FROM DIVERSE TO DIVERSITY:

A JOURNEY TOWARDS ACCEPTANCE

I. Introduction

Australia is a diverse country in the process of embracing diversity.

Australia has always been ethnically diverse. In pre-colonial Australia, distinct Aboriginal and Torres Strait Islander peoples formed a tapestry of different cultures and languages.[1] In contemporary Australia, the era of globalisation has seen the introduction of immigrants from increasingly varied ethnic groups and cultural heritages.

However, it cannot be said that Australia has fully embraced diversity. While institutional changes have been implemented to punish overt discrimination, there are still lingering issues that have yet to be addressed such as covert discrimination, the under-representation of minorities, and the degree of legal protection afforded to the fundamental right to equality and non-discrimination. Australia is also now confronted with the difficult question of how it should promote diversity in a positive manner that extends beyond penalising bad behaviour.

In this essay, I will examine how Australian society can continue to promote equality and diversity, focusing specifically on cultural and ethnic diversity in Australia's laws, legal profession, and justice system.

In Part II, I will trace the development of equality and diversity in Australia. Historically, individual activists have fought for equality and diversity in the face of institutional discrimination. In contemporary Australia, changes in societal norms have led to organisations and institutions implementing systemic changes to promote equality and diversity, reducing the relative influence of individual activists. While equality and diversity are now societally accepted as ideals to be pursued, the path towards diversity remains unclear.

In Part III, I will provide principles that should guide Australia going forward. My focus will be on how individuals, organisations and institutions can cooperate to address complex issues, rather than providing specific solutions to these issues.

Australia's anti-discrimination laws have traditionally been limited to sanctioning discriminatory behaviour, while individuals and community organisations attempt to

[1] 'Timeline: Pre 1800's', *New South Wales Department of Education* (Web Page) <https://racismnoway.com.au/about-racism/timeline/pre-1800s/>.

proactively foster diversity through encouraging mutual understanding and tolerance for different cultures and ethnicities. This Austinian view of the law has led to a disjoint between formal legal institutions and other organisations and individuals at the grassroots level. An integrated approach to diversity requires individual, organisations and institutions to have a shared understanding of what diversity is and how it can be collaboratively achieved.

Systemic changes implemented by large organisations and corporations should also reinforce rather than displace grassroots activism. The movement towards greater equality and diversity can only be legitimised when individuals are empowered to participate in the movement and share their authentic experiences.

In Part IV, I will examine how these concepts can be applied, using hate speech and disinformation as a case study. There has been a global uptick in populist right-wing sentiment across the United States and various European countries, often coupled with an increase in anti-immigrant sentiment. This trend has also coincided with the rise of disinformation tactics such as data manipulation or astroturfing as a political tool – a progression that is likely to accelerate even further with the use of artificial intelligence tools. Australia itself is no stranger to the potential dangers of populism and disinformation, having witnessed the 2005 Cronulla race riots. Against this backdrop, it is necessary to re-evaluate Australia's current approach to discriminatory speech under the *Racial Discrimination Act 1975* (Cth) ["the *RDA*"]. Individuals and community organisations can be legally empowered to play a greater role in promoting understanding, correcting disinformation, and rehabilitating offenders of the Act.

II. History of equality and diversity in Australia

The history of equality and diversity in colonial and post-colonial Australia is characterised by individual activists pushing back against institutional discrimination based on ethnicity. Despite its subscription to principles of equity and the rule of law, Australia's laws and justice system was no exception to the prevailing trend of the times.

Institutional discrimination

Australia's contemporary laws, legal profession and justice system are based on the ideologies and traditions imported by Australia's British colonisers.[2] As a result, many aspects of Australia's legislative and justice system both overtly and covertly entrenched discrimination

[2] Justice Hament Dhanji, 'Cultural Diversity in the Law: It is not revolution – but we are going to occupy the buildings' (Speech, The Law Society of New South Wales Cultural Diversity Networking Event, 27 Sept 2022) [11].

based on ethnicity.[3] This discrimination was further amplified by fears of the economic and military threat posed by the Chinese, dating back to the sudden influx of Chinese immigrants entering Australia during the Victorian gold rush era.[4] As a result, anti-Chinese sentiment was prevalent during Australia's colonial period, and discriminatory legislation extended well into the 20th century.

The non-recognition of Aboriginal rights and customary law is an example of both covert and overt discrimination in colonial Australia, and continues to be a contentious issue to this day. In *R v Murrell*, the NSW Supreme Court held that British law was applicable to Aborigines in Australia.[5] While the Court used the language of equality to purport that Aboriginal peoples were equally subject to British law, the reality was that the British legal system and common law traditions were an unfamiliar and disadvantageous landscape for them. Colonial Australia's laws were also expressly discriminatory against Aboriginal peoples, with the express non-recognition of Aboriginal rights concerning land, voting, and various other basic entitlements.[6]

Discrimination within Australia's law and justice system was not limited to discrimination against Aboriginal peoples. In 1901, the newly-established federal government enacted a set of immigration laws commonly known as the White Australia Policy. The *Immigration Restriction Act 1901* (Cth) [the "*Immigration Restriction Act*"] was the cornerstone of the White Australia Policy, vesting the executive arm of the government with the authority to bar migrants from entering Australia and deport existing migrants if the migrants were unable to pass a dictation test.[7] The details of the test were largely left to the discretion of the immigration officer, and as a matter of practice the administration of the test was targeted at and vastly disadvantageous to non-European migrants. From 1909 to 1958, no person managed to pass the dictation test.[8] The situation was such that there was even express judicial recognition of the discriminatory intentions underlying the dictation test:

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[3] *Ibid.*
[4] 'Violence on the goldfields', *National Museum of Australia* (Web Page) <https://www.nma.gov.au/explore/features/harvest-of-endurance/scroll/violence-on-goldfields>.
[5] *R v Jack Congo Murrell* (1836) 1 Legge 72.
[6] Bain Attwood, *Rights for Aborigines* (Routledge, 2020).
[7] *Immigration Restriction Act 1901* (Cth) ss 3(a), 5, 8,
[8] 'The Immigration Restriction Act 1901 (Cth)', *Museum of Australian Democracy* (Web Page) <https://www.foundingdocs.gov.au/item-sdid-87.html>.

> "The giving of a dictation test to an immigrant is not for the purpose of testing his education. It is given so that his failure to pass the test (*and it can be assumed that he will fail*), will convert him into an immigrant deemed to be a prohibited immigrant offending against the Act." [9]
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> -Acting Chief Justice Williams, 1953

While there were notable court cases which successfully challenged the deportation of immigrants under the White Australia Policy, these cases did not challenge the validity of the legislation, but rather the interpretative scope of the legislation and whether the formal requirements set out in the legislation had been followed.[10]

In other countries, more activist courts have been willing to go further to protect principles fundamental to a thick conception of the rule of law. One of the most radical examples from more recent times would be India's judiciary. Among other things, India's Supreme Court has expansively interpreted the constitutional right to life and personal liberty in India's Constitution to include other fundamental rights such as the right to education[11] and to a clean environment.[12]

In contrast, the approach taken by the legal profession and the judiciary in young federal Australia was reflective of the deep-rooted nature of the institutional discrimination against non-Europeans. One of the reasons for Australia's federalisation was to allow for unified immigration legislation that would restrict non-European immigrants from entering Australia.[13] It is therefore unsurprising that Australia's Constitution contained no enforceable bill of rights, while vesting Parliament with broad power to make laws concerning immigration and "aliens".[14] There was no avenue to argue that the legislation comprising the White Australia Policy was invalid, as the very origins of the institutions perpetuating the discrimination were steeped in racism.

The xenophobic mentality underlying the White Australia Policy was also prevalent in the legal profession. Across various States in Australia, barrister and solicitor admission rules prohibited

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[9] *Chu Shao Hung v The Queen* (1953) 87 CLR 575, 581 (emphasis added).
[10] See e.g. *O'Keefe v Calwell* [1949] HCA 6.
[11] *Mohini Jain v State of Karnataka* 1992 AIR 1858.
[12] *Maneka Gandhi v Union of India* AIR 1978 SC 597
[13] Timothy Kendall, 'Within China's Orbit? China through the eyes of the Australian Parliament' (Australia Department of Parliamentary Services, 2008) ch 1 <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/APF/monographs/Within_Chinas_Orbit/Chapterone>.
[14] *Commonwealth of Australia Act 1900* ss 51(xix), 51(xxvii).

"aliens" from admission or enacted structural barriers in the form of education and apprenticeship requirements.[15] These barriers remained in place well into the second half of the twentieth century, and it was only in 1978 that all States allowed the admission of "alien" lawyers.[16] While the admission of a lawyer from an ethnically diverse background was not completely unheard of in those times, it was rare enough to make newspaper headlines.[17]

Individual activism

In the face of institutional discrimination pervasive throughout Australia's laws, legal profession and justice system, individual activists pushed for greater equality and diversity to a limited degree of success. While organisations were established to defend minority interests, the influence of these organisations was often limited to the influence of their most prominent individual members.

Some individuals leveraged their existing positions of power and influence to speak out against Australia's discriminatory laws and policies. For example, Patrick Francis Moran, Catholic cardinal and Archbishop of Sydney, was a vocal critic of anti-Chinese legislation.[18] Prominent merchants and missionaries such as Louis Ah Mouy, Cheok Hong Cheong, and George Kwok Bew also petitioned against both racist sentiments in Australia in general and discriminatory legislation in particular.

Within the legal profession, lawyers such as William Ah Ket and William Jangsing Lee acted as representatives of their ethnic communities, creating more opportunities for interaction between different ethnic groups. These lawyers also took on cases confronting Australia's discriminatory laws and policies.

In *Potter v Minahan*,[19] William Ah Ket successfully challenged the application of the *Immigration Restriction Act* to Minahan, an Australian of mixed descent who was born in Australia but lived in China since he was five years old. After spending twenty-seven years abroad, Minahan sought to return to Australia but was declared a prohibited immigrant under the Act. William Ah Ket challenged the interpretative scope of the legislation, arguing that it

[15] Dhanji, *supra* note 2 at [12] – [17].
[16] *Ibid.* at [17].
[17] Malcolm Oakes, 'William Lee: First barrister of Chinese descent admitted to the New South Wales Bar' (2015) *Journal of the New South Wales Bar Association* 73, <https://nswbar.asn.au/docs/webdocs/BN_022015_lee.pdf>.
[18] Cahill, 'Moran, Patrick Francis (1830–1911)', *Australian Dictionary of Biography* (Web Page, 1986) <https://adb.anu.edu.au/biography/moran-patrick-francis-7648>.
[19] *Potter v Minahan* [1908] HCA 63

was a fundamental principle for every person born within British territory to be a British subject with a right to freedom of movement.[20] The *Immigration Restriction Act* could not be interpreted as depriving British subjects of their fundamental rights unless this interpretation was clearly found within the language of the Act by express words or necessary implication. The High Court of Australia agreed with William Ah Ket's interpretation by a majority of 3:2, a landmark decision recognising the importance of fundamental principles of law. However, the decision ultimately failed to recognise the right to equality as a fundamental principle of law.

In *Koon Wing Lau v Calwell*,[21] William Jangsing Lee challenged the constitutional validity of White Australia Policy legislation that gave the federal government the authority to deport refugees and "aliens" who entered Australia during World War II. William Jangsing Lee argued that provisions of the *War-time Refugees Removal Act 1949* (Cth) were constitutionally invalid on various grounds. There were no limits on how long a person could be kept in custody pending deportation, and a power of unlimited incarceration arguably was not within the scope of the Commonwealth government's heads of power. It was also contended that the immigration power did not allow for the deportation of persons after they had been absorbed into the community and ceased to be immigrants. The High Court of Australia ultimately rejected the arguments and upheld the constitutional validity of the Act.

In *Chu Shao Hung v The Queen*,[22] William Jangsing Lee also challenged the prevailing understanding of the Immigration Act, which was at the time understood as mandating courts to sentence prohibited immigrants to six months of imprisonment pending an order for deportation to be made. It was viewed as impossible for prohibited immigrants to be released on a good behaviour bond, as their very existence in Australia was a continuing offence. William Jangsing Lee argued that being deemed a prohibited immigrant did not necessarily involve any element of wrongdoing, and the court should have the discretion to make an order for conditional release under the generally applicable Crimes Act provisions. The case was significant as the High Court of Australia not only found in William Jangsing Lee's favour, but also expressly adopted the argument that prohibited immigrants had not necessarily engaged in any wrongdoing, and commented on the absurdity of a good behaviour bond being broken "by doing nothing at all".

[20] *Ibid.*
[21] *Koon Wing Lau v Calwell* [1949] HCA 65.
[22] *Chu Shao Hung v The Queen* (1953) 87 CLR 575

While there was never a successful challenge to the validity of the discriminatory laws, the public attention brought by the efforts of individual activists brought the issue of racism into the public consciousness and sparked wider societal debate on the issue, ultimately leading to a shift in societal norms and expectations in the later half of the 20th century.

The normalisation of equality and diversity

In more recent times, shifts in societal norms have led to the public acceptance of equality and diversity as ideals to be pursued rather than a destabilising force to be suppressed. Organisations and institutions have therefore implemented systemic changes to promote equality and diversity, while also dismantling overtly discriminatory laws and policies. As a result, although activism continues to play a significant role in shaping public discourse, the relative influence of individual activists has diminished.

Australia's State and Federal governments have dismantled overtly discriminatory laws and policies enacted laws to prevent discrimination based on ethnicity. By 1966, the federal legislation comprising the White Australia Policy had largely been repealed.[23] In 1975, the federal government introduced the *RDA*, and various States also enacted their own local anti-discrimination laws.

With the shift in public opinion, organisations established to represent ethnic minorities have gained greater influence, while also taking on a more moderate role. Historically, grassroots organisations such as the Chinese Merchants Defence Association were established by influential individual activists to resist systemic discrimination. The hostility and tension between different ethnic groups meant that these grassroots organisations were often viewed as bastions against the discrimination of racist organisations, such as boycotts of Chinese merchants by the Anti-Chinese and Anti-Asiatic League.[24] While this was an inevitable result of their hostile conditions, these grassroot organisations may inadvertently reinforced the "us-them" mentality that led to different ethnic groups viewing each other with suspicion. In contemporary Australia, while grassroots organisations continue to represent and advocate for the interests of ethnic minorities, they do so in a more accepting environment.

Both grassroots organisations such as the Federation of Ethnic Communities' Councils of Australia, as well as statutory organisations such as the Australian Human Rights Commission

[23] 'End of the White Australia Policy', *National Museum of Australia* (Web Page) <https://www.nma.gov.au/defining-moments/resources/end-of-white-australia-policy>.
[24] Gloria Davies, 'Liang Qichao in Australia: a sojourn of no significance?' (2001) 21 *East Asian History* 65.

[the "AHRC"], represent the voice of ethnic minorities in Australia's legislative process by advising on government laws and policies. Similar organisations can be found across other aspects of Australia's law and justice system. The Judicial Council on Diversity and Inclusion, for instance, aims to support procedural fairness and equal treatment for court users of different ethnic origin. In Australia's legal profession, various minority organisations such as the African Australian Legal Network and the Asian Australian Lawyers Association seek to promote greater cultural diversity within the ranks of the profession.

In addition to organisations established with the specific purpose of promoting diversity and representing certain ethnic groups, existing organisations and institutions have implemented policies to reduce discrimination and foster a culture of inclusivity. For example, some law firms have implemented education and speaker programs to promote understanding of different cultures, and hold events marking days of cultural significance.[25]

With the increasingly significant role played by large organisations and formal legal institutions, milestones in diversity are now being driven by structural changes and formal legal reforms rather than individual advocacy.

Contemporary issues

With these changes, Australia has taken steps towards embracing its diversity and promoting equality regardless of ethnicity. However, this journey is by no means over, with various complex issues remaining unresolved. For many of these issues, there simply may not be a convenient solution that comes without compromise.

For example, while the *Mabo* decision[26] overturned the legal fiction of *terra nullius* and recognised the land rights of Aboriginal and Torres Strait Islander peoples, it remains practically difficult to reconcile the historical land rights held by Aboriginal and Torres Strait Islander peoples with the practical reality that other individuals and organisations may now hold legal ownership over the land. Although the *Native Title Act 1993* (Cth) provides limited recognition of Aboriginal and Torres Strait Islander land rights, it also places them below the land rights of other landowners in the legal hierarchy, entrenching Australia's colonial legacy of discriminatory treatment.

[25] Christoper Nieche, 'Australia's Law Firms Focus on Diversity, Ethnicity and Inclusion' (Web Page, 2022) < https://www.law.com/international-edition/2022/09/12/australias-law-firms-focus-on-diversity-ethnicity-and-inclusion/?slreturn=20230721022128>.
[26] *Mabo and others v. Queensland (No. 2)* [1992] HCA 23

Another issue would be the legal position of the right to equality. While Australia is a signatory to international human rights treaties that require Australia to prohibit discrimination based on ethnicity, these treaty obligations are only implemented by ordinary domestic legislation which may be superseded. There is also often no forum for an aggrieved individual to dispute that Australia has breached its obligations under international law. When coupled with the High Court of Australia's current interpretation of the race power under s 52(xxvi) of the Constitution in the *Hindmarsh Island Bridge* Case,[27] the legal conclusion is that the Commonwealth Parliament is fully capable of enacting discriminatory laws aimed at certain races where such laws are not beneficial to those races. This has led to issues such as the controversial suspension of the *Racial Discrimination Act 1975* (Cth) on multiple occasions.[28] Even if it is not politically feasible for discriminatory laws which expressly disadvantage specific minorities to be enacted in our current times, it remains unsatisfactory for the fundamental right to equality to hinge on the uncertain vagaries of Australia's political climate.

The presence of covert discrimination also continues to be an issue in Australia, and Australia's legal profession and justice system are not exceptions. This is reflected in the under-representation of ethnic minorities at senior levels of the legal profession and the judiciary. According to data from 2019, while almost 10% of Australia's population is of Asian descent, but, only 3.1% of partners in law firms, 1.6% of barristers, and only 0.8% of the judiciary are Asian-Australian.[29] The issue with addressing covert discrimination is that not only is the discrimination hidden behind seemingly reasonable behaviour, the perpetuators of covert discrimination may be unaware of their own implicit biases.

These are just some examples of the complex challenges that Australia faces in its journey towards becoming more diverse and inclusive. While many of these issues concern preventing discriminatory behaviour or remedying past instances of governmental discrimination, there is also a lack of a cohesive approach to promoting equality and diversity positively, beyond merely punishing discriminatory behaviour.

III. Lessons going forward

[27] *Kartinyeri v Commonwealth* (1998) 195 CLR 337
[28] Dylan Lino, 'Thinking Outside the Constitution on Indigenous Constitutional Recognition: Entrenching the Racial Discrimination Act' (2017) 91 *Australian Law Journal* 381, 382
[29] Christoper Nieche, *supra* note 24.

In this Part, I will provide two lessons that should guide Australia going forward. My focus will be on how individuals, organisations and institutions can cooperate to address complex issues, rather than providing specific solutions to these issues.

An integrated approach to diversity

Australia's anti-discrimination laws have traditionally been limited to sanctioning discriminatory behaviour, while individuals and community organisations attempt to proactively foster diversity through encouraging mutual understanding and tolerance for different cultures and ethnicities. This Austinian view of the law has led to a disjoint between formal legal institutions and other organisations and individuals at the grassroots level. Moving forward, Australia should adopt a more integrated approach to promoting diversity that is premised on collaboration between individuals, organisations and institutions at all levels.

An integrated approach to promoting diversity requires individuals, organisations and institutions to share a common understanding of how diversity should be defined. Properly understood, diversity is not just the absence of discrimination. Embracing diversity requires an understanding and appreciation of different cultures that goes beyond mutual tolerance.

Australia's current approach draws a clear delineation between the roles of individuals, organisations, and institutions. This leads to various problems.

First, because legal action is often seen as a last resort, organisations and individuals are often left to regulate themselves. This leads to many instances where discriminatory behaviour goes undetected for prolonged periods of time, especially where the discrimination is covert and would not readily lend itself to formal legal action.

Second, Australia's current approach places too much emphasis on reducing discrimination between ethnicities without addressing the root cause of the discrimination - the lack of meaningful interaction between people of different cultural and ethnic backgrounds. As a result, racist sentiments are left to simmer beneath the facade of polite outward behaviour, only to erupt in response to traumatic external events such as the September 11 attacks or the COVID-19 pandemic.

Third, legal outcomes can fail to have a deterrent or rehabilitative effect where the outcome is determined by an institution that is divorced from proactively promoting diversity in a positive manner. For courts to effectively determine issues concerning discrimination, they require not only legal authority but also social and moral legitimacy.

An integrated approach requires each of the players in Australia's law and justice system to bear responsibility for identifying and penalising discriminatory behaviour, as well as responsibility for incentivising inclusive behaviour and mutual understanding.

The importance of grassroots activism

My second guiding principle would be that systemic changes implemented by institutions and organisations should reinforce rather than displace grassroots activism. Lessons may be learnt from other social movements involving both grassroots activism and organisational initiatives.

A parallel may be drawn with the current literature on feminist grassroots activism and corporate marketing campaigns that incorporate feminist ideals such as Dove's Real Beauty campaign. While corporate marketing campaigns have far greater influence and outreach than grassroots activists, they lack the legitimacy needed for individuals to "buy-in" and participate in the movement.[30]

Similarly, the social movement towards greater equality and diversity is only made human and relatable when individuals are empowered to participate in the movement and share their experiences. While efforts by institutions and organisations are laudable, the lack of a human face gives rise to potential issues of saturation and issue fatigue, cynicism and apathy, and an "anti-woke" countermovement against perceived virtue signalling.

IV. Case study: Hate speech & disinformation

In Part IV, I will examine how these concepts can be applied, using hate speech and disinformation as a case study and drawing from my experiences living and studying in Singapore.

Recent years have seen the rise of right-wing populism in other countries, particularly in Europe and America.[31] While these groups do not always expressly identify themselves as standing against equality and diversity, they often perpetuate anti-immigration sentiment, xenophobic mentalities, and the otherisation of those of different ethnic and cultural background.

[30] Josee Johnston & Judith Taylor, 'Feminist Consumerism and Fat Activists: A Comparative Study of Grassroots Activism and the Dove Real Beauty Campaign' (2008), *Signs Journal of Women in Culture and Society* 33(4):941.

[31] Laura Silver 'Populists in Europe – especially those on the right – have increased their vote shares in recent elections', *Pew Research Center* (Web Page 2022) <https://www.pewresearch.org/short-reads/2022/10/06/populists-in-europe-especially-those-on-the-right-have-increased-their-vote-shares-in-recent-elections/>.

This trend has also coincided with an increasing use of disinformation tactics such as data manipulation or astroturfing – a progression that is likely to accelerate even further with the use of artificial intelligence tools. A prominent example of this would be the COVID-19 pandemic, with research linking disinformation related to COVID-19 to increased incidents of discrimination against Asians.[32] Much of this disinformation was fuelled by conspiracy theories pushed by populist media with a political agenda.

Australia itself is no stranger to these concepts, having witnessed firsthand the 2005 Cronulla race riots which saw violence between white Australians and Middle Easterners. In 2015, Australia's far right-wing Party for Freedom celebrated the tenth anniversary of the violence with a barbecue of exclusively non-halal foods.[33]

Against this backdrop, it is necessary to re-evaluate Australia's current approach to hate speech under s 18C of the *RDA*. S 18C prohibits public acts which are reasonably likely to "offend, insult, humiliate or intimidate" another person or group of people, where the act was done because of the race, colour, or national or ethnic origin of those people. This is subject to specified exceptions such as artistic works and public interest exceptions.

On the face of the ordinary language of the statute, s 18C appears extraordinarily broad due to its inclusion of public acts that are reasonably likely to offend or insult another person. In practice, most complaints under the *RDA* are resolved by the AHRC, and a dispute only proceeds to court as a last resort. In 2015-2016, the Commission finalised 86 complaints under s 18C of the Act, with only one complaint proceeding to court.[34] When a s 18C complaint does proceed to court, the courts have consistently interpreted s 18C as requiring an objective test of whether a reasonable member of the group would have been offended, insulted, humiliated or intimidated. In light of the legislative context of the provision, to offend, insult, humiliate or intimidate are interpreted as profound and serious effects, not to be likened to mere slights.[35]

The current state of the law is unsatisfactory for several reasons.

[32] Šrol Jakub, Čavojová Vladimíra, Ballová Mikušková Eva, 'Finding Someone to Blame: The Link Between COVID-19 Conspiracy Beliefs, Prejudice, Support for Violence, and Other Negative Social Outcomes', (2022) *Frontiers in Psychology* (12).
[33] 'Cronulla protesters kept apart as 'halal-free' memorial barbecue held', *ABC News* (Web Page 2015) <https://www.abc.net.au/news/2015-12-12/cronulla-protesters-kept-apart-as-halal-free-bbq-held/7023304>.
[34] 'Race hate and the RDA', *Australian Human Rights Commission*, (Web Page 2016) <https://humanrights.gov.au/our-work/race-discrimination/projects/race-hate-and-rda>.
[35] See e.g. *Creek v Cairns Post Pty Ltd* [2001] FCA 1007

First, both the AHRC and the courts are statutory entities with key officials being appointed by the Governor-General. This top-down approach may not be appropriate when it comes to the difficult issue of determining discriminatory speech disputes, which require balancing tensions between different interest groups. While the AHRC and the Federal Courts have the legal authority to resolve disputes under s 18C of the *RDA*, this can only be effective if they also have the social and moral legitimacy for their decisions to be accepted by the diverse groups that comprise the Australian public. Transparency and natural justice concerns have been raised regarding the AHRC's processes, both in the 2017 Parliamentary committee inquiry report after an inquiry into the operation of the AHRC,[36] and in the Global Alliance of National Human Rights Institution's review of the AHRC in 2022.[37] This legitimacy issue is further compounded by the politicisation of s 18C by politicians and the media, who portray the provision as an attack on free speech.

Second, the bar for legal remedy is set unnecessarily high because the court is viewed as an entity that sanctions bad behaviour, with an adversarial system that entrenches hostilities between different parties. This allows for racially insensitive remarks and disinformation targeted at specific ethnic groups to be spread publicly with no legal recourse if they fail to meet the high threshold set by the courts. Individuals and community organisations are left to regulate their own behaviour and speak out against those spreading disinformation.

In theory, disinformation and prejudice should not survive in the marketplace of ideas. However, it has become increasingly apparent that the world is now a war field of ideas rather than a marketplace, and individuals and community organisations are ill-equipped for war. In the aforementioned 2017 inquiry report, the Parliamentary committee received evidence that experiences of racially discriminatory speech had a chilling effect where targeted individuals did not feel safe speaking out against discrimination. Even where individuals do speak out against racially discriminatory speech, the interconnectedness of the internet has paradoxically allowed for the formation of echo chambers, where prejudicial ideas can thrive in closed bubbles rather than compete in an open market.

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[36]'Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)', *Parliamentary Joint Committee on Human Rights* (Report, 2017) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/FreedomspeechAustralia/Report>.

[37] Nour Haydar & Matthew Doran, 'Australian Human Rights Commission warned by global body to improve independence of appointments', *ABC News*, <https://www.abc.net.au/news/2022-04-07/human-rights-commission-accreditation-warning-independence/100974640>.

An integrated approach would remedy these problems by providing legal institutions with greater flexibility, while empowering individual and organisations to combat hate speech and disinformation at a grassroots level.

First, courts could be given greater flexibility in the remedies available when a person has been found to have breached s 18C. Currently, courts may award declaratory relief, injunctive relief and damages. In my home country of Singapore, discriminatory speech offenders are sometimes given a voluntary offer whereby if they engage in community work with the community that was the target of the hate speech, they will not be criminally prosecuted.[38] While there is much to criticise regarding Singapore's hate speech laws, and it may be neither possible nor desirable for this legal framework to be transplanted to Australia in its entirety, the Singapore community remedial initiative is an example of how legal institutions can engage in meaningful collaboration with grassroot organisations to rehabilitate rather than sanction offenders.

Second, grassroots organisations and individuals could play a greater role in the judicial process. Under the current legal framework, the Commission members of the AHRC are expressly given an *amicus curiae* function to assist the court in proceedings under the *RDA*.[39] A schedule of peak grassroots organisations or a panel of established members of various ethnic communities could be given a similar *amicus curiae* function in addition to the Commission members. This would empower individuals and organisations to have a voice in defining racially discriminatory speech while providing the court with greater legitimacy and an opportunity to respond to grassroots concerns in a timely manner.

Third, the evolution of disinformation tactics requires a re-examination of Australia's current discriminatory speech framework. While disinformation does not necessarily constitute hate speech, research linking disinformation to increased incidents of discrimination and violence against specific ethnic groups indicates that it is a significant problem that needs to be addressed.

While a few countries have attempted to introduce laws to combat disinformation; virtually all of them have been criticised for curtailing freedom of speech. One of the key reasons for this is likely that the arbiters of truth and disinformation lack social legitimacy. In Singapore, a Minister of any government agency may assert that a statement is a falsehood statement of fact

[38] *Maintenance of Religious Harmony Act 1990* (Singapore) s 16H, <https://sso.agc.gov.sg/act/MRHA1990>.
[39] *Australian Human Rights Commission Act 1986* (Cth), s 46PV

and issue corrective orders against the communicator of the statement or internet intermediaries.[40] In Germany, social media platforms with over 2 million users bear the burden of censoring content that is manifestly unlawful, with regulators having the authority to determine if platforms are taking sufficient corrective action.[41]

A better approach may be to borrow from the least intrusive aspects of some of these experiments, while encouraging more democratic participation in defining what speech constitutes disinformation. The least intrusive remedy under Singapore's disinformation laws is the issuing of an order requiring an internet intermediary to display a corrective notice next to the false statement, without removing the false statement itself or penalising the communicator of the statement. Instead of having an executive government institution as the arbiter of truth, individuals who have a complaint against online disinformation could bring their complaints to grassroots organisations, who would have the option of then drafting a corrective notice and applying to court for an order requiring the corrective notice to be displayed.

V. Conclusion

While structural changes have gone a long way towards reducing discrimination based on ethnicity, this top-down approach has also led to a disjoint between institutions and large corporations at the peak of the hierarchy, and grassroots organisations and individuals at the bottom.

The complex issues that Australia faces today requires multiple stakeholders to share a common understanding of what diversity looks like and collaborate towards that goal, lest our common pursuit for equality and diversity end up splintering us into different directions.

[40] *Protection from Online Falsehoods and Manipulation Act 2019* (Singapore)
[41] *Network Enforcement Act 2017* (Germany)