



## Précis Paper

### Racial Discrimination Laws in Australia

This is a presentation by two leaders in the field of human rights in Australia, discussing a topical issue in Australian politics.

#### Discussion Includes

- Background and history of the *Racial Discrimination Act*
- The debate around s 18C
- Federal anti-discrimination legislation
- Responding to cyber-racism
- Comparison between s 18C and other limits on speech under Australian law
- Gaps in the legislative scheme
- Interaction between state and federal legislation

## Précis Paper

### Racial Discrimination Laws in Australia

1. In this edition of BenchTV, Dr Tim Soutphommasane (Race Discrimination Commissioner, Human Rights Commission, Sydney) and Adjunct Professor George Newhouse (Principal Solicitor, The National Justice Project, Sydney) discuss Australian racial discrimination laws and the *Racial Discrimination Act 1975* (Cth).

#### Background and history of the *Racial Discrimination Act 1975* (Cth)

2. Prior to 1975, there was no federal law relating to racial discrimination. Against the backdrop to changes in Australian society, from a country that embraced a White Australia policy to a more multicultural society, and a number of historical events such as the Freedom Rides and protests against the Springbok tour, the *Racial Discrimination Act 1975* (Cth) (**RDA**) was introduced to combat racial discrimination and vilification. The RDA gave people the right to make a complaint about racial discrimination.
3. The RDA contains a number of rights, specifically the right to be equal before the law and right to be free from discrimination, and outlines a number of areas where discrimination is prohibited on the basis of a person's race, skin colour or ethnic origin, including in the provision of goods or services, in accommodation, in employment, in access to public places and facilities, and in membership of trade unions.
4. In 1995, the RDA was amended to include laws relating to racial hatred in public. Under the controversial s 18C of the RDA, it is unlawful to do an act to offend, insult, humiliate or intimidate another person or group because of their race.

#### The Debate around Section 18C

5. Section 18C(1) provides:

##### ***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.*

6. Section 18C is accompanied by s 18D, which provides exemptions from the application of s 18C for certain types of acts:

**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*

*(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.*

7. The inclusion of s 18D is an attempt by the law to strike a balance between two freedoms – freedom from racial vilification and abuse versus freedom of speech. Dr Soutphommasane considered that although s 18C placed limitations on the freedom of speech, this is justified in circumstances where a person is exercising their freedom of speech in a way that diminishes another person's freedoms, and reminded viewers that our society places many other limitations on the exercise of free speech that we readily accept.
8. Many laws exist in Australia that restrict what a person can say in public, including defamation laws, trade practices law and criminal laws. Dr Soutphommasane considered that the RDA acts as a group defamation law, where racial discrimination or vilification is akin to the defamation of a racial or ethnic group. Unlike criminal prohibitions on offensive conduct, the RDA only provides a civil remedy and has no criminal force or penalties. Dr Soutphommasane emphasised that s 18C does not prohibit an act of merely insulting or offending someone, but prohibits conduct that occurs because of a person's race or ethnic background.
9. Moreover, although some people consider that s 18C is an unnecessary provision, Dr Soutphommasane considered that it is important to have a law that states our values as a society on race and sets an acceptable standard of behavior. He commented that very few complaints end up in court, and in 2015, of the 77 complaints received by the Australian Human Rights Commission under s 18C, only one matter proceeded to court, as most matters are settled at conciliation. The complaints that the Commission receives only represent the tip of the iceberg in relation to discrimination in Australia, and Dr Soutphommasane indicated that approximately 20 percent of Australians have experienced racial or religious discrimination during the past 12 months. This reiterates the

importance of being able to hold people to account for their racially discriminatory conduct.

#### Australian Anti-Discrimination Legislation

10. The Australian Constitution does not prohibit racial discrimination, but actively empowers the Commonwealth government to discriminate on the basis of race under the races power contained in s 51(xxvi). The absence of a constitutional protection means that Parliament can suspend laws that prohibit racial discrimination. This has occurred on several instances in the past, when the RDA was suspended in relation to the Northern Territory Emergency Response, amendments to the *Native Title Act 1993* (Cth), and the Hindmarsh Island Bridge affair.
11. As a consequence of the absence of constitutional protection, Australia has introduced a "patchwork" of anti-discrimination legislation at the federal level, which includes the following laws in addition to the RDA:
  - *Sex Discrimination Act 1992* (Cth);
  - *Age Discrimination Act 2004* (Cth); and
  - *Disability Discrimination Act 1984* (Cth).
12. This patchwork stands in contrast to the position in many states, where a single piece of anti-discrimination legislation covers a range of areas.

#### Gaps in the Legislative Scheme

13. The limitations of Australian anti-discrimination law include geographical boundaries, as it can be difficult to take any action against a perpetrator who is overseas. The increasing importance of the internet and social media in communication has led to a rise in cyber-racism, where discrimination and vilification can occur by people in other parts of the world, but still have an impact on people in Australia.
14. In some circumstances, internet service providers or platform providers will respond to complaints and respect Australian laws, including by geo-blocking websites that contain content that is unlawful in Australia. However, Dr Soutphommasane acknowledged the limitations and practical difficulties in taking action in these matters.
15. Another gap in the law is the absence of protection for religious discrimination. The dividing line between race and religion is contentious, and there are a number of groups, such as Jews and Sikhs, which have been recognised as having both a religious and ethnic basis.

16. Finally, Dr Soutphommasane considered that another gap in the law is the fact that the RDA does not have criminal force. The *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 UNTS 195 (entered into force January 4, 1969) contains a commitment to criminalising racism, however Australia has not adopted this commitment in domestic law.

#### Interaction between State and Federal Legislation

17. Because of differences between federal and state legislation, different laws will say different things about conduct which is on its face the same. For example, the RDA may take one position regarding racial vilification, but the NSW *Anti-Discrimination Act 1977* (NSW) may take a different view of the same conduct. Under the Commonwealth law, the focus is on the harm to the party who was subjected to racial vilification. In contrast, under s 20B of the NSW legislation, the harm in question is the effect that the conduct has on an audience or third party, as the law prohibits the incitement of hatred, serious contempt, or severe ridicule on the basis of race.
18. In practical terms, this means that an individual wishing to make a complaint needs to think carefully about how they want to exercise their rights. If a person has experienced discrimination, they have to choose whether to pursue a complaint under federal or state law. Adj. Professor Newhouse and Dr Soutphommasane therefore advised people who have suffered from discrimination to seek advice prior to lodging a complaint.

## **BIOGRAPHY**

### Dr Tim Soutphommasane

Race Discrimination Commissioner, Human Rights Commission, Sydney

Dr Tim Soutphommasane has been Race Discrimination Commissioner since August 2013. Prior to joining the Australian Human Rights Commission, Tim was a political philosopher and held posts at the University of Sydney and Monash University. His thinking on multiculturalism, patriotism and national identity has been influential in shaping debates in Australia and Britain. Born in France and raised in southwest Sydney, Tim holds a Doctor of Philosophy and Master of Philosophy (with Distinction) from the University of Oxford, and is a first-class honours graduate of the University of Sydney.

### Adjunct Professor George Newhouse

Principal Solicitor, The National Justice Project, Sydney

George Newhouse is an Adjunct Professor of Law at Macquarie University, an Australian human rights lawyer and a former mayor. He is well known for his work with the vulnerable people in particular the mentally ill, Aboriginal Australians, refugees, detainees and prisoners.

## **BIBLIOGRAPHY**

### Legislation

*Racial Discrimination Act 1975* (Cth)

*Native Title Act 1993* (Cth)

*Sex Discrimination Act 1992* (Cth)

*Age Discrimination Act 2004* (Cth)

*Disability Discrimination Act 1984* (Cth)

*Anti-Discrimination Act 1977* (NSW)

*Australian Constitution*

### Treaties

*International Convention on the Elimination of All Forms of Racial Discrimination*, 660 UNTS 195 (entered into force January 4, 1969)