

# A LIMITED RIGHT TO EQUALITY: EVALUATING THE EFFECTIVENESS OF RACIAL DISCRIMINATION LAW FOR INDIGENOUS AUSTRALIANS THROUGH AN ACCESS TO JUSTICE LENS

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Fiona Allison\*

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## I Introduction

From the 1960s and 1970s and over a 30 year period, State, Territory and Federal governments in Australia have introduced legislation prohibiting discrimination. Human rights enshrined within this legislation include a right to be treated equally, regardless of one's gender, age, disability and/or racial background, *inter alia*. This article seeks to explore what has been achieved by and for Indigenous people in terms of a right to equality as the result of the introduction of racial discrimination law.

The *Prohibition of Discrimination Act 1966 (SA)*, the first anti-discrimination law in Australia, outlawed discrimination based on 'race, country of origin or colour of skin'. It provided for the South Australian Attorney-General to initiate criminal proceedings against those in breach of the law, with appropriate penalties attached to conviction. Though since repealed and replaced by broader-ranging (and civil) anti-discrimination legislation in this jurisdiction, the law was criticised as having done little for Indigenous people. Moriarty, a founding member of the South Australian Aborigines Advancement League, had claimed close to a decade after the law had been in operation that it had 'given a few of us some hope' initially, but that it had 'since...become our despair'. He noted that whilst '[t]he concept may be a good one', due to the law's 'implementation and the way it is written, it is not worth very much to Aboriginal people'. He continued, 'We cannot use this to further our consolidation in Australian society'.<sup>1</sup> Problems inherent within the legislation included that the requisite burden of proof was at a criminal law standard (beyond a reasonable doubt).

The landmark *Racial Discrimination Act (1975) (Cth)* ('RDA') was enacted in the mid-1970s, followed by Federal legislation

prohibiting discrimination on grounds other than race, such as sex and disability.<sup>2</sup> From 1977 to 1998, each State and Territory then introduced broad ranging anti-discrimination laws, all of which included provisions covering racial discrimination. New South Wales ('NSW') and Victoria were the first jurisdictions to do so and Tasmania was the last.<sup>3</sup> All States and Territories, but one, now prohibit both direct and indirect discrimination on the basis of race and, in addition, racial vilification.<sup>4</sup> The Northern Territory ('NT') alone has neither indirect race discrimination nor racial vilification provisions. Whether racial discrimination legislation introduced subsequent to the early South Australian law has been as disappointing to Indigenous people as the latter legislation is something that this paper proposes to examine. Aboriginal and Torres Strait Islanders have been subject to myriad forms of racism, including racial discrimination, since colonisation.<sup>5</sup> There is some evidence that to a certain extent racial discrimination law, at least at a Federal level, was developed to provide protection to Indigenous communities in particular, given the extent of the racial prejudice they suffered, and in response to Indigenous activists' calls for its enactment as a means of achieving social change for Aboriginal and Torres Strait Islander people. Thus the RDA carried with it, upon its introduction, the promise and expectation that it would provide to Indigenous people civil law remedies enabling them to confront discrimination and to enjoy greater equality.

Although some time has now passed since the development of the relevant provisions, in numerous respects this promise has not been fulfilled, nor has this expectation been met. Although there have been some changes in the situation of Indigenous Australians over recent decades, it is clear that they are today still far from able to enjoy 'equal rights' in either a formal or substantive sense. Arguably, they

remain disproportionately more likely than other groups to encounter racism in their daily lives, evident both in the extent to which they report individual experiences of race-based discrimination and in the levels of social exclusion to which they are subject. Given this, this article seeks to raise a number of key issues as a starting point to consideration of whether racial discrimination laws have failed to achieve, as intended, any tangible shift in Indigenous and non-Indigenous race relations in Australia.

One important measure of how well the laws might be working for Indigenous people is the extent to which Aboriginal and Torres Strait Islanders are using civil law remedies provided in anti-discrimination law to challenge racial discrimination. The formal equality of racial discrimination legislation bestows upon Aboriginal and Torres Strait Islanders an equal entitlement to take legal action in response to a contravention of the law in this area, initially through lodgement of a formal complaint to agencies administering anti-discrimination law, such as the Australian Human Rights Commission ('AHRC'). In general, however, existing qualitative and quantitative data indicates that Indigenous access to the law in this area appears to be relatively poor. Indigenous people report that they rarely engage formal legal remedies in responding to racial discrimination, and complaint statistics paint a similar picture.

In at least this one significant respect, the legislation is *not* working effectively for Indigenous communities. As Lindsay, Rees and Rice write, 'Perhaps the greatest failure of (anti-discrimination) laws is that they have been little used by Indigenous Australians'.<sup>6</sup> Why levels of access might matter to the efficacy of the laws in question in an Indigenous context is discussed further below but in short, without better access to racial justice through discrimination law the capacity of the relevant legislation to make a genuine contribution to Indigenous peoples' attainment of substantive equality is limited.

Given that the low incidence of formal complaints by Indigenous people is not likely to be occurring because they rarely or never experience race-based discrimination, it is important to identify possible barriers which might be hindering access, noting that Indigenous perspectives on what is and is not working in this regard are essential. This is a crucial first step in ensuring that the relevant laws are able to achieve genuine social reform. Otherwise, the law and

administrative machinery associated with it will continue to effectively 'exclude' those it apparently seeks to protect and, in this way, will always be not much more than a significant part of the problem it is designed to address.

## **II Indigenous People and the Origins of Racial Discrimination Law**

As well as being the precursor to racial discrimination law that followed in the States and Territories, the Commonwealth's RDA is also important in its own right, serving as a 'significant statement of Australia's commitment against racism'.<sup>7</sup> What is especially noteworthy about this particular legislation, for our purposes, is its focus upon Indigenous people in both its origins and stated objectives. In passing this legislation, Federal Parliament expressed an intent to provide specific benefit 'in a practical sense' to Indigenous people and to send a strong message to the international community that Australia was going to improve its 'appalling track record' with respect to its Indigenous peoples.<sup>8</sup> Moreover, there is also some evidence to suggest that at the time of introduction of the RDA, Indigenous people (and those supporting them) anticipated or hoped that civil law of this type would provide to them and their communities increased opportunity for enhanced equality. This detail is worth highlighting as it provides some important context within which the achievements of the law to date might be measured.

Post-World War II and particularly in the decades leading up to the enactment of the RDA, there was heightened consciousness of human rights and of racism, both internationally and domestically, with a strong focus on the necessity for governments to develop effective legal protection against the damaging impacts of racial bigotry. There was also a strong desire to challenge the status quo, including where it sustained state-endorsed racial discrimination. This was evident, for example, in the civil rights and anti-apartheid movements in the United States and South Africa.<sup>9</sup>

In Australia too, there was at this time more open acknowledgement and discussion of race relations and of the terrible prejudice suffered by Indigenous Australians, along with a deeper appreciation that the latter needed to be confronted and eliminated. Significant levels of public and political concern emerged during this period in response to the condemnation by the international community of the shameful way in which Indigenous people had been

and continued to be treated, aptly described at the time by Charlie Perkins as “fringe dwellers” on the edge of the white man’s world’.<sup>10</sup>

As an illustration of the pressure this placed on government to introduce relevant legislative protection, Whitlam, who was instrumental in the enactment of the RDA, promised in his policy speech leading up to the December 1972 election (under the subheading ‘Aborigines’) that if elected Labor would legislate to prohibit race-based discrimination, given that Indigenous people had been denied ‘basic rights’ for ‘180 years’.<sup>11</sup> Labor also committed in this speech to setting up conciliation procedures to ‘promote understanding and cooperation between aboriginal (sic) and other Australians’.<sup>12</sup> Whitlam continued by stating that ‘Australia’s treatment of her Aboriginal people will be the thing upon which the rest of the world will judge Australia. Not just now, but in the greater perspective of history’.<sup>13</sup> Further, he claimed that ‘the Aborigines are a responsibility we cannot escape, cannot share, cannot shuffle off - the world will not let us forget that’.<sup>14</sup> Further, when the then-Attorney General, Lionel Murphy, introduced the Racial Discrimination Bill 1973 into Parliament, he made specific reference to Indigenous Australians and to the hardship they endured as ‘perhaps the most blatant example of racial discrimination in Australia’.<sup>15</sup> He stressed the importance of the legislation to ‘Aboriginals’, ‘the poorest of the poor in our community’, and stated that ‘it is clear that past wrongs must be put right so far as the Aboriginal population is concerned and that special measures must be provided’ in this regard.<sup>16</sup>

Activism around Indigenous rights also had a part to play in the development of the RDA. Indigenous resistance to race-based oppression had a long history in Australia, but Clark claims that particularly from the 1960s, encouraged by international events and ‘buoyed by national organisation’, Indigenous people became increasingly vocal, mobilised and politicised in their calls for racial equality, demanding ‘freedom from the trappings of colonialism’ and insisting that Australia recognise that a “wind of change” was blowing their way’.<sup>17</sup> According to Clark, what had to date been ‘sporadic activism, local dissent and personal resistance’ by Indigenous people now evolved into a ‘discernible movement’.<sup>18</sup>

Chesterman also writes of Australia’s own ‘civil rights movement’ in the mid-20<sup>th</sup> century, and of the direct protest and domestic litigation and law reform that formed part of

this movement.<sup>19</sup> One such protest was the Freedom Ride, led by Perkins through country towns in NSW in 1965. In the midst of international criticism of the racial divides within South Africa, Australia’s own “apartheid” system was laid bare by the Freedom Ride buses. The protest revealed overt discrimination against Indigenous people, who were excluded from hotels and clubs, municipal swimming pools and shops. This and other similar activism produced irrefutable evidence of the harsh racism to which Indigenous people were subjected, which in turn assisted in the push for political and legislative reform. The Freedom Ride attracted high profile media commentary wherever it went, and according to Perkins it ‘sowed the seed of concern in the public’s thinking across Australia. Something was wrong, something had to be changed in a situation that was unhappy for Aborigines’.<sup>20</sup> Others have also seen this event as an important catalyst in terms of transforming attitudes towards Indigenous Australians and their relationship with non-Indigenous people.<sup>21</sup>

The movement demanded law reform, including both the overturning of racially discriminatory laws denying Indigenous people a right to vote, to access social security and to equal wages (for example), as well as the introduction of legislation that would offer protection against racial discrimination and recognition of Indigenous land rights. Perkins, for instance, advocated for the implementation of civil laws which would ‘protect Aboriginal people (against discrimination on the grounds of race) right throughout the nation’ and ‘will allow them to be able to take action against anybody on their own initiative without having to go to anybody else, or to rely on anybody else to take the initiative for them. They can feel that they have the law of the country supporting them.’<sup>22</sup> As a further earlier example, in 1959 the Federal Council for the Advancement of Aboriginal and Torres Strait Islanders (‘FCAATSI’) also called for Federal and State governments to ‘legislate to make discriminatory behaviour based on colour or race illegal and a punishable offence’.<sup>23</sup> Others highlighted how important it was to create civil law that might be utilised by Indigenous people for their benefit, in contrast to the way the law had historically been used to prosecute, control or to otherwise instigate negative intervention in Indigenous lives.<sup>24</sup>

The enactment of the RDA in 1975 has been identified as a significant moment in Australia’s civil rights movement.<sup>25</sup> It is claimed that whilst other ‘wins’ within this period, including through reform of racially discriminatory legislation, may

have granted Indigenous people a kind of 'formal' equality, the RDA appeared to offer Aboriginal and Torres Strait Islanders a real chance of winning more *substantive* equality through, for instance, the legislation's special measures provisions and its broad educative and other functions.<sup>26</sup>

The extent to which this and similar legislation in other Australian jurisdictions has actual capacity to achieve such change for Aboriginal and Torres Strait Islanders, or indeed was ever in fact designed to do so, has been the subject of some debate, discussed further below. Thornton, for instance, suggests that discrimination legislation was never really intended to make Indigenous people 'equal'.<sup>27</sup> Setting aside the question of deliberate intent, problems with the way the law has been written and/or implemented, as was said to have occurred in relation to the *Prohibition of Discrimination Act 1966* (SA), may have negatively impacted upon the degree of assistance the RDA and other racial discrimination law has afforded Indigenous people. Forty years have passed since the introduction of Federal racial discrimination legislation in Australia, and yet, there is much evidence to indicate that levels of racial oppression experienced by Aboriginal and Torres Strait Islander people remain high. This suggests that the relevant law has not at this point achieved what it might have for Indigenous people, particularly with respect to substantive equality.

### **III Contemporary Indigenous Experiences of Racial Discrimination**

#### **A Indigenous Accounts of Discrimination: Quantitative and Qualitative Data**

Moreton-Robinson claims that whilst the 'official' story about racism in Australia indicates that it exists only in 'small pockets of society or not at all', Aboriginal and Torres Strait Islander accounts tell a different story.<sup>28</sup> When questioned about this issue directly, most Indigenous people are likely to identify it as a very significant problem. They report instances of racism as being commonly and frequently experienced by Aboriginal people in many different areas of life – in public streets and in schools, as tenants and as consumers, as well as in our wider 'socio-political environment'.<sup>29</sup>

The prevalence of race-based discrimination and racism against Indigenous people has been quantified in a number of recent social surveys, some examples of which follow and all of which indicate that these issues occur at comparatively

high rates within Indigenous communities.<sup>30</sup> The Australian Bureau of Statistics ('ABS') data relating to Indigenous experiences of racism collected for the 2008 *National Aboriginal and Torres Strait Islander Social Survey* ('NATSISS') reveals that 27 per cent of Aboriginal and Torres Strait Islander people aged 15 years and over reported experiencing racial discrimination in the last 12 months, most commonly in public (11 per cent); by police, security personnel or courts of law (11 per cent); and at work or when applying for work (8 per cent).<sup>31</sup> By way of further example, a study published by VicHealth in 2013 and conducted across four communities in Victoria found that almost every Indigenous participant in the study had encountered racism in the last 12 months, with the overwhelming majority reporting multiple incidents during this time.<sup>32</sup> Although the racism in question occurred across a broad range of settings, common sites were shops (67 per cent) and public spaces (59 per cent) with no differences based on age, gender or location (community) of the participant.

The Indigenous Legal Needs Project ('ILNP') is currently carrying out research into Indigenous civil and family law need in 32 Indigenous communities across Australia. To date, it has identified discrimination as a priority area of Indigenous civil law need in a number of jurisdictions.<sup>33</sup> Prioritisation is primarily based on Indigenous focus group responses to a questionnaire asking participants to identify personal experiences of civil/family law problems. Through these questionnaires, Indigenous ILNP participants identified racial discrimination as an issue at similar rates to those set out in the aforementioned ABS data. Thus, 28.1 per cent of participants in NSW,<sup>34</sup> 22.6 per cent of participants in the NT<sup>35</sup> and 29 per cent of participants in Victoria<sup>36</sup> reported encountering discrimination in the last two years. The type of discrimination specifically identified by participants was almost always *direct* and *race*-based (excluding other potential grounds for complaint such as sex, disability and/or indirect discrimination), and usually occurred in the areas of goods and services (taxis, shops, police, pubs/clubs), employment and accommodation (real estate agents). It is worth noting, however, that that which looked very much like discrimination, but which might not always have been named as such by research participants, was also identified in areas of civil law other than discrimination, meaning that the ILNP statistics relating to instances of discrimination are likely to represent an undercount of its actual incidence within the communities in question.<sup>37</sup> An example of this is where differential (negative) treatment of Aboriginal school

students was raised as a common problem within the civil law area of education, but was not necessarily identified as discrimination. The fact that the discrimination identified was predominantly direct and racial perhaps reflects, in part, a lack of understanding about the extent of protection offered by anti-discrimination law.<sup>38</sup> Of note, gaps in knowledge are not limited to community members alone. It was also identified in the ILNP research that legal practitioners, too, might fail to identify anything other than more obvious manifestations of racism.<sup>39</sup>

Relevant qualitative data, including that collected by the ILNP during Indigenous focus groups also shows that for Indigenous people, racial discrimination is generally a terrible but unavoidable 'part of life'. ILNP focus group participants in Victoria, for example, state that 'everyone goes through it at least once a day, every day'. 'You're going to face it no matter where you are... at work, at home, school, wherever'. 'We deal with it on a daily basis. You would think that in this day and age it'd be easier, but it's not'.<sup>40</sup>

Mellor has also undertaken qualitative research with Indigenous Australians around the nature of racism experienced and its frequency. Within this study, he identifies four categories of racism.<sup>41</sup> Significantly, it is evident that not all of the relevant incidents reported by the Indigenous participants in this study constitute 'discrimination' in a legal sense, including many of those Mellor categorises as 'verbal racism' (name-calling or other comments) or 'behavioural racism' (ignoring, avoiding, looking, and denying identity). An example of the latter might be where a non-Indigenous person moves away from an Indigenous person on a bus or makes comments which patronise or degrade Indigenous culture or people in their presence, including where the speaker is not conscious of the likely impact of what they are saying.

Racial discrimination and 'macro-level racism' are the two further categories identified by Mellor. Of note, discrimination is thus a component of racism, but racism is broader than discrimination alone. Mellor defines discrimination as unreasonable or unnecessary denial, restriction and exclusion and/or subjection to 'excessive, biased and unnecessary punitive measures, such as the application of rules or the law'.<sup>42</sup> Examples include denial of a job or of quality housing and over-policing by police officers or store security personnel. Macro-level racism, on the other hand, is 'institutional and cultural' in form, 'diffuse,

anonymous and intangible' and operating at a societal level rather than at an individual level.<sup>43</sup> It might include, for example, a general lack of concern by the community for Indigenous peoples' circumstances, a selective view of Indigenous/non-Indigenous history (such as the denial of genocide) and/or the domination of Indigenous culture by non-Indigenous culture (including in the types of housing provided to them by the State where it may be unsuitable to Indigenous ways of life).

## **B Other Quantitative Data: Statistical Inequality and Institutional Racism**

These Indigenous accounts of broad-ranging racism represent what Essed has called 'everyday racism'; that which spans across a person's lifetime and runs through almost every social situation. Essed suggests that racism in this form is both all-pervasive and often subtle and intangible so as to avoid possible legal or other sanctions, meaning its victims are repetitively and 'meticulously checking' in order to confirm whether what is happening to them is actually racism.<sup>44</sup> Mellor believes that for Indigenous people the situation is somewhat different. Based on Indigenous accounts of this problem, he claims that they continue to endure a prejudice which is 'one-on-one, blatant (and) old-fashioned'.<sup>45</sup> They are also able to confirm these experiences as being racist because of the clear links between contemporary events and the past, between micro-level and macro-level racism.

Two hundred years of colonisation, dispossession, genocide, and cultural imperialism, as well as everyday racism, (leaves) little doubt in (Indigenous peoples') minds ... that their experiences in day-to-day life are tinged by racism.<sup>46</sup>

Along with the regularity with which racism occurs in their daily life, to a large degree this broader historical and social context in which discrimination plays out for Indigenous people is what sets their experiences apart from those of others in Australia. In so many respects, Indigenous people have been continuously and 'permanently confined to the bottom rung of the racial hierarchy' in this country.<sup>47</sup> Whilst racism directed here towards particular immigrant groups may, to some degree, abate over time as waves of migration bring people from 'new' nations here, who are then fresh targets of racist stereotyping; for Aboriginal and Torres Strait Islanders it is a constant - coursing with resilience throughout 200-plus years of contact.<sup>48</sup> The relationship between Indigenous and non-Indigenous people over time



has largely been one of oppression, entrenched prejudice and racial domination.<sup>49</sup>

Significantly, racism against Indigenous people has always resided and is still located within the nation's 'framework' itself, permeating 'the very fabric of contemporary Australian society'.<sup>50</sup> It is embedded as 'institutional' racism within areas as diverse as our health,<sup>51</sup> legal<sup>52</sup> and educational systems<sup>53</sup> and in our sport,<sup>54</sup> in housing<sup>55</sup> and in politics, including government policy.<sup>56</sup> It is also clearly evidenced by the 'statistical inequality' of Indigenous Australians, the result of which is that a 'disproportionate number of the Indigenous population are at the very bottom of Australia's socio-economic ladder and appear to be going nowhere'.<sup>57</sup> Thus in a range of key areas, the quality of many Aboriginal and Torres Strait Islander's lives cannot be said to be *anywhere* near equal to that of other Australians. Their social exclusion is represented by (but is not limited to) reduced chances of employment, difficulties in finding adequate housing, overrepresentation in the criminal justice system and poor health outcomes. When compared to a non-Indigenous person, an Indigenous person is thus 'much less likely to be employed, live in an adequate house, achieve education milestones, survive childbirth or live beyond the age of 55'.<sup>58</sup> The latter is both a legacy of past racism and in and of itself a form of contemporary racism.

Whilst the law may to some extent have done something to address more obvious manifestations of racial discrimination, thereby providing some measure of more formal equality, according to Burney it is data about health and other social outcomes that best demonstrates continuing Indigenous inequality. 'Direct discrimination is not as apparent in public debate today', she claims, but these 'statistics tell their own story'. In this way, discrimination 'has [now] manifested in more insidious forms of political and institutional racism, while simultaneously residing in a kind of malign neglect by the rest of the population'.<sup>59</sup>

Taking, for example, Indigenous health, as Thornton suggests, although we no longer tolerate Indigenous peoples being given handouts of poisoned flour or being shot in hunting expeditions, 'we do condone a health scenario which endows an Aboriginal person with a more tenuous hold on life than a white person'.<sup>60</sup> Inequality in this area means a lack of access to broad-spectrum health services for Aboriginal and Torres Strait Islanders living remotely, for example, but it is more than this. Health services in general

have been principally developed to meet the needs of *non-Indigenous* consumers. This means that Indigenous people are likely to be effectively excluded from these services, or at least from drawing real benefit from them. Health service providers may fail to genuinely accommodate the cultural differences of Aboriginal and Torres Strait Islander people, whether that means responding inadequately to language issues or to Indigenous expectations or need around the type of care that will be provided. They may suffer harm as a result, including, for instance, given the aforementioned language issues when they do not understand what medication is being provided to them and/or how to take it or what surgical procedure they are 'consenting' to.<sup>61</sup> Further, expenditure on Indigenous health care is said to be far from adequate, given the additional health needs of and extent of health-related problems in Indigenous communities.<sup>62</sup>

Discrimination certainly happens at an individual level for Indigenous people, but as demonstrated above in the area of health, it is also 'supported by the institutional barriers created by policies and procedures or laws that result (inadvertently or otherwise) in locking people out of mainstream society and services, thereby creating (further) disadvantage'.<sup>63</sup> As Chesterman suggests, only when there is government recognition within policy development of a right to substantive equality will improvement to Indigenous wellbeing be a real possibility. Indigenous people require more than equal access to hospitals; they also require equal health outcomes, which may not be the same thing as or achieved by 'equal access' alone.<sup>64</sup> Arguably, for positive change in this area, Aboriginal and Torres Strait Islander must be provided with everything that mainstream communities have and more. A similar point might be made with respect to the current reach of the law, including the legislative and administrative regime surrounding anti-discrimination (and racial discrimination) law, remembering that the legal system is as much a potential site of institutional racism as the health system, including when all it offers to Indigenous people is a measure of formal equality. This is discussed further below.

#### **IV Indigenous Access to Racial Discrimination Law**

##### **A Evaluating Racial Discrimination Law through an Access to Justice Lens**

The influence which any legislation has upon society is inevitably shaped by a range of factors, including the

political and legal institutions and economic systems within which that legislation resides, writes Flynn.<sup>65</sup> This does not mean, however, that our expectations of the role of law in transforming society should be set low and/or that it is too difficult to accurately assess the effectiveness of legislation in terms of its achievements and failures. As Flynn further notes, civil law is 'but one of a number of elements in our society that both engender our complex social problems', but which 'must also be adapted to provide solutions' to them.<sup>66</sup> Thus, whilst law may only ever be a part of the solution to social issues such as racial discrimination, it is still an important part 'capable of making a significant contribution' to their resolution.<sup>67</sup>

Gaze suggests that anti-discrimination law seeks to alter society 'at both instrumental and symbolic levels, changing actual practices or social understandings'.<sup>68</sup> It can and should be held accountable in terms of its performance in this regard. Significantly, she also suggests that law which is 'relatively ineffective at the instrumental level may not have much impact at the symbolic level'.<sup>69</sup> In other words, if anti-discrimination law has little practical utility for Indigenous people, including because they are not using it to challenge discrimination, it will be unlikely to achieve its intended objectives of upholding the human rights of the most vulnerable members of our community. The degree to which Aboriginal and Torres Strait Islanders are challenging racism through anti-discrimination law is thus one important measure of the law's efficacy for Indigenous people.

In this regard, there is evidence to suggest that Indigenous people do not enjoy adequate levels of access to justice with respect to discrimination. Gaze, again, has suggested that whilst 'significant inroads' have been made for relevant groups by laws targeting gender and impairment discrimination, it is much less clear that there have been similar gains 'for those affected by race and related discrimination'; in particular, Indigenous Australians.<sup>70</sup> She writes that the law in this area has been 'unavailing against the situation of Indigenous people, where the problems are so deep that mere anti-discrimination legislation is hardly used'.<sup>71</sup> This is likely to have been a contributing factor in the still relatively high incidence of both formal and (particularly) substantive inequality Indigenous people face in contemporary Australia. It also points to the difficulties the law has had in bringing about real change for Aboriginal and Torres Strait Islanders.

## **B Complaint Statistics as an Indication of Levels of Indigenous Access**

All racial discrimination legislation, though differing in more specific detail, provides similar mechanisms for seeking redress when contravened. Initially, dispute resolution is commenced through lodgement of a formal complaint with agencies tasked to administer anti-discrimination law, including the AHRC, the NSW Anti-Discrimination Board ('ADB') and the Equal Opportunity Commissions ('EOC') in Western Australia ('WA') and Victoria, for example.<sup>72</sup> In general, if the complaint in question is within (legal) jurisdiction and raises a *prima facie* issue of discrimination, attempts will then be made to resolve it by way of conciliation, facilitated by these same agencies. Where conciliation is not attempted or is unsuccessful, complainants have the option to initiate proceedings in a court or a tribunal, depending on the jurisdiction in which the complaint is lodged.

The primary site of access for dispute resolution in this area is therefore the investigation and conciliation process of complaint handling agencies, as this is where most disputes begin and end.<sup>73</sup> Complaint handling agencies also play an important gate-keeping role in terms of access to courts and tribunals. For these reasons, statistics indicating numbers of race-related inquiries and complaints lodged by Aboriginal and Torres Strait Islanders provide a good starting point for measuring levels of Indigenous access to justice. Significantly, only the AHRC, the NSW ADB and the EOC in WA publish complaint statistics that specifically identify complaints made by Indigenous people. These statistics are summarised immediately below. There is, at the time of writing this article, no other publicly available quantitative data from complaint handling agencies presenting numbers of Indigenous complaints of racial discrimination, other than that set out below – a significant issue in and of itself.<sup>74</sup>

Although it is difficult to define what 'appropriate' numbers of complaints might be, the complaint statistics which follow indicate that relatively small numbers of Indigenous people are taking formal action in response to racial discrimination – perhaps surprising given the frequency with which it is reportedly experienced within Indigenous communities, as previously noted.

- In 2011-2012, 36 per cent of RDA complaints to the AHRC were lodged by Aboriginal and/or Torres

Strait Islander complainants (or 173 complaints in raw numbers).<sup>75</sup> In 2010-2011, 34 per cent of RDA complaints were lodged by Aboriginal and/or Torres Strait Islanders (or *approximately* 143 complaints in raw numbers).<sup>76</sup> Over this same two-year period, Indigenous complaints constituted 9 per cent of *all* AHRC complaints (under all grounds), or *approximately* 194 complaints in 2010-2011 and 230 complaints in 2011-2012.<sup>77</sup>

- In 2011-2012 Indigenous people lodged 92 race-based complaints and 8 complaints of racial harassment under the *Equal Opportunity Act 1984* ('EOA') (WA) out of a total of 795 complaints received (by both non-Indigenous and Indigenous persons) and 193 complaints overall during this period (including race and other attributes).<sup>78</sup> In 2010-2011, 126 Indigenous complaints in total were received, 69 of which are clearly race-based.<sup>79</sup>
- In 2011-2012, 97 Indigenous complaints were lodged with the ADB, 69 of which were race-based, out of a total of 1243 complaints received. In 2010-2011, Aboriginal and Torres Strait Islander complaints accounted for 79 out of a total of 1332 complaints, 57 of which were racially based.<sup>80</sup>

As Gaze has suggested, although these numbers indicate that the proportion of Indigenous complaints lodged may exceed 'the proportion of Indigenous people in the (respective) population(s), one would not expect many claims of racial discrimination to come from the white majority, so these figures are likely to be an under-representation of (potential) Indigenous complainants.<sup>81</sup> Those working in anti-discrimination agencies have also stated that this is indeed likely to be the case.<sup>82</sup> These figures, therefore, tell us little about the true nature and extent of the actual encounters Indigenous people have with racial discrimination. They are probably more indicative of problems of Indigenous access to relevant legal mechanisms.<sup>83</sup>

### **C Other Data: Current Indigenous Responses to Racial Discrimination**

Beyond these statistics, a small number of studies provide other information relating to current Aboriginal and Torres Strait Islander responses to racial discrimination, with further research required in this area. Whilst responses vary, Indigenous people commonly report taking very little formal action when confronted by racism, including by

seeking help or by lodging a complaint, confirmed by the above complaint statistics.

Research carried out in this area by VicHealth, referred to above, indicates that the vast majority of Indigenous participants who had experienced discrimination in the previous 12-month period did not respond in any formal sense to relevant incidents. The VicHealth research data reveals that 33 per cent ignored it, 25 per cent wanted to confront it but did not, and 13.7 per cent accepted it. Some confronted it verbally (32.4 per cent) or found other ways of dealing with it; for instance, by talking to someone (18 per cent), using humour (11.2 per cent) or via creative means (art or writing) (2.3 per cent). Only 10.8 per cent made a complaint, 5.6 per cent 'received help' and 4.4 per cent contacted police.<sup>84</sup>

ILNP research also identifies that only 17.1 per cent of Indigenous participants in NSW who had experienced discrimination had sought legal or other help for it.<sup>85</sup> In the NT and in Victoria, respectively, only 21.4 per cent<sup>86</sup> and 11.6 per cent<sup>87</sup> of participants had done so. As one Indigenous man in Tennant Creek in the NT said:

You tend to grow up with those things (discrimination) all around you. Your parents, your grandparents, they grew up with the white people standing over them.... [T]hings might have changed a lot... but that feeling's still there. You know if ... the white person talks to you in the wrong way, a lot of Warumungu people (local people from Tennant Creek), they wouldn't answer them back. ... They just end up putting their hands up.<sup>88</sup>

By way of further example, a legal services study of Indigenous women's experiences of discrimination conducted in NSW and published in 2001 also found that whilst a small proportion of participants had openly confronted racial discrimination, very few of the incidents in question had been reported, challenged, acted upon or recorded in any way.<sup>89</sup>

### **D Different Ways of Accessing Racial Justice**

Raising a formal legal complaint of racial discrimination is not the only way to respond on either a personal or a community level to this issue. It is acknowledged that there are many ways to 'access justice', that justice means different things to different people, and that it is not solely



confined to 'having one's day in court'. There are both formal and informal responses to legal problems relating to discrimination, including directly challenging a racist neighbour or real estate agent, for instance, without recourse to the legal system or lawyers. Not initiating legal action or raise a complaint is not necessarily a negative thing where people feel sufficiently resourced to handle problems on their own. Indeed, they may well achieve an outcome that is satisfactory to them and feel that they have accessed 'justice' adequately through this type of approach. As Galanter suggests, health is not only found in hospitals or knowledge in schools and 'access to justice is (also) not just about bringing cases to a font of official justice'.<sup>90</sup>

As the above VicHealth data indicates, Indigenous people sometimes deal with instances of racial discrimination without using formal dispute mechanisms, including through humour and art. The effectiveness of, and opportunity for, Indigenous people to respond in this way, as a means of successfully combating racism, requires further examination. What is worth pointing out, however, as Clarke and Davies have done, is that access to formal legal remedies, including through complaint mechanisms such as those established by racial discrimination law, may be particularly important for 'the powerless, discriminated against and disadvantaged'.<sup>91</sup> Relevant mechanisms can play a pivotal role in 'preventing breaches of the law, redressing legitimate grievances and educating the offender and the community'.<sup>92</sup> Courts, for example, are able to issue public statements of strong disapprobation of racial discrimination, which have the potential to perhaps shape social norms and reform behaviour at a societal level more so than might occur when more informal responses are used. It is probably fair to say that the less that Indigenous people have access to the law, the less benefit they will be able to draw from what it has to offer in the latter and in other regards; not just in terms of seeking justice for themselves when wronged, but also because they will have less opportunity to be directly involved in 'shaping' the law, a point returned to below in discussion relating to legislative barriers to access. Aboriginal and Torres Strait Islanders need to have a genuine choice about how they deal with racial discrimination and to be able to take legal action if appropriate in the circumstances. Leading up to the development of the RDA, a right to take legal action as a way of combatting racial discrimination is certainly something that Indigenous people called for.

## V Improving Indigenous Access to Racial Discrimination Law

### A Barriers to Indigenous Access to Racial Justice

Nielsen suggests that the formal equality of anti-discrimination legislation makes Indigenous people 'equally entitled to pursue their complaints' of discrimination. However, she claims that in reality they are effectively excluded from doing so on the basis that the law also requires those who complain to be "'sufficiently informed, motivated... empowered" and resourced to use its complex legal machinery'.<sup>93</sup> How then might the law achieve and indeed be representative of a more substantive form of equality for Indigenous people?

As noted above with respect to the health system and Indigenous health outcomes, specific measures might need to be developed and implemented to respond to the particular circumstances and needs of Aboriginal and Torres Strait Islanders so as to ensure that they have genuine access to racial justice, including through legislative provisions contained in racial discrimination law that have the capacity to offer them something more than formal equality (such as special measures and indirect discrimination provisions).

There has been a fair amount of academic and other discussion concerning administrative (process-related) and legislative barriers to accessing gender and disability discrimination law. There has also been some focus on Indigenous access to justice in a criminal law context. There has been much more limited consideration of problems of access confronting Indigenous people seeking to rely on *civil* law justice, including through racial discrimination law. Despite 'parallels' with gender and/or impairment-based discrimination, which are of course also experienced by Aboriginal and Torres Strait Islanders, there are said to be important differences between issues of access to justice pertaining to race *and* to other types of discrimination that must be examined, including and especially those that arise for Indigenous people.<sup>94</sup> It has been said, for example, that the evidentiary burden placed on complainants to prove race-based discrimination (direct or indirect) makes the law in this area 'close to unenforceable'.<sup>95</sup>

Issues relating to access to justice so far identified in relation to discrimination, including those pertaining to the burden of proof, may have little relevance *or* indeed

particular application to Indigenous people. The complexity of anti-discrimination law may create higher barriers for Indigenous communities than it does for others due to language or literacy issues arising within such communities, for instance. There may also be issues that are *specific* to Indigenous communities; including, for example, a certain level of resignation they may feel towards the occurrence of discrimination due to the history and nature of oppression they have experienced over centuries. Moreover, there may be different problems in relation to access that apply to the young or old within Indigenous communities, to remote or urban, male or female, Aboriginal or Torres Strait Islander.

Further research and analysis is essential as to why *Indigenous* people are not using legal remedies as productively as they might in responding to racial discrimination, with particular reference to Indigenous perspectives about why this might be so. This is an important first step in developing strategies in response to Indigenous needs and circumstances and directed towards improving Indigenous access to racial justice. A first start is made on this task below, principally to identify barriers rather than strategies for change, with some emphasis upon the complaint handling process, given that this is where most disputes in this area are dealt with - although a number of the issues raised will be applicable to responses to racial discrimination other than that involving lodgement of a complaint. The author intends to develop a further paper with a specific focus on strategies to improving access to racial justice, again with an emphasis on what Indigenous people think might be the most effective way forward in this regard.

(i) Extra-Legal Barriers to Indigenous Access to Justice

a. *Confronting Discrimination: Exhaustion, Resignation, Fear of Retaliation, Disillusionment*

The current system of formal complaint primarily relies upon an individual to raise allegations of discrimination. Agencies such as the AHRC can generally only be triggered into action, at least in terms of complaint and investigation work, and courts and tribunals to adjudication when this occurs. In this sense at least, these bodies are reactive in nature.<sup>96</sup> Some Indigenous people report that they would like complaint handling agencies to have a greater capacity to act 'like police and stamp on' racial injustice.<sup>97</sup> Challenging an incident of discrimination as an individual, whether through a complaint-handling agency, through courts or

outside the law is not an easy thing to do. As one Indigenous woman states in this context, 'You've got no power. You've got no rights. You're just black. It's been the reality for too many years now'.<sup>98</sup> Moreton-Robinson also identifies the 'great personal cost' involved in 'taking' discrimination 'on' and confronting it.<sup>99</sup>

Relevant issues likely to deter an Aboriginal and Torres Strait Islander person from challenging racial discrimination include a fear of repercussions arising as a result of a complaint. They may well believe that confronting racism will only make things worse for them, as well as for other Indigenous community members, including where the alleged perpetrator is a police officer or, for example, the only relevant service provider in town. A community organisation interviewed for the ILNP in Shepparton, Victoria, states:

(Discrimination) is ever present. I had a conversation the other day that kind of started a little bit like, 'I'm not prepared to make any formal complaint because I believe that the service would not be there for me if I did'. It's the general thought... It's entrenched through the community that if you complain it will disadvantage you in some way.<sup>100</sup>

They may worry about retaliation in one form or another, with racist violence against Aboriginal and Torres Strait Islanders a real possibility.<sup>101</sup> There is also a fear that the 'whole community will be labelled as troublemakers' if someone speaks out.<sup>102</sup> This all speaks to the disempowerment of Indigenous people within their communities and in their relationships with government and other service providers.

A very fine example of this at a broader societal level is the public backlash that followed close upon the heels of the racial vilification litigation initiated in response to journalist Andrew Bolt's derogatory comments concerning political and other opportunism and 'fair skinned' Aboriginals.<sup>103</sup> The Abbott Government's now abandoned push in 2014 for legislative amendments, designed to water down the racial vilification provisions in section 18C of the RDA and referred to by some as 'the Bolt laws', was a clear and direct consequence of the success of this litigation in the Federal Court.<sup>104</sup>

Many Indigenous people also report a feeling of exhaustion and resignation in relation to this issue.<sup>105</sup> As one Indigenous

woman, again a participant in the ILNP research, states, 'I'm sick of talking about it. We've said so much'.<sup>106</sup> Aboriginal and Torres Strait Islander communities have had to deal with racism on multiple levels for so long and in so many ways that they may not feel sufficiently 'resourced' to then turn around and tackle it, whether that be formally through the law *or* more directly and informally. It is unlikely that a racially discriminatory event will ever be an isolated incident but may be seen instead as a single portion of a huge wall of racism they have had to endure over generations. As one Indigenous ILNP participant located in Heidelberg, Victoria, suggests:

Over generations, that's the point of it... We all get discriminated against at one time or another. We're Aboriginal. We might not always see it, but it's still there. They're always looking at me as if I'm going to steal something. You take it as it comes, you just move on. You got no choice.<sup>107</sup>

Indigenous people may also feel that very little will be achieved if a complaint is made, even where the outcome is likely to be positive. Does 'making a noise' about discrimination really change anything, in the broader scheme of things? Matters are often settled at conciliation for small amounts of compensation, for instance, and taking a dispute through to a contested hearing may take years, with no guarantee of a particular result at the end of it all, for all the effort expended.<sup>108</sup> They may ask themselves whether it is really worth it.<sup>109</sup> Moreover, contrary perhaps to a court-ordered outcome, Nielsen claims that during conciliation the 'best (the legislation) can offer an Aboriginal person is the "opportunity" to persuade white people to release their grip upon privilege through a process that actually supports white privilege because it imposes no demand that it must change'.<sup>110</sup> A respondent, for instance, may choose to settle a complaint on a commercial basis, rather than because they have been somehow magically transformed into a 'good citizen'.<sup>111</sup>

A further point of relevance is that it is highly likely that Aboriginal and Torres Strait Islander people will be facing a range of complex social and legal issues that they need to address at any one time, including perhaps incarceration, removal of their children by government or government agencies, and/or eviction from a tenancy. Any one of these issues may well end up taking precedence over an incident of racial discrimination, which is perceived as less 'urgent'.<sup>112</sup>

#### *b. Knowledge of Rights and Remedies*

Citing Foucault, Bird submits that in the context of accessing justice 'knowledge is power', and that as knowledge is not 'available equally to all citizens', power is inevitably 'unevenly distributed'. Barriers to access arise with respect to discrimination for 'people who could be (better) empowered by an understanding of their rights', including Indigenous people.<sup>113</sup> Lack of knowledge impacts in this area as people do not recognise that they have rights to start with, nor do they recognise the nature of these rights or how to enforce them, including by way of formal complaint.<sup>114</sup> They may also not know where to go for information and advice about resolution of disputes or problems in this area. This is so with respect to both organisations administering anti-discrimination legislation, such as the AHRC, as well as to legal services and other agencies who are able to assist in this regard.

Aboriginal and Torres Strait Islanders have themselves identified a lack of knowledge in this area as a significant barrier to accessing substantive justice. This includes not having an understanding that discrimination is a legal issue with a potential legal remedy - an essential starting point to accessing relevant legal help and justice more generally.<sup>115</sup> Poor awareness of rights may be due in part to the complexity of anti-discrimination law, with (even) legal advocates not appearing to always understand it particularly well.<sup>116</sup> Further, as the majority of Indigenous communities' contact with the justice system (including lawyers) is in relation to criminal law matters, Indigenous awareness of civil law appears to be lacking.<sup>117</sup> All of this means, as noted above in the context of ILNP research into Indigenous civil law needs, that anti-discrimination law might not be fully understood and may, for example, be seen as only offering protection against more direct and blatant forms of racism, when in fact the law potentially offers much more than this.

Further, confidentiality requirements forming part of the conciliation process, including in relation to any terms of settlement, do little to assist in increasing Indigenous awareness of how the law has (or has not) worked to date for others who are in similar circumstances.<sup>118</sup> Indigenous communities and indeed the broader community do not get to hear whether a particular incident has been 'sanctioned' through conciliation by way of payment of compensation or provision of an apology to the complainant, for instance. The more the law is seen by Indigenous communities as working

positively to address racial inequality, the more inclined they will be to use it to achieve positive outcomes. This has been identified as one of the most effective forms of Indigenous community legal education around anti-discrimination law process and provisions. It has been suggested, for instance, by one ILNP stakeholder organisation in Victoria that the way to increase complaints by Indigenous people is as follows.

[We need] just one [Aboriginal complainant]! [We] just need one [who will then] go back to the community and say that it actually worked... It would be good to get some runs on the board.<sup>119</sup>

*c. The Process of Complaint and Complaint Handling Agencies*

Aboriginal and Torres Strait Islanders may feel and/or might actually be far removed geographically from complaint handling agencies, which are located in city centres and, given current resourcing, are generally unable to conduct regular outreach outside these centres (although they may well conciliate in regional/remote locations).<sup>120</sup> This makes them difficult to contact, as many Indigenous people for instance may not have easy access to telephones.<sup>121</sup> It also makes them, metaphorically speaking, a 'world away from the lives' of those who might approach them for information and assistance, including Indigenous people.<sup>122</sup>

Further, Aboriginal and Torres Strait Islander people may see anti-discrimination agencies as just another government department from which they might expect little help, despite these agencies' stated independence. This is likely to be so, particularly where they seek to complain about 'another' government institution such as public housing or police. A certain level of distrust, in this sense, is common where any organisation is branded from a community perspective as 'government', given historically negative interactions between government and Indigenous people.

At a practical level, the process of complaint itself is also said to be 'too slow and cumbersome to have been of any use to Indigenous Australians',<sup>123</sup> although agencies claim to have made attempts to fast-track complaints where possible.<sup>124</sup> This jurisdiction is, for instance, a paper-driven one to a significant extent. Being required to lodge a complaint in writing and to respond to written correspondence thereafter is likely to be particularly problematic for large numbers of

Aboriginal and Torres Strait Islanders given language and literacy issues within their communities, especially where they do not keep any written record of what has occurred (in terms of the alleged incident) and/or may in general be confused or alienated by written material.<sup>125</sup> It is also suggested that many Indigenous people do not maintain a fixed residential address for long enough to receive relevant correspondence.<sup>126</sup>

Some Indigenous people have also reported feeling that the complaint process is biased against them. In one study conducted in relation to complaint handling by the NSW ADB, Indigenous complainants were more likely than others to believe that their case had not been handled fairly.<sup>127</sup> Indigenous people have indicated elsewhere that they have a fear that their complaints will not be taken seriously and will go nowhere.<sup>128</sup> Previous Aboriginal and Torres Strait Islander contact with the legal system (in the areas of child protection, housing and eviction, credit and debt or criminal law) is likely to have been negative, and thus the law may be perceived by Indigenous people as a tool used by the government and others to adversely impact upon Indigenous lives and to protect the interests of the more powerful. This may be a contributing factor to the sense of bias that Indigenous people experience in this area.

Further, whilst there may well be, to some degree, a level of inherent bias within the 'prevailing culture' of the anti-discrimination 'agency' itself, in terms of how it deals with the complaint and complainant,<sup>129</sup> Indigenous people may also have different expectations about how the agency in question might assist them with their complaint. For this reason, they may perceive that the process is working against them rather than for them when these expectations are not met. So, for instance, it is suggested that in general Aboriginal and Torres Strait Islanders may not be familiar with the concept of a 'neutral third party' in dispute resolution processes.<sup>130</sup> The understanding may well be that the conciliator will support an Indigenous complainant more so than actually occurs within the complaints process, which may lead to an appearance that they are working 'against' the complainant.

This raises a significant broader point. Complaint handling agencies are mainstream institutions first and foremost. They are not Indigenous-specific or geared towards the particular needs of Indigenous people. Non-Indigenous structures and programs, including conciliation, will be unlikely to

'fit' with Indigenous people or they may be perceived as being too 'white', as the bureaucracy associated with the complaints process, for example, may be seen as 'too much white fella's way'.<sup>131</sup> This means that the way that the law is administered by complaint handling agencies might hold little value for Indigenous people as a means of responding to discrimination - or at its worst it 'may (actually) work against Indigenous needs and perpetuate disadvantage', where, for instance, neutrality in conciliation masks power imbalances, leading to poor outcomes for Indigenous complainants.<sup>132</sup>

*d. Advocacy and Support, Including from Legal Services*

There is not enough specialised, affordable legal advice and assistance available to Indigenous people in relation to racial discrimination problems. This is probably the case with respect to most civil law problems. Aboriginal and Torres Strait Islander Legal Services ('ATSILS'), as the primary provider of legal services to Indigenous people, have generally had a significant focus upon criminal law service delivery to Indigenous communities. This is in part, a response to disproportionate Indigenous contact with the criminal justice system. ATSILS are vastly under-resourced in all areas, but particularly in terms of capacity to deal with Indigenous civil law needs. Whilst other legal services, including Community Legal Centres ('CLCs') or Legal Aid Commissions ('LACs'), may be able to provide varying degrees of legal help with respect to discrimination, the extent to which Indigenous people are accessing these services will be much lower than that of the ATSILS, which almost always will have a much greater Indigenous focus than CLCs or LACs. Indigenous Family Violence Prevention and Legal Services, though Indigenous-focussed, would not ordinarily undertake much casework in relation to racial discrimination.

To some extent, advocates and lawyers appear to have been written out of the process of complaint and investigation. Within the anti-discrimination regime, for instance, complainants may be encouraged to draft their own complaints<sup>133</sup> and to proceed without legal representation.<sup>134</sup> Whilst this might well be thought to render the complaints process less formal, 'easy to access' and 'relatively free of technicalities and legal forms',<sup>135</sup> Indigenous people are commonly more likely to engage with the complaint and investigation process with increased access to legal and non-legal advice and support, given the level of disempowerment they may feel within society. The importance of some form

of advocacy or assistance at every stage of the legal process cannot be over-emphasised. Legal and other services have the capacity to provide information about the law and about the process, as well as to walk besides the complainant as they seek legal redress.<sup>136</sup>

(ii) Legislation and Interpretation of the Law as a Barrier to Accessing Justice

Barriers arising within the law itself may create problems for Indigenous peoples' access to justice in this area. Sometimes legislative provisions underpin process-related issues referred to in the preceding section (where a complaint is required at law to be lodged in writing, for instance). There are also perhaps more substantive issues arising within the law likely to inhibit Indigenous access, including those resulting from the way in which legislative provisions have defined race-based discrimination, how these provisions have been interpreted by courts or tribunals (and also by complaint handling agencies when dealing with complaints), and what is required from the complainant in order to prove their case.

In discussing the significant issues relating to the burden of proof in this area, Hunyor asks 'If we know that racism exists, why is it so hard to prove?'<sup>137</sup> Establishing a causal connection between race and the incident which is the subject of a complaint (direct discrimination), or that a condition, requirement or practice has an unreasonable and disproportionate impact on a particular group (indirect discrimination), is notoriously difficult. A complainant claiming direct racial discrimination when turned down for a job, for example, needs to establish that the decision of the employer in question was based on race. The respondent need only suggest, however, that the job application was declined based on merit to rebut the allegation and without further evidence from the complainant, the case will be dismissed as unsubstantiated.<sup>138</sup> Placing the onus of proof on the complainant in this way makes racial discrimination cases virtually impossible to win as the respondent has 'a monopoly on knowledge' and in most cases 'controls all information essential to the complainant's case'.<sup>139</sup> Without direct evidence, the complainant is forced to rely upon the drawing of inferences from circumstantial evidence that the discrimination has occurred - and it is suggested that courts have been reluctant to draw such inferences in racial discrimination cases, in particular.<sup>140</sup> Issues of proof in relation to discrimination were identified within the ILNP



research. It was noted, for example, that lawyers sometimes frame race-based discrimination in employment as an unfair dismissal case rather than use anti-discrimination law because of problems of proof.<sup>141</sup> These issues are likely to both deter Indigenous people from taking action and to present as a barrier if they do so, thus impeding access to justice.<sup>142</sup>

*a. Inherent Bias in the Law and its Impacts on Indigenous Access to Justice*

Aboriginal and Torres Strait Islander people appear to have had little part to play in the 'shaping' of racial discrimination law; that is, in terms of how it has been written and/or implemented – and they continue to be excluded from the latter process where their access to the law is inadequate. As a result, the law may feel like it is not 'on the side of' or of any relevance to Indigenous people. Nielsen quotes one Indigenous man, 'Uncle', who believes that anti-discrimination laws are not really 'for' Indigenous people: 'The laws are designed for them (white people). It's not for us... It's not. It's just taking things away'.<sup>143</sup> His experience of the law, according to Nielsen, is of a 'practice skewed towards the white majority' because it offers a 'protected and exclusive place of privilege' to which non-whites gain entry only on 'white terms and conditions'.<sup>144</sup>

These terms and conditions demand that Indigenous people jump through procedural and more substantive hoops in order to use the 'form' of law to tackle racism. They are required to 'cram' their individual experiences and those that they share collectively into a pre-determined shape, moulded by existing ideologies and systems which are largely controlled by the dominant (mainstream, non-Indigenous) groups within society. This 'shape' defines what is and is not 'discrimination' – as legislation, case law or legal precedent and even within the complaint handling process.

An Indigenous person might believe that an incident or issue is clearly racially discriminatory, but it is not seen as such at law, as pointed out above in discussion relating to Mellor's four categories of racism. One Indigenous man from Heidelberg participating in the ILNP has suggested, for instance, that '[r]acism comes in all sorts of shapes and sizes. It can be the way that the shopkeeper gives you the money back in your hand'.<sup>145</sup> This sort of action would of course not constitute a contravention of anti-discrimination law. On a broader scale, racial discrimination at a societal level 'disappears', 'immunized by the process of legal

formalism'.<sup>146</sup> This fits within Moreton-Robinson's claims that the 'official' story about racism, including that articulated by the legal system, is that it exists in 'small pockets of society or not at all'.<sup>147</sup>

And so, having racial discrimination laws in place makes it look like everything is taken care of and that something is being done to eradicate racial prejudice against Aboriginal and Torres Strait Islanders. But in reality there is only an appearance of racial equality. In fact, there is no genuine equality and racism remains a serious problem, with widespread impacts. The law does nothing but maintain the status quo, including existing power relations in society.

A number of commentators have spoken of the colour blindness of the formal equality of law in this area, which simply does not 'see' an Indigenous person's race. Aboriginal and Torres Strait Islander experiences and perceptions (and ultimately the racism they actually encounter) are thus 'written out' of the law. As Uncle says, the law takes things away. This 'whitewashing' of Indigenous difference introduces a bias against them, rather than offering them protection as promised. Law, as stated, becomes part of the problem. It also 'effectively reproduces and stabilizes white privilege or dominance in society'.<sup>148</sup> It serves as an additional method of colonisation of Indigenous people, a 'part of' non-Indigenous peoples' 'claim of right to settle territory and to receive privileges attendant upon occupation – including the expectation of laws' protection'.<sup>149</sup>

Numerous examples of such whitewashing and colour blindness include litigation relating to the eviction of an Indigenous public housing tenant in WA, Joan Martin, on the basis of alleged overcrowding of her public housing property by her Indigenous family members.<sup>150</sup> Martin had argued at law that any overcrowding in her home was due to her cultural obligations as a Yamatji mother and grandmother to take in family. She therefore claimed that the eviction was indirectly discriminatory on the basis of her race. The Equal Opportunity Tribunal (WA) hearing the matter at first instance determined, however, that Martin had taken in relatives not because she was Indigenous but because she was a mother, thereby implying that her 'mothering is "cultureless"'.<sup>151</sup> McGlade claims that this decision did not give 'equal credence and respect to Aboriginal culture', rendering 'race' invisible and providing clear evidence that anti-discrimination legislation is 'failing Aboriginal people'.<sup>152</sup> As a further significant point, it also illustrates

that the law's 'one dimensional' nature may mean that it is not able or willing to identify more than one attribute relevant to Indigenous complaints of discrimination. In this instance, Martin's gender and race were both important but were effectively 'split' apart, with gender and mothering obligations given precedence over race and cultural obligations.<sup>153</sup>

The impact this has on Indigenous access to legal redress is not only negative because the likelihood of substantiating a claim of racial discrimination is small. It is also problematic because where the law consistently fails to accept or corroborate their accounts of racism, Indigenous people will be deterred from using the law to uphold their rights. It leads to a sense - quite appropriately - that the harm they suffer will never fall within the limited legal definitions of racial discrimination, as the following comment suggests.

I think a lot of things don't get resolved because if it is a race issue it seems to be difficult to identify, so legal procedures virtually say, 'You can't identify it, so nothing we can do about it'. So nothing gets resolved, and people tend not to follow up and not pursue it.<sup>154</sup>

Of course, the less Indigenous people engage with the law, the more it never has to change its shape so as to better understand and incorporate Indigenous experiences and perspectives of racial discrimination. Thornton further claims that the restricted legal interpretation of 'discrimination' (and failed cases) flows through and may actually increase discrimination in the community. By denying that something equates to racism, you implicitly permit it and even encourage it.<sup>155</sup>

#### *b. Critical Race Theory and Substantive Equality*

Critical race theory has been used much more extensively in analysis of civil rights law in the United States than it has been in Australia with respect to anti-discrimination law. Proponents of this theory would suggest that legal reform directed towards combatting racism only ever 'masks' and 'legitimizes' continuing racial inequality and that it cannot possibly, nor was ever really intended to, result in major social reform along racial lines.<sup>156</sup> In a United States context, Bell for example claims that we need to question the extent to which equality legislation and jurisprudence actually improves the lives of Black Americans.<sup>157</sup> He advocates for 'racial realism' rather than 'racial equality', stating that 'Black people will

never gain full equality'.<sup>158</sup> He also suggests therefore that there is more harm than good done in constantly looking to abstract legal rights in order to fight for such equality, as these rights may bring about the cessation of one form of discriminatory conduct, but this soon appears 'in a more subtle though no less discriminatory form'.<sup>159</sup> Other more direct, and more effective forms of protest, including those relied upon within civil rights movements in the United States and Australia, are put to one side without any real gains being made through the law.

Within critical race theory, the law is only a set of 'ideological constructs that operate to support existing social arrangements by convincing people that things are both inevitable and basically fair'.<sup>160</sup> Through these constructs, our legal and social system appears 'neutral' and is 'acceptable'.<sup>161</sup> This, according to Gordon, is the most effective form of 'domination'; when 'both the dominant and dominated classes believe that the existing order, with perhaps some marginal changes, is satisfactory, or at least represents the most that anyone could expect'.<sup>162</sup> Critical race theorists identify, for instance, that civil rights-based law will never be able to address certain substantive aspects of racial domination, including redistribution of wealth, as it does not have the capacity to recognise differences based on wealth. Despite this, 'economic exploitation and poverty have been central features' of race-based oppression, and poverty is 'its long term result'.<sup>163</sup>

Much of what is said by critical race theorists is to an extent applicable to the situation of Indigenous Australians. Commentary above relating to colour blindness of the law in Australia corresponds to that which has been discussed in the United States as part of a critical race theory analysis of civil rights legislation and litigation. As noted, too, there is some suggestion that those in power never intended racial discrimination law in Australia to really achieve much at all for Indigenous people. Criticisms of United States equality law relating to its incapacity to bring about more substantive change with respect to systemic or institutional racism are also levelled at our discrimination law. Writing shortly after the commencement of the RDA, the first Federal Commissioner for Community Relations, for example, identified that the 'number of RDA complaints (by Indigenous people) does not accurately gauge the extent of the existence of racial discrimination in Australia'.<sup>164</sup> This is not only because Indigenous people do not always complain formally, but also as '[t]he most prevalent form

of racial discrimination is institutional, and this form is not evidenced in single acts', which might form the basis of a complaint under the RDA.<sup>165</sup>

The RDA was amended in 1990 to include indirect discrimination provisions, which are likely to be useful in this regard, as discussed below. Even so, one particular issue identified is the fact that racial discrimination laws, in general, confer a limited positive right to seek redress on *an individual* who has suffered an alleged violation.<sup>166</sup> Where this occurs, the onus is on that person to find a particular act of discrimination amidst the 'phenomenon of racism'.<sup>167</sup>

Whilst this wider 'phenomenon' 'fosters racist behaviour' it is only the act in question which is able to be dealt with at law. The problem is that racism 'by its very nature' is endemic, 'diffused throughout (our) social fabric', as discussed above in further detail and as suggested by the example above relating to disproportionate distribution of wealth. Given this, how does an Indigenous person find an appropriate 'wrongdoer' with respect to this broader 'phenomenon'?

By way of further illustration, an Aboriginal person applying for employment who has a poor quality curriculum vitae because of a history of social exclusion must complain about the discrimination by the prospective employer who is at this moment refusing him or her a job, allegedly though (according to the employer) on the basis of merit rather than race. The employer is thus rendered 'immune' from sanction because the applicant's entire work history is placed outside of the employer's responsibility, 'even though that employer's denial of employment perpetuates systemic racism'.<sup>168</sup>

Whilst there are legislative limitations in this regard, Flynn and others have noted that there is capacity in the law to tackle racial discrimination at a more substantive level, to alter societal structures that support racism suffered by Indigenous people, including through individual complaints of indirect discrimination and through special measures provisions, but that this capacity is presently under-utilised, for a number of reasons.<sup>169</sup> Flynn submits that statistical inequality is not in itself an unlawful act of direct or indirect discrimination. Proof of no more than that an Indigenous person is, for example, less likely to live in an adequate house does not identify 'an act' or 'a discriminator', much less how the discriminator's act is one that is 'based on race'.<sup>170</sup> He cites, however, as an example of the potential of the law to

tackle broader disadvantage, a report by the Ngaanyatjarra Council, published in 2003 and identifying poor health, education and housing outcomes, amongst other problems, in a number of Aboriginal communities located in remote Central Australia.<sup>171</sup>

The report in question found that what was required to address these outcomes was better 'access [to] the same level of support available to low income and disadvantaged non-Indigenous people'.<sup>172</sup> In order to access that support, an applicant required certain resources, including reasonable literacy and numeracy skills, viable use of English, 'adequate maintenance of personal records', and a residential address for relevant mail. These requirements were unlikely to be easily met by Indigenous people from the communities in question (or in many similar remote communities, no doubt), therefore denying them equitable access to support and contributing to the aforementioned poor outcomes.

Flynn suggests that this particular scenario or situation may well constitute a prima facie case of indirect racial discrimination under section 9(1A) of the RDA, which would be unlawful only if it were assessed as 'unreasonable' by a court or tribunal under a vague legal standard.<sup>173</sup> If successful, improvements to Indigenous access to services - and as a consequence to the circumstances of Indigenous people - could be made. He further posits that issues of Indigenous access to justice represent the most significant barrier to using section 9(1A), but that the legislative capacity is there to address systemic issues and to achieve for Indigenous people more substantive equality. Barriers inhibiting access in this respect may include some of those outlined above, such as a lack of understanding of the legal concept of indirect discrimination, the onus of proof in relation to establishing 'reasonableness' within this concept, and, in keeping with the above comments pertaining to colour blindness, a poor understanding of and reluctance to interpret the law with reference to the broader social and historical context within which racism occurs.<sup>174</sup>

## VI Challenging Indigenous Social Exclusion Through the Law and Beyond

Writing from a United States perspective, Crenshaw suggests that liberal legal ideology remains receptive to 'some aspirations that are central to black demands' and that the law is important 'to combating the experience of being excluded (and) oppressed'.<sup>175</sup> She states that in the battle for

civil rights 'legal protection has at times been a blessing – albeit a mixed one', and that it is possible to work within the existing dominant ideology to change it, even if any transformation made is not absolute.<sup>176</sup>

Despite criticisms of the law and how it has worked for Indigenous Australians to date, it is still likely that improving Indigenous access to racial discrimination law is an essential component of the process of achieving a greater measure of substantive equality and social advancement for Aboriginal and Torres Strait Islanders. Indeed, this is the potential that Indigenous people who called for the introduction of the RDA saw in such legislation. In more contemporary times too, faced with the prospect of the possible weakening by the Abbott Government of racial vilification provisions in the RDA, prominent Indigenous persons highlighted the importance of existing legislative protection against discrimination to Aboriginal and Torres Strait Islanders. By way of example, prior to the Government's decision to scrap the proposed amendments, the National Congress of Australia's First Peoples stated that the RDA 'is a key, if not foundational, law establishing Australia's identity as a nation upholding equality and tolerance within a diverse multicultural society.' Further, it is 'also a keystone for reconciliation in Australia between Aboriginal and Torres Strait Islander Peoples and the settler state'.<sup>177</sup>

Having the capacity to engage in legal action, where appropriate, enables Indigenous people to take on and to turn around for themselves issues which are both the cause and the consequence of the social marginalisation and exclusion they experience, including unequal treatment on the basis of race. As part of this social exclusion, Indigenous people, along with other 'outsider' groups, experience at disproportionate rates a range of significant problems, including for example: poverty, homelessness, criminalisation and unemployment. These occur, in part, because those who are so excluded do not have equal access to a range of resources that facilitate social inclusion such as adequate housing, job and financial security, a strong civic and political voice - and also, significantly, justice.<sup>178</sup> Of importance, these same problems will also commonly have a legal element (such as debt or unfair dismissal within unemployment or homelessness) for which there may be an appropriate legal remedy. However, as poor access to justice is generally a component of social exclusion, the possibility of being able to respond to, or resolve the relevant 'legal element' is very likely to be significantly reduced, contributing to further levels of exclusion and so it

goes on. The marginalised, including Aboriginal and Torres Strait Islander people and communities, may thus be both more likely to have a legal issue they need to attend to and less opportunity to do so.

Racial discrimination is an example of a civil law problem clearly impacting upon health, education, housing and employment outcomes of Indigenous Australians. If it were to be dealt with more effectively, including through legal frameworks, increased levels of social inclusion is the likely outcome, over time. It is imperative that access to justice is improved so that Indigenous people are better able to challenge instances of discrimination, within the capacity of the law, as a means of improving their circumstances. On the other hand, inadequate resolution of disputes and incidents in this area will only exacerbate the disadvantage Indigenous people face.

## VII Conclusion

As Essed suggests, the incidence of racism in society will only ever be decreased by 'drawing attention' to it and by 'challenging it constantly'. Keeping silent, on the other hand, 'will not make it go away'.<sup>179</sup> The legislative and administrative regimes built around racial discrimination need to be much more effective for Indigenous Australians in this regard, given the disproportionate levels of racial inequality they continue to face. Improving Indigenous access to justice as a means of challenging and drawing attention to racism is a key component of this increased effectiveness. McGlade states that 'Aboriginal people know that Australia is a racist country, and we have a right to mechanisms which offer real and effective redress against discrimination.'<sup>180</sup> Although there is no single definition of 'justice', nor of ways to access it, it is imperative that Aboriginal and Torres Strait Islander people have real opportunity to use legal remedies for resolution of disputes or problems in this area, if they so choose, including that provided by complaint handling agencies.

This paper has concentrated upon barriers arising for Indigenous people in terms of more formal access to justice. A next step is to identify strategies to assist in addressing these barriers, something that has not been discussed in detail herein and which requires further research, with an emphasis upon Indigenous input in this regard. In developing such strategies, as Gaze suggests, the law needs to better account for and accommodate the 'variation in the

social, political and economic impact of race discrimination upon *Aboriginal* peoples as compared to those of other “non-white” heritages’ (emphasis added).<sup>181</sup>

With this in mind, initial suggestions for possible strategies might include legislative reform around, for example, the burden of proof placed on complainants;<sup>182</sup> ensuring that all complaint handling agencies prioritise and are better able to respond to the needs of Indigenous people through, for instance, employment of Indigenous staff and development of Indigenous-specific strategies and processes, including in relation to conciliation;<sup>183</sup> increasing capacity of (Indigenous) legal services to provide much needed support and information to Indigenous communities with respect to racial discrimination; and working harder to ensure that legal precedent is established which more effectively reflects and responds to Indigenous experiences of racism.<sup>184</sup> They should also, however, involve careful thinking about how capacity can be built from the ground up to ensure that Indigenous people as ‘justice seekers’ are able to overcome lack of knowledge, fatigue, fear and other issues which impact on whether and how they respond to racial inequality. It is also important to acknowledge the range of statutory functions of anti-discrimination bodies such as the AHRC, other than that of complaint handling, and what they might further achieve in an Indigenous context. These functions include working to increase knowledge within the community about discrimination (through training and other forms of education), lobbying government around policy and legal reform, conducting public inquiries into relevant social issues, and intervening in certain legal proceedings in the public interest, *inter alia*. With adequate resourcing of the agencies in question, these functions each make important contributions to the overarching objective of reducing discrimination, alongside investigation and conciliation of individual complaints.

Further and as noted, the law can only ever provide one response to racism and racial discrimination targeted at Indigenous people, as other factors work alongside it, impacting on the change it can achieve. As such, strategies to address racial discrimination against Indigenous people will have to encompass initiatives and other effort from government and civil society, independent of the law and legal system, including (as noted) policy reform that references a right for Indigenous people to substantive equality. The Commonwealth’s Anti-Racism Strategy is an example of a broad-reaching educative initiative sitting

outside the legal system and coordinated by the AHRC, the National Congress of Australia’s First Peoples and various other partners.<sup>185</sup> The People’s Hearing into Racism and Policing held in Victoria in 2013, established by a local CLC and a community-based advocacy group, provides another example of a similar partnership. It gives voice to the disempowered by providing them with an opportunity to publicly ‘name’ racial injustice for what it is and to describe the effects that it has had upon them.<sup>186</sup> These and other ideas need to work alongside any changes to the law and its administrative processes to ensure effective Indigenous access to racial justice, thereby increasing the prospect of a genuine shift in Australian race relations which will be of genuine benefit to Aboriginal and Torres Strait Islanders.

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- \* Senior Research Officer, Senior Project Coordinator: Indigenous Legal Needs Project, PhD Candidate, Cairns Institute, James Cook University.
- 1 Garth Nettheim (ed), *Aborigines, Human Rights and the Law* (ANZ Book Company, 1974) 28-9.
  - 2 *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth).
  - 3 *Anti-Discrimination Act 1977* (NSW) ('ADA'); *Equal Opportunity Act 1984* (Vic) ('EOA'); *Equal Opportunity Act 1984* (WA) ('EOA'); *Anti-Discrimination Act 1991* (Qld) ('ADA'); *Discrimination Act 1991* (ACT) ('DA'); *Anti-Discrimination Act 1992* (NT) ('ADA'); *Anti-Discrimination Act 1998* (Tas) ('ADA').
  - 4 See *Racial Vilification Act 1996* (SA); *Racial and Religious Tolerance Act 2001* (Vic); *Criminal Code 1913* (WA) ss 76-80. Otherwise, racial vilification is included in general anti-discrimination legislation: ADA (Tas) s19; ADA (Qld) ss 124A, 131A; ADA (NSW) ss 20A-20C; DA (ACT) ss 66, 67. The ADA (NT) does not prohibit racial vilification, although ‘harassment’ is prohibited under s 20(1)(b), which may include racial harassment. The Northern Territory’s *Criminal Code* creates offences such as making threats as per section 200, which may also be applicable in certain circumstances.
  - 5 See, eg, Gillian Cowlishaw and Morris Barry, *Race Matters: Indigenous Australians and ‘Our’ Society* (Aboriginal Studies Press, 1997).
  - 6 Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law: Texts, Cases, Materials* (Federation Press, 2008).
  - 7 Beth Gaze, ‘Has the Racial Discrimination Act Contributed to



- Eliminating Racial Discrimination? Analysing the Litigation Track Record 2000-2004' (2005) 11(1) *Australian Journal of Human Rights* 6.
- 8 Race Discrimination Commissioner, *Battles Small and Great: The First Twenty Years of the Racial Discrimination Act* (Australian Government Publishing Service, 1995) 4.
- 9 Ibid 4-5.
- 10 Charles Perkins, *A Bastard Like Me* (Ure Smith, 1975) 177.
- 11 Gough Whitlam, 'It's Time for Leadership' (Speech delivered at the Blacktown Civic Centre, Sydney, 13 November 1972).
- 12 Ibid.
- 13 Ibid.
- 14 Ibid.
- 15 Commonwealth of Australia, *Parliamentary Debates*, Senate, 21 November 1973, 1976-7 (Lionel Murphy, Attorney-General).
- 16 Ibid.
- 17 Jennifer Clark, *Aborigines and Activism: Race, Aborigines and the Coming of the Sixties to Australia* (University of Western Australia Press, 2008) 4.
- 18 Ibid. See, also, Lorna Lippman, *Generations of Resistance: The Aboriginal Struggle for Justice* (Longman Cheshire, 1985) 56, 59.
- 19 John Chesterman, *Civil Rights: How Indigenous Australians Won Formal Equality* (University of Queensland Press, 2005).
- 20 Perkins, above n 10, 74.
- 21 See, eg, Clark, above n 17, 149-50, 175; Ann Curthoys, *Freedom Ride: A Freedom Rider Remembers* (Allen and Unwin, 2002).
- 22 Nettheim, above n 1, 12.
- 23 Report of the Second Annual Conference of Federal Council for Aboriginal Advancement, February to March 1959, MN 1176, Acc 3491A, items 18-20, PROWA: *Australian*, 17 April 1965, 3.
- 24 See, Nettheim, above n 1, 149.
- 25 Chestermann, above n 19, 14.
- 26 Ibid 30.
- 27 Margaret Thornton, *The Liberal Promise: Anti Discrimination Legislation in Australia* (Oxford University Press, 1990) 38. There is some evidence, requiring further examination, that the objective of early legislative enactment in this area was, in part, directed towards avoiding the race-based dissent and violent protest which was occurring at this time. See, eg, South Australia, *Parliamentary Debates*, House of Assembly, 14 July 1966, 491-2 (Don Dunstan, Attorney General and Minister for Aboriginal Affairs). Dunstan claims, for instance, that if the *Prohibition of Discrimination Act 1966* had not been introduced in South Australia, 'some of the direct action that has been taken in other States' might have occurred in South Australia.
- 28 Aileen Moreton-Robinson, 'Witnessing the Workings of White Possession in the Workplace: Leesa's Testimony' (2007) (26) *Australian Feminist Law Journal* 81, 82.
- 29 David Mellor, 'Contemporary Racism in Australia: The Experiences of Aborigines' (2003) 29(4) *Personality and Social Psychology Bulletin* 474, 483.
- 30 See, eg, Yin Paradies, Ricci Harris and Ian Anderson, *Impact of Racism on Indigenous Health in Australia and Aotearoa: Towards a Research Agenda* (Cooperative Research Centre for Aboriginal Health, 2008) 6. The authors suggest that the prevalence of self-reported racism amongst Indigenous people in recent Australian studies is placed at between 58% and 79%.
- 31 Australian Bureau of Statistics ('ABS'), *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples* (Cat Number 4704.0).
- 32 Angeline Ferdinand, Yin Paradies and Margaret Kelaher, *Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities* (Victoria Health Lowitja Institute, 2013).
- 33 These jurisdictions are New South Wales, Victoria and the Northern Territory. ILNP research in Queensland and Western Australia will be completed in 2014. See, James Cook University, *Indigenous Legal Needs Project* (2014) James Cook University Australia <<http://www.jcu.edu.au/ilnp/>>.
- 34 Chris Cunneen and Melanie Schwartz, *The Family and Civil Law Needs Of Aboriginal People in NSW: Final Report* (UNSW Law Faculty, 2008) 80 ff.
- 35 Fiona Allison, Larissa Behrendt, Chris Cunneen and Melanie Schwartz, *Indigenous Legal Needs Project: NT Report* (Cairns Institute James Cook University, 2012) 96 ff.
- 36 Melanie Schwartz, Fiona Allison and Chris Cunneen, *Indigenous Legal Needs Project: Victorian Report* (Cairns Institute James Cook University, 2013) 92 ff.
- 37 See, Fiona Allison, Chris Cunneen and Melanie Schwartz, 'That's Discrimination! Indigenous Experiences of Racial Discrimination in the Northern Territory' (2012) 8(5) *Indigenous Law Bulletin* 8.
- 38 Ibid.
- 39 Schwartz, Allison and Cunneen, above n 36, 46.
- 40 Ibid 93.
- 41 Mellor, above n 29.
- 42 Ibid 479-80.
- 43 Ibid 481.
- 44 Philomena Essed, *Understanding Everyday Racism* (Sage Publications, 1991); Philomena Essed, *Everyday Racism: Reports from Women of Two Cultures* (Hunter House, 1990).
- 45 Mellor, above n 29, 483
- 46 Ibid.
- 47 Thornton, above n 27, 53.
- 48 See, Andrew Markus, *Mapping Social Cohesion 2011: the Scanlon Foundation Survey* (Monash University Victoria, 2011). The 2010 and 2011 Scanlon Foundation surveys identify a long-term change in Australian opinion towards immigrant groups,

- with a large measure of acceptance towards groups who were once stigmatised.
- 49 See, eg, Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence* (Australian Government Publishing Service, 1991)
- 50 Yin Paradies, 'Anti-Racism and Indigenous Australians' (2005) 5(1) *Analyses of Social Issues and Public Policy* 1, 2.
- 51 See, eg, Barbara R Henry, Shane Houston and Gavin H Mooney, 'Institutional Racism in Australian Healthcare: A Plea for Decency' (2004) 180(10) *Medical Journal of Australia*, 517.
- 52 See, eg, Reuben Bolt, *It's Just How You've Been Brought Up! An Aboriginal Perspective on the Relationship Between the Law, Racism and Mental Health in NSW* (Bachelor of Arts Honours Thesis, University of Sydney, 2001).
- 53 See, eg, Myra Dunn, 'Lessons from the Past: Education and Racism in Australia' (2001) 11(1) *Education in Rural Australia* 62.
- 54 See, eg, Collin Tatz, 'Racism and Sport in Australia' (1995) 36(4) *Race and Class* 43.
- 55 See, eg, Joanne Walsh, 'Suburban Oppression' (2003) 5(22) *Indigenous Law Bulletin* 14; Western Australia, Equal Opportunity Commission, *Accommodating Everyone: An Inquiry into Whether People from Culturally and Linguistically Diverse Backgrounds and Aboriginal People are Being Discriminated Against on the Basis of their Race either Directly or Indirectly in the Private Housing Rental Market* (2009); Jane Stanley, 'Rental Market Failure: Discriminatory Obstacles Faced by Aboriginal People in the Private Rental Market' (Paper presented at the National Housing Conference, 2001); Victorian Equal Opportunity And Human Rights Commission ('VEOHRC'), *Locked Out: Discrimination in Victoria's Private Rental Market* (2012).
- 56 See, eg, Martha Augoustinos, Keith Tuffin and Mark Rapley, 'Genocide or a Failure to Gel? Racism, History and Nationalism in Australian Talk' (1999) 10(3) *Discourse and Society* 351.
- 57 Martin Flynn, 'Why Has the *Racial Discrimination Act 1975* (Cth) Failed Indigenous People?' 2005 9(1) *Australian Indigenous Law Reporter* 15.
- 58 Ibid.
- 59 Linda Burney, 'An Australian Sense of Xenophobia' (2009) 52(4) *Development* 479, 481.
- 60 Thornton, above n 27, 37.
- 61 Lella de Mel, Yvonne Henderson, Noel Nannup, 'Indigenous Interpreting Service: Is there a Need?' (Equal Opportunity Commission, Western Australia, 9 July 2010).
- 62 See, Henry, Houston and Mooney, above n 51.
- 63 Ferdinand, Paradies and Kelaher, above n 32, 3.
- 64 Chesterman, above n 19, 260.
- 65 Flynn, above, n 57.
- 66 Ibid.
- 67 Ibid.
- 68 Gaze, above n 7.
- 69 Ibid.
- 70 Ibid.
- 71 Ibid.
- 72 Recent changes in Victoria mean that under the *Equal Opportunity Act 2010* (Vic), aggrieved persons can bypass the EOC (Vic) and commence action directly in the Victorian Civil and Administrative Tribunal.
- 73 Dominique Allen, 'Behind the Conciliation Doors: Settling Discrimination Complaints in Victoria' (2009) 18(3) *Griffith Law Review* 778.
- 74 This is despite the fact that some jurisdictions have strategic frameworks in place requiring reporting of numbers of Indigenous complaints. The Anti-Discrimination Commission in Queensland's ('ADCQ') *Reconciliation Action Plan*, for instance, includes as a measurable target an annual review of the complaints process (numbers of complaints and outcomes) for Aboriginal and Torres Strait Islanders 'to provide more accessible, appropriate and equitable service delivery' to this group. See, Anti-Discrimination Commission Queensland, *Reconciliation Action Plan 2011-12* (2011) Reconciliation Queensland Incorporated <[http://www.adcq.qld.gov.au/\\_\\_data/assets/pdf\\_file/0013/2407/RAP.pdf](http://www.adcq.qld.gov.au/__data/assets/pdf_file/0013/2407/RAP.pdf)>. Anecdotal evidence gathered as part of the ILNP research further indicates that Indigenous people only lodged 5-10% of the 350 individual complaints received by the Northern Territory Anti-Discrimination Commission in 2010–2011 (with no indication of the specific ground on which they were based). Note that around 30% of the Northern Territory population is Indigenous. See, also, Allison, Behrendt, Cunneen and Schwartz above n 35, 103. The Australian Human Rights Commission ('AHRC') also published extra detail on Aboriginal and Torres Strait Islander complaints for 2011-2012 in the Social Justice Report covering this same period: see, AHRC, *Social Justice Report 2012*, (Australian Human Rights Commission, 2012) 77-8.
- 75 AHRC, *Annual Report 2011-2012: Australian Human Rights Commission* (Australian Human Rights Commission, 2012) 132; AHRC, *Social Justice Report* (Australian Human Rights Commission, 2012) 77.
- 76 AHRC, *Annual Report 2010-2011: Australian Human Rights Commission* (Australian Human Rights Commission, 2011) 107. The raw numbers provided are the author's estimation only, based on available AHRC data (that is, 34% of a total of 422 Indigenous complaints received).
- 77 The raw numbers for 2011-2012 are provided in the AHRC *Social Justice Report* (2012), above n 75, 77. For 2010-2011, the raw numbers included here are again an estimation made by the author based on available AHRC data (that is, 9% of a total of

- 2152 complaints received by *all* complainants under *all* grounds). See AHRC, above n 76, 106-7.
- 78 Western Australia Equal Opportunity Commission, *Annual Report* (Equal Opportunity Commission, 2012) 51.
- 79 Ibid.
- 80 Anti-Discrimination Board of New South Wales, *Statistics 2011-2012* (Anti-Discrimination Board of New South Wales, 2013) <[http://www.antidiscrimination.lawlink.nsw.gov.au/adb/adb1\\_statistics/stats11\\_12.html](http://www.antidiscrimination.lawlink.nsw.gov.au/adb/adb1_statistics/stats11_12.html)>; Anti-Discrimination Board of New South Wales, *Statistics 2010-2011* (Anti-Discrimination Board of New South Wales, 2013) <[http://www.antidiscrimination.lawlink.nsw.gov.au/adb/adb1\\_statistics/adb1\\_statistics10\\_11.html](http://www.antidiscrimination.lawlink.nsw.gov.au/adb/adb1_statistics/adb1_statistics10_11.html)>.
- 81 Gaze, above n 7.
- 82 See, eg, Anti-Discrimination Board of New South Wales, *Anti Discrimination Board of NSW: Annual Report* (Lawlink, 2012) 47. See, also, Allen, above n 73, 780.
- 83 Greta Bird, 'Access to the Racial Discrimination Act' in Race Discrimination Commissioner, *The Racial Discrimination Act: A Review* (Race Discrimination Commissioner, 1995) 188.
- 84 Ferdinand, Paradies and Kelaher above n 32, 17, 22.
- 85 Cunneen and Schwartz, above n 34.
- 86 Allison, Behrendt, Cunneen and Schwartz above n 35.
- 87 Schwartz, Cunneen and Allison, above n 36.
- 88 Allison, Behrendt, Cunneen and Schwartz, above n 35, 102.
- 89 Public Interest Advocacy Centre ('PIAC') and Wirringa Baiya Aboriginal Women's Legal Centre ('WBAWLC'), *Discrimination... Have You Got All Day? Indigenous Women, Discrimination and Complaints Processes in New South Wales* (PIAC and WBAWLC, 2001)
- 90 Marc Galanter, 'Justice in Many Rooms: Court, Private Ordering and Indigenous Law' (1981) 13(19) *Journal of Legal Pluralism and Unofficial Law* 1.
- 91 Gay R Clarke and lyla T Davies, 'Mediation – When is it Not an Appropriate Dispute Resolution Process?' (1992) 3(2) *Australasian Dispute Resolution Journal* 70, 77
- 92 Ibid.
- 93 Jennifer Nielsen, 'Whiteness and Anti-Discrimination Law - It's in the Design' (2008) 4(2) *Australian Critical Race and Whiteness Studies Association* 1, 2.
- 94 Ibid 1.
- 95 Beth Gaze, 'Problems of Proof in Equal Opportunity Cases' (1989) 63(8) *Law Institute Journal* 731, 733.
- 96 Although it is noted that they undertake a range of other functions, such as education of the public and of potential respondents in relation to rights and responsibilities, conducting formal inquiries of issues in the public interest. This is less 'reactive', more preventative work than complaint handling. See, Irene Moss, 'Combating Racism via the Human Rights and Equal Opportunity Commission' (1987) 1(29) *Aboriginal Law Bulletin* 4.
- 97 PIAC and WBAWLC, above n 89.
- 98 Ibid 50-1.
- 99 Moreton-Robinson, above n 28, 93.
- 100 Schwartz, Allison and Cunneen, above n 36, 105.
- 101 Ibid 103: Indigenous people still speak of Klu Klux Klan type activity in their communities.
- 102 Author unknown, 'Aboriginal Outreach: A Better Approach to Aboriginal Complaints' (1993) 16 *Equal Time* 1 in PIAC and WBAWLC, above n 89, 15.
- 103 *Eatock v Bolt* (2011) FCA 1103.
- 104 See, National Congress of Australia's First Peoples ('Congress'), *Submission to the Attorney-General on the Exposure Draft of the Freedom of Speech (Repeal of Section 18C)*, 30 April 2014, <<http://nationalcongress.com.au/wp-content/uploads/2014/04/National-Congress-Submission-to-Exposure-Draft-of-RDA-Bill.pdf>>.
- 105 Allison, Cunneen and Schwartz, above n 37.
- 106 Schwartz, Allison and Cunneen, above n 36, 44.
- 107 Ibid 104.
- 108 See, eg, the litigation history of the ultimately successful racial vilification case of *McGlade v Lightfoot* [2002] FCA 1457. The complaint commenced in 1997, was successful at the Human Rights and Equal Opportunity Commission ('HREOC'), was set aside on review in the Federal Court and in 2002 was reheard and upheld in the Federal Court (the HREOC no longer had a hearing function at this time).
- 109 See, eg, Thornton, above n 27, 88 and Hilary Astor, 'A Question of Identity: The Intersection of Race and Other Grounds of Discrimination' in Race Discrimination Commissioner, *Racial Discrimination Act 1975: A Review* (Race Discrimination Commissioner, 1995) 279-80. Astor notes that damages awarded at hearings for RDA cases were comparatively small when compared to those awarded under the SDA.
- 110 Nielsen, above n 93, 7-8.
- 111 Ibid.
- 112 Allison, Cunneen and Schwartz, above n 37; Schwartz, Allison and Cunneen, above n 36.
- 113 Bird, above n 83, 290.
- 114 Allison, Cunneen and Schwartz, above n 37; Schwartz, Allison and Cunneen, above n 36.
- 115 Allison, Behrendt, Cunneen and Schwartz, above n 35, 102; Allison, Cunneen and Schwartz, above n 37.
- 116 Phillip Tahmindjis, 'The Law and Indirect Racial Discrimination: Of Square Pegs, Round Holes, Babies and Bathwater' in Race Discrimination Commissioner (1995) *Racial Discrimination Act 1975: A Review*, 123; Schwartz, Allison and Cunneen, above n 36, 46.

- 117 See Cunneen and Schwartz, above n 34; Allison, Behrendt, Cunneen and Schwartz, above n 35; Schwartz, Allison and Cunneen, above n 36.
- 118 Thornton, above n 27, 83-4.
- 119 Schwartz, Allison and Cunneen, above n 36, 46.
- 120 See, New South Wales Law Reform Commission ('NSWLRC'), *Discrimination Complaints Handling: A Study, Research Report No 8*, (Lawlink, 1997) 51-2.
- 121 PIAC and WBAWLC, above n 89, 15.
- 122 Bird, above n 83, 289.
- 123 Rees, Lindsay and Rice, above n 6, 3. See, also, NSWLRC, above n 120, 51-2. The NSWLRC indicates that a large proportion (45%) of Indigenous complainants thought that the ADB processes took too long.
- 124 See, eg, discussion in Western Australia Equal Opportunity Commission, above n 78, 34.
- 125 PIAC and WBAWLC, above n 89, 54.
- 126 Ibid 16, citing Hahine McCaskill and Patimah Molone, *A Consultation Project with Aboriginal and Torres Strait Islander Women* (Project Developers Brisbane, 1994) 18.
- 127 NSWLRC, above n 120, 51-2.
- 128 Schwartz, Allison and Cunneen, above n 36, 45.
- 129 Thornton, above n 27, 88.
- 130 National Alternative Dispute Resolution Advisory Council ('NADRAC'), *Indigenous Dispute Resolution and Conflict Management* (NADRAC, 2006) 5.
- 131 McCaskill and Molone, above n 126, 7.
- 132 Ibid 3.
- 133 See, eg, *Human Rights and Equal Opportunity Commission Act 1986 (Cth)* ('HREOCA') s 46P; ADA (NSW) s 88(1)(a).
- 134 See, eg, HREOCA s 46PK(S); ADA (NSW) s 93; ADA (Qld) s 163.
- 135 Loretta de Plevitz, 'The Briginshaw Standard of Proof in Anti-Discrimination Law: "Pointing with a Wavering Finger"' (2003) 27(2) *Melbourne University Law Review* 309, 332.
- 136 Schwartz, Allison and Cunneen, above n 36, 86.
- 137 Jonathon Hunyor, 'Skin-Deep: Proof and Inferences of Racial Discrimination in Employment' (2003) 25(4) *Sydney Law Review* 535, 535.
- 138 See, eg, *Sharma v Legal Aid (Qld)* (2002) 115 IR 91.
- 139 Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' (2009) 31(4) *Sydney Law Review* 578, 583; citing Laurence Lustgarten, 'Problems of Proof in Employment Discrimination Cases' (1977) 6(1) *Industrial Law Journal* 212, 213.
- 140 Plevitz, above n 135, 318-9.
- 141 Allison, Behrendt, Cunneen and Schwartz, above n 35, 102.
- 142 PIAC and WBAWLC, above n 89, 56.
- 143 Nielsen, above n 93, 6.
- 144 Ibid.
- 145 Schwartz, Allison and Cunneen, above n 36, 108.
- 146 Thornton, above n 27, 90.
- 147 Moreton-Robinson, above n 28, 82.
- 148 Nielsen, above n 93, 1.
- 149 Irene Watson, 'Indigenous Peoples' Law-Ways: Survival Against the Colonial State' (1997) 8 *Australian Feminist Law Journal* 39.
- 150 Hannah McGlade and Jeannine Purdy, 'From Theory to Practice: or What is a Homeless Yamatji Grandmother Anyway?' (1998) 11 *Australian Feminist Law Journal* 137.
- 151 Ibid 150.
- 152 Ibid 154.
- 153 Ibid 150.
- 154 Schwartz, Allison and Cunneen, above n 36, 108.
- 155 Thornton, above n 27.
- 156 Kimberly Williams Crenshaw, 'Race, Reform and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law' in Kimberly Williams Crenshaw et al (eds), *Critical Race Theory: The Key Writings* (New York Press, 1995) 103, 108.
- 157 Derrick Bell, 'Racial Realism' in Kimberly Williams Crenshaw et al (eds), *Critical Race Theory: The Key Writings* (New York Press, 1995) 103, 304.
- 158 Ibid.
- 159 Ibid 306.
- 160 Crenshaw, above n 156, 108.
- 161 Ibid quoting Robert W Gordon, 'New Developments in Legal Theory' in David Kairys (ed), *The Politics of Law: A Progressive Critique* (Pantheon, 1982) 281.
- 162 Alan Freeman, 'Anti-Discrimination Law: A Critical Review' in David Kairys (ed), *The Politics of Law: A Progressive Critique* (Pantheon, 1982) 96.
- 163 Ibid.
- 164 Commissioner for Community Relations, *Annual Report* (Australian Government Publishing Service, 1976) 71
- 165 Ibid.
- 166 Thornton, above n 27, 37.
- 167 Ibid 83.
- 168 Jennifer Nielsen, *An Intractable Problem: The Endurance of Settled White Privilege in Mainstream Work Cultures* (Unpublished PhD Thesis, Melbourne Law School, 2007) 161-191.
- 169 In Western Australia for instance, only 4.4% of complaints were about indirect discrimination in 2010 to 2011 and 7.9% in 2011 to 2012: Western Australia Equal Opportunity Commission, above n 78, 51.
- 170 Flynn, above n 57.
- 171 Ngaanyatjarra Council (Aboriginal Corporation), *Doing Business with Government* (Ngaanyatjarra Council, 2003).
- 172 Ibid.
- 173 Thus, the 'conditions of access to low income support are

imposed by an agent of the government' (the discriminator) and the 'effect' of the condition is to 'impair the enjoyment' of the 'human rights' of the Ngaanyatjarra people (in this instance) to 'housing', 'public health', 'social security and social services'. For discussion of problems of proof in relation to indirect race discrimination, see, Tahmindjis, above n 116.

- 174 Ibid 123.
- 175 Crenshaw, above n 156, 110.
- 176 Ibid 111.
- 177 Congress, above n 104, 3. See also recent comments by Pat Dodson: Dan Harrison, "'Father of Reconciliation" Patrick Dodson Urges George Brandis Not to Change Race-Hate Laws', *Sydney Morning Herald* (online), 28 May 2014, <<http://www.smh.com.au/federal-politics/political-news/father-of-reconciliation-patrick-dodson-urges-george-brandis-not-to-change-racehate-laws-20140528-393do.html>>.
- 178 Matthew A Diemer and Lilyan Ortega, 'Social Inclusion and Critical Consciousness in Australia' (2010) 19(1) *Australian Journal of Career Development* 13, 13-14.
- 179 Essed, *Understanding Everyday Racism*, above n 44, 35.
- 180 Hannah McGlade, 'Reviewing Racism: HREOC and the *Racial Discrimination Act 1975*' (1997) 4(4) *Indigenous Law Bulletin* 12.
- 181 Gaze, above n 7.
- 182 See, eg, Hunyor, above n 137.
- 183 See, eg, NADRAC, above n 130.
- 184 Gaze, above n 7.
- 185 See, eg, AHRC, *Racism. It Stops With Me*. (2014) AHRC <<http://itstopswithme.humanrights.gov.au/>>.
- 186 See, eg, IMARA Advocacy, *About: Peoples Hearing* (2013) Imara Youth <<http://www.imarayouth.org/about-peoples-hearing/>>.