

# **FIRST NATIONS ACCESS TO JUSTICE: RACE DISCRIMINATION LAW**

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# RACE DISCRIMINATION IN FIRST NATIONS COMMUNITIES

## **Indigenous Legal Needs Project (ILNP) (2011-2015)**

- Between 22.6% and 40.9% of ILNP First Nations participants in ILNP jurisdictions reported experiencing discrimination - predominantly race and direct discrimination (so statistics are an under-count)
- ‘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’ (VIC focus group participants)

## **My work (completed 2019)**

- Whether the law is of value to First Nations peoples, including as a mechanism to address racism? Do they want to use the law to tackle discrimination?
- If so, what could assist them to do this? > ACCESS TO JUSTICE
- What are the alternative or additional ways to address this issue, thinking from First Nations perspectives of ‘justice’? > EXPANDING DEFINITION OF ACCESS TO JUSTICE

# HISTORICAL CONTEXT

- Push for human rights internationally and domestically – ICERD, Civil Rights and Race Relations Acts (US, UK) and also introduction of legislation in Australia (1966 in South Australia, 1975 Federally and so on)
- Also a surge in activism against racism: anti-apartheid movement in South Africa, civil rights movement in US – and in Australia, with focus on First Nations peoples.
- Events include Referendum on Constitutional change (1967), Tent Embassy in ACT (1972), Freedom Ride in NSW (1965)
- Sometimes activists called for introduction of race discrimination law to protect against racial inequality, including Aboriginal activists in Australia
- Tension
  - WHAT OBJECTIVES SHOULD FIRST NATIONS PEOPLES BE STRIVING FOR and HOW SHOULD THESE OBJECTIVES BE ACHIEVE THEM

# RIGHTS MOVEMENT: KEY OBJECTIVES AND HOW TO ATTAIN THEM

## FORMAL EQUALITY AND MAINSTREAM METHODS

- FORMAL EQUALITY
  - Same treatment for all leads to equal (same) outcomes for all. We all have the same rights and entitlements (civil or human rights).
  - Use mainstream methods and systems, including the law: litigation, law reform, reference to international human rights instruments, call for domestic human rights legislation
  - Race discrimination law is essential to 'protect Aboriginal people... right throughout the nation', so that they could 'take action against anybody on their own initiative': Perkins (1965) *A Bastard Like Me*

## SUBSTANTIVE EQUALITY

- SUBSTANTIVE EQUALITY
  - Different treatment is required to respond to particular circumstances (disadvantage) of different groups in order to ensure truly equitable outcomes
  - In a US context, critics of civil rights legislation state that desegregating buses and lunch counters was not enough, needed 'wide-sweeping change in economic status, housing, employment opportunities and institutionalised racism'.
  - Similar comments here on formal equality delivered through 1967 Referendum – no real substantive change.

## INDIGENOUS RIGHTS AND INDIGENOUS-LED PROTEST

- Prioritise *Indigenous rights* based on prior occupation of the land, including land rights and right to self-determination, to Aboriginal culture.
- Equality equated to assimilation, negates Indigenous rights.
  - Australians ‘must understand that what is good for them does not necessarily follow as being good for black Australians’: Walker, K (1969) ‘Black-White Coalition Can Work’, *Origin*, 18 September 1969
- Wholly Indigenous-led direct action is best, including to overthrow mainstream systems altogether, which are at best only useless but at worst continually oppressive.

## FREEDOM RIDE & TENT EMBASSY: TWO DIFFERENT APPROACHES

### FREEDOM RIDE

- Confrontational protest, but it involved Indigenous and non-Indigenous students, also focused on segregation and civil rights not Indigenous rights

### TENT EMBASSY

- Emerged as protest against government’s handling of land rights, focused on these rights and on sovereignty. Wholly Indigenous-led. Flying Aboriginal flag at embassy. Coe described this event as a significant step towards establishment of a ‘Black nation’.
- Tent Embassy is seen as ‘more productive than twenty years of legal attack. We need more Embassies. We need more direct confrontation.’ Sykes, R, in Nettheim (1974) *Aborigines, Human Rights and the Law*

# INTRODUCTION OF RACE DISCRIMINATION LAWS

- Activism contributed to enactment of RDA (1975)
  - The RDA should provide some redress for ... 'violent dispossession' of Aboriginals from their land, the 'destruction of their social fabric', and the 'various forms of legal, social and economic discrimination' they have endured: Murphy (1973) Commonwealth of Australia, Parliamentary Debates

## CAVEATS

- Lack of First Nations input in design of legislation
- Need Indigenous-led responses too (e.g. Indigenous –led direct action)
  - The SA legislation had 'given a few of us some hope initially but had since...become our despair.' Whilst the 'concept may be a good one', because of the law's 'implementation and the way it is written, it is not worth very much to Aboriginal people'. 'We cannot use this to further our consolidation in Australian society'. Moriarty, in Nettheim (1974) *Aborigines, Human Rights and the Law*
  - 'What is the point of trying to create laws for a resistance movement?' 'What is the point of imposing from above a legal system that is completely alien to and doesn't have the respect of Aboriginals?' The South Australian race discrimination provisions, for instance, 'never involved Aboriginals. They weren't able to ratify it and subsequently don't have any respect for it': Briscoe, in Nettheim (1974)
  - Also need 'constructive and imaginative thinking' from Aboriginal people themselves: Perkins (1965) *A Bastard Like Me*

# RACISM NOW

Increase in formal equality – definitely some formal barriers to equality removed, but racism still a major issue, 50+ years after first race discrimination legislation was introduced.

Racism is different for First Nations peoples

(a) Still **overt**, especially in public spaces

- *No, they don't care. There's still people getting up on buses and yelling out racially discriminatory things. They know it's probably being recorded. The law's not stopping them. Stakeholder [Indigenous]*

(b) But also **covert**

Still segregated, just not as obvious

- *Melbourne is so racist, especially with public housing. I don't want to live in crappy housing. You don't get offered nice housing in nice places by Department of Housing [if you're Aboriginal]. MFP*



- Institutional or systemic racism, with widespread and substantial impacts
  - in government systems (child protection and criminal justice spaces noted)
  - always framed by racism of colonisation
    - *And that's another thing, they said they were going to stop the Stolen Generation. Why did they apologise when they're still doing that to our younger generations? BF2 ... It took the government so long just to say sorry. It's a five-letter word. They thought they were innocent, that we didn't deserve an apology. BMI .... It would be acceptable if they meant it but it's still going on ... We'll call it child protection now. BF2*
- High levels of racism evidenced by statistical inequality – nowhere near equal to others.
  - *Now we've got freedom! We're allowed to go wherever we want. If you walk into this RSL today, there's probably 90% Aboriginal people.]* Alongside this, however, is a high unemployment rate, substance abuse issues, poor educational outcomes, high levels of domestic violence and friction between townspeople and the local police force. Dubbo resident



# EVALUATION RACE DISCRIMINATION LEGISLATION

- Can't pin ALL racism on failure of race discrimination legislation
- BUT: key measure of the effectiveness of this legislation is how it is working in a practical sense for those whose rights it is intended to protect. Are they able to use it, and to positive effect?
- This is where access to justice comes in.
- Access to justice is a framework used to identify and address barriers inhibiting access to effective justice outcomes – sitting in substantive law, in initiation or progression of legal action, and in legal outcomes delivered.
- Barriers are more likely to arise for more marginalised groups. By addressing these barriers, the aim is to ensure *all* persons have *equal* access to the law to exercise their legal rights.
  - Access to justice is the 'most basic requirement' of 'a modern egalitarian system which purports to guarantee, and not merely proclaim, the legal rights of all' (Cappelletti and Garth)

## PROBLEMS OF ACCESS TO JUSTICE: RDA (2015, 2016)

Year	First Nations complaints lodged under RDA	First Nations population (2016) (ABS data)	First Nations reports of race discrimination Reconciliation Barometer (2016)
2015	152	649,171 people	46% of all First Nations peoples (verbal abuse, physical violence, rental/purchase, access to a property, service in a shop)
2016	211		

*... the numbers of Indigenous people making complaints is microscopic. It's the opposite of over-representation of Indigenous people in prison or detention. Stakeholder [Non-Indigenous]*

## BARRIERS: INITIATING ACTION

- *Formal equality* of anti-discrimination legislation appears to ensure Aboriginal people are 'equally entitled to pursue their complaints' of discrimination. However, in reality, one must be 'sufficiently informed, motivated', 'empowered' and 'resourced' to use its complex legal machinery': Bertone & Leahy (2003), 'Multiculturalism as a conservative ideology: impacts on workforce diversity', 41 (1) *Asia Pacific Journal of Human Resources* 101

### BARRIERS

- Not being aware of rights or how to exercise them: is NO 1 barrier: literacy, language and levels of education, remoteness, contact with the law around criminal law issues only
- Resignation, disempowerment, distrust (due to past racism)
  - *Most people just couldn't be bothered. They just don't care. It just keeps repeating itself for Indigenous people. Been there, done that, here we go again. Sad really (BM3)*
  - *It is important to understand the process of disempowerment that has taken effect on Aboriginal people over many generations to understand why some Aboriginal people are more passive in this regard [and don't complain about discrimination] .... You're born into poverty, born into this Aboriginal existence that is subservient. CM4*
  - *I'd rather just meet the person in a coffee shop and they say sorry. Anything to do with courts is stressful. The law has already jailed and failed [Indigenous people] so many times. That's what they're going to think about this system, it's the same. BMP*

- Just doesn't fit with First Nations culture
  - *In [the mainstream] community the individual [is everything], and our system is set up to be adversarial. We speak for ourselves. [Indigenous people] are communal so they're not taught to speak out for themselves. They need that community authority to speak ... [So] they don't get the system. It's too foreign. S8 [NI]*
- Formal equality in interpretation of the law leads to discriminatory outcomes
  - failure to respond to systemic issues of racism (statistical inequality) – most common form of racism against First Nations peoples
  - fails to recognise Indigenous-specific rights: *Traegar Park (1992), Maloney (2013)*

# INDIGENOUS RESPONSES TO DISCRIMINATION

- Rarely using the law

*... the numbers of Indigenous people making complaints is microscopic. It's the opposite of over-representation of Indigenous people in prison or detention.*

Stakeholder [Non-Indigenous]

- Combative physical or verbal confrontation → criminalization, feeds negative stereotypes

- Walking away and avoidance

*[The perpetrator's] hurting the most when you get up and walk away. But it does hurt us too because we feel like we're not fending for ourselves. BFP*

- Constructive confrontation

*We're all treated this way, but I've never myself wanted to use the legislation. I'm the kind of person that just yells back to them and tells them like it is. Not everyone's going to do that. A lot of Aboriginal and Torres Strait Islanders will just [ignore it] Stakeholder [Indigenous]*

*It's raising awareness to the issue. If the people within my close proximity can hear it they might go off later and say, 'I was at this pub tonight and this guy, he called this shit, and I've never seen anything like that before.' That's impact! CMP*

*I confronted them. I talked to the head person. I got the Liaison Officer there too. She had no clothes on in front of other people! One of the nurses said, if you [cause a ruckus] I'll ring the police. They tried to intimidate us. CMP*

# COMPLAINTS STATISTICS (2010-2013)

Problems in complaints system: limited numbers of Indigenous enquiries and complaints and only about particular issues; limited Indigenous complaints resolve or progress to completion; relatively limited outcomes at resolution

- Low numbers of Indigenous complaints/enquiries – as confirmed by other studies.

2010-2013	Indigenous complaints p/a	Indigenous population (2011)	% Indigenous people experiencing discrimination or racism
Federal	179	550,000 persons	46% [Reconciliation Barometer (2016)]
VIC	16	38,000 persons	29.2% [Indigenous Legal Needs Project] 100% [Vic Health study (2013)]
QLD	43	156,000	31.6% [Indigenous Legal Needs Project]

- Disproportionately related to employment and goods and services, direct discrimination
- Between one in six to one in four complaints resolved in or outside of conciliation
- Most common outcomes are financial compensation or an apology
- Up to three quarters of complaints were unresolved, with substantial numbers withdrawn, abandoned, declined, terminated

# ENACTMENT OF RACE DISCRIMINATION ACT 1975 (RDA): FIRST NATIONS CONTEXT

Indigenous activism in 1950s-70s helped push government to enact the RDA.

- Revealed widespread racism against Indigenous people, with the Freedom Ride a good example of this.
- Pushed government to enact race discrimination law
- Government concerned to address racism against Indigenous people, in particular. For example: 'Aboriginals are the poorest of the poor'. 'It is clear that past wrongs must be put right': Murphy, Commonwealth of Australia, Parliamentary Debates (Hansard), Senate, 21 November 1973, 1976-77
- OR Government passed law to avoid international criticism.
- Indigenous activists called for introduction of race discrimination law: to 'protect Aboriginal people... right throughout the nation', so that they could 'take action against anybody on their own initiative': Perkins (1965) *A Bastard Like Me*

Other Indigenous activists were more critical about race discrimination law (both its method and goals).

- Preference for direct action led by and for Indigenous people
- Push for recognition of Indigenous-specific forms of redress for breaches of and protection of rights (land, sovereignty)

Tent Embassy is seen as 'more productive than twenty years of legal attack. We need more Embassies. We need more direct confrontation.' Sykes, R, in Nettheim (1974) *Aborigines, Human Rights and the Law*

Australians 'must understand that what is good for them does not necessarily follow as being good for black Australians': Walker, K (1969) 'Black-White Coalition Can Work', *Origin*, 18 September 1969

Some evidence law was also introduced to quell direct action and/or to silence demands for recognition of Indigenous-specific rights.

# VALUE OF RACE DISCRIMINATION LAW

- Participants saw symbolic and instrumental value in the law

*You've got to have these laws to train white people about what they can and can't do. Just imagine if we didn't have them.... You need laws to make a civil society. If there were no laws, there'd be pandemonium really.*

Stakeholder [Indigenous]

*I think having racial discrimination laws is good.... The laws won't stop behaviour unless people use them to defend themselves. CMP*

- Others were more critical, questioning its value

*Is it important to have laws? To a degree yes, but it's still happening so what's the point? I think the laws are there to keep us quiet and ... happy. It doesn't change anything, how people treat us. CMP*

*From the 70s and 80s we had the Freedom Rides, the marches for Aboriginal land rights, the 1988 march over the bridge...*

*Where is that now? MFP*



“Now ‘freedom’ can’t exist on the right-hand side of this line [in the sand] because there is no ‘Law with Human Rights’. No legislation exists with freedom of choice for our lands and people without serious restrictions. There is only freedom on the left-hand side of the line where our Sovereignty exists. This freedom must be declared from our Sovereignty. The two sides need a treaty to coexist to make the right side legitimate. The treaty must define our human rights.” Michael Ghillar Anderson, *First Nations Telegraph*, 10 February 2015



# ACCESS TO JUSTICE

## Why is it important?

- Access to justice is 'fundamental human right' – available to all - in and of itself and a 'key means to defend' other rights
- *United Nations Declaration on the Rights of Indigenous People (2007) (UNDRIP)*

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights. [Art 40]

- Key to reducing social exclusion, constituted by material disadvantage and disenfranchisement.
- Civil law, though perhaps only a *part* of the solution to the problem of racism, is a critical part, 'capable of making a significant contribution' to its resolution : Flynn (2005) 'Why has the Racial Discrimination Act 1975 (Cth) failed Indigenous People?' 9(1) Australian Indigenous Law Review 15
- *Stated objectives within legislation*

i] to eliminate or reduce discrimination, though *inherent limitations* are expressly acknowledged

ii] to ensure that society embraces and advances the concept of equality.

Equal access to dispute resolution procedures is included as an objective [iii] and/or identified as essential to achievement of other objectives

- Indigenous access in particular: held itself out as being of particular benefit to them.



# BARRIERS TO EFFECTIVE ACCESS TO JUSTICE

Barriers that are particular to Indigenous people or differently experienced by them - because of their particular experiences of discrimination, needs and perspectives.

Barriers reside within justice provider and justice seeker. They can be legal, as well as personal, historical, cultural, economic and so on - often fitting within various categories at once.

## **A] Individual complaints-based model (legal/process-related barrier) and colonisation (historical barrier)**

- Onus on individuals to identify discrimination, then to initiate and resolve a dispute
- Formal equality of dispute resolution processes: all individuals are equally entitled to complain about discrimination. However, this is more difficult the more disempowered you are. Need to be 'sufficiently informed, motivated', 'empowered' and 'resourced' to 'use its complex legal machinery': Bertone & Leahy (2003), 'Multiculturalism as a conservative ideology: impacts on workforce diversity', 41(1) *Asia Pacific Journal of Human Resources* 101
- Indigenous people 'are one of the most poorly treated segments of Australian society' but are also 'least able to defend themselves (against racial discrimination) in a legal context': National Congress of Australia's First Peoples, (2016) *Submission into the Inquiry into Freedom of Speech*

*It is important to understand the process of disempowerment that has taken effect on Aboriginal people over many generations to understand why some Aboriginal people are more passive in this regard [and don't complain about discrimination] ....You're born into poverty, born into this Aboriginal existence that is subservient. CMP*

*A lot of Indigenous families are just trying to survive and you've got to pick your battles. Am I going to do this (complain) or make sure I have secure housing? That discrimination stuff doesn't become as important when you're trying to survive. MFP*

*It's one thing a white man doesn't like, an educated black man.....When you talk about discrimination we haven't been taught the laws because they don't want us to be educated. BMP*

*I'd rather just meet the person in a coffee shop and they say sorry. Anything to do with courts is stressful. The law has already jailed and failed [Indigenous people] so many times. That's what they're going to think about this system, it's the same. BMP*

*I don't reckon they'd be scared [about conciliation], probably more angry about our past, what's happened. That's something you don't forget. There'd be too much tension.... [There's] brothers and sisters that haven't seen each other for 30 or 40 years.... [They will] think, where were these laws back then so I could have stayed with my mother, my brothers and sisters, lived on the land where I'm from, not lived on a mission on some totally different land? BMP*

## **B] Limited 'justice' outcomes (legal/outcomes, cultural and historical barriers)**

Failure to recognise Indigenous 'difference' – again, difference based on particular experiences of discrimination (past and present), needs or perspectives

- Narrow definitions/interpretations of race discrimination in legislation and in court/tribunal decision-making
- Indigenous specific experiences of discrimination (and best responses to them) can be discounted through focus in legislation/jurisprudence on 'formal equality' (sameness, fairness of treatment) over 'substantive equality'. Substantive equality requires recognition of 'the accumulated disadvantage of generations of discrimination' or 'the disadvantage faced by groups by a system that fails to recognise different needs'. WA Equal Opportunity Commission (EOC) (2017) *The Policy Framework for Substantive Equality*

*Aboriginal Students' Support and Parents Awareness Committee, Alice Springs v Minister for Education, Northern Territory (1992) EOC 92-415* (Traegar Park case)

Not discriminatory to require an Indigenous student to access the same schooling as other students, though this decision also denied them access to a form of education that better accommodated (and recognised their rights to) culture and to self-determination. To have done so would have helped to improve poor Indigenous educational outcomes.

*Martin v State Housing Commission (Homeswest) (25/7/97) Unrept, EOTWA*

Martin's public housing home was overcrowded due to her cultural obligation as Yamatji mother and grandmother to take in Aboriginal family. She argued that her subsequent eviction was indirectly discriminatory (based on culture). There was no discrimination found, including because the relevant requirement or condition was not unreasonable and as Martin had taken in relatives because she was a mother not due to her Aboriginality.



# DIRECTIONS FOR CHANGE: POLICY, LAW AND OTHER AREAS

- Indigenous access to justice must take into account Indigenous ‘difference’
- UNDRIP provides guidance: must adhere to four key principles/rights – non-discrimination, self-determination, recognition of culture and participation in decision-making.
- Recognises the importance to Indigenous people of individual (human) rights, but that these need to be combined with and interpreted in ways that also uphold Indigenous collective rights - to culture, self-determination, land and so on. Indigenous human rights, including to access justice, are indivisible from Indigenous-specific rights.

1] Mainstream access to justice frameworks re-configured to better adhere to UNDRIP:

- Borrowing of effective adaptations to/hybridisation within criminal justice system into civil law system
- Increased Indigenous input into and leadership within discrimination complaints process (consultative body, Co-Commissioner)
- Cultural impact statements used to reform law and to inform jurisprudence in this area
- Address disempowerment through increased capacity for anti-discrimination agencies to take action, particularly for systemic issues

## 2] Building on effective Indigenous-led responses to discrimination (directly and/or through the law)

- Increasing knowledge of rights (community members holding and sharing knowledge)
- Community as support network

*It would be good to have more meetings and stuff [on this]. I go to this men's group each week and I find that helpful. Lot of the brothers there they've been through the same things as you have. Getting it off your chest. BMP*

- Increasing pride and knowledge in history and culture: initiatives, events, role models

*Breaking down community attitudes hasn't been because people have taken it upon themselves to... change, or [due to] legislative change. It's because Indigenous people are now campaigning on their own behalf. The Aboriginal football All-Stars event, they make a whole weekend out of that that is alcohol and drug free and focuses on health. [They are] the finest AFL players in our country... This heightens the status of Aboriginal people generally. CMP*

### 3] Community and government responsibilities

- Increase community's awareness of and responses to discrimination; positive contact with Indigenous people; understanding of Indigenous culture. Civic understanding of rights too.

*CLE is the most important thing. But that's for non-Indigenous and Indigenous. You can't just focus on Indigenous. Indigenous people know what's happening. It's the non-Indigenous people who sometimes don't see how offensive they're being. Take the blackface stuff. A lot of them do it thinking there's nothing wrong with it. It's just a costume. ... Education for everyone would be good, what the Racial Discrimination Act is about. Stakeholder [Indigenous]*

- Government must:
  - ensure effective implementation of discrimination law and support non-legal strategies identified as effective for reduction of discrimination
  - set up new relationship between Indigenous communities and government (justice frameworks)
  - address its own racism

*I've been a worker before with VACCA and Mercy Hospital. Getting people fresh out of college and they're laying judgement through DHHS on Indigenous families, yeah - nup. I don't know what sort of things they teach them but honestly, I think they should do cultural training or workshops, like police. They think they know better than anybody else. SFP*