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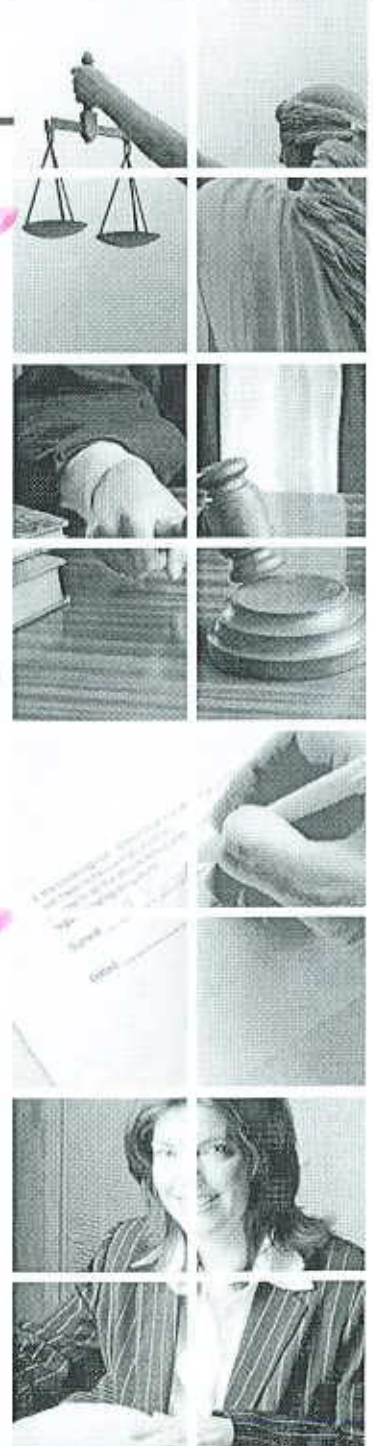
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Legal Measures to Combat Racism and Xenophobia:

Lessons from Australia and Europe A Special Issue by Freilich Foundation and National Europe Centre

Edited by Renata Grossi and Simon Bronitt, Australian National University

In memory of Dr Herbert Freilich (1925–2009), compassionately committed
to humanity and tackling intolerance and bigotry in all its forms.

Racial Discrimination Protection In Australian Law – A Snapshot

By Renata Grossi

Freilich Foundation, Australian National University

Introduction

This article will outline the content of the Australia's *Racial Discrimination Act 1975* (Cth) (RDA). It will discuss its origin, its possible future development, and show the way it has been applied in landmark and recent cases.

International Convention On The Elimination Of All Forms Of Racial Discrimination

In 1965 Australia signed the *International Convention on the Elimination of all Forms of Racial Discrimination* (CERD). Article 1 defines discrimination as 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'. Article 1 also states that special measures designed to secure advancement for certain groups in society who had hitherto been discriminated against do not constitute racial discrimination. Article 5 of the Convention imposes an obligation on states to

'undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law'. Article 5 also highlights a range of important rights which should not be impeded by discrimination based on race. These reflect the rights which are protected by other key United Nations (UN) human rights conventions.¹

In order to fulfil the requirements of this convention the federal parliament passed the *Racial Discrimination Act 1975* (Cth) (RDA). The High Court in *Koowarta v Bjelke-Peterson*² confirmed that federal parliament could validly use its external affairs power under the Constitution to enact the RDA.

STUDENT ACTIVITIES

1. How does the UN convention on the elimination of all forms of racial discrimination define *discrimination*?
2. If a government body made a commitment to hire 10 per cent of its staff from Indigenous background, would it be discriminating against anyone?
3. Explain the obligation imposed on governments who have signed and ratified CERD.
4. Identify THREE other UN conventions that protect human rights (clue: see notes at the end of this article).



The Freilich Foundation exists for the study of, and research into, the causes, the histories and the effects of ethnic, cultural, religious and sexual bigotry and animosity, and the exploration of how such intolerance can be combated – and co-existence promoted – by educational and social programs. For further information see <<http://www.anu.edu.au/hrc/freilich/>>

The Racial Discrimination Act 1975 (Cth) (RDA)

The RDA is the most important legal document designed to protect Australians from racial discrimination. Every state and territory jurisdiction has legislation which is modelled on the RDA.

The RDA makes discrimination based on race colour, descent, national or ethnic origin unlawful (s9). Racial discrimination involves treating someone less favourably because of one or more of the above factors. The RDA makes it unlawful to discriminate both directly and indirectly. An example of direct discrimination is to refuse to employ an Indigenous person in a business because it would deter customers. An example of indirect discrimination is to have a criterion which would necessarily impact adversely upon a group of people. For example a height requirement will impact more upon people from certain racial backgrounds. Indirect discrimination may be justified according to the circumstances.

The RDA prohibits discrimination in the following key contexts, employment (s15), advertisements (s16), access to places and facilities (s11), provision of goods and services (s13), land, housing and accommodation (s12), right to join trade unions (s14), rights to equality before the law (s10).



The *Racial Hatred Act 1995* (Cth) amended the RDA by making offensive behaviour based on race unlawful. Section 18C prohibits public behaviour which offends, insults or humiliates a person or group because of their race, colour, national or ethnic origin. However artistic work, academic discussion, material whose purpose is scientific, or any discussion which is considered to be in the public interest will be exempt (s18D). Material which is published that represents a genuine belief that it's a fair and accurate report and is in the public interest is also exempt.

The RDA allows racially discriminatory policies when those policies are deemed to be positive actions designed to protect racially disadvantaged groups. These are called 'special measures' and in order to be lawful they must have the following characteristics:

- they must provide a benefit to the group
- their sole purpose must be to secure the advancement of the group
- they must be necessary to achieve the purpose
- they must stop once the purpose has been achieved.

Examples of special measures are; educational funds and programs, rental assistance, employment programs and special medical services which are aimed at Indigenous Australians.

A complaint of racial discrimination can be made to the Human Rights Commission (HRC) for mediation and conciliation but following *Brandy v Human Rights and Equal Opportunity Commission*³ hearings can only be conducted by the Federal Court. In 2006/07 the HRC received 376 complaints of which 195 were conciliated, 134 were terminated, 31 were withdrawn, 56 were considered trivial and vexatious and in 69 of cases there was no reasonable prospect of conciliation. The majority of these complaints were based upon discrimination according to race, with ethnic origin being the second largest ground of complaint. The largest context where discrimination was alleged to occur was in employment. Seventy five complaints were to do with racial hatred. The majority of these were alleged to have occurred in the media and in the work place.⁴

STUDENT ACTIVITIES

5. Distinguish between *direct* and *indirect* discrimination.
6. Identify THREE areas in which the RDA prohibits discrimination.
7. Explain how the *Racial Hatred Act 1995* (Cth) attempts to extend and complement CERD.
8. Identify THREE ways in which the RDA attempts to provide greater legal protection (special measures) for Indigenous and other peoples.
9. Identify TWO legal institutions that can help Australians who wish to complain about racial discrimination.
10. In what social setting are most complaints of racial discrimination found?

A Contemporary Racial Discrimination Act?

In April 2008 Race Discrimination Commissioner Tom Calma issued a press release urging that the RDA remain a contemporary piece of legislation and reflect the changing composition of Australian society. Commissioner Calma released a background paper which analysed the continuing effectiveness of the RDA by comparison with legislation in other parts of the world such as US, UK Canada and the EU. In brief, that background paper, *An International Comparison of the Racial Discrimination Act 1975* (2008), found that in all jurisdictions examined, except Australia, there is a provision that allows relevant human rights bodies to initiate complaints in cases of complex issues and systematic discrimination.⁵ Whilst Australia, like other jurisdictions examined, requires a civil rather than a criminal standard of proof (i.e. on the balance of probabilities), he also noted that proving discrimination under federal law required compliance with a higher standard of evidence, and that Australia was the only jurisdiction which placed the whole burden of proof upon the plaintiff.

The question of religious vilification was also a factor which was examined in this report. Whilst the US, UK, Canada and the EU all have laws which prohibit discrimination and vilification on the ground of religion, this protection only exists in Australia at state level, and even then is not equally available in all jurisdictions.⁶ For a recent study on this specific topic see the HREOC Discussion Paper, *Freedom of Religion and Belief in the 21st Century* (2008).

STUDENT ACTIVITIES

11. Identify the Race Discrimination Commissioner.
12. Why do you think we do not protect Australian citizens against religious vilification at the federal level? (Hint: Constitution)

Landmark Cases

I have already mentioned above two important cases *Koowarta v Bjelke-Peterson* and *Brandy v Human Rights and Equal Opportunity Commission*. There have been a number of other cases which have clarified the operation of the RDA. It is worth briefly looking at them as their facts provide us with an understanding of the way in which the act impacts upon behaviour and policies.

*Gerhardy v Brown*⁷ challenged the notion that a non Pitjantjatjara needed a permit to enter land which had been granted to the Pitjantjatjara people under the *Pitjantjatjara Land Rights Act 1981* (SA). Mr Brown went onto this land without permission, when charged he argued that the *Pitjantjatjara Land Rights Act* contravened the RDA and was therefore invalid.



Eddie Mabo

The High Court upheld the validity of the SA act claiming that it constituted a special measure consistent with the RDA. All judges agreed with the concept of 'special measures' and the appropriateness of taking affirmative action for Indigenous people.

*Mabo v Queensland (No 1)*⁸ questioned the validity of the *Queensland Coast Islands Declaratory Act* (1985). The Queensland Parliament passed this act when the Meriam people commenced proceedings to have their traditional land rights recognised under Australian law. The act extinguished whatever rights and interests the Meriam people had under their traditional laws. One of the questions that this case raised was whether the Queensland act was consistent with the RDA. The High Court confirmed that state laws should conform to the RDA. This decision enabled the continuation of the Mabo

case and the subsequent decision in the famous case *Mabo v Queensland (No 2)*⁹ that recognised native title and extinguished the concept of terra nullius.

*Jones v Toben*¹⁰ was the first case to apply the RDA's racial hatred provisions to the Internet. Complaints were received about a website run by Dr Tobin of the Adelaide Institute. The Federal Court found that certain documents on the website vilified Jews due to the following content:

- denials that the Holocaust occurred
- denials that there were gas chambers at Auschwitz
- claims that Jewish people have exaggerated the number of people who were killed for improper and financial gain
- claims that some Jews who opposed Holocaust deniers are of limited intelligence.

A defence of academic opinion and good faith was not able to be legally tested as Dr Tobin did not enter a defence, and the site was therefore found to be in breach of the RDA and the court ordered it to be dismantled.

STUDENT ACTIVITIES

13. Explain how *Mabo v. Queensland (No 1)* expanded on the idea that state laws should conform to the RDA.
14. Explain the impact of RDA on the spread of racial hatred on the Internet – as indicated in *Jones v Toben*.

Recent Cases

Silberg v The Builder's Collective of Australia Inc [2007] FCA 1512

The applicant, Mr Silberg, managing director of the Housing Industry Association Limited, successfully claimed racial vilification under section 18C of the *Racial Discrimination Act 1975* (Cth). Comments posted on a website imputed the following:

- (i) 'that the applicant, by reason of his Jewish ethnicity, was responsible for an unhealthy monetary focus in the activities of The Housing Association Limited; and
- (ii) 'that the applicant was, by reason of his Jewish ethnicity, personally avaricious and primarily motivated to make money out of the activities of the Housing Industry Association Limited at the expense of its membership.'

Jeremy Jones and on behalf of the executive council of Australian Jewry v The Bible Believers Church [2007] FCA 55 – The Bible Believer's site was found to contravene section 18C of the RDA but as the organisation had no legal entity it could not be held accountable therefore relief was granted only in principle.

In its discussion of defences contained in section 18D – in particular the defence relating to academic purposes – the court cited with approval the decision in *Bropho v Human Rights and Equal Opportunity Commission and Anor* (2004) 135 CLR 105. French J held in that case that 'An act is done reasonably in relation to statements, publications, discussions or debates for genuine academic, artistic or scientific purposes, if it bears a rational relationship to those purposes. The publication of a genuine scientific paper on that topic of genetic differences between particular human populations might, for one reason

or another, be insulting or offensive to a group of people. Its discussion at a scientific conference would no doubt be reasonable. Its presentation to a meeting convened by a racist organisation and its use to support a view that a particular group of persons is morally or otherwise 'inferior' to another by reason of their race or ethnicity, may not be a thing reasonably done in relation to para(b) of s18D.¹¹

STUDENT ACTIVITIES

15. As a class, or in groups, discuss the view that there are simply no grounds on which a racial group should be discriminated against. Refer to both academic and scientific issues as well as the concept of positive discrimination. (You could also refer to the Northern Territory Emergency Response)

Research

1. Locate and identify the federal government's *External Affairs* powers under the Constitution.
2. Outline the anti-discrimination laws that apply in your state.

Notes

- 1 See the *Universal Declaration of Human Rights*, *UN Convention for Civil and Political Rights* and *UN Convention for Economic and Social Rights*.
- 2 (1982) 153 CLR 168.
- 3 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, this decision held that all cases which require determination and enforcement must be taken to the Federal Court or the Federal Magistrates Court as HREOC (now the Australian Rights Commission) lacks judicial power.
- 4 See Australian Human Rights Commission Annual Reports: <http://www.hreoc.gov.au/about/publications/annual_reports/2007_2008/index.html>
- 5 Download the report on the HREOC website at <http://www.hreoc.gov.au/racial_discrimination/publications/int_comparison/index.html>
- 6 All states and territories except NSW and SA have relevant legislation.
- 7 (1985) 159 CLR 70. This case also established the test for special measures. See the article on the Northern Territory Intervention in this edition.
- 8 (1988) 166 CLR 186
- 9 (1992) 175 CLR 1
- 10 [2002] FCA 1150
- 11 *Bropho v Human Rights and Equal Opportunity Commission and Anor* (2004) 135 CLR 105 quoted in *Jeremy Jones and on behalf of the executive council of Australian Jewry v The Bible Believers Church* [2007] FCA 55, para 80.

Secularism And Freedom Of Religion In Europe

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The separation of church and state has long been considered a fundamental tenet of Western democracies, including Australia and the United States. Its historical foundations can be found in the Reformation's challenge to religious authority, starting in the 16th Century, and the emerging primacy of the Enlightenment notion of individual liberty. In simple terms, the principle of church and state separation holds that states ought to be constituted and governed on *secular* grounds – not according to religious doctrine – allowing all citizens freedom of religious choice.

Secularism is the application of the secular ideal, a belief that religion has no place in public institutions and affairs. Relegating religion to the private sphere of society does, however, create a number challenges for states. In secular societies, states must officially recognise the different religions present within the state; they must provide adequate protection for religious groups; and they must ensure that the manifestation of one particular religious belief does not negatively impact on other members of society.

STUDENT ACTIVITIES

1. For approximately how long have many western nations separated church and state?
2. Define the concept of the *separation of church and state*.
3. Define the term *secularism*.
4. Explain why states must still recognise and protect various religious institutions.

Such is the zeal with which secularism is pursued and policed in France that it is sometimes considered almost a state religion

itself, and forms a crucial aspect of national identity. In keeping with this approach and reflecting the French Republic's constitutional separation of state and religion, France enacted a new law in 2004 banning religious symbols from public schools.¹ The new law applied equally to all 'ostentatious' religious insignia – Jewish skullcaps, large crucifixes, etc – regardless of the religion they represented. The law, however, has generated much controversy due to its affect on Muslim girls who wear the *hijab*, or headscarf, a number of whom have now been suspended or expelled from French public schools.



Skull cap



Crucifix



Hijab

The so-called 'headscarf affair' stimulated intense debate between those who see the ban as overly intrusive and specifically targeted at Muslims, and others who see it as a necessary means of protecting the republican secular tradition. Even feminists were divided over the ban, with some believing the law saved girls from an oppressive religious tradition, while others claimed it violated their right to freely express their own religious conviction. Muslim communities were likewise at odds over whether the wearing of the veil was a religious requirement, or a cultural tradition.