

RACE HAS NO PLACE: AUSTRALIA MUST NOT APPOINT A COMMISSIONER FOR RACIAL DIVISION

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This IPA Parliamentary Research Brief explains why at the expiry of the current term of the Race Discrimination Commissioner of the Human Rights Commission the federal government should leave the position vacant.

The term of the current Race Discrimination Commissioner becomes vacant in August, 2018. Applications for the position closed on 11 May, 2018.

The policy of the Institute of Public Affairs is that the Australian Human Rights Commission (AHRC) should be abolished. In principle, the AHRC, as a statutory authority established with the purpose of engaging in political advocacy, is incompatible with liberal democracy. In practice, the AHRC has over its history proven to be partisan and more likely to abuse the human rights of Australians than to uphold them.

If the AHRC is not to be abolished, then at a minimum, the worst features of the AHRC should be constrained. The position of Race Discrimination Commissioner is based on the concept that Australians should be divided and separated according to their 'race' - a concept which should find no place in modern-day Australia.

Specifically, the position of Race Discrimination Commissioner should be held vacant, because the position:

1. is merely one of political advocacy
2. fulfils no substantive function
3. promotes division in the community.

There is precedent for the position being left vacant.

Between 1999 and 2004 the role of Race Discrimination Commissioner was fulfilled in an acting capacity by Dr William Jonas who held the substantive position of Aboriginal and Torres Strait Islander Social Justice Commissioner.¹

Background

The position of the Race Discrimination Commissioner was established in 1986 following amendments to the *Racial Discrimination Act 1975*.² The Commissioner is appointed

by the Governor-General on the advice of the Attorney-General,³ for a term of appointment not exceeding seven years (but is eligible for reappointment).⁴

Total remuneration for the position is \$346,250 per year under current Remuneration Tribunal determinations.⁵

There have been eight Race Discrimination Commissioners since 1986. The current Commissioner is Dr Tim Soutphommasane who was appointed to a five year term in August 2013 at the age of 31. Dr Soutphommasane's qualifications include working as a speechwriter and researcher to state and federal Labor politicians.

1. The Race Discrimination Commissioner is a role of political advocacy

The responsibilities of the Race Discrimination Commissioner under the *Racial Discrimination Act 1975* is to engage in various forms of public advocacy. The responsibilities under the *Racial Discrimination Act 1975* require the Race Discrimination Commissioner to:

'promote an understanding and acceptance of, and compliance with', the *Racial Discrimination Act 1975*;

'develop, conduct and foster research and educational programs and other programs' for

'combating racial discrimination and prejudices that lead to racial discrimination;

promoting understanding, tolerance and friendship among racial and ethnic groups; and

propagating the purposes and principles' of the International Convention on the Elimination of all forms of Racial Discrimination.⁶

The *Australian Human Rights Commission Act 1986* also confers on the Race Discrimination Commissioner a unique courtroom advocacy role as *amicus curiae* (friend of the court).⁷ The role of an *amicus* is "to help the court by expounding the law impartially, or if one of the parties were unrepresented, by advancing the legal arguments on his behalf".⁸

The Race Discrimination Commissioner cannot be an effective *amicus curiae* as he is a member of a government agency that administers the law being considered and applied by the court.

2. The Race Discrimination Commissioner fulfils no substantive function

As outlined above, the position of Race Discrimination Commissioner is one of political advocacy.

The operation of the HRC is unaffected by the absence of a Race Discrimination Commissioner.

Section 8(7) of the *Australian Human Rights Commission Act 1986* provides:

The performance of the functions or exercise of the powers of the Commission is not affected by reason only of a vacancy in the office of... Race Discrimination Commissioner...

There is no obligation on the government to appoint a Race Discrimination Commissioner, and as was identified above between 1999 and 2004 no such appointment was made. Section 29 of the *Racial Discrimination Act 1975* says only that a "Race Discrimination Commissioner shall be appointed by the Governor-General" [emphasis added].

The meaning of "shall" is notoriously ambiguous and whether the word connotes a discretion or an obligation to make an appointment will be indicated by other provisions of the Act. In this case, there is no other references in the Act to how such an appointment is required to be made.

3. The position promotes division in the community

The terms of the legislation explicitly establish a divisive public commentator role within a government agency. Refusing to appoint a new Race Discrimination

Commissioner would be an acknowledgement that race has no place in Australia's national institutions.

The legislation requires the Race Discrimination Commissioner to publicly promote and defend controversial laws such as section 18C of the *Racial Discrimination Act 1975*, as well as similar contentious laws currently in force at the state level.

Dr Soutphommasane has delivered no less than 95 speeches and written 50 opinion articles published in a variety of Australian media outlets in defence of the terms and objectives of the *Racial Discrimination Act 1975* since 2013. In December 2017 Dr Soutphommasane welcomed the "recommendations on data, anti-racism, political discourse and the RDA, and Indigenous peoples"⁹ made by the United Nations Committee on the Elimination of Racial Discrimination. Those recommendations included reversing the onus of proof in complaints of racial discrimination.¹⁰

Dr Soutphommasane also encouraged people to make complaints to the AHRC following the publication of a cartoon in *The Australian* drawn by Bill Leak;¹¹ and advocated to entrench race in Australia's institutions by arguing for the Australian Constitution to be amended to insert provisions to "recognise" Aboriginal and Torres Strait Islander peoples.¹²

It has been suggested that the numerous problems of the position of Race Discrimination Commissioner could be overcome by a 'good appointment' that would "have an understanding and empathy not merely for minority groups but for middle Australia values" as Attorney-General Christian Porter told *The Australian* in February.

The difficulty with such a 'solution' is that the legislation under which the Commission must operate is based upon the assumption of identity politics and racial division – not racial equality and social cohesion.¹³

1 Australian Human Rights Commission, 'President & Commissioners' <<https://www.humanrights.gov.au/about/president-commissioners>>.

2 *Human Rights and Equal Opportunity Commission (Transitional Provisions and Consequential Amendments) Act 1986*

3 *Racial Discrimination Act 1975* (Cth) s 29. The Attorney-General must be "satisfied that the person has appropriate qualifications, knowledge, or experience."

4 *Racial Discrimination Act 1975* (Cth) s 30(1).

5 *Remuneration Tribunal Determination 2017/11: Remuneration and Allowances for Holders of Full-Time Public Office* (Cth) F2017L00812, part 2A.

6 *Racial Discrimination Act 1975* (Cth) s 20.

7 *Australian Human Rights Commission Act 1986* (Cth) s 46PV.

8 Lord Salmon in *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229, 266.

9 Tim Soutphommsane, Twitter, 8 December 2018 <<https://twitter.com/timsout/status/939275031145734144>>.

10 Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Eighteenth to Twentieth Periodic Reports of Australia*, UN Doc CERD/C/AUS/CO/18-20 (28 December 2017) 2-9.

11 Chris Johnson, 'Indigenous Affairs Minister Nigel Scullion condemns "racist" Bill Leak cartoon', *The Sydney Morning Herald*, 4 August 2016.

12 See Tim Soutphommasane, 'Our Constitution and our Law: A Stronger Multicultural Australia' (Paper presented at the 2013 Federation of Ethnic Communities Council of Australia Conference, Gold Coast, 9 November 2013).

13 Chris Merritt & Nicola Berkovic, 'Tim Soutphommasane replacement must empathise with mainstream,' *The Australian*, 2 February 2018.