



Reconciliation
A U S T R A L I A

1 February 2012

**Submission to the Commonwealth
Attorney General's Department**

*Consolidation of Commonwealth
Anti-Discrimination Laws*

1. Introduction

Reconciliation Australia is the peak national organisation building and promoting reconciliation between Aboriginal and Torres Strait Islander peoples and other Australians for the wellbeing of the nation. We believe that a reconciled Australia is one where:

- Aboriginal and Torres Strait Islander peoples are recognised appropriately as Australia's First Peoples;
- our society understands and values the history, culture, rights and contribution of Aboriginal and Torres Strait Islander peoples;
- genuine partnerships in which Aboriginal and Torres Strait Islander voices are heard and respected are the norm; and
- the success and well-being of all Aboriginal and Torres Strait Islander peoples and communities are part of everyday life.

We consider that stronger relationships, built on shared knowledge and respect, are central to Aboriginal and Torres Strait Islander peoples controlling their life choices and participating fully in the economic and social opportunities enjoyed by the wider community.

Aboriginal and Torres Strait Islander Australians continue to report experiences of racism. Reconciliation Australia believes that the major cause of prejudiced views and behaviour towards Aboriginal and Torres Strait Islander peoples is based on lack of understanding and awareness, although the social and economic circumstances of many Aboriginal and Torres Strait Islander Australians are also a contributing factor. We know that building respectful relationships between Aboriginal and Torres Strait Islander peoples and other Australians will be the key to reducing racism as well as closing the gap.

Section 3 of this submission will establish the critical importance of the *Racial Discrimination Act 1975* (RDA) and demonstrate that unacceptably high levels of racism continue to be experienced by Aboriginal and Torres Strait Islander Australians. Section 4 of the submission explains the negative impact that racial discrimination has on Aboriginal and Torres Strait Islander peoples, both for individual wellbeing and for reconciliation more broadly.

In section 5 of the submission we discuss the importance of the RDA in ensuring that Aboriginal and Torres Strait Islander peoples have the same rights as other Australians. We also note that the RDA has been a significant tool in achieving recognition of some of the unique rights of the Australia's First Peoples, including Native Title. The recognition of human rights as well as these unique rights is a cornerstone of the reconciliation process.

In section 6 we address the consolidation of discrimination legislation. Reconciliation Australia does not specialise in law and we are reviewing this process from a reconciliation perspective. In our view, it is necessary that the current protection of the rights of Aboriginal and Torres Strait Islander Australians is maintained following the consolidation of discrimination legislation. It is also critical that the reasoning behind any legislative changes,



as well as their content, is communicated very clearly, particularly to the Aboriginal and Torres Strait Islander community.



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2. Summary of recommendations

Reconciliation Australia recommends to the Commonwealth Attorney General's Department that if the *RDA*, *Sex Discrimination Act 1984*, *Disabilities Discrimination Act 1992* and *Age Discrimination Act 2004* are consolidated into a single Act that:

1. The following elements in the RDA that protect or advance the rights of Aboriginal and Torres Strait Islander Australians are maintained and strengthened where appropriate:
 - a. Special measures;
 - b. Direct discrimination and indirect discrimination;
 - c. Equality before the law; and
 - d. Racial vilification.
2. That any changes to the RDA are clearly communicated to Aboriginal and Torres Strait Islander peoples as well as to the Australian people generally and:
 - a. this is done by government in close collaboration with the National Congress of Australia's First Peoples and Aboriginal Legal Services across Australia; and
 - b. adequate funding is provided to Aboriginal Legal Services to produce material and hold workshops across Australia to explain the changes.



3. Racism experienced by Aboriginal and Torres Strait Islander Australians

There continue to be high levels of racism in Australian society. Raising the issue of racism is uncomfortable for many Australians and is even resented. Yet we were reminded by the recent comments of Dr Charles Teo during the 2012 Australia Day Address that for many Australians of different origins and backgrounds it is an ongoing reality in their lives.

The 2010 Mapping Social Cohesion report delivered by the Scanlon Foundation found that there has been an increase in the level of racism in Australia. Fourteen percent of people surveyed had experienced racism in the 12 months prior to the survey, up from 10 per cent in 2009¹. Similarly, the University of Sydney's Anti-Racism Project found that most Australians (84.4 per cent) believe that there is racial prejudice in Australia².

There is evidence that the depth of racist experiences suffered by Aboriginal and Torres Strait Islander peoples may be greater than that experienced by other groups in society³. In the 2008 National Aboriginal and Torres Strait Islander Social Survey (NATSIS Survey), 27 per cent of respondents aged 15 years and over reported having experienced discrimination in the last 12 months. The most common places where discrimination was experienced included the general public (11 per cent), by police, security, personnel or courts of law (11 per cent) and at work or when applying for a job (8 per cent)⁴.

The National Tertiary Education Union conducted a survey in 2011 of its Aboriginal and Torres Strait Islander members and their experience of racism in the workplace. Of those surveyed, 71.5 per cent had experienced racial discrimination in the workplace⁵. Similarly, as part of the Darwin Region Urban Indigenous Diabetes study that was completed in 2004, 70 per cent of Aboriginal and Torres Strait Islander participants reported experiences of interpersonal racism, mainly from service providers and in employment and public settings⁶.

Reconciliation Australia conducts the Australian Reconciliation Barometer (the Barometer) every two years to measure the attitudes and values of Australians on a range of

¹ Markus, A (2010) *Mapping Social Cohesion 2010: The Scanlon Foundation Surveys Summary Report*, p13. Retrieved 8 January 2011 from: <http://arts.monash.edu.au/mapping-population/--documents/mapping-social-cohesion-summary-report-2011.pdf>

²Challenging Racism Project (2011) *Challenging Racism: the Anti-Racism Research Project*. Retrieved 8 January 2011 from:http://www.uws.edu.au/ssap/school_of_social_sciences_and_psychology/research/challenging_racism/findings_by_region

³Mansouri F, Jenkins L, Morgan L, Taouk M (2009) *The Impact of racism upon the health and wellbeing of young Australians*, Melbourne: Foundation for Young Australians.

⁴ Australian Bureau of Statistics (2010) *The Health and Welfare of Aboriginal and Torres Strait Islander Peoples, Oct 2010* (ABS catalogue number 4704.0) Canberra: Australian Bureau of Statistics.

⁵ National Tertiary Education Union (2011) *I'm not a Racist, But...* Retrieved 4 January from: <http://www.nteu.org.au/library/view/id/2069>

⁶Paradies, Y and Cunningham, J (2009) 'Experiences of racism among urban Indigenous Australians: findings from the DRUID study' in *Ethnic and Racial Studies*, Vol.32 No.3 March 2009 p.570.



reconciliation related issues. The results of the 2010 Barometer showed that there is still a widespread lack of knowledge about Aboriginal and Torres Strait Islander history and culture among the general community. Of those surveyed, 62 per cent felt their knowledge about the history of Australia's First Peoples was low, while almost three quarters felt they had low levels of knowledge with regard to Aboriginal and Torres Strait Islander culture⁷.

In our view, a lack of understanding often translates into racist assumptions or stereotypes. Indeed, the Barometer found that non-Indigenous people tend to view Aboriginal and Torres Strait Islander people as not being hard-working or disciplined. There are also misunderstandings of Aboriginal and Torres Strait Islander lifestyles amongst general community respondents, such as believing that Australia's First Peoples generally live in tribal groups rather than having a diverse range of lifestyles and occupations⁸.

Stereotypes are also supported by negative representations of Aboriginal and Torres Strait Islander peoples in the media which like all bad news impacts more strongly than the positive accounts of Aboriginal and Torres Strait Islander peoples and their achievements. This has a significant impact as the Barometer found that many peoples' views of Aboriginal and Torres Strait Islander Australians are influenced significantly by the media and what we learn at school⁹.

Reconciliation Australia believes that building understanding and developing respectful relationships between Aboriginal and Torres Strait Islander peoples and other Australians and closing the gap hold the key to addressing racism.

⁷ Reconciliation Australia (2010) *Australian Reconciliation Barometer*, Available at: <http://www.reconciliation.org.au/home/resources/australian-reconciliation-barometer>

⁸ Ibid

⁹ Ibid



4. Impact of racism

Reconciliation Australia believes that racism directly damages the relationship between Aboriginal and Torres Strait Islander peoples and other Australians. Racism also has a significant negative impact on individual wellbeing and restricts the ability of Aboriginal and Torres Strait Islander peoples to control their life choices and participate fully in the economic and social opportunities enjoyed by the wider community.

It is common knowledge that Aboriginal and Torres Strait Islander Australians have poorer outcomes across a number of key indicators including life expectancy, year 12 attainment, household income and employment. According to the 2010 Barometer, 81 percent of Aboriginal and Torres Strait Islander respondents believe that race-based discrimination is a very important factor in creating disadvantage amongst Aboriginal and Torres Strait Islander people. Only 33 per cent of non-Indigenous respondents believe it is a very important factor. This suggests that non-Indigenous people may underestimate the impact of race-based discrimination¹⁰.

It has been well documented that racism is associated with poorer health outcomes. In particular, when people internalise negative stereotypes it negatively affects psychological wellbeing and self-esteem and in turn increases the risk of depression. At the same time racism can produce negative emotions such as stress and fear which also impact on mental health and broader wellbeing. It is difficult to determine the extent to which racism impacts on mental health but it is clear that it has some impact. According to the 2011 Overcoming Indigenous Disadvantage Report, Aboriginal and Torres Strait Islander peoples report experiencing a high/very high level of psychological distress at two and a half times the rate of non-Indigenous people (32 per cent compared to 12 per cent)¹¹.

We believe that trust is a key ingredient in strong and sustainable relationships between Aboriginal and Torres Strait Islander peoples and other Australians. Racism erodes people's trust in other people and institutions. The Barometer found that 81 per cent of general community respondents have low levels of trust towards Aboriginal and Torres Strait Islander Australians. Similarly, 85 per cent of Aboriginal and Torres Strait Islander respondents were found to have low levels of trust towards non-Indigenous Australians¹². The NATSIS survey shows that people who had experienced racism were less likely to trust the police, their local school, their doctor and/or hospital and other people in general¹³.

Experiences of discrimination and the subsequent eroding of trust are very likely to contribute to lower levels of participation of Aboriginal and Torres Strait Islander Australians in a range

¹⁰ Ibid

¹¹ Steering Committee for the Review of Government Service Provision (2011) *Overcoming Indigenous Disadvantage 2010* Melbourne: Productivity Commission p.41.

¹² Reconciliation Australia (2010) *Australian Reconciliation Barometer*, Available at: <http://www.reconciliation.org.au/home/resources/australian-reconciliation-barometer>

¹³ Australian Bureau of Statistics (2010) *The Health and Welfare of Aboriginal and Torres Strait Islander Peoples, Oct 2010* (ABS catalogue number 4704.0) Canberra: Australian Bureau of Statistics.



of settings, including school and tertiary education as well as economic participation and political participation. Through working with our Reconciliation Action Plan partners we have seen that the organisations that have had success in attracting and retaining Aboriginal and Torres Strait Islander staff have been socially inclusive organisations that are respectful of culture and have low levels of discrimination.



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5. The importance of the Race Discrimination Act to Aboriginal and Torres Strait Islander People's Rights

Reconciliation will not be achieved until Aboriginal and Torres Strait Islander peoples enjoy the same rights, opportunities and responsibilities as other Australians as well as having their unique rights as Australia's First Peoples recognised. As former Aboriginal and Torres Strait Islander Social Justice Commissioner Dr William Jonas said:

“It is not possible to talk meaningfully about reconciliation, and the transformation of relationships between Indigenous and non-Indigenous Australians that it aims for, without reference to human rights ... The treatment of Indigenous peoples throughout Australia's history has not respected these basic principles of humanity¹⁴.”

5.1 Current protections under the RDA

The RDA makes a significant contribution to ensuring that Aboriginal and Torres Strait Islander peoples have the same rights as other Australians in the following ways:

- a. **Special Measures:** Section 8(1) of the RDA provides that States may take special measures to ensure that minority racial groups that have been disadvantaged are able to enjoy and exercise their human rights and fundamental freedoms.
- b. **Direct Discrimination:** Section 9(1) of the RDA protects people from any direct discrimination on the grounds of race which has the effect of impairing or nullifying enjoyment of human rights. This includes in employment, renting or buying a property, the provision of goods and services, accessing public places.
- c. **Indirect Discrimination:** Section 9(1A) protects people from indirect discrimination which has the effect of impairing the enjoyment of human rights.
- d. **Right to Equality before the Law:** Under Section 10 of the RDA a law is unlawful if its operation and effect means that persons of a particular race do not enjoy a human right that is enjoyed by other persons of a particular race or only enjoy it to a limited extent.
- e. **Racial Vilification:** Section 18C of the RDA provides protection against offensive behaviour because of race, colour or national or ethnic origin. It is unlawful for a person to do an act, otherwise than in private, if the act is reasonably likely, in all the

¹⁴ Australian Human Rights Commission (2011) *Social Justice and Human Rights for Aboriginal and Torres Strait Islander peoples*. Retrieved on 16 January 2011 from: http://www.hreoc.gov.au/social_justice/info_sheet.html



circumstances, to offend, insult, humiliate or intimidate another person or a group of people¹⁵.

5.2 Gaps in protection provided by the RDA

While outside the scope of this inquiry, we consider that there are two significant gaps in the protection afforded to Aboriginal and Torres Strait Islander people by the RDA.

First, with regards to the special measures provision in the RDA, we note that in order to determine whether a measure qualifies as a special measure, one of the criteria that it must meet is that it confers a benefit on the people who would be affected¹⁶. However, in determining whether a measure confers a benefit on Aboriginal and Torres Strait Islander peoples, Section 8 (1) does not state that it is a mandatory requirement to obtain consent through consultation with the affected peoples. This is inconsistent with the general recommendation from the Committee on the Elimination of Racial Discrimination which states that:

“States parties should ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities¹⁷.”

Second, with regard to equality before the law, we note that Section 10 cannot prevent the enactment of a discriminatory Commonwealth law made after 31 October 1975. Section 10 of the RDA has been particularly significant in rendering a number of state laws inoperative because they discriminated on the basis of race in relation to the human rights of Aboriginal and Torres Strait Islander peoples. The same discipline is not imposed on the Commonwealth legislature.

We note that the Expert Panel on Constitutional Recognition of Indigenous Australians has recommended to the Prime Minister that a prohibition on racial discrimination be inserted into the Australian Constitution¹⁸. We understand that this would address the limitations of Section 10 of the RDA with regard to Commonwealth laws made after 31 October 1975. While reforms to the Australian Constitution are clearly outside the scope of this inquiry, it is important to recognise the consolidation of discrimination legislation will not be able to address this gap and that further reforms outside of this process are required.

¹⁵ Australian Human Rights Commission (2011) *Chapter 3 Racial Discrimination Act*. Retrieved on 18 January 2011 from: http://www.hreoc.gov.au/legal/FDL/2011/3_RDA.pdf

¹⁶ Australian Human Rights Commission (2003) *Special Measures*, Retrieved on 16 January 2011 from: http://www.hreoc.gov.au/racial_discrimination/guide_law/special_measures.htm.

¹⁷ Committee on the Elimination of Racial Discrimination, *General Recommendation 32 (2009): The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*. UN Doc A/64/18 (Annex VIII). Retrieved on 16 January 2011 from: <http://www2.ohchr.org/english/bodies/cerd/comments.htm>.

¹⁸ Expert Panel on constitutional recognition of Indigenous Australians (2012) *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, p.173



6. The consolidation of discrimination legislation

The RDA is an essential tool in protecting and advancing the rights of Aboriginal and Torres Strait Islander peoples. As Reconciliation Australia does not have legal expertise, our recommendations about the consolidation of the legislation are limited to what we believe should be part of the consolidated Act but not extend to how the rights and protections should be expressed. We also make recommendations around how the changes should be communicated. The most important principle is that the protections against discrimination that were outlined in section 5 are maintained.

6.1 Maintaining current protection against racial discrimination

The Australian Human Rights Commission (the Commission) is well placed to advise on how discrimination legislation can be consolidated in a way that does not diminish protection. We endorse their recommendations as to how protections in the RDA could apply to attributes additional to race (gender, age, disability and sexual orientation). However, if this is not done it is essential the current protections be maintained on the basis of race.

The following are Reconciliation Australia's recommendations regarding the consolidation of the key provisions in the RDA into a consolidated Act.

Special Measures

We endorse the Commission's recommendation that "so far as possible a consolidated Commonwealth equality law provide a single special measures and specific needs provision applying to all protected attributes¹⁹." However, if the provision is not applied to all protected attributes it must continue to apply on the grounds of race.

We also recommend that the special measures provision in a consolidated Act clearly state that a State must consult with affected communities before enacting legislation under the special measures provision.

Direct and Indirect Discrimination

We endorse the Commission's recommendation for "consideration of a unified test for discrimination based on a combination of the approaches taken in the *ACT Discrimination Act 1991* and the RDA or the *Northern Territory Anti-Discrimination Act 1992*²⁰." The Commission believes that this will not diminish protections.

Right to Equality before the law

We endorse the Commission's recommendation that "favourable consideration be given to inclusion within a consolidated Commonwealth equality law of an equivalent to RDA section

¹⁹ Australian Human Rights Commission (2011) *Consolidation of Commonwealth anti-discrimination law*, p.18. Retrieved on 4 January 2011 from:

http://www.humanrights.gov.au/legal/submissions/2011/20111206_consolidation.pdf

²⁰ Ibid p.10



10 applying to all protected attributes²¹.” If this does not occur it is important that the right to equality before the law be maintained on the basis of race in a consolidated anti-discrimination act.

Racial Vilification

As discussed earlier in this submission, racial vilification is any public act or behaviour that could incite others to hate, threaten, ridicule, insult or show contempt towards another person based on that person’s race, religion, colour, descent or origin. Reconciliation Australia believes that racial vilification has no place in our society and will significantly impede progress towards a reconciled Australia.

We recognise, however, that a balance needs to be struck between ensuring protection against racial vilification and enabling freedom of expression. To protect freedom of expression, the RDA sets out certain circumstances in which the prohibition will not apply, providing the person has acted reasonably and in good faith. We support this approach, but acknowledge that there are differing views on this matter throughout society.

We note that there are no equivalent provisions to racial vilification in the Sex Discrimination Act, Disabilities Discrimination Act and Age Discrimination Act. We strongly recommend that existing protection against racial vilification be maintained in a consolidated anti-discrimination act.

Recommendation 1: The following provisions in the RDA that protect or advance the rights of Aboriginal and Torres Strait Islander Australians are maintained and strengthened where appropriate:

- a) Special measures;
- b) Direct discrimination and indirect discrimination;
- c) Equality before the law; and
- d) Racial vilification.

6.2 Communicating the changes to Aboriginal and Torres Strait Islander Australians

Given the significance of the RDA to the rights of Aboriginal and Torres Strait Islander peoples, communicating the consolidation of the RDA will be vitally important, particularly to address any concerns that the Act is being removed or diminished. As a general principle, Reconciliation Australia believes that respectful and effective engagement with Aboriginal

²¹ Australian Human Rights Commission (2011) *Consolidation of Commonwealth anti-discrimination law*, p.26. Retrieved on 4 January 2011 from:
http://www.humanrights.gov.au/legal/submissions/2011/20111206_consolidation.pdf



and Torres Strait Islander peoples in all stages of policy and program design, implementation and evaluation should begin early and should, where necessary, be ongoing to enable meaningful participation.²²

In terms of communicating the changes, we recommend that the Attorney General's Department work closely with the National Congress of Australia's First Peoples and the Aboriginal Legal Services. These organisations have membership bases and strong connections with communities and are best placed to communicate the changes. We further recommend that the Government provide funding to the Aboriginal Legal Services in every State and Territory to produce and circulate material and hold meetings and workshops to explain the changes. The communication of the consolidated act is an important opportunity to increase awareness and understanding of how the anti-discrimination legislation can be used.

Recommendation 2: That any changes to the RDA are clearly communicated to Aboriginal and Torres Strait Islander peoples and:

- a) this is done by government in close collaboration with the National Congress of Australia's First Peoples and Aboriginal Legal Services across Australia; and
- b) adequate funding is provided to Aboriginal Legal Services to produce material and hold workshops across Australia to explain the changes.

²² Australian Human Rights Commission (2010) 'Appendix 4: Features of meaningful and effective consultation processes', *Native Title Report 2010*, Available at: http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/appendix4.html

Conclusion

The RDA provides protection to Aboriginal and Torres Strait Islander peoples to enjoy their human rights and has been a significant tool in recognising some of their unique rights as Australia's First Peoples. The recognition of human rights as well as these unique rights is a cornerstone of the reconciliation process. If a consolidated discrimination act is created it is essential that the rights protected by the RDA are not diminished and that this is clearly communicated to Aboriginal and Torres Strait Islander Australians.

