the Constitution.\(^7\) The judgment in that case would provide authority for the development of the external affairs power in subsequent cases such as the celebrated \textit{Tasmanian Dams} case.\(^8\)

In more specific terms, the RDA has been a significant instrument in prohibiting racial discrimination. Former chief justice of the High Court, Sir Harry Gibbs, once described the legislation as providing a qualified ‘bill of rights’.\(^9\) Through the provisions under section 10, and by virtue of section 109 of the Australian Constitution, the RDA can override any state or territory legislation that discriminates on the basis of race.\(^10\) This guarantee of equality before the law has established a national standard of racial non-discrimination. As George Williams notes, however, the effect of this standard should not be overstated. There have been 26 occasions when an Australian court has considered an alleged inconsistency of a state or territory law with the RDA. But only on seven occasions have such cases succeeded, demonstrating the unfulfilled potential of the legislation.\(^11\)

Some have drawn sceptical conclusions about the RDA’s contribution. Reflecting on the RDA a decade ago, on its 30th anniversary, Beth Gaze wrote that, ‘on any assessment, the RDA has not lived up to its symbolic promise’. For the most part, ‘it has proved to be weak as an instrument in fighting racial discrimination’.\(^12\) According to Gaze, this is demonstrated by the small number of cases that have been litigated in the federal courts. One possible reason is that in legal proceedings courts require allegations of racism to be proven by complainants, with evidence of the highest probative value. This is an area that warrants consideration of reform, particularly since countries such as the United Kingdom have anti-discrimination laws where it is adequate that racial discrimination could be inferred from the facts (the onus then being on the respondent to prove that race was not the ground).\(^13\)

Another scholar, Margaret Thornton, in a well-known critique of the false ‘liberal promise’ of anti-discrimination law, decried the ‘atomism’ of instruments such as the RDA.\(^14\) In Thornton’s view, the law’s concern with individual complaints about acts of racial discrimination means that it can only make a dent on the more general problem of racism – it fails to sanction the institutionalised prejudice and deeply entrenched social attitudes from which acts of discrimination originate:
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Racism … by its very nature, is endemic, that is, it is diffused throughout the social fabric. There is no clearly identifiable [person] who can be held liable for a harm that is buried deep within the social psyche and that has developed the status of a self-serving ‘truth’ as a result of replication and longevity. The disjuncture between racism and an act of racial discrimination is a major limitation of the RDA or, indeed, any legislative schema based on an individual complaint-based model, as a mechanism for effecting change.\(^{15}\)

It is true that the legal mechanism of complaint handling must be put into a larger social context. The presence of the RDA has not eradicated racial discrimination. The law did not prevent the rise during the 1990s of anti-immigrant racism and xenophobia. Nor has it prevented the significant rise in the incidence of racial and religious discrimination recorded in recent surveys on social cohesion.\(^{16}\)

Yet it seems unfair to expect that a single piece of legislation could, on its own, transform a political culture – particularly if there may be other elements in that political culture that work to undermine its goals. It seems also unfair to be judging legislation against a standard that legislators never originally set themselves and which their successors have never accepted. For example, in introducing the Racial Discrimination Bill, then attorney-general Kep Enderby recognised that while ‘laws proscribing discrimination are vital’, they are ‘not in themselves sufficient’ and should be complemented by the promotion of education and research.\(^{17}\) Speaking on the proclamation of the RDA, the prime minister Gough Whitlam sounded a similar note of caution: ‘Social attitudes and mental habits do not readily lend themselves to codification and statutory prohibitions.’\(^{18}\) On the occasion of the 20th anniversary of the RDA, then prime minister Paul Keating also observed that no one should be ‘under the illusion that we could legislate to abolish prejudice’, reiterating that ‘legislation alone is not enough’.\(^{19}\)

The operation of the RDA

There is no simple way of assessing the RDA’s impact, but any assessment should recognise that the bulk of the RDA’s operation exists in the realm of conciliation rather than litigation. It is revealing that in recent years the majority of complaints conciliated under the RDA resulted in an agreed outcome between the parties. The criticism that relatively few cases of racial discrimination have been litigated in the courts may be misplaced, in one sense. Much like a duck’s feet furiously paddling under water, the real work of the legislation may not be evident at first glance.

Indeed, throughout its forty years of operation, the legislation has retained its civil character. Contrary to popular perception, no one can be prosecuted or convicted for breaching the RDA. Racial discrimination may be unlawful, but it does not constitute a criminal offence attracting penalties. A contravention of the law is neither a misdemeanour nor a felony, but a statutory civil wrong. Where someone believes they have experienced racial discrimination under the law, they are free to make a complaint to the AHRC and seek a remedy.

It may not involve the criminal law, but the RDA has provided an important mechanism for redress. Since it commenced operation, more than 6000 complaints about racial discrimination have been
successfully conciliated, with fewer than 300 reported decisions made by a court or tribunal over that time.\textsuperscript{20) To give some indication of how the law currently operates, in 2013–14 the AHRC finalised 443 complaints under the RDA: of those, 14 complaints proceeded to court (3 per cent of complaints).

The relatively small number of litigated cases highlights the conciliatory and educative character of the legislation. Having in place a conciliation framework allows for a complaint-handling process that is accessible, private and flexible. It aims to provide an informal resolution of a complaint in way that avoids the lengthiness and expense of litigation. The conciliator, in the form of the AHRC as a third party, seeks to uncover evidence to show the parties where they stand with regard to their rights and obligations. A successful conciliation is one where both parties agree on the resolution, and which prevents a repetition of the act that was cause for complaint.\textsuperscript{21)

Conciliation enjoys numerous advantages over adversarial forms of enforcing the legislation. The confidential nature of the conciliation process enables negotiations to be conducted freely and openly. Those familiar with the process highlight that complainants appreciate the opportunity to explain to respondent parties how they have been affected by an alleged contravention of the law. They can also hold a respondent party to account without incurring publicity (as could happen if a public hearing is conducted by the courts). At the same time, the option of going to court is not removed from the equation: it remains an avenue that can ultimately be pursued if a complaint does not result in a satisfactory resolution.

Agreements achieved at conciliation vary in nature. Some include monetary settlements. In one complaint, a young Aboriginal man who was refused employment because he was considered by management to be ‘too Aboriginal’ received $15,000 damages for loss of dignity, and received a public apology placed in two metropolitan newspapers. Often remedies include more systemic responses to discrimination. For example, in one complaint by two workers of Nigerian ethnic background, it was alleged 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. In other cases, a resolution can simply be found through an apology and a gesture of goodwill. One complaint alleging that a local club had refused to serve beer to Aboriginal men was resolved with the club owner offering a verbal apology and an invitation to the complainants to have a drink with him at the club.\textsuperscript{22)

The type of agreements reached in successful conciliations mirror the kind of remedies obtained following formal determination by the courts. Take, for example, one case concerning discrimination in accommodation, which involved a caravan park business refusing to rent to Aboriginal persons ‘under any circumstances whatsoever’. A complaint about this resulted in a finding that ‘blatant racial discrimination’ had occurred and an order that the caravan park owner pay compensation of $20,700.\textsuperscript{23) Another case concerning racial discrimination in employment resulted in the award of $30,000 for economic loss, damages of hurt and costs.\textsuperscript{24) Insofar as there appear to be differences in remedies, it is that the resolutions reached through successful conciliation are more likely to include
action by respondents aimed at preventing future instances of discrimination. This is because the remedial powers of the federal courts are concerned only with redressing the situation of the complainant in the particular case.25)

The educative effects of legislation

There is one respect in which the value and impact of racial discrimination legislation is exceedingly difficult to measure. Laws serve to express a community’s political morality. They set rules for how people should conduct their lives together; they articulate a community’s aspirations for fairness and justice. The very existence of the RDA is itself of importance, because it reflects a statement from Australian society that it does not accept racial discrimination and is committed to the equal dignity of its members. It gives people the assurance that they will not be treated unfavourably or with contempt because of their race. In light of Australia’s early history of racial discrimination, this is no trivial feat for our legal and political culture.

At the same time, by existing as rules, the law may in time affect people’s behaviour. On the matter of race, one early American legal scholar of anti-discrimination laws put it in the following terms:

… the mere existence of the law itself affects prejudice. People usually agree with the law and internalise its values. This is because considerable moral and symbolic weight is added to a principle when it is embedded in legislation. Additionally, most people are conformists, and the law usually represents the prevailing attitudes in the community. The law, embodying as it does the societally acceptable norm, constantly holds before people an image of what their feelings should be. Over an appreciable period, this cannot help but influence them in their private attitudes. As a result, while we may not be able to repeal prejudice by law, [it] … is an essential part of the enterprise of education which alone can end prejudice.26)

There is one area where the RDA has had particularly significant impact on prejudice and attitudes. The introduction of racial vilification provisions in 1995 took the law beyond acts of discrimination in areas such as employment, accommodation and the provision of goods and services. In covering public acts that abused or degraded others because of their race, the provision of section 18C attempted to do more than protect people against unfair treatment. The section has sought ‘to ensure that people are not actually caused mental harm because of their race.’27)

Australian courts have found that Part IIA involves a permissible limitation in light of an implied constitutional right of freedom of political communication. They have found the enactment is a reasonable, necessary and proportionate means for pursuing the interest of racial tolerance and social cohesion in a multicultural society.28) The case law has also established that Part IIA is consistent with Australia’s obligations under CERD: ‘it is entirely consistent with the provisions of the Convention … that a State Party should legislate to “nip in the bud” the doing of offensive, insulting, humiliating or intimidating public acts which are done because of race … before such acts grow into incitement or promotion of racial hatred or discrimination’.29)

The history behind Australia’s racial vilification law reflects sustained concern about racist violence.
In response to a series of violent attacks against migrant communities during the late 1980s, then Race Discrimination Commissioner Irene Moss conducted the National Inquiry into Racist Violence. The final report in 1991 found that, ‘Physical violence is not the only, or even in some cases the most important, form of racist violence. The physical effects of violence often cause less damage to the individual victim than the psychological effects.’30) The National Inquiry into Racist Violence recommended that the RDA be amended to include civil remedies for racist harassment and incitement to racial hostility.31)

Two other major reports in the late 1980s and early 1990s made similar recommendations. The Royal Commission into Aboriginal Deaths in Custody recommended the introduction of legislation to ‘proscribe racial vilification and to provide a conciliation mechanism for dealing with complaints of racial vilification’.32) The Royal Commission stressed that such legislation would recognise ‘the important fact that language itself can be a form of violence’.33) Similarly, the Australian Law Reform Commission’s Multiculturalism and the Law report, tabled in 1992, supported making incitement to racist hatred unlawful, though it stopped short of recommending that it should be made a criminal offence. The Australian Law Reform Commission recommended that the law be amended to include a conciliation process for complaints about racial hatred, backed up by civil remedies when conciliation fails.34)

The current federal racial vilification provisions were introduced to Parliament through the Racial Hatred Bill 1994. In his second reading speech, attorney-general Michael Lavarch highlighted the causal link between racial vilification and racist violence: racist violence begins with threats of violence and a milieu of hatred and intolerance.35) It was in the public interest to counter this, while also being attentive to freedom of speech.

Part IIA of the RDA – the final result of the Racial Hatred Bill – includes sections 18C and 18D. Section 18C states that it is unlawful to commit a public act that is reasonably likely to ‘offend, insult, humiliate or intimidate’ someone on the grounds of race (language that was drawn from the sexual harassment provisions of the Sex Discrimination Act 1984). Section 18C is accompanied by section 18D, which ensures that artistic works, scientific debate, and fair comment on and fair reporting of a matter of public interest are exempt from being in breach of section 18C – provided that something has been done reasonably and in good faith.

By making acts of racial vilification unlawful, the RDA has set a norm for civility in a multicultural society. Many communities affected by racial vilification have consciously used section 18C as an instrument of advocacy – for instance, to put a perpetrator or publisher of racial hate speech on notice.36) As highlighted to me by various community representatives and organisations, there is utility in being able to invoke the RDA when making representations about racially offensive conduct. Having the law on your side can assist in securing some redress, even if you may not end up pursuing a formal complaint about racial vilification. Such experience demonstrates the powerful educative effect of legislation. All this must inform any assessment of the RDA’s contribution to eliminating racial discrimination.
The continuing urgency of education

It should go without saying that we cannot rely upon legislation – and legislation alone – to achieve social change. It is unrealistic to expect that law can deal exhaustively with the causes of social phenomena, for the law is more typically equipped to deal with the symptoms. If we are interested in educating people for social change, it must be at the level of policies and programs, and be done in schools and communities. As well as through the power of the state, through our parliaments and our laws, such work must be conducted through the habits of civil society.37)

An important part of my current work as Commissioner, for example, involves leading the National Anti-Racism Strategy, which was launched in 2012.38) The strategy aims to improve public understanding of racism, and to empower Australians to respond to prejudice and discrimination. Educational work conducted as part of the strategy covers the workplace, schools, sport, public services and the internet. There has, for example, been curricular material developed for primary and high school students in history and physical education, as well as guidance for employers on dealing with cultural diversity in their workplaces.

The strategy also includes a campaign called 'Racism. It Stops with Me', which invites individuals and organisations to pledge a stand against racism. At the time of writing, more than 350 organisations across the country are formal supporters of the campaign Some organisations join because of local incidents involving bigotry and hatred. In country Victoria, Bendigo Council supported the campaign as part of the community’s response to anti-Muslim protests over the building of a mosque in the town. In the case of Ventura Bus Lines, the company responded to a much publicised incident on one of its buses in Melbourne, where a passenger racially abused and threatened another passenger who had been singing a song in French: as part of its support for ‘Racism. It Stops with Me’, the company introduced new training for bus drivers about how to deal with racist abuse. Others, such as the 20-odd universities across the country who are campaign members, join because they believe it is a powerful way to build a more welcoming atmosphere within their organisation. Whatever the context, membership of the campaign has proven to be a means of expressing public commitment to racial tolerance and cultural harmony.

Ultimately, though, such educational work has its moral anchor in the stance that society takes towards racism. If Australian society has legislative prohibitions on racial discrimination and vilification, it is because it reflects standards we wish to maintain in our public life. For all the continuing challenges in combating prejudice and eliminating racism – including, importantly, from the Australian Constitution – there are many good reasons to be celebrating the presence of legislative protections against racial discrimination. Today, public expressions of racial contempt are greeted almost universally with disapproval. Would we be in the same position were the RDA not to exist at all?
Endnotes

5) S Rice, ‘Why free speech comes at a price: Reflections on race, civility and the law’ (Inaugural Research Seminar, Deakin University School of Law in association with Sladen Legal, 31 July 2014) p. 5.
10) Section 109 of the Constitution provides: “When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.”
13) B Gaze, ‘Has the Racial Discrimination Act Contributed to Eliminating Racial Discrimination?’
20) B Gaze, ‘The Racial Discrimination Act after 40 years: Advancing equality or sliding into obsolescence?’ Paper to ‘RDA@40’ Conference on 40 Years of the Racial Discrimination Act, Australian Human Rights Commission, Sydney, 20 February 2015. These reported decisions include decisions between 1975 and January 2015 in the Human Rights and Equal Opportunity Commission, the Federal Circuit Court/Federal Magistrate’s Court, the Federal Court of Australia, the Full Court of the Federal Court of Australia and the High Court of Australia.
Forty years of the Racial Discrimination Act: its impact on Australian legal and political culture


38) For more information about the National Anti-Racism Strategy, including the ‘Racism. It Stops with Me’ campaign, see <http://itstopswithme.humanrights.gov.au>.