THE WHITLAM GOVERNMENT AND THE RACIAL DISCRIMINATION ACT

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Authored by

Dr Tim Soutphommasane

Dr Tim Soutphommasane is Race Discrimination Commissioner and commenced his five-year appointment on 20 August 2013. Prior to joining the Australian Human Rights Commission, he was a political philosopher and held posts at The University of Sydney and Monash University. His thinking on multiculturalism, national identity and patriotism has been influential in shaping debates in Australia and Britain.

Dr Soutphommasane is the author of four books, *I'm not racist but ...* (2015), *The Virtuous Citizen* (2012), *Don't Go Back To Where You Came From* (2012), and *Reclaiming Patriotism* (2009). He was co-editor (with Nick Dyrenfurth) of *All That's Left* (2010). He has been an opinion columnist with The Age and The Weekend Australian newspapers, and in 2013 presented the documentary series “Mongrel Nation” on ABC Radio National.

A first-generation Australian, Dr Soutphommasane was raised in southwest Sydney. He completed a Doctor of Philosophy and Master of Philosophy (with distinction) at the University of Oxford, and is a first-class honours graduate of The University of Sydney.
The Whitlam Legacy

*The Whitlam Legacy* is a series of occasional papers published by the Whitlam Institute offering contemporary insights on matters of public interest inspired by Gough Whitlam’s public life and the legacy of the Whitlam Government.

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The Whitlam Institute within Western Sydney University at Parramatta commemorates the life and work of Gough Whitlam and pursues the causes he championed. The Institute bridges the historical legacy of Gough Whitlam’s years in public life and the contemporary relevance of the Whitlam Program to public discourse and policy. The Institute exists for all Australians who care about what matters in a fair Australia and aims to improve the quality of life for all Australians.

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The other key area of activity, the Whitlam Institute Program, includes a range of policy development and research projects, public education activities and special events. Through this work the Institute strives to be a leading national centre for public policy development and debate.

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Foreword

This latest paper, in the Whitlam Institute’s ‘Whitlam Legacy’ series, *The Whitlam Government and the Racial Discrimination Act* (RDA) by Race Discrimination Commissioner Dr Tim Soutphommasane, offers a succinct history of the background to the Act itself, its passage through Parliament and its broader significance. It argues that the RDA provided the foundations on which the transformative Mabo cases were built.

However, it does more than this. It provokes a contemporary consideration of the role that legislation can play both in catalysing and in embedding social change. It reminds us that in fundamental matters of human relations – in this case race and culture – the social questions are never ‘settled’ with any finality. It points to the consequential need for vigilance, intellectual honesty and the determination to stay the course.

In the space of a few thousand words Soutphommasane allows the story to unfold through a deceptively simple mingling of personal experience, political history and the realities of a multicultural 21st century Australia.

Soutphommasane first delivered this paper at the Whitlam Institute’s one-day forum on *Gough Whitlam and the Social Democratic Imagination* (6 November 2015). The Whitlam Institute is delighted to be publishing it now for the wider audience it deserves.

Eric Sidoti  
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THE WHITLAM GOVERNMENT AND THE RACIAL DISCRIMINATION ACT

As someone who grew up in southwest Sydney, I was surrounded by places called Whitlam. I borrowed books from the EG Whitlam Library in Cabramatta. My Mount Pritchard cricket team played out of Whitlam Park in Ashcroft. The local swimming pool was located in the Whitlam Leisure Centre in Liverpool.

There was a reason we named everything after Whitlam in that part of the world. He was our champion. He was, as it has been observed, an enlarger of our life, a man whose Government made Australia a bigger place. He was indeed Australia’s social democratic maximus – a prime minister whose government completed the work of ending the White Australia policy, opened Australia to Asia, embraced multiculturalism and introduced the Racial Discrimination Act.

This afternoon, I would like to reflect on one part of the Whitlam legacy. Others have already spoken about Whitlam the man and about Whitlam’s vision. My attention will be devoted to the impact of the Whitlam Government on racial equality and multiculturalism – namely, the impact of the Racial Discrimination Act that it introduced in 1975 as Australia’s first national human rights legislation. It is appropriate that we reflect on this today. On October 31 2015, we marked the 40th anniversary of the Act coming into effect. Forty years on, well may we ask: how has the Act changed our race relations?

The decline of the White Australia ideal

By the 1960s, the White Australia policy became increasingly untenable. Australia found itself increasingly subjected to international criticism for racial discrimination. Civil rights movements against racial segregation influenced a younger generation of Australians. Inspired by the freedom riders of the United States, student leader Charles Perkins organised the Freedom Ride of 1965, bringing the issue of racial discrimination against Aboriginal people to a national audience. In 1967, Australians voted resoundingly in a referendum to ensure Aboriginal people would be counted in the national census for the first time.

The White Australia policy was losing its primacy on the immigration front as well. In 1957, non-Europeans with 15 years residence in Australia were allowed to become citizens. A review of immigration policy also led to a decision in 1966 to accept well-qualified immigrants, including non-Europeans. Change was occurring, though elements of discrimination remained. For instance, while British and European immigrants continued to enjoy assisted passage, immigrants from Asia and elsewhere were not extended the same benefit.

It was not until 1973 that the White Australia policy was completely abolished. The Whitlam Government moved to remove race as a criterion in Australia’s immigration policies. All immigrants, regardless of their origin, were made eligible for citizenship after they had lived in Australia for three years. Instructions were given to overseas posts to disregard race entirely as a factor in the selection of immigrants. International agreements relating to immigration and race, including the Convention on the Elimination of All Forms of Racial Discrimination (CERD), were to be ratified. In the words of the Whitlam Government’s Immigration Minister Al Grassby, the White Australia policy was now ‘dead and buried’. In its place was a new vision for Australian society: a multiculturalism that sought to celebrate ethnic and racial difference rather than suppress it.¹

In 1975 this would be given legislative expression through the Racial Discrimination Act. Noel Pearson, in his Whitlam Oration of 2013, described this legislation as ‘akin to the Civil Rights Act 1964 in the US’. It is the law that secures for all Australians, whatever their racial background, equality before the law. Yet its significance can easily be overlooked. Those who have never experienced the pangs of prejudice and the degradation of discrimination can discount its importance. Even when the Act was passed by the Parliament in 1975, it was greeted with only a muted sense of historical gravity. Whereas in the United States civil rights legislation was enacted as the culmination of a rights struggle, the push for Australian racial equality was never accompanied by the emergence of a social movement, at least of equivalent scale.

Nonetheless, the introduction of laws prohibiting racial discrimination in 1975 was an important political development. Australian white settler society was historically structured on notions of race. Colonial governments openly sanctioned discrimination on racial lines; racial integrity was a defining aspiration of Australian nationhood. The ethos of ‘Australia for the white man’ was maintained without serious dissent or demurral. Indeed, for most of the period since Federation, Australia displayed features of what historian George Frederickson calls an ‘overtly racist regime’. Racism was central to the exclusion of non-white immigrants – to the formulation of a White Australia doctrine. This doctrine would also be manifest in the treatment of Aboriginal people, at whom policies of protection and assimilation were directed.

The Racial Discrimination Bill 1975


Murphy did not succeed in getting the legislation passed (his various bills lapsed). It required a fourth attempt by his successor as Attorney-General, Kep Enderby, in the final year of the Whitlam Government. Introduced into the Parliament in February 1975, the Racial Discrimination Bill was passed in June 1975 with amendments made by the Senate.

The debate surrounding the bill revealed divided opinion between the Labor government and the Coalition opposition. In his second reading speech introducing the bill, Enderby again returned to Australia’s obligations under CERD, arguing that his fellow parliamentarians would surely agree that ‘all human beings are born free and equal in dignity and rights and that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous and without any justification’. The Attorney-General argued that, as common law provided few effective remedies against discrimination, it was necessary for the Parliament to legislate.

But having legal sanctions enacted was about more than just remedies. It was also about social change:

The proscribing of racial discrimination in legislative form will ... make people more aware of the evils, the undesirable and unsociable consequences of discrimination – the hurtful consequences of discrimination – and make them more obvious and conspicuous. In this regard the Bill will perform an important educative role. In addition, the introduction of legislation will furnish legal background on which to rest changes reflecting basic community attitudes. The fact that racial discrimination is unlawful will make it easier for people to resist social pressures that result in discrimination.

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There was agreement on both sides of Parliament about the laudable goals of the proposed legislation; no one disputed the abhorrence of racial discrimination. But there was still vehement opposition expressed in some quarters. Queensland National senator Glen Sheil predicted that, far from eliminating racial discrimination, the Bill would have ‘the most dangerous effect’ of creating ‘an official race relations industry with a staff of dedicated anti-racists’ intent on persecuting white Australians. Another Queenslander, Liberal senator Ian Wood, fulminated that, ‘it is a lot of utter nonsense and rubbish to bring such a Bill before this Parliament’, since ‘racialism in this country probably is practised less than it is in the big majority of countries’.

The views of Sheil and Wood were in stark contrast to their Coalition colleague from the north, Senator Neville Bonner, the first Aboriginal person elected to parliament. After recalling one personal experience when denied a job because an owner of a farm told him, ‘I could not have an Aborigine working on my farm’, Bonner tersely noted: ‘There is no discrimination, according to some people.’

Other Coalition members were more measured in their reservations about the bill, though their objections revealed ideological or philosophical resistance to legislating for dignity. For backbencher John Howard, the Member for Bennelong, it was important to recognise that race was an ‘extremely tender’ subject. There was room in the debate for differences of opinion about ‘the best method by which the problem of racial discrimination in our society can be handled’, and for doubts to be expressed about using ‘legislative coercion’ to promote tolerance. Senator Fred Chaney had doubts about some of the machinery associated with the proposed office of Community Relations Commissioner, but expressed fundamental agreement with the Government that legislation can set a standard for behaviour and change attitudes over time on race.

Shadow Attorney-General Ivor Greenwood gave the lengthiest critique. While acknowledging that the bill ‘gives expression to a desirable and acceptable principle’, Greenwood then proceeded to cast doubt about the constitutionality of using the external affairs power to legislate. There was even doubt about the very existence of racism: ‘We in Australia have been singularly free of racial discrimination’, the Senator would say, and it was only in recent times that instances of racial disharmony had been ‘created by persons who claim there is a racism which ... does not exist’. In any case, governments should be wary of legislating to change human conduct, since its effect may even be to undermine race relations. There was, according to Greenwood, ‘a tendency for laws of this character to exacerbate the tensions which they were expressly designed to avoid’, and to ‘be used as a source of provocation, a focal point for professional agitators who wanted to stir up trouble’.

Such sentiments led many on the Government benches to charge that the Opposition, while not opposing the bill outright, was damning it with faint praise. At the conclusion of the parliamentary debate on the bill, Attorney-General Enderby acknowledged that one could neither legislate for morality nor expect that community behaviour would change instantaneously. Yet, Enderby argued, it was important to recognise that laws also exist to express the feelings of a civilised society. And, perhaps more importantly, his fellow legislators should refrain from stoking fear about anti-discrimination laws exacerbating racial tensions:

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Do not blame legislation like this that has appeared around the world for the rising tide of racial anger that exists in the world. The legislation has been in response to that rising tide of racial anger. My God, racial relations in the United States of America have been transformed, and transformed for the better, as a result of legislation in that country. I can remember my boyhood days when films portrayed negroes as monkeys. Those days are gone and negroes now stand in large measure with a certain dignity largely because of the Warren court and the way in which it was able to interpret the United States Constitution and apply that interpretation to legislation.

With great respect, Mr Speaker, I ask honourable members opposite not to talk that nonsense.

Enderby’s bill would pass. (On October 22 2015, we honoured Enderby’s contribution with the Inaugural Kep Enderby Memorial Lecture, which was delivered by Chief Justice Robert French of the High Court – and which will be an annual lecture dedicated to advancing public understanding of racism, race relations and the Racial Discrimination Act.)

The RDA received its royal assent on 11 June 1975 and came into force on 31 October 1975. Former Immigration Minister Al Grassby was announced as the inaugural Community Relations Commissioner – recognition of his standing as the ‘father of Australian multiculturalism’. At a ceremony for the proclamation of the Act, the prime minister Gough Whitlam reflected that ‘the main victims of social deprivation and restricted opportunity’ have been ‘the oldest Australians on the one hand and the newest Australians on the other’. The legislation was ‘a historic measure’ in the struggle for human rights, Whitlam said, forecasting that it may signal the eventual removal of discriminatory laws on the statute books of at least one State (namely, Queensland). Yet Whitlam saw the importance of the law as not only specifically about redress of present abuses and past injustices. It was also about setting standards for the future: to build, as he put it, ‘a climate of maturity, of goodwill, of cooperation and understanding at all levels of society’.

The very parliamentary debate about the RDA’s enactment, however, seemed to highlight the magnitude of this challenge. Everyone could agree that racial discrimination warranted condemnation; who would disagree? But such common ground only went so far. Whether it was ideological disagreement about the role of legislation in eliminating discrimination, or the passionate defensiveness about racism expressed by some Coalition members, it was clear that racial discrimination was indeed ‘an extremely tender’ area of concern.

**The impact of the Racial Discrimination Act, 1975–2015**

Have attitudes of tolerance and understanding been entrenched in hearts and minds?

Public surveys demonstrate strong public support for cultural diversity. For example, the most recent Scanlon Foundation study of social cohesion in Australia found that 86 per cent of respondents agreed that multiculturalism was a good thing and that the majority are comfortable with levels of immigration. For the most part, the story of Australian multiculturalism since the 1970s has been one of extraordinary success. The RDA has played an important role in this, providing the legislative architecture of racial equality.

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The Act has set a tone for civil conduct in our society. Its ability to do this was enhanced in 1995 with the introduction of racial vilification provisions. A new section 18C made it unlawful to do a public act that is reasonably likely to offend, insult, humiliate or intimidate someone because of their race, colour, ethnicity or national origin. This section was accompanied by free speech exemptions (section 18D) for a number of defined acts concerning the public interest. These provisions on racial vilification and free speech have recently been subject to intense debate, following an unsuccessful proposal for amendment in 2014.

The law has also been a practical instrument, providing a civil protection against discrimination and vilification. 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. To give some indication of how the law currently operates, in 2014-15 the Commission finalised 405 complaints under the Act, of which only 12 proceeded to court (about 3 per cent). The Commission successfully resolved 67 per cent of complaints where it attempted conciliation. In 2013–14 the AHRC finalised 443 complaints under the RDA: of those 14 complaints proceeded to court (3 per cent of complaints).

More specific to matters of race, the RDA has been a significant instrument in prohibiting racial discrimination. 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. This guarantee of equality before the law has established a national standard of racial non-discrimination. As constitutional lawyer 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.

Even so, the RDA has been used to assist in securing land rights for Indigenous people, something foreshadowed in Koowarta.

The role of the RDA in underpinning native title was confirmed in the 1988 High Court judgment in Mabo v State of Queensland (No. 1). There, the majority of the High Court held that Queensland legislation, which sought to extinguish native title in the Murray Islands of the Torres Strait, was constitutionally invalid because it was inconsistent with the RDA. The judgment meant that no state law could validly extinguish or acquire native title rights in a way that discriminated on the basis of race. Mabo (No. 1) also meant, of course, that Mabo (No. 2) would proceed – a case in which the High Court would recognise native title at common law and the rejection of the doctrine of terra nullius.

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15 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.

16 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.’


18 Mabo v Queensland (No. 1) (1989) 166 CLR 186.

19 Mabo v Queensland (No. 2) (1992) 175 CLR 1.
What remains to be done

The protections afforded by the RDA remain vulnerable. The Act remains subject to the will and whim of our parliament, which has on three occasions suspended the operation of the Act (most recently, during the NT Intervention). This reflects the lack of a constitutional guarantee of racial non-discrimination.

More generally, some scholars have been sceptical about the RDA’s impact. A decade ago, reflecting on the Act’s 30th anniversary, law professor 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’.\(^{20}\) 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.\(^{21}\) 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.

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. It is limited in its ability to remedy systemic forms of discrimination, relying as it does upon victims of discrimination to come forward with a complaint or to initiate legal proceedings.

Yet it seems unfair to expect that a single piece of legislation could, on its own, transform a political culture. 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, 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.\(^{22}\) 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.’\(^{23}\) 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’.\(^{24}\)

All this must inform any assessment of the RDA’s contribution to eliminating racial discrimination. It should go without saying that we cannot rely upon legislation – and legislation alone – to achieve social change. But there are also good reasons to be celebrating the presence of legislative protections against racial discrimination. Public expressions of racial contempt and discrimination were once accepted without controversy in Australian society; today they are greeted overwhelmingly with disapproval. Much of these changes were given momentum by what was enshrined in the statute books in 1975, by that legislation that was passed in the dramatic final year of the Whitlam Government, and which was proclaimed by Whitlam only a fortnight before his Government ended.

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