CAUSE FOR HOPE OR DESPAIR? EVALUATING RACE DISCRIMINATION LAW AS AN ACCESS TO JUSTICE MECHANISM FOR ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE

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Thesis submitted to the

College of Business, Law and Governance

in fulfillment of the requirements for the degree of

Doctorate of Law

AUGUST 2019

ACKNOWLEDGEMENTS

I begin by acknowledging the contributions made to this work by the Aboriginal and Torres Strait Islander peoples who participated in interviews for the thesis. I would also like to acknowledge contributions made by other Aboriginal and Torres Strait Islander peoples with whom I've formed professional and personal relationships over past years. These individuals have contributed much to my understanding as a non-Indigenous Australian. This is an understanding, firstly, of all the things to celebrate and admire about Aboriginal and Torres Strait Islander culture, but also of our history and its ongoing impacts on Aboriginal and Torres Strait Islander people; and secondly, of the importance of listening to, learning from, and responding to Indigenous knowledge and perspectives – of value in its own right, but also as a process that is essential to mitigating the latter impacts.

The expert advice and support provided to me by my two supervisors over a number of years, Professors Chris Cunneen and Simon Rice, is also acknowledged, and with sincere appreciation. They have been patient and supportive, and have brought to the thesis their extensive experience and knowledge – guiding me both in terms of skills required to produce a thesis and with respect to the issues and questions interrogated.

I acknowledge the provision of material by anti-discrimination agencies in each jurisdiction. This includes race discrimination complaints data, but also (in two jurisdictions) input provided by way of a thesis interview. Other organisations that have contributed to these interviews are also acknowledged. These organisations have facilitated contact between the researcher and interviewees and have also generally participated in an interview. Also gratefully acknowledged is having had access to the Freedom Ride data deposited by students who took part in the 1965 ride with the Australian Institute of Aboriginal and Torres Strait Islander Studies. The financial support of both James Cook University and the Australian Research Council has also been an important contribution to the research undertaken.

Last but in no way least, friends and family, especially my son, have offered support and encouragement over the years it has taken to complete this thesis. I am so grateful for this very significant contribution.

STATEMENT OF THE CONTRIBUTION OF OTHERS

Nature of assistance	Contribution	Co-Contributors
Intellectual support	Editorial assistance and other intellectual input	Professor Chris Cunneen Professor Simon Rice
Financial Support	Australian Postgraduate Industry Award Scholarship Stipend	Australian Research Council James Cook University
Data collection	Assisting the researcher to make contact and talk with thesis interview participants and participation in interviews	Aboriginal and Torres Strait Islander Legal Services (Queensland) Victorian Aboriginal Legal Service Family Violence Prevention and Legal Service (Victoria) Elizabeth Morgan House Aboriginal Women's Service (Victoria) Murri Watch Aboriginal and Torres Strait Islander Corporation (QLD) Anti-Discrimination Commission (QLD) Victorian Equal Opportunity Commission
	Participation in interviews	Community member interview participants Cairns, Brisbane, Shepparton and Melbourne
	Provision of complaints data	Anti-discrimination agencies in all jurisdictions

	Aboriginal and Torres Strait Islander Studies (AIATSIS)	Provision of Freedom Ride survey data

ABSTRACT

This thesis explores the contribution that racial discrimination laws have made and might make to addressing race discrimination against Indigenous Australians, who still experience this problem at disproportionately high levels despite introduction over four decades ago of racial discrimination legislation in Australia. The research investigates whether this legislation has failed to make appropriate contributions to reduction of race discrimination because of problems associated with Indigenous access to justice. It demonstrates that Aboriginal and Torres Strait Islander peoples are using processes of dispute resolution in this area to a limited degree, relative to the extent to which they encounter race-based discrimination.

Informed by Indigenous methodologies, the research employs a mixed method design: utilising historical, qualitative and quantitative social science and legal approaches. This provides opportunity for distinctive analysis of the current limitations associated with Indigenous access to justice in the area of race discrimination. Also identified is whether Aboriginal and Torres Strait Islander peoples see value in enhancing Indigenous access to justice through race discrimination law and how this might be achieved.

The thesis presents evidence that indicates that access to justice is seen, including by Aboriginal and Torres Strait Islander peoples, as an important right in itself and as essential to the assertion of all other rights, encompassing the right to equality or non-discrimination. It is argued, however, that to be effective the concept of access to justice must be appropriately expanded to incorporate Indigenous perspectives on 'justice' and how this might be attained. Formal equality of access to justice can lead to discriminatory outcomes, including limitations in terms of the extent to which Indigenous people are able to draw benefit from race discrimination law. The thesis also argues that Indigenous people do not see the law as providing a complete solution to the problem of race discrimination. Key non-legal strategies are identified, including those that empower Indigenous people to respond to discrimination without recourse to the law and that place responsibility for reduction of race discrimination targeting Indigenous people upon the wider community and government.

The research makes a novel contribution to analysis of the effectiveness of race discrimination law in Australia. By prioritising Indigenous historical and contemporary perspectives throughout, it presents new perspectives on race discrimination law and access to justice for Aboriginal and Torres Strait Islander peoples.

ACRONYMS AND ABBREVIATIONS

ABS - Australian Bureau of Statistics

ACCHOs - Aboriginal community-controlled health organisations

ACCOs - Aboriginal community-controlled organisations

ADR - Alternative dispute resolution

ADA (NSW) - *Anti-Discrimination Act* 1977 (NSW)

ADA (QLD) - *Anti-Discrimination Act* 1991 (QLD)

ADA (NT) - *Anti-Discrimination Act* 1992 (NT)

ADA (TAS) - *Anti-Discrimination Act* 1998 (TAS)

ADB - Anti-Discrimination Board

ADCQ - Anti-Discrimination Commission Queensland

ADR - Alternative Dispute Resolution

AHRC - Australian Human Rights Commission

AHRCA - *Australian Human Rights Commission Act (1986)* (CTH)

AJAC - Aboriginal Justice Advisory Council

AJF - Aboriginal Justice Forum

AIATSIS - Australian Institute of Aboriginal and Torres Strait Islander Studies

ATSI - Aboriginal and Torres Strait Islander

ATSILS - Aboriginal and Torres Strait Islander Legal Services

AWB - Aboriginal Welfare Board

CERD - Committee on the Elimination of Racial Discrimination

CLC - Community Legal Centre

CLE - Community Legal Education

COAG - Council of Australian Governments

CTH - Commonwealth

CRT - Critical race theory

DHHS - Department of Health and Human Services

DVO - Domestic Violence Order

EEO - Equal Employment Opportunity

EOA (WA) - *Equal Opportunity Act* 1984 (WA)

EOA (VIC) - *Equal Opportunity Act* 1984 (VIC)

EOC (WA) - Equal Opportunity Commission (WA)

FCAA - Federal Council for Aboriginal Advancement

FCAATSI - Federal Council for the Advancement of Aboriginal and Torres Strait Islanders

FVPLS - Family Violence Prevention and Legal Services

HREOC - Human Rights and Equal Opportunity Commission

ICERD - *International Convention on the Elimination of Race Discrimination*

ICCPR - *International Covenant on Civil and Political Rights*

IJA - Indigenous Justice Agreement

ILNP - Indigenous Legal Needs Project

ILO - International Labor Organisation conventions

NACCHO - National Aboriginal Community Controlled Health Organisation

NAIDOC - National Aboriginal and Islanders Day Observance Committee

NATSILS - National Aboriginal and Torres Strait Islander Legal Services

NSW - New South Wales

NT - Northern Territory

NTER - Northern Territory Emergency Response

QCAT - Queensland Civil and Administrative Tribunal

QLD - Queensland

QHRC - Queensland Human Rights Commission

RCIADIC - Royal Commission into Aboriginal Deaths in Custody

RDA - *Racial Discrimination Act* 1975 (CTH)

SA - South Australia

SCAG - Standing Committee of Attorney Generals

SPER - State Penalties Enforcement Registry

TAS - Tasmania

UN - United Nations

UNDP - United Nations Development Programme

UDHR – *Universal Declaration of Human Rights*

UNDRIP - *United Nations Declaration on the Rights of Indigenous Peoples*

VACCA - Victorian Aboriginal Child Care Agency

VALS - Victorian Aboriginal Legal Service

VCAT - Victorian Civil and Administrative Tribunal

VEOHRC - Victorian Equal Opportunity and Human Rights Commission

VIC - Victoria

VLA - Victoria Legal Aid

WA - Western Australia

WWII - World War II

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CHAPTER 1: INTRODUCTION TO THE THESIS

This thesis explores the contribution that racial discrimination laws have made and might make to addressing race discrimination experienced by Indigenous Australians.[1] Today, Indigenous people encounter race discrimination at disproportionately high levels, despite introduction over four decades ago of racial discrimination legislation in this country.

The research set out below investigates whether the aforementioned legislation has failed to provide redress to, and therefore to decrease the incidence of race discrimination against Indigenous people, and the extent to which this might be attributable to poor Indigenous access to justice in this area. Presently, when encountering race discrimination Aboriginal and Torres Strait Islander peoples appear to be using processes of dispute resolution and attaining outcomes likely to be identified by them as appropriate — and as 'justice' — to a limited degree, relative to the extent to which they encounter race discrimination. Whether this should be cause for concern is a question explored by the thesis.

The research identifies access to justice as both an important stand-alone right to which every individual, including Indigenous Australians, are entitled and as essential for assertion of all other rights, including the right to equality or non-discrimination. Effective access to justice is also identified as having potential to contribute to increased levels of Aboriginal and Torres Strait Islander social inclusion. This suggests that Indigenous people should benefit from enhanced access to justice through race discrimination law, requiring both increased use of effective justice processes, as well as attainment of appropriate or satisfactory justice outcomes through these processes.

Indigenous views on best responses to discrimination, legal or otherwise, have been sought and gathered by the researcher, including by way of interview. These views indicate that Indigenous people want to be able to use race discrimination related legal remedies. They believe that improved Indigenous access to justice should provide a useful mechanism through which to tackle race discrimination.

[1] The terms Indigenous people, Indigenous Australians and Aboriginal and/or Torres Strait Islander peoples are used interchangeably throughout the thesis to identify First Nations Peoples, including those living in Australia.

The thesis argues that there are multiple problems related to Indigenous access to justice in this area, however, and that though as a concept or framework it does have potential to deliver benefit to Indigenous people, reforms are necessary to be ensure that this potential is realised.

A significant issue canvassed in the research is that access to justice is currently similarly conceptualised in both Indigenous and non-Indigenous contexts. This 'formal equality' of access to justice leads to discriminatory outcomes, largely because it fails to take adequate account of or to respond appropriately to Indigenous perspectives on justice and how this might be attained. The thesis argues that the benefits of race discrimination law can only be delivered to Indigenous people if the concept of access to justice is *substantively* equal; that is, expanded to incorporate the latter Indigenous perspectives. By recognising and responding to 'difference', including that associated with Indigenous people, 'substantive equality' in an access to justice context (and otherwise) produces different but *equitable* outcomes, as opposed to formal equality, which produces same but potentially discriminatory outcomes. Suggested directions for change likely to ensure substantive equality within the civil law justice system are described.

The thesis also, however, presents contrary Indigenous views on the utility of race discrimination law, along with criticism of our continual positioning of access to justice within legal frameworks. The law, it is argued, does not provide a complete solution to the problem of race discrimination, including as it impacts on Indigenous people. This is because race discrimination is not just a legal construct. It has political, social, economic and other manifestations. Key strategies that sit outside of the law are therefore highlighted, particularly those recognised by Aboriginal and Torres Strait Islander peoples as most likely to contribute to attainment of racial justice. These strategies encompass building capacity of and opportunity for Indigenous people and communities to challenge discrimination and encouraging or compelling the wider community and government to play a part in its reduction.

We turn now to consider the research questions and methodology used to explore these issues.

1 Research aims and questions

The overarching **objective** of the research is to increase our knowledge and understanding of Indigenous access to justice issues in the area of race discrimination so as to inform development of more effective policy, law and practice on this area.

The **aim** of the research is to identify the value to Indigenous Australians of race discrimination law, particularly as an access to justice mechanism.

The thesis **hypothesis** is that race discrimination law has capacity to reduce race discrimination against Indigenous people, but that it is not working as effectively as it might in this regard, evidenced by the continuing significant levels of racial inequality they experience. Race discrimination is but one aspect of racial inequality, which has multiple socio-economic and other manifestations. Additionally, *unlawful* race discrimination (that which is prohibited by law) is a single manifestation of race discrimination. The effectiveness of race discrimination law is presently inhibited for Indigenous people due to problems related to Indigenous access to justice. Improving Indigenous access to justice, as both processes *and* outcomes, will enhance the contributions race discrimination law will make to decreasing Indigenous experiences of (unlawful) race discrimination. This in turn should help to reduce racial inequality experienced by Indigenous people. To achieve this outcome, the concept access to justice must be adapted or reconfigured to better incorporate Indigenous perspectives and needs.

1.1 Research questions

The thesis responds to a number of research questions.

The **primary research question** asks what is the value to Indigenous Australians of race discrimination law, particularly as an access to justice mechanism.

To respond to this primary question, a series of **secondary research questions** are also interrogated, as follows.

1] How effectively is race discrimination law currently working as an access to justice mechanism to reduce race discrimination against Indigenous people?

2] What do Indigenous people consider to be the most effective strategies, initiatives and approaches for tackling race discrimination? Do Indigenous people see value in race discrimination law as tool for addressing the problem of race discrimination and in improved Indigenous access to justice through such law?

3] How might current responses to discrimination, including accessing justice through race discrimination law, be improved and strengthened (in terms of both processes and outcomes) so as to increase racial equality for Indigenous people?

2 Methodology

This thesis explores Indigenous peoples' experiences of the civil law justice system as a response to racial discrimination. The study is a socio-legal one; that is, it involves analysis of the law and its operation within a broader social context. In particular, it critically examines the purpose of racial discrimination laws in Australia, as well as the impact that these laws have had on race-based discrimination, and the political, racial and other contexts in which they operate.

These points of inquiry are examined with reference to Indigenous research methodologies and through a mixed methods research design. This involves the collection, analysis and mixing of various types of data, methods and methodologies so as to develop enhanced research outcomes.[2] In this instance, historical, legal, quantitative and qualitative methods are applied. Indigenous research methodology is also utilised throughout the thesis. Additionally, critical analysis of access to justice as a framework is undertaken. To a lesser extent, critical race theory is used alongside Indigenous research methodology

[2] Greene, J Caracelli, V and Grahame, W (1989), 'Toward a conceptual framework for mixed-method evaluation designs', 11(3) *Educational Evaluation and Policy Analysis* 255.

in the analysis of access to justice and of Australian race discrimination law undertaken by the researcher.

2.1 Indigenous research methodology

The fundamental tenets of Indigenous research methodology incorporate placing Indigenous perspectives, experiences and knowledge at the centre of research processes and outcomes and ensuring that research produces genuine benefit for Indigenous peoples.

Indigenous research methodology has been fundamentally important to the present research, particularly given that it is being undertaken by a non-Indigenous researcher. The researcher has considerable experience (as an academic, an educator, a conciliator at the Australian Human Rights Commission, a lawyer and otherwise) working with and for Indigenous people and organisations. She has learnt much about Indigenous justice and associated issues in each of these contexts. It has, however, been absolutely crucial to invite or seek out perspectives from Aboriginal and Torres Strait Islander peoples as experts and knowledge holders to produce valid research outcomes.

Indigenous research methodology aims to produce research conducted with and for Indigenous peoples that is 'respectful, ethical, sympathetic and useful'.[3] It is focused on the 're-positioning of Indigenous peoples within the construction of research',[4] aimed at avoiding or responding to the potential for research to become a further site of Indigenous colonisation.[5] Indigenous peoples may well see research as a 'powerful intervention' — one that has 'traditionally benefited the researcher, and the knowledge base of the dominant group in society', according to Tuhiwai Smith.[6] In contrast, Indigenous research methodology emphasises Indigenous conservation of and control over knowledge, requiring that

[3] Tuhiwai Smith, L (1999), *Decolonizing Methodologies: Research and Indigenous Peoples,* Zed Books, 9.

[4] Henry, J et al, (2002), *Indigenous Research Reform Agenda: Rethinking research methodologies*, Cooperative Research Centre for Aboriginal and Tropical Health, 4.

[5] Tuhiwai Smith, for example, writes that research within 'late-modern and late-colonial conditions continues relentlessly and brings with it a new wave of exploitation, discovery … and appropriation.' Tuhiwai Smith (1999), 24. See also Rigney, L (1999), 'Internalization of Indigenous Anticolonialist Cultural Critique of Research Methodologies: A guide to Indigenist Research Methodology and its principles', 14 *Wicazo Sa Review* 109.

[6] Tuhiwai Smith (1999), 176.

research material or data gathered from Indigenous peoples should not be taken away and used by the researcher in such a way that they can derive no benefit from, or are disempowered or indeed harmed by it. Tuhiwai Smith further states that Indigenous peoples 'want to tell our own stories, write our own versions, in our own ways, for our own purposes'.[7]

Adherence to the principles of Indigenous methodology in this thesis has occurred in a number of ways. Firstly, the research is designed to contribute towards achievement of an objective or outcome previously identified by Aboriginal and Torres Strait Islander organisations and community members as likely to benefit people: that is, enhancement of Indigenous access to civil law justice in the area of race discrimination.

From 2011-2015 the researcher and her colleagues conducted a national research project titled the Indigenous Legal Needs Project ('ILNP'). The ILNP explored issues related to Aboriginal and Torres Strait Islander access to civil and family law justice.[8] The project mapped unmet Indigenous legal need and Indigenous barriers to accessing justice in civil and family law areas, visiting 32 communities across four jurisdictions: Victoria, Western Australia ('WA'), Northern Territory ('NT') and Queensland ('QLD').[9] Focus groups were conducted with up to 20 local Aboriginal and Torres Strait Islander participants in each community visited. Focus group participants discussed and completed a questionnaire related to civil and family law access to justice issues. This yielded information about participants' experiences of legal problems in the last two years in a range of specified civil and family

[7] Ibid, 28 and 176.

[8] This research produced a number of reports and submissions, including the following. Allison, F, Behrendt, L, Cunneen, C, and Schwartz, M (2012), *Indigenous Legal Needs Project: NT Report*, Cairns Institute, James Cook University (JCU); Schwartz, M, Allison, F, and Cunneen, C (2013), *The Indigenous Legal Needs Project Victorian Report*, Cairns Institute, JCU; Indigenous Legal Needs Project (2013), *Submission to Productivity Commission's Inquiry into Access to Justice Arrangements*, JCU; Cunneen, C, Allison, F and Schwartz, M (2014), *The Indigenous Legal Needs Project QLD Report*, Cairns Institute, JCU; Allison, F, Cunneen, C and Schwartz, M (2014a), *The Indigenous Legal Needs Project WA Report*, Cairns Institute, JCU; Allison, F, Cunneen, C and Schwartz, M (2015), *Submission to the Senate Inquiry into Access to Legal Assistance Services*, JCU.

[9] A list of communities visited and other information about the ILNP is available at the ILNP website (accessed May 2019: <https://www.jcu.edu.au/indigenous-legal-needs-project>

law areas (including discrimination), and whether they had sought legal help in response to or how these problems had been resolved, more broadly. Additionally, in each community interviews were conducted with stakeholder organisations, also focused on gathering information on Indigenous civil and family law access to justice issues. Stakeholders encompassed legal services and a range of community-based organisations and government agencies. This work was preceded by an earlier project conducted by ILNP researchers in 8 Aboriginal communities in NSW, applying the same methods and similar aims to those of the ILNP.[10] Overall, around 800 Aboriginal and Torres Strait Islander people participated in the NSW and ILNP research.

Based on data collected the ILNP identified discrimination as one of five more pressing civil/family law issues for Indigenous people and an area in relation to which increased Indigenous access to legal remedies is likely to be of significant value.[11] This issue was prioritised because of the extent to which it is experienced by Aboriginal and Torres Strait Islander people and the limited degree to which they are currently addressing it through available legal processes. Furthermore, *race* discrimination is the focus of the present research because it was identified within the ILNP as the predominant issue of concern for Indigenous people in terms of experiences of discrimination. Almost all ILNP focus group and Indigenous stakeholder discussion was centred upon race-based discrimination.[12] There was very little mention of criminal record, sexuality, disability and/or gender discrimination during the research, for instance, though Aboriginal and Torres Strait Islander peoples are certainly impacted by these and other grounds of discrimination.[13]

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[10] The NSW research findings are published in Cunneen, C and Schwartz, M (2008), *The Family and Civil Law Needs of Aboriginal People in NSW: Final Report*, Law Faculty, UNSW, Sydney.

[11] The five ILNP priority areas of legal need are housing (tenancy), discrimination, social security, credit and debt and associated consumer law issues, and child protection.

[12] See discussion in Allison, F, Cunneen, C and Schwartz, M (2013a), 'That's Discrimination! Indigenous peoples' experiences of discrimination in the Northern Territory', 8(5) *Indigenous Law Bulletin* 12; Allison, F (2014b), 'A limited right to equality: evaluating the effectiveness of racial discrimination law for Indigenous Australians through an access to justice lens', 17 (2) *Australian Indigenous Law Review* 3.

[13] See information gathered, for instance, by the Victorian Woor-Dungin project, focused on addressing criminal record discrimination of Aboriginal people (accessed January 2019): <http://www.woor-dungin.com.au/criminal-

Significantly too, key Indigenous legal organisations supported and partnered on the ILNP research: that is, Aboriginal and Torres Strait Islander Legal Services ('ATSILS') and Indigenous family violence prevention and legal services ('FVPLS'). These and other Indigenous (and non-Indigenous) organisations also participated in ILNP stakeholder interviews. These Indigenous organisations stressed that increasing our understanding of Indigenous experiences of civil law problems, including race discrimination, and improving Indigenous (legal) responses to such problems is essential to delivering improved justice and other socio-economic outcomes for Indigenous people.

Additionally, Indigenous research methodology is applied by prioritising Indigenous voices within the thesis. Historical and more contemporary knowledge and perspectives gathered directly from Aboriginal and Torres Strait Islander people has substantially informed the research process and findings. This approach is designed to contribute to the building of 'communities' and to restoring 'hope and belief in their capabilities to resolve challenges they encounter.'[14] Examples include reliance within the research on Indigenous interview material collected by the researcher for the thesis, earlier surveys that have also gathered input directly from Indigenous people, and the opinions and expertise of Indigenous academics, commentators, community leaders and peak bodies, all discussed below.

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record-discrimination/>. The First Peoples Disability Network (FPDN) has also identified and advocated about Indigenous issues within which disability and race discrimination coincide (accessed June 2018): <https://fpdn.org.au>. Discussion of dual discrimination based on gender and race is also discussed in Chapter 3 (in the case of *Martin v State Housing Commission (Homeswest)* 25/7/97) Unrept, EOTWA. This focus on race discrimination is borne out in federal complaints statistics, which indicate that very small percentages of Aboriginal and Torres Strait Islanders lodge complaints with the Australian Human Rights Commission (AHRC) under federal discrimination legislation other than the *Racial Discrimination Act* (CTH) (1975) (the 'RDA'). Between 2014-2017 Indigenous people constituted between 2% and 4% of individuals lodging under each of federal discrimination Acts other than the RDA. Overall, between 7% and 9% of individuals lodging complaints under *any* federal discrimination legislation identified as Aboriginal and/or Torres Strait Islander. Australian Human Rights Commission (AHRC) (2015), *Annual Report*, Sydney NSW; AHRC (2016), *2015-2016 Complaint Statistics*, Sydney NSW; AHRC (2017), *2016-2017 Complaint Statistics*, Sydney NSW. Complaint statistics are discussed further in Chapter 6.

[14] See discussion in Chilisa, B (2012), *Indigenous Research Methodologies*, Sage, 174.

2.2 Historical research methodology

Historical research involves locating and analysing evidence from the past to interpret historical events that hold some significance for the present. It provides important context for contemporary studies of social and cultural events, phenomena or issues. Primary historical sources used within the thesis include political speeches and autobiographies of both prominent Indigenous activists and Indigenous and non-Indigenous politicians. Secondary historical sources include third party accounts and biographies of relevant persons, periods, events or issues.

These sources are used to increase our understanding of the background to, and the development and impacts of racial discrimination legislation in Australia. They are used in the thesis in discussion of why and how this legislation was first introduced: to identify, for instance, the role mid-20th century Indigenous activism played in enactment of the laws in question, the extent to which they were intended to benefit Indigenous people, and whether Indigenous people saw them as having potential to provide some benefit. These sources also used to provide valuable historical context against which past and more recent experiences of racial discrimination against Indigenous Australians are compared.

Particularly important to the thesis is presentation and analysis (for the first time) of survey material gathered during the 1965 Freedom Ride in NSW. The Freedom Ride sought to reveal racism against Aboriginal people, with students from the University of Sydney travelling by bus to and protesting in NSW country towns. The ride collected survey responses from Aboriginal people living in these towns that described their experiences of racial discrimination. This data was collected in the same period in which racial discrimination law was introduced in Australia, providing background information of use in developing responses to the thesis research questions.

2.3 Legal methodology: doctrinal legal research

Doctrinal legal research involves the study of the law and legal concepts, including the 'tracing of common law precedent and legislative interpretation and change.'[15] It provides 'systematic exposition

[15] Hutchinson, T (2010), *Researching and Writing in the Law*, Lawbook Co (3rd ed.), Pyrmont NSW, 11.

of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments' in the law.[16]

This methodology is applied in the thesis by way of presentation and analysis of legal doctrine through primary legal documents and texts (legislation and case law) and various secondary materials (including textbooks, parliamentary debates, and commentary on the law found in journals or textbooks).[17] It is used to provide an overview of key legislative objectives, provisions and jurisprudence, and to identify and describe political and other contexts surrounding the passing of race discrimination legislation. It is also used to highlight legislative and jurisprudential barriers to Indigenous access to justice and to make suggestions as to possible reforms within the legal system designed to overcome these barriers: with 'reform' being more narrowly conceptualised in this context, however, than that expounded by critical race theorists, discussed below.

In this and other respects there are limitations inherent within doctrinal legal research. It is said, for instance, to disproportionately focus on the 'privileged voices' of 'judges in case law and the parliament in legislation'.[18] It has also been criticised as having too great a focus on the rules of law, 'without systematic or regular reference to the context of problems [these rules] are supposed to resolve, the purposes they were intended to serve or the effects they in fact have'.[19] This and other relevant limitations can be overcome, however, by using doctrinal legal research alongside other research methods (such as Indigenous research methodology) and theoretical frameworks (such as critical race theory), increasing the likelihood that a sufficiently 'rounded vision of a topic' is produced.[20]

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[16] Ibid, 7, citing Pearce, D, Campbell, E and Harding, D (Pearce Committee) (1987), *Australian Law Schools: Assessment for the Commonwealth Tertiary Education Commission Report*, Vol 3, 17.

[17] Hutchinson, T and Duncan, N (2012), 'Defining and Describing What We Do: Doctrinal Legal Research', 17(1) *Deakin Law Review* 83, 85 and 116.

[18] Ibid, 117.

[19] Twining, W (1976), *Taylor Lectures 1975 Academic Law and Legal Development*, University of Lagos, Lagos.

[20] Hutchinson (2010), 23.

2.4 Qualitative Methodology

Qualitative research methodology is also applied in this instance to produce the aforementioned 'rounded vision'. Suter speaks of qualitative methodology being useful for understanding complex phenomena (for instance, the law's impact on race relations). It enables exploration of the 'multiple 'realities' experienced by qualitative research participants within such phenomena', which he refers to as 'insider' perspectives.[21] Hutchinson also advocates for the use of social science methodologies (including qualitative research) in studies such as the present one, stating that the law 'does not operate in a vacuum. It operates within, and operates on, society'.[22] Social science studies relating to law, in general, are useful to 'illuminate' the law's 'effects … on society'. We 'need to look outside the law for answers, and indeed for the effect that the law is having on the world. Interdisciplinary methods are part of this extra-legal context'.[23]

Qualitative data has been used in the thesis to examine the nature of Indigenous peoples' experiences of and responses to race discrimination, Indigenous perspectives on barriers to accessing justice, as well as strategies to improve and the value of improving Indigenous access to justice. Ethics approval for qualitative data collection was granted by James Cook University (Approval No. H5583).

Secondary sources of qualitative data included in the thesis encompass but are not limited to the previously discussed Freedom Ride surveys. Primary qualitative data has been collected from (predominantly) Indigenous participants through semi-structured interviews conducted for the thesis in four focus sites. These interviews have been singularly important to the research, allowing participants to express how they subjectively perceive and experience the law as a response to racial discrimination. In keeping with Indigenous research methodology principles, the thesis has therefore drawn heavily on

[21] Suter, N (2012), *Introduction to Educational Research: A Critical Thinking Approach* (2nd ed.), Sage, 350.

[22] Hutchinson (2012), 99.

[23] Ibid.

Indigenous insight and knowledge to develop research findings. Thematic analysis has been applied to all qualitative data collected to organise and interpret it so as to answer the above research questions.[24]

2.4.1 Fieldwork sites: primary data collection

Two of the jurisdictions in which fieldwork has been conducted are QLD and Victoria. In these jurisdictions data was collected from a capital city (Melbourne and Brisbane) and a regional location (Shepparton and Cairns).

These two jurisdictions and four sites have been chosen on the basis of their differences, which pertain to geographic location (relative remoteness), as well as the size and distribution of respective Indigenous populations.[25] The intention has been to explore whether information of relevance to the research questions might be drawn out through these differences. Australian Bureau of Statistics (ABS) data indicates that QLD has a larger Indigenous population than Victoria, proportionally and in overall numbers. The second largest Indigenous population and a larger Torres Strait Islander population than other parts of Australia live in QLD. By comparison, Victoria has one of the smallest Aboriginal populations nationally. A proportion of Aboriginal and Torres Strait Islander people live remotely in QLD. This is not the case in Victoria, which has a much smaller land size than QLD. Victoria's Aboriginal population is thus more urban than that of QLD.[26]

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[24] Boyatzis, R (1998), *Transforming Qualitative Information: Thematic Analysis and Code Development*, Sage Publications, California USA, vi-viii. This type of analysis involves 'encoding' qualitative information according to a list of 'themes': a 'pattern found in the information that at the minimum describes and organizes possible observations or at the maximum interprets aspects of the phenomenon'. A theme may be anticipated and explicitly included in data collection, 'initially generated inductively from the raw (qualitative) information', or 'generated deductively from theory and prior research'. Ibid.

[25] The researcher commenced research for the thesis in a remote Aboriginal community in WA. Due to urgent personal (family) circumstances, however, this research had to be abandoned mid-way through the fieldwork trip. It was then not possible to return to this community to complete the fieldwork, primarily (but not solely) due to resourcing issues.

[26] As at 2016 Aboriginal and Torres Strait Islander peoples in QLD constituted 4% of the State's total population (compared with 3% nationally) and 28.7% of Australia's national Indigenous population. QLD's Aboriginal and Torres Strait Islander population numbered 186,482 persons. In Cairns this population numbered 13,906 persons

Population size, distribution and location may impact on the incidence of discrimination and on access to justice: for instance, life in remote and regional locations may give rise to barriers to accessing justice, including as a response to race discrimination. Relevant difficulties present as (for example) restricted access to legal services, legal information and anti-discrimination agencies (through which a complaint of discrimination must be lodged).[27]

Interpretation of research findings published to date, however, can be somewhat complex. Some researchers suggest that those residing in urban areas are more likely to report experiences of racism, suggesting that there is a higher level of access to justice in cities (city residents are more frequently identifying and reporting discrimination) and/or that city residents experience more racism.[28] Other

(9% of the local population) and in Brisbane 59,158 persons. Close to a third (29%) of QLD's Aboriginal and Torres Strait Islander population lived in Brisbane, the remainder living regionally or remotely. Australian Bureau of Statistics (ABS) (2016a), *Aboriginal and Torres Strait Islander Population Data Summary*, ABS, Canberra; ABS (2016b), *2016 Census of Population and Housing, Aboriginal and Torres Strait Islander Peoples Profile: Cairns*, cat. no., 2002.0, ABS, Canberra. As at 2016 Victoria's Aboriginal population numbered 47,788 persons (0.8% of the State's overall population). A total of 24,062 Aboriginal persons lived in Melbourne (0.3% of the city's population but 50.4% of the State's Aboriginal population). Aboriginal people numbered 2,193 persons in Shepparton (3% of the town's population). ABS (2016a) and ABS (2016c), *Census of Population and Housing, Aboriginal and Torres Strait Islander Peoples Profile: Shepparton*, cat. no. 2002.0, ABS, Canberra. In Victoria 87% of Aboriginal people lived in an urban area and 13% rurally. In QLD 81% of Aboriginal and Torres Strait Islanders lived in an urban area and 18% rurally. ABS (2016a).

[27] See, for instance, discussion of distance and its impact on Indigenous access to justice in WA in Allison (2014a), 80ff.

[28] Additional detail provided in this same research indicates that those who are members of the Stolen Generation, who identify with a tribal group and recognise a traditional country, and/or who have higher socio-economic status were also found to be more likely to report racism. See Paradies, Y, (2006), 'Beyond Black and White: Essentialism, hybridity and Indigeneity', 42(4) *Journal of Sociology* 355 and Paradies, Y (2007), 'Exploring the Health Effects of Racism for Indigenous people', presented at the *Rural Health Research Colloquium*, Tamworth, NSW. There is some evidence that stress caused by stigma, prejudice and discrimination is worse in cities than in remote Indigenous communities. 'Indigenous respondents living as dispersed minorities in urban areas are likely to experience racism and discrimination differently from those living in small Aboriginal and Torres Strait Islander communities in remote areas where they form greater numbers and, in some cases, the majority of the population'. 'Put simply, people of an oppressed cultural group who form a minority within a larger population are likely to suffer greater mental health problems.' Nissim, R (2014), *Building resilience in the face of racism: options for anti-racism strategies*, Sydney Social Justice Network, University of Sydney, NSW citing Kelly K,

studies have reached different conclusions, however.[29] Research conducted by the ILNP, for instance, found that Aboriginal people in Victoria, a relatively urbanised population, reported experiencing racial discrimination at slightly lower levels than those of Aboriginal and Torres Strait Islander Queenslanders. They were also somewhat less likely than the latter to take formal action in response to discrimination, including through anti-discrimination complaints mechanisms.[30]

Another point of difference between Victoria and QLD pertains to their respective histories. Again, the intention has been to investigate any potential implications of the latter history for the present research. Victoria has had a relatively significant history of quite strident Indigenous political activism and resistance to oppression.[31] Though there has been similar activism in QLD, Aboriginal and Torres Strait Islander peoples in this jurisdiction have arguably also been subject to more blatant and longer-standing racial oppression than Aboriginal Victorians. QLD was the last jurisdiction to enact legislation bestowing on Indigenous people the right to vote, for instance.[32] It is also renowned for its despotic Protection Acts that controlled all aspects of Indigenous life until the 1970s.[33] Indeed, according to the Queensland Anti-Discrimination Commission ('ADCQ') (now the Queensland Human Rights Commission ('QHRC')) levels of racist subjugation of Aboriginal and Torres Strait Islanders in QLD caused many Indigenous activists to leave the State in the 1960s and 1970s.[34] Questions raised by these

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Dudgeon P, Gee G and Glaskin B (2009), *Living on the Edge: Social and Emotional wellbeing and Risk and Protective Factors for Serious Psychological Distress Among Aboriginal and Torres Strait Islander People,* Cooperative Research Centre for Aboriginal Health, 24.

[29] Some studies have found that there is no association between demographic or socioeconomic factors and self-reported racism. See, for instance, Larson, A et al (2007), 'It's Enough to Make You Sick: The impact of racism on the health of Aboriginal Australians', 31(4) *Australian and New Zealand Journal of Public Health* 322.

[30] Schwartz (2013) and Cunneen (2014).

[31] Attwood, B and Markus, A (1999), *The Struggle for Aboriginal Rights*, Allen and Unwin.

[32] The *Elections Act Amendment Bill* 1965 (QLD) amended the *Elections Act* 1915 (QLD). This Act extended voting rights to all Aboriginal people and Torres Strait Islanders in Queensland.

[33] For instance, *Aboriginals Protection and Restriction of the Sale of Opium Act* 1897 (QLD). Queensland was one of the last jurisdictions to repeal this type of legislation. See discussion Anti-Discrimination Commission QLD (ADCQ) (2017), *Aboriginal people in Queensland: a brief human rights history*, Brisbane, QLD, 29.

[34] Ibid.

histories for the research might include how they impact on Indigenous capacity to challenge race discrimination today, for instance.

The federal jurisdiction is the third focus jurisdiction of the thesis, including because of the symbolic importance of the *Racial Discrimination Act* 1975 (CTH), discussed in detail in Chapter 2. Moreover, all Indigenous people, including those living in Victoria and QLD, have the right to challenge discrimination through Commonwealth, State or Territory legislation. Access to justice issues arising at a federal level, therefore, have relevance to and may impact on all Aboriginal and Torres Strait Islander peoples. Fieldwork was not conducted specifically at a federal level.[35] However, comments made during thesis interviews about race discrimination law were not only about the State or Territory in which participants lived and worked. They are often applicable and/or specifically referred to the federal jurisdiction.

2.4.2 Gathering qualitative data

Qualitative data has been collected from interview participants in Victoria and QLD. Fieldwork has yielded a total of 25 interviews with Indigenous community member participants and 8 stakeholder interviews. Although difficult to quantify, a sample size of between 20 to 30 community member participants is likely to be adequate for the present type of research.[36] Community member participants numbered 12 in Victoria (6 individuals in Melbourne, 6 in Shepparton) and 13 in QLD (7 in Brisbane, 6 in Cairns). Male and female participants were close to equal in number (12 women and 13 men). Ages ranged from 18 to 70+ years, but most community member participants were under 40 years of age.[37]

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[35] The AHRC declined to participate in an interview and no other federal or national bodies were approached for an interview.

[36] Warren, C, 'Qualitative Interviewing', in Gubrium, J and Holstein, J (ed.s) (2002), *Handbook of Interview Research: Context and Method*, Sage USA. It is noted that sample sizes in qualitative research 'should not be so small as to make it difficult to achieve data saturation, theoretical saturation, or informational redundancy'. Nor should they be so large 'that it is difficult to undertake a deep, case-oriented analysis'. Onwuegbuzie, AJ and Collins, KMT (2007), A Typology of Mixed Methods Sampling Designs in Social Science Research', 12(2) *Qualitative Report* 281.

[37] Participants were not asked to provide dates of birth so ages are not available.

All interviewees were selected through purposive sampling. Purposive sampling is used to select participants with 'potential to yield insight' into the study's research questions.[38] It is intended to maximise 'the value of data for theory development' by gathering 'data rich enough to uncover conceptual relationships' or themes.[39] In this instance, inclusion criteria for community member participants encompassed Indigeneity, living in the focus communities and gender (to ensure equal numbers of male and female participants). A question of some interest to the researcher was whether differences in gender yielded information of relevance to the research questions. There was also at commencement of the fieldwork a preference for participants who would not be especially knowledgeable about racial discrimination law, given that this is likely to be the case for the majority of Indigenous Australians.

Community members interviewed were largely contacted through Indigenous organisations. In Brisbane interviews were facilitated by Murri Watch, an Indigenous organisation that provides supported accommodation to Aboriginal and Torres Strait Islander people.[40] In Cairns local Indigenous-focused legal services assisted, including ATSILS. In Melbourne one participant was located through Elizabeth Morgan House Aboriginal Women's Service.[41] Various attempts were made to locate and interview other community member participants in Melbourne, including during two visits to the city, through local Indigenous organisations. Despite these efforts, however, the only participants available for interview during the second (and last) trip were Aboriginal staff working at the Victorian Aboriginal Legal Service ('VALS'). Other participants did not come forward at all, or as organised, during the first visit to Melbourne. This meant that most of the participants in Melbourne are staff members of VALS and are therefore likely to have somewhat greater awareness of and/or experience with the legal system (though largely related to criminal rather than civil law justice) than most Indigenous people. In Shepparton participants were located through the local VALS office but were not VALS staff members.

[38] Patton, M (2002), *Qualitative Research and Evaluation Methods*, 3rd ed., Thousand Oaks, Sage, 40.

[39] Suter (2012), 350. See also Sarantakos, S, (2005), *Social Research,* Palgrave, New York, 164.

[40] Information on Murri Watch is available on their website (accessed January 2018): <http://murriwatch.org.au/>

[41] Information on Elizabeth Morgan House is available on their website (accessed January 2018): <http://www.emhaws.org.au/>

The process of recruitment involved contacting all of the above organisations with details of the research, and with a request that these details (Information Sheets, Consent Forms and questions) would be shared with clients with whom they were in contact, with an invitation to participate. In some instances, contact details of participants interested in meeting with the researcher were shared with her for direct follow up. In other instances, particularly where the researcher was meeting participants at the above organisations, arrangements for this meeting were made between the researcher and organisations in question.

Organisations were selected for stakeholder interviews on the basis that they provide a service to or otherwise work with Indigenous communities in the focus locations and jurisdictions and provide assistance in relation to and/or administer racial discrimination law. Of the 8 interviews conducted, five were with Aboriginal and Torres Strait Islander community-controlled organisations: ATSILS in QLD (two offices), and Elizabeth Morgan House, ATSILS and the Family Violence Prevention and Legal Service in Victoria.[42] Three stakeholder organisations interviewed do not have a sole focus on but engage with Aboriginal people/clients: the Victorian Equal Opportunity and Human Rights Commission ('VEOHRC'), the ADCQ and Victoria Legal Aid ('VLA'). A total of 15 staff members participated in stakeholder interviews and 9 of these individuals were Indigenous. Overall, the bulk of *all* interview participants were Aboriginal and Torres Strait Islander (34 individuals out of a total of 40). All organisations were contacted initially by phone or email, with details of the research shared, along with an invitation to participate. In some instances, those initially contacted were invited to participate and did participate in an interview. In other instances, staff contacted initially circulated an invitation to participate to staff more broadly and/or selected most relevant staff for participation (such as lawyers working with discrimination law). Other staff members then indicated their interest in participation, with direct contact made by the researcher with them to set up interviews.

[42] This service is now named Djirra. Information is available on their website (accessed May 2019): <https://djirra.org.au>

All participants responded to questions pertaining to Indigenous access to race discrimination law. Stakeholder interviewees and Indigenous community participants were asked different questions, however, to a degree. The two sets of interview questions were designed to respond to the above research questions and are attached as **Appendix A**. Community participants were asked questions about their personal experiences of and responses to discrimination, and stakeholder participants about their perspectives as professionals working with Aboriginal and Torres Strait Islander peoples. The majority of stakeholder interviewees, however, were also Indigenous, as noted. Where this was the case responses provided were based on both professional and personal experiences. All non-Indigenous stakeholder interviewees chose not to respond to certain questions they considered were best asked of Indigenous people and/or were very careful to respond to these questions, using examples and/or information previously shared with them by Aboriginal and Torres Strait Islander people. The latter questions included those related to contemporary Indigenous experiences of racial discrimination and changes to those experiences over time.

The use of semi-structured interviews meant the researcher could rely on a schedule of questions, thus allowing for comparability across the data collected. This approach also provided opportunity, however, to vary the sequence of questions posed and to use more open-ended and general questions than might be found in more structured interviews. This was useful, for instance, when Indigenous people sought to respond to stakeholder questions as both professional people and Indigenous community members and when non-Indigenous stakeholders did not think it appropriate to answer certain questions. The researcher has thus been able to move beyond the schedule of questions during interviews as the need arose.[43]

Open-ended questions used during the interviews provided participants with a chance to raise issues they considered important and to allow for broader discussion to explore, in detail, new themes and ideas as they emerged. The flexibility of this approach is particularly important in facilitating Indigenous knowledge and input. It allows participants to answer on their own terms whilst still

[43] Bryman, A (2012), *Social Research Methods*, 4th Ed., Oxford University Press, Oxford, 214.

providing some structure for comparability.[44] It also leads to the emergence of material, concepts or issues that the researcher may not have originally countenanced in designing the research, but which can then be used to enhance research findings. As an example of this, quite early on in the interviews it became apparent that a question asking how Indigenous people experience discrimination differently to other culturally diverse groups was required, as this difference has implications for the extent to and ways in which Indigenous people might best access justice as a response to discrimination.

Finally, the interview material presented in the thesis has been coded to de-identify all participants. Interviews are separated into stakeholder and community member interviews and numbered chronologically. Community member interviews are also identified by gender and location. For instance, each of the Cairns community member participant comments is recorded with three letters and digits. The first male participant interviewed in Cairns is identified as CM1, the first female participant as CF1, and so on. The same pattern is used for community member interviews in all locations, with Shepparton identified with an 'S', Melbourne with an 'M' and Brisbane with a 'B'.

Identifying the location of stakeholder interviews was not possible, given the small number of organisations participating. There was too high a likelihood of identifying these organisations, by inference. Stakeholder organisations are therefore numbered S1 to S8. Also identified is whether comment has been provided by an Indigenous or non-Indigenous stakeholder participant, as far as possible. This is done by using the symbols [I] for an Indigenous participant and [NI] for a non-Indigenous participant.

2.5 Quantitative Methodology

Some academics suggest that experiences of and responses to racism are not 'well-suited to quantification'.[45] Others claim that quantitative data can be useful to studies related to race and racism, particularly when combined with qualitative data. Combining these two types of data is seen as

[44] May, T (2001), *Social Research Issues, Methods and Process*, Open University Press, Buckingham.

[45] Mellor, D, (2003), 'Contemporary racism in Australia: The Experiences of Aborigines', 29(4) *Personality and Social Psychology Bulletin* 474-486, 475.

providing an enhanced 'picture' within which an issue of interest can be more comprehensively examined.[46] Quantitative data, for example, 'can illuminate the relevance of particular social trends as well as contextualise the processes, meanings and identities elucidated in qualitative analyses.'[47]

The thesis has taken this approach: drawing, for example, on interview and anti-discrimination complaint-handling agency data to measure the degree to which Indigenous people are using discrimination complaint processes. As the latter example suggests, both primary and secondary quantitative data have been relied upon. In terms of secondary data, as a further example, quantitative analysis of Freedom Ride survey data has been undertaken. As indicated immediately above, statistics have also been requested from anti-discrimination complaint handling agencies for all jurisdictions, including the federal jurisdiction, given that publicly available complaints data was not sufficiently detailed. This data was originally requested in 2013 for the financial years of 2010 to 2013, as follows:[48]

- number of inquiries of racial discrimination lodged by Indigenous people, including by area (such as employment, goods and services etc.);
- number of formal complaints of racial discrimination lodged by Indigenous people, including by area and by type (direct, racial vilification, etc.);
- number of formal complaints of racial discrimination lodged by Indigenous people that proceed to conciliation;
- number of complaints of racial discrimination lodged by Indigenous people that don't proceed to conciliation (terminated, and on what basis; withdrawn; settled outside conciliation, etc.);
- number of Indigenous complaints of racial discrimination that are successfully conciliated or resolved;
- number of Indigenous complainants of racial discrimination in which complainants are represented by an advocate during the complaints process.

[46] Given, L (ed.) (2008), *Sage Encyclopedia of Qualitative Research Methods*, Sage.

[47] Phoenix, A, 'Extolling eclecticism: language, psychoanalysis and demographic analysis of the study of 'race' and racism' in Bulmer, M and Solomos, J (2004), *Researching Race and Racism*, Routledge London, 48-9.

[48] The age of this data at the time of submission of the thesis is discussed further in Chapter 6.

Analysis of these and other statistics has been descriptive; that is, patterns in the data have been identified, and through this its characteristics described and relevant inferences drawn (about Indigenous access to justice and experiences of racial discrimination, for example). Descriptive analysis produces a mathematical summary of data, within which a large number of observed values are converted to relatively fewer numbers. This summary is provided in the thesis by way of tabulated descriptions (tables) and statistical commentary (discussion of results). Where applicable, patterns across and within jurisdictions and studies that are similar in nature (the ILNP and Freedom Ride surveys, for instance) have been highlighted.

2.6 Critical Race Theory

Critical race theory ('CRT') may be usefully applied in responding to the above research questions. It is highly relevant to the thesis overall as it critically assesses the effectiveness of law from the perspective of racial minorities: in particular, US civil rights law (broadly comparable to Australian discrimination law).[49]

Doctrinal legal theory, discussed earlier, may search for an objective reality within the law. CRT, on the other hand, rejects a simplistic, black letter approach to scrutiny of the legal system. It sees legal doctrine or principles as full of ambiguity rather than determinacy, giving rise to views about what is 'right' or 'wrong' in a legal sense that are neither neutral nor objective. The law is subjectively experienced, with these experiences influenced by race, according to critical race theorists All law, including civil rights law, is impacted by racial bias on the part of those who administer it - the same bias that is found in society at large. This leads to judicial interpretation of legislation that always and inevitably reflects and preferences the perspectives and interests of the racially dominant over those of racial minorities. Examples of this include where the law consistently favours the perspective of the perpetrator of racism over that of its victim; or where it sanctions only more blatant and interpersonal forms of racial discrimination, leaving systemic inequality and the social, political and other structures

[49] Of note, CRT emerged as a response to critical legal studies, which also critiques the law but is seen within CRT as failing to adequately consider and represent the perspectives of racial minorities.

that support it untouched.[50] As such, the law looks like it's doing one thing (eradicating inequality) when it's actually doing another (reinforcing racial hierarchies). CRT sees legal rights as at best useless, and at worst as perpetuating harm to racial minorities, who remain as downtrodden as ever in the larger scheme of things.

Moreover, CRT also argues that reliance on a discourse of 'rights' (through law reform and 'legal victories') obfuscates the need for other more effective methods of delivering truly substantive socio-economic reforms such as political mobilisation, collective action and mass social movements, led by racial minorities themselves.[51] Civil rights law, according to critical race theorists, silences responses to racism such as these because it appears to provide an adequate solution (and therefore an end) to this issue.[52]

Opinions within CRT are not always so black and white, however. Some theorists see a rights discourse as having some utility for minority groups. They are not always so quick to dismiss the potential for legal rights to serve as a weapon against racial inequality. To do so, they suggest, deprives marginalised groups of an option that they may identify as worthwhile and use to positive effect.[53]

Though emanating from and much more developed in the USA, as well as being primarily focused on the experiences and perspectives of African-Americans, there has been some application of CRT (or similar critical analysis) to assessment of the effectiveness of race discrimination law for Indigenous

[50] See for instance, Freeman, A (1988), 'Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay', 23 *Harvard Civil Rights – Civil Liberties Law Review* 297.

[51] See for instance, Tushnet, M (1994), 'The Critique of Rights', 47 *Southern Methodist University Law Review* 23.

[52] Many critical race theorists claim that legal rights emphasise individual self-interest and self-reliance over collective action, solidarity and cooperation. See for instance, Powell, JA (1992), 'Racial Realism or Racial Despair?', 24 *Connecticut Law Review* 553; Aleinikoff, T (1991), 'A Case for Race-Consciousness', 91 *Columbia Law Review* 1060; Bell, D (1992), 'Racial Realism' 24 *Connecticut Law Review* 363.

[53] Delgado, R (1987), 'The Ethereal Scholar, Does Critical Legal Studies Have What Minorities Want?', 22 *Harvard Civil Rights – Civil Liberties Review* 301.

Australians.[54] More work in this area is required, however. The thesis makes a start on this, utilising Indigenous research methodology alongside CRT. CRT's critique of the law is used at various points of the thesis: for instance, to explore why there is such significant and longstanding inequality within Indigenous communities, despite the fact that racial discrimination legislation was first introduced in Australia half a century ago. Also considered is whether introduction of this law has silenced more effective direct action by and for Indigenous Australians. The divergence of opinion within CRT about the value of legal rights is investigated, additionally, but with a focus on Indigenous perspectives and an Australian setting.

3 Thesis outline

This section describes the overall structure of the thesis and briefly summarises the content of each of the thesis chapters.

Chapter 2

This chapter sets out definitions and descriptions of access to justice, and of Indigenous access to justice in particular (including with respect to race discrimination), prior to embarking in later chapters on analysis of the latter.

Chapter 2 begins with a brief chronology of the introduction of race discrimination law in Australia. It then describes our current framing of access to justice, which generally refers, quite narrowly, to attainment of legal outcomes through legal dispute resolution processes and frameworks. Thus, access to justice is both *substantive* (outcomes-focused) and *procedural* (process driven) in nature. Each of these two elements are connected with and essential to the other. They are both applied to analysis in the thesis of the effectiveness of race discrimination law as an access to justice mechanism, but with some focus throughout on procedural access to justice. Justice outcomes cannot be attained without first

[54] See, for instance, Nielsen, J (2008), 'Whiteness and anti-discrimination law - it's in the design', 4(2) *Australian Critical Race and Whiteness Studies Association* 1 and McGlade, H and Purdy, J (1998), 'From Theory to Practice: or what is a homeless Yamatji Grandmother anyway?', 11 *Australian Feminist Law Journal* 137.

engaging with (effective) justice processes (though of course, there is also no point doing so if outcomes attained are likely to be unsatisfactory).

Access to justice is also identified in the chapter as a stand-alone human right to which everyone is entitled, and as essential to the exercise of all other rights, including the right to non-discrimination. Its inclusion in the 2007 *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP') points to its significance to Indigenous people, more specifically.[55] The important role that improved Indigenous access to justice might play in enhancing Indigenous socio-economic and personal wellbeing, including by reducing race-based inequality, is also discussed. It is argued that use of race discrimination legal processes and remedies are both important and worthwhile, and should be available to all those who wish to engage with them, including Indigenous people.

The chapter raises questions, however, about the current utility of race discrimination law to Aboriginal and Torres Strait Islander peoples, given that they continue to experience race discrimination and racial inequality at disproportionately high levels. This might quite reasonably lead to a conclusion that race discrimination law does not appear to be working as well as it might as an Indigenous access to justice mechanism. This leads on to brief discussion of our knowledge of the nature and extent of Indigenous access to justice in this area, and of barriers to Indigenous civil law access to justice. These barriers generally appear to pertain to marginalisation within Indigenous communities, as well as to issues that impact on Indigenous people alone, including colonisation. This is one 'difference' that must be addressed in ensuring substantive equality in access to justice context, a point returned to in later chapters. It is noted too that problems related to procedural access to justice are likely to require particular attention in an Indigenous context, given that race discrimination is currently challenged at law by Indigenous people to such a limited degree. Though substantive access to justice (outcomes produced) (discussed as problematic in Chapter 3) must also be enhanced, without increased Indigenous engagement with justice processes this is unlikely to occur.

[55] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*: resolution/adopted by the General Assembly, 2 October 2007, A/RES/61/295.

Also considered is that challenging race discrimination through legal channels is the predominant focus of existing definitions of access to justice, but is not the only option for those seeking 'justice'. 'Everyday justice', which involves direct confrontation of discrimination and other issues, may deliver adequately satisfactory justice outcomes. This point is introduced here, prior to discussion in later chapters of preferred or more common Indigenous methods of challenging discrimination, which include direct inter-personal confrontation (rather than use of the law). It will be argued that the latter methods might form part of an expanded *Indigenous* definition of access to justice.

Chapter 3

Chapter 3 sets out important context on race discrimination legislation and jurisprudence, the latter representing the end point of all legal processes (litigation and alternative dispute resolution (ADR)) used to resolve disputes in this area and substantive (or the focus on justice outcomes within) access to justice.

The chapter firstly identifies the stated objectives of race discrimination law, which refer to promotion of the concept of equality and to reduction of discrimination. Effective access to justice is also identified within some race discrimination legislation as key to achieving the latter objectives. These points are relevant to (reasonable and fair) evaluation in later chapters of law in this area, and discussion of whether it has achieved its objectives.

Chapter 3 then presents an overview of racial discrimination complaint processes, legislative provisions and Indigenous-focused race discrimination jurisprudence in Australia, with a principal focus on direct and indirect race discrimination, special measures (a defense against race discrimination) and racial vilification. It highlights three significant access to justice issues associated with legislation and jurisprudence in this area, as well as their particular application to Aboriginal and Torres Strait Islander people, generally due to their higher levels of disadvantage and our history of colonisation. This again is useful context to the discussion in later chapters of the importance of *substantively* equal access to justice, which recognises and responds to the particular circumstances of persons with shared characteristics (such as Indigeneity) seeking justice.

The three issues of concern relate to (a) the onus placed on (comparatively marginalised) individuals to initiate legal action in response to race discrimination, as well as (b) the limited protection against discrimination offered by and (c) racism inherent within the law. Institutional racism of the law is identified as the failure to account for and/or respond effectively to Indigenous-specific experiences of race discrimination, which include denial of Indigenous rights to culture and self-determination (past and present) and much poorer Indigenous socio-economic outcomes than is evident in other sectors of society, as well as Indigenous perspectives on what appropriate 'justice' (as a response to these experiences) might look like.

The concepts of formal and substantive equality are further discussed at this point in the thesis. As the jurisprudence presented in this chapter indicates, the legal system is far too focused on formal as opposed to substantive equality in its adjudication of Indigenous litigation related to race discrimination, to the detriment of Indigenous plaintiffs. Substantive equality would provide a better response to the aforementioned access to justice issues.

Demonstrating the inter-connection between substantive and procedural access to justice, the aforementioned issues arising in a jurisprudential context are not dissimilar to those found within the discrimination complaints process. These issues are returned to and discussed in some detail in the latter context in Chapter 6. At this point in the thesis, however, given the substantial jurisprudential and legislative difficulties impacting on Indigenous access to justice, Chapter 3 will conclude by suggesting that it is quite reasonable to ask whether there is any value in race discrimination law for Indigenous people. Of note, these types of difficulties were pre-empted by Indigenous activists who rejected introduction of race discrimination legislation during Australia's mid-20th century civil rights movement, discussed in some detail in Chapter 5. They identified mainstream law as not having the potential or capacity to respond to Indigenous needs and perspectives. These same issues continue to be raised by some contemporary Aboriginal and Torres Strait Islander people. This points to the importance of expanding the concept of access to justice for Indigenous people to incorporate processes and outcomes Indigenous people see as appropriate and effective.

Chapter 4

Chapter 4 takes a step back in time and investigates the historical background within which racial discrimination laws were enacted in Australia, focused primarily on national issues and events, including enactment of the RDA and the Indigenous rights movement of the 1950s-1970s. This movement was closely connected with and drew heavily from civil rights movements, here and overseas.

The chapter describes mid-20th century Indigenous and government understandings of what race discrimination legislation might deliver to Indigenous people, once enacted. Evidence presented, including by way of Parliamentary debates surrounding introduction of the RDA, suggests that this legislation was developed, in part, in response to and with the intention of reducing race discrimination against Indigenous Australians. Also identified is that some Indigenous activists called for introduction of such laws during this period, with the expectation that they would protect Indigenous people against race-based inequality. This indicates that race discrimination law did, prior to its introduction, hold value for Indigenous Australians.

More critical Indigenous perspectives of race discrimination law are also considered, however, raising a number of tensions, potentially resolved in Chapter 8. Some activists involved in the Indigenous rights movement rejected race discrimination law as too 'mainstream', both as a means of achieving reform (as a justice process) and the nature of the reform it was likely to bring about (as justice outcomes). They saw such law as unable to deliver broad ranging socio-economic reform, but also identified that it would offer very little to attainment of goals of importance to Indigenous people: including recognition of Indigenous or collective rights. Civil or human rights and the more superficial forms of equality that these rights (and the laws enshrining them) offered were seen as having more relevance to non-Indigenous than Indigenous Australians. In many respects, this is what has occurred in race discrimination law, as seen in Chapter 3. Also preferred by these activists was Indigenous-led direct action over legal rights. These views are identified as very much in alignment with those of critical race

theorists, discussed in Chapter 1 - though with an emphasis on the failure of civil rights legislation to reflect the perspectives of those who are both colonised *and* racially marginalised.

The chapter details that these views are still held today by some Aboriginal and Torres Strait Islander people: including those calling for a Treaty (that might incorporate recognition of human rights, alongside Indigenous rights) in preference to stand-alone human rights legislation.

The chapter concludes with consideration of potential compatibility rather than conflict between different types of strategies (legal and direct action) and sets of rights (Indigenous and civil/human rights), a point returned to in Chapter 8.

Chapter 5

Chapter 5 assesses what has been achieved for Indigenous people in terms of increased racial equality since introduction of race discrimination law in Australia. This is done by drawing on resources from the 1960s, a period in which race discrimination was first introduced, and more contemporary times that provide or describe Indigenous accounts of race discrimination.

Analysis of Freedom Ride survey data is firstly presented. This details Aboriginal views on race discrimination in NSW in 1965, identifying the elimination or reduction in blatant segregation as a priority issue of concern for those surveyed. Though not identified as 'discrimination' by Freedom Ride respondents, this data and data collected for other then-contemporary surveys indicate that Aboriginal people also suffered broad-ranging and disproportionate levels of Indigenous social disadvantage and disenfranchisement. This is attributed to poverty, race and, significantly, colonisation by academics writing during this period, and points to Indigenous-specific experiences of inequality. The Freedom Ride survey responses also indicate that Aboriginal people wanted more say in their own affairs and better access to essentials (such as health, education, housing) that would lift their socio-economic status to something nearly equal to that of others.

Interview data collected for the thesis and other survey data gathered from Aboriginal and Torres Strait Islander people in more recent years is then explored. This reveals that Indigenous Australians continue

to be severely impacted by racial inequality — both as more overt inter-personal racism (though its incidence is now somewhat reduced) and, perhaps more commonly as institutional or other forms of systemic racism. Aboriginal and Torres Strait Islander people are identified as still highly socially excluded.

Also discussed is thesis interview material in which Indigenous people describe their situation as being the same as or worse than in previous decades, of relevance to evaluation of what race discrimination law has contributed to Indigenous communities since introduction. This is attributable, perhaps, to decreases in the very blatant segregation of the mid-20th century, which has led to Indigenous people expecting to achieve more substantive goals, including greater autonomy as individuals and as a collective (as self-determination), as well as equality in Indigenous and non-Indigenous socio-economic outcomes. These goals are to some degree evident in both Freedom Ride survey responses and in the demands of Indigenous activists for greater recognition of their rights, including as First Nations peoples presented earlier in the thesis.

Chapter 6

Chapter 6 explores what the ongoing prevalence of racial inequality against Indigenous people suggests about the success or failure of racial discrimination law: failure, that is, on the part of the law to produce sufficient benefit for Indigenous people. Also investigated is whether this failure may be due to problems of Indigenous access justice (in terms of legal processes, outcomes and associated legal frameworks).

The chapter begins by considering how one might fairly evaluate the effectiveness of race discrimination law, or indeed any law. The stated objectives of this law and the intentions and expectations evident at the time of its introduction held by both government and Indigenous Australians are identified as being pertinent to and useful for such an evaluation.

Complaint agency data is presented points to process-related issues. Indigenous people are only lodging a small number of complaints of discrimination, comparative to the extent to which they are impacted

by this issue. Indigenous complaints lodged also generally relate to a fairly limited set of problems (employment, goods and services). Outcomes achieved also appear to be quite restricted, additionally, with complaints often failing to settle or having little potential to deliver more systemic outcomes to Indigenous people (beyond the individual complainant). Thus, both substantive and procedural access to justice is inhibited for Indigenous people.

Thesis interview data collected from Indigenous participants confirms that the law is rarely used by Indigenous people to respond to race discrimination. More common responses to discrimination are non-legal, including avoidance and walking away and direct interpersonal confrontation. The latter was seen as a difficult but most effective non-legal response: more so when it involved measured discussion or debate with an alleged perpetrator than angry and sometimes violent confrontation (potentially accompanied by criminal charges).

Of note, the responses highlighted during interviews almost always described responses to quite overtly discriminatory behaviour of (an) individual(s) rather than systemic issues of discrimination, quite frequently instances of racial vilification. This points to an issue raised earlier (in discussion of the Freedom Ride surveys) and returned to later in the thesis. Race discrimination is often identified by Indigenous people (and others) as something other than institutional or indirect, which impacts on capacity and opportunity to challenge it at a more systemic level. This presents as a significant barrier to achieving access to justice.

Though not currently used to any significant degree, the chapter reveals that most Aboriginal and Torres Strait Islander interview participants saw race discrimination law and the remedies it provides as of genuine value to Aboriginal and Torres Strait Islander people. The law is, however, in some respects valued as a concept, rather than as a tried and tested mechanism. Some participants indicated too that direct (non-legal) action, on an individual or collective basis, will always be more effective than legal action, similar to the views of mid-20th century Indigenous activists.

Chapter 7

Chapter 7 draws on thesis interview material and literature to identify reasons for poor Indigenous access to justice in this area, but with a focus on initial and sustained engagement with the anti-discrimination complaint process. Both substantive and procedural access to justice are identified as problematic within this process, which plays an important gate-keeping role for entry into judicial processes and outcomes.

The same three access to justice issues related to legislation and jurisprudence contexts explored in Chapter 3 are revisited — and again, with identification of the different or particular ways in which these issues impact on Indigenous people. The chapter points to institutional racism evident in judicial interpretations of race discrimination law as also present within complaint handling processes and outcomes. The latter appear, to a degree, to again emphasise formal rather than substantive equality in terms of the form of access to justice provided. This disadvantages Indigenous people because it fails to account for their specific experiences of discrimination and racism, as well as Indigenous cultural difference.

Significant levels of disempowerment and marginalisation due to colonisation and other forms of entrenched racism (including their disproportionate social exclusion) make it less likely, for instance, that they will know how to and/or will make a choice to assert their right to non-discrimination. Neutrality, however, underpins race discrimination complaint handling mechanisms, which sees all parties to a dispute as equal. Cultural and language difference renders the complaints process 'foreign' to Indigenous people. Additionally, the greater likelihood that Indigenous people live remotely impacts on their capacity to access both lawyers (to assist with a complaint) and anti-discrimination agencies, as further examples. Not enough has been done to address these types of issues, to the detriment Aboriginal and Torres Strait Islander people who might seek justice when confronted with race discrimination.

Chapter 8

Chapter 8 pulls together threads running through the thesis, setting out strategies likely to help reduce race discrimination as it impacts on Indigenous people and to improve access to justice so that legal responses, in particular, are more effective.

Its starting point, however, is to point to problems inherent in positioning access to justice solely within the law, including because the latter is a site of power (and oppression), as critical race theorists and Indigenous people have asserted. The concept of access to justice must be expanded, it is argued, to encompass *non*-legal processes and 'justice' outcomes. This includes processes and outcomes preferred by Indigenous people, encompassing direct interpersonal and/or collective action able to deliver Indigenous-specific end-goals. These types of strategies might be used quite effectively alongside rather than in place of legal action (and vice versa), a suggestion that may resolve a *first* tension raised within CRT and during the Indigenous rights movement (discussed in detail in Chapter 4), which sees civil rights law as designed to silence and/or as in effect silencing racial minority-led direct action aimed at substantive social reform.

The chapter then considers possible adaptations of legal dispute resolution processes and frameworks to render them more responsive to Indigenous justice needs and perspectives (and therefore substantively as opposed to formally equal). The adaptations in question embody substantive rather than formal equality to account for key differences in Indigenous experiences of discrimination and the status of Indigenous Australians as First Nations peoples. These adaptations ought also, it is further argued, be informed by UNDRIP principles, including self-determination and protection of culture.

Noted too is that the UNDRIP calls for recognition of both Indigenous-specific rights *and* of human rights for Indigenous people. The Declaration also indicates, however, that human rights must always be defined in an Indigenous context in ways that uphold rather than undermine Indigenous rights. Indeed, human rights for Indigenous people are indivisible from Indigenous rights. This resolves a *second* tension raised, also detailed in Chapter 4, between Indigenous and civil rights. Specific law-related reforms are then discussed, all of which are underpinned by UNDRIP principles. These

encompass changes to the complaints process, to litigation and to development of legislative frameworks, addressing some of the issues impacting on access to justice raised in earlier chapters.

The remainder of Chapter 8 is concerned with *non*-legal responses to racism, as opposed to unlawful race discrimination alone. These are identified as important and necessary due to the inherent limitations of the law to respond to this issue — which manifests, as noted in Chapter 1, in social, economic and political and well as legal ways; and given that some Indigenous people will prefer to avoid legal action.

Considered firstly are Indigenous community-led and embedded strategies with potential to build on existing Indigenous capacity to confront and/or avoid the more negative impacts of racism. This includes naming or calling out discrimination without recourse to the law in informal or more formal settings (including through community and family networks). The importance of the broader Australian community stepping up and taking responsibility for racism is then explored, as is an increased role for government. Government, it is suggested, ought to ensure there are effective mechanisms for enforcement of laws designed to protect the rights of Indigenous people, discussed in earlier parts of the chapter. Also essential is addressing institutional racism within government and forging a relationship between government and Indigenous Australians framed by and strengthened through core UNDRIP principles, including of self-determination.

Chapter 9

Chapter 9 concludes the thesis with a summary of key findings, potential implications for law and policy, and principal contributions of the research.

Principal contributions of the research identified in this chapter include reliance the research has placed on Indigenous voices and perspectives in inquiring into issues previously under-explored but seen as important to Indigenous people: that is, improved procedural and substantive access to civil law justice, particularly with respect to race discrimination. These voices and perspectives have been used in the design and completion of the research, and to develop research findings, based on the understanding

that Indigenous people must be active participants in the development of solutions to problems they are experiencing, including race discrimination. Aspects of the research may also be used, it is suggested, to expand our understanding of Indigenous access to justice in other civil law areas, and for potential expansion of the latter concept for other groups in society.

The chapter confirms that access to justice with respect to race discrimination law is not working as well as it might, largely because it fails to account for Indigenous perspectives of justice and how to achieve it. Indigenous criticisms of race discrimination law as an appropriate means of protecting Indigenous-specific and human rights are identified as largely borne out by the range of problems inhibiting Indigenous access to justice canvassed in the research. Also confirmed, however, is that Indigenous people continue to see value in both non-legal and (improved) legal responses to inequalities and injustices they encounter.

It is argued that Indigenous people should have opportunity to use their preferred mechanism for advancement of rights, including through access to justice as traditionally framed or in a form that extends beyond legal processes and remedies. The chapter reiterates that as a means of combatting racial injustice and regardless of the form it takes access to justice will, however, never be effective for Indigenous people unless it reflects Indigenous perspectives, with UNDRIP principles and rights a good starting point in this context.

CHAPTER 2: CONTEXTUAL BACKGROUND TO THE RESEARCH

Chapter 2 sets out contextual background to the research, briefly outlining the chronology of the enactment of race discrimination law in Australia and providing details of its dispute resolution processes.

The chapter begins by discussing questions raised by Aboriginal people about the practical utility of our first race discrimination legislation within the first decade after its enactment in South Australia in 1966. It is suggested that similar questions might also be raised today about race discrimination laws introduced subsequent to the RDA, given that despite legislative prohibition racial inequality continues to have substantial impacts on Aboriginal and Torres Strait Islander peoples. It is claimed, in fact, that Aboriginal and Torres Strait Islander peoples 'continue to bear the greatest burden' in Australia with respect to race discrimination.[56] The chapter then considers whether legislation in this area may not be reaching its potential for Indigenous people partly due to problems they experience in relation to access to justice. It is suggested that Indigenous people experience discrimination very frequently, but do not commonly use the law to challenge it.

Access to justice is described as defined, quite narrowly, as attainment of legal outcomes through legal dispute resolution processes. The various components of this traditional conceptualisation of access to justice are then set out, which encompass legal rights contained in substantive law and effective mechanisms for enforcement of these rights. Access to justice is also identified as a human right to which all persons are equally entitled, including Indigenous people, and as of fundamental importance to the exercise of every other right, including that of non-discrimination. It is suggested that though challenging race discrimination through legal avenues is not the only solution to this problem, it is an option that should be available to Aboriginal and Torres Strait Islander people. Discussion on the role

[56] Ferdinand A, Kelaher M and Paradies Y (2013), *Mental health impacts of racial discrimination in Victorian culturally and linguistically diverse communities: Full report*, Victorian Health Promotion Foundation, Melbourne VIC, 1.

that improved access to justice might play in enhancing Indigenous socio-economic wellbeing, including through a reduction in levels of social exclusion, concludes Chapter 2.

1 Race discrimination against Indigenous Australians and Australian race discrimination law

1.1 Introduction of race discrimination law in Australia

From the 1960s and 1970s State, Territory and Federal Governments introduced legislation prohibiting discrimination, including race discrimination. The first anti-discrimination legislation was introduced in South Australia ('SA') in the 1960s, as noted above. The *Prohibition of Discrimination Act* 1966 (SA) outlawed discrimination against an individual 'by reason only of that person's race, country of origin or colour of skin' in the areas of goods and services and employment. The Act empowered the South Australian Attorney-General to initiate criminal proceedings against alleged perpetrators, with penalties attached to a conviction. It was superseded in 1976, with only four prosecutions having been commenced during its life span.[57]

Though since repealed and replaced by broader-ranging anti-discrimination law in SA, this legislation was strongly criticised as having done little for Aboriginal people. Aboriginal activist John Moriarty, a founding member of the South Australian Aborigines Advancement League, spoke in the 1970s of the law as having 'given a few of us some hope' initially but as having 'since … become our despair'. He noted that 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'.[58] Whether the raft of Australian anti-discrimination legislation that followed has been as similarly disappointing to Indigenous people is a key focus of the thesis.

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[57] Rees, N, Lindsay, K, and Rice, S (2008), *Australian Anti-Discrimination Law: Texts, Cases and Materials*, Federation Press, 18. The superseding legislation was the *Racial Discrimination Act* 1976 (SA), now replaced by the *Equal Opportunity Act* 1984 (SA).

[58] Quoted in Nettheim, G (ed.) (1974), *Aborigines, Human Rights and the Law,* ANZ Book Company, Sydney, 28-9.

The first law to be enacted after the South Australian legislation was the RDA, given significant attention throughout the thesis because of its landmark status.[59] The RDA, firstly, served as an important national statement on human rights. At the time of its proclamation on 31 October 1975 Prime Minister Gough Whitlam, for instance, referred to it as 'a historic measure, symbolic of the aims and philosophy of the Australian Government, and a further stage in the struggle for human rights by minorities everywhere'.[60]

The RDA also paved the way for introduction of anti-discrimination law in other Australian jurisdictions. From 1977 to 1998 each State and Territory passed anti-discrimination legislation prohibiting race and other forms of discrimination. NSW and Victoria were the first jurisdictions to enact such provisions and Tasmania the last.[61] All but one jurisdiction, the NT, now prohibits both direct and indirect discrimination on the basis of race. The NT legislation provides protection against direct discrimination alone. Each jurisdiction, again other than the NT, has also introduced laws prohibiting

[59] Federal legislation prohibiting discrimination on grounds such as sex, age and disability was also introduced in Australia from 1984, including the *Sex Discrimination Act* 1984 (CTH) and the *Disability Discrimination Act* 1992 (CTH).

[60] Whitlam, G, 'Proclamation of the Racial Discrimination Act', 31 October 1975 (accessed July 2016): <http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/Q0IF6/upload_binary/q0if67.pdf;fileType=application%2Fpdf#search=%22media/pressrel/Q0IF6%22 >. Gaze also refers to the RDA as a 'significant statement of Australia's commitment against racism'. Gaze, B (2005)**, '**Has the Racial Discrimination Act Contributed to Eliminating Racial Discrimination? Analysing the Litigation Track Record 2000-2004', 11(1) *Australian Journal of Human Rights* 171, 176. Other reasons cited for the significance of the RDA by Gaze include that it 'pioneered' expanded Constitutional powers (it was passed using the external affairs power in s 51(xxix) of the Constitution). Gaze, B (2015), *The Racial Discrimination Act after 40 years: advancing equality, or sliding into obsolescence?* in AHRC (2015b), *Perspectives on the Racial Discrimination Act: Papers from the 40 Years of the Racial Discrimination Act Conference*, Sydney 19-20 February 2015, NSW, 66, 66.

[61] *Anti-Discrimination Act* 1977 (ADA) (NSW); *Equal Opportunity Act* 1984 (EOA) (VIC); *Equal Opportunity Act* 1984 (EOA) (WA); *Anti-Discrimination Act* 1991 (ADA) (QLD); *Discrimination Act* 1991 (DA) (ACT); *Anti-Discrimination Act* 1992 (ADA) (NT); *Anti-Discrimination Act* 1998 (ADA) (TAS). Note that Victoria set up an Equal Opportunity Board in the 1970s and introduced the *Equal Opportunity Act* 1977, only prohibiting discrimination on the basis of sex and marital status, however. The 1984 legislation introduced further grounds, including race, and the areas of employment, education, accommodation and the provision of goods and services.

racial vilification, commencing with WA and NSW in 1989.[62] Racial vilification provisions were incorporated into the RDA through the *Racial Hatred Act* 1995 (CTH).

Through this and associated legislation a right to non-discrimination and mechanisms for protection of that right were established.[63] These mechanisms include a complaint-handling process centred upon alternative dispute resolution ('ADR') and administered by anti-discrimination agencies established in each jurisdiction. Anti-discrimination agencies include the Australian Human Rights Commission ('AHRC'), VEOHRC and the ADCQ.[64] These agencies also have a range of statutory functions beyond complaint handing, including education about rights, conducting of public inquiries, and intervention in court cases of significant public interest.

The complaints process serves as the principal 'gateway' through which almost all legal action in this area is commenced and concluded. In specified circumstances litigation can be conducted in courts and tribunals, but very few cases (and an even smaller number of Indigenous matters) reach that point.[65] It is, in fact, impossible in all but one jurisdiction to initiate legal action in a court or tribunal without

[62] Of note, s. 20 of the ADA (NT) may be interpreted as including an indirect discrimination provision, according to Rees et al (2008), 120. See also the recent review of the ADA (NT), which considers amongst other things introduction of racial vilification provisions. Department of the Attorney General and Justice (NT) (2017a), *Discussion Paper: Modernisation of the Anti-Discrimination Act*, Darwin NT. Racial vilification provisions are set out in the *Racial Vilification Act* 1996 (SA) and *Racial and Religious Tolerance Act* 2001 (VIC). Otherwise, racial vilification is included in anti-discrimination legislation. See ADA (TAS) (s. 19); ADA (QLD) (ss. 124A, 131A); ADA (NSW) (ss. 20A-20C); and DA (ACT) (ss. 66, 67). The ADA (NT) does not prohibit racial vilification, although 'harassment' is prohibited under s. 20(1)(b), of this Act, which may include racial harassment. WA has similar provisions in the EOA (ss. 49A-D). The *Criminal Code Act* 1983 (NT) creates offences such as making threats (s. 200), which may be applicable in certain circumstances, as does the *Criminal Code* 1913 (WA) (ss. 76-80).

[63] See, for instance, at a federal level the *Australian Human Rights Commission Act* 1986 (AHRCA) (CTH).

[64] Other agencies are the Equal Opportunity Commission (EOC) (SA), the Human Rights Commission (HRC) (ACT), the Anti-Discrimination Commission (ADC) (NT), and the Equal Opportunity Commission (EOC) WA.

[65] The Federal Race Discrimination Commissioner states, for example, that only 3% of AHRC complaints end up in court. Soutphommasane, T, ''A Brave Piece of Legislation': The Racial Discrimination Act, 40 Years on,' ABC Religion and Ethics, 23 February 2015. Gaze also commented in 2015 that since 2000 the High Court has dealt with the RDA only twice, both in cases considering s. 10 of this Act. These cases are *Western Australia v Ward* (2002) ALR 1 and *Maloney v R* [2013] HCA 28. Gaze (2015), 77. See further Chapter 3.

having first been through the complaints process. Victorians alone have the option of lodging a dispute in the Victorian Civil and Administrative Tribunal ('VCAT') *or* a complaint with VEOHRC.[66] There is some focus within the thesis on the complaints process given that it is such a fundamental component of access to justice in this area.

1.2 Continuing high levels of race discrimination against Indigenous people

Aboriginal and Torres Strait Islander people have been subject to racism in a multitude of forms since invasion in 1788.[67] They are today still far from able to enjoy rights equal to those of other Australians. Arguably, they remain 'by far the most 'Outsider' group in Australian society', disproportionately more likely to face race discrimination and racism in their daily lives.[68] This inequality is evident at an interpersonal level, but also manifests as institutional racism and substantial levels of social exclusion: evidenced by reduced employment opportunities and poorer educational and health outcomes in Indigenous communities, for example.[69] Institutional racism has been defined as 'racist beliefs or values' that are 'built into the operations of social institutions that discriminate against, control and oppress various minority groups'.[70]

As more than 40 years have now passed since introduction of the RDA and 50 years since enactment of the first race discrimination legislation in Australia it is both timely and appropriate to question

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[66] See Part 8, EOA (VIC) and Part 4 Div. 5, *Victorian Civil and Administrative Tribunal Act* 1988 (VIC).

[67] See discussion, for instance, in Cowlishaw, G and Barry, M (1997), *Race Matters: Indigenous Australians and 'Our' Society*, Aboriginal Studies Press.

[68] Angelico, T, 'Wallerstein and contemporary Australian racism', in Collins, J (ed.) (1995), *Contemporary Racism in Australia, Canada and New Zealand,* Vol. 2, 237, UTS, Sydney, 253.

[69] See discussion, for instance, in Burney, L (2009), 'An Australian Sense of Xenophobia', 52(4) *Development* 479 and Vinson, T (2009), *Indigenous Social Exclusion*, Commonwealth Department of Education, Employment and Workplace Relations.

[70] Mellor (2003), 479-80. Indigenous academic Aileen Moreton-Robinson defines institutional racism as 'the cultural pattern of distribution of social goods and opportunities, including power, which regularly and systematically advantages some ethnic groups and disadvantages others.' Cited in de Plevitz de, L (2000), *The failure of Australian legislation on indirect discrimination to detect the systemic racism which prevents Aboriginal people from fully participating in the workforce*, Queensland University of Technology, 12.

whether race discrimination legislation has made a positive difference to Aboriginal and Torres Strait Islander peoples. The laws in question bestow rights and responsibilities upon each and every member of our community, intended to ensure fair and equal treatment, regardless of race, ethnicity or cultural background. On its face, the benefit to be drawn from such legislation — a reduction in experiences of inequality — is to be enjoyed by *all* persons, including Indigenous Australians. That their experiences of racism, including race discrimination, are still so significant decades after introduction of these laws leads one to reasonably question whether they have failed to meet their potential in an Indigenous context, and if so, to then ask why this has occurred.

2 Access to justice: definitions and its role in evaluation of race discrimination law

2.1 The concept of access to justice

Assessing the influence or impact any of any legislation is a complex exercise. For a start, the achievements and failures of legislation are inevitably affected by a broad range of factors, including the political and economic systems within which it operates.[71] One key measure of the effectiveness of legislation such as the RDA, however, is how it is working as an access to justice mechanism.

Access to justice is a concept or framework generally, and in some respects restrictively understood as attainment of justice outcomes through legal dispute resolution processes: originally only those associated with formal justice (courts and tribunals) but expanded over time to incorporate informal

[71] Sackville cites as an example of this influence (and its impacts on access to justice) government interference in the criminal justice system through mandatory sentencing. 'Such laws do not prevent individuals from gaining access to courts. On the contrary, they only apply to criminal proceedings instituted by the state against accused persons found guilty of an offence. But mandatory sentencing regimes remove the judicial discretion to determine an appropriate penalty by reference not merely to the nature of the particular offence, but to the circumstances of the individual offender. They represent a retreat from the principle that, of all institutions, courts should be able to dispense individualised justice.' Sackville, R (2004), 'Some thoughts on access to justice', 2 *New Zealand Journal of Public and International Law* 85, 101.

justice mechanisms (including ADR).[72] That the concept is firmly wedded to the legal system is described by Currie, as follows.

> Especially in the western common law countries, the legal profession has tended to dominate the institutions for providing access to justice. Thus, the hegemony of the legal professions has shaped the character of the access to justice movement. Traditionally, access to justice [has] rested on a rights-based paradigm. Access to justice has meant access to the courts. Problems [are] defined mainly in legalistic terms, and … the solutions to them [as, in part] … services provided by lawyers.[73]

Access to justice has been further defined as the 'most basic requirement' of 'a modern egalitarian system which purports to guarantee, and not merely proclaim, the legal rights of all'.[74] It is thus a 'key means to defend' rights, including human rights.[75] But it is also a 'fundamental human right' in itself.

As this suggests, equality is a key component of access to justice. The latter concept emerged during emergence of the welfare state during the 1960s and 1970s.[76] A response in its earliest beginnings to societal inequality, access to justice aims to ensure 'equal ability' for *all* persons to 'access the

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[72] Ibid.

[73] Currie, A (2003), *Riding the Third Wave: Rethinking Criminal Legal Aid Within an Access to Justice Framework*, Research and Statistics Division, Department of Justice Canada, 2.

[74] Cappelletti, M and Garth, B, 'Access to Justice: The Worldwide Movement to Make Rights Effective: A General Report', in Cappelletti, M and Garth, B (1978), *Access to Justice: Vol 1 - A World Survey*, 8-9.

[75] United Nations Development Program (UNDP) (2005), *Programming for Justice: Access for All*, Bangkok Thailand. The Human Rights Council's UN Expert Mechanism on the Rights of Indigenous people also identified access to justice as follows. 'Access to justice requires the ability to seek and obtain remedies for wrongs through institutions of justice, formal or informal, in conformity with human rights standards. It is essential for the protection and promotion of all other human rights.' Expert Mechanism on the Rights of Indigenous Peoples Advice No. 5: *Access to justice in the promotion and protection of the rights of indigenous peoples,* A/HRC/EMRIP/2013/2, 3, para 3.

[76] Currie claims that access to justice has its origins in European craft guilds and similar, assisting members of the guilds with legal problems. Currie (2003), 1. Sackville also defines access to justice as 'affirmative action', designed to ensure that basic social rights (to work, education, healthcare) can be enjoyed. Sackville (2004), 88.

processes' used to enforce 'existing rights or laws'.[77] Currie defines access to justice, as such, as 'a range of institutional arrangements to assure that people that lack the resources or other capacities to protect their legal rights and resolve their law related problems have access to the justice system'.[78]

To achieve 'equality' in this context, access to justice must address barriers that inhibit the exercise by more marginalised persons of rights that are enjoyed by the majority and/or that lead to 'underdevelopment of the common law' in areas with particular relevance to or impacts on marginalised persons (for instance, poverty law and discrimination).[79] These barriers may sit within different parts of the legal system, including those connected with 'justice providers'.[80] Examples of such barriers include bias within legal norms and adjudicative systems, lack of information about legal norms and practice, geographical distance between courts and those needing to access them, and poor access to

[77] Schetzer, L, Mullins, J and Buonamano, R (2002), *Access to Justice and Legal Needs: A project to identify legal needs, pathways and barriers for disadvantaged people in NSW, Background Paper*, Law and Justice Foundation (NSW), Sydney, 6.

[78] Currie (2003), 2. Others have described access to justice as intended to address and reduce inequality, and for this reason, as particularly important to marginalised groups. Van de Meene and Van Rooij state that all individuals must have the same capacity to 'seek and to obtain justice' in relation to an 'issue or grievance', whether that be 'with or against another individual, an organisation or the state'. Van de Meene, I and Van Rooij, B (2008), *Access to Justice and Legal Empowerment,* Law Governance and Development: Research and Policy Notes, Leiden University Press, 6. Cappelletti and Garth recognised that as all persons are bound by the law, so too should they have the same opportunities to 'receive justice when the law is enforced against them' and to 'take advantage of the benefits the law confers on them'. Cappelliti and Garth (1978), 8. Access to justice is also tied by Parker and others to 'freedom', a concept or idea discussed at various points of this thesis. Freedom is defined by Parker as a 'social status enjoyed by someone who is so protected by the law and culture of his community that he does not have to depend for the enjoyment of independent choice on the grace or favour or mercy of another'. She refers to 'freedom from domination' achieved through adequate protection being afforded by the law. This is threatened 'if some classes of individuals have more access to law than others.' 'The powerless are at the mercy of whoever can buy up the best advice and representation in making their [legal] claims. If some people are always able to use the law to have their claims heard, while others are not, then the law will become skewed by continually recognising the claims of those who can afford to use it. It will fail to serve its overall purpose of advancing the freedom of all.' Parker, C (1997), *Lawyers' Justice, Lawyers' Domination: Regulating the Legal Profession for Access to Justice*, Thesis, ANU, 46-7, 54.

[79] Schetzer et al (2002), 7.

[80] Discussed in Van de Meene and Van Rooij (2008), 10-11.

lawyers. Barriers may also be connected with 'justice seekers', defined as 'claim holders' seeking resolution of a dispute or legal problem and incorporating individuals, groups and 'in particular the poor, women and indigenous people' (sic). Justice seeker related barriers include lack of financial capacity, lack of experience in dealing with 'formal justice institutions' and negative perceptions and distrust of legal institutions and litigation, often accompanied by a perception that 'getting justice from the legal system is difficult or impossible'.[81]

Sackville points to various stages or waves of access to justice reform and lists initiatives or approaches introduced over time to address barriers such as those identified above. These include establishment of legal aid schemes (to overcome economic inhibitors to accessing lawyers); creation of specialised regulatory agencies 'to enforce public … interests' and liberation of rules of standing (to overcome justice seekers' limited resources); and, as noted above, ADR (to overcome obstacles associated with accessing more formal justice forae).[82] There have been calls for *further* extensions to the conceptualisation of access to justice, enabling it to move beyond resolution of (largely) individual disputes through legal frameworks. Legislative and policy reform and, at its widest margins, democratic representation, participation in social movements and civic education for respect of rights might, for instance, be incorporated within these extended parameters.[83]

2.2 Access to justice and evaluation of race discrimination law

The barriers referred to above point to access to justice as encompassing a number of elements, each of which must be in place and 'in order' to ensure that individuals are able to 'effectively protect and

[81] Other justice provider barriers include, for instance, formalistic laws and the slowness and cost of legal processes. Additional justice seeker barriers include 'economic dependency', preventing enforcement of rights against (for instance) employers or landlords, for instance. Ibid.

[82] Sackville (2004).

[83] Parker, C (1999), *Just Lawyers: Regulation and Access to Justice*, Oxford University Press, Oxford, 56 and Productivity Commission (2014), *Access to Justice Arrangements,* Inquiry Report No. 72, Australian Government, Canberra.

claim' their rights.[84] These elements are defined by the United Nations Development Programme ('UNDP') as follows:

(a) a normative framework (legislation, procedures and administrative structures);

(b) access to an appropriate forum within which claimants can initiate action;

(c) effective handling of relevant grievances;

(d) 'sufficient 'legal awareness' to ensure claimants are aware of their rights and how to enforce them'; and

(e) genuine opportunity to obtain a satisfactory remedy.[85]

Thus, access to justice includes both *outcomes* achieved and *processes* that lead to these outcomes, as well as legal frameworks underpinning both of these.[86] This is the 'framework' of access to justice applied throughout the thesis in analysis of how race discrimination law is currently working.

That these various parts are closely connected is illustrated in the following example. 'Justice' is often interpreted in a legal context as a sufficiently satisfactory (legal) outcome, which can only be attained through engagement with relevant dispute resolution processes. These processes, however, will not be seen as worth engaging with if the outcome likely to be produced as a result does not equate to 'justice', as defined by the aggrieved party.

As a further example, access to justice is described in a human rights context as an inter-play between the above elements. Commentators such as Kinley, for instance, claim that there are two basic elements of human rights. Firstly, the rights in question should be expressed in legal terms (through a normative

[84] Van de Meene and Van Rooij (2008), 6, 12. They also state that 'interventions at (only) one stage of the process are likely to be insufficient'.

[85] United Nations Development Programme (2006), *Doing Justice: How Informal Justice Systems Can Contribute,* UNDP

[86] As the United Nations Human Rights Council states, from 'a *procedural* perspective, the human right to access to justice includes impartiality in adjudication … From a substantive perspective, access to justice requires fair and just *remedies* for violations of rights' (emphasis added). UN Human Rights Council 21st session, Panel Discussion on Access to Justice for Indigenous Peoples, 18 September 2012, Palais des Nations, Geneva, 1.

framework (legislation) or judicial pronouncements, as above). Secondly, they require the 'backing of legal sanction': that is, 'provision of means by human rights are or can be enforced and redress provided for any breaches (access to an appropriate forum, effective handling of grievances, opportunity for satisfactory remedy, as above).[87]

We see this in international law, whereby signatory States to legal instruments, such as the 1965 *International Convention on the Elimination of Racial Discrimination* ('ICERD'),[88] have obligations to both establish substantive rights *and* to ensure that there are effective remedies available to those whose rights are breached, discussed in later chapters. At a domestic level, Gaze has referred to the RDA as 'revolutionary', pointing to its 'original and fundamental achievement' as its categorisation of race discrimination as 'unlawful': 'not merely unfair, but also against the law'. She states that 'although the very existence' of prohibitions against racial discrimination such as this are important law must also 'provide an effective remedy for racial discrimination wherever it occurs'.[89] This requires that race discrimination legislation must be more than symbolic. It must also be of 'instrumental' value, which requires that its intended beneficiaries are actually using it to assert their rights when breached.[90]

Clearly, problems related to Indigenous access to justice through race discrimination law cannot be identified as the entire root cause of continuing racial inequality in Indigenous communities. The

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[87] Kinley, D (1998), *Human Rights in Australian Law: Principles, Practice and Potential*, Federation Press, Sydney, 3. The importance of enforcement is highlighted by others, including Golub, who states that '[i]n many developing countries, laws benefiting the poor exist on paper but not in practice unless the poor or their allies push for the laws' enforcement'. Golub, S (2003), *Beyond Rule of Law Orthodoxy. The Legal Empowerment Alternative*, Carnegie Endowment for International Peace, Washington D C, 6.

[88] UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965

[89] Gaze (2015), 68-9. She also states that before the RDA's enactment 'you could lawfully refuse someone a job because of their race, or pay them less because of their race, or refuse to serve them in a bar or restaurant.' The RDA 'opened up the ability to use unlawfulness as a framework for claims and negotiation within workplaces and all other locations where discrimination had occurred.' Ibid, 68. There was no *common law* remedy for an individual aggrieved through of an adverse decision made because of one or more of their personal attributes, such as sex, disability, race prior to the passing of anti-discrimination law. Rees et al (2008), 17, 180.

[90] Gaze (2005).

positive contribution this law might or should be making to reduction of inequality is presently impacted, however, by problems of Indigenous access arising at various points in the legal system. Given this, a reasonable key measure of the 'success' of racial discrimination legislation might be whether Indigenous people are drawing on it to positive effect to challenge discrimination. In this singularly important respect the law does not appear to be working well for Aboriginal and Torres Strait Islander peoples.

3 Race discrimination law and indigenous access to justice

3.1 Indigenous access to civil law justice, including through race discrimination law

There has been much more said about Indigenous Australians' criminal than civil or family law access to justice issues. This is no doubt due, in large part, to valid concerns related to the hugely disproportionate rates of contact they have with the criminal justice system.[91]

A national study conducted by the researcher and her colleagues has made some contribution to addressing gaps in knowledge with respect to Indigenous civil and family law access to justice issues, including with respect to race discrimination law. As stated in Chapter 1, the ILNP has explored Indigenous civil and family law need and access to justice issues. This research found that race discrimination was a priority area of Indigenous civil law need, often left unaddressed and rarely responded to through the law. For Indigenous ILNP participants race discrimination was seen as an entrenched reality. Participants in Victoria, for example, described race discrimination as follows. '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

[91] An example of this focus is evident in the work of Change the Record, a coalition of Indigenous and non-Indigenous legal, human rights and other organisations focused on reduction of violence in Indigenous communities and Indigenous incarceration. Information on Change the Record is on their website (accessed June 2017): <https://changetherecord.org.au/about>. See recent research, however, by Senate Legal and Constitutional Affairs References Committee (SL&CARC) (2004), *Legal aid and access to justice,* Canberra; Coumarelos, C et al (2012), *Legal Australia-Wide Survey: Legal Need in Australia*, Law and Justice Foundation of NSW, Sydney; Productivity Commission (2014).

this day and age it'd be easier but it's not'.[92] Statistics drawn from ILNP questionnaires indicate that between 22.6% and 40.9% of focus group participants in the various jurisdictions had experienced problems related to discrimination. In Victoria and QLD respectively 29.6% and 31.6% of participants reported such experiences.[93] These findings on the extent of Indigenous experiences of racism and race discrimination are supported by those of other studies.[94]

Also identified by the ILNP was that the vast majority of those experiencing discrimination had not accessed legal advice or help, lodged a complaint with anti-discrimination bodies or otherwise taken formal action in response. Only 11.6% and 15.6% of the relevant participants in Victoria and QLD had done so, respectively.[95] Indigenous people appear very unlikely to defend or assert their rights in *all* civil and family law areas: whether being evicted from their home, facing legal action for an unpaid debt or encountering race discrimination.

ILNP findings on poor Indigenous access to civil and family law justice are again supported by the work of other researchers.[96] Publicly available statistics measuring Indigenous complaints of race

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[92] Schwartz et al (2013), 92-3. See also discussion in Allison et al (2013a), Allison (2014b).

[93] Schwartz et al (2013), Cunneen et al (2014). The percentage of participants experiencing discrimination in NSW, NT and WA were 28.1%, 22.6% and 40.9%, respectively. Allison et al (2012), Allison et al (2014a), Cunneen and Schwartz (2008).

[94] By way of example, the ABS regularly collects data from Indigenous people for the National Aboriginal and Torres Strait Islander Social Survey. Data collected in 2008 indicated that of those Aboriginal and Torres Strait Islander people surveyed 27% had experienced racial discrimination in the last 12 months, most commonly in public (11%), by police, security personnel or courts of law (11%), and at work or when applying for work (8%). ABS (2010), *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples*, cat no. 4704.0, Canberra. In 2015, this same study reported that around one third (33%) of Indigenous respondents had experienced racism in the last 12 months, an increase from previous years. Hearing racial comments or jokes was identified as most prevalent. One in seven (14%) respondents had been called names, teased or sworn at. ABS (2015), *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples*, cat no. 4714.0, Canberra

[95] Cunneen et al (2014), Schwartz et al (2013). The percentages for WA and NSW were 17.1% and 16.3%, respectively, and 21.4% in the NT. Allison et al (2012), Allison et al (2014a), Cunneen and Schwartz (2008).

[96] The Senate Legal and Constitutional Affairs References Committee, for instance, described access to civil law justice, particularly in remote communities, as 'so inadequate that remote Indigenous people cannot be said to have full civil rights.' SL&CARC (2014), para. 5.120.

discrimination also confirm that relatively small numbers of Aboriginal and Torres Strait Islander peoples use the anti-discrimination complaints process — as noted, a key site of access to justice for those experiencing discrimination.[97] Complaint agency statistics are discussed in detail in Chapter 6. That Indigenous people are not using anti-discrimination complaint mechanisms to respond to discrimination to the degree one might expect, given the extent to which they are impacted by this issue, is identified by commentators as perhaps the 'greatest failure' of anti-discrimination laws.[98] It is certainly indicative of problems of access to justice for Indigenous people in this area.[99]

3.2 Barriers to Indigenous access to justice through race discrimination law

In large part, conceptualisations of access to justice have largely ignored the circumstances and perspectives of Indigenous people. They are fairly generic in nature, with scant attention given to what effective access to justice might look like in an Indigenous-specific context. For the most part, most critical analysis of these conceptualisations also fails to identify or to seek to address barriers inhibiting effective access to justice applicable to Aboriginal people, in particular.

Attempts have been made, again quite recently and including through the ILNP, to understand why Indigenous access to civil law justice is so problematic. Of note, the ILNP had some focus on identifying barriers inhibiting Indigenous entry into and engagement with the *earliest* stages of civil and family law dispute resolution: for instance, as initiation of a discrimination complaint with anti-discrimination agencies. This focus is justified because, as Galanter has suggested, 'so much of what could be

[97] See discussion in Allison (2014b), 9-10, and in Chapter 6 below.

[98] Rees et al (2008), 11.

[99] Of note, the Law and Justice Foundation has identified, too, that Indigenous people are less likely than non-Indigenous people to take any action with respect to civil law issues (50.9% of Indigenous people compared with 32% of non-Indigenous people). They are less likely to seek legal help for such issues (seeking help for 36.8% of legal events experienced) compared with non-Indigenous persons (seeking help for 52.1% of legal events experienced). This same study indicates that everyone is least likely to do anything about a human rights issue compared to other legal issues (63.6% of people who had experienced such an event would not do anything). Law and Justice Foundation (NSW) (2006), *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, Sydney NSW.

producing unequal access to justice happens before people arrive at a lawyer's office or courthouse. If there are processes that lead people to never see themselves as potential litigants, (for example), access to the courts is immaterial.'[100]

Certainly, the ILNP revealed that most Aboriginal and Torres Strait Islander peoples do not recognise their right to access civil law remedies and processes when discrimination occurs. In fact, they generally do not identify civil law problems as legal problems at all. Other barriers to access identified by the ILNP as specific to the area of discrimination include a certain level of resignation towards its occurrence, along with a perception that there is little point in raising allegations as they will not be believed and/or are difficult to prove.[101] As this suggests, it is not usually a question, therefore, of Indigenous people utilising legal processes but not attaining satisfactory remedies. They rarely engage with these processes.

Barriers identified by the ILNP as impeding Indigenous access to civil law justice in general, but also as applicable to discrimination, relate to poverty and disadvantage — issues that impact on many marginalised groups. These barriers may, however, be exacerbated for Aboriginal and Torres Strait Islander peoples because of their higher levels of socio-economic disadvantage.[102] As examples of this, poor literacy (often associated with the latter disadvantage) impacts on knowledge of rights and engagement with dispute resolution processes. Not having sufficient funds to pay for legal assistance outside of subsidised legal services impedes access to legal advice and representation. Geography (remoteness) is a further issue, affecting access to lawyers and other organisations through which information on rights can be sourced, as well as to forums through which disputes are resolved. As will be discussed later in the thesis, Aboriginal and Torres Strait Islander peoples experience poverty,

[100] Galanter, M (1974), 'Why the haves come out ahead: Speculations on the limits of legal change', 9 *Law and Society* 95.

[101] Allison et al (2013a), Allison (2014b).

[102] Allison, F, Cunneen, C and Schwartz, M, 'The Civil and Family Law Needs of Indigenous People 40 Years After Sackville: Findings of the Indigenous Legal Needs Project' in Durbach, A, Edgeworth, B and Sentas, V (eds) (2017), *Law and Poverty in Australia: 40 Years after the Poverty Commission*, Federation Press.

illiteracy and geographical remoteness to a greater extent than non-Indigenous people: rendering these issues especially problematic for them.

Also identified through analysis of ILNP data, however, are the impacts on Indigenous access to justice of both Indigenous *culture and colonisation* — rarely accounted for in strategies designed to improve civil law access to justice.[103] As an example, anti-discrimination law mandates that aggrieved individuals take the first step in enforcing rights by way of initiation of a complaint. This is quite different to what occurs with respect to criminal law matters, into which Indigenous people are pulled against their will.[104] Initiating legal action is difficult for many potential complainants, given that those encountering discrimination are likely to be comparatively disempowered due to race, disability and so on and are therefore likely to struggle to assert their rights. It may, however, be especially (or 'differently') difficult for Indigenous people because of their experience of the law as a mechanism of colonial oppression, rather than as an avenue through which to seek protection or some other benefit. This deters Aboriginal and Torres Strait Islander people from engaging with legal processes.

As this illustrates, to achieve enhanced Indigenous access to justice in this area there must be closer examination of Indigenous-specific experiences of barriers likely to arise for other similarly disenfranchised groups, and of barriers that are particular to Indigenous people. Nielsen also correctly points out that there has been more investigation of barriers to accessing justice through gender or disability discrimination law than race discrimination law. This she identifies as problematic as whilst there are 'parallels' between the different areas of discrimination law, there are also important points of difference.[105] Required, therefore, is detailed analysis of Indigenous-specific, race discrimination related barriers to access.

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[103] Ibid.

[104] This also occurs with some civil law issues, such as child protection. Currie distinguishes the 'agency' involved in engaging with civil and criminal law processes as follows. 'Unlike being charged with a criminal offence, civil justice problems may be dealt with in a variety of ways. One can attempt to solve the problem on his or her own, one can seek advice and assistance from a variety of sources other than people with legal training and having varying levels of competence, or one can ignore the problem at least for a while.' Currie (2009), 3.

[105] Nielsen (2008), 1.

4 'Justice' responses outside of legal institutions

To take an important sideways step, access to legal dispute resolution processes will never be the complete solution to the problem of race discrimination, for Indigenous people or for any other group. Firstly, discrimination is *in certain instances and in part* legal in nature, but it is also a social problem requiring responses that sit outside of the law. Secondly, legal responses are reactive, generally available to (an) aggrieved person(s) once discrimination has occurred. Non-legal strategies are useful as they may help to prevent the occurrence of discrimination.

Additionally, to hold the law up as 'the one and only answer' to discrimination also under-estimates the capacity and indeed the preference of some who seek 'justice' to use non-legal responses to problems such as discrimination, including by way of direct confrontation of an alleged perpetrator or issue. It is not expected that *every* person harmed by racial discrimination will initiate legal action. In fact, most people wanting redress and/or recognition of their rights will not seek out justice in this form. They will either avoid a dispute, ignore a problem *or* may address disputes and problems without contact with the legal system or lawyers through what has been termed 'everyday justice'.[106] This involves individuals directly responding to an issue: by, for instance, returning faulty goods to a store, speaking with a school principal about bullying of their child and/or confronting a racist neighbour. Individuals relying on everyday justice may well achieve an outcome they consider to be quite satisfactory — more satisfactory perhaps than might be the case with outcomes of legal dispute resolution.

As noted above, there has been some push to expand definitions of access to justice to encompass, for instance, law reform, social movements and rights education. Everyday justice is identified as fitting within an appropriately expanded definition of access to justice. It may still be framed by legal rights, but does not have to involve recourse to legal institutions, contrary to usual conceptualisations of access to justice. Currie refers to 'justice' experiences that occur in everyday life (rather than in courts). Civil

[106] Galanter, M (1981), 'Justice in Many Rooms: Court, Private Ordering and Indigenous Law', 13(19) *Journal of Legal Pluralism and Unofficial Law* 1.

law, he claims, underpins 'rights and obligations in many areas of life'.[107] It is 'designed to protect people against the unscrupulous actions of others, and it allows people to pursue a just claim.' Currie states that these 'defining features of civil law', however, 'do not take effect only at the court house door; they operate in all the corners and crevices of daily life where activities regulated by civil laws take place.' Civil law 'justice', he states, is a 'thread that runs through *all* social institutions, embodying very fundamental social values of fairness and equality of treatment.[108] Moreover, responses outside of the law to issues arising in daily life can be used to the same or perhaps sometimes even better effect than legal action. 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'.[109] Justice means different things to different people, and it is not necessarily about 'having one's day in court'.[110]

While everyday justice is a good option the degree, however, to which (especially) marginalised persons are using it, and using it to positive effect, is unclear. It is likely, for a start, to be impacted by the same barriers that inhibit access to formal justice, as Currie suggests, with reference to the Canadian context.

> [Civil] justice problems are pervasive in the lives of Canadians. People can and do choose many paths to justice, with varying degrees of success. Many people do, indeed, experience a problem, resolve it satisfactorily largely on the strength of their own resources and get on with life. However, many people fail to act to resolve their justiciable problems, mainly because of

[107] Currie (2009), 3. As examples of this '[e]mployment, consumer transactions, debt and credit, family relations, managing the financial affairs and the health care of the elderly and many other areas of social and commercial activity are regulated by civil laws', according to Currie. Ibid, 83.

[108] Ibid.

[109] Galanter (1981), 4.

[110] More traditional definitions of access to justice, as noted above, presume that the rule of law will provide 'an effective vehicle to achieving just or fair outcomes'. Law and Justice Foundation (2003), *Background Paper: Understanding access to justice and legal needs*, Sydney NSW, 7. But as Van de Meene and Van Rooij state too, 'statistics counting how many people access a court or complaint handing agency when encountering discrimination … does not necessarily tell us anything' about whether 'people's concerns have been addressed' or 'inequalities … reduced' — in other words, that justice has been 'served'. Van de Meene and Van Rooij (2008), 23.

> common barriers to access to justice; not knowing that something could be done, not knowing their rights; and not knowing where to find assistance among the most frequent of them.[111]

As the ILNP has revealed, and as detailed in later chapters, Indigenous people are unlikely to be using the law to address race discrimination. This and other research suggests that Indigenous people are avoiding the issue of discrimination altogether, may want to challenge it in certain instances but are not doing so, and/or are confronting it directly (but rarely) without recourse to the law (through something like everyday justice).[112] Whilst they may be satisfactorily responding to disputes related to discrimination using non-legal approaches, to some degree, problems of Indigenous access to legal remedies are still worthy of attention, as discussed in the following section, wherein it is argued that it is beneficial and indeed essential that Aboriginal and Torres Strait Islander peoples have the option of taking legal action, if they so choose. Additionally, considering ways to address problems of access to legal remedies should help reduce problems inhibiting use of non-legal responses, given that the problems in question may well be similar or the same.

5 Access to justice as a right and a means to enhance quality of life

All persons, including Indigenous people, have the right to access justice, including in civil law contexts. This right is identified as important by and to Indigenous people globally within the UNDRIP. Article 40 of the UNDRIP indicates as follows.

> 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

[111] Currie (2009), 88. 'Rather than turning to courts or lawyers, people are much more likely to turn elsewhere for help or to attempt to resolve problems on their own. People also often do nothing about problems that they nevertheless recognize and consider serious', according to Sandefur. Sandefur, R (2015), 'Access to justice: Classical approaches and new directions', 12 *Sociology of Crime, Law and Deviance* ix, x.

[112] See, for instance, Goodstone, A and Ranald, P (2001), *'Discrimination …. Have you got all day?' Indigenous women, discrimination and complaints processes in NSW*, Public Interest Advocacy Centre and Wirringa Baiya Aboriginal Women's Legal Centre, Sydney, NSW.

> 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.

Significantly for the thesis, one of the rights identified by the UNDRIP as protected through effective implementation of Article 40 is that of non-discrimination, enshrined in Article 2. The right to non-discrimination applies to the exercise of all other rights, including a right to access justice, confirming that equality is a key component of access to justice, as noted above. Article 2 of UNDRIP reads as follows.

> Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Closer to home, National Congress of Australia's First Peoples, the peak national representative body for Aboriginal and Torres Strait Islander peoples, claims that it is vitally important to 'close the gap' between Indigenous and non-Indigenous access to justice so as 'to ensure the greatest possible quality of life' for Aboriginal and Torres Strait Islander peoples.[113] In terms of access to justice with respect to race discrimination in particular, Aboriginal academic McGlade also states that 'Aboriginal people know that Australia is a racist country, and we have a right to [legal] mechanisms which offer *real and effective redress* against discrimination'.[114]

Access to justice is directly linked to enhanced quality of life for Indigenous people by National Congress, as well as to community and individual wellbeing. Quality of life is defined by the National Aboriginal Community Controlled Health Organisation ('NACCHO') as 'whole-of-community self-

[113] National Congress of Australia's First Peoples (Congress), 'Access to Justice in Australia: Aboriginal and Torres Strait Islander Peoples' Experience', in Littlechild, W and Stamatopolou, E (2014), *Indigenous people's access to justice, including truth and reconciliation processes*, Institute for the Study of Human Rights, Colombia University, 45, 51.

[114] McGlade, H (1997), 'Reviewing Racism: HREOC and the Racial Discrimination Act 1975', 4(4) *Indigenous Law Bulletin* 12 (emphasis added).

determination and individual spiritual, cultural, physical, social and emotional wellbeing.' Positive wellbeing in this context is achieved through individuals being able 'to achieve their full potential as a human being'.[115] Race discrimination has deleterious impacts on Indigenous wellbeing across multiple areas, with health and education two examples of this. Researchers have identified the serious physical and psychological health consequences of racism on Aboriginal or Torres Strait Islander people as including depression, stress, suicide, and increased drinking and drug taking.[116] Institutional racism and more directly discriminatory behaviour within health settings also lead to poor Indigenous health outcomes. As health services, for instance, have generally been developed to meet the needs of non-Aboriginal health consumers they may fail to respond to Aboriginal and Torres Strait Islander culture, including language differences and/or the type of care they expect or require.[117] Racism within schools can deter Indigenous children from attending classes and affects their capacity to learn, depriving them

[115] National Aboriginal Community Controlled Health Organisations (NACCHO) (2016), *Submission to Inquiry into Freedom of Speech* ACT.

[116] A 2005 study indicated that experiences of racism by young people in WA doubled their risk of alcohol and substance use, emotional and behavioural problems, and suicidal thoughts, for instance. Zubrick SR et al (2005), *Western Australian Aboriginal Child Health Survey: Social and Emotional Wellbeing of Aboriginal Children and Young People*, Curtin University of Technology and Telethon Institute for Child Health Research, Perth WA. See also Paradies, Y, Harris, R and Anderson, I (2008), *The impact of racism on Indigenous health in Australia and Aotearoa: Towards a Research Agenda*, Discussion Paper No. 4, Cooperative Research Centre for Aboriginal Health, Darwin NT; Priest, N et al (2011), 'Racism and health among urban Aboriginal young people' 11 *BMC Public Health* 568; Australian Institute of Health and Welfare (2009), *Measuring the Social and Emotional Wellbeing of Aboriginal and Torres Strait Islander Peoples*, cat. no. IHW 24; Ferdinand, A, Paradies, Y and Kelaher, M (2012), *Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities: LEAD Experiences of Racism Survey*, for Vic Health, Lowitja Institute et al., Melbourne VIC.

[117] This may lead directly to physical harm where, for instance, Indigenous people do not understand what medication is being provided to them and how to take it due to language differences, or even what surgical procedure they are 'consenting' to. Henry, B, Houston, S and Mooney, G (2004), 'Institutional Racism in Australian Healthcare: A Plea for Decency', 180(10) *Medical Journal of Australia*, 517. Access to Indigenous health professionals is also restricted, and on a significant number of remote Indigenous communities' access to broad-spectrum health services (including mental health services) is severely limited. Related to this, expenditure on Indigenous health care is also said to be far from adequate, given the additional and particular health needs of Indigenous communities. Hunter, E (2007), 'Disadvantage and discontent: A review of issues relevant to the mental health of rural/remote Indigenous Australians', 15 *Australian Journal of Rural Health* 88.

of an education and undermining their capacity to reach their full potential (to use terminology used by NACCHO in its definition of 'wellbeing').[118]

Poor health, educational and other socio-economic outcomes attributable to racism are elements of social exclusion (or 'inequality'). Social exclusion is about poverty and material disadvantage, as well as disenfranchisement.[119] A socially excluded person or group will have reduced capacity to participate in society, including due to restricted access to opportunities or essentials (such as health services and education, as above). They will also be affected, however, by 'non-material aspects' of their exclusion, such as 'stigma and denial of rights'. Social inclusion, conversely, is defined as 'being able to participate fully in social and economic life — by getting a good education, receiving an adequate income, having a job and being closely connected to family, friends and the community.' [120]

These definitions align with NACCHO's definition of 'quality of life', which Congress asserts can be improved in an Indigenous context through access to justice. This may be explained as follows. Those who are socially excluded, as noted, do not have equal access to resources (opportunities or essentials) that facilitate social inclusion, which includes a strong civic and political voice, but also adequate access to justice.[121] As a direct consequence of their exclusion marginalised groups, therefore, are more likely

[118] Bodkins-Andrews' study of NSW Aboriginal high-schoolers indicated that experiences of racism in high school increased the likelihood of leaving school, of poor self-esteem in terms of learning capability and of lower grades. Bodkin-Andrews, G, and Craven, R (2014), 'Bubalamai Bawa Gumada (Healing the Wounds of the Heart): The search for resiliency against racism for Aboriginal Australian students', Quality and Equity: What does Research Tell Us - Conference Proceedings, Australian Council for Educational Research, Camberwell, Victoria, 49-58.

[119] Others have also talked about the link between material disadvantage and social and personal disenfranchisement. Poverty entails lack of income, but also incorporates physical vulnerability and powerlessness within existing political and social structures, according to Van de Meene and Van Rooj (2008), 9-10, citing Bernstein in Anderson, M (2003), *Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDCs*, Brighton, Institute of Development Studies, UK. See also discussion in Diemer, M and Ortega, L (2010), 'Social Inclusion and Critical Consciousness in Australia' 19(1) *Australian Journal of Career Development* 13.

[120] These definitions or descriptions are drawn from the Brotherhood of St Laurence website (accessed June 2018), available at: <https://www.bsl.org.au/research/social-exclusion-monitor/what-is-social-exclusion/ >

[121] See Diemer and Ortega (2010), 13-14.

to experience problems such as compromised access to health services and education — *but also* to not be able to challenge these problems through the law.[122] Being able to access justice increases one's capacity to use the law to tackle the latter types of problems, and thereby to lift oneself out of social exclusion.

To draw this point out further, we have seen that denial of rights sits alongside material disadvantage within social exclusion. As such, poor educational or health outcomes may at some point involve a breach of civil law, including (both direct and indirect) discrimination law. Though there may be a potential legal remedy in this situation, inhibited access to justice (arising due to social exclusion) makes it difficult to assert any relevant rights, contributing to ongoing marginalisation. If the legal element in question were to be dealt with more effectively, including through effective access to justice, it could be resolved — with increased levels of social inclusion over time the likely outcome.[123]

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[122] Sackville's 1975 *Report on Law and Poverty* (the 'Sackville Report') describes social disadvantage as involving deprivation of basic necessities, denial of access to life opportunities, as above, and a vulnerability to experiencing 'misfortunes' and exploitation. He details how the poor and marginalised are more likely to experience particular types of legal problems, including criminalisation and discrimination, and common legal problems in specific ways. He also claims that marginalisation is evident in poor levels of access to justice, reducing individual's capacity to turn to the law to 'influence decisions and processes that affect their daily lives' and often underpin the latter reduced opportunities, misfortunes and exploitation, trapping them within a perpetual cycle of disadvantage. Australian Commission of Inquiry into Poverty (1975), *Law and Poverty in Australia (Second Main Report)*, AGPS Canberra, 1-2.

[123] Bielefeld and Altman identify discrepancies between Indigenous and non-Indigenous outcomes as due, in part, to racial discrimination. Bielefeld, S and Altman, J (2015) 'Australia's First People — still struggling for protection against discrimination', in AHRC (2015b), 206. Currie also describes potentially 'justiciable' civil law problems as 'very frequently aspects of, and one in the same with, the problems of everyday life. In a way, the ubiquitous quality of civil justice problems has a tendency to obscure [legal issues, which are] … submerged in the normal activities of people's daily lives.' Currie, A (2009), *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians*, Research and Statistics Division, Department of Justice Canada, 2. Sandefur points out too that 'often very mundane problems — with neighbors, merchants, government agencies, employers, or children's schools — can cause serious and wide-reaching consequences if not resolved, leading to additional justice problems, to the breakdown of relationships, to loss of employment or housing … and to impaired physical and mental health … Though these problems have legal aspects, people often do not think of them as legal, and they show an enormous creativity in their search for solutions.' Sandefur (2015), x.

As such, access to justice is likely to make an important contribution to breaking potentially perpetual cycles of social exclusion impacting on individuals and whole communities, including Indigenous communities.[124] Given the extent of Indigenous social exclusion in Australia, improved access to justice may, in fact, be especially important in an Indigenous context. Recent research indicates that 44% of Indigenous Australians are 'socially excluded', compared with only 22% of all Australians.[125]

As a final note, we often speak about 'justice' for Indigenous people in a criminal law context, given the high rates of Indigenous over-representation in the criminal justice system. Breaches of discrimination law, however, *also* arguably impact disproportionately on Indigenous people, and when left unaddressed lead to and/or underpin many of the drivers that funnel Indigenous people into the criminal justice system.[126] Identified above is that access to justice is likely to help halt cycles of social exclusion. Related to this, cycles of imprisonment are also likely to be addressed by improving Indigenous access to justice with respect to discrimination.

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[124] This is discussed in ILNP reports and submissions. See, for instance, Allison et al (2014a), 243ff. The Organisation for Economic Cooperation and Development (OECD) comments on this as follows. 'Access to justice is a vital part of the UNDP mandate to reduce poverty and strengthen democratic governance. Within the broad context of justice reform, UNDP's specific role lies in supporting justice and related systems *so that they work for those who are poor and disadvantaged*'. Organisation for Economic Cooperation and Development, *Access to justice practice note*: 9/3/2004.

[125] Social exclusion is categorised as 'marginal', 'deep' or 'very deep' by the Brotherhood of St Laurence. In 2015 nearly one in five Indigenous Australians (18%) experienced 'deep social exclusion', compared with 4.4% of all Australians. A range of 'indicators of social exclusion', including levels of 'material resources, employment, education and skills, health and disability, social connection, community and personal safety', are used to calculate these percentages. See Brotherhood of St Laurence site for further details (accessed June 2018): <https://www.bsl.org.au/research/social-exclusion-monitor/measuring-social-exclusion/depth-of-social-exclusion/#c6976>; and <https://www.bsl.org.au/research/social-exclusion-monitor/who-experiences-social-exclusion/indigenous-background/>

[126] Cunneen, C and Schwartz, M (2009a), 'From Crisis to Crime: The Escalation of Civil and Family Law Issues to Criminal Matters in Aboriginal Communities', 7(15) *Indigenous Law Bulletin* 18.

6 Conclusion

This chapter has considered long-standing definitions of the concept of access to justice. It has described an access to justice framework that positions legal processes, outcomes and frameworks as the tools or avenues through which 'justice' is to be attained. The next chapter describes legal rights, processes and outcomes that Indigenous people aggrieved by breaches of race discrimination law may engage with in accessing justice, according to this traditional definition.

Chapter 2 introduces the idea that we must expand our current conceptualisations of access to justice beyond legal dispute resolution through legal institutions, with everyday justice provided as an example of appropriate expansion. The chapter also suggests that Indigenous people are significantly impacted by race discrimination decades after introduction of race discrimination law. This is attributed to problems of access to justice impacting on Indigenous people. These problems may be addressed, it is suggested, through a further useful expansion of access to justice incorporating Indigenous perspectives of how the concept ought to be defined and what will render it effective for Indigenous people.

Access to justice is identified too as a human right to which all are entitled, and as essential to the enforcement of other rights (including to non-discrimination). The chapter asserts that though currently problematic in an Aboriginal and Torres Strait Islander context, access to justice does have value to Indigenous people. It is identified as important to Indigenous peoples both globally (through the UNDRIP) and in Australia. Aboriginal and Torres Strait Islander community leaders describe it as essential to ensuring quality of life for Aboriginal and Torres Strait Islander peoples. The chapter concludes by stating that being able to assert and defend legal rights through legal processes can increase social inclusion for socially excluded groups - identified as likely to be of particular benefit to Indigenous people, given their high levels of social exclusion.

CHAPTER 3: ACCESS TO JUSTICE AND RACIAL DISCRIMINATION LAW IN AUSTRALIA

As detailed in Chapter 2, access to justice is defined as processes of dispute resolution, legal outcomes delivered by these processes and associated legal frameworks. Chapter 3 provides further detail about each of these aspects of access to justice and, in particular, their application in a race discrimination law context: identifying and analysing problems of access to justice issues within race discrimination related court and tribunal decision-making and legislation.

The chapter starts with discussion of the stated objectives of race discrimination law. Identifying what the law originally held itself out as likely to achieve is useful for evaluation of its effectiveness, undertaken later in the thesis. Anti-discrimination ADR, court and tribunal processes are then described, as are key legislative provisions, including those that define race discrimination. A selection of Indigenous focussed case law demonstrating how these provisions have been interpreted to date is also set out.

The chapter then turns to consider three significant access to justice issues arising within jurisprudence and legislation in this area. The first of these issues pertains to the reliance we place on an individual complaints-based model for enforcement of anti-discrimination law. The second issue is concerned with limitations in our legal definitions of discrimination and the impact these limitations have on the law's capacity to address systemic issues, including socio-economic disadvantage. The third issue relates to institutional racism within the law. It is suggested that barriers to accessing justice arising in each of these areas, to a large degree, are likely to apply to many aggrieved individuals seeking to enforce their rights. The chapter considers, however, their particular application to Aboriginal and Torres Strait Islander peoples.

As identified in Chapter 2, all elements of access to justice are interconnected. The focus of the thesis on complaint handling processes was referred to earlier in the thesis. However, access to justice issues emerging in the complaint handling system cannot be considered in isolation from those found within jurisprudence and legislation. There are similarities between issues arising at the various points of

access to justice. Those emerging in the formal justice system discussed below also emerge within ADR and are considered in this context in Chapter 7. Interconnections are evident in other ways. Failure to improve access at the point of entry into the complaints process impedes access to courts, as an example. Conversely, legal precedent established by courts with respect to race discrimination law may indicate to a potential complainant that their case has little merit, deterring them from lodging a complaint or leading to termination of a complaint by the agency with which it has been lodged it. Additionally, during ADR parties will be bargaining 'in the shadow of the law', and as part of this, applying legislation and case law. When the latter have been restrictively interpreted positive resolution of a dispute for a complainant is less likely.

Jurisprudential and legislative barriers are also interdependent in an access to justice context. As the case law below indicates, courts and tribunals may narrowly interpret legislative provisions, for instance, with negative implications for human rights protection. Gaze points, for example, to displays by the judiciary of a 'limited understanding of equality and discrimination'. She claims that often judicial decision making in this area reflects an assumption that anti-discrimination law 'must be interpreted by impartial judges according to the usual 'neutral' principles of statutory interpretation.'[127] Contributing to this, however, is the often highly technical and formal nature of race discrimination

[127] Gaze, B (2002), 'Context and Interpretation in Anti-Discrimination Law', 26 *Melbourne University Law Review* 325, 325. Problems with the way courts and tribunals have interpreted the law are partly attributed to the fact that there has been little real judicial expertise developed in the area of discrimination, Gaze suggests. She notes too that following the High Court ruling in 2000 that the Human Rights and Equal Opportunity Commission (HREOC) could not determine disputes related to discrimination (because it was a non-judicial body) all federal discrimination litigation was removed to federal courts (see *Brandy v HREOC* (1995) 183 CLR 245). This meant 'normal court costs rules would then apply, together with greatly increased formality and the loss of specialist expertise in anti-discrimination law'. Gaze (2015), 74. Similar comments have been made about State and Territory courts and tribunals. Writing at the time of enactment of the RDA Kelsey claims, for instance, as follows. 'Further, conferring jurisdiction on the courts of the States and Territories inhibits the development of consistency and expertise in an area in which it is essential that there be sensitivity to the underlying social purpose of the legislation and the subtleties inherent in the manifestations of prejudice.' Kelsey, B (1975), 'A Radical Approach to the Elimination of racial Discrimination', 1 *University of New South Wales Law Journal* 56, 70.

provisions, impacting on judicial interpretation and/or in other ways affecting implementation of law in this area.

These interconnections confirm a point raised earlier in the thesis: that to ensure effective access to justice each and all of its various components must be working well (that is, be free of barriers). We turn now to consider barriers to access related to legislation and jurisprudence.

1 Stated objectives of the law

The objectives of any piece of legislation are generally found within its object clauses or similar. The latter identify the original expectations of legislators and parliamentarians for the Act in question, as well as being useful to courts and tribunals in their interpretation of the provisions it contains. Law may also be 'held to account' through these objectives. The extent to which race discrimination law is achieving its intended goals or outcomes is a key measure of its effectiveness.[128]

Academic and other commentators have highlighted that Australian discrimination law says little about its objectives.[129] What *is* clear according to commentators, however, is that 'much responsibility for determining significant issues of social policy' is delegated by anti-discrimination legislation to the judiciary. Problematically, however, the legislation also provides little guidance as to how it ought to be interpreted by courts and tribunals, which also appear reluctant at times to take on the latter responsibility, often deferring to parliamentary opinion — a point returned to below.[130]

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[128] As Gaze states '[t]he effectiveness of the legislation in achieving its aims may depend on identifying exactly what those aims are in order to guide its interpretation and application. It may also be necessary to assess how capable the legislative scheme is of delivering them.' Gaze (2002), 326.

[129] The Commonwealth's RDA, for instance, simply refers to the ICERD and to the Commonwealth Government's Constitutional powers to pass the legislation, including the external affairs power. See discussion in Rees et al (2008), 17, 33ff. Rees et al also state that the RDA is closely modelled on the ICERD throughout, using the 'language of the broad, aspirational kind which is commonly found in international human rights instruments, but rarely in domestic legislation'. This was apparently done, in part, to ensure it had the greatest chance of surviving challenges to its constitutional validity. Ibid, 190.

[130] Ibid, 17.

Gaze identifies within discrimination laws frequently repeated 'motherhood statements' rather than objectives. These highlight 'a commitment to equality and elimination of discrimination'.[131] She sees laws in this area as generally having two main aims: 1] to eliminate '*as far as possible*' discrimination against persons 'on the grounds covered by the laws' and 2] 'to promote recognition and acceptance within the community of equality.'[132]

By way of example, the objectives of Section 3 of the *Equal Opportunity Act* 1984 ('EOA') (VIC) are 'to promote recognition and acceptance of everyone's right to equality of opportunity'; 'to eliminate, as far as possible, discrimination against people by prohibiting discrimination on the basis of various attributes'; and 'to provide redress for people who have been discriminated against.'[133] The *Anti-Discrimination Act* ('ADA') in QLD also states in its Preamble that Parliament recognises the need to ensure that 'determinations of unlawful conduct are enforceable in the courts of law' and that 'everyone should be equal before and under the law and have the right to equal protection and equal benefit of the law without discrimination'. Section 6 of this same Act identifies one of its purposes as being to 'promote equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity'. This is to be achieved by 'prohibiting discrimination that is on a ground, of a type and in an area of activity as specified in the relevant parts of the Act', by 'allowing a complaint to be made under the Act against a person who has unlawfully discriminated' and by 'using the agencies and procedures established by the Act to deal with the complaint'.

[131] Gaze adds '… without addressing the harder issue of to what degree this commitment is to be enforced'. Gaze (2002), 330.

[132] Ibid (emphasis added).

[133] As a further example, Section 3 of the EOA (WA) states an intention to eliminate, 'so far as is possible' discrimination and sexual/racial harassment, 'to promote recognition and acceptance within the community' of the 'equality of men and women', of 'persons of all races' and of 'all persons regardless of their sexual orientation, religious or political convictions or their impairments or ages'.

In summary, the objectives of anti-discrimination law might be defined broadly as:

(a) the elimination or reduction of discrimination, though the inherent limitations in what the law might achieve in this regard are expressly acknowledged; and

(b) working to ensure that society embraces and advances the concept of equality.

Also made clear is that only certain types of discrimination are prohibited by the law, and that *equal access to dispute resolution procedures* is likely to be essential to achievement of the latter objectives.

Of note, none of the relevant clauses or other introductory provisions make specific reference to Aboriginal or Torres Strait Islander people. Parliamentary speeches made at the time of introduction of the RDA, however, clearly indicated an intention that racial discrimination law would address the particular needs and circumstances of Indigenous Australians. This is discussed in detail in Chapter 4.

We turn now to consider anti-discrimination dispute resolution procedures and legislative prohibition of discrimination.

2 Processes of dispute resolution

2.1 The role of complaint handling agencies

As discussed, all of the relevant laws, though differing in more specific detail, provide mechanisms through which individuals are able to seek redress when discriminated against.

Other than in Victoria, a complaint *must* be lodged with an anti-discrimination complaint handling agency initially in order to commence legal action. The agencies' complaint handling processes are fairly uniform, providing that an individual may lodge a complaint alleging a breach of anti-discrimination law.[134] Most jurisdictions require that the complainant must be personally affected or

[134] See, for instance, s. 46P(2)(a)(i) AHRCA (CTH), s. 87A(1)(a)(i) ADA (NSW) and s. 113 EOA (VIC). In most jurisdictions two or more persons can lodge a joint individual complaint. See s. 46P(2)(b)(i) AHRCA, for example.

'aggrieved' by the alleged unlawful discrimination.[135] Representative complaints can also be lodged, involving a person or organisation initiating a complaint on behalf of a class of aggrieved persons against the same respondent — though this is not, apparently, a common occurrence.[136] There is no fee for lodgement of a complaint, but all complaints must be made in writing.[137]

A certain minimum content must be included in a complaint to render it legally valid, generally requiring sufficient detail about allegations raised and identification of a named respondent.[138] Complaints must also be lodged within a specified time period after the unlawful discrimination is alleged to have occurred (usually within 12 months, but within 6 months federally).[139] Complainants may have a choice in terms of the jurisdiction (federal or State/Territory) in which to initiate action. Issues such as coverage of the legislation in question, remedies available, and potential for delay may have some bearing on this decision.[140]

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[135] NSW and WA have open standing provisions, meaning that any person may lodge a complaint, whether personally aggrieved or not. See s. 46P(2)(a) AHRCA (CTH), compared with s. 87A(1) ADA (NSW) and s. 83(1) EOA (WA).

[136] See, for example, s. 46P2(a)(ii) AHRCA (CTH) and s. 114 EOA (VIC). Rees et al suggest that these provisions have been little used due to their complexity and the lesser remedies they provide. Rees et al (2008), 734. In some jurisdictions an agent (such as a solicitor) can also lodge a complaint on another's behalf and parents on behalf of a child. A guardian or interested person can lodge on behalf of a person prevented from doing so due to disability. In some jurisdictions the relevant minister or agency can initiate a complaint, but these provisions are also rarely used. See, for instance, s. 95 ADA (NSW), s. 155 ADA (QLD), and s. 93A EOA (SA).

[137] See, for instance, s. 46P(a) AHRCA, s. 89(1) ADA (NSW) and s. 44 *Human Rights Commission Act* (HRCA) (ACT).

[138] This is sometimes but not always stipulated in the relevant legislation. Agencies have, on occasion, been ordered to take no further action in relation to a complaint interpreted by courts/tribunals as invalid on one or both of these bases. See, for instance, *Nestle Australia Ltd v Equal Opportunity Board* [1990] VR 805 and *R v Sex Discrimination Board: Ex parte Corporation of the City of West Torrens* (1981) 27 SASR 58. All jurisdictions should provide at least some assistance with drafting of a complaint, where required, and they are, in fact, in some jurisdictions directed by law to do so. See, for instance, s. 46P(4) AHRCA and s. 44(2) HRCA.

[139] This is the case in all jurisdictions other than the ACT, where the time limit is 2 years. These time limits are shorter than those that apply to commencement of other types of civil law actions (relating to tort or contracts, for instance). Rees (2008), 745. There is some discretion, however, for agencies to accept out of time complaints.

[140] Other relevant issues include the onus of proof, risk of costs and appeal rights. Rees et al (2008), 799.

Upon lodgement, a complaint will be accepted, declined or 'terminated' by the agency. Of note, complainants may also withdraw a complaint at any time.[141] The grounds for declining or terminating a complaint are broadly similar across the jurisdictions. They include where it is 'trivial, vexatious, misconceived or lacking in substance' or where it does 'not relate to discrimination or prohibited conduct'.[142] Other grounds for termination include if the subject matter of the complaint has already been dealt with or may more appropriately be dealt with by another relevant authority; the complainant has already commenced proceedings in relation to the same events in a commission, court or tribunal; and/or where it appears that a more appropriate remedy is reasonably available.[143] A complaint may also be terminated if it has no reasonable prospects of success at conciliation or if the subject matter is of such public importance that it requires public litigation.[144]

Once a complaint is accepted agencies are obliged to investigate it, which would initially involve, in most cases, seeking a written response from the named respondent.[145] Agencies are also permitted or required to make attempts to resolve the complaint by way of conciliation or otherwise, and parties can

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[141] This, at times, can only occur with the leave of the agency head. See, for instance, s. 170 ADA (QLD), s. 83A(1) EOA (WA) and s. 92B ADA (NSW).

[142] See for instance, s. 64 ADA (TAS).

[143] Federally, the choice is between Commonwealth and State/Territory anti-discrimination laws or if the discrimination in question relates to employment, between federal employment and discrimination law. It is not possible to bring a complaint in more than one jurisdiction. If action has been commenced using State or Territory anti-discrimination law, action in the Commonwealth jurisdiction is barred. This is stipulated in various Commonwealth legislative provisions. See, for instance, s. 6A, RDA (CTH). The *Fair Work Act 2009* (CTH) also states, for instance, that it is not possible to bring an action for adverse action or unlawful termination if action has already been taken under anti-discrimination law 'in relation to the dismissal' (ss. 725, 732). There are no similar provisions in State/Territory law, though a complaint may be declined if it is being dealt with under another law. In NSW there is also express provision made for action to be taken under both anti-discrimination and workplace laws. See s 88B, ADA (NSW).

[144] See s 46PH AHRCA (CTH), for instance. A decision to terminate, therefore, can mean that valid complaints may be rejected. It is for this reason that complainants in most jurisdictions are still able to litigate after termination.

[145] In most jurisdictions, anti-discrimination agencies have statutory power to compel production of information (including documents) from respondents, complainants and non-parties. Failure to provide information is a criminal offence. See, for instance, ss. 46PI, 46PM and 46PN of the AHRCA.

be directed to attend a conciliation conference for this purpose.[146] In addition, permission must be sought for legal or other representation during conferences.[147]

If a matter resolves the terms of settlement are usually confidential, though agencies often publish outcomes of a small number of de-identified matters.[148] Possible outcomes at conciliation include compensation, an apology, and a change in policy or practice, for instance. Agreements between parties can be lodged with a court or tribunal in most jurisdictions, which means they become enforceable like other legal orders.[149]

2.2 Litigation of complaints

Where conciliation is not attempted, is unsuccessful or where a matter is declined or terminated by the agency for other reasons proceedings may be commenced in a court or tribunal. In the federal jurisdiction, matters are heard in the Federal Circuit Court or Federal Court, with fees payable.[150] In States/Territories matters are initially heard in a tribunal, without payment of a fee.[151] Legal proceedings

[146] It is an offence to fail to comply with a notice to attend. See, for instance, ss. 46PJ AHRCA (CTH), s. 91A(2) ADA (NSW), and s. 159 ADA (QLD).

[147] See, for example, s. 46PK (5) AHRCA (CTH), s. 163 ADA (QLD) and s. 92 EOA (WA).

[148] A register of outcomes of conciliated complaints is available, for example, on the AHRC website (accessed December 2017): <http://www.humanrights.gov.au/complaints/conciliation-register>. Conciliation in general is confidential. Anything said or done at a conciliation conference is inadmissible in later court/tribunal proceedings. See, for instance, s. 46PK(2) AHRCA and ss. 161 and 164AA ADA (QLD).

[149] This step is mandatory in some jurisdictions (federal, SA, WA and the NT). In those jurisdictions where agreements cannot be lodged parties to the agreement are entitled to initiate court action for enforcement.

[150] A filing fee of $55 is payable in the Federal Circuit Court, though fees can be waived on the basis of hardship . The complainant must initiate proceedings within 60 days from the time notice of termination of the complaint is issued, though the court has some discretion to extend this time period (s/ 46PO(2)). Leave of the court is required to litigate terminated complaints (s. 46PO9(3A) of the AHRC).

[151] These tribunals include the Civil and Administrative Tribunal (NSW), Queensland Civil and Administrative Tribunal and VCAT. If the matter is to proceed to hearing, the relevant complaint agency will refer the complaint to a tribunal. In some instances, this occurs where the complainant asks that the referral of the complaint be made (QLD, ACT), but in other jurisdictions the relevant agency *must* refer the complaint, by law (SA, WA, Tasmania). In many jurisdictions the complainant must make an application to the court themselves.

are conducted in as informal a manner as possible.[152] Courts and tribunals will encourage parties to engage in mediation, and a significant proportion of matters are settled this way. Cases can also be summarily dismissed if considered, for instance, to be frivolous or vexatious, or to have no reasonable prospect of success.[153] If an action is successful a court may make an enforceable order, including for an award of damages. An appeal on a question of law is permissible in all jurisdictions, and in some jurisdictions also on a question of fact, but only with leave.[154] The parties may be legally or otherwise represented, in some jurisdictions only with leave but in others as of right.[155] Hearings are generally open to the public.

3 Prohibition of race discrimination and vilification

3.1 Direct and indirect race discrimination

Race discrimination laws in all jurisdictions, other than the RDA (the only stand-alone race discrimination legislation), are fairly similar in terms of content and structure.[156] The laws generally

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[152] See, for instance, s. 46PR, AHRCA (CTH), which states that the federal courts are not 'bound by technicalities or legal forms'. Allegations and responses to allegations are generally provided in a written document, as are witness statements, for example.

[153] See, for instance, r. 13.10 *Federal Circuit Court Rules* 2001 (CTH)

[154] Appeals from the Federal Circuit Court go firstly to a single judge of the Federal Court and then to the Full Court of the Federal Court. Avenues for appeal in the States/Territories vary, sometimes involving appeal to an appellate division of the tribunal in which the original matter was heard, at other times to a Court of Appeal or Supreme Court, for example.

[155] Provisions indicating that leave is required include, for example, s. 98 ADA (NSW), s. 43 *Queensland Civil and Administrative Tribunal Act* 2009 (QLD), s. 85(2) ADA (TAS), and s. 62 *Victorian Civil and Administrative Tribunal Act* 1998 (VIC). Those indicating that representation is a right include s. 39 *State Administrative Tribunal Act* 2004 (WA), s. 30 *ACT Civil and Administrative Tribunal Act* 2008 (ACT) and s. 46PQ AHRCA (CTH).

[156] Each Act also provides protection for attributes in addition to 'race', including 'colour', 'descent', 'ethnic origin' and 'national origin'. For discussion of s. 9 and its coverage of Aboriginal people as a 'race' see *Williams v Tadanya Cultural Centre* (2001) 163 FLR. These provisions also generally make it unlawful to discriminate against someone because of a characteristic which is usually possessed by, or imputed to, people who have the same protected attribute as the person aggrieved, commonly termed a 'characteristics extension'. See, for instance, s. 7(2) ADA NSW and s. 8 ADA (QLD). The RDA does not have an express 'characteristics extension' but the Act is likely to be interpreted by courts as including this broader protection. Rees et al (2008), 213.

contain provisions rendering it unlawful to discriminate against another on a prohibited ground and in a particular area of public life, such as the provision of goods and services or employment.[157] There are, in addition, provisions in each jurisdiction that define race discrimination, including direct and indirect discrimination.

3.1.1 Direct discrimination

Direct discrimination occurs where one person is treated differently (in a less favourable sense) from the way in which another is or might be treated 'in comparable circumstances and on the ground of some unacceptable consideration'.[158]

In each State and Territory direct discrimination has, in general, two key elements, both of which must be made out to establish a breach. The *first* element involves a comparison of the respondent's treatment of the complainant with treatment of another actual or hypothetical person without the same protected attribute as the complainant *and* in the same/similar circumstances — referred to as 'differential treatment' (the 'comparator' requirement).[159] The *second* element is one of causation: that is, determination that the *ground for or basis of* the differential treatment is the complainant's protected

[157] Section 19 of the ADA (NSW), for example, states that it is unlawful to discriminate against a person 'on the ground of' race and in the provision of goods and services 'by refusing to provide the person with goods and services' and/or 'in the terms in which that other person is provided with those goods and services.' Other areas of public life covered include access to places and facilities, accommodation, provision of goods and services, education and employment.

[158] Dawson and Toohey JJ in *Waters v Public Transport Corporation* (1991) 173 CLR 349, at 392. Direct discrimination provisions in the various jurisdictions are broadly similar to that of the WA EOA. Section 36(1) of the EOA states that a person discriminates against another 'on the ground of' race if that person 'treats the aggrieved person less favourably than in the same circumstances, or in circumstances that are not materially different' he/she 'treats or would treat a person of a different race', with the latter referred to as a 'comparator'. Note that VIC and ACT provisions are different in that they do not require a comparator.

[159] The treatment in question must be 'objectively less favourable' than that actually provided or 'which would have been afforded' to a person of a different race in circumstances that are the same or not materially different. See discussion in Rees et al (2008), 82ff. Note that in Victoria and the ACT there is no requirement for proof of differential treatment. Section 8(1) of the EOA defines direct discrimination as occurring 'if a person treats, or proposes to treat, a person with an attribute unfavourably because of that attribute'.

attribute. This requires an objective assessment of the respondent's 'state of mind, or thought processes, at the time the relevant decision was made' to determine whether a prohibited ground (such as race) was one of the factors influencing his or her decision and conduct towards the complainant.[160]

Courts have interpreted s. 9(1) of the RDA as a direct discrimination provision, though it is somewhat different to its counterpart provisions in the States/Territories.[161] This section provides that it is unlawful for:

> … a person to do any act involving a distinction, exclusion, restriction or preference where based on race, colour, descent or national or ethnic origin, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life. [162]

[160] Four elements to be made out are (1) 'treatment' by the respondent (2) that is 'less favourable'. (3) The relevant comparator must be identified, (4) as well as appropriate circumstances for the purpose of comparison. Rees et al (2008), 92. Subjective intent of the respondent may be relevant but is not 'decisive' as to the reason for the alleged discrimination (Kirby J in *IW v City of Perth* (1997) 71 ALJR 943, at 975). In the majority of jurisdictions, the prohibited ground need only be *one reason,* not the significant or dominant reason for the act complained of. See, for instance, s. 18 RDA (CTH). In Victoria, QLD and SA, the prohibited ground must be the 'substantial reason'.

[161] The Federal Court has identified five elements within s. 9(1) (*Australian Medical Council v Wilson* (1996) FCR 46 at 73). The first is the doing of an act, prohibited by case by case interpretation. The second and third elements are 'by a person' and involving a distinction, exclusion, restriction or preference. The fourth element is based on race, colour, descent or national or ethnic origin. This phrase has been interpreted as different to similar phrases in other Australian anti-discrimination law. Weinberg J in *Macedonian Teachers' Association of Victoria Inc. v HREOC* (1998) 91 FCR 8 at 29-33 stated that 'based on' was not to be understood in the same way as a phrase such as 'by reason of' or 'on the ground of'. It encompasses a 'broader, not necessarily causative, relationship' expressed in the phrase 'by reference to'. The fifth element is having the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or other field of public life.

[162] The differences between s. 9(1) and other similar provisions include because it provides wider protection and has no 'comparator' requirement.

Section 9(2) of the RDA then defines 'human right or fundamental freedom in the political, economic, social, cultural or any other field of public life' as any right of the kind referred to in Article 5 of the ICERD.[163]

Sections 11-16 of the RDA also identify as unlawful certain actions or omissions in specified areas (such as access to places and facilities) if done 'by reason of the race, colour or national or ethnic origin of a person or of any relative or associate of that other person', interpreted in a similar manner to other direct race discrimination provisions.[164]

Baird v Queensland (2006) 156 FCR 451 (*Baird v Queensland*) demonstrates the potential breadth of section 9(1).[165] Aboriginal people living on church-run reserves in North QLD had been paid lower or below award wages for work performed between 1975 and 1986, clearly because of their Aboriginality. As a consequence, their human right to equal pay for equal work in Article 5 of CERD was found to have been nullified or impaired and s. 9(1) breached. In *House v Queanbeyan Community Radio Station* [2008] FMCA 897 (*House v Queanbeyan Community Radio*) a decision by a radio station's Board to deny membership to two Aboriginal women was determined to be a contravention of s 9(1). Board meeting minutes provided direct evidence that the decisions in question were based on Aboriginality.[166] It was also observed that while there was no 'malice or intent' on the part of the Board members to be

[163] Article 5 of ICERD refers to rights to education and training, housing, and equal participation in cultural activities, amongst others. Notably, courts have interpreted s. 9 to offer protection of human rights and freedoms beyond those specifically listed in Article 5. See, for instance, *Gerhardy v Brown* (1985) 159 CLR 70 at 101 (Mason J) and at 125 (Brennan J), *Mabo v Queensland (No 1)* (1988) 166 CLR 186 at 229 (Deane J), and *Maloney v The Queen* [2013] HCA 28 at [286] (Gageler J).

[164] Other areas include housing and other accommodation, membership of trade unions, employment and advertisements. According to s. 9(4), these more specific prohibitions do not limit the generality of the wider-ranging protections offered by s. 9(1).

[165] See discussion in Hunyor J (2007), 'Landmark decision in Aboriginal wages case', 45 *Law Society Journal* 46.

[166] The minutes also indicated that the applicants were denied membership because they did not comply with a requirement that they constitute a 'family'. The two applicants lived at different addresses. That Aboriginality was *one* reason for the decision in question was sufficient to render the actions of the Board in question discriminatory.

racially discriminatory 'intention is not a pre-requisite or requirement for an act to be rendered or found to be unlawful for the purposes of s. 9(1)'.[167]

By way of comparison, in *Murray v Forward and Merit Review Agency* (Unreported, HREOC, Sir Ronald Wilson, 17 September 1993) (*Murray v Forward*) it was unsuccessfully argued that an Aboriginal woman was denied a job because of the respondent's perception, allegedly based on stereotypes concerning Aboriginal people, that she was incapable of performing the work required due to poor literacy. It was stated by the Commission that to accept the complainant's allegation of discrimination 'all other inferences that might reasonably be open' must be excluded. The Commissioner was not able or willing to draw an inference in this instance that would support the complainant's claims, stating as follows.

> I am sensitive to the possible presence of systemic racism, when persons in a bureaucratic context can unconsciously be guided by racist assumptions that may underlie the system. But in such a case there must be some evidence of the system and the latent or patent racist attitudes that infect it. Here there is no such evidence. Consequently, there is no evidence to establish the weight to be accorded to the alleged stereotype.[168]

In *Hagan v Trustees of the Toowoomba Sports Ground Trust* (2000) FCA 1615 (*Hagan v Toowoomba Sports Ground*) an unsuccessful complaint was made under s. 9(1) about a decision to retain a sign that read 'Nigger Brown Stand' at a Toowoomba oval. This sign referred to a local (non-Aboriginal) football player whose nickname was 'Nigger', apparently (in part) because his surname was 'Brown'.[169] The complainant claimed that the word 'Nigger' was deeply offensive to him as an Aboriginal man.[170] The Commission stated that this term had to be interpreted with reference to the context and way in which

[167] Ibid, [930].

[168] Ibid, 4.

[169] Another reason for the nickname was said to include his wearing of dark brown shoes, once referred to as 'nigger-brown' in colour.

[170] The complainant said that this would be the case, no matter what the context was. He could not, in fact, think 'of a single instance in which the term could have an innocuous or neutral meaning'. Ibid, 1615.

it was used in each instance. In this case there was no racist connotation attached to the word 'nigger' as it had long been used as the nickname or 'customary identifier' of Mr. Brown. The Commission held that whilst the complainant's 'personal feelings were affected' the decision to retain the sign on the stand was not based on race, nor was 'capable of affecting detrimentally in any way any human rights and fundamental freedoms'.[171]

In *Combined Housing Organisation Ltd, Ipswich Regional ATSIC for Legal Services, Thompson and Fisher v Hanson* (Unreported, Human Rights and Equal Opportunity Commission, Sir Ronald Wilson, 16 October 1997) (*Combined Housing Organisation v Hanson*) a complaint was initiated about a statement made by politician Pauline Hanson during a print media interview. Hanson stated that Aboriginal people had too many benefits, which she saw as racially discriminatory. For this reason, she was going to advocate for 'the white community, the immigrants, the Italians, Greeks, whoever, it really doesn't matter, you know, anyone apart from Aboriginal and Torres Strait Islanders.'[172] The statement was found not to constitute discrimination. Indicative of the formality of judicial interpretation of the law and of its focus on formal rather than substantive equality, discussed further below, the Commissioner hearing the case stated that it did not matter whether he agreed with Hanson's views. He had to decide the case 'on a strictly legal basis'. Hanson was, according to the Commissioner, simply stating that it was unfair that Aboriginal people enjoyed benefits only available to them because of their Aboriginality, and that she would be fighting for the same benefits to be equally available to anyone other than Aboriginals (because they already have them). The Commissioner remarked that '[s]he just wants everyone to be equal'.[173]

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[171] Ibid, 1630. Moreover, the Trustees of the sports ground in question had apparently canvassed opinions of other local Aboriginal people, who indicated that the sign did not offend them.

[172] The Aboriginal complainants identified Hanson's remarks as denial of 'the political right to take part in the government', 'the conduct of public affairs' and 'equal access to the public service' under Article 5.

[173] *Combined Housing Organisation v Hanson*, at 13. See also McNamara, L (1998), 'The Things You Need: Racial Hatred, Pauline Hanson and the Limits of the Law', 2 *Southern Cross University Law Review* 92. The complaint was originally brought under s. 9(1) and 18(C) of the RDA. Both provisions were considered.

3.1.2 Indirect discrimination

The High Court has described indirect discrimination as occurring when 'one person appears to be treated just as another is or would be treated. However, the impact of this 'equal' treatment is that the former is in fact treated less favourably than the latter'.[174] Direct discrimination occurs where the treatment in question 'is on its face less favourable'. Indirect discrimination arises where the treatment is 'on its face neutral' but its impact 'on one person when compared with another is less favourable'.[175]

Generally, the adverse impact in question arises through imposition of a requirement or condition (embedded within rules, policy or practice) with which persons of a particular group, including a racial group, are less able to comply.[176] The requirement or condition must be unreasonable, in all the circumstances. A commonly cited example would be height restrictions imposed on those applying for a job where these restrictions are likely to disadvantage particular racial groups and women *and* are unjustified.

Broadly speaking, indirect discrimination provisions have the following elements.

1) The respondent imposes a requirement or condition to which the complainant must comply.
2) This requirement or condition is more easily complied with by those without the complainant's protected attribute.
3) The requirement or condition, having regard to the circumstances of the case, is unreasonable.
4) The complainant does not or is not able to comply with the requirement or condition in question.

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[174] Dawson and Toohey JJ in *Waters v Public Transport Corporation* (1991) 173 CLR 349, at 392.

[175] Ibid. Rees et al state that whilst direct discrimination may focus on 'the process of decision-making, usually in individual cases', indirect discrimination is said to target the 'outcome of decision-making, often as it affects many people'. Rees et al (2008), 117.

[176] Indirect discrimination, according to Rees et al, revolves around the 'effect, or impact, of policies and practices which assist in decision-making' and which are 'irrelevant to the activity in question' and 'unfair because people with [particular] … attributes find it more difficult to comply with [them] ... than those without the attributes'. Ibid.

As an example of an indirect discrimination provision, Section 9(1A) of the RDA contains both similarities and differences to its counterpart provisions in the States/Territories.[177] For instance, it again refers to the ICERD, defining indirect discrimination as impacting on specified human rights and fundamental freedoms within Article 5. Section 9(1A) states that where:

> (a) a person requires another person to comply with a term, condition or requirement which is not reasonable having regard to the circumstances of the case; and
> (b) the other person does not or cannot comply with the term, condition or requirement; and
> (c) the requirement to comply has the purpose or effect of nullifying or impairing enjoyment or exercise, on an equal footing, by persons of the same race, colour, descent or national or ethnic origin as the other person, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life ….
>
> … [T]he act of requiring such compliance is to be treated as an act involving a distinction based on, or an act done by reason of, the other person's race, colour, descent or national or ethnic origin.[178]

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

[177] As an example, s. 36(2) of the EOA (WA) states that a person discriminates against another on the ground of race if they require the aggrieved person to comply with a requirement or condition 'with which a substantially higher proportion of persons not of the same race as the aggrieved person comply or are able to comply', 'which is not reasonable having regard to the circumstances of the case' and 'with which the aggrieved person does not or is not able to comply'. Indirect discrimination provisions in SA, Tasmania and NSW largely mirror those of WA, but in other jurisdictions, including Victoria, the provisions differ somewhat. Whether the complainant or respondent has the burden of proof can also vary between jurisdictions.

[178] To date, there has been little case law concerning indirect discrimination, including under s. 9(1A). There is some suggestion, however, that this provision ought to be interpreted by courts as providing the same protection as other indirect discrimination provisions in Australia. Rees et al (2008), 141. Case law includes *State Housing Commission v Martin* (1999) EOC 92-975 (discussed further below) and *Walley v Homeswest* (1999) EOC 93-023. Of note, case law related to indirect discrimination has generally turned on identifying the requirement or condition imposed and establishing, including through statistical evidence, that though neutral on its face this requirement/condition is more difficult for certain persons to comply with.

breach of ss. 9(1) and 9(1A) of the RDA. Traeger Park was a school in the NT that had an almost entirely Aboriginal student cohort, attributable to a significant degree to its effective responses to the cultural and other needs of Aboriginal students. In the late 1980s the NT's Minister of Education forced the school's closure without consultation with the local Aboriginal school community, arguing that the students could transition into mainstream schools. The decision was apparently based on financial necessity and low attendance numbers, but there was evidence too that the Minister disapproved of all-Aboriginal schooling.

A complaint of race discrimination was lodged, with Aboriginal parents of the students claiming that retaining the school was 'in keeping with the rights of Aboriginal people to self-determination and culturally appropriate education' and 'that dispersing their children into other local schools would dissipate the real gains' being made by them.[179] Neither direct nor indirect discrimination was identified, however, by the Commission. The closure of the school was found to be based on race, at least in part (which was sufficient), but it involved no racist purpose or effect. Rather, the closure was aimed at 'the maintenance of educational opportunities and services' for the students, whose longer-term interests, according to the Minister, were served by attending a school other than Traeger Park.[180] There was no denial of an opportunity to access education and no impairment of a right to education (under Article 5) to the extent that it could not be enjoyed on an 'equal footing' with others, given that alternative (mainstream) schooling was offered. According to the Commissioner, a right is 'one thing; [and] the form in which the right may be enjoyed or exercised is something different'. For whilst some students might for 'idiosyncratic reasons' struggle with the change in schools, in general terms they would be provided with the same opportunities as any other student.[181]

[179] Walton, C (1995), 'Traegar Park School: closing the options', 23(1) *The Aboriginal Child at School* 2, 9.

[180] The Commissioner stated (at 78, 968) 'I am in no doubt that it was the mind of the Minister that Traeger Park Primary School should be closed because it was in the nature of an Aboriginal enclave ... Nor am I in doubt that his decision was based on race, albeit in his view, a decision which would in the longer term be to the suggested advantage of the Aboriginal community'.

[181] Ibid at 78, 966.

3.2 Special measures and section 10 of the RDA

3.2.1 Special measures

Anti-discrimination law contains provisions that make certain types of unlawful conduct lawful, including special measures. Special measures are defined by the law as those 'taken for the benefit of people with a protected [shared] attribute' (such as race) 'in order to overcome disadvantage' experienced because of this attribute.[182] These measures involve 'essentially differential treatment between racial groups' identified as 'necessary to address an existing inequality' and as intended to achieve 'equality of outcomes for disadvantaged groups'.[183] As one example, an employer could lawfully preference Indigenous over non-Indigenous applicants for a job to overcome historical and ongoing Indigenous disadvantage with respect to employment.[184] Thus, whilst indirect discrimination labels as *discriminatory* conditions or requirements that appear neutral but that have discriminatory (unequal) outcomes, special measures provisions define as *not discriminatory* measures that deliberately differentiate between groups in order to address existing inequalities.

The provisions in question are worth somewhat detailed discussion, given the Indigenous focus of much of the case law in this area. One example of a special measures provision is s. 8 of the RDA, which states that prohibition of race discrimination does not apply to 'special measures', defined in Article 1.4 of the ICERD as follows.[185]

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[182] Rees et al (2008), 534.

[183] AHRC (n.d.), *Guidelines to understanding 'special measures' in the Racial Discrimination Act* 1975 (CTH), Sydney NSW.

[184] See, for instance, *Lethbridge v Homeswest* [1997] HREOCA 3. See also discussion in AHRC (2015c), *Targeted recruitment of Aboriginal and Torres Strait Islander people: A guidelines for employers,* Sydney, NSW.

[185] Though differing in both language and substance, all but one jurisdiction (NSW) has some kind of special measures provision. See, for instance, s. 12 EOA (VIC) and s. 105 ADA (QLD). In QLD the term 'equal opportunity measures' is used and in WA 'measures intended to achieve equality'. Legislation (not the RDA) will also generally contain provisions providing for an exemption on the basis of genuine occupational qualification that could be used in a somewhat similar way to special measures provisions. See for instance s. 50 EOA (WA).

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure to such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken to have been achieved.[186]

The five key elements required to establish that a measure is 'special' under the RDA are as follows.[187]

1) The measure must confer a benefit on some or all members of a class.
2) Membership must be based on race, colour, descent or national or ethnic origin.
3) The sole purpose of the measure must be to secure adequate advancement of the beneficiaries so they may enjoy and exercise their human rights and fundamental freedoms equally with others.
4) The protection given to the beneficiaries by the measure must be necessary in order that they enjoy and exercise their human rights and fundamental freedoms equally with others.
5) The measure must not have achieved its objectives (if still in place).[188]

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[186] Art. 2(2) of the ICERD also imposes positive obligations on government to take 'special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms', generally interpreted as affirmative action or positive discrimination.

[187] Note that persons or organisations can determine that certain measures are necessary 'subject only to the risk that a court or tribunal may subsequently determine that … [they] do not fall within the 'special measures' exception'. Rees et al (2008), 535. Special measures provisions then become a *defence* against an allegation of unlawful discrimination, with the burden of proof imposed upon the respondent. Generally, a person or organisation does not proactively apply for and/or is not granted prior approval by a court or other body to develop and implement a special measure. NSW is an example of an exception to this rule, where an exemption must be sought for activity or initiatives likely to equate to a special measure (s. 126A, ADA (NSW)).

[188] *Gerhardy v Brown* (1985) 159 CLR 70, at 133 (Brennan J).

In *Bruch v Commonwealth* [2002] FMCA 29, as an example, it was held that the Commonwealth's ABSTUDY rental assistance scheme was a special measure under s. 8(1) of the RDA. The sole purpose of ABSTUDY, identified by the Court as necessary to improve Indigenous rates of participation in higher education, was to ensure the advancement of the human rights of Aboriginal and Torres Strait Islander people with respect to education.[189]

In *Gerhardy v Brown* (1985) 159 CLR 70 (*Gerhardy v Brown*), in considering s. 10 of the RDA the High Court held that s. 19 of the *Pitjantjatjara Land Rights Act* 1981 (SA) constituted a special measure. This Act vested title to land in a body representing various Aboriginal groups in South Australia. Section 19 prohibited non-Pitjantjatjara persons from entering Pitjantjatjara land without prior permission. Mr Brown, a non-Pitjantjatjara Aboriginal man, was charged with an offence under this provision, which was found to be discriminatory but was then 'saved' as a special measure. Mason J stated that it was 'inevitable that the effect of the State Act is to discriminate by reference to race ... because eligibility to enjoy the rights which the statute confers depends … on membership of the Pitjantjatjara peoples'. In particular, the restrictions on access it imposed on non-Pitjantjatjara people amounted to an impairment of their freedom of movement.[190]

Brennan J alone also discussed how to determine whether a 'measure' is directed towards 'advancement' of a particular group. In a statement considered but not followed in subsequent cases Brennan found that advancement is not established by showing that parliament or whomever is taking the measure 'does so for the purpose of conferring what it or he regards as a benefit'.

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[189] See similarly *Central North Adelaide Health Service v Atkinson* (2008) 103 SASR 89, where the Full Court of the South Australian Supreme Court held that a medical service for a limited group of people, including Indigenous Australians, constituted a 'scheme or undertaking for the benefit of persons of a particular race' under s. 65 of the EOA (SA). Compare with *Bligh and others v State of Queensland* [1996] HREOCA 28, wherein the QLD Government argued that laws authorising payment of lower wages to residents of Palm Island were a special measure, aiming to further the 'development, education and training' of Aboriginal people. This was found *not* to be a benefit and it was also done against the wishes of Palm Island residents. The provisions denied these residents human rights to just and favourable conditions of work and equal pay for equal work. They were discriminatory and could not be defined as special measures.

[190] *Gerhardy v Brown,* at 103-4.

> [The] wishes of the beneficiaries of the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them'.[191]

Courts have on a number of occasions had to grapple with how to interpret measures considered beneficial by government but not by (all of) the intended beneficiaries of such measures. Special measures may protect only 'some members of a group by curtailing the rights of others within that group' or 'the group generally by taking away certain rights from all people within that group'.[192]

An example of this is *Bropho v State of Western Australia* [2007] FCA 519 (*Bropho v Western Australia*). This case considered a decision made by the WA Government to pass the *Reserves (Reserve 43131) Act* 2003 (WA), challenged as racially discriminatory but found to be a special measure by the Federal Court. The legislation transferred management of the Aboriginal Swan Valley Nyungah Community from the community to an administrator, who then prohibited entry onto the reserve and effectively closed it down. The WA government claimed to have taken this action due to concerns about suicide and sexual abuse of women and children in the community. It was argued that the Act and actions taken under it were in breach of section 9(1) of the RDA, interfering with, *inter alia,* enjoyment of human rights to own property and to freedom of movement. At first instance, Nicholson J held that there was no discrimination based on race as these rights were not breached.[193] If there was discrimination, however, the Act was identified as constituting a special measure as it conferred a benefit on local women and children, despite the fact that a large number of Aboriginal women living in the community did not support it. The court identified its sole purpose as securing adequate

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[191] *Gerhardy v Brown*, at 135 (Brennan J).

[192] Hunyor, J (2009), 'Is it time to rethink special measures under the Racial Discrimination Act? The case of the Northern Territory Intervention', 14(2) *Australian Journal of Human Rights* 49, 49

[193] According to the court the community could be accessed, with consent (which was not unreasonably withheld). Exclusion by the administrator was done only for the purpose of controlling criminal behavior. Any deprivation of rights was reasonable, proportionate and legitimate and, moreover, applied to both non-Aboriginal and Aboriginal persons. It was not, therefore, based on race.

advancement of its beneficiaries in order that they might enjoy and exercise their human rights on an equal footing. Moreover, it saw the wishes of the intended beneficiaries as not necessarily a relevant consideration in determining whether something constituted a special measure.[194]

The High Court in *Maloney v the Queen Maloney v The Queen* [2013] HCA 28 again considered s. 8 of the RDA. A Regulation made under the *Liquor Act* 1992 (QLD) restricted the possession of alcohol on Palm Island. Maloney had been charged and convicted under the Regulation and had unsuccessfully appealed this conviction on the basis that the relevant provision breached the RDA. The High Court found that the Regulation racially discriminated by impacting on human rights and fundamental freedoms but was a special measure – though it was questionable whether adequate local consultation had been undertaken or that the Regulation was sufficiently supported by local community. Consultation was seen by the court as having some relevance, but was not a definitional element' in determining whether the sole purpose of the measure was to secure advancement of the relevant group.[195]

It was also unsuccessfully argued that the Regulation was a disproportionate response to the problem of alcohol misuse in the community.[196] As occurred in *Bropho v Western Australia*, French J held that political assessment of whether a measure is necessary for and likely to secure 'advancement' was a

[194] It was stated that the court must accept the government's view of the objective of the *Reserves (Reserve 43131) Act*, unless unreasonably held. See also *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2010] QCA 37 (discussed in a later footnote) and *Morton v Queensland Police Service* [2010] QCA 160, neither of which followed Brennan J's reasoning in *Gerhardy v Brown* on this particular point.

[195] See also discussion in Rice, S (2013), 'Case note: Joan Maloney v The Queen [2013] HCA 28', 8(7) *Indigenous Law Bulletin* 28.

[196] The High Court found that the two requirements of 'necessary in order to protect' and 'directed at the sole purpose of securing' protection were satisfied in this instance. Deane J had earlier argued in *Gerhardy v Brown* (at 149) that special measures must be able 'to be really and not colourably or fancifully referable to and explicable by the sole purpose' said to provide their character. They must be 'reasonably considered to be appropriate and adapted to achieving that purpose. Beyond that, the Court is not concerned to determine whether the provisions are the appropriate ones to achieve, or whether they will in fact achieve, the particular purpose.'

matter for 'the political branch of government', not the courts.[197] Other justices were more willing to weigh in as to whether less restrictive measures may have been available to Parliament but found that there was no material before the court that might allow for such an assessment to be made in this instance.[198]

3.2.2 Section 10 of the RDA

Section 10 of the RDA is seen as unique in Australian race discrimination legislation as it looks beyond the actions of individuals and considers the discriminatory 'operation and effect of laws'.[199] The provision effectively works to re-write or override Commonwealth, State and Territory legislation that intentionally or otherwise denies persons of a particular race enjoyment of a right at all *or* to the same extent as it is enjoyed by persons of a different race.[200] Where such a right is found to have been denied or restricted s. 10 bestows upon the persons affected its equal enjoyment.[201] Section 10 reads as follows.

> If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

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[197] This is notable, given that (as identified earlier) anti-discrimination law appears to delegate interpretation of such matters to the judiciary.

[198] Per Hayne and Crennan JJ. There was also no clear consensus from the judges as to what human right or fundamental freedom the measure in question was intended to ensure equal enjoyment of – though Justice Gageler, for instance, identified a right to security of person, to protection against violence or bodily harm and to public health (at 375).

[199] Rees et al (2008), 263.

[200] The right in question must include a right of the kind referred to in Article 5 of ICERD. Also relevant are colour, or national or ethnic origin.

[201] Sections 109 and 122 of the Constitution mean that s. 10 will override State/Territory law.

The provision operates as follows. Where an issue arises for adjudication under s. 10 a complaint of unlawful discrimination is not lodged with the AHRC as occurs with s 9. Proceedings are commenced in the Supreme Court of the jurisdiction in which the legislation in question was passed or in the Federal Court.

Rees et al suggest that s. 10 is underutilised due to its complexity, but that it has significant potential, given that it enables close examination from a human rights perspective of legislation that does not expressly or clearly intend to deprive persons of those rights.[202] It has been used, however, to successfully challenge State legislation designed to extinguish native title rights of Indigenous people. In the landmark decision of *Mabo v Queensland (No 1)* (1988) 166 CLR 186 ('Mabo case') the High Court determined that s. 10 invalidated the *Queensland Coast Islands Declaratory Act* 1985 (QLD).[203] This Act declared that the Murray Islands were vested in the Crown in right of QLD to the exclusion of all other rights and claims, which effectively prevented the Miriam people from pursuing a native title claim as the original inhabitants of the Murray Islands. The majority of the High Court found that the QLD Act discriminated on the basis of race in relation to property rights (as 'human rights' under Article 5 of the ICERD) as the native title interests to be extinguished were held only by the Miriam people. The Act impaired the rights of this particular group 'while leaving unimpaired the corresponding human rights of those whose rights in and over the Murray Islands did not take their origin from the laws and customs of the Miriam people'.[204] It was therefore invalidated by s. 10 of the RDA.

Much of the case law relating to s. 10 concerns its interaction with s. 8 of the RDA. Section 10 will not apply to legislation that is found to be a special measure. Jurisprudence regarding the interaction of these provisions has on a number of occasions restricted or limited the rights of Indigenous people.

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[202] Rees et al (2008), 263.

[203] See also *Western Australia v Commonwealth* (*Native Title Act* Case) (1995) 183 CLR 373 and *Western Australia v Ward* (2002) 213 CLR 1.

[204] At 218 (Brennan, Toohey and Gaudron JJ).

As an example, the facts of *Bropho v Western Australia*, referred to above, were considered in a later case applying s. 10 (an appeal in 2008 from the 2007 case cited above). In this matter it was unsuccessfully argued that the WA legislation in question interfered with property rights (and that s. 10 applied) because it restricted access to the land in question.[205] It was held, however, that there was no breach of s. 10 as property rights were not absolute and 'no invalid diminution of property rights occurs where the State acts in order to achieve a *legitimate and non-discriminatory public goal'*.[206] In this case, any interference with property rights was affected in accordance with a legitimate public purpose, namely to protect the safety and welfare of residents of the community.[207]

3.3 Racial vilification

As discussed in Chapter 2, most jurisdictions have civil law prohibitions of racial vilification, either within anti-discrimination law or other legislation. Section 18C of the RDA, as an example, renders it unlawful for a person to 'do an act, otherwise than in private' if the act is 'reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or group of people' and 'is done because of the race, colour, or national or ethnic origin of the other person or of some or all of the people in the same group'. According to the case law, this provision requires courts to apply an objective

[205] (2008) 169 FCR 59.

[206] Ryan, Moore and Tamberlin JJ at [80] – [83] (emphasis added).

[207] See also *Aurukun Shire Council v CEO Office of Liquor, Gambling and Racing in the Department of Treasury* [2012] 1 Qld R 1, in which an amendment to the *Liquor Act* 1992 (QLD) providing that Aurukun Shire Council could no longer hold or apply for liquor licences was held to be a special measure under s. 8. The Queensland Court of Appeal also held that s. 10 did not apply to invalidate the amendment. Having an opportunity to buy alcohol from a local source was not a human right or fundamental freedom that would attract s. 10 protection. See similarly *Morton v Queensland* [2010] QCA 160 *Police Service* 2010) 271 ALR 112 and discussion in Watson, N (2009a), 'Regulating alcohol: one step forward, two steps back?', 7(11) *Indigenous Law Bulletin* 27. In *Maloney v The Queen*, discussed above, the majority held that s. 10 applied to the Regulation in question. It was not a question of whether the law was 'discriminatory' but whether it in effect interfered with human rights or fundamental freedoms. Maloney was not able to enjoy a right to own property (alcohol) to the same extent as non-Indigenous people outside her community. However, the regulation was valid because a special measure.

test to ascertain the likely impact of the act in question on a person or persons from the target group.[208] A further element is that the act in question must be done *because of* the aggrieved person/group of person's race, colour or national/ethnic origin. This again requires an objective assessment of the reasons for the doing of the act, which may include examination of the respondent's intention or motive.[209]

Relevant exemptions or defences are contained in s. 18D of the RDA, largely revolving around the right to freedom of speech. Section 18D exempts from the application of s. 18C anything said or done *reasonably and in good faith*:

(a) in the performance, exhibition or distribution of an artistic work;[210]

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[208] The State/Territory provisions differ from the RDA in this respect. Whilst the RDA requires that the impact of the alleged vilification be measured with reference to perceptions of a hypothetical, reasonable member of the target (victim) group the State/Territory provisions require that the relevant impact be measured by considering the response to the victim group that the conduct would elicit from an ordinary member of 'the audience'. It is necessary, in this context, for a court to identify both the 'meaning of the defendant's act — or the imputations that can be fairly drawn from it' and the 'group from whose perspective the impact of the conduct must be assessed'. Rees et al (2008), 636. See *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352 and *Eatock v Bolt* (2011) 297 FCR 261 (*Eatock v Bolt*).

[209] Note too that under s. 18B race need not be the dominant or sole reason for the act in question. See *Jones v Scully* [2002] FCA 1080 and *Eatock v Bolt*. Generally, State/Territory racial vilification provisions will also require that the alleged vilification be done in public or be observable by the public, and that it must be done to incite hatred towards, serious contempt for or severe ridicule of a person or a member of a group on the ground of race. Section 20C(1) of the ADA (NSW) states, for instance, that it is 'unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of race of the person or members of the group'. The four key elements of this provision are that there is (1) a public act (2) by a person (3) which incites hatred towards, or serious contempt for, or severe ridicule of another person/group of persons (4) on the ground of their race. Case law generally turns on the third and fourth element. For example, with respect to element (3) it has been held that it is not required that the respondent intended to incite or that anyone was actually incited and that the conduct must do more than convey hatred, serious contempt or severe ridicule. It must incite these feelings/actions in others. See, for instance, *Veloskey v Karagiannakis* [2002] NSWADTAP 18. The Victorian provisions (contained in a separate Act, not in the EOA) look somewhat different but have been interpreted in a similar manner to provisions in other jurisdictions. See *Catch the Fire Ministries Inc. v Islamic Council of Victoria Inc*. (2006) 15 VR 207, for instance.

[210] This point was successfully argued by the respondents in both *Kelly-Country v Beers and Another* (2004) FMCA 336 and *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105.

(b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest;[211] and/or

(c) in the making or publishing of a fair and accurate report of any event or matter of public interest or a fair comment on any event/matter of public interest if the comment is an expression of genuine belief by the person making the comment.[212]

The relationship between rights to protection from racial harm and to freedom of speech is a complex one, as case law in this area reveals. As Rees et al suggest, the breadth of the exemptions at law suggests that the intent of the legislature was to 'prioritise' rather than 'balance' the right of free speech against that of a right to protection against racial vilification.[213] Meagher has also suggested that the exemptions are so wide as to create 'a danger' that they 'may well swallow the rule'.[214]

These comments are borne out and other difficulties in substantiating allegations are evident in caselaw concerning vilification against Indigenous people. Successful vilification cases brought by Aboriginal and Torres Strait Islander peoples include *Clarke v Nationwide News Pty Ltd trading as The Sunday Times* [2012] FCA 307. After a fatal car accident involving young Aboriginal people a newspaper was alleged to have made derogatory comments based on the Aboriginality of the victims. These comments

[211] See *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, at 360.

[212] See *Eatock v Bolt*. Victoria has the same exceptions to prohibitions of vilification as those contained within the RDA (s. 11 of the *Racial and Religious Tolerance Act* 2001 (VIC)). The other jurisdictions refer to exceptions for 'a fair report of a public act', 'a communication or the distribution or dissemination of any matter on any occasion that would be subject to a defence of absolute privilege … in proceedings for defamation' (such as a speech to parliament), or 'a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate'. See, for instance, s. 20C(2) of the ADA (NSW).

[213] Rees et al (2008), 657.

[214] Meagher, D (2004), 'So far so good? A critical evaluation of racial vilification laws in Australia', 32 *Federal Law Review* 225, 241-242. See also Eastman K (1994), 'Drafting Vilification Laws: Legal and Policy Issues', 1 *AJHR* 285.

were about Aboriginal families (they all have criminal records), Aboriginal mothers (they should not 'breed'), and the young boys involved in the accident (labelled 'criminal trash').[215]

A fair proportion of Indigenous complaints involving vilification are, however, dismissed. In two cases discussed previously, *Combined Housing v Hanson* and *Hagan v Trustees of the Toowoomba Sports Ground*, arguments that s. 18C had been breached (along with s. 9 of the RDA) were unsuccessful. In *Kelly-Country v Beers and Another* (2004) FMCA 336, by way of further example, a non-Aboriginal comedian wore black makeup and face paint of a 'traditional' Aboriginal man, delivering a comedy skit based around stereotypes associated with Aboriginal people related to drinking, criminal records and swearing. This was found to be an artistic work done reasonably and in good faith and as such did not constitute vilification.

As a final note on vilification, many States and Territories have embedded within civil law (including anti-discrimination legislation) criminal offences relating to vilification on the ground of race, generally when certain aggravating factors exist (such as evidence of incitement to violence). There are also offences related to race hatred that sit entirely outside of civil law.[216]

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[215] Another successful case is that of *Jacobs v Fardig* [1999] HREOC, in which a complaint against a Swan Shire Councillor who expressed a desire to shoot a group of Aboriginal people was upheld.

[216] Section 20D of the ADA (NSW), for instance, makes it an offence for a person 'by a public act, incite hatred towards, serious contempt for or severe ridicule of' a person/group of persons by threatening physical harm towards them or their property or inciting others to threaten such harm. The NSW Attorney General must consent to prosecution and if convicted, a fine, imprisonment or both may be imposed. There are no statutory exceptions or defences to this offence. Perhaps demonstrating difficulties with the drafting of this and similar legislation, a man who publicly vilified Aboriginal Olympian Nova Peris on Facebook in 2016 (at that time a Parliamentarian in the NT) was charged with an offence of 'using carriage service to cause offence' under s. 474.17(1) of the *Criminal Code Act* 1995 (CTH). The comments in question did not meet the threshold for prosecution under s. 20D. See Murphy, B, 'Nova Peris case highlights shortcomings in Australian Hate Speech laws', Independent Australia, June 2016. The preference in Australia, however, seems generally to be for civil rather than criminal law prohibitions of racial vilification, including so as to protect free speech, according to McNamara. McNamara, L (2002), *Racial Vilification Laws in Australia*, Institute of Criminology, University of Sydney. Section 474.17(1) is an example of criminal law prohibition of racial vilification. Other jurisdictions have passed criminal law provisions prohibiting racial vilification: for instance, see ss. 76-80G of *Criminal Code* 1913 (WA).

4 Jurisprudential barriers to accessing justice

This section discusses barriers impacting on Indigenous access to justice in the area of race discrimination: in particular, those located within jurisprudence (legal outcomes), processes of litigation and legislation (elements of the access to justice framework described in Chapter 2). Though considered separately, each of the barriers discussed below are interlinked and might all, broadly speaking fall within definitions of 'institutional racism'. Additionally, each of these barriers are also likely, to a degree, to potentially affect all potential complainants. Their specific relevance or application to Aboriginal and Torres Strait Islander peoples is identified below, however — generally attributable to their status as First Nations peoples, and to t particular vulnerabilities or marginalisation associated with this status. That the latter might impact on Indigenous access to justice in this area was highlighted within the ILNP, as noted in Chapter 2. The discussion below adds to existing knowledge in this area.

4.1 Individual complaints-based model

The individual complaints-based model embedded within Australian anti-discrimination law means that individuals affected by race discrimination are almost wholly responsible for initiating legal action in response. This is a highly problematic model for enforcement of race discrimination law because, as Gaze states, those targeted by race discrimination are likely to be the 'most vulnerable and least resourced' individuals.[217] She suggests that problems the model gives rise to are more pronounced in litigation than in conciliation. Litigation in this area, she claims, is 'far too risky, stressful and unsuccessful to be an attractive remedy for complainants', particularly as they are generally from more marginalised groups. Whilst complaint agencies may assist complainants 'by receiving complaints, investigating claims and defences and organising conciliation processes', states Gaze, there is 'no public assistance for individual litigants.'[218] These litigants face risks associated with unpredictable outcomes.

[217] Gaze (2015), 74.

[218] Ibid, 75. Less assistance is 'provided to enforce anti-discrimination laws than to enforce consumer protection laws,' according to Gaze, a point raised again in Chapter 8. Moreover, public agencies also 'do not undertake any of the risk or strategy involved in bringing cases and developing precedents.' She speaks too of limited access to legal aid to assist with race discrimination matters. Ibid.

They will pay the other parties' costs if they lose, which is more likely to occur than not, including because of the '*high standard for what has to be proved*'. If successful, their own costs will need to be covered. Compensation is also 'inadequate', including as damages are 'relatively low' given the 'personal risks undertaken'.[219]

The imposition of the burden of proof on litigants, as Gaze has identified, is a key barrier to accessing justice, with elements of proof criticised as being 'close to impossible for complainants to make out'.[220] A major reason for difficulties in this regard is that litigants will generally have insufficient and no enforceable access to the evidence needed to establish their case.[221] According to Thornton, they may 'often succeed in showing they were treated less favourably but fail in proving that it was because of their race or ethnicity'. Most likely, what has led to a particular act or decision is 'something known' only to the respondent, who will 'have a monopoly on knowledge' and 'all information essential to the complainant's case'.[222]

In employment related matters, for instance, an employer is deemed to know best the requirements for a job and whether a job applicant is the 'right fit'. All the employer must do to respond to allegations

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[219] Ibid (emphasis added). See also Gaze, B, and Hunter, R (2010a), *Enforcing Human Rights: An Evaluation of the New* Regime, Federation Press and Gaze, B, and Hunter R (2010b), 'Access to Justice for Discrimination Complainants: Courts and Legal Representation', 32 *UNSW Law Journal* 699. Kelsey has also discussed early expectations that the Office of the Commissioner for Community Relations would take a race discrimination matter to court if conciliation failed, but that this did not happen, with litigation left up to the aggrieved individual. Kelsey criticises this approach as 'individual complainants may be subject to pressures to refrain from bringing action, pressures from which the Commissioner would be immune'. Kelsey (1975), 70.

[220] Gaze refers to this as 'outmoded and old fashioned', an 'injustice', and as not reflecting 'what has been learned over 40 years about how difficult it can be to prove a discrimination case'. Gaze (2015), 75. Hunyor too describes the law on racial discrimination as 'close to unenforceable'. He asks that if 'we know that racism exists, why is it so hard to prove?' Hunyor, J (2003), 'Skin-deep: Proof and Inferences of Racial Discrimination in Employment', 25(4) *Sydney Law Review* 535, 535.

[221] See Thornton, M (1995), 'Revisiting Race' in Race Discrimination Commissioner (1995a), *Racial Discrimination Act 1975: A Review***,** Commonwealth of Australia, 81-100. See also Gaze (2005), 190-96

[222] Thornton, M (1990), *The Liberal Promise: Anti-Discrimination Legislation in Australia***,** Oxford University Press, Melbourne, 180. See also Allen, D, (2009a), 'Reducing the burden of proving discrimination in Australia', 31 *Sydney Law Review* 579, 582.

of discrimination when they have denied someone work, therefore, is to provide an apparently rational explanation for the decision. This then carries probative weight that is difficult for the plaintiff to rebut without a 'smoking gun' or direct evidence of discrimination.[223] In the absence of the latter evidence litigants will generally have to rely on the drawing of inferences and circumstantial evidence. Courts and tribunals, however, are often reluctant to draw such inferences, as seen in the case of *Murray v Forward*, discussed above.

In more blatant instances of discrimination proving allegations is somewhat less problematic – though these types of matters may be less common nowadays as people are likely to be more careful not to blatantly discriminate, including due to the possibility of legal sanctions. This is a criticism levelled at civil rights law by critical race theorists: that the law is able and willing to only sanction more blatant forms of racism and because of this fails to address more substantive or systemic inequalities.

Gaze has investigated Federal Court discrimination and vilification rulings under the RDA between 2000 and 2015, identifying only 6 cases in which the plaintiff's claims were upheld.[224] This leads her to question 'whether the RDA has any effect in eliminating or reducing racial discrimination'. She states: 'The absence in fifteen years of any case in which the court was prepared to infer that discrimination was because of race in the absence of explicit evidence indicates precisely how limited is the scope of [the RDA] …. in the most common situation where no reason for unfavourable treatment is obvious or volunteered'.[225] Cases appear to be only successful in situations in which 'an overt racial criterion is used or an explicit racial insult or harassment occurs', providing irrefutable evidence that race was the basis for the actions complained of. Of interest perhaps, three of these 6 successful cases involved clearly discriminatory behaviour against Aboriginal people, two of which are cited above: *Baird v Qld* and *House v Queanbeyan Community Radio*. Wins like these would appear to be

[223] Thornton (1990), 180.

[224] Gaze (2015).

[225] Ibid, 78.

exceptional rather than commonplace, given Gaze's findings.[226] Gaze also raises an important point: that '[w]ell-resourced respondents settle good cases to avoid precedents being developed, leaving weaker cases to be litigated with predictably poor outcomes. This further deters litigation, and as a result the law is left largely unenforced at a public level, and the body of precedent developed tends to focus on weak cases that are lost.'[227]

Access to justice issues that inhibit the initiation and success of race discrimination related legal action, including problems related to the burden of proof, will be more pronounced the less resourced and more vulnerable or marginalised (potential) litigants are. Indigenous people have especially significant levels of socio-economic marginalisation, discussed in Chapter 2. This is likely to render barriers to accessing justice in response to race discrimination disproportionately high for them, as identified by National Congress. Speaking of their use of the RDA's racial vilification provisions, Congress states that Aboriginal and Torres Strait Islander people 'are one of the most poorly treated segments of Australian society', as well as being 'least able to defend themselves in a legal context'.[228]

It is not just socio-economic vulnerability that impacts on Indigenous access to justice in this area, but also Indigenous experiences of colonisation, within which the law has been used as an effective tool of subjugation and dispossession. Turning again to problems related to the burden of proof and how they

[226] The other successful Indigenous case was *Trapman v Sydney Water*, in which an Aboriginal man alleged six separate incidents involving explicit racial or colour references. The only allegation upheld, however, was the one admitted by his workmate. All others were denied and unproven. *Trapman v Sydney Water Corporation and Ors* [2011] FMCA 398. A similar investigation conducted by Gaze for an earlier 4-year period (2000-2004) uncovered only *one* successful race discrimination case, a matter which the plaintiff simply could not lose. It was brought by a non-Indigenous employee dismissed by an Aboriginal organisation on the basis of an explicitly race-based change of employment policy prioritising Aboriginal employment. The Aboriginal organisation raised no defence. *Carr v Boree Aboriginal Corporation* [2003] FMCA 408. Gaze states that '[n]o person of minority race or ethnicity brought a successful claim of racial discrimination' in the 4 years studied. '[T]he only successful claim was an undefended case based on an explicit racial criterion. Plenty of unsuccessful cases were brought but failed because they could not prove that race was the basis of the differential treatment'. Gaze (2015), 76-8.

[227] Ibid, 75.

[228] National Congress (2016), *Submission to Freedom of Speech (Repeal of s. 18C) Bill 2014 - Exposure Draft*, 5. Congress refer here to use of the RDA's racial vilification provisions.

might apply to Indigenous people specifically, as will be discussed in Chapter 7 Indigenous people (quite reasonably) have little faith that allegations of race discrimination they may raise in a court or tribunal will be responded to appropriately. They do not think that they will be able to prove these allegations or that they will be believed. This distrust may well deter Indigenous people to a greater degree than others from commencing litigation.

4.2 Addressing systemic racism through the law

A second barrier to accessing justice arises due to the law's limited capacity to respond to discrimination in *all* its forms, but in particular where it is anything other than direct and inter-personal (and often also overt) in nature. This is a major criticism raised within CRT. Critical race theorist Freeman, for instance, claims that the law often defines discrimination as the 'misguided' conduct of individual actors, the 'actions of atomistic individuals … apart from and outside of social fabric and historical continuity' – rendering it incapable of confronting entrenched structural racism.[229] Taking on direct discrimination in areas such as health, education and housing can and does make inroads into systemic inequalities, noted in discussion of social exclusion and inclusion in Chapter 2. Indirect or less overt discrimination, including where it manifests as institutional racism, is, however, likely to be more common than direct discrimination (because people fear being seen as racist), a point returned to in Chapter 4. It is in this area, problematically, that the law struggles to provide an effective response.

Partly legislative, partly jurisprudential, this issue relates to but is broader than that concerning the burden of proof. It is an issue raised just after enactment of the RDA (but prior to introduction of indirect race discrimination provisions) by the inaugural Commissioner for Community Relations, heading up

[229] Freeman, A (1977), 'Legitimizing racial discrimination through anti-discrimination law: a critical review of Supreme Court doctrine', 62 *Minnesota Law Review* 1049, 1054. Kelsey also states that 'all hopes for the liberalization of relations between groups in any society will remain unfulfilled so long as legislation is enacted which merely tinkers with some of the more overt but superficial aspects of a problem which is part of the existing fabric of society. Paternalistic legislation based upon the assumption that racial (or any other) conflict within society is a 'problem' to be solved without disturbance of the basic patterns of economic social and political relations within that society is an illusion'. Kelsey (1975), 83.

the first iteration of what is now the AHRC. The Commissioner identified that the 'number of RDA complaints [lodged by Indigenous people] does not accurately gauge the extent of the existence of racial discrimination' they encounter, not only because they do not always lodge complaints but also because the 'most prevalent form of racial discrimination' they experience is 'institutional' in nature.[230] This type of discrimination 'is not evidenced in single acts', according to the Commissioner, which at that time were the only acts on which a complaint could be based.

As is evident in the complaint statistics presented in Chapter 6, 'single act' instances of (direct) discrimination still underpin the bulk of Indigenous complaints. Whilst we now have indirect discrimination provisions in place in almost all jurisdictions, including federally, these are not used to the extent they might be or where they are used, the matters in question are often unsuccessful. The law is generally understood as conferring on an individual the right to initiate legal action alleging less favourable treatment of an individual) on certain grounds, in specified public areas and in a particular instance.[231] Our focus on the individual complaints-based mechanism within the anti-discrimination legal regime is unhelpful in this regard.[232]

As Indigenous academic Moreton-Robinson writes, the law 'finds racism from time to time, usually with reference to the overt behaviour of individuals. To my knowledge there has never been a finding of systemic racism in any racial discrimination case.'[233] Thornton too suggests that amidst the broad 'phenomenon of racism' only isolated (one-off) discriminatory acts are generally dealt with by the law: those for which there is an identifiable complainant and respondent. This is not how things work, she

[230] Commissioner for Community Relations (1976), *Annual Report*, Sydney, NSW 71.

[231] See discussion in Allison et al (2013a), Allison (2014b).

[232] Writing about UK experiences of racial discrimination law in 1975, Kelsey claims, for instance, that the individual complaint-based procedure 'by definition treats only symptoms, not causes' and 'redressing individual grievances'; leaving 'untouched the economic social and political environment with its built-in, structured, sanctioned inequality, its established patterns of discrimination, and its exclusion from positions of power of the victims of discrimination.' He continues, stating that the 'potentialities for social conflict remain … so long as solutions are confined to the conventional and traditional'. Kelsey (1975), 89.

[233] Moreton-Robinson, A (2007), 'Witnessing the Workings of White Possession in the Workplace: Leesa's Testimony', (26) *Australian Feminist Law Journal* 81, 84.

claims, asking how one is expected is locate an individual 'tortfeasor' when racism is so 'diffused throughout (our) social fabric'.[234]

To expand on the employment-related scenario raised above, an Aboriginal person may (apparently quite reasonably) be denied the job they seek because of a poor resume. To a significant degree, however, this is highly likely to be due to a history of social exclusion or disadvantage impacting on both the individual job applicant and, in fact, *all* Aboriginal and Torres Strait Islander people. The job applicant will generally only complain of discrimination by the respondent named in this particular case, who will then point to decision-making based on individual merit rather than race. Lack of success is therefore attributed to failure on the part of the Indigenous applicant. In situations of this type the law 'fails to see and cannot address the continual cycles of discrimination' that disproportionately 'affect the employment prospects of all Aboriginal people', according to Moreton-Robinson. The employer, and indeed broader society is in this sense rendered 'immune' from legal sanctioning, reinforcing and reflecting the *perpetrator*'s view of discrimination as something that occurs out of the ordinary, as an aberration – as Moreton-Robinson describes it, in 'small pockets of society or not at all'. [235]

Existing indirect discrimination provisions do have potential to tackle systemic inequalities impacting on Indigenous people, including institutional racism.[236] This potential is largely untested or poorly actualised, however, due to problems of access to justice: both as poor levels of Indigenous engagement with dispute resolution processes through which these provisions could be tested and limitations in the outcomes achieved through such engagement.

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[234] Thornton (1995), 84.

[235] Moreton-Robinson (2007), 82. She states further, as follows. ''We' are all Australians and 'we' all have the same chances. Any failure to achieve is the fault of the individual.' She asks why 'is the dominant representation of Indigenous socio-economic disadvantage within the media attributed to our pathology'? This is compared to white people on welfare, attributed to 'a lack of opportunity, training and market forces'. Ibid, 84-5.

[236] See, for instance, Trlin, who points out that 'involuntary residential segregation and restricted employment opportunities cannot, of course, be completely removed or prevented' by the RDA. 'Nevertheless, the Act is a necessary forerunner to fundamental changes required in the institutional structure of Australian society.' Trlin, A (1984), 'The Racial Discrimination Act of 1975', 19 (4) *Australian Journal of Social Issues* 251, 257.

Flynn points to the 'statistical inequality' of Indigenous people reflected in the highly 'disproportionate number of the Indigenous population' who are 'at the very bottom of Australia's socio-economic ladder and appear to be going nowhere'.[237] When compared to a non-Indigenous person an Indigenous person is 'much less likely to be employed', to 'live in an adequate house, achieve education milestones, survive childbirth or live beyond the age of 55' — all manifestations of social exclusion. Though these outcomes do not constitute direct or indirect discrimination in and of themselves, according to Flynn, the conditions that give rise to them *may* be challengeable at law.[238] As an example, Flynn cites a report prepared by an Aboriginal body representing traditional owners in the NT. The report indicated that to address Indigenous disadvantage Indigenous access to 'the same level of support available to low income and disadvantaged non-Indigenous people' was required.[239] To access that support, however, an applicant had to have 'reasonable literacy and numeracy skills, viable use of English, adequate maintenance of personal records … and a residential address for the receiving of relevant mail'. Many Indigenous people are unlikely to have these 'resources', resulting in denial of access to the aforementioned support, which then continues to feed disproportionate levels of Indigenous disadvantage.[240]

Taking legal action, particularly where indirect discrimination provisions are utilised, may help to halt the latter cycles of Indigenous disadvantage and exclusion. Flynn suggests that the type of scenario cited in the above-mentioned report may support a complaint of indirect discrimination. The 'conditions of access to low income support are imposed by an agent of the government' and the 'effect' of the

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[237] Flynn, M (2005), 'Why has the Racial Discrimination Act 1975 (Cth) failed Indigenous People?', 9(1) *Australian Indigenous Law Reporter* 15, 15.

[238] Ibid. Flynn claims that proof of no more than that an Indigenous person is 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'. Nor does proof of statistical inequality identify 'the condition' imposed or 'the discriminator' imposing the condition. It follows that there cannot be a finding of an unlawful act of *direct* or *indirect* racial discrimination on this basis alone.

[239] Ngaanyatjarra Council (Aboriginal Corporation) (2003), *Doing Business with Government*, Ngaanyatjarra Council, Alice Springs NT.

[240] Flynn (2005), 18.

condition is to 'impair the enjoyment' of the 'human rights' of Indigenous people to 'housing', 'public health', 'social security and social services.' Whether redress is available will depend on whether a court or tribunal identifies the relevant requirement or condition as 'unreasonable'.[241]

As a further example, De Plevitz suggests that indirect discrimination provisions might be used to improve Indigenous employment outcomes, including where an employer denies an Aboriginal person a job.[242] She claims that job criteria related to educational background or work experience reflect the circumstances, capabilities, beliefs and achievements of (generally white middle class) employers and may be challengeable at law as indirect discrimination. These criteria may unreasonably disadvantage Aboriginal and Torres Strait Islander job applicants, given the impacts over time on Aboriginal and Torres Strait Islander people of structural racism.[243]

As highlighted by the Commissioner for Community Relations, the type of discrimination identified by Flynn and de Plevitz in the above examples is highly prevalent, including and perhaps particularly as it impacts on Aboriginal and Torres Strait Islander people. Despite this, there is relatively limited use of indirect race discrimination provisions.[244] Reasons for this are somewhat complex but may include that

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[241] Ibid.

[242] Plevitz de, L (2000), *The failure of Australian legislation on indirect discrimination to detect the systemic racism which prevents Aboriginal people from fully participating in the workforce*, Queensland University of Technology.

[243] Ibid, 44ff. See also the landmark US case of *Griggs v Duke Power 401 US 424,* in which the US Supreme Court referred to the 'disparate impact' of policies or conditions imposed by employers upon African Americans, (including those requiring a high school diploma to access higher paying jobs in the firm in question) as unlawful under civil rights legislation. It was recognised that African Americans would be less likely to have attained a diploma due to racism. De Plevitz also identifies indirect discrimination provisions as having capacity to improve Indigenous educational outcomes. Plevitz de, L (2007) 'Systemic Racism: The Hidden Barrier to Educational Success for Indigenous School Students,' 51(1) *Australian Journal of Education* 54.

[244] Lawyers may have difficulty identifying or interpreting indirect discrimination as defined at law, given the complexity of provisions in question. See, for instance, discussion in Schwartz et al (2013), 107. Gaze points to limited use of s. 9(1A) of the RDA, at least in litigation. There have been no successful indirect discrimination cases under s 9(1A) since 2000, she states, though there have been successful cases under State/Territory provisions. See, for instance, *Awad v Western Sydney Local Health District* [2013] NSWADT 287). Gaze (2015) 72.

an unsuccessful Aboriginal job applicant (as described in the job scenario cited earlier in the chapter) may be unaware of the full range of legal protections available to challenge discrimination, particularly indirect discrimination. De Plevitz also points out that the aforementioned unsuccessful Aboriginal job applicant is likely (as is the case for society generally) to identify personal failure as the reason for being denied work, rather than structural racism.[245] Furthermore, she also suggests that marginalised individuals will not even contemplate applying for a job, a further impact of structural racism. As a result, there will be no discriminatory act to complain of.[246] Moreover, where indirect discrimination *is* litigated courts and tribunals are quite likely to fail to properly comprehend and/or consider the broader social and historical context within which an instance of alleged discrimination occurs. This is an example of institutional racism within the law, discussed in the following section.

Problems of access associated with capacity of the law to confront indirect or more systemic discrimination has particularly significant impacts on Indigenous people. Arguably, they are more affected than others by these forms of discrimination, evidenced in their disproportionate levels of socio-economic disadvantage. They are also less likely to challenge them, however, because of the degree of marginalisation to which they are subject. Where these types of issues go unchallenged, moreover, disparity between Indigenous and non-Indigenous disadvantage is further entrenched.

4.3 Institutional racism in the law

The implications for Indigenous access to justice arising due to institutional racism *within the law* are detailed in this section. This occurs where the law fails to account for and respond to the particular needs, circumstances and perspectives of Indigenous people, leading to discriminatory outcomes.

Critical race theorists identify the legal system, as noted earlier, as highly biased, despite its appearance of neutrality and fairness. It is seen as largely incapable of delivering 'justice' to racially marginalised groups due to this bias, which may be overt and/or intentional and generally arises because the law is

[245] Plevitz de (2000).

[246] Ibid.

dominated by the perspectives of more powerful racial groups.[247] In the latter sense, the law is simply a reflection of what occurs in society as a whole. Similar views are expressed about the capacity of anti-discrimination law in Australia to deliver effective justice outcomes to Indigenous people. Nielsen quotes an Indigenous man referred to as 'Uncle' who believes that this area of law is 'designed for them' (white people). 'It's not for us … It's not. It's just taking things away'.[248] His experiences of the law, in general, are of a 'practice skewed towards the white majority', offering a 'protected and exclusive place of privilege' to which non-whites gain entry only on 'white terms and conditions'. Reminiscent of the terminology of indirect discrimination, these terms and conditions demand that Indigenous people jump through procedural and more substantive hoops that do not 'fit well' with them in order to engage with the 'form' of law. They are required to 'cram' their experiences into a pre-determined outline of what is and is not 'discrimination'. These 'hoops' and this 'outline' cannot, however, accommodate Indigenous experiences and perspectives.

Other commentators point to the administration of anti-discrimination law in Australia as inherently racist, disadvantaging racial minorities. Tahmindjis, for instance, states that the supposed 'neutrality' of law in this area masks 'value choices', with our cultural and other experiences leading us to organise and process information in a race-conscious way.[249] In interpreting legal provisions, including those related to the concept of 'reasonableness' within indirect discrimination, decision-makers may 'sterilise relevant facts' raised in a complaint 'by abstracting them from the context in which their meaning *for the complainants* can be appreciated', Tahmindjis claims.[250]

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[247] Tahmindjis discusses the fact that the legal system is dominated by white people and that mainstream (white) culture will always be seen as superior within the value choices these people make. Tahmindjis, P (1995), 'The Law and Indirect Racial Discrimination: Of Square Pegs, Round Holes, Babies and Bathwater' in Race Discrimination Commissioner (1995a), 126. 122.

[248] Nielsen (2008), 6. Of note, Australian legislation was largely modelled on similar law in the US and United Kingdom (UK) (with no reference to Indigenous Australians' particular circumstances or perspectives). As will be explored in Chapter 4, Indigenous people called for introduction of race discrimination law but had little say in its drafting, identified as contributing to failures of the early South Australian racial discrimination law and also impacting on the effectiveness of current legislation in this area.

[249] Tahmindjis (1995), 122.

[250] Ibid, 110.

The impacts of these value choices on judicial decision-making is evident in case law cited above, including the Traegar Park case.[251] Illustrating Gaze's point about the judiciary's 'limited understanding of equality and discrimination', the Commissioner in this matter determined that it was *not* discriminatory to require an Indigenous student to access *the same* (mainstream) schooling as every other student, though this denied them a (*different*) form of education that better accommodated their cultural needs. According to de Plevitz, this decision 'overlooked the human rights principle that what is equal is to be treated equally, but what is different should be treated differently'.[252]

As the Equal Opportunity Commission ('EOC') in WA states, sameness of treatment or *formal equality* is generally 'equated with fairness of treatment'. This approach, however, leads to discriminatory outcomes where it fails to 'take into account the accumulated disadvantage of generations of discrimination' and/or 'the disadvantage faced by groups by a system that fails to recognise different needs'.[253] In the Traegar Park case the 'different needs' in question were cultural, but also related to self-determination – manifested in this instance as Aboriginal parents deciding on the type of education that best meets their children's needs. As Walton suggests, the Aboriginal students' right to education was interpreted as 'sufficiently protected so long as they have access to *some* form of education. Their rights did not seem to extend to *the form* that education took, and certainly took no account of any principles of self-determination'.[254]

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[251] Note that a later case under the Victorian legislation based on similar facts to those of *Traeger Park* was successful. See *Sinnapan and Foley v State of Victoria* (1996) AILR 55.

[252] Plevitz de (2007), 58.

[253] EOC (WA) (2014), *The Policy Framework for Substantive Equality*, Perth WA, 4.

[254] Walton (1995). She states too that '[t]here can be no self-determination while non-Aboriginal people persist in the view that they know what is best for Aboriginal people.' Walton takes particular issue with the 'assimilationist argument' that the students needed to attend and would be better off within mainstream schools 'because it assumes Aboriginal and Torres Strait Islander students should measure up to some mythical white norm; it presumes all students should be judged from the position of a white centre — thereby excluding alternative constructions of Aboriginal aspirations.' Walton too cites Commonwealth policy in place at the time of the closure of the school emphasising the primacy of consultation with Indigenous people in planning, implementation and evaluation of schooling as key to addressing the structural inequality faced by, and subsequent poor educational outcomes of Indigenous students. Ibid, 3, 8-9.

The case of *Martin v State Housing Commission (Homeswest)* 25/7/97) Unreported, EOTWA ('Joan Martin case') is a further example of the law's failure to take adequate account of Aboriginal needs and perspectives, again leading to outcomes that are themselves discriminatory. Joan Martin was an Aboriginal woman living in public housing in WA. She was evicted from her home because it was overcrowded, according to the WA public housing provider, Homeswest.[255] She challenged her eviction through discrimination law,[256] arguing, in part, that it was indirectly racially discriminatory due to the imposition of the requirement or condition with which she could not comply: that is, not to accommodate additional tenants. Martin claimed that her cultural obligations as a Yamatji mother and grandmother required that she house her family members requiring shelter. The Equal Opportunity Tribunal (WA) at first instance found no discrimination, 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. According to McGlade and Purdy, Martin's mothering was thus rendered 'cultureless'. No 'credence and respect' was afforded to her Aboriginal culture: evidence, they suggest, that anti-discrimination legislation is 'failing Aboriginal people'.[257]

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[255] At the time of the eviction she had more than 15 other Aboriginal people living with her, many of them children Notably, those she had taken into her home all had their own difficulties accessing and retaining housing.

[256] On appeal the Supreme Court in WA found that direct and indirect discrimination had occurred (direct discrimination involved a racist campaign lodged against her by her non-Indigenous neighbours.) This case was then overturned by the WA Court of Appeal. Martin was then unsuccessful in her application for leave to appeal to the High Court. See *Martin v State Housing Commission* (Unreported, Kirby and Hayne JJ, 6 August 1999) and discussion in McGlade and Purdy (1998).

[257] McGlade and Purdy (2008), 150, 54. They quote Behrendt as follows. 'The dominant style of legal analysis claims it defines rights and ensures their interpretation. But the experience of distinct disadvantaged societal groups is that the dominant style of legal rational analysis is unable to define 'rights' without bias and retards the enforcement of those rights.' The decision also highlights the complexities that arise where Indigenous people suffer multiple forms of oppression. The Tribunal could not see Martin as a grandmother, mother *and* Indigenous. It sought to fracture her into parts, despite her claims that she was obligated to relatives in 'two ways - because of my culture and because of my heart'. Ibid, 149-50. Nielsen also cites Duclos who suggests that an Aboriginal woman complaining about gender discrimination must 'establish that she is just like a white woman', or if complaining about race discrimination, that she is just like an Aboriginal man even though 'it is very possible that the discrimination occurred precisely *because* she was not those people'. Consequently, discrimination laws have the effect of making' Aboriginal women 'disappear'. Duclos, N (1993), 'Disappearing Women: Racial Minority Women in Human Rights Cases', 6 *Canadian Journal of Women and the Law* 25, 43-44. Nielsen (2008), 6.

In these two cases the law becomes part of the problem of race discrimination, rather than offering a solution to it. For the Aboriginal plaintiffs in question, denial of culture and/or of self-determination equated to unlawful discrimination. The decision makers, however — including the Minister, the public housing provider, and ultimately, the legal system — denied that there had been discrimination. Indigenous people were (only entitled to be) treated the same as everyone else, with no account taken of their different or particular circumstances. Formal equality was preferred over substantive equality, with the latter defined by the WA EOC as 'achieving equitable outcomes as well as equal opportunity.' Equal opportunity removes formal barriers to applying for a job, for instance. Achieving equitable outcomes, however, requires that substantive barriers to attaining work (educational levels and criteria, for example) are also acknowledged and addressed. Substantive (as opposed to formal) equality appropriately accounts for 'the effects of past discrimination. It recognises that rights, entitlements, opportunities and access are not equally distributed throughout society' and that it is 'necessary to treat people differently because people have different needs', and in the case of Indigenous people, different rights.[258]

The above discussion illustrates that rights are not the same for all groups. Indigenous people enjoy collective rights associated with their status as First Nations Peoples, including to culture and self-determination, which they attempted to assert in (and saw as relevant to) their claims of discrimination in the Traegar Park and Joan Martin cases. Recognising and adhering to these rights is fundamentally important to addressing the effects of past discrimination on, and to ensuring substantive equality for Aboriginal and Torres Strait Islander peoples.[259] Aboriginal academic Irene Watson describes this as follows.

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[258] EOC (WA) (2014), 4.

[259] Critical race theorist Delgado suggests that the language of 'neutrality' and of 'colour blindness' can never lead to or underpin a 'coherent civil rights strategy', though these terms or approaches become so commonplace over time as to seem natural and right. They are best displaced, however, through 'counterstories', according to critical race theorists. In an Indigenous context this means introducing and reinforcing Indigenous accounts of equality and inequality. Delgado, R (2007), 'Rodrigo's Corrido: Race, Postcolonial Theory and U.S. Civil Rights', 60(6) *Vanderbilt Law Review* 1689, 1707.

> In general, Nunga rights from a Nunga perspective differ from the Anglo-Australian view of what Nunga rights should be … [U]sing Anglo-Australian law to decide what the rights of Indigenous people should be is the same as using Aboriginal law to decide what are the rights of non-Indigenous Australians. From both camps there is denial of the other's sovereignty …. [Required] is mutual respect for each other's right to self-determination.[260]

The decisions discussed above both dismiss Indigenous accounts of racism and implicitly permit and even encourage its further occurrence. Nielsen suggests that far from delivering 'justice', by responding to Indigenous accounts in the way it does mainstream law 'effectively reproduces and stabilises white privilege or dominance in society', reinforcing the status quo, including existing power relations.[261] Watson goes further in stating that in hiding behind its appearance of 'neutrality' so as to deny Indigenous rights the legal system further colonises Indigenous people. Denial of a right to self-determination, in particular, bolsters mainstream society's 'claim of right to settle territory and to receive privileges attendant upon occupation – including the expectation of …. [legal] protection'.[262]

This is in keeping with comments made by Thornton (though without reference to Indigenous people). She claims that highly restrictive legal definitions and 'failed' cases of discrimination actually *increase* its incidence.[263] There is deliberate design in all of this, Thornton suggests. In line with the views of critical race theorists, she argues that anti-discrimination law was never intended 'to make those who belong to out-groups *equal in fact* to the dominant [social] group'.[264] As evidence of this she points to the partial rights and remedies this law bestows upon these 'out-groups', offering only a right 'to resort to specific procedures' of complaint when a dispute arises. This purely procedural right is 'not absolute'

[260] Watson, I (1996), 'Law and indigenous peoples: the impact of colonialism on indigenous cultures' 14(1) *Law in Context*, 107, 109.

[261] Nielsen (2008), 1.

[262] Watson (1996), 109.

[263] Thornton (1995), 90.

[264] Thornton (1990), 38.

in that it does not 'hold when the consequences for policy' arising through legal action by minority groups 'are very serious, that is, *when they might be disruptive or dangerous*'.[265]

These points and issues are illustrated by the decision of *Gerhardy v Brown*. In this matter the High Court identified the *Pitjantjatjara Land Rights Act* as discriminatory, as noted above, though its aim was to vest land rights on Aboriginal people: another collective Aboriginal and Torres Strait Islander right. This Act was then identified as a special measure. Sadurski has criticised this judgement as prioritising form over substance, suggesting that it 'endorsed an approach according to which all references to race, however benign and reasonable, are *prima facie* discriminatory'.[266] Legally, however, discrimination ought to 'lack an objective basis or legitimate purpose' and be 'arbitrary, invidious or unjustified'. Though defining the Act in question as an 'exceptional short term (special) measure' was incorrect, this became necessary once it had been labelled discriminatory. Sadurski attributes the approach taken due to reluctance on the part of the legal system 'to spell out any substantive moral judgements of distributive justice', including recognition of Indigenous land rights.[267]

A previous Race Discrimination Commissioner also claims that Indigenous collective rights were never intended to be caught within special measures provisions but have been due to narrow judicial interpretations of discrimination.

> The special measures provision is open to the criticism that it does not adequately serve collective rights. The concept of special measures rests on the idea that certain racial groups

[265] Ibid (emphasis added).

[266] Sadurski, W (1986), '*Gerhardy v Brown* v the concept of discrimination: reflections on the landmark case that wasn't', 11 *Sydney Law Review* 5, 7-8.

[267] Sadurski (1986), 7-8. See also the Native Title Act case of *Western Australia v Commonwealth* (1995) 183 CLR 373, wherein it was held that Commonwealth native title legislation was a special measure. Discussed in Hunyor (2009), 46ff, and in Pritchard, S (1995), 'Special measures', in Race Discrimination Commissioner (1995a), 183, 197-8. Though not referring to Indigenous people specifically, Gaze too points to a reluctance evident in race discrimination jurisprudence both to 'depart from same treatment as the ideal of equality' and 'to question existing social arrangements, which might disturb accepted patterns of allocation and attributed merit'. Gaze (2002), 325.

> may require special treatment until they attain the standard enjoyed by others. The rationale underpinning this provision is redress for past discrimination. It is basically a 'catch-up' provision. This is problematic from an Indigenous perspective. It posits an equality based on *sameness*. It does not allow for the equal enjoyment of rights based on difference, based on the different culture and values of Indigenous Australians.[268]

In a number of the special measures cases cited earlier the courts have disregarded Indigenous definitions of discrimination *and* of 'human rights', which incorporate an Indigenous right to self-determination, a point returned to in Chapter 8. The same approach is evident in suspension by the Commonwealth Government of the RDA so as to permit discrimination against Indigenous people, apparently 'in their best interests' though contrary to Indigenous views on the latter. An example of this is the Northern Territory Emergency Response ('NTER').[269] In 2007 the Commonwealth introduced laws and policies targeted at Aboriginal people in the NT as a 'national emergency response' to Aboriginal child sexual abuse and family violence. The NTER was categorised by government as a 'special measure' under the RDA. The RDA was also suspended in as it applied to the NTER. Whilst government identified this intervention as necessary for the 'protection of Indigenous people', commentators have been highly critical of it: described by Hunyor, for instance, as 'discrimination cloaked in paternalism', and as overriding various human and Indigenous rights, including a right to self-determination.[270]

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[268] Race Discrimination Commissioner (1995c), *Alcohol Report*, AGPS, Canberra, 37.

[269] *Northern Territory National Emergency Response Act* 2007 (CTH), s. 132. This legislation has since been repealed and the subsequent legislation does not suspend the RDA.

[270] The rights Hunyor points to include a right to free, prior and informed consent in Article 19 of the UNDRIP and the right to self-determination in Article 1 of the *International Covenant on Civil and Political Rights* and Article 3 of UNDRIP. Hunyor, J (2015), 'A glass half empty? Alcohol, racial discrimination, special measures and human rights', in AHRC (2015b), 183, 187. See also Watson, I, (2009b), 'In the Northern Territory Intervention what is Saved or Rescued and at what Cost?', 15(2) *Cultural Studies Review* 45; Hunyor, J (2009), 'Is it time to re-think special measures under the Racial Discrimination Act? The case of the Northern Territory Intervention', 14(2) *Australian Journal of Human Rights* 39; and Gibson, P (2009), 'Return to the Ration Days - the NT Intervention: Grass-roots Experience and Resistance', 3 *Ngiya: Talk the Law* 11–13.

Academics Bielefeld and Altman point to the RDA as 'an important statement about the value of racial equity and anti-discrimination in Australian society', which is why it is 'so disturbing', they suggest, that it has been overridden by Federal Parliament 'to allow racially discriminatory laws' impacting negatively on Indigenous people three times between 1997 and 2007. This, they claim, demonstrates the 'precarious nature of the protection offered by the RDA'.[271] They also see it as indicative of Federal Parliament's willingness to place limitations on Indigenous human rights; 'allegedly to deal with child sexual abuse and ostensibly to promote beneficial outcomes', but with government's views on what those outcomes might be 'in sharp contrast' to those of Aboriginal and Torres Strait Islander peoples and the United Nations.[272] Of particular concern is the manipulation of the 'language of rights' ('special measures') to achieve government-oriented goals. For Bielefeld and Altman, the 'rhetoric of human rights' has been used during the NTER 'to underpin the power of the state and reduce the possibilities for independent activity' of Aboriginal people in the NT.[273] This illustrates that government 'maintains hierarchical understandings of human rights whereby some rights are routinely sacrificed allegedly to achieve others deemed more significant.' They continue as follows.

> Amongst the casualties are the right to be free from racial discrimination, rights to self-determination and rights to autonomy for Indigenous peoples. This tendency has led Irene Watson to question 'whose concept of human rights and equality applies?' The Intervention is an instructive illustration of the manner in which 'State powers massage rights to their definition and purpose'.[274]

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[271] Bielefeld and Altman (2015), 197. The instances discussed include the *Hindmarsh Island Bridge Act 1997* (CTH), which removed rights related to protection of Aboriginal cultural heritage and was thus inconsistent with the RDA. The *Native Title Amendment Act 1998* (CTH) also limited the scope of the RDA and diminished the native title rights of Indigenous people.

[272] Bielefeld and Altman cite Spann's statement that 'harmful effects are harmful regardless of the intent with which they are produced'. Ibid, 198-9. See Spann, G., 'Pure Politics', in Delgado, R, and Stefancic, J, (eds.) (2000), *Critical Race Theory –The Cutting Edge,* 2nd ed., Temple University Press, 21, 25.

[273] Bielefeld and Altman (2015), 198.

[274] Ibid, 203, quoting Watson (2009b), 47.

5 Conclusion

Chapter 3 identifies significant barriers within judicial adjudication of race discrimination disputes, impacting on Indigenous access to justice as both a process and in terms of justice outcomes delivered. A major reason for the problematic issues identified in this chapter is failure of the law to deliver substantive as opposed to formal equality. The legal system does not take adequate account of Indigenous perspectives, including perspectives of what constitutes discrimination. For Indigenous people, this includes more traditional forms of race discrimination, but also denial of rights to culture and self-determination, for instance. It is argued that Indigenous understandings of what must be done to deliver genuine (substantive) equality to Indigenous people must be better accounted for. These encompass recognition of and appropriate responses both to Indigenous-specific experiences of discrimination. The case law discussed in this chapter clearly indicates that this is not presently occurring to any significant degree.

Given the significant jurisprudential and legislative access to justice issues identified in this chapter it must be asked: is race discrimination law, in reality, of little to no value to Indigenous Australians? Chapter 4 explores this question by examining the origins of the RDA, presenting evidence that goes some way to supporting Thornton's claims of deliberate design in the problems of access to justice manifesting in this area. A larger body of evidence is set out, however, that points to a desire on the part of government to introduce legislative protection against discrimination, particularly as it impacts on Indigenous people. Significantly too, some Indigenous activists pushed for introduction of such protection, seeing it as likely to deliver benefit to Indigenous Australians.

CHAPTER 4: INDIGENOUS PEOPLE AND THE INTRODUCTION OF RACIAL DISCRIMINATION LAW IN AUSTRALIA

The analysis in Chapter 3 of race discrimination jurisprudence and legislation suggests that law in this area is not working as an access to justice mechanism as effectively as it might for Aboriginal and Torres Strait Islander people. Also discussed were suggestions that anti-discrimination law was never, in fact, intended to protect and/or that it actually further oppresses Aboriginal and Torres Strait Islander peoples.

Chapter 4 now travels back in time to the period during which racial discrimination law was enacted in Australia. Drawing on primary and secondary sources, how and why race discrimination legislation came into being at the precise moment that it did is explored, with links arising between the law's introduction and Indigenous people highlighted throughout. The primary focus of the chapter is on the RDA, given its significance as the first national race discrimination legislation passed in this country.

The aim of this time travel is to investigate expectations surrounding enactment of this law from both government and Aboriginal and Torres Strait Islander perspectives. The chapter explores what value Indigenous people initially saw in this law, or at least in the *concept* of a law that would protect them against discrimination. Also considered is whether there was consensus amongst Aboriginal and Torres Strait Islander peoples about this value. Did government intend the legislation to offer very little to racial minorities, to simply maintain the status quo, as critical race theorists and others surmise? These and similar questions and issues are interrogated, all of which are useful for assessment later in the thesis of the effectiveness of race discrimination legislation in Australia.

1 Setting the scene: international and national forces

The RDA was passed at a specific moment in time through a confluence of factors emerging at both international and domestic levels. These included greater recognition of human rights and increased

political and community-led mobilisation pushing for social reform, with some focus within this on empowerment of racial minorities.[275]

The atrocities of World War II ('WWII') had intensified interest in and awareness of human rights issues, including racism, compelling nation states to develop legal protection of these rights. Domestic anti-discrimination or civil rights legislation introduced post-WWII included the *Civil Rights Act* 1964 (US) and the *Race Relations Act* 1965 (UK), legislation upon which Australia's anti-discrimination laws were modelled. A number of international human rights instruments were also introduced during this period, setting certain standards for the treatment of racial minorities. These included the 1948 *Universal Declaration of Human Rights* ('UDHR'), the 1966 *International Covenant on Civil and Political Rights* ('ICCPR') and the ICERD.[276]

The ICERD was adopted and made available for ratification by the UN's General Assembly in 1966. It declared, amongst other things, that: 'All human beings are born free and equal in dignity and rights and … everyone is entitled to all the rights and freedoms … without distinction of any kind, in particular as to race, colour or national origin'.[277] Positive obligations imposed on signatory states by the ICERD include undertaking to eliminate all racial discrimination by governments, public authorities, organisations and individuals; amendment of discriminatory laws; introduction of programs of social, cultural and educational development; and provision of *effective* protection against discrimination — a significant inclusion to which we return later, and which confirms a point raised in Chapter 2: that substantive laws are important but must be enforceable to be genuinely effective.

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[275] Race Discrimination Commissioner (1995b), 9.

[276] The *Universal Declaration on Human Rights* (UDHR) (1948), for instance, refers in its Preamble to the 'inherent dignity and the equal and inalienable rights of all members of the human family' and states that the Declaration was intended to set a 'common standard of achievement for all peoples and all nations'. Articles 1 and 2 refer to the equality of all human beings and to their entitlements to rights and freedoms without distinction as to a number of grounds, including race. UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III). UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations.

[277] ICERD, Preamble.

Additionally, there was at this time growing a number and increased activism of action groups willing to confront human rights issues, including racism.[278] This was part of a 'worldwide surge of energy for overthrowing the old, giving voice to new fresh thoughts' and 'empowering the disenfranchised'.[279] The capacity of such groups to attract a 'representative community' was also enhanced during this period.[280] This gave rise to whole movements eager to affect reform. A heightened consciousness of racial inequality, for instance, and the desire to collectively challenge the status quo is evident in the anti-apartheid movement in South Africa and in the US civil rights movement. A similar 'movement' developed in Australia during the mid-20th century, one that sought recognition of the rights of Indigenous Australians.

At this time race issues could also 'could no longer be quarantined in any one country; rather, race equality was now an international issue'.[281] This meant that domestic protest relating to race relations in places such as the US and Australia inevitably played out on an international stage. The global community was harsh and outspoken in its repudiation of racism, as seen in its censorious reaction to the 1960 massacre by government of apartheid protestors in Sharpeville, South Africa, for example.[282] Scrutiny from other nations strengthened the resolve and efforts of domestic activists seeking to confront racial problems and pushed nation states to tackle racism within their borders. This 'internationalisation' of race issues also led to a transfer across national borders of ideology and methods of protest associated with protest movements, as occurred with the influence of the US civil rights movement on activism here in Australia.

[278] Clark J (2008), *Aborigines and Activism: Race, Aborigines and the Coming of the Sixties to Australia*, UWAP, Perth, 111.

[279] Race Discrimination Commissioner (1995b), 4.

[280] Clark (2008), 111.

[281] Ibid, 15.

[282] This led, for instance, to South Africa's removal from the Commonwealth and to UN-imposed sanctions.

2 Post-WWII domestic activism and Indigenous people

Attwood and Markus state that 'the parameters of Aboriginal protest have been determined by the nature of colonial regimes'.[283] This has meant that as colonised people Aboriginal and Torres Strait Islander peoples have always made use of whatever means are available to them to challenge their oppression.[284] Colonisation has followed a 'classic pattern of invasion, conquest, exploitation and political and cultural control' in Australia.[285] Indigenous people have therefore had to resist their colonisers using physical confrontation, including warfare - but also 'mainstream' channels, such as 'political demonstrations of equal ingenuity and courage' and a legal rights discourse.[286] As an example, the very first Indigenous political protest is identified as the petitioning in 1840 by Aboriginals in Van Diemen's Land of colonial and imperial governments against their oppressive living conditions.[287]

Though Aboriginal politics has a long history, from the 1950s it took on a form perhaps more readily identifiable as 'protest'. Events such as the highly publicised strike against terrible Aboriginal working and living conditions by Aboriginal cattle workers at Wave Hill (NT), commencing in 1966, and their subsequent seven-year fight for return of their traditional lands is one example of this new form of protest. Other events include the 1967 referendum for Constitutional change, the erection of the Tent Embassy on the lawns of Parliament House in Canberra in 1972, and the Freedom Ride of 1965.

This mid-20th century shift within Indigenous protest primarily related to tactics used, alliances 'exploited', and the 'growing assertiveness with which [Indigenous people] expressed their demands',

[283] Attwood and Markus (1999), 7.

[284] Indigenous people, Attwood and Markus suggest, have always had limited capacity to influence the Australian political process, sitting at less than 3% of the population and with little economic power. Ibid, 24.

[285] Commissioner for Community Relations (1981), 'Discrimination against Aborigines and the Role of the Commissioner for Community Relations', *Community Relations Paper No. 13*, Sydney, 2.

[286] Attwood and Markus (1999), 24. As an example, the very first Indigenous political protest is identified as the petitioning in 1840 by Aboriginals in Van Diemen's Land of colonial and imperial governments against their oppressive living conditions. Ibid, 28.

[287] Ibid, 28.

all of which were influenced by international events.[288] In Australia, as elsewhere, there was more open acknowledgement of and public discussion of racism than there had been previously.[289] This encompassed racism as it impacted on Indigenous Australians — aptly described at the time by Aboriginal activist Charles Perkins as ''fringe dwellers' on the edge of the white man's world'.[290] There was also a much stronger inclination to do something about this racism, leading to a surge in activism aimed at improving the circumstances of Aboriginal and Torres Strait Islanders.

Domestic activism drew strength from the global momentum whirling around race relations at this time. To galvanise support for the Indigenous cause activists sought to raise awareness of similarities between the situation of Aboriginal and Torres Strait Islanders within Australia and 'coloured' people in South Africa, for instance.[291] They also deliberately sought out publicity in the foreign press about racism against Indigenous people, and through this appealed to world opinion – an effective 'protest tactic'.[292] Domestic activists otherwise drew from methods used overseas. Perkins, for instance, claimed that the Freedom Ride of 1965 was motivated by similar civil rights action in the US. He stated that 'oppressed people everywhere are often forced to act upon similar lines'.[293] The US civil rights movement had a significant impact in Australia in various ways, providing 'a benchmark and rhetoric' for those seeking

[288] Ibid, 18.

[289] Enderby, Commonwealth Attorney General at the time of enactment of the RDA, stated '[a]t no time in our history has both the denial and recognition of fundamental rights been brought into sharper contrast than in the last 40 years. The events of the Second World War focused attention on the need to outlaw racial discrimination and, since that time, there has been intense international activity to ban [it].' Enderby, K, Speech by the Attorney-General and Minister for Police and Customs, Mr Kep Enderby QC to the Inner Western Suburbs Region Ethnic Communities Group on: 'The Racial Discrimination Bill', Ashfield Town Hall, 8pm, Thursday 1 May 1975.

[290] Perkins, C (1977), *A Bastard Like Me*, Ure Smith, Sydney, 177.

[291] See discussion in Clark (2008), 79.

[292] Ibid, 49. As an example, in 1961 Jim Jacko, an Aboriginal living at the Hopevale mission (QLD), was flogged, jailed and threatened with 'banishment' by the mission superintendent for courting another resident (genders were strictly segregated). The Federal Council for Aboriginal Advancement ('FCAA') generated significant national and international publicity about the case, bringing public attention to the nature of mission discipline as the abuse of human rights and it showed Australia's treatment of Indigenous people in the poorest light'. Ibid.

[293] Perkins (1977), 177.

a better deal for Aboriginal and Torres Strait Islanders.[294] Commentators have identified an Australian 'civil rights movement' that borrowed from that of the US, including in its campaign for acquisition for Indigenous people of civil rights to freedom of movement, to equal wages and to vote.[295]

There was also the emergence of a national Indigenous movement, based on 'a shared historical experience of oppression' and a 'shared culture'.[296] The first Aboriginal political organisations were founded in the 1920s, but these were state-based (including the Aborigines Advancement League in Victoria). There were early attempts to form a national group to represent Indigenous interests, the most significant body established prior to the 1970s being the Federal Council for Aboriginal Advancement ('FCAA'), formed in 1958 by both non-Aboriginal and Aboriginal people. The FCAA, or FCAATSI (Federal Council for the Advancement of Aboriginal and Torres Strait Islanders) as it later became, had five basic principles at the time of its formation. These were (1) equal citizenship rights through both repeal of discriminatory legislation and Constitutional reform; (2) adequate and equal standards of

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[294] Clark (2008), 151, 153.

[295] Chesterman, J (2005), *Civil Rights: How Indigenous Australians Won Formal Equality*, St Lucia, University of Queensland Press, 9. It is suggested, however, that our movement differed from that of the US in that it did not have any 'watershed moment' or 'defining moment of victory' to be commemorated, with the shift in Indigenous/non-Indigenous relations comparatively 'piecemeal and gradual'. Ibid. Though without referring specifically to 'civil rights', Clark also identifies the emergence of an Indigenous 'movement' in the second half of the 20th century. She claims that pre-WWII political organisations concerned about the situation of Indigenous people were relatively small in scale, revolving for the most part around individuals. From the 1960s, however, 'sporadic activism, local dissent and personal resistance' turned into a 'discernible movement'. Indigenous people became increasingly mobilised, organised and politicised in their calls for rights, voicing their demands more loudly than previously. They were 'encouraged by events overseas and buoyed by national organisation', demanding 'freedom from the trappings of colonialism' and recognition from Australia that a 'wind of change' was blowing its way. Clark (2008), 8, 20. See also Lippman, L (1985), *Generations of Resistance: The Aboriginal Struggle for Justice*, Longman Cheshire, Melbourne, 56, 59.

[296] Indigenous people around Australia from the 1960s, according to Attwood and Markus, 'came to have a much greater sense of themselves as a common national group'. These commentators point to the growth of national organisations and of 'deepening relationships between Aboriginal communities.' Early protest against colonisation had been, in comparison, 'intensely local'. Aborigines of a local place or 'country' had focused on 'their own needs and did not struggle for the interests and rights of other Aborigines'. See Attwood and Markus (1999), 9, 18.

living; (3) equal pay for equal work; (4) free and compulsory education for 'detribalised aborigines'; and (5) absolute retention of all remaining native reserves.[297] The 'discriminatory legislation' referred to here was federal and state law that, amongst other things, prevented Indigenous people from voting at state or Commonwealth levels, led to underpayment of Indigenous wages (paid well under award rates or withheld altogether), significantly restricted Indigenous freedom of movement and forced Indigenous people to seek permission to marry.[298]

A focus by FCAA and other Aboriginal political groups on issues that were not just focused on an individual community or region gave the Indigenous cause greater credibility and momentum.[299] It provided Indigenous people with a collective political identity and set of objectives through which to more effectively push for change, with leadership provided by these groups fundamentally important to mobilising Indigenous activism at local and broader levels.[300] Speaking in the 1970s, prominent Indigenous activist Paul Coe highlights the collective nature of the Indigenous cause at this time as follows.

> We are working on the basis that we are Aboriginal people one and all, and that we have similar problems, and that the only way that we will solve these problems is with a united front… There is now, for instance, in most of the [NSW] settlements an awareness that was not there five

[297] Smoke Signals, May 1958 (publication of Aborigines Advancement League), Federal Council for Aboriginal Advancement, Smoke Signals, May 1958.

[298] Chesterman (2005), 44.

[299] Clark (2008), 84. This is evident in comments made by Rowley, a social scientist of some influence in the mid-20th century. Rowley stated that though Aboriginal political resistance may have had a long history in the 1970s Australia was 'living in a period of transition from humbug to politics. Aboriginal people are becoming political men and women and claiming equality. And in the fight for this they force others to see them as real people with realistic needs like anybody else.' Quoted in Nettheim (1974), 5.

[300] FCAA, for instance, supported local Aboriginal activists fighting against oppression on reserves and racism in country towns. It led or was otherwise involved in campaigns against police brutality, the leasing of land at both Mapoon and Yirrkala missions to miners, and assimilation and dispossession from land of residents of Lake Tyers, for instance.

years ago. An attitude that they are people that have the right to exist and the right to have the same use and enjoyment as an average white Australian has.'[301]

3 Indigenous contributions to enactment of the RDA

This section considers the influence Indigenous people had on introduction of the RDA, including through their activism. This activism revealed widespread and blatant racism against Aboriginal and Torres Strait Islander peoples. Indigenous leaders also called on government to enact legislative prohibition of race discrimination.

3.1 Indigenous activism and the passing of the RDA

Chesterman directly links the passing of the RDA with the fight from the 1950s for equality by and for Indigenous Australians. He describes its enactment as a defining 'civil rights moment',[302] a 'final step in the hard-won acquisition of civil rights by Indigenous people',[303] and a 'pre-eminent (if belated) expression' of the same principle that had driven the campaign for Indigenous rights all along - that of non-discrimination based on race.[304]

Indigenous activists and their supporters contributed to introduction of anti-discrimination legislation by way of their campaigns for greater recognition of rights for Indigenous people. This activism increased the public's understanding of and concerns about racism targeted against Indigenous Australians. An Aboriginal person in 1965 still could not 'try on clothes, sit down for a meal, get a

[301] Quoted in Nettheim (1974), 139.

[302] Chesterman (2005), 95.

[303] Ibid, 96, 175.

[304] Ibid, 30. Noel Pearson has commented similarly. Pearson, N, 'Eulogy for Gough Whitlam', Sydney Morning Herald, 5 November 2014 (accessed October 2016), available at: <http://www.smh.com.au/comment/noel-pearsons-eulogy-for-gough-whitlam-in-full-20141105-11haeu.html>. A previous Race Discrimination Commissioner, Soutphommasane, also identifies introduction of the RDA as a pivotal race relations and human rights moment for Australia. Soutphommasane (2015).

haircut, go to secondary school, run for office, join a club, drink in the lounge bar or work in a shop.'[305] Once the reality of Indigenous/non-Indigenous race relations was revealed it could no longer be ignored by the wider Australian community or by government. Positive and purposeful action was required, including enactment of legislative prohibition of race discrimination.

3.1.1 The 1965 Freedom Ride and its impacts

The Freedom Ride is worthy of some attention at this point, for a few reasons. It is, firstly, a good example of the potential impact of direct action, highlighted within CRT as more effective than legal action in addressing racial injustice. Some contemporary commentators suggest that no other protest prior to the 1967 referendum had as much impact on public perceptions as the Freedom Ride, an event that took 'the issue of racism out into the streets for all to see'.[306] The ride and the surveys conducted with Aboriginal people in NSW it produced are also returned to throughout the thesis in evaluating how far we have come since enactment of race discrimination laws in terms of confronting the racial oppression of Indigenous people. The ride provides historical context against which to measure the latter progress, given that it occurred during the same period in which these laws were first introduced. Further, this event introduces the concept of 'freedom' and its connection with the rights of Indigenous people. This concept is also revisited in later chapters.

In arranging the ride on behalf of the Students Association for Action, Perkins wrote to the Chairman of the NSW Aborigines Protection Board, indicating that the group would seek to 'integrate certain

[305] Read, P (1990), 'Cheeky, insolent and anti-white: the split in the Federal Council for the Advancement of Aboriginal and Torres Strait Islanders - Easter 1970', 36(1) *Australian Journal of Politics and History*, 73, 97.

[306] Clark (2008), 179. One journalistic piece of 1965 referred to the event as a 'stinging challenge to the whole country', a 'direct and rude blow at the genteel silence that has clothed injustices with respectability, a sideswipe at the self-righteousness that has allowed Australians to warm themselves championing the causes of the Bantu at Sharpeville or the Negro students at Little Rock'. The piece continued as follows. 'What the 'freedom ride' has said in a mass of newspaper reports, widely circulated photographs, and a score of editorials and interviews is that a long, unwholesome silence has ended. It has pointed to signs and conventions saying 'No Aborigines' at rest rooms and café tables ... It has called out that Aboriginal people have been hospitalised on segregated verandas in [NSW, QLD and WA] …. and that Aboriginal mothers have been directed to separate labour wards.' Spalding, I, 'No genteel silence', Crux, Journal of the Australian Christian Movement – Aborigines, June-July 1965, 3.

theatres, swimming pools etc. which discriminate against Aboriginal people' and in so doing expose the racism they endured. Perkins continued as follows: 'The tactics will follow the pattern set by the Rev. Martin Luther King. It is passive non-violent action'. 'We do not intend to create confusion or disturbances that will lead to violent action. We merely wish to stimulate both Aboriginal and European towns-people into doing something practical about the situation.'[307] This would, it was hoped, lead to 'something constructive', useful for solving the problem of racism. 'Too long have students complained of South Africa and such. I feel it is time they channelled their efforts to doing something for their own depressed coloured people'.[308]

And so, Australia's 'apartheid' system was laid bare by busloads of student activists travelling through NSW country towns. Attracting high profile media commentary wherever it went, the ride highlighted the segregation of Aboriginal people from public places such as hotels and clubs, municipal swimming pools and shops, discussed in detail in Chapter 5. It demanded 'equality' for Indigenous, deserving of the same choices as non-Indigenous people in terms of where they lived, ate out, engaged in recreational activity, and so on.

Of note, the segregation highlighted by the riders was sometimes formally sanctioned. In Moree, for instance, a 1955 Council ordinance prohibited or restricted Aboriginal use of council facilities, including the local swimming pool.[309] The ride also revealed, however, a form of apartheid that was 'not an official one, not one that sanctioned troop movements and massacre' (as in South Africa), but that was represented by 'a huge gulf between Indigenous and non-Indigenous Australians.'[310] Though

[307] Perkins, C, 'Charles Perkins to Mr A.G. Kingsmill, Chairman, New South Wales Aborigines Welfare Board', 18 January 1965.

[308] Ibid.

[309] Aboriginal students were restricted to swimming during school hours, and this was only because the local headmaster had specifically applied for permission from the Council for this to occur. Prior to entering the pool, Aboriginal children also had to be soaped down and checked for lice. A 1948 council ordinance in Kempsey also forbade any Aboriginal person from swimming in the local pool, though an amendment in 1949 allowed them to swim with their school during school hours.

[310] Race Discrimination Commissioner (1995b), 1.

by the mid-1960s the repeal of discriminatory legislation limiting the civil rights of Indigenous people was well underway (discussed above), ordinary community members rather than or in addition to government still placed significant restrictions on the lives of Aboriginal people, including through unspoken social codes or rules.[311]

At least in its immediate aftermath, the Freedom Ride did not produce substantial change for Aboriginal people in the towns visited. They remained economically depressed and socially marginalised. As Clark notes, 'entrenched racism, apathy and habit were all difficult to dispel'.[312] The ride was and remains important, however.[313] In particular, it stimulated Aboriginal and non-Aboriginal people into action, including by shocking the broader community out of its complacency. Referring to the discriminatory legislation discussed above Perkins claimed that 'first class citizens made the laws which kept the Aborigines in their place'. The Freedom Ride, however, was 'the one thing that destroyed this charade with one big swipe. 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'.[314]

As was the case with other prominent moments of Indigenous political agitation during this period, the ride garnered important public and political support for the Indigenous cause, which contributed to reform, including introduction of the RDA. As evidence of this, second reading speeches debating the RDA's introduction, discussed below, are peppered with examples of the type of race discrimination

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[311] The Race Discrimination Commissioner stated that '[w]hite community attitudes toward Aborigines were just as effective an enforcer of social segregation as legalised apartheid'. Ibid.

[312] Clark (2008), 177.

[313] Curthoys, a student involved in the Freedom Ride, points to the growth of Aboriginal leadership it gave rise to. An Aboriginal leader like Perkins was a 'rarity' in the 1960s, but since then many other Indigenous leaders have emerged, including in the political sphere, and she suggests that the ride encouraged this. Curthoys, A (2002), *Freedom Ride: A Freedom Rider Remembers*, Allen and Unwin, Crows Nest NSW, 150.

[314] Perkins (1977), 89. In a 1965 report to the FCAATSI's Annual Conference on Aboriginal Affairs Perkins further stated '[t]he problem is out in the open now and is stark reality whereas before it was suppressed and not considered at all. People accepted that Aborigines were second-class citizens and that they were happy in the shanties that many of them live in'. Perkins, C, 'Report to Federal Council for the Advancement of Aboriginal and Torres Strait Islanders (FCAATSI)'s 8th Annual Conference on Aboriginal Affairs, Canberra, 16th – 18th April, 1965, 48.

highlighted during the Freedom Ride. These examples are used to justify enactment of the law, based on an explicit or implicit assumption that it would provide an appropriate response to this issue as it affected Aboriginal and Torres Strait Islander peoples.[315]

The impact of the Freedom Ride is attributed to the methods used, demonstrating the capacity of social movements to make important contributions to social change. The public and confrontational form it took signalled a shift in approach, according to past and more contemporary commentators. The event is identified by Clark as the most 'visible, militant and dramatic protest that had ever been seen' in Australia.[316] Previous protest about Aboriginal affairs was 'not like this'. This had 'capacity to shock, stir, arouse' - to produce the required level of 'discomfort, opposite opinions and alternative judgements' necessary for change to occur.[317]

3.2 Fear of international condemnation

Undoubtedly, more 'confrontational' forms of protest like the Freedom Ride also increased concerns about the Indigenous rights movement, including that it would draw international attention to and condemnation by the international community of domestic race relations. These concerns motivated government to enact racial discrimination legislation alongside or, looking it at more cynically, perhaps more so than any desire to improve the situation of Indigenous people.[318]

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[315] That the ride contributed to reform is identified by Rowley. Writing in 1972, Rowley identified the ride as 'an important turning point. Once the Aboriginal situation became a matter for political action … it became essential for governments to develop a national strategy'. Rowley, C (1972), *Outcasts in White Australia*, Penguin Melbourne, 388. More recently, commentators identify the event as forcing 'a reinterpretation of events and attitudes so that people would begin to give different weight to matters previously downplayed'. It provided 'a stimulus to make ideas and attitudes public so that they could be seen in relief and not simply accepted'. Clark (2008), 172. Soutphommasane has also identified this event as an important stepping-stone that helped push government to pass the RDA. Soutphommasane (2015).

[316] Clark (2008), 179.

[317] Ibid, 172. Other points of difference include the level of media interest it attracted and its capacity to tap into an international climate of change and the new political awareness of this period, Clark states. Ibid, 179.

[318] See discussion, Chesterman (2005), 55ff.

Activists deliberately used the fear of international approbation to influence the community and politicians. Thus, when FCAA spoke in the early 1960s of 'apartheid' in Australia, warning that 'unless conditions for Aborigines' are improved 'we may find ourselves in a similar position to South Africa', this appeared to reference both the violence of the Sharpeville massacre and the international community's critical response to this event.[319]

Clark suggests that during the 1960s the main issue for many non-Indigenous Australians may not have been 'improvement in domestic race relations so much as avoidance of the disruption, riot and rebellion that marked international racial strife'.[320] This was a frightening prospect in many ways, including because it would 'provide interest and focus for prying foreign eyes.' Clark also suggests that prior to the Freedom Ride Australians had been 'grateful that the racial troubles convulsing America and South Africa did not exist at home'. They were also 'vigilant lest they should'.[321] The ride and similar activism was seen as having real potential to shift everything in this regard.[322]

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[319] Clark (2008), 48. This approach can also be seen in the campaign for Constitutional reform, which referred to 'world opinion' as holding Australia 'collectively responsible for the treatment and conditions of Aboriginal people' in the case it made for the granting to the Federal Government power to legislate for Aboriginal people. The campaign material continues as follows. 'Australians are held collectively responsible for the treatment and conditions of the Aboriginal people by world opinion. Proper race relations is a national and international issue which therefore ought to be dealt with by Australians at a national level as well as at the State and local level (including through ratification of international conventions). Aborigines are a national responsibility. We must see to it that the National Parliament is able to accept that responsibility. We can make this possible by voting 'YES' for Aborigines on 27 May'. FCAATSI, Referendum on Aborigines (Background Notes), prepared by the National Directorate, Vote Yes Campaign, quoted in Attwood and Markus (1999), 214. The Queensland ADA in its Preamble also notably refers to the international community's desire 'to protect and preserve the principles of dignity and equality for everyone'.

[320] Clark (2008), 154.

[321] Ibid.

[322] The following commentary from *The Bulletin,* written just prior to the commencement of the Freedom Ride, provides evidence of these types of concerns. '[The freedom riders] have set in motion a scheme that may well focus the spotlight on Australia. Their plan is to charter a fleet of buses after the style of the American freedom riders and tour northern New South Wales and Queensland … Conscious that the American and Australian situations are not similar they nevertheless have seen the effect that world publicity can have on democratic governments. Now it seems it is Australia's turn.' Lipski, S, 'The Freedom Riders: 'I wish I was jet black'', *Bulletin*, 20th February 1965.

That these fears were significant enough to push government into action is evident, for instance, in Gough Whitlam's Labour Party *Policy Speech* delivered prior to the 1972 federal election. Whitlam, instrumental in the RDA's development, stated 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'. He further emphasised that 'the Aborigines (sic) are a responsibility we cannot escape, cannot share, cannot shuffle off — the world will not let us forget that'. Comments such as these are also evident in parliamentary debates surrounding introduction of the RDA, revealing anxieties arising due to media commentary, for instance, identifying Australia as the second most racist country in the world, 'eclipsing Rhodesia, the United States and Britain and beaten only by South Africa'.[323]

3.3 Agitating through the law for equality

As noted above, Indigenous people have often relied on mainstream systems, including politics and the law, to advocate for rights. It is suggested, in fact, that the mid-20th century Indigenous political movement, including where it manifested as direct action, was 'clothed in the language of rights'.[324] This movement is said to have heavily relied upon both the 'politics of rights and of shame', identified as 'crucial vehicles for the kinds of symbolic challenge' sought by Indigenous people and 'essential when minorities take on majorities in a liberal democracy'.[325]

Indigenous engagement with the law within the Indigenous rights movement occurred in a variety of ways, including through legal challenges and calls for legislative reform that would assist Indigenous people in their fight for racial equality. Reliance by Indigenous people on the law for recognition and protection of their rights is noteworthy, given that in both civil and criminal contexts it has so frequently

[323] Whitlam, G, 'It's time for leadership', Australian Labor Party Policy Speech, delivered at Blacktown Civic Centre, 13 November 1972. This followed the arrest and questioning of a famous Negro singer in Australia by police who had apparently thought he was 'a wanted Aboriginal'. See Commonwealth, *Parliamentary Debates*, Senate 15 May 1975, 3.

[324] Chesterman (2005), 19.

[325] Ibid.

been used to oppress Indigenous people. Perkins claimed, for instance, that the attitude of Aboriginals to the law 'has never been very good'. 'History has always been one of conflict between Aboriginals and the Law, however the law has manifested itself, and I think that this has always usually been through the police.'[326] Further, whilst discriminatory legislation was being repealed during this period, Perkins claimed that 'law' was also reflected in 'repressive institutions' such as the Aborigines Welfare Board ('AWB'). The AWB handed out blankets, tobacco, flour and sugar and said they were 'doing a great deal towards Aboriginal advancement. But they don't really seem to have done this, as is shown by today's present conditions.'[327] This meant that to Aboriginal and Torres Strait Islander people the law might understandably not be seen as 'an avenue for advancement in any way at all'. According to Perkins, Indigenous people's attitude to the law was, in fact, largely 'one of suspicion' and 'cynicism'.[328] Indeed, as we shall see later in the chapter, some Indigenous activists during the 1970s did *not* believe that the mainstream legal system was an appropriate tool for strengthening of Aboriginal and Torres Strait Islander rights, quite understandably.

3.3.1 Litigation and international human rights

Indigenous activists and their supporters used domestic and international law and litigation in their fight for rights. As an example of this, industrial action associated with the Wave Hill walk-off resulted in the Conciliation and Arbitration Commission's decision in 1966 to award equal wages to Aboriginal cattle station workers.[329] The Victorian Aborigines Advancement League also challenged through the law the NT Welfare Ordinance that classified most Aboriginal people as 'wards of the state'. Moreover,

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[326] Quoted in Nettheim (1974), 11. Perkins discusses the over-stepping by police of their privileges and rights in supressing Aboriginal people in a 'violent manner' in outback QLD and WA as but one example.

[327] This organisation was formed in 1883 as the Board for the Protection of Aborigines. It made recommendations about the conditions of Aboriginal people living in NSW, administered stations and reserves and provided food, clothing and housing for their residents. It had significant control over Aboriginal peoples' lives, determining where they lived and worked, and removed children from their families. The Board only included Aboriginal members from 1943.

[328] Quoted in Nettheim (1974), 11.

[329] *Commonwealth Conciliation and Arbitration Commission, Cattle Station Industry (Northern Territory) Award 1951*, 7 March 1966.

QLD's Aboriginal and Torres Strait Islander Advancement League released a *Declaration of Rights* in 1960 calling for civil rights, land rights and an end to racial discrimination. The language of international human rights is also evident in Indigenous rights campaign material. In arguing against closure of the Aboriginal mission at Mapoon in northern QLD, for example, the Secretary of the Aboriginal and Torres Strait Islander Advancement League, Joe McGuiness, urged 'all who read this story to protest and campaign on behalf of the Mapoon people, whose hearts beat strong in the faith that they do not stand alone in their struggle for simple human rights'.[330]

Additionally, that Indigenous access to civil law justice was seen as important by Indigenous people to recognition of Indigenous human rights is evident in a comment by the National Tribal Council. The Council stated that 'Aboriginals and Islanders in Australia need more lawyers than welfare officers' to fight against 'petty officials, mining companies' and others who 'push Aboriginals and Islanders off their land or otherwise deprive them of their rights. Where the rights of Aboriginals and Islanders are at stake, lawyers should intervene to ensure that justice is done.'[331]

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[330] Aborigines and Torres Strait Islander League, 'They Have Made Our Rights Wrong', pamphlet authorized by Joe McGuiness, Secretary, Aborigines and Torres Strait Islander League, Cairns, 6 November, 1962. Voting YES at the Constitutional Referendum of 1967 was also identified as involving 'a basic question of human rights': though more literally it sought to bestow upon the Commonwealth power to legislate for the benefit of Indigenous people and to include Indigenous people in the census count. Discussed in Attwood and Markus (1999), 215.

[331] National Tribal Council, Policy Manifesto, adopted 13 September 1970. Another unnamed participant of Nettheim's 1975 seminar on human rights and Aboriginal people (a resource referred to in previous footnotes) stated that '[w]e live in, and are part of, a white racist society. It is up to us to try to change it so that Aborigines are free to do their own thing faster, more fully and effectively.' Overall, 'I am appalled at the general lack of attack, the lack of emphasis on the use of the law as a force of social change'. Quoted in Nettheim (1974), 150. Contemporaries of Perkins, including the academic Tatz, referred to the 'Aboriginal struggle for law' (involving, for instance, 'phoney biological definitions of race enshrined in statutes' and 'prejudice and ignorance' in courts) as being 'an unequal one for too long.' Given this, Aboriginal people can 'hardly be expected to trust the [legal] system'. Tatz advocates for use of civil law to fight Indigenous 'political battles', to 'right wrongs', and to change the 'social and political conditions that produce the Aboriginal 'condition'', claiming that 'Aborigines are currently suffering legal and political wrongs for which white society (and other minority groups abroad) has found resolution through actions in contract theory, intentional and negligent torts, human rights conventions and so on. These types of actions should be explored by and for Aborigines.' Quoted in Nettheim (1974), 188.

3.3.2 Law reform: legislative repeal and the passing of race discrimination law

The rights movement fought hard to overturn racially discriminatory legislation, referred to by one Indigenous activist as 'entrenched legalised discrimination and racism'.[332] McGuiness identified the QLD legislation as 'scandalous', and as 'not in keeping with the United Nations Charter of Human Rights'.[333] Its repeal was sought so as to grant to Indigenous people full land and property rights, freedom of movement, freedom for the family (removal of children and a right to marry), removal of censorship (reading of mail), equal work conditions and wages, and 'justice before the law'.[334]

Indigenous activists also specifically called for introduction of legislation that would offer them legal redress against racial discrimination. Perkins advocated for a Bill of Rights to be inserted into the Constitution to 'protect Aboriginal people' against discrimination on the grounds of race 'right throughout the nation', law that 'will allow them to be able to take action against anybody on their own initiative'. 'They can feel that they have the law of the country supporting them.'[335] Whilst acknowledging, significantly, that what is required to address the 'desperate' situation is partly 'constructive and imaginative thinking' from Aboriginal people themselves, Perkins stressed that government also had a responsibility to act. He pointed out that discrimination against Aboriginal people is 'not diminishing or static' and that something 'dynamic needs to be done immediately'. 'Racial discrimination must be legally punished.'[336]

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[332] Pat Miller, quoted in Nettheim (1974), 23

[333] Queensland Council for the Advancement of Aborigines and Torres Strait Islanders, *The Existing Aboriginals Preservation Act, Amendments Which Should Be Made and Why*, 1964.

[334] Ibid

[335] Quoted in Nettheim (1974), 12.

[336] Perkins, C (1965). This comment sits alongside his demands for increased funding for programs to benefit Indigenous people; for Aborigines to 'run their own affairs — and this should be written into statutes or whatever it may be that would allow this to happen'; and for educating the general public about Aboriginal people, amongst other things. This indicates that the law was not seen as a panacea, but as one part of a broader strategy to be developed to address Indigenous inequality.

In 1959, as a further example, the FCAA also called for Federal and State governments to 'legislate to make discriminatory behaviour based on colour or race illegal and a punishable offence'.[337] Indigenous activist Gordon Briscoe also highlighted the utility of legal protections against discrimination — but significantly he stressed the need for Indigenous people to be involved in its development, raising the following questions.[338] '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'.[339]

4 Commonwealth response: enactment of the RDA

4.1 Human rights and Aboriginal affairs

The RDA was enacted in 1975 based on a range of factors, including a push by Indigenous activists for a response by government to racism but also due to the Commonwealth Government's obligations to

[337] Federal Council for Aboriginal Advancement, *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. FCAATSI also suggested that the Commonwealth might use its new powers, if the proposed Constitutional amendments were passed after the 1967 Referendum (enabling Government to pass laws for the benefit of Indigenous people), to enact a law like the *Prohibition of Discrimination Act* (SA).

[338] Quoted in Nettheim (1974), 36. Tatz also believed that anti-discrimination law was preferable to a Bill of Rights, as the latter generally declared rights in 'ambiguous' or 'rhetorical' terms. Anti-discrimination legislation would enable government to 'grant rights or prohibit deprivation of rights': to 'legislate specifically for what it wants'. To demonstrate the potential utility of such laws, Tatz suggested that the early South Australian discrimination law was probably not as bad as was thought. It served the purpose, for example, 'of making hoteliers, publicans and landlords look over their shoulders when deciding, or before deciding, whether or not to discriminate'. As had been seen in South Africa or Nazi Germany, such law does have capacity to 'alter the prejudices of an adult public, either negatively or positively, and is therefore an important instrument of social change'. In the US, civil rights law 'has had the social effect of depriving racial discrimination of its earlier legitimacy. The KKK men now creep in the night, illegitimately – a far cry from the open sanction given to their earlier activities.' Something similar to the South Australian legislation, he states, should be introduced in other parts of Australia, though modified and 'given more teeth'. Quoted in Nettheim, 144.

[339] Ibid, 36.

ratify the ICERD, which it did by passing the RDA.[340] Enderby, Commonwealth Attorney General in 1975, stressed that Australia had signed the Convention in 1966, that it had been ratified by more than 80 countries, and that there was 'therefore a good deal of international pressure' on Australia to also ratify it 'as soon as possible'.[341]

Additionally, the newly elected Whitlam Government, the first Labor Government in 23 years, demonstrated a commitment to the recognition and protection of human rights. This is evidenced, for instance, in the adoption by the Government of a range of International Labor Organisation ('ILO') conventions and human rights instruments, and in its expression of a belief in the capacity of legislation like the RDA to offer effective protection of such rights.[342] In his proclamation speech for the RDA delivered in October 1975, for instance, Whitlam states that the Act was passed because of the 'long-

[340] ICERD requires, amongst other things, that State Parties undertake to eradicate discrimination through enactment of domestic legislation. As the Racial Discrimination Commissioner pointed out in 1995, introduction of the RDA was necessary 'to enable Australia to take seriously its responsibilities as a global citizen' and to 'be in a position to ratify international instruments which the country had signed but had never put into domestic effect.' Race Discrimination Commissioner (1995b), 5. It is also worth noting that the RDA was rejected by the Senate on a number of occasions prior to its passing. A Racial Discrimination Bill was first introduced into Parliament in 1973 but was not passed at that time because the Commonwealth Parliament was prorogued for the 1974 Federal election. It passed in 1975 after significant amendments, including the removal of offences relating to incitement and promotion of racial hatred (later introduced in 1995). Of note too, although it was abandoned, the Commonwealth introduced simultaneously with the Racial Discrimination Bill a Human Rights Bill: a general charter of civil and political rights, incorporating equal protection of the law to all. See discussion in Evans, G (1974), 'New Directions in Australian Race Relations Law', 48 *Australian Law Journal* 479, 480.

[341] Enderby (1975). During the Racial Discrimination Bill's second reading speeches it was highlighted that ratification of the ICERD had been on the agenda of the Standing Committee of Attorneys-General since 1966 but that nothing had been 'done about it'. By 1975, however, the Government had 'realised that Australia could not be isolated from the area of the United Nations' due to failure to ratify it and that ratification was essential. Commonwealth of Australia, Parliamentary Debates (Hansard), Senate, 22 May 1973, 1976-77.

[342] See, for instance, Commonwealth ratification of the *ILO Convention Number 111: Discrimination (Employment and Occupation)* and establishment of Committees on Discrimination in Employment and Occupation to investigate work-related complaints of discrimination. Ex-High Court justice, Michael Kirby, has pointed to the 15 international human rights instruments Whitlam ratified in the three years he held power. Kirby, M, Whitlam as Internationalist', University of Western Sydney Whitlam Lecture, Sydney 25 February 2010. Establishment of the Australian Legal Aid Office by Whitlam is another example of the interest he and his party had in protection of rights. Funding was also provided to Aboriginal legal services for the first time by Whitlam.

term and continuing need' to 'entrench new attitudes of tolerance and understanding in the hearts and minds of people'.[343] Enderby also identified the RDA as fundamental to achieving social reform, citing improvements made to the lives of 'American negroes' over recent decades through similar legislation.[344]

Laws of this type were needed, it was stated, due to gaps in the common law. Arguing for the introduction of race discrimination law, Gareth Evans stressed the important role it would play in tackling discrimination between individuals, rather than discrimination embedded within discriminatory legislation. As noted above, discrimination at this time was not always based within formal policy and legislation.

> It is abundantly clear that, for most minority groups, de facto discrimination — the discriminatory behaviour of officials, trades-people and others with whom they daily come in contact — is of much greater significance than discriminatory provisions embodied in formal legislation …. The law in Australia, just as it was in Britain before the passing of the *Race Relations Acts* in the late 1960s, is incapable of dealing effectively in a direct manner with this kind of discrimination. At common law, everyone is in a large measure free to do as he chooses.[345]

Significantly too, given that we are exploring connections between introduction of the RDA and Indigenous Australians, the Whitlam Government also had an interest in improving government-Aboriginal affairs. As an example of this, whilst in office Whitlam attempted to increase Indigenous input into policy-making, upgrading the Office of Aboriginal Affairs to a Department with its own

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[343] Whitlam (1975).

[344] Enderby (1975).

[345] Evans (1974). Jack Horner, a non-Indigenous member of FCAATSI, also pointed to the fact that there was no common law protection against discrimination at this time, claiming that 'at the very least there should be an anti-discrimination law throughout the country and the Aborigines are saying that there should certainly be a Bill of Rights; and I think this at least would bring some proper balance' because 'as it stands now, any person of any race in Australia who comes across this kind of insult just has to put up with it as best he can'. Quoted in Nettheim, 184.

Cabinet Minister and establishing the National Aboriginal Consultative Committee, an elected body intended to advise the Aboriginal Affairs Minister.[346]

4.2 For the benefit of Indigenous Australians

Alongside this commitment on the part of Government to the protection of human rights and the rights of Indigenous Australians, there is also evidence that race discrimination law was introduced, in part, to provide a response to racial injustices experienced by Aboriginal and Torres Strait Islander peoples. This is identified by the Race Discrimination Commissioner in 1995, who claimed that the RDA was introduced not only to ratify the ICERD but also because there was 'a consciousness of the intolerable position of Aboriginal and Torres Strait Islander peoples in Australia' and a 'feeling' that racial discrimination legislation 'would assist' them 'in a practical sense as well as indicating to the international community that Australia was going to improve' its approach to Aboriginal affairs.[347]

At the time of enactment of the RDA, though it outlawed race discrimination against racial minorities in general the intent to offer protection to Indigenous people specifically is set out in political material, including Whitlam's 1972 policy speech, cited above.[348] This speech contains a section on 'Aboriginals', wherein it was stated that Government would legislate 'to prohibit discrimination on the ground of race, ratify all the United Nations and ILO Conventions for this purpose, and set up conciliation procedures to promote understanding and co-operation between aborigines (sic) and other Australians'.[349] In his RDA proclamation speech Whitlam again refers to Aboriginal people. The RDA was passed, he states, because whilst Australia's immigration program had been relatively 'smooth and

[346] It also established the Aboriginal Land Fund (a grant of funds to be accessed by Indigenous people to buy back traditional lands) and drafted the first Commonwealth legislation recognising Indigenous land rights, the *Aboriginal Land (Northern Territory) Act* 1976 (NT).

[347] Race Discrimination Commissioner (1995b), 7.

[348] Chesterman (2005), 98. In contrast, Ronalds believes that the RDA was directed more to protecting the rights of immigrants than Indigenous Australians. Cited in Rees et al (2008), 18.

[349] Whitlam (1972), 30-31.

harmonious', it is '[t]rue, we have far to go in restoring the rights of the Aboriginal people, and no Government has done more than mine to redress their long history of injustice.'[350]

In addition, when the Racial Discrimination Bill was first introduced into Parliament in 1973, Lionel Murphy, then Attorney General, acknowledged the problem of racial discrimination in Australia, but expressly noted its impacts on Indigenous Australians. He claimed that 'from the broadest construction of the term 'racist', down to the inter-personal relationships between Aboriginals and Europeans in Australian society, it is difficult to deny that prejudice exists and that this prejudice, over the years, has been erected into a functional system.'[351] He again singled out Aboriginal people by stating that '[p]erhaps the most blatant example of racial discrimination in Australia is that which affects Aboriginals', which covers 'a wide field'. He described their experiences of discrimination as follows.

> There are still remnants of legislative provisions of the paternalistic type based implicitly on the alleged superiority of the white race in which it is assumed that Aboriginals are unable to manage their own personal affairs and property. Discrimination affects Aborigines so far as it

[350] Whitlam (1975). This focus on Indigenous people is continued by the early complaint handling, educational and inquiry work of the Office of Community Relations, established in 1975 under the RDA. The Commissioner of Community Relations emphasised at this time that the circumstances of Indigenous people were worse than those of other groups and that they required special attention in the implementation of the RDA. The Commissioner wrote, for instance, that since the agency had come into being in September 1974 it had had to 'come to grips with the greatest task of combating discrimination'. It has 'clearly emerged from our work' 'that Aboriginal Australians form the largest single group of cases both of individual discrimination and of institutional discrimination. In short they remain the group most seriously wronged in the Australian community.' See Commissioner for Community Relations (1975), *Community Relations and the Aboriginals*, Community Relations Paper No. 2, 1.

[351] Commonwealth of Australia, Parliamentary Debates (Hansard), Senate, 21 November 1973, 1976-77 (Murphy). Citing then-contemporary research, Murphy suggests that external 'manifestations of prejudice might be witnessed daily throughout the country … [The] relative situation and standing of the indigenous (sic) community also demonstrates that Australians of European origin are prepared to employ a different standard of social, political, economic and legal behaviour which applies to individuals of different genetic origin from that which they would apply to people 'of their own kind''. The research cited was Stevens, F (ed.) (1971), *Racism: The Australian experience - a study of race prejudice in Australia,* ANZ Book Co, Sydney.

concerns the administration of the criminal law and the enjoyment of civil, political, social and economic rights.[352]

Murphy further claimed that 'Aboriginals are the poorest of the poor'. 'It is clear that past wrongs must be put right so far as' they are concerned.[353] He pointed to the need for 'special measures' to be provided to Indigenous people through race discrimination legislation. This he justified by referring to the '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. [354]

4.3 Parliamentary debates

The thesis presents here analysis of parliamentary debates aimed at identifying references to and discussion of discrimination against Aboriginal and Torres Strait Islanders, in particular: the first time such analysis has been conducted. There is limited reference to the particular circumstances of Indigenous Australians in parliamentary material accompanying introduction of State and Territory anti-discrimination legislation. Likely reasons for this include that the legislation in question does not have a specific focus on race discrimination.[355] There is, however, significant discussion of Aboriginal and Torres Strait Islander peoples within parliamentary speeches leading to introduction of the RDA.

During the latter speeches there was some suggestion by parliamentarians that the proposed legislation was simply unnecessary. As Senator Greenwood stated, for instance, '[we] in Australia have been

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[352] Commonwealth of Australia, Parliamentary Debates (Hansard), Senate, 21 November 1973, 1976-77 (Murphy).

[353] Ibid.

[354] Ibid, 1978 (Murphy). Section 8 of the RDA was apparently specifically intended to confer rights and benefits on Aboriginals and Torres Strait Islanders. There is also reference to s. 9(3) as a provision intended to supersede provisions in Queensland laws that authorise the management, without consent, of Aboriginal and Torres Strait Islander property.

[355] Additionally, other than in NSW, some time had elapsed between the period of intense agitation for equality leading up to enactment of the RDA and introduction of State/Territory anti-discrimination legislation. States/Territories may also not have been as concerned as the Commonwealth with how Australia presented to the international community with respect to race relations, including relations with Indigenous Australians.

singularly free of racial discrimination. I think it is only in recent times that we have had instances in which racial disharmony and racism have been highlighted.' But these instances 'have been created by persons who claim there is a racism which I believe does not exist'.[356]

Various parliamentarians fiercely countered this view by pointing to specific examples of discrimination, with multiple references made to Indigenous people and the need to offer them protection through the law. The only Aboriginal Senator at the time, Neville Bonner, spoke as follows. 'Ask some of the Aboriginal people who have been called boongs, Abos and such like whether there is discrimination. There is and we must do something about it'.[357] He pointed to discrimination against Aboriginal people seeking private rental accommodation, claiming that Aboriginal people were often denied opportunities and as such did not have genuine freedom. 'Sure, we can say that people in Australia are free. We say that there are opportunities for all. What are opportunities if one is not able to take advantage of them?'[358]

Senator Coleman highlighted the importance of the RDA in reducing segregation against Aboriginal people. He referred to scenarios similar to those revealed during the Freedom Ride.

> Restaurants and cafes have been known to refuse to serve even our own Australian Aborigines purely because of the colour of their skin. The proprietors say nice things such as: 'Well, the white people won't eat here if they see us serving Aborigines.' How on earth could the proprietors know that if they have never served Aborigines in the first place?[359]

The Minister for Aboriginal Affairs, Senator Cavanagh, spoke of Indigenous people being hated and exterminated.[360] Senator Innes described their treatment as vermin to be hunted, poisoned and

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[356] Commonwealth, *Parliamentary Debates*, Senate, 15 May 1975, (Ivor Greenwood), 1518.

[357] Commonwealth, *Parliamentary Debates*, Senate 27 May 1975, (Neville Bonner), 1884.

[358] Commonwealth, *Parliamentary Debates*, Senate 27 May 1975, (Neville Bonner), 1885.

[359] Commonwealth, *Parliamentary Debates*, Senate 15 May 1975, (Coleman), 2.

[360] Commonwealth, *Parliamentary Debates*, Senate 22 May 1975, (Cavanagh), 1806-7.

scattered.[361] Senator Geitzelt also placed Indigenous circumstances in historical context, referring to Tasmania's 'genocide of its Aborigines'.[362] 'That ought to be a living memory to us of what doing nothing and saying nothing means to an Indigenous people.' The RDA, on the other hand, was to serve as a mechanism through which the right thing could now be said and done.

> We take away their land, their self-respect, and we impose our system which we say is superior. We condone and support inequities while claiming it is unintentional. All of us are guilty, by our passive conduct in the past, of inaction which this Bill seeks to redress in a small way.[363]

Present-day discrimination to be addressed by the legislation, according to Geitzelt, included that perpetrated by 'puny public officials' who denied Aboriginal people access to social services because they 'might spend the money in a way that does not suit the custom of the white man.' 'This Bill', he claimed, 'will make those public officials culpable'.[364] Geitzelt also referred to discrimination 'against the Aborigine in the administration of the criminal law' (sic), including as disproportionate incarceration. He suggested that the Bill might be used to challenge police who are discriminating against Aboriginals in Redfern by throwing them into paddy-wagons each evening, claiming they are inebriated but leaving inebriated 'whites' alone. In addition, he discussed recent public protests in NSW by non-Aboriginal people against the Housing Commission's decision to allocate Aboriginal people houses in town.[365]

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[361] Commonwealth, *Parliamentary Debates*, House of Representatives, 8 April 1975, (Innes), 1295.

[362] Senator Geitzelt states that '[i]f a Racial Discrimination Bill ought to have been in operation at any time it was at the time that the Tasmanian Aborigines were being exterminated by the settlers in that State … In the prevailing atmosphere of that period of our history very few members of the conservative parties raised a voice … We made their conditions unbearable. We took away their cultural heritage. That happened not only to Tasmanian Aborigines but to Aborigines generally.' Commonwealth, *Parliamentary Debates*, Senate 15 May 1975, (Geitzelt), 3.

[363] Ibid.

[364] Ibid, 4.

[365] Ibid, 5.

Senator Clayton added to the debate by claiming that racism exists 'at the highest levels', as witnessed by the then WA Premier's resistance to the Commonwealth Government's decision to establish a Royal Commission into allegations of police brutality against Aboriginals. The QLD Premier had also resisted Commonwealth initiatives designed to give land rights to Aboriginals, it was claimed. The Senator suggested that this is because if they were given 'land where they could lead their own lives in peace, the source of cheap labour would soon dry up'. QLD is singled out as the 'only one State where Aboriginal people are classed as inferior citizens. Discrimination exists everywhere [there].'[366]

Senator Fred Chaney described an Aboriginal woman attending his law practice for representation in a matter involving application by the State to have her six children declared neglected, a case he then went on to win on her behalf. Another lawyer, he claimed, had declined to help the woman because she was Aboriginal, though she had money to pay him. Apparently, the decision to make the application arose because the relevant government agency had had 'a lot of complaints about having too many Aborigines in East Perth' and was therefore 'moving them out'. These six children would have been institutionalised as a result of this government program, according to Chaney. 'That, to me, is blatant discrimination, and this woman was subjected to it not only by a government department but also by my own profession'. This case demonstrated 'that groups of people in the community are treated abominably simply because they happen to have dark skin.'[367] Significantly too, Chaney noted that conciliation under the RDA is important to Indigenous people as approaching courts would be very difficult for them, including because of their imperfect control of the English language. To 'put those people into a legal battle is to do them very little good'.[368]

Finally, Senator Davidson cited examples of discrimination which include stalling and other pressures imposed to postpone or alter town planning and housing programs for Aborigines, exploitation carried out over the counter of shops, and discrimination against Aboriginal apprentices.[369] He paid tribute to

[366] Commonwealth, *Parliamentary Debates*, Senate 8 April 1975, (Clayton), 1.

[367] Commonwealth, *Parliamentary Debates*, Senate 22 May 1975, (Chaney), 2.

[368] Ibid.

[369] Commonwealth, *Parliamentary Debates*, Senate 27 May 1975, (Davidson), 4.

those trying to combat discrimination, noting the increased awareness in the community around this issue as a result.[370]

Importantly, there was also recognition in these speeches that the legislation in question should not be seen as a panacea, or as likely to completely eradicate race discrimination. There was a strong emphasis on the contribution education and other preventative strategies would make in this area, alongside legal remedies, as Senator Davidson stated.

> We seem to think that we can solve all the problems by Acts of Parliament. It is true that legislation is needed to help society, but for a society to live easily and happily – and that is what we are talking about – it is more important that society become aware of its own responsibilities. Therefore legislation, when it is put before society, should not so much provide things which we may not do but rather should provide guidelines so that a Bill such as this can contribute to what I will call an educated and responsible society. [371]

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[370] Davidson also speaks of problems occurring where European-Australian communities live side by side with Aboriginal communities. 'I think of remote communities in our Australian society where there appears to me to be serious objection on the part of what I will call the white community to proposals for housing or for community benefits that were arranged for the Aboriginal community. The proposals related to social opportunities for the Aboriginal community, and it was of some concern to me that there seemed to be some objection to them by other sections of the community.' Ibid.

[371] Commonwealth, *Parliamentary Debates*, Senate 27 May 1975, (Davidson), 6. Of note, the *Racial Hatred Act* (1995) (CTH) incorporated racial vilification provisions into the RDA and is also identified as intended, in part, to address the 'endemic' levels of racial hatred directed towards Aboriginal and Torres Strait Islander peoples detailed in reports into racist violence and those of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC). These reports were specifically referred to as contributing to enactment of this Act in the Explanatory Memorandum of the *Racial Hatred Bill* (1994). The reports are as follows. Johnston, E, (1991), *National report, 5 Vols*, *Royal Commission into Aboriginal deaths in custody* AGPS, Canberra and HREOC (1991), *Racist Violence: Report of the National Inquiry into Racist Violence in Australia*, AGPS Canberra. See discussion in Chapman, A (2004), 'Australian Racial Hatred Law: Some Comments on Reasonableness and Adjudicative Method in Complaints Brought by Indigenous People', 30(1) *Monash University Law Review* 27, 29 and Poynder, N (1994), 'Racial Vilification Legislation' 71 *Aboriginal Law Bulletin* 4.

5 Introduction of racial discrimination law: critical viewpoints

5.1 Critical race theory and race discrimination law

Much of the discussion above suggests that at the time of introduction of the RDA there was an expectation amongst Indigenous people and government that the legislation would (and needed to) be especially beneficial to Indigenous people, given their significant historical and ongoing oppression. Things may not have been quite so straightforward, however. There are alternative perspectives about the intentions and expectations surrounding enactment of this legislation.

Within the discussion of racism of the legal system set out in Chapter 3 comments by Thornton that anti-discrimination law was never intended to make marginalised groups 'equal in fact' were cited. This point is similar to that raised by critical race theorists, who claim, as noted, that although the passing of civil rights legislation *seems* to be a positive step, significant barriers hinder its effective enforcement, rendering the rights and remedies it creates hollow. CRT argues that these barriers are at best unintentional, and at worst wilfully manufactured to reinforce the oppressed status of racial minorities. Either way, the effect is that the legal system simply maintains the status quo and its inherent racial inequalities whilst appearing to advance the rights of racial minorities.

Freeman, a prominent proponent of CRT, has suggested that legal reforms that emerged from the US civil rights movement have been 'severely limited by the ideological constraints embedded within the law' and dictated by 'needs basic to the preservation of the class structure'. These have served as 'repositories of racial domination and obstacles to the fundamental reordering of society'.[372] Thus, constraints found within the law reinforce but also reflect those residing within broader society. For Freeman, courts are limited to sanctioning only the most clear-cut violations of civil rights law, a point highlighted previously in discussion of race discrimination related jurisprudence. He points to the formal equality of such law and to its inability to 'recognize (and address) any (substantive) difference based on wealth' - and yet 'economic exploitation and poverty have been central features of racial

[372] Freeman (1977), 1051.

domination' and poverty 'its long-term result. A legal strategy that does not include redistribution of wealth cannot remedy one of the most significant aspects of racial domination.'[373] That civil rights law is missing the point is illustrated in the following comment.

> [For] as surely as the law has outlawed racial discrimination, it has affirmed that Black Americans can be without jobs, have their children in all black, poorly funded schools, have no opportunities for decent housing, and have very little political power, without any violation of antidiscrimination law.[374]

Bell, another critical race theorist, identifies that 'racial remedies are the outward manifestations of unspoken and perhaps unconscious conclusions that such remedies — if adopted — will secure, advance, or at least not harm the interests of whites in power'.[375] He also suggests that responses by society to civil rights activism were primarily motivated by a desire to heighten US standing internationally and to reduce domestic racial unrest. He discusses, for instance, the landmark decision of *Brown v Board of Education* in 1954 in which the US Supreme Court held that state laws establishing separate public schools for black and white students was unconstitutional.[376] This case was seen as a major victory for the civil rights movement, paving the way for use of 'strategic' litigation to bring about societal change. Bell, however, believes it mostly served as 'a potent propaganda weapon' for the US.[377]

The claim that enactment of civil rights legislation and the potential for civil rights litigation that this brings has deliberately or otherwise diverted racial minority groups away from engagement with more

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[373] Ibid.

[374] Ibid, 1050.

[375] Bell states that 'most of what is called racial reform has been conciliatory rather than crusading and, ironically, has benefited all Americans as much as, if not more than, it has relieved the suffering of individual minority groups.' Bell, D Jr, 'Civil rights: to make a nation whole', New York Times, September 13, 1987. Available at (accessed February 2019): <https://www.nytimes.com/1987/09/13/magazine/civil-rights-to-make-a-nation-whole.html >.

[376] *Oliver Brown et al v Board of Education of Topeka et al* (1954) 347 US 483.

[377] Bell (1987).

effective tools of reform, including collective political protest, is commonly raised by various critical race theorists. Tushnet argues, for instance, that the 'use of rights' embedded within a legal framework to enact reform 'impedes advances by [more] progressive social forces.'[378] Crenshaw also explains that racial tension and political agitation by racial minorities helped to enact civil rights law in the US. However, the 'deleterious effect of civil rights reforms' is that once enacted both black and white society is no longer committed to 'fighting discrimination'.[379] Having achieved these reforms work on eradicating racism appears to be complete, according to Bell. The 'benefits to blacks' that civil rights reforms offer are, however, 'often symbolic rather than substantive, and when the crisis that prompted their enactment ends, they will infrequently be enforced for blacks, though in altered interpretations they may serve the needs of whites.'[380] In the end, Crenshaw claims, the 'limited gains' of the laws in question 'hamper efforts of African-Americans to name their reality', which is one of enduring racism, and 'to remain capable of engaging in collective action in the future'.[381]

Of significance, however, some critical race theorists see reliance on a (mainstream) rights discourse by racial minorities as definitely worthwhile. Whilst acknowledging that the law often strengthens the interests of the powerful, these theorists identify rights as having made and as at times able to make a positive difference to marginalised groups, through litigation and otherwise.[382] As an example, Delgado argues that 'rights do, at times, give pause to those who would otherwise oppress us; without the law's

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[378] Tushnet, M (1984), 'An Essay on Rights', 62 *Texas Law Review* 1363, 1363-1364.

[379] Crenshaw, K (1988), 'Race, reform and retrenchment: transformation and legitimation in antidiscrimination law', 101(7) *Harvard Law Review* 1331, 1349.

[380] Bell (1987).

[381] Crenshaw (1988), 1349. Rosenberg also suggests that the legal system, and in particular litigation, will 'seldom produce significant social reform'. The courts actually 'limit change by deflecting claims from substantive political battles, where success is possible, to harmless legal ones where it is not.' Further, 'even when major cases are won, the achievement is often more symbolic than real. Thus, courts may serve an ideological function of luring movements for social reform to an institution that is structurally constrained from serving their needs, providing only an illusion of change.' Rosenberg, G (1991), *The Hollow Hope: Can courts bring about social change?* University of Chicago, 341. See also Brown-Nagin, T (2005), 'Elites, Social Movements and the Law: The Case of Affirmative Action', 105(5) *Columbia Law Review* 1436.

[382] See, for instance, Delgado (1987).

sanction, these individuals would be more likely to express racist sentiments on the job'.[383] Delgado also refutes claims that rights, including as realised through 'occasional court victories', offer only piecemeal reform, leading to a kind of complacency. He suggests that this view is 'imperialistic and wrong' as it 'tells minorities and other oppressed people how they should interpret events affecting them'. 'Indeed', he writes, 'some incremental changes may bring revolutionary changes closer, not push them away' and not 'all small reforms induce complacency; some may whet the appetite for further combat'.[384]

How such arguments might apply or be expanded upon in an Australian context are considered in the next section.

5.2 Critical Indigenous perspectives of race discrimination law

CRT is useful to analysis of both government and Indigenous perceptions surrounding the passing of racial discrimination law in Australia. Application of CRT to this analysis may suggest, for instance, that the latter represents a 'win' for *non*-Indigenous people more so than for Indigenous people, forestalling what was seen as politically or otherwise more 'dangerous' forms of Indigenous protest that emerged from the late 1960s.

CRT might also inform our understanding of why some Indigenous activists of the Indigenous rights movement identified a fight for and attainment of a right to 'equality', including that potentially bestowed through racial discrimination law, as of little use or indeed as harmful to their pursuit of justice.

5.2.1 Aboriginal politics in the 1960s and 70s: divergent views

As identified above, the Indigenous rights movement in Australia was shaped by international forces and ideas. From the late 1960s there was rejection by some Indigenous activists of the existing

[383] Ibid, 305.

[384] Ibid, 308.

leadership, objectives and methods of protest of the Indigenous political movement, in part as a result of the increasing influence of Black Power — demonstrating again how rights movements at this time borrowed from each other, internationally.

Black Power was a US-based movement that in its ideology bears some similarity to CRT. Black Power advocates in the US saw the civil rights movement as having provided them with very little in real terms, even at its highest points. Localised desegregation of a bus line or a lunch counter, goals similar to those sought during the Freedom Ride, were simply not enough. The passing of civil rights legislation in 1964 was also too little, too late. As critical race theorists identified when dismissing the formal equality of civil rights reform, what was required was 'wide-sweeping change in economic status, housing, employment opportunities and institutionalised racism'.[385] The Black Power movement also stressed the importance of cultural difference of African Americans in their push for change, strongly asserting a 'right to be black' and challenging the influence of white institutions, values and structures within the civil rights movement and more generally.[386] Rather than reaching for success as defined by mainstream society, Black Power activists advocated for Afro-Americans to define and achieve this on their *own* terms: through black initiatives and black leadership.

A similar disappointment with what the movement in Australia had achieved to date, particularly through groups such as FCAATSI, was evident amongst Indigenous activists of the 1960s and 70s, including those embracing Black Power. There was criticism, for instance, of the outcomes of the 1967 FCAATSI referendum campaign, which Clark describes today as the 'soft edge of protest' — not 'violent, loud or aggressive but quietly intense and within the parameters of the law'.[387] It was not just the 'passive' form of this campaign that caused consternation to some. The Constitutional reforms it ushered in were also identified as having done little to improve the lives of Indigenous people — not only because of Commonwealth Government inaction after the referendum, but also due to the nature

[385] Clark (2008), 204.

[386] Ibid.

[387] Ibid, 184.

of the reforms achieved.[388] Indigenous activist Kath Walker wrote in 1969, for instance, that the Referendum's 93% YES vote was the only 'improvement' attained since formation of FCAATSI. This 'did not benefit the black Australians, though it eased the guilty conscience of white Australians'.[389] The vote might be 'regarded therefore as a victory for' white Australians. But they 'must understand that what is good for them does not necessarily follow as being good for black Australians'.

FCAATSI and similar organisations were also perceived as being too 'white', failing to represent a truly Aboriginal perspective. Read suggests that for some Aboriginal and Torres Strait Islander activists FCAATSI, with its Minutes and Rules of Procedures, was 'essentially a European vehicle for executing principles Europeans believed to be important.[390] These organisations were identified as derivations of similar groups in the US and as striving to increase Indigenous access to a 'middle-class way of life' — a nice home, a good education, and so on.[391] Inherent within their demands was an assumption that Aborigines were 'either potentially or actually, the *equal* of whites; therefore the same economic, legal and social conditions should apply to them'.[392] It was also assumed by such groups that equality was the end-goal that Aboriginals wanted to pursue, just like Afro-Americans within the civil rights movement. Drawing on the words of Martin Luther King, 'Aborigines as well as whites had their eyes on the prize'.[393]

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[388] Lothian, K (2005), 'Australian Aborigines and the influence of the Black Panther Party 1969-1972', 35(4) *Journal of Black Studies* 179, 183. See also Clark (2008), 211-12.

[389] Walker, K, 'Black-White Coalition Can Work', *Origin*, 18 September 1969. For Lippmann too, the Yes vote was reasonably high because amendment of the Constitution 'cost nothing' and did not lead to any real substantive change. Lippman also notes that the 1967 Referendum results were held up as proof that Australians held favourable attitudes towards Indigenous people, and yet the Yes vote was not uniformly high. It was lower in those locations with larger Indigenous populations and in QLD, compared with NSW and VIC. Lippman (1970), 5.

[390] Read (1990), 80. When it was first formed FCAA only had three Aboriginal members out of thirty in total. Ibid, 74.

[391] Clark (2008), 214.

[392] Ibid, 90.

[393] Read (1990), 75.

This 'prize' was best attained by working, for the most part, within mainstream systems, based on a belief that these could and would respond to Indigenous needs and demands. Legal reform, for instance, would bring about 'Aboriginal legal, economic and social equality', 'guaranteed by statute and accepted by Europeans' as 'the touchstone of a just society'.[394] In the mid-1970s, non-Indigenous politician Gordon Bryant identifies, for example, the work of groups such as FCAATSI, of which he was a member, as highly effective activism, 'responsible for the total social change and attitude and the legislative change that had taken place over the last sixteen years'.[395] FCAATSI's success in repealing discriminatory legislation, he claimed, wasn't achieved 'by sitting down idly. Much of it wasn't done by confrontation, by violence either. It was done by continuous and effective and persistent persuasion'.[396]

In stark contrast, the Black Power movement presented Aboriginal people with 'a new language, a new way of looking at their own growing movement, a confidence to appreciate the black perspective and a desire to assert it'.[397] It emphasised Black self-determination, Black pride, Black control and a refusal to tolerate oppression.[398] This led to changed thinking about who should speak for Aboriginal people, what they were entitled to, and tactics used to demand these entitlements. According to some activists, Aboriginal and Torres Strait Islander peoples needed increased decision-making power, including within the Indigenous rights movement. This contributed to the demise of FCAATSI, a 'black-white coalition', and the emergence of new political groups with wholly Aboriginal and Torres Strait Islander membership such as the Aboriginal and Islander Tribal Council and the Black Panthers in Brisbane.[399] There was also a rejection of mainstream law as a tool for reform, including as referred to by Bryant

[394] Ibid, 74.

[395] Quoted in Nettheim (1974), 121.

[396] Ibid.

[397] Lothian (2005), 183.

[398] Ibid, 184.

[399] By 1976, the 70 organisations that had 'flourished a decade earlier for the benefit of Aborigines were either in Aboriginal hands or defunct'. Read (1990), 80.

(see above), and a call for 'more immediate action that would no longer accommodate White interests'.[400]

Indigenous Activist Gary Foley stated, for instance, that the 'non-confrontationist methods and tactics of the older generation … seemed to amount to nothing'. 'More effective methods had to be considered', including vigils or sit-ins such as that of the 1972 Tent Embassy.[401] Activist Roberta Sykes also preferred direct action of the type used during the Tent Embassy, seen as 'more productive than twenty years of legal attack. We need more Embassies. We need more direct confrontation.'[402] More radically, groups like the Black Panthers talked openly about needing 'to smash this decadent system'.[403] They expressed disillusionment with the slow progress within Aboriginal affairs, identifying likely relief within 'revolutionary ideology based on the eventual overthrow of the system' as an alternative.[404] The Panthers and similar groups encouraged members to take up arms, threatening to use violence – 'then all hell will break loose'.[405]

Not all Indigenous people agreed with such methods, though they expressed an understanding of the appeal that they held. Perkins, for instance, warned that there was a real possibility of violent action and upheaval related to racial tensions as had occurred in South Africa as Indigenous people were becoming increasingly disappointed by weak political responses to their demands.[406] Aboriginal Senator Neville Bonner also stated that the mainstream system *could* be made to work for Aborigines by Aborigines. He did not believe that anything could be achieved by working outside of that system and abhorred violence.[407]

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[400] Lothian (2005), 183.

[401] Quoted in Lothian (2005), 183

[402] Quoted in Nettheim (1974), 155.

[403] Ibid.

[404] Clark (2008), 220.

[405] Ibid.

[406] Chesterman (2005), 4. See also Race Discrimination Commissioner (1995b), 2.

[407] Clark (2008), 212.

For whites too, this confirmed long-held concerns. The civil rights movement was clearly 'growing a separatist arm fuelled by anger and bitterness and bolstered with violence and threats of violence'.[408] The coming of racial violence was predicted to arrive here as it had in the US because of the 'repeated rejection, continued frustration and the failure of peaceful methods to deliver speedy and comprehensive change'.[409]

5.2.2 Indigenous rights versus civil rights

Read also identifies within the Indigenous rights movement from the late 1960s a 'shift in interest from civil rights to Indigenous rights, from equality to particularity.'[410] This shift is represented in the push by some activists, highlighted above, for more events like the 1972 Tent Embassy. Read claims that the Embassy was different to earlier protests, including the Freedom Ride. Protests such as the Freedom Ride were 'conservative, derivative and universalist in their aims', generally modelled on activism overseas both in technique and objectives and largely consistent with the demands of non-Indigenous people and non-Indigenous institutions. In contrast, the Embassy was wholly Aboriginal 'in tactics as well as personnel':[411] a demonstration that Indigenous people 'no longer were willing to behave or be quiet' or to have their viewpoints expressed by white sympathisers.[412]

In this and in other ways the Embassy prioritised Indigenous rights based on prior occupation of the land, including land rights and self-determination, over racial equality. As activist Paul Coe described it, this was a significant step towards establishment of a 'Black nation'; illustrated, for instance, by the flying of the Aboriginal flag over the Embassy. Coe stated that Aboriginal people 'have never relinquished their sovereignty or their rights to the lands that we now know as Australia'. We 'have always been and still are, a nation within a nation', a 'sovereign people'.[413] The concept and terminology

[408] Ibid, 208.

[409] Ibid, 211.

[410] Read (1990), 81.

[411] Ibid, 80.

[412] Clark (2008), 204.

[413] Lothian (2005), 197.

of Aboriginal sovereignty that emerged in the early 1970s was in itself radical, a new concept within political discourse.

Prioritisation of Indigenous rights at this point in time may have been due to a perception that the struggle for equal or civil rights, which had been an important aspect of Aboriginal politics since the 1930s, was now won – evidenced, for instance, through repeal of much of the discriminatory legislation that had been in place. Read claims, however, that it was more likely to have emerged because whilst acquisition of civil rights was a key objective for racially marginalised African Americans, for Indigenous Australians it was essential to attain justice as *colonised* people.[414]

He makes this point, in part, by highlighting that Black Power activists in Australia borrowed directly from the movement in the US in their demands for basic human freedoms: an end to police brutality and access to 'bread, housing, education, clothing, justice, and peace'. But whilst Black Americans also sought compensation for slavery, including in the form of parcels of land, Aboriginal people, in contrast, saw as their entitlement 'restitution of the armed robbery of our land' as their 'social, cultural and economic base'. This perspective identifies Aborigines as 'not the equal of' but as 'owed something special by the rest of the community'. [415] It is, however, worth noting that the reference in the above comment to access to education, housing and so on does suggest that Indigenous people saw as their entitlement civil rights *and* to Indigenous rights, a point returned to below. In Australia, Indigenous and civil rights battles were treated as if they were one — but they were *not* the same, according to Read, and in fact were fundamentally incompatible. Civil rights 'ran towards a homogenous, assimilated Australia. Indigenous rights ran away from it'.[416]

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[414] Read (1990), 81. Lothian notes that Indigenous activists were reading the Dee Brown book on Native American history 'Bury My Heart at Wounded Knee' alongside Black Power movement manifestos. Lothian (2005), 189.

[415] Read (1990), 81.

[416] Read identifies separate 'battles' in the US: one for civil rights and one for native-American rights, claiming that many native-Americans were 'unimpressed' and to some degree 'threatened' by the civil rights movement. If mainstream society was forced to accept blacks in non-exclusive schools, for instance, this might mean that native-Americans would be compelled to attend them too. Native-Americans, however, were more concerned with self-government and a separate Indigenous identity than 'equality'. Read (1990), 76.

Others have also opined that equality or civil rights negate Indigenous-specific rights, given the association between civil rights and assimilation. Assimilation was formal government policy in Australia from the 1940s that pushed Indigenous Australians to forfeit their uniqueness in order to adopt the ways of (a supposedly superior) mainstream culture.[417] Assimilation required 'all Aborigines and part-Aborigines' to live as 'members of a single Australian community, enjoying the same rights and privileges, accepting the same responsibilities, observing the same customs and influenced by the same beliefs, hopes and loyalties as other Australians.'[418]

This and other representations of formal (as opposed to substantive) equality, discussed in earlier chapters as in fact discriminatory, is said to have brought very little to Indigenous people. By the late 1960s Aborigines in most states were, theoretically, 'equal' members of the wider community. Most discriminatory legislation had been repealed. The 1967 Referendum was understood as having bestowed upon Indigenous Australians equal citizenship. As Clark suggests, however, a fuller picture of the true state of Aboriginal citizenship was afforded by statistics revealing their continued social and economic struggles. These statistics recorded, for instance, appalling standards of health, high mortality levels and significant rates of unemployment.[419]

Some commentators suggest that equal rights may have actually exacerbated Indigenous disempowerment and disadvantage. Rowse refers to replacement in the 1960s and 70s of Indigenous rations with a cash economy through acquisition of civil rights (equal access to social security benefits and award wages) as 'assimilation'. This change, he claims, led to introduction of non-Indigenous work and social practices that disturbed traditional family structures and increased Indigenous poverty.[420]

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[417] See Policy of Assimilation, Native Welfare Conference, Canberra, January 26th and 27th, 1961.

[418] Chesterman (2005), 12-13.

[419] Clark (2008), 181.

[420] Poverty, according to Rowse, is attributable to the changes in question leading to higher rates of Indigenous unemployment (as nobody wanted to pay Aboriginal people equal wages) and as Indigenous people received an income without working (through social security benefits). Rowse claims too that the RDA 'may not be adequate to the recognition of indigenous political forms' as it enshrines 'individualist rights against discrimination, consistent with the axioms of assimilationist policy'. Cited in Chesterman (2005), 30.

Read similarly claims that the principle of non-discrimination does not 'necessarily help Indigenous people to free themselves from post-colonial domination, rather it may serve to hasten their flight towards post-modern capitalism, waste and unemployment, into environmental and social degradation.'[421]

6 Implications of critical viewpoints on the RDA

Chapter 4 begins with discussion of the benefits that Indigenous people expected from racial discrimination law and of government intentions to deliver this benefit through enactment of this law. Overall, the thesis argues for improved Indigenous access to discrimination law. But what are the implications of the above more critical views of anti-discrimination law, particularly of Indigenous people, for this argument?

[421] Read (1990), 126. Noel Pearson also sees access to social security, for instance, as detrimental to Indigenous Australians. He suggests that 'many elements of the abolition of formal discrimination and the liberal-progressive advancement program have inadvertently been major causes of Aboriginal disadvantage'. Also cited in Chesterman (2005), 30. American academics have also highlighted a disconnect between the American Indian and civil rights movements in the US. Native-Americans, Bates claims, experienced similar racial discrimination to black Americans but endured 'additional layers of oppression' based on their Indigenous status (such as denial of the opportunity to claim this status, impacting on their ability to apply for federal recognition and associated benefits). Native-Americans willingly stepped into the space that civil rights activists had carved out but pushed for reform on their own terms and for their own goals. Though the 'Indian rights movement emerged and evolved concurrently with the black civil rights movement, their visions were starkly different'. Given this, Native-Americans disassociated themselves from the civil rights movement so far as was necessary to accommodate their particular needs, which largely revolved around cultural preservation and recognition of tribal sovereignty. Bates writes: '[As with other] … racially defined non-white groups that sought rights and power not previously held, Indians worked towards reclaiming their historically sovereign status as tribal nations that Congress and the states had usurped. As a result, Indigenous people not only have a racial status — that was made all too clear by the racism and discrimination they experienced — but a unique, historically based political status'. Civil rights movement methods were borrowed and adapted. A Red Power as opposed to a Black Power movement was established. The standoff at Wounded Knee, South Dakota, not dissimilar to tactics used by African-Americans, was particularly significant to Native-Americans as this was the site of the 1890 Lakota Pine Ridge Indian Reservation massacre. Bates, D (2016), 'Reshaping Southern Identity Politics and Race', 9 *Native South*, 125, 128-9, 132, 136, 142.

6.1 Diverting Indigenous people away from protest and 'revolution'

As noted, CRT sees the passing of civil rights law as intended to halt or as leading to the silencing of more effective minority-focused and driven movements. In an Australian context, the more assertive and confrontational nature of Indigenous protest certainly created a level of tension that pressed government to enact the RDA at a federal level — at least partially to protect the interests of the racial majority, likely to be harmed by international disapprobation that the latter protest might attract. There is also some (though limited) evidence that government deliberately passed race-based discrimination law out of a desire to avert bloody 'revolution' by Indigenous people. In a statement made to Parliament in 1966 by then South Australian Premier Dunstan there is reference to averting social unrest through enactment of the *Prohibition of Discrimination Act* (SA).

> I have been grateful for the cooperation of bodies concerned with the rights of racial minorities in the State in that they have not taken public and direct action of the kind that has happened elsewhere in Australia because it was indicated to them clearly that the Government intended to take this important step and that, rather than that direct action should be taken by groups of citizens, it was better that the community as a whole should express its disapproval of practices of discrimination on the grounds of race … If this measure had not been proposed we might have seen in South Australia some of the direct action that has been taken in other States because those States did not see fit to enact legislation of this kind. [422]

Recognising the intensity of Indigenous protest at this time and the potential that legal reforms might provide a response to or quieten such protest, some activists and commentators at around the time of introduction of the RDA also called on government to respond to and encouraged Indigenous people to seek reform through *legal* means and methods so as to avoid the possibility of bloodshed. Rowley, for instance, hoped that Aboriginal pressure groups would be able to reach goals 'obtained within the law'.

[422] South Australia, Official Reports of the Parliamentary Debates (Hansard), House of Assembly, 14 July 1966, 491-50.

For if you achieve nothing through the law, 'you have got to think about going outside it'.[423] The police-provoked violence, the 'eyeball-to-eyeball' tactics that arose at the Tent Embassy he identified as likely to produce 'hastier — though not always better — political results', including as they provided Aboriginal protestors with moral high ground. The newly elected Labor Government, Rowley also suggested, rushed through policies to avoid the latter type of scenario. 'Certainly, it has no wish for more world TV coverage of another round between those armed with weapons and those only with tongues.'[424] This last comment indicates that government was certainly keen to avoid negative press and may have responded to Indigenous protest through policy reform with this in mind.

There is some suggestion, too, that it was fear of *politically* rather than physically 'dangerous' Indigenous protest that motivated government to legislate in this area. Chesterman, for example, claims that Indigenous calls for land rights and self-determination contributed to enactment of the RDA. Legislating for equal rights (including through anti-discrimination legislation) was perhaps seen as a significantly easier option for government than meeting Indigenous demands for recognition of Indigenous-specific rights: given voice, for instance, through the Tent Embassy.

> The very radicalness of the Embassy - the call for an acknowledgement that Australia had been 'invaded' in 1788 and that Aboriginal land had been 'stolen' – would have made the denial of civil equality even less defensible to politicians than it had previously seemed. It would also have made the removal of the last vestiges of discrimination laws, and the passage of anti-discrimination laws, appear as very achievable goals when compared with the more radical call for the recognition of Indigenous rights.'[425]

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[423] Ibid, 135.

[424] Ibid, 179. See also comments by Tatz, who claimed that the law should be used 'as a convivial tool of social change — as opposed to political strategies that are, or become, a violent tool of social revolution'. This he claimed was 'fully consonant with democratic theory and practice. It is simply the legitimate use of a traditional legal institution in a parliamentary democracy'. 'But if Aborigines and their supporters are not going to explore that avenue, what other kind of road is open to them? The answer, I believe, is the violent way'. Quoted in Nettheim (1974), 179.

[425] Chesterman (2005), 96.

6.2 Differing Indigenous perspectives on legislating for equality

There were clearly tensions amongst Indigenous activists during the movement of the 1960s and 70s as to best strategies to achieve end-goals, and what these goals ought to be. There is, however, some possibility of resolving these tensions, to be discussed further as the thesis progresses. But for now, it is firstly noted that all of the strategies employed by Indigenous people during this period share some common ground — from litigation and law reform, swaying of public opinion through the media, to physical protest and demands for violent upheaval. These are all forms of activism: activities carried out by and/or on behalf of Aboriginal and Torres Strait Islander people to enact social and political change. Rather than being contradictory or in conflict, it might be argued that using these methods *in combination* is an effective means of attaining justice and progressing rights.

Also identified is conflict arising between equal and particular rights for Aboriginal and Torres Strait Islander peoples. Indigenous and other critics of equal rights, acquired (for example) through repeal of discriminatory legislation and introduction of racial discrimination legislation, suggest that they are of greater relevance to racial minorities who are not *also* subjected to colonisation. As noted, equality may represent to Indigenous people another form of subjugation or colonisation.

Counteracting these arguments, however, is evidence, including that presented above, that many Indigenous people *chose* to fight for equal or civil rights, using any means available. Acquisition of formal equality, including through civil rights, did not just 'happen' to Indigenous people, nor was it pushed on them by an oppressive government. The principle of non-discrimination that underpinned Indigenous demands for reform was, for Chesterman, the main 'rallying call' of many non-Indigenous and Indigenous activists in Australia in the mid-20th century. Should Aboriginal people not aspire to attain a right to equality, a pre-eminent human right enshrined in international instruments such as the UDHR and overwhelmingly supported by representatives of most of the world's populations,

Chesterman asks? 'Formal equal rights such as the right to vote, to drink liquor and so on *are* important. They at least recognise that Aborigines and Islanders are human beings.'[426]

Chesterman refutes the suggestion that equal and Indigenous rights are by their nature incompatible. Seeking 'equality', as many Indigenous people did, did not mean sacrificing a distinct Aboriginal and Torres Strait Islander cultural identity, including where that identity is tied to land.[427] Civil rights did not necessarily equate to assimilation. In this context, Indigenous activists were keen to distinguish integration from assimilation.[428] The Aborigines Advancement League in Victoria, for instance, defined integration as 'the ability of the smaller group to retain its identity while living within and in harmony with the National community'. Assimilation, on the other hand, was identified as 'racial genocide, as being 'made like' and the total absorption of the lesser into the larger community'.[429]

Moreover, civil *and* Indigenous rights *clearly* co-existed within mid-20th century Indigenous Australian activism. Lothian points to the long narrative of Indigenous protest demanding equality in education, health and legal representation, abolition of discriminatory legislation, an end to police harassment and 'the simple right to live without racism'. Accompanying this as 'a central concern for Indigenous people from the early 19th century' was a 'demand for land as an economic and spiritual resource'.[430] The 1960s walk-off by NT cattle workers combined demands for both equal and Indigenous-specific rights, as an example of both 'anti-colonial protest by a suppressed people' and a 'protest against unfair and unequal wages and working conditions'.[431] That an Indigenous fight for land was an important part of all forms

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[426] Ibid.

[427] Ibid, 22.

[428] Ibid, 15-16.

[429] Ibid, 24. Radical activists such as Kath Walker also stated as follows. 'We do not desire to become replicas of the white man; rather would we be members of our own race standing side by side with the white race'. Quoted in Chesterman (2005), 24.

[430] Lothian (2005), 182. See also Goodall, who has suggested, contrary to Read's position, that there were not two opposing Indigenous political movements in Australia, one fighting for land and one for civil rights, cited in Chesterman (2005), 27.

[431] Jennett, C, 'Politics, the Law and Aborigines' in Jupp, J (ed.) (1988), *The Australian People: An Encyclopedia of the Nation: Its people and their Origins*, Angus and Robertson Sydney.

of Indigenous resistance to colonisation is illustrated by Bryant's comment. 'All those freedom fighters who are now so keen on land rights and things such as that might look up the record of when it was taken up first and who took out one of the first cases for land rights in the courts of Australia,' referring here to FCAATSI.[432] Similarly, more radical activists did not always reject civil rights outright. The National Tribal Council, for instance, stated as follows within its manifesto.

> A Federal law prohibiting all forms of racial discrimination is urgently required both as an indication of the commitment of the Australian people to racial equality and as a practical measure designed to discourage and overcome individual instances of discrimination and prejudice … Racial discrimination in all existing laws and in all public activities and pursuits must be eliminated by effective Federal and State legislation as soon as possible.[433]

Chesterman also differentiates between enactment of the RDA and other legislative reform during this period. He suggests that civil rights won 'formal equality' for Indigenous people. Whilst these gains were at least symbolically important and needed to happen, they did not guarantee any real alteration to Indigenous socio-economic circumstances. Equal wages for Indigenous people, for instance, did not and still does not mean equal Indigenous access to employment opportunities. He claims that the RDA, on the other hand, was a 'legislative initiative that did hold out the promise of a significant and ongoing shift towards *substantive* equality'.[434] In this regard, he points as Murphy did to the RDA's special measures provision, designed to address structural inequality.[435] Of course, it is questionable whether these measures have had the desired effect, as seen in Chapter 3. Chesterman also, however, highlights the legislation's capacity to have a 'persuasive and educative effect' upon society at large, with its prohibition against racial discrimination making it 'easier for people to resist social pressures that result

[432] In Nettheim (1974), 160.

[433] National Tribal Council (1970). The Queensland ATSI Advancement League, as a further example, sought acquisition of civil rights, an end to racial discrimination and assimilation, as well as land rights in its *Declaration of Rights*.

[434] Chesterman (2005), 30 (emphasis added).

[435] Indirect discrimination provisions were not included in the first iteration of the RDA, as noted previously.

in discrimination'.[436] The contributions of the educative functions of anti-discrimination legislation are discussed later in the thesis.

7 Contemporary Indigenous perspectives on human rights legislation

Tensions for Indigenous people between attainment of equality (human rights) as opposed to Indigenous-specific rights, and the methods and frameworks used to achieve this, are still evident today. Similar to comments made by Briscoe about the early South Australian legislation, Aboriginal activist Michael Ghillar Anderson, writing on the eve of the 50th anniversary of the Freedom Ride, categorised Western human rights law as an instrument developed and implemented by non-Aboriginal society, with little capacity to deliver 'freedom' to Aboriginal and Torres Strait Islander peoples.[437] This is demonstrated, for Anderson, in how little has changed for Indigenous people since the Freedom Ride, with its push for recognition of human or civil rights for Indigenous people through mainstream law.

> [C]onsidering the issues that Aboriginal people face today, many Aboriginal people of the 1965 vintage argue that we may have advanced with bricks and mortar and achieved better educational outcomes, given the fights we have had in the past for our rights, but overall our people are worse off now than they ever were.[438]

The point Anderson goes on to make is that to be valid in an Indigenous context human rights must co-exist with Indigenous-specific rights, including to self-determination. He suggests that 'freedom' for Indigenous people will only be attained through human rights protection embedded within a Treaty that also recognises Indigenous (collective) rights (to land, sovereignty). Demonstrating this point with a diagram, Anderson spoke as follows.

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[436] Chesterman (2005), 186.

[437] Anderson, M, 'Ghillar's Freedom Ride comments', First Nations Telegraph, 9 January 2015. Anderson was a member of an Aboriginal family involved in the 1965 Freedom Ride visit to Walgett.

[438] Ibid.

Figure 1: Anderson - Freedom Ride

> 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.

At the time of making the above comment Anderson was part of a large group of Aboriginal and Torres Strait Islander people participating in a 'Freedom Summit' held in Alice Springs in late 2014.[439] The Summit provided opportunity to highlight as a single voice issues impacting on Indigenous people, which included high rates of incarceration, child removal, suicide and death from preventable diseases. Anderson and others are here demanding equality of outcomes for Indigenous people. However, they are simultaneously championing self-determination as essential to attaining these and other outcomes of importance to Indigenous people, including by establishing a leadership group that will take Indigenous demands to Parliament House in Canberra. They also, of interest, called for a return to direct protest by Indigenous people. This event culminated in a *Communique*, which states, amongst other things: 'The fight for our rights will rise from the ashes. We are planning to lead mass action on the streets to defend our rights and enforce our vision of self-determination and continuing sovereignty.'[440]

[439] They met, significantly, at the Old Telegraph Station, birth place to Charlie Perkins.

[440] The Communique (titled 'Communique from the Freedom Ride') is available at the following link (accessed February 2019): <http://nationalunitygovernment.org/communiqué-freedom-summit >.

8 Conclusion

Chapter 4 has described the ways in which Indigenous people influenced the development of racial discrimination law in Australia, particularly at a federal level. A key point raised is that some Indigenous people expected that the law would make a positive difference to Indigenous lives. Government also referred to the legislation as likely to provide some redress against discrimination experienced by Aboriginal people, with parliamentarians referring to it as righting past wrongs, including those associated with invasion and colonisation.

This material is particularly relevant to discussion in Chapter 6 about whether legislation in this area has achieved what was intended of it at the time of its enactment, especially from an Indigenous perspective. It could be argued that these early expectations of Indigenous people and government with respect to race discrimination law imbues it with a special obligation or responsibility to make a genuinely positive difference in an Indigenous-specific context. The thesis will go on to consider whether the law has, in fact, met these expectations and fulfilled this obligation over recent decades.

Criticisms of law in this area are also presented – those of critical race theorists and of Indigenous people themselves that identify apparently irreconcilable tensions between the perspectives of racial minorities, including those subjected to colonisation, and the perspectives of society on legal rights: both how to define and attain them. As we have seen in Chapter 3, CRT suggests that these tensions are always resolved in favour of the powerful, resulting in entrenched inequalities. Bolstering these claims, in the next chapter it is argued that though racial discrimination law may have delivered a measure of formal equality to Indigenous people, they still struggle with and are impacted to a significant and disproportionate degree by racial discrimination.

CHAPTER 5: INDIGENOUS EXPERIENCES OF RACE DISCRIMINATION AND RACISM

The previous chapter discussed historical context surrounding introduction of the RDA. This discussion highlighted expectations amongst some Indigenous Australians that racial discrimination legislation would be an effective mechanism through which to challenge race discrimination. It suggested that government held similar expectations, seeing legal protection as likely to be an effective tool for tackling race discrimination against Aboriginal and Torres Strait Islander peoples.

Against this contextual backdrop, Chapter 5 explores what inroads have been made in terms of achieving reduced race discrimination against Indigenous people since enactment of racial discrimination law in Australia. It compares their circumstances in past decades and in more recent times, using the 1960s as a starting point.[441] The bulk of the discussion related to past discrimination centres upon analysis of qualitative and quantitative data drawn from the Freedom Ride surveys, providing insight into perspectives on discrimination and related matters shared in 1965 by Aboriginal people living in country towns in NSW. Findings from sociological surveys of Aboriginal people living in SA, NSW and Victoria undertaken in the late 1960s by non-Indigenous scholars are also presented. These surveys capture data on Indigenous life circumstances and inequality.

We move then forward in time to the re-enactment of the Freedom Ride in 2015, and to Aboriginal and Torres Strait Islander opinions on levels of 'progress' reached with respect to positive race relations over the last 50 years. Thesis interview data collected from community members and stakeholder organisations is also used to describe present-day Indigenous experiences of discrimination and perspectives on whether and how these experiences have changed since the 1960s. Relevant academic and other material provides further context.

[441] There are, of course, complexities inherent in making a comparison of this nature, including due to significant differences within social, political and other contexts between the two time periods. These complexities have been borne in mind in making comparisons.

Chapter 5 presents a solid case indicating that Indigenous people are still far from equal to others in Australian society. This lends some weight to criticisms discussed in the previous chapter: that government may never have intended to provide effective legal protection against discrimination to racial minorities; and, according to some Indigenous people, that race discrimination legislation is not an appropriate mechanism for Indigenous advancement.

1 The 1965 Freedom Ride and its survey data

In February 1965 a bus carrying Sydney University students journeyed through country towns in NSW.[442] During this journey, referred to as the Freedom Ride, these students conducted a survey with Aboriginal persons living in or near each of the country towns visited. This survey asked these Aboriginal respondents to share their views on racial discrimination and general living conditions. This and other material gathered by the students then informed protest events held in the towns in question.

For some of the students participating in the ride this survey work was central to their objectives, which were to investigate and expose racism encountered by Aboriginal people.[443] Importantly, as one student rider states, use of the survey also provided the ride with credibility.[444] It meant '[we] weren't just white students breezing in and kicking up a fuss about Aboriginal rights, we were going to try to talk to Aboriginal people and get their own version of their actual conditions'.[445] Prior to the ride Perkins wrote to the AWB about the surveys, indicating that they would enable the students to 'view all facets of Aboriginal assimilation and accumulate statistical data on the same' by visiting homes of Aboriginal

[442] Towns visited in NSW include Wellington, Walgett, Bowraville, Kempsey, Grafton, Lismore, Moree, Tenterfield, Boggabilla and Gulgargambone.

[443] See discussion, Curthoys (2002), 51. Clark, on the other hand, claims that the Freedom Ride survey 'failed to produce anything of lasting value'. She suggests that the survey was 'clearly of secondary interest' to the ride's 'real purpose', which was 'undeniably direct action'. Clark (2008), 177, 169.

[444] Gathering survey data was apparently a relatively common activity for organisations interested in Aboriginal affairs at this time. Given this, the survey work created a measure of respectability for the ride amongst mainstream society. Clark, for instance, suggests that the survey made the ride more 'acceptable', 'a comfortable link to a more conservative, less controversial approach to race' than direct action might provide. Ibid, 169.

[445] Quoted in Curthoys (2002), 69.

people located on reserves, missions, and in towns. He wrote: 'We believe the material compiled would be of great benefit to all organisations dealing with Aboriginal welfare. It will possibly give some a guide to future action and indicate both Aboriginal and European attitudes to problems of assimilation.'[446]

1.1 Analysis of the Freedom Ride data

The Freedom Ride data is useful today for what it tells us about race discrimination in the 1960s and Indigenous perspectives of the same. More specifically, it provides the present research with a point in time through which to draw comparisons between past and present Indigenous experiences of discrimination.

It is important to note that no comprehensive analysis of the Freedom Ride survey data had been completed prior to the analysis conducted for this thesis. As such, the discussion below is an original contribution to our understanding of Indigenous history and the history of Indigenous activism in Australia. The survey data has been sourced and analysed as follows. A copy of the data was requested from the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS).[447] The survey originally had six parts.[448] However, the bulk of the data still in existence is made up of 137 participant responses provided by Aboriginal people to a single questionnaire on 'Aboriginal Attitudes' (**Appendix B**). The questionnaire covers issues such as Aboriginal access to health services, education and housing, the role of the AWB, as well as describing Aboriginal life more generally. Some survey questions are directly related to race discrimination.

The Aboriginal Attitudes survey data is discussed and analysed below in detail. A series of Tables summarising the data is also set out at **Appendix C**. The Aboriginal Attitudes questionnaire contained

[446] Perkins advised the Board, in fact, that the 'main objective of the whole tour would be a comprehensive survey of Aboriginal life'. Perkins (1965).

[447] Student riders had deposited the completed surveys with AIATSIS.

[448] These surveys were as follows: 'Aboriginal Attitudes', 'European Attitudes', 'Living Conditions', 'Health', 'Occupations and Incomes' and 'Schooling and Education'.

29 questions in total. The first set of questions (1-15) required a yes/no (Y/N) answer. The second set of questions (16-25) are multiple-choice. A third section of the questionnaire (questions 26-29) required substantive responses to four questions. For the first and second parts interviewers have recorded Y/N and multiple-choice answers but have also noted alongside each question comments shared by respondents. The third section was also able to be both qualitatively and quantitatively analysed through coding of responses. The entire survey has therefore yielded statistical and qualitative data.

Of note, the students developed the survey questions themselves, for the most part. They also surveyed Aboriginal people 'either totally or largely untrained as interviewers' and usually without any local contacts to facilitate this process.[449] This is likely to have had some impact on responses provided and should be kept in mind in reading through the analysis below.[450] Additionally, the comments quoted and attributed to Aboriginal people were recorded by the students during completion of the surveys. They are not directly transcribed records of respondent comments.

Other issues arising within the analysis largely pertain to the relatively narrow interpretation of discrimination evident in the survey responses. Overall, the data paints a fairly grim portrait of social exclusion of Indigenous people from mainstream society. As noted in earlier chapters, social exclusion means both material disadvantage and disenfranchisement from society. The descriptive accounts of daily life recorded indicate that Aboriginal people at this time experienced widespread socio-economic disadvantage and overt control over their lives in multiple areas. However, within the survey's quantitative data, in particular, this disadvantage and control is not generally identified as race discrimination by the respondents. This means that discrimination is likely to be under-counted statistically in analysis of the data. As such, just over two in every five respondents felt that 'white

[449] Curthoys (2002), 71.

[450] For instance, one of the students writing in more recent times describes the Aboriginal people surveyed as 'fairly easy to talk to'. The questionnaires themselves, however, she felt were 'unsuitable'. She claimed that it 'is difficult, now, to know what to make' of the answers provided and 'hard to tell what the students and the Aboriginal people of the settlement understood what each wanted of the other, or thought the other could do'. Quoted in Curthoys (2002), 72.

people' were not 'giving the Aborigines a fair chance' (44% of respondents: Table 1).[451] A similar proportion identified that discrimination against Aboriginal people existed in their town and/or in the state of NSW (44%: Table 9).[452]

One reason for this may be that the survey responses, including those yielding quantitative data (particularly as answers to Y/N and multiple-choice questions), are focused on more protrusive forms of discrimination: most commonly, severely restricted access to places/facilities. Perhaps no coincidence, this was also the focus of the Freedom Ride and the protests it held.[453] What is not so commonly identified as discrimination by the respondents or students is government policy and law, even where it clearly discriminated against Aboriginal people.[454] By way of specific example, survey respondents were asked if they thought it was wrong that Aboriginal people were not counted in the census or accepted for military service, to which a large majority of respondents responded affirmatively (84%: Table 11). And yet, the proportion of respondents who identified having experienced discrimination, as noted above, is much lower.

Further, the survey responses point to broad-ranging social inequity and disadvantage, as noted above, including extreme poverty, limited access to health care, and poor educational and employment outcomes. These outcomes were often directly linked with then-current government policy — though again, this link was not identified by the respondents. For example, many Aboriginal people in NSW at

[451] For each question, there are usually multiple blank responses (for instance, in this case responses were not recorded for 16 participants). Note also that percentages are rounded to nearest whole figures. See further detail set out in Appendix C.

[452] Many also felt that the 'Aboriginal situation' had improved over the last 20 years (78% of respondents: Table 10).

[453] The students primarily focused their protest activities on segregation of local Aboriginal people from public places/facilities, perhaps because this would be more likely to invite media attention and/or because of the survey respondents' predominant focus on this form of discrimination.

[454] The 1960s and 1970s are marked, in general, by changes in attitudes towards discrimination, as discussed in Chapter 3. As Read identified, during this period there was greater 'intellectual and moral rejection' of racism, particularly in its more blatant forms, and 'loss of its ability to provide a rationale for (discriminatory) government action'. Although as a result efforts were made at this time to eradicate overtly discriminatory legislation government law and policy continued to oppress and marginalise Aboriginal people. Read (1990), 81.

this time were excluded from public places and from housing in town, including by local government edicts and policy. They were segregated and subjected to significant control on Aboriginal reserves through NSW State Government policy, implemented by mission or reserve managers. Though captured in the survey responses these policies and rules (and the social exclusion that is (in part) their end result) were not generally attributed to race, nor labelled as discrimination by respondents.

As an example, two thirds of respondents believed that their children would encounter barriers to accessing higher education, which encompassed living in reserves with no transport or electricity and financial strain, including due to under-employment. There is no connection drawn between educational and employment issues and race discrimination. More than half of those responding to a question asking whether it was harder for Aboriginal people to get jobs felt that this was the case (58%: Table 8), but nearly half of these respondents also thought that this was due to class and/or ability rather than 'colour' (48%: Table 16).[455]

That the respondents defined their experiences in this way tells an important story in itself, as well as highlighting difficulties involved in identifying and labelling issues as 'discrimination', which has access to justice implications - to be discussed later in the thesis. The latter 'story' confirms that Aboriginal people in the 1960s were certainly concerned about their lack of civil rights, as discussed in Chapter 4. They were clearly very focused on reducing formal barriers to equality, given the levels of blatant physical segregation to which they were subjected.[456] In terms of social exclusion generally, though respondents may not have labelled poor access to adequate housing, educational and employment opportunities as discrimination many identified increasing access in these areas as key to enhanced Aboriginal well-being.[457] Examples of disenfranchisement (such as not being counted in the

[455] This reference to 'ability' is reminiscent of attribution to an unsuccessful Indigenous applicant of his or her personal failure to get a job, with little regard given to the role of structural racism, as discussed in Chapter 2.

[456] On this note, Aboriginal people were identified by almost all respondents as 'the same as white people in every way' (97% positive responses). Additionally, when asked if they were happier than non-Aboriginal people the vast majority of respondents said yes (80.9%).

[457] This confirms points raised in Chapter 2 in discussion of social inclusion, of the importance of access to opportunities, 'essentials' and rights to this inclusion, and of inclusion to enhanced wellbeing.

census) were also not often identified as 'discrimination', but almost all respondents wanted a stronger voice, more autonomy and to assert their rights. Close to every respondent thought that Aboriginal people should stand up for their rights (98%), with only a small percentage indicating that they should 'just accept the situation as it is'. Almost unanimously, they also indicated that they should be given 'more say in their affairs' (96%).[458]

We turn now to consider the Freedom Ride data in detail.

1.2 Nature and extent of discrimination: survey data

Survey respondents were asked to describe ways in which they were discriminated against. This question led to general observations about prejudice. 'A lot of people don't like' Aboriginals. They are not treated in a 'friendly' way, stated one respondent. 'Bowraville is the worst place around here', the 'teenagers don't mix', and there are 'a few odd remarks by ignorant people', claimed others.

More specifically, as noted above, survey responses identified discrimination as occurring most frequently as restrictions to access to public facilities/services (41%: Table 19).[459] This was followed by discrimination in the areas of housing (26% of responses), work (24%), health (10%), education (7%), police (6%) and as a category of 'other' (6%). The next section discusses each of these areas, beginning with those in which discrimination was identified as most prevalent.

[458] Respondents also wanted more Aboriginal representation on the AWB, which was described by Perkins, as noted in Chapter 4, as a 'repressive' institution that did little for 'Aboriginal advancement'. There was criticism of the AWB in respondents' comments. Most did not know how many Aboriginal people were on the AWB (89%) and by a small majority, respondents did not think the AWB was doing a good job (54%). When asked if they would like to see a local committee set up to 'deal with assimilation', almost all respondents said yes — and in particular, to a committee with equal Aboriginal/non-Aboriginal representation as opposed to a majority of Aboriginal or non-Aboriginal representatives (92%).

[459] Some respondents reported experiencing more than one type of discrimination. See Appendix C.

Access to places/facilities

Access to the local cinema was identified by respondents as highly restricted. They complained of segregated seating yet having to pay the same price as non-Aboriginal people for tickets. As one survey noted, the theatre 'has a place down front petitioned off' for Aboriginals. Another stated that Aboriginal people had to climb stairs for their seating, which sometimes caused 'accidents'. Respondents also talked of having to use the theatre's side entrance, the front entrance having been closed off to them.

As described in Chapter 4, racism during this period emerged as and resulted from racially biased social mores, rather than formal policy (alone). As an example of this, segregation in the cinema sometimes occurred because of the attitudes of theatre staff (rather than of management) or of 'whites' in general. And so, though it was reported that in one theatre 'Aborigines are now allowed in the same door' as non-Aboriginal people, they still don't feel right 'mixing', so they continue to enter and sit separately. Restrictions on access to the local swimming pool, including at Moree, were also highlighted.

One respondent questioned why Aboriginal people couldn't use the public baths on the weekend and why children could only go there with their school. Discrimination also allegedly occurred in shops. Comments included that the 'frock shop in town bars Aboriginals'. Aboriginals can't 'buy clothes at certain shops'. Further, you 'must have a big recommendation to fill in papers' for layby as Aboriginal people were not trusted, even though they would certainly 'honour' their commitments. Restaurants and cafes, too, were segregated. Some wouldn't let Aboriginal people sit down at all or in certain seats. 'Only three out of four cafes in one town allow Aboriginal people in.' 'Restaurants have no dark [people] at all for meals'. 'Harry's Grown Café serves them but not milkshakes in containers.' 'If served they are treated badly, can't ... eat off plates'.

Hotels and pubs excluded Aboriginal people; 'all hotels except one' in one of the towns visited. Accounts were provided of Aboriginal people being denied entry or being permitted in one room only. 'There's six hotels in town, two won't serve Aborigines'. 'Up until 12 months ago, Aborigines not allowed in the pubs'. The police in one town told the publican to only let 10 Aboriginal people in at a time. Further concerns related to post offices, dance halls and other places to which the public were

permitted entry. A survey reported that on one occasion Aboriginals 'were being presented with football blazers. White players went into the club, but blazers were brought outside to the Aboriginals.' Other responses indicated that Aboriginal people were 'not allowed to join RSL club… or bowling club' and that in the 'Post Office, lots of people not served.' The barber from Coonamble apparently wouldn't cut Aboriginal people's hair, and in another town 'They won't take kids in barber's shop.'

Housing

Housing was identified as a major issue, both because it was an area in which there was overt physical segregation of Aboriginal people and due to housing conditions on missions and reserves, which were nothing short of abysmal.[460]

Respondents were asked if they thought Aboriginal people should be living in town or on reserves. A large majority responded that they should be living in town (89%).[461] Exclusion from town appeared to be racially motivated. One woman's sister, for example, apparently had 'married white' and got a house in town straight away, while others were 'stuck' on reserves. Respondents claimed they were not permitted to reside in town even if they had the money to do so. One respondent spoke of trying to get a house in McLean for 18 years, without success. This same person believed Aboriginal people shouldn't have to live in reserves and should have an opportunity to 'mix'. Exclusion was blatantly racist, including by local government, with a mayor in one of the towns resisting AWB attempts to house Aboriginal people in town.

Those living on missions or reserves reported feeling physically cut off. There was, for instance, no bus from one particular reserve into town. As a result, 'Aborigines don't go to town much in the week,

[460] Commentary on mission or reserve life is included in reports on the Stolen Generations and Stolen Wages, for instance. See Senate Committee on Legal and Constitutional Affairs (2006), *Unfinished business: Indigenous stolen wages*, Commonwealth of Australia, Chapter 2 and HREOC (1997), *Bringing them home. Report into the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, AGPS Canberra, Part 2.

[461] Less than one in ten respondents (9%) wanted to remain on Aboriginal reserves (Table 15). An additional 2.4% were not sure how to respond to this question.

mostly Saturday or Friday nights or occasionally weeknights for the pictures.' Of concern too was the level of control exerted by reserve/mission managers. 'We should be just as good as the white people. They don't have to report [to the manager] like we do', stated one respondent. Control by the mission manager was recorded as ranging from over-scrutiny of all kinds (such as having to ask permission to go and see a relative), to refusal to call an ambulance after 5pm if someone was ill. The Burnt Bridge Manager allegedly treated Aboriginal people as though they were in prison – probably, it was claimed, because he used to be a prison warden. On another community, 'the manager only allows (named person) to enter mission for 2 hours at a time, with special permission', though he 'has lived here, reared his children here.' AWB staff also allegedly just 'barge in, don't knock. They take away your house if you are away for three months or more'.

In addition, housing conditions were, in a word, atrocious and a common area of complaint, with houses lacking basic amenities such as sewerage, hot or running water, and gas or electricity. As one of the students, Pat Healy, remembers it, her first reaction to seeing Aboriginal living conditions during the ride was one of 'complete numbness and shock. You know roughly before you go what you are going to face, but you simply don't realise until you get there and see for yourself. Take the houses they live in. I could hardly believe it when I first saw it'.[462]

One female respondent said that 'too little money [is] … spent on improvement of reserve, lack of innovations and modernisation of homes.' She 'fought for years for a bathroom for her house.' Others spoke of leaking houses, of living in a 'shanty', and of the many people on the mission with hookworm because of the rain, the damp ground, and kids running around without shoes. There was no adequate disposal of waste and no sewerage system. A respondent spoke of a 'sanitary depot dump' located '200 yards away' from houses that brought flies and stank. There were 'no garbage bins. Rubbish not picked up. Sometimes father takes it away.' The 'shower room is always clogged up. No decent drainage for water to go out, lies around in laundry also every time it rains.' Though this was a different era, conditions were obviously better at this time in non-Aboriginal homes. In one location, for example,

[462] Quoted in Curthoys (2002), 71.

respondents pointed out that there was no running water in Aboriginal houses but water in non-Aboriginal houses sitting just 100 yards away.

Access to adequate housing was identified by respondents as essential for enhanced Aboriginal socio-economic wellbeing. The importance of quality housing is evident too in responses when Indigenous people were asked to comment on how Indigenous health could be improved. Many identified housing and living conditions as a major contributor to poor Aboriginal health, including mortality (79%: Table 22). 'Disease stems from the current conditions — no drainage.' 'Water's terrible, wrigglers in it, stinks.' 'No tanks on houses or bores. Kids sometimes get sick from water.' 'Homes are insanitary. Five kids died of malnutrition and worms'. Moreover, when asked how the 'Aboriginal situation' in general could be 'helped' just over half also suggested addressing housing problems (53%: Table 21). As one respondent stated, if you give Aboriginal people 'decent homes, they'd be alright … [they] will [then] be able to help themselves.'

For some, this was about improvements to housing on reserves, such as access to clean water and electricity, construction of footpaths, the addition of lights 'just like a street', and the building of new homes.[463] The bulk of responses, however, called for the relocation of Aboriginal people into houses in town and closure of the missions to ensure a measure of self-sufficiency, as well as inclusion in the local (non-Indigenous) community. Aboriginals should not be 'stuck away by themselves', they should be able to mix in town 'and show white people they can live just as well as them.'[464] Quite a few respondents indicated that they should be able to purchase a home. One survey recorded: 'let them buy

[463] This was an issue, in particular, for the minority that thought that living out of town was better for Aboriginals. As one participant put it, Aboriginals 'like to be together' on reserves. Other comments were as follows. 'They said before Christmas they'd build new homes but haven't sorted it'. In another location, government had promised new homes 'near library' for two years. 'This girl appears to only want what promised by government. Seems to think this is enough', records the interviewer.

[464] Some respondents complained that there was 'little law and order' on reserves. Another said that all reserve residents do is 'drink and fight every day'. They should 'get them away from one another'.

houses in town because they want to be given responsibility like white people and they would take more care of' houses if they owned them.[465]

Work

Over half of respondents thought it was harder for an Aboriginal person (compared with a non-Aboriginal person) to get work in town (58%), and as discussed above, close to half of those responding believed that this was due to 'colour'.[466] Unemployment was also the third most common area in which discrimination was experienced (24%: Table 19). Additionally, when asked what would help the Aboriginal situation around one in six respondents identified employment (16%: Table 21).

Qualitative responses confirm that work was often hard to find, generally menial, and sometimes unstable. 'Jobs are hard to get', sums up many of the comments. More specifically, 'Coles will not employ Aborigines', 'they' don't 'let Aborigines work here' and 'white (married) women get hospital jobs as opposed to trained Aboriginal girls'.[467] Some put low employment down to a lack of jobs in country towns or 'lack of training', rather than discrimination. 'Got to know someone to get job in country towns', claims one respondent. Others, including a man working in the local abattoir, stated that it wasn't hard to get work, particularly labouring jobs or jobs in 'a few trades'. A further respondent states, 'Aborigines get jobs' but 'lose them through their own fault'. On this point, a respondent stated that Aboriginal people 'could find employment if didn't drink so much. Not white people's fault.' This same respondent, however, also noted that 'Aboriginal people are ashamed, frightened of white people.

[465] If reserves were abolished, suggested another, welfare money could be used to build houses in town rather than to pay managers. One participant expressed a desire to buy the crown land on which their house was built but complained that they were not permitted to do so. Another comment was that the 'Welfare Board, several years ago, agreed to buy land in town and to give Aboriginals a loan to build houses but no more [was] heard of it. Sister-in-law has had application for loan in for 3 years.' Respondents were also asked whether they would prefer to be buying or renting their home, or to have it gifted to them. Most preferred to be purchasing their home (57%) rather than renting (31%). A comparatively small percentage wanted to be gifted a home (13%) (Table 14).

[466] An additional 4.4% attributed problems with getting a job to a combination of these factors.

[467] Finding work may have been particularly hard for women, as this last comment suggests. In one community, few adult women apparently bothered to look for work, though the adult men were generally fully employed. One participant suggested that 'girls' are too 'shy' to ask for work.

They're tramping us down.' Another survey noted that the government should find Aboriginal people work 'like new Australians.'

Education

Discrimination in education was identified by 7% of respondents (Table 19). One question asked respondents: if their children had a chance to go on to higher education, what things might prevent this? More than a quarter of respondents indicated that there was nothing preventing enrolment in higher education (27%: Table 20).[468] Access *was* an issue, however, for most respondents – with 'financial capacity' the most significant barrier, including that which related to under-employment (72%: Table 20). Money was needed to buy books and clothes, including 'expensive' uniforms.[469] One individual indicated that bursaries would improve access to education. Apathy or a lack of desire was also identified as a barrier (12%: Table 20). Kids 'just don't want to go' to school or they wanted to work instead, to leave school at 15 years of age. Being without transport or having no electricity also impacted on access. Notably, only three responses identified direct discrimination as a barrier to access. One respondent said that they 'tell you to leave [school] up here, sent one away to Sydney', 'weren't allowed to go to high-school', and 'teachers don't encourage them. He'd [respondent's son] be the only one [at school]'.

Education, along with better housing and more employment, was identified as essential for self-sufficiency and a better life. Almost everyone thought that acquiring a 'good education' would benefit Aboriginals (98%: Table 2). Around one in six also thought increased education would improve the situation of Aboriginal people (17%: Table 21). Accessing education was directly connected with enhanced opportunities, including in employment. Children need 'more opportunities to better themselves'. Aboriginal people would be able to 'help themselves' with 'better jobs', rather than relying

[468] Notably, however, Perkins was to become the first Aboriginal person to graduate from a university at around this time, indicating that barriers were in fact quite substantial.

[469] Participants reported having no permanent job and/or no stable income to pay for such things. Work was seasonal or participants were unemployed or unable to access 'good work'.

on welfare payments. They are 'deserving' and should have access to education. There was 'nothing here for them to do'. They 'wander around from daylight to dark.'

Police and health services

Discrimination was identified with respect to police by 6% and health services by 10% of respondents (Table 19). Discrimination in terms of policing manifested as both under and over-policing of Aboriginal people. There were reports of constables picking on 'young blokes', of police being 'rough' and 'tough' with them, of police 'telling off' Aboriginal people for laughing or talking in the street, and of their disproportionate jailing. If an Aboriginal person staggered in the street a little when they left the pub they would be jailed, but a white person would not be, it was suggested. 'Last week, fight between Aboriginal and white person and cop took them away and let off white and jailed dark fellow.' Another suggested that 'practically every day police pick up men on 'drunkard' charges. They barge in houses without knocking, the men often have had only 1 or 2 glasses of beer, then drag them to the truck without formally telling them they are being arrested'. Also recorded is a tragic story of a 'dark woman' kicked to death by her partner near Gilgandra. She was apparently wrapped in canvas and put in a box, with no further inquiries made by the authorities.[470]

Segregation was identified within health service provision. Respondents spoke of having to stay on the hospital veranda when sick and of Aboriginal people being seen at the doctor's surgery only after all the other patients. Specific doctors and nurses were also singled out. 'One 'Sister' won't look at the Aboriginal kids'. A 'particular doctor also doesn't take much notice of Aboriginal people. Nurses belted up kids for misbehaving. One child came home with two black eyes, put out of hospital before was well.' The need for better access to medical and dental care was identified in responses to the question about how to improve Aboriginal health. Barriers to access related to transport (a five mile walk or taxi ride into town) and lack of finances, which made it difficult to pay for an ambulance and treatment. No matter how sick you are, claimed one person, the doctor won't see you unless you have money. A

[470] One woman also stated that she needed to access unemployment benefits at the local police station, but that the police would not give it to her.

'cheaper medical service', outreach care from doctors and nurses and/or having a permanent 'trained nurse', 'female welfare worker' and/or 'resident medical officer' out on reserves would all assist, it was claimed.

2 Other mid-20th century surveys on Indigenous inequality

Other mid-20th century sources of data on discrimination or inequality gathered directly from Indigenous people include sociological surveys, two of which were conducted in the late 1960s by non-Indigenous researchers Lippman and Rowley.[471] These surveys describe high levels of Indigenous social exclusion and attributes this to poverty, race and colonisation.

Lippman conducted research into race relations in four towns in Victoria and NSW, jurisdictions where 'there are no discriminatory laws' against and 'special government agencies purport to assist' Aboriginal people. [472] On 'the surface', therefore, 'conditions are good. But Aborigines are beginning to ask, 'If we're so free and equal, why are we so poor?'' Indigenous poverty is evidenced in this context by 'overcrowded and below-standard housing', 'a low level of formal education' and 'a lack of work skills, high unemployment or under-employment'. Aboriginal survey participants were, according to Lippmann, 'occupying a subordinate position in the community as a whole'. They did not, however, 'equate their poverty with that of poor whites'.[473] Contrary to the responses recorded on the Freedom Ride surveys, Lippman claims that those surveyed clearly identified their situation as different to non-Aboriginal people due to both their race and colonised status.

[471] Lippman, L (1970), *A Survey of Race Relations in Selected Country Towns*, Monash University and Rowley C (1967), 'The Aboriginal Householder', 11(6) *Quadrant* 90. Lippmann points to such studies as important: a 'self-assessment by Aboriginal groups of their position in the general society'. Lippmann (1970), 6.

[472] Lippman also remarks that in the towns selected Aboriginal residents were living and working as 'town-dwellers' but were only just integrated from reserves into the general community – a 'new and uneasy experience'. Lippman (1970), 4

[473] Ibid.

Lippmann writes that 'though racism is not as a rule virulent in Australia, there is an overall belief in the inferiority of Aborigines, of their intrinsic inequality'.[474] She also refers to their 'separate group identity', and the fact that they 'have always been treated as separate by the general community'.[475] As such, when barriers commonly underpinning poverty are removed for Indigenous people they remain highly marginalised. As two examples of this, she suggests that even where educational outcomes were improved for Aboriginal people they still couldn't get jobs, and certainly not decent ones.[476] Moreover, despite the fact the Aboriginal people included in her study are 'no longer spatially remote' (having

[474] Lippman (1971), 31. Of note, Lippmann also surveyed non-Aboriginal people living in the four towns she visited as part of her study, uncovering substantial levels of prejudice. The data gathered indicates, for instance, that 52% of non-Aboriginal respondents spontaneously identified Indigenous people (without any prompting) as 'dirty', 'drunken', 'irresponsible' and 'inferior'. The data is discussed in Lippman, 'Aboriginal-White Attitudes: A Syndrome of Race Prejudice', in Stevens (1971), 30. Lippman identifies surveys with non-Aboriginal people as unlikely to present a truly accurate picture of racial interactions, given the tendency amongst European-Australians to under-report racism. Lippman, L (1970), 4. These and similar surveys are nevertheless useful as they provide evidence of discriminatory attitudes towards Indigenous people within mainstream society, even as an under-estimation, which are then confirmed by Indigenous accounts of the same. Other examples are as follows. In 1968 Taft surveyed non-Aboriginal people in WA about their attitudes towards Aboriginal people. Respondents (disproportionately) selected negative traits from a list of specified attributes to describe Aboriginals, identifying them as 'wasteful with money' (50% of respondents) and 'drunken' (26%), for instance. Taft, R, 'Attitudes of Western Australians Towards Aborigines' in Taft, R, Dawson, J and Beasley, P, (1970) *Aborigines in Australian Society*, ANU Press, Canberra, 1. Western's 1969 survey of non-Aboriginal people in NSW also revealed racism, with 21% of respondents agreeing, for example, with the statement '[t]he incorporation of Aborigines into our communities could well lower our standards of hygiene.' Moreover, 21% expressed an unwillingness to be friendly to an Aboriginal person, 29% thought that 'white culture is more advanced', and 40% believed that Aboriginal people were best suited to manual labour. Western, JS (1969), 'The Australian Aborigine: What White Australians Know and Think About Him – A Preliminary Survey', 4 *Race* 411. A further survey of non-Indigenous people in NSW and VIC that found that 20% of respondents thought Aboriginal Australians should stay on reserves and missions, 51% would not like a family member to marry an Aboriginal Australian, and 26% thought that if Aboriginal people moved into their community, its hygiene would decrease. Beswick, D and Hills, M (1972), 'A survey of ethnocentricism in Australia', 24(2) *Australian Journal of Psychology* 153.

[475] Lippman (1971), 31.

[476] Lippman cites 1966 census data indicating that 37 Aboriginal women matriculated from secondary education, but 14 of these were employed in domestic or personal service. Of 103 males who matriculated only 9 fell within the top 7 categories of employment status. See also Broom, L (1971), 'Educational Status of Aborigines', 7 *The Australian and New Zealand Journal of Sociology*, 1.

been integrated into towns), they 'still do not take part, nor are they expected to take part, in public affairs'. They remain largely 'invisible', tending 'to get swept out of sight as non-contributors to the economic whole'.[477] That colonisation had played a part in this differential treatment is evidenced by the fact that other racial minorities were in a better position than Aboriginal people.

> Social stratification now is by a new status order — by occupation, life-styles, education, value systems. Judged by these criteria, ethnic minorities are often placed *low in the stratification order*. Aborigines, indeed, may find themselves *outside the stratification system altogether*, unemployed or in jobs not acceptable to the white worker, in housing not wanted by the general population, with education of a low standard or with none at all, and a value system at variance with the rest of society.'[478]

Rowley's findings about the poor socio-economic circumstances of Aboriginal people in non-metropolitan NSW and SA broadly mirror those of Lippmann.[479] It is worth citing here as context against which to draw comparisons about the same later in the thesis detail about housing conditions and insecurity and education, as examples of these circumstances. Rowley reports that most participants were living rent free 'in some way or another' (56% of respondents), predominantly on Aboriginal stations/reserves but 'at the price generally of quite shocking accommodation'. Although about a third (35%) of the participants indicated that they owned their homes, Rowley suggests that this is likely to refer only to the makeshift materials they used to build them, not to ownership of the land on which these houses were located. Over a third of participants lived in self-built shacks (37%), largely because

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[477] Lippmann records that non-Aboriginal town dwellers appeared to have little contact with and/or interest in local Indigenous people. This lack of contact 'both gives rise to, and results from a lack of awareness, on the part of the whites, of Aboriginal existence'. She records that not one non-Aboriginal respondent to her survey reported having had a 'great deal' of contact with Aboriginals and 51% had had no contact with them whatsoever. Moreover, only 4% of these respondents were recorded as being 'actively favourable' and 6% were 'very unfavourable' to Aboriginal people, which for Lippman reflects 'the lack of interest of the majority [in], as much as tolerance' of Indigenous communities. Lippmann (1971), 31. Increasing 'everyday' and other contact between Indigenous and non-Indigenous people is identified as likely to improve race relations in Chapter 8.

[478] Ibid (emphasis added).

[479] Rowley (1967).

they could not afford rent or other accommodation. Insecurity was particularly pronounced for this group – fringe dwellers illegally building homes close to town to access employment and other opportunities. For those with tenancies rent was most often paid to the AWB, for Aboriginal people were 'at the bottom of the queue' for Housing Commission tenancies (as they were for most services).[480] Difficulties in accessing other types of tenancies were due to prejudice and not having sufficient funds to regularly pay rent.[481] Low levels of educational attainment were also discussed in Rowley's study. In NSW, of the non-school population over school age the majority had left school aged under 15 (52.5%) and/or between 15 to 17 (42.8%). Only 1.6% were in school at age 17.[482] No one in this same group had attained a leaving certificate or any tertiary or technical qualification. Just over a third had not completed primary school (35.2%). Slightly more than a third had *only* finished primary school (35.5%), and just over a quarter had finished secondary (below intermediate) schooling (27.2%). Only 2% had completed intermediate schooling.

Rowley claimed, as did Lippmann, that Indigenous people were positioned at the lower end of socio-economic opportunities due to a 'culture of poverty', race, and ongoing colonisation. This, he claimed, had involved 'a high degree of institutionalisation, often without security, over long periods' and 'white settler prejudice', seen in the inadequate servicing of 'fringe dwelling' Aboriginals and local government resistance to integration of Indigenous people into town, for instance.[483] As further evidence of the impacts of colonisation, Rowley refers to 'destruction of the basis of social order which gave legitimacy to Aboriginal leadership and custom without compensatory attraction to, or entry into, the encroaching society and economy'. At this time the 'only real opportunities for full social development' for an Aboriginal person:

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[480] Only 1.9% were in Housing Commission tenancies.

[481] Rowley (1967), 93. Rowley points to broader census data from 1961 indicating that in NSW whilst two thirds of homes were owned or being purchased (67%), only 9% of Aboriginal dwellings fell into this category.

[482] For 25% of this group, the age at which they left school could not be ascertained, which Rowley claims 'may be in itself significant'. For 29.5% of persons in this group, details of levels of schooling completed were also not available. Ibid, 91.

[483] Ibid, 94.

> … lie within the general society, from which he [sic] has until very recently been excluded to various degrees legally (in Queensland, especially, he may still be) and in which there are racial prejudices strong enough to limit both his social mobility and economic opportunity.[484]

3 Contemporary Indigenous experiences of discrimination

We now consider how Indigenous experiences of discrimination have changed over recent decades. We begin by looking at Aboriginal and Torres Strait Islander perspectives on this change, shared during the 50th anniversary re-enactment of the Freedom Ride. We then look at academic and other material that describes contemporary Indigenous experiences of discrimination before focusing on thesis interview data.

3.1 Freedom Ride – then and now

A re-enactment of the Freedom Ride took place in 2015. This involved returning to the country towns visited by Perkins and his fellow students. According to media representatives accompanying the riders, during this re-enactment it 'soon became obvious that what started 50 years ago was far from being finished'.[485] Indigenous people also indicated at this time that they felt there was still a long way to go in terms of improving race relations and adequate recognition of their rights.

Measuring progress of this nature is not a simple exercise, including as it is not always linear, as the following example suggests. One media piece quoted a local Aboriginal woman from Dubbo as saying during the re-enactment '[y]ears ago I would have been locked up for singing in my language'. 'Now the local primary schools teach the local Indigenous languages.' She refers to Dubbo high school as having unprecedented numbers of Aboriginal students completing school in 2015, but the nearby juvenile detention facility as also filled with young Aboriginal people.[486] Another newspaper report

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[484] Ibid, 90-91.

[485] Hall, M and Jonscher, S, 'What next for Freedom Ride and bringing change to Indigenous Australia?', Guardian Australia, 23 February 2015.

[486] Power, J, 'Freedom ride marks 50 years since Charles Perkins' ride for Aboriginal equality', Guardian Australia, 18 February 2015.

speaks of the warm welcome given to the riders by Walgett's RSL, a site of blatant segregation in 1965. 'Now we've got freedom! We're allowed in the clubs, we're allowed to go wherever we want,' stated a local Aboriginal woman. 'If you walk into this RSL today, there's probably 90% Aboriginal people.'[487] This same woman, however, also suggests that a 'more subtle form of racism remains in the town, which is now 50% Indigenous' and has a 'high unemployment rate, substance abuse issues, poor educational outcomes, high levels of domestic violence and friction between townspeople and the local police force'.[488]

Poor living conditions and societal disenfranchisement reported during the re-enactment is not *so* very different from that recorded in the 1960s. One article spoke of the 'decaying streets and poverty of a place like Gingie mission' near Walgett, where 150 Aboriginal people are housed in just 12 homes. The mission's roads are identified as being in such a deep state of disrepair that school children are regularly unable to access the local school.[489] Auntie May from Top Camp reserve, a former mission in Moree, also told the press that 50 years ago 'in the days of tangible and legal segregation, her community had a church, school, hall, playing field and pool. Now, all of these things were gone and her community was more isolated than ever'. 'No one tells us anything,' Auntie May stated. 'We don't control our own destiny – things happen to us and not for us.'[490]

Aboriginal participants of the re-enactment, including Perkins' daughter Rachel, called for renewed effort to address issues that are still problematic some decades after the first Freedom Ride – a reality that 'we as a nation should and can do something about'.[491] According to Perkins, more work is required on less tangible areas of racial division and inequality. She states that 'we must … be willing to engage

[487] Tan, M, 'Freedom Ride returns to Walgett, the town where the RSL banned black diggers', Sydney Morning Herald, 20 February 2015.

[488] Ibid.

[489] Ibid.

[490] Ibid.

[491] Tan, M, 'Fifty years on: Freedom Ride again holds up a mirror to white Australia', Guardian Australia, 19 February 2015.

with the realities of ongoing institutional racism and societal separation that, year on year, hold Indigenous and non-Indigenous Australia apart.'[492]

3.2 Describing and measuring present day discrimination

Moreton-Robinson asserts that the 'official' story about racism in Australia, as recounted in the media, the political arena, and our legal system (described in Chapter 3) suggests that it exists only in 'small pockets of society or not at all'.[493] Demonstrating the importance of Indigenous accounts of race discrimination experienced, Indigenous people will tell quite a different story about where, when and how this problem manifests, according to Moreton-Robinson. They are likely to identify it as a very significant problem with substantial impacts. This the following data confirms.

Various surveys have been conducted with Indigenous Australians about racism and race discrimination in recent years. Reconciliation Australia's Reconciliation Barometer data from 2016, for instance, indicates that 46% of Aboriginal and Torres Strait Islander survey respondents reported experiencing racial prejudice in the last 6 months.[494] The most common types of prejudice encountered were verbal abuse (37% of respondents), physical violence (17%), being prevented from renting or buying a property (17%), and being refused entry to a property (16%) or service in a shop (12%).[495]

A 2013 study conducted by Vic Health in four Indigenous communities in Victoria found that almost *every* Aboriginal participant had reportedly experienced racism in the last 12 months, with the overwhelming majority reporting multiple incidents over this period of time. Although the racism in question had occurred across a broad range of settings common sites were shops (67% of respondents)

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[492] Ibid.

[493] Moreton-Robinson (2007), 82.

[494] Reconciliation Australia (2016), *2016 Australian Reconciliation Barometer*, ACT.

[495] Other data from the *Reconciliation Barometer* indicates that Indigenous respondents were much more likely than the general community to feel they had been racially discriminated against by real estate agents (18% compared with 3%) and twice as likely to have experienced discrimination by school staff, for example. Confirming Moreton-Robinson's point above, Indigenous respondents were also more likely than non-Indigenous respondents to identify a high degree of prejudice towards Indigenous people (60%, compared with 40%).

and public spaces (59%).[496] By way of further example, a 2016 NT study about discrimination conducted with Indigenous people living in Darwin investigated perceptions of race relations between Indigenous and non-Indigenous people, with a majority of participants identifying relations as 'not very good'. Only a quarter of participants felt the latter race relations were 'good' or 'very good'. A similar proportion rated them as 'bad' or 'very bad'. The majority (56%) also thought that relations were 'worse' ('a lot' or 'a bit') than ten years ago.[497]

The ILNP also identified racial discrimination as a priority area of Indigenous legal need, as discussed in Chapter 2. Between around a quarter to two fifths of Indigenous focus group participants reported experiencing discrimination, dependent on the jurisdiction in question. This is again likely to represent an undercount of the actual incidence of discrimination, as was the case with Freedom Ride data and again attributable to narrowly prescribed definitions of discrimination.[498] As stated previously, the type of race discrimination described by ILNP participants was almost always direct and often quite blatant rather than indirect or more systemic. It was evident that in civil law areas such as education, social security, consumer law/credit and debt, housing and neighbourhood disputes, the issues described

[496] Ferdinand et al (2013).

[497] Around a quarter thought they were 'better' (23%) ('a lot' (4%) or 'a little' (19%)), and one in five saw them as 'the same' (21%). Larrakia Nation Aboriginal Corporation and UTAS (2016), *Telling it like it is: Aboriginal perspectives on race and race relations*, Darwin NT. Aboriginal responses were sought to a series of statements about non-Aboriginal people, with participants asked to indicate whether these were 'never', 'rarely', 'often', 'sometimes' or 'always true'. The majority agreed with the statement that non-Aboriginal people 'always' or 'often' judge Aboriginal people by stereotypes (83%), and 64% felt that it was 'never' or 'rarely true' that Aboriginal people are treated the same as non-Aboriginal people. Over 70% felt they had been disrespected 'a lot' or 'sometimes' or discriminated against ('treated unfairly') in the last 6 months. One participant stated that the 'level of racism and prejudice is horrific. Daily accounts of misunderstandings or ignorance. It's real ignorance and a lack of wanting to understand or accept difference'. Participants felt 'stereotyped, judged, patronised and found wanting' and identified little understanding of or attempts to understand the 'depth and richness' of Aboriginal culture and the strength and resilience of Aboriginal people, a point returned to in Chapter 8.

[498] Given the focus of the ILNP on legal need it may be that participants relied on what they understood to be *legal* definitions of discrimination in their responses.

sounded very much like, though were not commonly labelled by participants as race discrimination.[499] As briefly noted above in discussion of the Freedom Ride surveys and to be discussed later in the thesis, limited definitions of 'discrimination', including in a legal sense, have access to justice implications, including where they impact on the capacity or potential to name and therefore challenge race discrimination.

The most problematic areas of discrimination identified across ILNP communities, additionally, occurred in relation to access to and service within shops and pubs/clubs, under and over-policing, employment-related issues, and access to and the quality of (almost always public) housing. ILNP data again aligns closely in this respect with data captured in contemporary and historical surveys, including those of the Freedom Ride, as well as the interview data set out below. The ILNP data and other contemporary surveys differ from that of the Freedom Ride, however, in the frequency with which they record racial vilification as an issue for Aboriginal and Torres Strait Islander people. Moreover, some ILNP participants (but particularly stakeholder organisations rather than community members) linked discrimination to government policy, more so than occurred within the Freedom Ride surveys (though often with reference to racist implementation of this policy rather than the policy itself) and to racism of staff employed by government — police services most frequently, but also public housing providers, educational institutions, Centrelink and child protection agencies, health services and local government.[500]

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[499] For instance, the ILNP found that Indigenous people do not have equal access to mainstream systems on which they are disproportionately dependent (for instance, Centrelink), leading to legal problems (such as getting cutting off of benefits). See discussion, for instance, in Allison et al (2014a), 209ff.

[500] Of relevance too, recent surveys conducted with *non*-Indigenous Australians identify significant levels of racism towards Indigenous people. In 2014, for instance, one in five participants stated that they would discriminate against Indigenous people, including by moving away from them if they sat nearby or by watching them closely in a retail situation. At least a third did not think that behaviour of this type was discriminatory, pointing to a need to increase awareness about discrimination (to be discussed in Chapter 8). The survey also revealed that discrimination is underpinned by negative stereotypes, including that Indigenous people are lazy (37%) or are given unfair advantages by government (42%). Beyondblue and TNS Social Research, (2014) *Discrimination against Indigenous Australians: a snapshot of the views of non-Indigenous people aged 22-44 years*, 3, 5.

3.3 Racism and discrimination against Indigenous people: general comments

Mellor has conducted qualitative research with Indigenous Australians about their experiences of racism and discrimination.[501] Based on their responses he identifies four categories of racism against Indigenous people: *verbal racism* (name-calling or other comments), *behavioural racism* (ignoring, avoiding, looking, etc.), *racial discrimination* and *macro-level racism*.

Of note, not all of these types of racism will fall within definitions of discrimination, including at law. Race discrimination is identified by Mellor as constituting a single component of racism. He defines it 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'.[502] Examples cited include denial of a job and over-policing by police officers or store security personnel.

'Macro-level' racism, in contrast, is defined by Mellor as 'cultural' and more 'diffuse, anonymous and intangible', operating at a societal rather than an individual level. It may include, for instance, a general lack of concern by the broader community for Indigenous people; a selective view of colonial history (such as denial of genocide and other injustices); and the domination, subversion or invisibility of Indigenous culture by or to non-Indigenous culture and/or society. An example of the latter is the provision of public housing to Indigenous people that is unsuitable to Indigenous ways of life, an example of institutional racism, discussed further below.

According to Mellor, racism against Indigenous people is different because they continue to endure 'one-on-one, blatant [and] … old-fashioned' racism, to a greater degree than other racial minority groups.[503] He also points to disproportionate Indigenous experiences of 'everyday racism': repetitive events spanning a person's lifetime and running through almost every social situation. Essed suggests that this form of racism is likely to be difficult to clearly identify and to apply legal or other sanctions

[501] Mellor (2003).

[502] Ibid, 479-80.

[503] Ibid.

to, given its often relative subtlety.[504] For Mellor, however, whereas other groups may find themselves constantly and 'meticulously checking' to confirm whether what they encounter equates to racism Indigenous people name their experiences, without hesitation, as unambiguously racist.[505] He attributes this to the fact that they identify an unbroken link between contemporary and past racism through colonisation.[506]

Differences between Indigenous and non-Indigenous experiences of discrimination are largely attributable to colonisation. Whilst racism against immigrant groups in Australia is likely to abate over time (as waves of migration bring new ethnic, racial and cultural groups here, who are then fresh targets of racist stereotyping), racism is a constant for Aboriginal and Torres Strait Islander peoples.[507] It has *always* been (since 1788) and *remains* a major part of their relationship with non-Indigenous society, and is located within the 'framework' of our nation, permeating 'the very fabric of contemporary Australian society'.[508] The connection between colonialisation and current racism is described by Watson as follows. 'The impact of colonialism has reduced our peoples from one hundred percent of the population to just two per cent in two hundred years. It is also responsible for permanently altering, degrading and dominating the territories of Nungas. Colonialism is a process of domination, subjugation

[504] Essed, P (1990), *Everyday racism: reports from women of two cultures*, Hunter House and Essed, P (1991), *Understanding Everyday Racism: An Inter-Disciplinary Theory*, Sage Series on Race and Ethnic Relations. See discussion of everyday racism in an NT context in Smith, C, Ralph, J and Pollard, K, 'Markers of everyday racism in Australia', The Conversation, 25th January 2017 (accessed July 2018): <https://theconversation.com/the-markers-of-everyday-racism-in-australia-71152>

[505] Mellor (2003), 483.

[506] Of interest (and on a positive note), the Reconciliation Barometer (2016) survey identified that 54% and 46% of non-Indigenous respondents (respectively) also understood that past racial and colonial policies are causes of Indigenous disadvantage; and 51% and 56% (respectively) of participants holding this belief felt that Indigenous people were not responsible for their disadvantage. Reconciliation Australia (2016), 19.

[507] The 2011 Scanlon Foundation survey, for instance, identifies a long-term change in Australian opinion towards immigrant groups, with a large measure of acceptance of groups that were once stigmatised. Markus, A, (2011), *Mapping Social Cohesion 2011: the Scanlon Foundation Survey, Monash Institute for the Study of Global Movements*, Monash University, Victoria.

[508] Paradies, Y (2005), 'Anti-Racism and Indigenous Australians', 5(1) *Analyses of Social Issues and Public Policy* 1, 2. See also HREOC (1991) and Cowlishaw and Barry (1997).

and genocide. It results in the subordination of Nunga peoples to the nation-State. Discrimination, marginalisation and a denial of fundamental human rights are the legacies of colonialism.[509]

Racism against Indigenous Australians emerges as racially discriminatory government policy and law, again, linked to colonisation, such as the Stolen Generations policy and the doctrine of *terra nullius*. It is firmly embedded in our institutions – of politics;[510] legal and health systems; health;[511] the media;[512] education;[513] and housing (both in terms of private rentals and in the public housing system).[514] Institutional racism may look different to, but has the same or similar impacts as those of colonisation.[515] These impacts are wide-ranging and substantial, given that institutional racism sits within systems which potentially affect whole populations, leading to poor health, educational and other outcomes, and as it is now the more common form of discrimination Indigenous people face. As Aboriginal politician Linda Burney states, direct 'discrimination is not as apparent in public debate today', but statistics measuring Indigenous socio-economic outcomes 'tell their own story'.[516]

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[509] Watson (1996), 108.

[510] See, for instance, Augoustinos, M, Tuffin, K, and Rapley, M, (1999), 'Genocide or a failure to gel? Racism, history and nationalism in Australian talk', 10 *Discourse and Society* 351.

[511] Henry et al (2004) and Hunter (2007).

[512] The case of *Eatock v Bolt* is an example of this, discussed in Chapter 6.

[513] See, for instance, Dunn, M (2001), 'Lessons from the Past: Education and Racism in Australia', 11(1) *Education in Rural Australia* 62 and Bodkins-Andrews (2014).

[514] See for instance, Walsh, J (2003), 'Suburban Oppression', 5(22) *Indigenous Law Bulletin* 14; EOC (WA) (2009a), *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*, Perth WA; Staley, J (2001), *Rental Market Failure: Discriminatory Obstacles Faced by Aboriginal People in the Private Rental Market*, Paper prepared for the National Housing Conference 2001; and VEOHRC (2012), *Locked Out: Discrimination in Victoria's Private Rental Market*, Melbourne VIC.

[515] Thornton suggests, for instance, that although we no longer tolerate Aborigines 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'. Thornton (1990), 37.

[516] Burney (2009), 479. She also points to race discrimination as more commonly manifested nowadays in 'more insidious forms of political and institutional racism, while simultaneously residing in a kind of malign neglect by the rest of the population. Ibid.

Across a broad range of indicators of Indigenous socio-economic wellbeing statistics reveal that in many key areas the quality of many Indigenous peoples' lives is *nowhere near equal* to that of others, as was the case in mid-20th century Australia. The wealth of data supporting this claim includes, as just one example, data collected by the Australian Bureau of Statistics Census for 2016.[517] These statistics can be compared with those captured in the Rowley survey and cited above: indicating some positive change, but with continuing significant disparity in Indigenous and non-Indigenous outcomes.

- Aboriginal and Torres Strait Islander peoples are much less likely to have completed Year 12 or equivalent: 79% of non-Indigenous people aged 20-24 years report completion of Year 12 or equivalent compared with 47% of Aboriginal and Torres Strait Islander people. Almost one in five (19%) Aboriginal and Torres Strait Islanders aged 25-64 years have left school early (in Year 9 or earlier), compared with 6.7% of non-Indigenous people in the same age bracket. Only 4% of Aboriginal and Torres Strait Islander peoples are attending university or another tertiary institution.
- Only 47% of Aboriginal and Torres Strait Islander peoples are employed, compared with 72% of non-Indigenous people. Just over half of all Aboriginal and Torres Strait Islander people (53%) have an income of between $150 and $799 per week. In comparison, a similar percentage of non-Indigenous people have an income of between $400 and $1249 per week.
- Indigenous people are much more likely to be renting (rather than buying/owning a home outright) than non-Indigenous people (57% compared with 30%), which means they also have less housing security. They are also less likely to rent privately (43% compared to 61%) and are three times more likely to be renting from social housing providers (32% compared with 10%).

[517] Australian Bureau of Statistics (2016d), *Census of Population and Housing: Reflecting Australia, Stories from the Census: Aboriginal and Torres Strait Islander Population 2016.* 2071.0. Other useful data sources, though not relied upon here, include the *Overcoming Indigenous Disadvantage* reports published by the Productivity Commission.

4 Contemporary Indigenous perspectives of discrimination: interview data

During thesis interviews participants were asked to describe (a) the nature and extent of discrimination encountered by Indigenous people today; (b) how this differs, if it does, from discrimination experienced by other culturally diverse groups in Australia; and (c) whether discrimination against Indigenous people has changed over time. Participant responses are set out in the following section.

4.1 The nature and extent of discrimination

4.1.1 An all-pervasive problem

Participants identified the persistent presence of discrimination in Indigenous lives. Every Indigenous participant identified discrimination as encountered frequently, and by all Aboriginal and Torres Strait Islander people. One male participant in Brisbane remarked '[e]verywhere I go, no matter where I walk …. I experience fucking racism all day every day' (BM1).

Some participants indicated that there may be some variation in terms of discrimination based on social status, with 'middle-class' Aboriginals potentially more sheltered from systemic racism 'because they've got assets and resources' (S1 [I]). Skin tone might also make a difference to levels of discrimination.

> I went to a club in Darwin. I was in my beat-up old clothes, and don't look so obviously Aboriginal because of my mixed Italian heritage. My Aboriginal friends were well dressed but I was allowed in and they weren't. I said 'Mate if they're not coming in, neither will I'. I looked like a hobo! CM3

Perspectives on whether location impacted on racism varied, though there was some consensus that overall, race relations were more progressive in Victoria, particularly when compared to QLD.

> Being from Queensland you've got to be on your guard all the time ... I experienced a lot of discrimination in Townsville. I'd go to the shop and get followed around. I'd go and sit on a bus next to non-Indigenous people. They'd get up and walk away. I'd have my bags checked

> and people in front of me who are non-Indigenous can walk right through … Down here [in Melbourne] I've experienced much less racism … Maybe because Melbourne's more diverse and multicultural. MF4

Certain participants thought that the bigger and more visible the local Indigenous population (in a place like Cairns, for instance), the higher the level of racial tolerance. Others felt that in places where Indigenous people were but one part of a culturally diverse local population (such as Melbourne or the Torres Strait) there was less discrimination. There were differences in opinion too as to whether cities or country towns were worse in terms of discrimination.

> We have 9 to 10 different races in the Torres Strait so we don't worry about racism so much. Our colour doesn't make any difference. Aboriginal people have been under a different style of oppression. To them, it was either black or white. In the Torres Straits we've had Chinese, Malay, everything … for centuries. CM5

> I've been to a lot of country towns, being a country boy myself. I think cities have more racism in them than the country, personally. I've been called a 'black c' at Southbank [in Brisbane], just drunken people walking past. It's like, man I didn't even look at you, did nothing to you and they come out with that … There've been other occasions. BM2

4.1.2 Common areas of race discrimination

Access to public places

Indigenous entry into and interactions with pubs, shops and similar, all points of access to goods and services, are reported by participants as being highly controlled and/or otherwise impacted by what looks very much like racism. Previous (numerous) encounters with racism leave participants in no doubt in this regard.

> You see the parks in Cairns, the black people like to sit there and have a quiet drink but they're not allowed to. They've put signs all along the Esplanade now. They've been moved out of

> every park. The pubs around here, instead of telling them right out you can't drink because you're making a problem for tourists, they got together and thought – what type of drinks do they drink? They cut down on Moselles and things like that ... It's targeting the blackfellas. It's a different way of discriminating. CM5

> Back home, you've got one side black fella bar, one side white fella bar. That's like what's called the animal bar by white people in Alice Springs. It's the bar where Aboriginal people are allowed. They could go to other places but they don't make them feel welcome so they go where they feel comfortable. BM4

> I can simply repeat a remark made to me by an Elder recently from a quite prestigious family who said he's been discriminated against all his life for being a black fella and it's not getting any better. He'd been recently denied service at a pub and then he was discriminated against three weeks later when he was put to the back of the queue in a bank. The explanation was that he'd fallen off the digital queue. That might have … occurred but that doesn't change his perception that it's about skin colour because that's been his experience previously. S4 [NI]

Indigenous people report feeling both completely invisible (not served in turn) and highly visible in stores, attracting unreasonable and unwanted attention from security personnel, for instance. This was a major area of concern for participants.

> They follow us as if we're going to shoplift. White man walks in and fucking racks as much as he fucking wants but when a black man goes in to actually purchase something they get stereotyped. It happens doing shopping at Coles. I had $200 worth of money but I had two detectives following me. I went up to them and said 'What are you doing? Every aisle I go into you seem to be there!!' BF1

Street-level verbal abuse or vilification also appears common. One participant suggested that 'surface' level discrimination like this is often highlighted by Indigenous people because of the rate at which it occurs. 'I've been called a black bastard in the street. I can talk about that all day … The regularity of

this type of stuff is startling. It could happen to me today … in this or that place, it would happen two to three times a day' (CM4). Given that racism is so ever-present in public spaces, one woman felt that home represented the only truly safe place for her and her family. 'Our home is our safe place where we protect our family. We're safe at home and the world can't touch us in there. Outside the gates, when you put yourself out there you're always vulnerable … We're too frightened to go outside' (SF1).

Housing

In many respects, the effect of the latter types of discrimination is a form of segregation similar to that revealed during the Freedom Ride; either as it directly excludes Indigenous people from certain locations or, as will be discussed in Chapter 6, because Indigenous people tend to avoid situations or places in which they (perceive that they) have been or are likely to be treated unequally on the basis of their race.

Similar issues emerge within housing. Most housing issues raised during interviews concerned public housing tenancies, given that Indigenous people are (still) more likely to be renting than purchasing homes and renting from social housing providers, as the ABS data above indicates. This disproportionate dependence on social housing arises because Indigenous people are racially excluded from and/or cannot afford private rentals (and are less likely to be purchasing a home). Real estate agents may discriminate even when formal barriers to applying for a private tenancy are removed - when an Indigenous applicant is just as good 'on paper' as a non-Indigenous applicant (employed, financially stable, for instance). In this and other ways, including because of decisions made by public housing providers about where to house Indigenous tenants, Indigenous people may become segregated into certain neighbourhoods.

> They can't get private real estate. On their rental applications one real estate agency used 'Are you Aboriginal or Torres Strait?' They said, oh it's just for statistical reasons. Wherever you go now they ask if you're 'ATSI'. I asked the real estate agent regulator about it and they said — oh god no they can't do that. S3 [NI]

> Melbourne is so racist, especially with public housing. There's buildings that they allocate just to Aboriginal people … [But] I don't want to live in crappy housing. I don't want to live in Richmond Flats, being scared all the time … You don't get offered nice housing in nice places by Department of Housing [if you're Aboriginal] MF1

Being disproportionately dependent on public housing causes problems for Indigenous people where public housing providers ignore their needs and circumstances as tenants and/or exert punitive control over them, sometimes leading to eviction.[518] Stakeholder participants were more likely to identify as (indirectly) discriminatory (and institutionally racist) housing related policies that appear neutral but that can have negative impacts on Indigenous tenants in particular, as the following comment highlights.

> People feel they're being discriminated against because of a lack of responsiveness from housing providers (to questions about repairs, rental payments etc.). A woman's having trouble with Housing who are saying her partner's been living there longer than she says. Therefore they've backdated rental arrears and slapped her with a big debt. Really that's a feature of him having quite a transient lifestyle as an Aboriginal male, living here, there and everywhere. They've decided to throw the book at her and say his income should have been included in rental calculations. I suppose that's an example of indirect discrimination. A feature of his culture is that he moves around to live with family. S4 [NI]

The 'three-strikes policy' in place across various jurisdictions in Australia is a further example of a potentially discriminatory policy. This policy enables public housing providers to evict tenants after three allegations of anti-social behaviour have been raised against them. It has disproportionate impacts on Indigenous people, including because of their dependency on public housing tenancies and as it sometimes fails to take adequate notice of or responds poorly to Indigenous cultural difference — a

[518] This was what happened in the Joan Martin case, discussed above.

further example of institutional racism.[519]

> People make vexatious complaints against Indigenous people to get them out, then they get their three strikes because Housing don't have to supply any statements, no proper proof until they get to QCAT (Queensland's Civil and Administrative Tribunal). They say, oh this neighbour, we're not going to say who it is, says they're having parties and having all their family over …. Let's kick them out. QCAT usually listens to Housing and does just that. S1 [I]

Again, very similar housing-related issues arose in the Freedom Ride data: that is, large-scale segregation, poor living conditions and over-institutionalisation (a high degree of control exercised over Indigenous people and how they live) within a housing context.[520]

Work and education

Work-related issues are, again, not so very different to those identified over five decades ago. Race might impact on access to paid work, the type of work available, and/or lead to derogatory treatment during employment.

> I went for a job interview when I lived in Queensland. The lady took one look at me and asked: 'Are you [name]?' and I said yeah. She was like 'Oh I'm sorry I can't squeeze you in today. I'll give you a call to come back'. It was just a fish and chip shop, nothing fancy. She never called back. She didn't say anything directly, but you can say a million things with your face. She just looked me up and down and thought I'm not going to even attempt to interview this girl … I was unemployed for such a long time, though I got to the interview stage lots of times. MF4

[519] See discussion, for instance, UQ Pro Bono Centre and Caxton Legal Centre (2018), *Objectionable behavior evictions in social housing*, Brisbane QLD and EOC (WA) (2013), *A Better Way: An inquiry into the Department of Housing's Disruptive Behaviour Management Strategy*, Perth WA. See also discussion in Allison et al (2014a), 33ff.

[520] This is also similar to issues highlighted by Rowley as impacting on Aboriginal people in the 1960s, including housing insecurity, institutionalisation and overcrowding.

> I've been for job interviews and I felt that I didn't get the work because I'm Aboriginal – just by the line of questioning, just how they spoke to me. If I was a white fella they probably wouldn't ask the questions they asked like 'do you drink a lot?' It's like — it's my personal problem if I do … Asking what I drink, how much I drink. Wait a minute would you ask if I was white? BM4

Indigenous participants identified racial bias where it was unspoken or otherwise 'concealed', as the following comments by Brisbane participants suggest. One of these participants had attended a job interview and did not get the job in question. 'You can tell by a person's body language and you can feel the vibe' BM2. 'It's a gut feeling …. Maybe even the tone of their voice, how they speak to you' BM4. Under-payment of wages was also identified as an issue, with one woman comparing this to Stolen Wages, thereby connecting historical and contemporary discrimination against Indigenous people.

> A couple of years ago I was working in Mt Isa with a catering company. I was the only Aboriginal person working there …. Everyone else was getting paid except me. Nothing, not a cent. I asked the other workers 'You got paid today?' 'Yeah, I got paid today.' … Three months later, still no pay ... Wow! Those days are over, Aboriginals working for free! BF2

There were comments about racist name-calling and similar within schools, and also some discussion of institutional racism within the education system — though the latter point was raised generally only after prompting by the researcher. Some participants attributed poor Indigenous educational outcomes to lower expectations for Aboriginal and Torres Strait Islander students by this system, for instance.

> They're pushing our kids through without an education. They put them in the too hard basket. 'I'm not going to deal with you. I'm going to concentrate on those that can get an education'. My son, full blown dyslexic. I didn't find out 'til last year and they pushed him through Year 10 .... My frustration, if he just got pushed through with that what about all the others? They

> have this revelation that something like 150 Aboriginal kids out of the whole of Australia did Year 12. It's like 'Hello!' SF1
>
> I know when I was at school in Mt Isa when the careers people came through they said I could do a business admin traineeship or get a Certificate 2 at TAFE … I wanted to do bigger things but felt the expectation was lower. A lot of the Aboriginal professionals back where I'm from, as high as they've gone is working as a team leader at Centrelink. It's like they've hit the jackpot! MF2

This is a good example of how whole *systems* can exclude Indigenous people from equal access to the same opportunities as others. Education is now seen as a basic right and is compulsory, which should, in theory at least, have removed barriers to access (identified in the Freedom Ride surveys as including poverty and geographic isolation). As Lippmann suggested, however, elimination of these barriers does not automatically result in equality. Schools may still fail to meet the needs of and deliver positive outcomes to Indigenous students.

Police services

Police behavior raised by participants included verbal abuse, violence leading to deaths in custody, racial profiling and failure to differentiate between Aboriginal people as victims and offenders. These issues were very quickly identified as race-based discrimination by participants.[521] Concerns raised about under and over-policing are close to identical to those raised during the Freedom Ride surveys. The justice system, in general, was one area in which government practice (and to an extent policy too) was identified by almost all community member participants as race discrimination.

[521] The recent sentencing of the man who ran over Elijah Doughty in WA was identified by participants as an example of the incapacity of the legal system to provide justice to an Aboriginal victim of violence, with lines between victim and offender frequently blurred. See discussion of this and similar cases in Graham, C, 'The Killing Fields: how we failed Elijah Doughty and countless others', New Matilda, July 23 2017.

> We get treated a lot worse by police. It's discrimination and racism. I want you to come film us walking around. There they are, driving past. 'Oh shit, let's do a U-Turn.' They come up to me in the street. 'Come here now. You're under arrest for questioning. You fit the description of someone who stole something in a shop' or 'someone who did an armed robbery'. How many times has this happened to me? Lost count …. I don't see them doing that to other races. Not once have I ever seen a Chinaman arrested … I got to go to court tomorrow for 41 charges of police harassment … The thing is, they fucking harass me then *I* get charged! I want to hang myself … Fucking disgusting the way we are treated in our own country. BM1

> I got an eye socket fractured [by my ex-partner]. Instead of coming to Brisbane for surgery I got sent to prison. I could be running up a road covered in blood, police grab me, lock me up, send me to prison ... Happens every time I call police. My ex, he's a white fella and he's [6 foot 5 inches] ... and I'm the one that gets charged with DVO (domestic violence order). That's pretty suss. I reckon that's discrimination. BF2

> In terms of family violence … if a white woman walks into a courthouse you just blend in. If an Aboriginal woman, probably of a stereotypical type, walks in seeking a DVO, the police do a double take. Do we know that person? They check them all the time for warrants. S3 [NI]

The consequences of racism within the justice system were identified as including disproportionate Indigenous criminalisation and incarceration. 'Yeah, some [over-representation] is about racism …. Cops are more likely to be pulling Aboriginal people up on the street. If they see a white man staggering down the street, they're like — he's okay' (BM4).

> It's still 'legal' to take Aboriginal kids away [like Stolen Generations] … through the Juvenile Justice Act. Though that's not Aboriginal-specific legislation look at the disproportionate numbers of Aboriginal youth in youth detention centres, Aboriginal men and women in prisons. They're *also* not set up specifically for Aboriginal people, but look at who occupies them, look at who is subject to those laws. CM4

Harsh treatment in police or correctional custody was a focus of a number of interviews, with participants pointing to the lack of accountability of justice agencies for their actions in this regard. 'And look what they're doing with our children there in prison' (BM5). 'It's shocking how the kids are treated in detention centres. They're children' (BM3).

> There was this Aboriginal boy. I saw the video on Facebook. They got him for riding a bike without a helmet or something like that. He was drunk. They put him in the cells. They chucked him and kicked him. He hit his head somehow. You can see him moving for a bit and then he died. There was nothing that happened to police [after that]. SF1

Health services

Indigenous community members complained of outright racism within the health system, significant enough to discourage and therefore effectively exclude them from accessing emergency assistance, as well as less overt differential treatment that was readily identified as race-based. One woman also pointed to the 'whiteness' of health services, another example of institutional racism.

> My friend dropped me off at Emergency ... She asked the ambulance man … for a wheelchair. I thought I was having a stroke. I asked him, 'Could you please squeeze my hand'? I was starting to freak out. 'I'm not here to squeeze anybody's hand. You drunken old cunt' … I couldn't turn around because I was worried about having a heart attack. The other ambulance man was there having a cigarette and he just turned and ignored it. This fella pushed me into triage and I asked the sister 'What does this ambulance man look like behind me? I have his accent'. He must have signalled to her to say nothing and she didn't answer me. I asked my friend to get me out of there. CF1

> My most recent time was when I had my baby at the neo-natal unit at the Mercy. It was towards me and other Aboriginal girls, not the other (non-Aboriginal) girls … A lot of rudeness but also at times … stopping family members from coming in. They said it was because we had too many people visiting, but mum and dad and my sister is not 'too many people'. The other

> patients had friends and family coming. I was a first-time mum and asked lots of questions and I didn't get any help. I went home in tears after that. They didn't have Aboriginal workers. That made it really difficult. I think having them work there would have been good. MF1

As is the case with education, formal barriers to accessing health service provision may have been reduced. It is subsidised by government (reducing cost), there is less blatant segregation within health services than was the case in 1965, and there are also now Aboriginal and Torres Strait Islander-specific health services. Despite this, both direct and more systemic forms of discrimination clearly still exist and Indigenous health outcomes remain poor.

Institutional and macro level racism

Racial stereotyping: macro level racism

Many participants believed that racism underpins *most* interactions, both interpersonal and within systems or institutions, between Indigenous and non-Indigenous people, and that this racism is often attributable to race-based stereotyping. Though not highlighted so much within the Freedom Ride data, stereotyping was identified during thesis interviews as an extremely prevalent problem — at times attributed to ignorance rather than maliciousness. Examples follow that focus on Indigenous parental capacity, discussed by a number of participants.

> I became a ward of the State, put into a Christian home. I've been bible bashed for a good part of my life. My foster parents used to say to me when I asked about my family 'Aboriginal people are the devil'. I asked them, does that make me the devil? They said, 'No, no, not you — you're living with a Christian family'. BM4

> Aboriginals have big problems, that's all that gets put on the media. We have the worst [stereotyping], like we're not good with kids …. I took my baby to the doctors and I said I'm Aboriginal, and he looked at me differently as a mother. You don't know me. I'm a great mum. I don't sit at home drinking wine all day …. The minute I had my baby [too] VACCA (Victorian Aboriginal Child Care Agency) contacted me by mail and said they wanted to come and look

> at my house and how I was with her. 'Hold on, I get you're a child protection agency but I've done nothing wrong' ... I hadn't even brought her home yet. This was apparently because I was young ... but I reckon it's because I am Aboriginal. I'm probably a better mum than lots of others. MF1

'Positive' stereotyping of Indigenous people can also be racist, according to participants: forcing Aboriginal and Torres Strait Islanders into limited 'categories' of success, such as sports stars or 'traditional natives'. 'The sporting field is now considered to be the only level playing field for Aboriginal people' (CM4). As discussed in the previous chapter, this is an instance of non-Indigenous society defining goal posts as markers of Indigenous 'success'.

> Australia has a romanticised view of what Aboriginal people are. Black people painted up doing corroboree, shake a leg around a campfire, put rock art on a cave. Australia wants this picture. This promotes Aboriginal tourism. They don't want to hear about Aboriginal people running companies, the ones that are successful in the white man's world. It doesn't fit their romanticised conception of 'the Aboriginal and Torres Strait Islander'. We don't live in this dreamtime around a campfire, telling dreamtime stories. I do my hunting in Woolworths! CM4

Institutional racism

In general, institutional racism was labelled as such by stakeholder interviewees – other than that of the justice system, which community members also identified.[522] Stakeholders suggested that nowadays racial discrimination or racism is, in fact, *more likely* to be located within our institutions, particularly

[522] In contrast, in recent consultations held with community members about racism and discrimination conducted by the AHRC Aboriginal and Torres Strait Islander people, more so than other participating groups, highlighted institutional racism as a huge challenge in terms of combating racism. As one participant describes it 'our systems are Anglo-designed'. Another cited as an example the 'disillusioned, disrespectful and discriminatory attitude at decision-making levels at all stages of government', with the NTER once again cited as a prime instance of this type of approach. AHRC (2015a), *Freedom from Discrimination: Report on the 40th anniversary of the Racial Discrimination Act, National Consultation Repor*t, Sydney 65-67.

within government practice, policy and law. 'Statistical inequality', as Flynn suggests, is the consequence of this form of racism. This point was raised during interviews.

> There's a spectrum from violent behaviour … [to] casual type racism and behaviours directed towards Aboriginal people. Along that spectrum, you've got individual-to-individual type discrimination but you've also got it sitting within our institutions …. So back in the day it was more obvious. Now it's still there but harder to see. In some degree, it's in every area of government service delivery and institutions ... The types of goods and services offered, the way they're offered, attitudes of staff and policies and procedures that aren't culturally appropriate … In terms of how often it occurs, it's a constant when you're thinking about it at an institutional level … You look at the statistics, and it's skewed. If it was a fairer system, there'd be more equal representation in those statistics. S1 [I]

Institutional racism as imposition on Indigenous people of mainstream systems that fail to respond to cultural difference is described as follows by a participant. 'There's a lot of structural racism. That's to do with our western system cause it doesn't allow for the normal way that we'd make decisions as Indigenous people. It's based on a democracy. But we're 3% of the population so it's not for us'. 'It's not made for minorities' (S8 [I]).

One example provided was that of the administration of the SPER scheme in QLD (State Penalties Enforcement Registry) and of the social security system, both highlighted as racially discriminatory. As a non-Indigenous stakeholder participant claims: 'Anything to do with government administration, ATSI communities are at a disadvantage, wherever they live. They don't have the skills to deal with it'. This is due to the language it uses, the form it takes, and then 'you've got an IT (information technology) layer on [top of] that'. This same stakeholder continues as follows.

> [With Centrelink] the young people are pressing yes, yes, yes, yes and they're not getting their payments. It's not going to work until you gear up these people with the savvy that they need to deal with it. It's not just a cultural or low IT-literacy issue, it's a human rights issue. [With

> SPER], they get a penalty for speeding or not paying for their licence. That penalty attracts interest, their car gets impounded … They lose their car, their licence, their job. The payment gets bigger and bigger. So, they end up inside [prison] and their kids go into care. That's just one example … Government is making decisions about policy and law and they have no idea of the effects of it. What are you doing to implement it — with safeguards [for Indigenous communities]? .... This is very clear discrimination. S8 [NI]

Rowley discussed poor Indigenous access to services in mid-20th century Australia. Today, Indigenous access to services and systems remains problematic due to barriers that are not necessarily designed to exclude Indigenous people, but that have this effect.

> Once you put the services there, then you also must be trained in ways that allow you to access them … It's like, with nationwide services, with the current generation, there's like no need to access services face-to-face anymore? How can they just move services onto MYGOV?[523] We're all IT savvy or literate somewhat in this office, but we struggle. Imagine a community member trying to do that? What about different language groups? S8 [NI]

In other instances, government racism is perceived as being more deliberate, evidenced by the arrogance and paternalism inherent in its interactions with and policy impacting on Indigenous communities, with the following examples cited.

> With mandatory sentencing, Alcohol Management Plans and the Northern Territory Intervention, I don't think much has changed on the human rights front. Aboriginal people are the only people subject to these reforms. Is that fair and just? I doubt it very much. Systemic racism in its purist form. CM4

Of note, restriction of alcohol and the NTER are both labelled as discriminatory by Indigenous people but not by government or by the legal system, discussed in Chapter 3. Moreover, the assumption made about Indigenous people in these contexts is: you need *our* help because of *your* dysfunction but it must

[523] MYGOV is an online portal through which Australians access a range of government services.

be on *our* terms. As well as denying to Indigenous people their right to self-determination, this approach is based on negative stereotypes and assumptions. It then feeds these stereotypes and assumptions at a broader community level. The following comment began with discussion about how 'people in the know' were suggesting at the time of the NTER that *all* Aboriginal people were deeply dysfunctional.

> I had this young class come in … and they said to me 'How do you feel about what *you people do*'? I said, 'Children sit down and listen.' [Racial stereotyping] … happened because government interfered. It's okay to have a white sect with multiple wives ... But yet, they can go into an Aboriginal community and put the whole community on lock down and say that everybody is molesting children. Then that spills out into every Aboriginal community … 'It's everywhere'. 'Aboriginal people are into incest', and so on. SF1

Another example of paternalism and of the stereotypes that consciously or unconsciously underpin government interactions with Indigenous people arises within the child protection system. Stakeholders noted that though not always directly visible — 'they don't say it [openly]' — racism inherent in this system is evident in its decision-making processes, which lead to disproportionate rates of intervention and child removal in Indigenous communities. 'The child protection system is pre-empting that they're not going to be a good parent. *They* (parents) have to prove that they're a good parent' (S3 [NI]).

> [The Department's] approach is quite primed and based on stereotypes of Aboriginal people. The Aboriginal Commissioner for Children has looked at the abysmal rates of use of cultural plans, so though it's hard to pinpoint racism in how they deal with individuals this is something you can hold up as an example of where the Department has failed to uphold and protect Aboriginal culture. S2 [NI]

As occurs in other contexts, introduction of child protection policy that appears to be racially neutral can also have disproportionately negative impacts in its application to Aboriginal and Torres Strait Islander families.

> [Recent development in policy is] concerning for all children, but particularly for Aboriginal children... The preferences for options for all children – not just Aboriginal children, but it will affect our children more because of their disproportionate engagement with the system – has moved adoption up the list. So, kinship care is less prioritised … We have grave concerns as kinship care is so important for our community, particularly for continuity of culture. S2 [NI]

4.2 Differences in discrimination against Indigenous people

When asked whether and how discrimination differs for Indigenous people, a minority of participants felt that it was the same for everyone, including where it simply targeted skin colour (brown or black). 'I reckon they sort of treat all blacks the same way. If you're African or Indian they look at you different. When you've got that brown skin, they always class you as 'black'. They go straight for the colour' (BM4).

Whilst some also thought that racism might be worse (at least for a time) for certain groups, for most migrants it was never going to be as bad as it is for Indigenous people, for whom discrimination does not abate. The fact that migrant groups show obvious contempt for Indigenous people was proof of their place at the bottom of the social hierarchy. 'Taxi drivers in Melbourne. The funniest thing is, they're Indian. And they're locking the doors, 'Show me your money'. And it's like hang on, you're darker than me. What's the go?' (SF1).

> Italians [for instance] … adopt Australian culture and values, get into our football and sporting clubs. They have a history of being a bit more accepted, being able to start local businesses, make community connections. Their restaurants and foods become part of Australian culture. That's the Australian melting pot we're meant to be. But Aboriginal people are always on the outside, kicked to the bottom and meant to stay down there. S1 [I]

> Australia is a racist country, whether you're Indian or Aboriginal … The only thing that's different is the stereotypes and we have a long history of being mistreated …. These

> stereotypical views of Asians, they've always got their head in books … And ours are always very negative, the bottom of the pile. It's bullshit. I think all of us have felt it. S8 [I]

Aboriginal and Torres Strait Islander participants, both stakeholders and community members, directly attribute their poor social standing to the racism of colonisation. As one stakeholder participant stated, racist oppression is a 'massive part of the lives of our people. It's been the essence of the Australian state since colonisation, which continues. It's embedded in the heart of the nation' (S1 [I]). The ongoing legacy of colonisation is the continuing struggle of Indigenous people to interact within society on anywhere near a level playing field to that of others. 'I think discrimination is worse for Aboriginal people based on what I've experienced -— or you can go way back to 1788 where it all started. They were shooting everybody and anybody then. Aboriginal people still get the worst treatment' (BM3).

> Aboriginal people are always the last cab off the rank. This happens around the world because of the history of dispossession and intergenerational harm that goes with that. It puts us in a more difficult position to succeed. For generations we were held back, we couldn't buy land, or work to make a go. Our old people in late 1800s were very industrious, strong work ethic. The system consistently denied them an opportunity and deliberately prevented our people from being educated, being trained in trades, having opportunities to buy land and have a go at farming or to receive the wealth of the nation. When that's happened for three or four generations you become so oppressed that to get out of that rut it's a long-term process. S1 [I]

As the following comment suggests, migrants in Australia also suffer discrimination but their experiences are not so bonded to colonisation.

> My dad's Italian, he came over when he was a one-year old. He experienced racism, but I always bring it back to what my Nan experienced. The difference is that even though Italian people were discriminated against you had choices. You could go to school. You could get jobs. My Aboriginal Nan wasn't allowed to go to school. That's not to take away my dad's experience but [for] Aboriginal people … choices were always made for them. MF5

A major historical site of violent conflict and genocide during colonisation related to possession of land. This history is seen as conjuring up guilt and shame for mainstream Australia, according to some participants. This contributes to present-day racism as society must continually dehumanise Indigenous people, as occurred in past centuries, to justify perpetual occupation of Indigenous land.

> So, there is a deeply embedded settler guilt and anxiety that's based around the occupation of the country. That's not been resolved. We had Mabo overturn Terra Nullius but that hasn't healed the wound that's existed due to the colonisation of the country. The reason the colonisation and taking the country was justified was through [our] dehumanisation … That meant it wasn't a crime to kill us, or a bad thing. S1 [I]

As this suggests, Indigenous people continue to pose a threat to society as the original occupants of this country. Interview participants identified a racist backlash when Indigenous people speak up about Indigenous-specific rights. 'When Indigenous people talk about sovereignty, Treaty and all that you can see the racists coming out. You can read it in the paper the next day', states a male participant in Cairns (CM4).

> Mainstream Australia don't like to acknowledge the truth of how this country was invaded. So, when you have people constantly fighting for their rights, it's seen as offensive or threatening. Every migrant group has the time that they're discriminated against, and maybe then they'll get accepted. But we're constantly fighting for these rights that Australians don't want to acknowledge. [It's our land] … and no one can say that it's not. MF5

Again, as suggested in this last comment, Aboriginal circumstances are very different to those of migrant groups. Participant responses made clear that Aboriginal and Torres Strait Islander peoples have experienced and continue to experience race discrimination in particular forms. These include disproportionately negative outcomes (for instance, in criminal and child protection contexts), but also denial of history (colonial and pre-colonial), of culture, and of Indigenous rights, including to land and

self-determination. As one community member participant suggests, there's a lot of 'rug sweeping that happens with Aboriginal people' (MF3).

> Prejudice against Aboriginal people has been with us from the beginning. Without respect and authority being given to Aboriginal people and their lore the system will always be discriminatory because it doesn't give equal weight to this lore, our culture and understanding. The longer we're assimilated and colonised, the longer the discrimination will continue. S1 [I]

> In my previous career I had to practice, implement and present culture (in a tourist spot). A non-Indigenous person decided how an Aboriginal person should 'appear' (artistically) …. When we're talking culture, we mean song and dance, which Aboriginal people use to pass on ancient stories ... He was saying who could do it - you should present your culture this way, not that way … He was very insensitive to a culture that's been around for 40,000 years ….. Aboriginal culture is not Hollywood. They want to dictate what it is and make it into a circus show, not realising it's going to bastardise it … Our songline, our storyline, it's still being put down in history. We're still creating it. He was like, hang on, leave that back there. CM1

To return to a point raised earlier, it is for this reason that tackling race discrimination against Indigenous people is not simply about attainment of (formal) 'equality'. Equality in a form that fails to account for Indigenous difference, including different Indigenous experiences of discrimination, further discriminates. More substantive equality is required, one that recognises and responds to this difference: for instance, by acknowledging Australia's colonial history, and the validity of and importance to Indigenous people of rights to culture, self-determination and land.

4.3 Changes over time to discrimination against Indigenous people

Participants were also asked to comment on changes to racial discrimination against Indigenous people over time. In responding, they were invited to think back over past decades (whether there had been any change in this regard for Indigenous Australians overall) and/or over their own lifetime.

There were some, particularly of an older generation, who felt that race relations had definitely improved and that discrimination was reduced as a result. One Torres Strait Islander man who had been active in Indigenous politics in the 1960s and 1970s stated as follows.

> In my day we had no money. Our allowance was $7 a week … We had no government funding at all ... The trade union movement funded us. My job was to go around and talk to the unions so we could get money to eat. As students, we had to save what we had. Today, they abuse the education system. They don't want to go to school, but in our time, we were fighting to get that education. CM5

> Going back to my teenage years, we'd go to the pictures at Mossman, and I was shocked. Here I was marching in, like in Cairns, sitting anywhere and they said — you can't sit there. All the blackfellas were sitting down the front. This was the 1960s ... Aboriginal people were downstairs. Half-caste with the fair skin were allowed upstairs. They can't do that now. CF1

Change in this context was attributed to greater recognition of rights, including due to the introduction of legislative protections against discrimination. 'Now they have … laws to protect you but in our time if you were called a black gin they'd say go sort it out yourself' (CF1). 'With political correctness coming in, all these types of things have been cut out, there's been a big change. I used to hear jokes in the pub, black people and poor Irishman jokes' (CM5). 'Things have changed now, there's a lot of rights out there for us. Even the football players, in sports — when they get treated badly, the racists get dealt with straight away' (BF1).

The vast bulk of responses indicated, however, that regardless of what had occurred at a formal policy or legislative level racism was still a major problem — perhaps a bigger problem than previously, particularly 'out in the public', at a community level, away from more tightly regulated environments like the workplace (with their policies and procedures). 'It's gotten worse for me. I've been arrested since I was young … If it was getting better, I'd be saying now 'I know the police, they're good people'. I can't say that' (BM1)'. 'No, they don't care. There are 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'

(S8 [I]). In fact, discriminatory government practice and policy was described as continually changing shape, but as always constructed on long-standing racially negative foundations and as still designed to control and oppress.

> Racism has come this weird 360 degrees in the sense that under the Protection Act it was all about keeping Indigenous people 'safe' — because the State wanted it that way.[524] They were kept out of 'normal and decent' society. So, they made laws, 'passports', to completely control them. Your finances were completely controlled because, God forbid, we can't have you spending money on assets that might bring you up in the world. Nowadays, we've got cashless welfare cards controlling people's spending, it's the same thing … They're still being over-governed. We're back to the same place, though maybe for different reasons. CM2

> 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. BM1 ... It would be acceptable if they meant it but it's still going on … We'll call it child protection now. BF2

As noted above in discussion about institutional racism, the latter are examples of what participants described as more hidden forms of racism. Participants also confirmed contemporary survey findings set out above, however. More blatant forms of discrimination (such as physical violence or hate crimes) hadn't gone away. People were just more careful to 'cover their tracks', with some suggesting that they preferred incidents, in fact, to be 'out in the open' where they can more easily be challenged. 'The government and society in general are responsible for making discrimination more discreet. You would probably have to be Aboriginal to fully appreciate what I am saying' (CM4). 'People are not always aware of their racism because it's so much a part of the fibre of this country. But those that do know that they're being racist are smarter at it, a bit cleverer about how they do things' (S2 [I]).

[524] This refers to now abolished QLD legislation discussed in Chapter 1.

> I'd rather that if someone felt like saying something racist they say it. 'Oh, bloody fucking blackfellas'. But sitting there and saying, because of their guilt or whatever, that they 'have to help' us. They put that idea into bad political policy [like Basics Card]. If it's just spelt out … it becomes less systemic. You can deal with it a little different, more directly. You could ask them 'why do you think that' or say 'F off'. If you know them well enough, you can question them. CM2

One area which exacerbated the problem of racism for Indigenous people was social media, which of course did not exist at the time of the Freedom Ride.[525] Facebook and other online social media have provided a platform for completely open and unabashed sharing of right-wing or racist views.[526] 'Before the internet, if you knew a place was racist, you'd stay away from it. With the internet, it's always in your face. You can never escape it' (CM2).

> Discrimination is worse now because of social media ... That's what happened in Kalgoorlie. There's a picture of this kid (Elijah Doughty) and someone in the chat group saying there's this kid, go run him over. See that's where it's transitioned. It's so easy for groups to get together based on shared racism or discrimination. Shared hate groups. They're right in your face. S8 [I] [527]

> Just with social media and stuff like that, people are more inclined to feel free to have a say. This heightens it. Before social media, if you wanted to read stuff, you could go to libraries, you could try to source things. But now, people that aren't so educated, who haven't had so much holistic exposure to the world, they have access to news stories and Facebook pages on

[525] See discussion in Dunn, K and Atie, R (2015), 'Regulating online racism in the online age' in AHRC (2015b), 118.

[526] Cunneen, C and Russell, S (2017), 'Social Media, Vigilantism and Indigenous People in Australia', *Oxford Research Encyclopedia of Criminology and Criminal Justice*, published online, Sep 2017, DOI 10.1093/acrefore/9780190264079.013.109.

[527] See discussion in Graham (2017).

their phone. When there's a hate page, everyone's got access to it. It feeds the issue… It's 100% worse in that way. MF2

5 Summary: 1960s and present-day discrimination

What conclusions can be drawn about changes since the mid-1960s to Indigenous experiences of discrimination, and to Indigenous perspectives of the same, based on the above discussion?

The chapter begins with discussion of the 1965 Freedom Ride, with the predominant focus of Aboriginal survey respondents on discrimination as barriers to formal equality, given levels of segregation faced. Having the 'freedom' to enter a local RSL with non-Indigenous people was a priority, as an example. There have clearly been some positive changes in the latter regard, which (mostly) older participants attributed to increased recognition of rights, including those enshrined in race discrimination law. Despite this progress, however, Indigenous experiences of discrimination in the past and present are not *so* very different, in various respects.[528]

For a start, discrimination continues to be a *major* issue for all Aboriginal and Torres Strait Islander peoples - though with some potential variation based on factors such as location, skin colour and social status. For most interview participants race discrimination was seen as the *same or worse* now, compared to earlier decades. It was also identified in quite similar ways across the different decades. Aboriginals in mid-20th century NSW were concerned about access to public facilities and services (shops, pubs and swimming pools, for example), housing and work. ILNP research conducted in NSW in 2008 identifies the most problematic areas for Aboriginal people in terms of discrimination as pubs/hotels, real estate agents (housing), shops and employment. These are areas in which basic needs (shelter, income, and inclusion and participation in society) are accessed. Difficulties of access in these areas therefore have significant impacts.[529]

[528] Though not directly comparable, up to 40% of Indigenous respondents (in WA) reported experiences of discrimination, compared with 44% of participants of the Freedom Ride survey.

[529] These most common areas of discrimination are similar across all ILNP jurisdictions.

Of note too, discrimination was mostly framed by thesis participants as interpersonal or otherwise quite direct – perhaps because this remains sufficiently problematic and/or as it is easier to see and 'call out' than more systemic or institutional racism. One major exception to this, however, was identification by participants of direct links between colonisation and all forms of discrimination.[530] Participants had little hesitation in drawing an unbroken line between past racism (as colonisation, such as the Stolen Generations policy) and present-day racism (contemporary child removal). Other examples of this link include our continued denial of our colonial past, and within this, denial of Indigenous-specific rights to culture, self-determination and land. This they highlighted as what separates Indigenous from non-Indigenous experiences of discrimination, as noted above.

The above analysis also very clearly indicates that Indigenous people continue to occupy, to a large degree, a similarly 'subordinate position in the community' to that which they held half a century ago. Widespread socio-economic disadvantage still afflicts Aboriginal and Torres Strait Islander peoples at highly disproportionate levels, likely to be attributable, in part, to institutional racism (including in government services and institutions) – at least, more so than to overt discrimination. As was the case in 1965, however, Indigenous people do not appear to identify poverty and other manifestations of this disadvantage as race-based.

As noted too, formal barriers to inclusion highlighted during the Freedom Ride are no longer with us, for the most part. However, whilst there is no explicit barring of entry into the local RSL or public pool, Indigenous exclusion and segregation persists. Examples cited above include apparently neutral public housing provider policy that leads to more frequent eviction of Indigenous tenants from housing and overt racism in health services discouraging Indigenous engagement with (and denying them access to) those services. This is discussed further in the next chapter. Disenfranchisement also continues to impact on Aboriginal and Torres Strait Islander peoples, who remain well and truly 'kept in their place'.

[530] This did not occur in the Freedom Ride material, though this may be due to the nature of the survey conducted. Lippman, however, claimed that those Aboriginal people who had participated in her study (conducted at the same time as the Freedom Ride surveys) made similar connections between discrimination and colonisation.

This occurs by way of government control and intervention within justice and child protection systems, for instance (and in particular). They are in other ways, however, largely invisible to mainstream society, having little 'say' in their own affairs and limited opportunity to participate in government decision-making that directly affects them.

6 Conclusion

It is interesting that despite some positive progress, almost all Indigenous participants saw Indigenous circumstances as unchanged or worsening over time. This is no doubt partly because many participants were younger in age (40 years and under) and did not live through the more transparently racist 1950-70s. It is also perhaps likely to be due to *expectations* about what should be achieved by and for Indigenous people shifting over time.

Indigenous people now expect to be able to attain more substantive goals, in general, than those commonly highlighted in the Freedom Ride surveys. These more substantive goals are not new, but may seem more attainable, including as there is less necessity today to focus on tackling overt racism than was the case in previous decades. These goals are seen, for instance, in Freedom Ride survey responses expressing a desire for more control over one's life and improved socio-economic status. Indigenous activists agitating for change in the 1960-70s also argued that formal equality is not a 'good enough' end goal for Indigenous people. They sought recognition of the particular or special status of First Nations people (and of the rights that are associated with this).

Shane Houston, an Aboriginal academic, claimed on the eve of the Freedom Ride re-enactment that things may be getting better for Indigenous people, but what they are demanding has also shifted in recent times. They 'expect more and rightly so', including that 'our nation's institutions' will be 'more responsive to the changes we have secured. We expect that progress will be made real in people's lives.'[531] Referring to the concept of 'freedom' used during the Freedom Ride he also emphasised that

[531] Houston, S, *Freedom not frustration: Opinion Piece*, delivered at University of Sydney in 2015 at event commemorating 50th anniversary of 1965 Freedom Ride (accessed June 2019): < https://sydney.edu.au/documents/about/indigenous/Freedom-not-Frustration-Freedom-ride-opinion-piece.pdf>

it is Indigenous people who must decide whether they have attained freedom and what it means. In an Indigenous context this term is likely to refer to enjoying a greater degree of autonomy and self-determination, as well as recognition of collective Indigenous rights, as Anderson also stated. On this point Houston writes as follows.

> What is freedom and importantly freedom to do what? Do Aboriginal and Torres Strait Islanders today possess in equal measure with other Australians the freedom to give full effect to their life choices? Do our social and institutional frameworks assist or impede the realisation of these personal and collective rights and goals? Do we truly understand and respect difference and how do we eliminate the conscious and unconscious bias that operates against freedom and fairness? These questions go to the heart of the freedom puzzle. Aboriginal and Torres Strait Islanders may be free to decide what constitutes a valued life for themselves, but in too many ways, still the choices on which they can act do not speak to an Aboriginal conception of a valued life. And like the students on the Freedom Ride, we find ourselves today asking the obvious question 'what's next'?[532]

Whether race discrimination law has something to offer to Indigenous Australians in this regard is a key focus of the thesis, but the points and discussion raised in this chapter provide important context within which an assessment of the effectiveness of this law can be made. We explore in the next chapter whether Indigenous people consider race discrimination law to be of value to them as a mechanism for attaining goals of 'freedom' and 'justice'.

[532] Ibid.

CHAPTER 6: EFFECTIVENESS OF RACIAL DISCRIMINATION LAW FOR INDIGENOUS PEOPLE

As we have seen in the previous chapter, race discrimination continues to impact significantly on Indigenous people, despite its prohibition now for over 40 years. Can we conclude, based on this fact, that race discrimination law has failed Indigenous people? Does this confirm criticisms raised above that it is either not intended to or simply cannot deliver positive outcomes for Indigenous people?

Chapter 6 begins by restating that any consistency and change in Indigenous experiences of discrimination over time cannot be fully attributed to the operation of the law. The impact race discrimination legislation has on these experiences is influenced by a range of factors, including its own inherent limitations which restrict, for instance, the range of issues it can address. Not everything constitutes 'discrimination' at law. What might reasonably be determined, however, is whether race discrimination law is making the *best possible* contribution to tackling the issue of discrimination in an Indigenous context (within the aforementioned limitations), which will depend, to a significant degree, on how it is working as an Indigenous access to justice mechanism.

As suggested in Chapter 2, though race discrimination law sets out a range of strategies directed towards meeting its core objectives of reduction of discrimination and promotion of equality (including public education and policy reform), the processing of race discrimination related disputes has a key role to play in this regard. The contribution that the latter makes to achievement of these objectives is impacted by the extent to which those whom the law is intended to benefit are engaging with it. As Bird states, it 'is no use having a law to outlaw racial discrimination' if persons 'likely to be the target of discrimination are unable to use' it.[533]

Chapter 6 uses the adequacy of Indigenous access to justice as a measure of the effectiveness of race discrimination law. It investigates whether and to what effect Indigenous people are using this law to

[533] Bird, G (1995), 'Access to the Racial Discrimination Act' in Race Discrimination Commissioner (1995a), 287, 288.

respond to discrimination, with a particular focus on the complaint handling process administered by anti-discrimination agencies. As identified in earlier chapters, initiating a complaint through this process is an essential first point of access to justice in this area.

The discussion below indicates that few Aboriginal and Torres Strait Islander people are initiating complaints, relative to the extent to which they report experiencing discrimination. Complaints statistics point to limited use of the complaints mechanism by Aboriginal and Torres Strait Islander peoples. They also suggest that problems of access are also evident after lodgement, leading to outcomes unlikely to be satisfactory to or to no outcome at all for many Indigenous complainants. Interview data presented below confirms that Indigenous people are almost wholly reliant on *non-legal* responses to discrimination. Indigenous perspectives on the extent to which responses other than the law effectively resolves race-based issues are canvassed, as are those that speak to the utility of increased access to legal processes and remedies in this area.

1 Evaluating race discrimination law through an access to justice lens

Attempting to evaluate the effectiveness of any legislation raises a number of questions. The first of these asks how one should define 'effectiveness' in this context. What measures might be used to determine whether a particular law has been a 'success' or a 'failure'? How might one establish a causal nexus between the legislation in question and 'good' and/or 'negative' outcomes given the complex social, political and economic environments within which all law operates? Change for the better, for example, might be entirely unforeseen by or otherwise difficult to attribute to the operation of the legislation in question.

Given this, do we 'let law off the hook', so to speak, and avoid any appraisal of its efficacy? For Flynn, civil law is 'but one of a number of elements in our society that both engender our complex social problems' and that 'must also be adapted to provide solutions' to them. As such, he sees the law as a *part* of the solution to the problem of racism, but a critical part, he stresses — one that is 'capable of

making a significant contribution' to its reduction.[534] Gaze too suggests that while 'anti-discrimination law is not the whole story of equality for racial and ethnic minority groups' given its limitations, 'it is nevertheless an important tool for individuals and groups who want to take action' to address racial inequality.[535] As noted in Chapter 2, some critical race theorists also argue for retention — and appropriate reform — of civil rights law as it will have *some* value for some individuals within minority groups.[536]

As such, detailed assessment of race discrimination law's contribution to date is both useful and necessary, particularly where able to yield suggestions for appropriate reforms.

1.1 Using access to justice to assess effectiveness of the law

A first step within such an assessment requires identification of the contribution race discrimination law holds itself out as likely to make. As detailed previously, law in this area seeks to advance the concept of equality and to eliminate discrimination (but only as defined in the legislation and 'as far as possible').

Equal access to anti-discrimination complaints mechanisms is also identified within the legislation as an objective in itself and/or as key to achieving the latter objectives. Also noted in discussion above is that it is not sufficient to simply create a legal right to non-discrimination. This right must be enforceable *and* actually enforced by those aggrieved by discrimination to be meaningful. As such, adequate access to justice has a key role to play in ensuring that race discrimination law is effective, and an appropriate measure of the 'success' or effectiveness of racial discrimination legislation is, therefore, how well it is working as an access to justice mechanism. Given the expectation that race discrimination law should be responding to the circumstances of Indigenous Australians specifically, as discussed in Chapter 4, it is also reasonable to assess *Indigenous* access to justice.

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[534] Flynn (2005).

[535] Gaze (2005), 171.

[536] See Delgado (1987), for instance.

Gaze has suggested that whilst 'significant inroads' have been made for relevant groups through discrimination laws targeting gender and impairment it is less clear that there have been similar gains 'for those affected by race and related discrimination' and for Aboriginal and Torres Strait Islanders, in particular. She states that anti-discrimination law has been 'unavailing against the situation of Indigenous people, where the problems are so deep that mere anti-discrimination legislation is hardly used.'[537] Analysis below confirms that Indigenous people *do not* enjoy adequate levels of access to justice with respect to race discrimination, both as a process of dispute resolution and as positive justice outcomes attained through that process.

1.2 Other functions of the law: educating the public and conducting inquiries

Before moving on to investigate Indigenous access to justice in more detail it is important to acknowledge that race discrimination law creates functions for anti-discrimination agencies beyond those related to dispute resolution, all of which are directed towards and contribute to the protection of human rights and promotion of equality.[538]

Two common functions of anti-discrimination agencies are discussed briefly here: educative functions and the conducting of inquiries. Educative functions are set out in legislation. They encompass, for instance, the collection and dissemination of information so as to promote anti-discrimination law, including through consultations, research and inquiries.[539] The AHRC states on its website, for example, that it seeks to 'build a universal culture of human rights' and to 'give people the knowledge and skills

[537] Gaze (2005), 195. This comment appears to point both to poor levels of Indigenous access to the complaints system and to incapacity of the law to provide an adequate response to Indigenous-specific experiences of racism.

[538] A key point discussed later in the thesis is whether these functions might fall within an expanded definition of access to justice.

[539] See, for instance, s. 31(d) AHRCA (CTH); s. 20(c) RDA (CTH); s. 235(d) ADA (QLD); and ss. 80(a), (b), (c), (e) EOA (WA).

they need to understand their rights and to bring about positive change in their lives and their communities'.[540]

The AHRC informs the public and stimulates debate and discussion about human rights. It collates and distributes materials and provides training on human rights, advocating for their inclusion within the national school curriculum and publishing guidelines to inform employers about how special measures might be used to employ Aboriginal and Torres Strait Islanders, for instance. The Commission also runs various community engagement initiatives, such as Rights Talk events,[541] the annual presentation of human rights awards,[542] and a National Anti-Racism Strategy.[543] There is some focus on increasing compliance with the law by the broader public and specific groups through educative functions: for instance, by providing training to businesses on relevant obligations. Anti-discrimination agencies in the States/Territories undertake similar work.[544]

All anti-discrimination agencies also engage in policy and law reform. This involves making submissions to public inquiries and conducting own inquiries into relevant human rights issues, amongst other things. Irene Moss, Race Discrimination Commissioner from 1986 to 1994, highlighted the importance of inquiries undertaken by the Human Rights and Equal Opportunity Commission (HREOC, now the AHRC) as offering a 'broad brush or macro approach, as opposed to (the) microcosm of complaint handling'.[545] These inquiries, she suggests, highlight the 'larger issues, the institutionally entrenched problems, the system - the structure'. They have a community education element, with

[540] Detail on education programs at the AHRC and in WA (as a further example) are available at the AHRC and EOC (WA) websites (accessed June 2018) at: <https://www.humanrights.gov.au/human-rights-education-and-training> and <http://www.eoc.wa.gov.au/community-education-training/current-courses/courses---standard>.

[541] Detail is on the AHRC website (accessed June 2018) at: <http://rightstalk.humanrights.gov.au/past-talks>

[542] Detail is on the AHRC website (accessed June 2018) at: < https://www.humanrights.gov.au>.

[543] Detail is on the AHRC website (accessed June 2018) at: <https://www.humanrights.gov.au/our-work/race-discrimination/projects/national-anti-racism-strategy-and-racism-it-stops-me-campaign>.

[544] Victoria, for instance, provides education and training to organisations on rights and obligations. See detail on VEHORC site (accessed June 2018) at: <http://www.humanrightscommission.vic.gov.au/index.php/training>.

[545] Moss, I (1987), 'Combating racism via the Human Rights and Equal Opportunity Commission' 12 *Aboriginal Law Bulletin* 4.

publicity generated serving as a 'huge consciousness-raising exercise, a necessary thing for an essentially apathetic nation. Understanding the truth is always the first step to eliminating prejudice'.[546]

The AHRC (including as earlier iterations of itself) has conducted research and inquiries into issues of importance to Aboriginal and Torres Strait Islander peoples from its earliest days.[547] These inquiries have generated reports on Stolen Generations, native title, racist violence, Aboriginal deaths in custody and family violence, for example.[548] The AHRC makes submissions to governmental and other inquiries as well on issues such as customary law and Aboriginal witnesses.[549]

Additionally, the Aboriginal and Torres Strait Islander (ATSI) Social Justice Commissioner, a position established in 1993, plays an important role in publicly profiling issues impacting on and related to Indigenous Australians, including those concerning racial discrimination.[550] The Commissioner is required to publish an annual report on key human rights issues for Aboriginal and Torres Strait Islander peoples — the *Social Justice Report*. The reports set out recommendations on changes to law, policy and programs, and is issued as both a more formal detailed report and as a Community Guide to ensure greater accessibility.[551] Other anti-discrimination agencies produce submissions and own inquiry reports, though they are nowhere near as extensive in number as those of the AHRC. These include, for

[546] Ibid.

[547] The Commissioner for Community Relations, for example, conducted inquiries into discrimination against Indigenous people in WA and North QLD in the late 1970s and early 1980s. See, for instance, Office of the Commissioner for Community Relations (1980), *Report on inquiries by the Office of the Commissioner for Community Relations into complaints of racial discrimination in the Kimberley and Perth Districts of Western Australia, ACT*, Sydney.

[548] See, for instance, HREOC (1997); HREOC (1993), *Mornington: A report by the Federal Race Commissioner*, AGPS Canberra; and Office of the Aboriginal and Torres Strait Islander Commissioner (1996), *Indigenous Deaths in Custody 1989 – 1996*, AGPS Canberra: and HREOC (1991).

[549] Detail is on the AHRC website (accessed June 2019) at: <https://www.humanrights.gov.au/our-work/legal/submissions-made-aboriginal-and-torres-strait-islander-social-justice-commissioner>.

[550] See Part IIA, AHRCA (CTH).

[551] These reports can be found on the AHRC site (accessed June 2019) at: <https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/social-justice-reports>.

instance, EOC (WA)'s report into the need for an Indigenous interpreting service,[552] VEOHRC's report into Koori women and the justice system,[553] and the NT Anti-Discrimination Commission's interpreter report.[554]

We have seen earlier discussion of discrimination law having capacity to change societal attitudes, though included in this discussion was reference to the possibility that legal sanctions against discrimination has made people more careful to avoid getting caught, rather than addressing the problem more substantially. The aforementioned functions are likely to be having an impact in terms of changed attitudes, and in helping to reduce discrimination, without doubt. They may also, perhaps, provide some form of justice, redress or otherwise make a positive difference to the lives of those harmed by race discrimination, particularly with respect to more systemic issues that may be harder to challenge through individual litigation — with the AHRC's *Bringing Them Home Report* on Stolen Generations policy one example of this.[555]

2 Assessing Indigenous access to justice within the complaints system

Evaluating race discrimination law involves, according to Gaze, investigation of 'general statistics concerning the reduction of inequalities in society at which the legislation is aimed', undertaken in Chapter 5. Potentially also useful are 'outcomes of cases brought under the legislation', considered as jurisprudence in Chapter 3. Additionally, she claims, 'complaint rates and the outcomes of conciliation' might be investigated for what they reveal about access to justice. This is a focus of the present chapter.[556] Gaze also states, however, that none of these are 'unambiguous' measures, and all are 'subject to interpretation', a point returned to below.

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[552] EOC (WA) (2010), *Indigenous interpreting service: is there a need?* Perth WA. See also EOC (WA) (2004), *Finding a Place: The Existence of Discriminatory Practices in Relation to the Provision of Public Housing and Related Services to Aboriginal People in Western Australia*, Perth WA.

[553] VEOHRC (2013a), *Unfinished business: Koori women and the justice system*, Melbourne VIC.

[554] ADC (NT) (1999), *Inquiry into the Provision of an Interpreter Service in Aboriginal Languages by the Northern Territory Government*, Darwin NT.

[555] HREOC (1997).

[556] Gaze (2002), 327.

As discussed, all racial discrimination legislation, though differing in more specific detail, provides similar mechanisms for dispute resolution — initiated by lodgement by an aggrieved individual of a complaint with complaint handling agencies.[557] These agencies also respond to enquiries from the public about matters that may relate to discrimination, at which point they can provide information about lodging a complaint, if appropriate, or referral information for those matters that are outside of their jurisdiction. Once a complaint is lodged and accepted by the agency it then moves through various stages, likely to include conciliation, until closure.

As detailed in Chapter 1, Aboriginal and Torres Strait Islander complaints data for 2010-2013 was requested from anti-discrimination agencies for the thesis. This was necessary because of difficulties encountered in locating data through publicly available resources. Likely to be an important issue in and of itself (because it inhibits monitoring and evaluation of how well the complaints system is working for Indigenous people), there is little public reporting of statistics related to Indigenous enquiries and complaints.

Several years have now passed since the period for which the data in question was requested. The thesis was commenced in 2012, and at the time of the request the data sought was recent data. Given the dating of the statistics provided, an attempt has been made to compare the data requested with more recent publicly available statistics. However, the latter data (set out in footnotes in Appendix D, see immediately below), does not contain anywhere near the level of detail captured in the data provided upon request for the thesis. This has made direct comparison somewhat difficult. It has been possible to conclude from the limited published data that is available (only reported in Annual Reports for NSW, WA and federally), however, that in broad terms there has been little change since 2010-2013 in the numbers, types and/or outcomes of Indigenous complaints lodged.

The more detailed data provided by the complaints agencies has been analysed and is discussed below. The data is also set out in Tables in **Appendix D**. The data in question, as noted, was requested for a

[557] As noted in Chapter 2, legislative changes in Victoria mean that aggrieved persons can bypass the EOC and commence action directly in the Victorian Civil and Administrative Tribunal.

three-year period. Some agencies provided calendar year data, others provided financial year data. However, all data presented in the following section relates to a three-year period sometime between July 2010 and December 2013. It is noted that not every jurisdiction provided all statistics requested. For instance, only three jurisdictions have provided data on Indigenous race-based enquiries and four jurisdictions on Indigenous complaints. Differences between jurisdictions in interpreting the data request, in the data that was available to the agencies, and in legislative provisions associated with the complaints process account for inconsistencies in this regard.

The data provided below measures *numbers and types of race-related enquiries and complaints* made or lodged by Indigenous people. Numbers of enquiries reveal the extent to which Indigenous people are initiating contact with anti-discrimination agencies with a query of any description. Numbers of complaints indicate the degree to which Indigenous people are formally engaging with dispute resolution processes. The data also captures the *subject matter (or 'area') of Indigenous enquiries and complaints*. This provides information about the most concerning and/or more common types of discrimination Indigenous people experience, and/or those which fall within or are more readily identified by Indigenous complainants as covered by legislative prohibition of discrimination. Finally, the data provides information about *progression of Indigenous complaints through the complaints process* upon and after lodgement. It indicates how often these complaints settle through formal conciliation and the type of outcomes attained at settlement, as well as the extent to which and reasons why they do not make it that far. Detailed access to justice implications to be drawn from analysis of this data are discussed in Chapter 7.

2.1 Indigenous enquiries and complaints data: by number and type

2.1.1 Enquiries and complaints data

Indigenous **enquiries data** was provided by Victoria, Tasmania and SA only (Tables 1, 2: Appendix D). In Victoria, over the three-year period a total of 149 Indigenous race-based enquiries were initiated, most commonly about goods and services and/or employment (68% of enquiries), education (11%), and accommodation (9%); and 12% of enquiries are recorded as 'no area' (no jurisdiction)'. In SA, a

total of 85 race-based enquiries are recorded, the vast majority of which relate to goods and services or employment (74%), followed by education (9%). Two of the SA enquiries are classified as 'other/unknown' (2%). In Tasmania there were four race-based enquiries in total. One enquiry related to goods and services, one to employment and one to accommodation. The area of the fourth enquiry is not recorded.

In terms of **complaints data**, a total of 538 complaints were lodged in the federal jurisdiction under the RDA by Aboriginal and Torres Strait Islanders within the relevant three-year period (Tables 3, 4). Racial hatred is recorded as at least one of the grounds for complaint, alongside other grounds (including race), in 109 instances. Excluding those complaints that concern racial hatred,[558] the bulk of federal complaints fall within the areas of goods and services (36%), 'other section 9' (30%), and employment (30%).[559] In WA a total of 272 complaints were lodged by Aboriginal and Torres Strait Islanders in the relevant period, the majority of which related somewhat unusually to accommodation (42%), followed by goods, services and facilities (31%), employment (22%), and racial harassment (8%).[560] The EOC (WA) points out that at this time there was an increase in Aboriginal complaints about the public housing provider's 'three strikes policy', discussed in Chapter 5.[561] In QLD there were 129 complaints of racial discrimination or vilification lodged by Aboriginal and Torres Strait Islander peoples.[562] Just

[558] Of note, racial hatred related complaints are recorded in Annual Reports as often related to employment, goods and services and internet (email, webpage, chat room). Racial hatred is excluded from calculations of percentages for comparison purposes because the other jurisdictions do not include racial vilification or hatred as an 'area', only as a 'ground'.

[559] It is noted that the total number of complaints received will not be the same as the total number of complaints received by ground and area as one complaint may have more than one area and/or ground. More recent federal complaints data is set out in footnotes in Appendix D.

[560] More recent WA complaints data is set out in footnotes in Appendix D.

[561] See discussion in EOC (WA) (2011), *Annual Report*, Perth WA, 43 and EOC (WA) (2013) *Annual Report*, Perth WA, 38. Perhaps not coincidentally, the Commission also published a report on the Department of Housing's 'disruptive behavior strategy' (three strikes policy) in 2013, which might account, in part, for the increase in accommodation related complaints at this time. See EOC (WA) (2013).

[562] The data provided by the ADCQ included *all* complaints lodged by Aboriginal and Torres Strait Islander complainants, whether in relation to race or other grounds. These totalled 137 complaints, which included 129 race discrimination complaints (121 of race, 8 of racial vilification).

over half related to work (50%), close to a quarter to goods and services (23%), 12% to accommodation, and 10% to 'administration of State law or program' (13).[563]

Aboriginal people in the NT lodged 87 complaints, with over half relating to employment (52%) and over a third to goods, services and facilities (39%). In NSW, 158 Indigenous complaints were received. Around half related to goods and services (51%) and a third to employment (34%). Of these 158 complaints, 12 related to racial vilification.[564] In Victoria, 48 complaints were lodged by Indigenous complainants, 54% of which were concerned with goods and services and 31% with employment. In Tasmania 25 complaints were received from Aboriginal people, half of which related to facilities, goods and services (13 complaints) and the remainder to accommodation, employment, and clubs. A total of 7 Tasmanian complaints referred to 'inciting hatred'. In SA, 30 complaints were received by Aboriginal people, more than half of which related to employment (53%) and a third to goods and services (33%).

Some jurisdictions also provided detail, as requested, about whether Indigenous complaints concerned direct and/or indirect discrimination. Generally, complaints of indirect discrimination also involved allegations of direct discrimination. Indirect discrimination was included as a basis for complaint in 218 instances at a federal level. In WA, 56 race-based complaints involved an allegation of indirect discrimination, 35 of which related to accommodation; 14 to goods, services and facilities; and 8 to employment. In Victoria two complaints referred to indirect discrimination, one of these in the area of education and one in goods and services. In Tasmania five complaints related to indirect discrimination.

2.1.2 Analysis of enquiry and complaints data

Numbers of enquiries and complaints

The first point to make, and it is an important one, is that Indigenous people are not initiating enquiries or lodging complaints in very high numbers. It is difficult, of course, to accurately identify an

[563] The QLD data on areas of complaint has used the total of 137 complaints, which includes 8 complaints that were not about race or racial vilification.

[564] More recent NSW complaints data is set out in footnotes in Appendix D.

'appropriate' number of enquiries or complaints.[565] Moreover, there is ambiguity inherent in interpreting enquiry and complaint numbers, discussed further below. However, the above data should be considered alongside the size of the respective Aboriginal and Torres Strait Islander populations in each jurisdiction and the extent to which Indigenous people have reported experiences of racial discrimination, discussed in previous chapters. As Bird points out, where large numbers of people believe that they are being discriminated against based on their race and yet they do not raise formal complaints of discrimination, this is evidence of problems related to access to justice.[566] The following data points to the existence of such problems in an Australian context.

- In 2010-2013, just 538 complaints were lodged by Indigenous people federally: on average, 179 complaints per annum. In 2011 the national Aboriginal and Torres Strait Islander population numbered close to 550,000 persons.[567] Statistics on experiences of discrimination vary, but as an example the Reconciliation Barometer for 2016, referred to in Chapter 5, indicates that 46% of Indigenous people reported experiencing racial prejudice in the relevant six-month period.
- In the same period, only 48 complaints were lodged by Aboriginal people in Victoria. This equates, on average, to 16 Indigenous complaints per annum. Additionally, 149 enquiries were made in this period, or 50 enquiries per annum. The Aboriginal population in Victoria in 2011 numbered around 38,000 persons. ILNP research indicates that 29.2% of focus group participants in Victoria reported experiencing discrimination, as noted previously. The Vic

[565] The data provided by agencies has not been analysed in any detail for what it might reveal about differences and similarities between Indigenous and non-Indigenous access to the complaints system, though differences and similarities are sometimes immediately apparent. For instance, it is noted below that the predominance of employment and goods and services related complaints at a federal level is evident across Indigenous *and* non-Indigenous complaints (see below).

[566] Bird (1995).

[567] Given the period of time the complaints data covers, the 2011 census is used for population figures for all jurisdictions. ABS (2011), *Census of Population and Housing: Reflecting Australia, Stories from the Census: Aboriginal and Torres Strait Islander Population 2011,* cat. no. 2071.0, ABS, Canberra.

Health study referred to in Chapter 5 indicated that 100% of Indigenous participants reported experiencing racism in the relevant 12-month period.

- In QLD, Aboriginal and Torres Strait Islander persons numbered 156,000 in 2011. Total Aboriginal and Torres Strait Islander complaints in QLD numbered 129 in 2010-2013. ILNP data indicates that 31.6% of participants in QLD reported experiencing discrimination.

As a second point, although enquiries data is not available for all jurisdictions, numbers of enquiries also appear low, but higher than complaint numbers, in those States that provided this data (Victoria, SA and Tasmania). Enquiries do not appear to be proceeding to formal complaint in a significant proportion of cases.[568]

Types of enquiries and complaints

The above data also indicates that employment and goods and services are the two most common areas of enquiry and complaint.[569] This is perhaps unsurprising in an Indigenous context, particularly with respect to goods and services, given that the data presented in Chapter 5 identifies this area as highly problematic: manifesting as racist policing and health service provision, racist treatment within shops and pubs, and so on.

Employment, on the other hand, is not *so* much of a priority issue identified in the data set out in Chapter 5, particularly the interview data — at least not to the degree reflected in the complaints data provided by the agencies. Its prominence might simply confirm the accounts of Indigenous interview participants

[568] Reasons for this will vary, but as an example, 10% of enquiries in Victoria fell outside of jurisdiction.

[569] This is so, according to Annual Reports, regardless of the ground upon or the jurisdiction in which complaints are made and whether complainants are Indigenous or not. The AHRC's Annual Reports (2010-2013), for instance, indicate that the prevalence of employment and goods and services related complaints is found across *all* RDA complaints (not Indigenous-specific). This is followed by complaints of racial hatred and 'Other Section 9'. The NSW ADB's reports also indicate that employment and goods and services in 2010-2013 constituted 70-80% of *all* complaints (Indigenous and non-Indigenous), with employment the basis of around 50% of complaints each year, regardless of whether these were related to race or other grounds. ADB (NSW) (2010-2014), *Annual Reports,* Sydney NSW. See also EOC (WA) (2011), 23 and discussion in Rees et al (2008), 485.

related to difficulties in this area, especially in *seeking* work. It may be, however, that lodging a complaint of discrimination requires a certain level of resources, and those that are applying for work or are employed are potentially somewhat better resourced and therefore have greater capacity to access the complaints mechanism. Another possibility is that issues most frequently raised as complaints by Indigenous people are those that they more readily identify as and/or that are prohibited by discrimination law, rather than those causing them greatest grief. It is worthwhile again stressing that not all Indigenous experiences of discrimination will fit within legal definitions, given the limited protection provided by the law – an access to justice issue explored in previous and later chapters.[570]

As a further point, there are a reasonable number of indirect discrimination complaints in the jurisdictions for which relevant data is provided, identified previously as having some potential to address more systemic forms of inequality.

These numbers are perhaps less likely to indicate that Indigenous people are recognising potential breaches of indirect discrimination provisions and lodging complaints in response. The bulk of these complaints arise alongside a complaint of direct racial discrimination, as noted. It is more likely that indirect discrimination was identified as a potential issue by complaint handling agencies rather than

[570] As interesting historical context, as part of a review of the RDA conducted in 1995 Thornton highlighted that Aboriginal complaints were more likely to be successful when involving discrimination about service in hotels — 'relatively trivial' matters – rather than employment. She attributes this to the fact that inferences of discrimination are more readily drawn in the context of hotel service. The only reason for differential treatment other than discrimination, she states, might be dress standards and behavioural norms. Race discrimination law is identified as less sophisticated than sex discrimination law in this respect. Thornton also pointed out that 'we are still at the [same] … point of access' to justice – though it has been 'more than 20 years' since the first 'criminal prosecutions for refusal of service to Aboriginal people' under the early South Australian law. She refers here to the cases of *Port Augusta Hotel v Samuels* [1971] 1 SASR 139 and *Samuels v Traegar* (1978) SA Law Society Judgement Scheme 445. Thornton (1995), 90-91, 96. The data set out in this chapter indicates that goods and services related issues remain problematic, but that employment is now the most common or second common area of complaint for Indigenous people.

complainants.[571] More positively, these statistics suggest that indirect discrimination provisions *are* being accessed. As an example, the data indicates that in WA there was a sizeable number of accommodation-related indirect discrimination complaints concerning policy issues of WA's public housing provider.

2.2 Progress and outcomes of complaints

This section investigates what happens to Indigenous complaints once lodged (Table 5).[572] We begin with the federal jurisdiction. In 2010-2013 a total of 480 Indigenous complaints were progressed by the AHRC. Over half went to conciliation (57%), though it is not clear from the data what percentage of these were successfully conciliated.[573] Just over one fifth of complaints progressed were terminated with no reasonable prospect of conciliation (22%),[574] 8% were terminated for other reasons, 8% were withdrawn,[575] 6% were discontinued,[576] and 3% were closed administratively.[577]

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[571] This is suggested as it was common practice when the researcher was employed in the complaint handling section of the AHRC (working on Aboriginal and Torres Strait Islander and other race discrimination complaints, specifically).

[572] The data provided by agencies relating to progress of complaints and outcomes of conciliation is not consistent across the jurisdictions. This is partly due to the way in which the request for data was interpreted by agencies. It is also due to differences in the complaints process and associated legislative provisions across the jurisdictions.

[573] The AHRC notes that an estimate of the number of complaints that proceeded to conciliation are obtained by adding together the outcomes — 'conciliated' + 'terminated, no reasonable prospect of conciliation', but that this calculation will be not be 100% accurate as in some cases conciliation may have been attempted but there was another outcome — for example, the complaint was withdrawn.

[574] It is not clear whether this group of matters failed to conciliate after attempts to resolve them at conciliation or because they were never referred to conciliation (because there was no reasonable prospect that they would be settled). Given the comment in the footnote immediately above, these matters are presumably those that were not referred to conciliation as matters 'conciliated' appear to include those that were successfully resolved at conciliation and for which conciliation was attempted, unsuccessfully.

[575] This includes instances, according to the AHRC, where a complainant withdraws a complaint due to personal circumstances, or where they decide not to proceed after reviewing information from the respondent or being provided with information about the law and/or a preliminary assessment of the complaint.

[576] A complaint may be discontinued where a complainant does not respond to the Commission's attempts to contact them, including after being provided with an assessment of the merit of complaint.

[577] More recent AHRC outcomes data is discussed in footnotes in Appendix D.

The most common outcome for AHRC conciliated matters is recorded as a 'private agreement' (39%), followed by financial compensation (14%), an apology (mostly private, but some public) (13%), and 'complainant satisfied with response/information provided' (7%). It is noted that for matters in all jurisdictions, attainment of more than one outcome is possible. Other more systemic outcomes, those with potential to benefit persons other than the complainant, encompass introduction or revision of equal opportunity/anti-discrimination and other training (7%). Revision or review of policy (relating to internal staff, external customers, etc.) constituted just 2% of AHRC conciliation outcomes.

In NSW, 40 out of a total of 179 complaints progressed were successfully conciliated or settled (22%). For the 40 complaints resolved the most common outcomes recorded are financial compensation (45% of matters), 'complainant satisfied with response' (42%) and a private apology (23%), followed by policy change and training (10%) and improvement of employment options (5%). Of the 139 complaints in NSW that were not resolved, 17% are recorded as being referred to the NSW Civil and Administrative Tribunal (because unresolved, declined, for instance), 27% as declined or terminated, 23% withdrawn, and 26% abandoned by the complainant. Of 10 racial vilification matters progressed four were abandoned, two were withdrawn and four were settled.[578]

Of a total of 272 complaints progressed in WA 27% (73 complaints) were resolved at conciliation. Just over a quarter of the remaining complaints (28%) were dismissed, 26% lapsed and 12% were withdrawn. The most common outcomes at conciliation are recorded as 'respondent's explanation satisfactory to complainant' and provision of accommodation (both 27%), followed by 'educational/EEO program' (16%). In SA, 11 out of a total of 30 matters progressed were withdrawn (37%), 5 were resolved at conciliation and 5 were declined (both 15%), 7 were 'not initiated' (categorised as 'not accepted') (23%), and two were referred to the Equal Opportunity Tribunal.[579] For the 5 complaints resolved at conciliation two resulted in an apology and two in 'staff training/development program'. The others resulted in a private agreement, an undertaking to cease

[578] The 10 racial vilification complaints *progressed* during the relevant period are not necessarily the same as the 12 racial vilification complaints *received* in the relevant period: hence the discrepancies in numbers.

[579] Reasons for referral are unstated.

action or financial compensation. Though not requested, SA also provided detail about outcomes of matters referred to the Equal Opportunity Tribunal during the relevant period. Three complaints were referred: two of these were dismissed (one as out of jurisdiction) and one was withdrawn.[580]

In Tasmania, of a total of 20 complaints progressed three were referred to conciliation, two of which resolved. Two complaints are also recorded as 'early resolution' complaints. From these four settled complaints emerged three apologies and one 'financial' outcome (presumably compensation). Of the remaining 10 complaints four were rejected, three were dismissed, and three were withdrawn post-investigation. Tasmania has provided data on tribunal decisions, though this was not requested. This data indicates that 5 complaints were referred to and finalised in the Administrative Decisions Tribunal, all of which were dismissed: two by consent of all parties, one because of 'failure to prosecute', one because the complainant failed to attend, and one was dismissed pre-hearing.

In QLD, 56% of the total of 137 matters were 'accepted' and 47% were not. Nearly two thirds of those that were accepted (63%) were conciliated and a third (33%) were unresolved. Of the 25 complaints that were unresolved 18 were referred to QCAT and 7 lapsed or the complainant in question 'lost interest' after conciliation. In terms of outcomes, 49% of those resolved involved financial compensation, 34% an apology, 13% training by ADCQ or cultural awareness training, and the remainder 'reinstatement' or a 'reference'.

For the following jurisdictions data on progress of complaints is available, but not on outcomes of settled matters. In the NT, 21 out of a total of 87 complaints went to conciliation (24%).[581] Of these 21 matters 13 were settled at conciliation, two outside of conciliation, and 6 were dismissed. The NT

[580] The agency reports that there was an additional race discrimination Tribunal decision in 2011, although the original complaint was received in 2009-10. See *Haynes v Ceduna Community Hotel Limited* [2011] SAEOT 7. This complaint was upheld and damages awarded for injury to feeling ($3,000 in compensation).

[581] Those that went to conciliation were mostly employment related (15/21). The remainder of matters that went to conciliation related to goods and services. No education-related complaints went to conciliation. This is not necessarily significant as the bulk of matters that did *not* proceed to conciliation are also employment-related (30/65), followed by goods and services related matters (29), education matters (3) and 3 matters recorded as 'no area'.

provides outcomes for the 66 matters that did not go to conciliation. Over half were rejected (38 matters), 12 were subjected to a 'notice of lapse', 7 were withdrawn, 5 are recorded as 'early intervention', two 'settled outside', one lapsed and one was dismissed. Based on this data a total of 22 matters were settled in or out of conciliation (25% of all complaints progressed).

In Victoria, of a total of 48 matters progressed during the relevant period only 13 were resolved in or outside of conciliation (27%). Of the remaining 35 complaints 13 were recorded as withdrawn by either the complainant or respondent, 11 as unresolved at conciliation, and 7 as closed because 'unresolved' or 'unable to be resolved (conciliation inappropriate)'.[582] For three complaints, the offer of dispute resolution was declined and one complaint was declined as lacking in substance.

2.2.1 Analysis of progress and outcomes data

Given the differences between complaint handling processes across jurisdictions it is somewhat difficult to draw general conclusions about outcomes, other than where matters went to or were resolved at conciliation: an outcome available to and similar across all jurisdictions. It is fair to conclude, however, that a sizeable proportion of Indigenous complaints did not produce a positive or indeed any outcome. Moreover, outcomes produced may not be defined as substantive, or specific details of outcomes were not provided (because they are private settlements), discussed further in Chapter 7.

Turning first to *numbers of settled complaints*, data available in all but one jurisdiction indicates that between one in six and one in four Indigenous complaints resolved in or outside of conciliation. As noted above, the AHRC data is not clear in this regard, revealing that just over half of all complaints went to and/or were resolved at conciliation.

Data on *outcomes produced upon resolution of complaints*, including through formal conciliation, are available for all jurisdictions other than Victoria and NT. The data provided indicates that the most common outcomes at settlement appear to be financial compensation and apologies (as high as 45%

[582] Two different Acts applied over this period. This is why there is a total of 35 and use of the somewhat confusing or inconsistent terminology or categorisations.

and 23% of conciliated outcomes in NSW, respectively). In some jurisdictions the details of outcomes attained are not available for a significant number of settled matters. Outcomes are simply recorded as 'complainant satisfied with response/information provided' or similar. In NSW and in WA, 42% and 27% of settled matters fell into this category, respectively. Federally, 39% of complaints were settled by way of a 'private agreement', for which no detail is provided.

It is worth highlighting too the small proportion of conciliated outcomes that suggest the possibility of systemic change, such as a shift in policy or provision of education/training to staff of a respondent organisation. Federally, revision or review of policy and education/training outcomes constituted 9% of all relevant conciliated outcomes. In SA, two of the 5 conciliated matters led to a 'staff training/development program'. In WA, 16% of conciliated matters led to changes involving an 'educational/EEO (Equal Employment Opportunity) program'.

Additionally, at least three quarters of complaints in all jurisdictions other than in the federal jurisdiction (where the data provided is not clear) failed to settle. One cannot, of course, presume that failure to conciliate is always a negative outcome. If negotiations in unsettled matters is on terms that are not agreeable to the complainant it may be a positive or preferred outcome, in some respects. The data does not provide this level of detail, however.

Based on the above data Indigenous complaints of discrimination in some instances do not proceed to conciliation or other resolution due to decisions or actions on the part of the complainant or respondent. The percentage of complaints falling into this category are reasonably high, particularly in certain jurisdictions. In NSW, for instance, 26% of matters were abandoned and 23% withdrawn. In WA, 26% of complaints lapsed and 12% were withdrawn, and in SA, one in ten complaints (11/30 complaints) were withdrawn. The data generally does not indicate whether the complainant or respondent has stopped engaging with the complaint and/or whether the agency may have played some part in this (for instance, advising that the matter has little merit), but where detail is recorded the complainant more commonly withdraws or abandons the matter.

In other instances, decisions or actions on the part of the agency have clearly led to closure of a complaint without resolution, though this may at times also be due to the actions of the parties in question. This occurs in a significant proportion of cases: to the same or to a greater degree than the conciliation of matters. For instance, a total of 27% of complaints in NSW are recorded as 'declined', 28% in WA as dismissed, and nearly half the complaints lodged in the NT (45%) were either rejected or dismissed. Reasons for this are likely to include little chance of a matter settling, failure to resolve the matter through conciliation, and/or because complaints are identified as outside jurisdiction or otherwise invalid.

Although not all jurisdictions provided data on progression of complaints to more formal adjudication, the statistics provided indicate that overall very few Indigenous matters are adjudicated in a tribunal. In SA three complaints were referred to the tribunal over a three-year period. All of these were dismissed: one as out of jurisdiction and one was withdrawn. In Tasmania 5 matters were referred to the tribunal, all of which were dismissed.

2.3 Other statistics on Indigenous complaints

Overall, the complaints data set out above indicates that Indigenous people do not engage with or derive benefit from complaint mechanisms to any substantial degree. Perhaps the main access to justice issue highlighted by the data, given the importance of this step to accessing justice, is that Indigenous people are not lodging complaints (or making enquiries) in high numbers, relative to the data set out above measuring the extent of racism and discrimination against this particular group.

Given what we know about Indigenous experiences of discrimination, Allen's statement that small numbers of complaints of discrimination do *not* indicate that the law is working effectively (that is, that discrimination has been reduced by the law) appear to be accurate. These statistics are much more likely to reveal that complainants are 'disinclined to use the formal (legal) system' to resolve disputes.[583] It is

[583] Allen, D (2009b), 'Behind the conciliation doors: settling discrimination complaints in Victoria', 18(3) *Griffith Law Review* 778.

recognised by those working in anti-discrimination bodies, including those interviewed for the thesis, that low complaint statistics under-represent actual levels of discrimination targeted at Indigenous people.[584] The ILNP, as discussed in Chapter 2, also found that a very small percentage of people encountering discrimination had lodged complaints or accessed legal help or advice in response. The Vic Health research discussed previously indicates that though nearly all Aboriginal respondents had encountered at least one racist incident in the preceding 12 months a sizeable portion reported 'ignoring' the racism in question (33%).[585] A quarter (25%) wanted to confront it but didn't and 13.7% just 'accepted' it. A relatively significant percentage confronted racism verbally (32.4%) or found other ways of dealing with it: talking to someone (18%), trying to reason with the 'perpetrator' (13.4%), and using humour (11.2%) or creativity (2.3%).[586] A small percentage made a 'complaint' (10.8%), received help (5.6%) or reported it to police (4.4%).[587]

An earlier qualitative study conducted with Indigenous women in NSW by Wirringa Baiya Aboriginal Women's Legal Centre and the Public Interest Advocacy Centre describes a range of responses to discrimination, from avoidance to confrontation and formal complaint.[588] Broadly speaking though,

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782. Writing in 2005 Gaze also suggests that although the reported statistics at that time indicated that the proportion of Indigenous complaints lodged exceeds the proportion of Indigenous people in the respective populations, 'one would not expect many claims of racial discrimination to come from the white majority'. As such, these figures are 'likely to be an under-representation of' potential Indigenous complainants. Gaze (2005), 183. Compare this with comments by Varova, who states that declining numbers of Indigenous complaints indicates that the system is working. Varova, S (1995), 'Racism the Current Australian Experience, 8 *Without Prejudice* 11.

[584] Allen (2009b), 780.

[585] Ferdinand et al (2013).

[586] See also discussion in Behrendt, L, 'The flipside of racism is humour', The Conversation, 19 June 2013 (accessed 21 September 2018) at: <https://www.theguardian.com/commentisfree/2013/jun/19/aboriginal-comedy-humour>.

[587] National Aboriginal and Torres Strait Islander Health Survey (NATSIHS) data also reports that the most common response to racism is to talk with friends and family about it (38%), followed by trying to avoid the situation (33%), trying to do something about the perpetrator (30%), forgetting about it (28%), keeping to yourself (18%), and trying to change the way you are/things you do (9%). ABS (2006), *National Aboriginal and Torres Strait Islander Health Survey*, 2004-2005, ABS, Canberra.

[588] Goodstone and Ranald (2001).

very few incidents had been reported, challenged or acted upon in any way. Most individuals identified withdrawing from the situation: deliberately shopping at a different store or discharging themselves from hospital after discrimination. One participant in the NSW study stated that directly responding to discrimination was difficult. 'You've got no power. You've got no rights. You're just black. It's been the reality for too many years now'. There were, however, some direct challenges of alleged perpetrators — though this was more likely to occur where the situation was more serious or had provoked a certain level of anger. Mostly, however, 'You have to weigh up whether it's important enough' to take an issue on.[589] Direct confrontation might include questioning a real estate agent about why you missed out on a rental property or returning to a racist teacher after moving on from school to show them what you've achieved in life, contrary to earlier expectations: examples of 'everyday justice' referred to in Chapter 2. Individuals spoke of writing letters of complaint to the NSW ADB when angry but then not sending them, deciding not to follow anything up when given legal advice that they had no case, or even when told that they *did* have a case.

We turn now to consider thesis interview data on current Indigenous responses to discrimination and Indigenous perspectives on the utility of improved access to justice in this area.

3 Thesis interview data: Indigenous responses to discrimination

During thesis interviews community members participants were questioned about their own and other Aboriginal and Torres Strait Islander people's most common responses to racial discrimination. They were asked, specifically, whether they had ever used and whether they thought that many Indigenous people would use anti-discrimination law. Comments were also sought from stakeholder interviewees about how Indigenous people might generally respond to racial discrimination.

The data gathered confirms that recourse to the law is rare for Aboriginal and Torres Strait Islander peoples. It indicates that the proportion of Indigenous people with *any* knowledge of rights and remedies that are available to them when they experience discrimination is very small. This will make it virtually

[589] Ibid, 50.

impossible for them to initiate complaints, and indeed, the vast majority of Indigenous community members interviewed had not made or had not even thought of making a complaint about race discrimination.

> We know that the law is used seldom, but responses vary greatly. People will verbally confront people. Or they might think they'd like to do that, but they feel ashamed or fearful, so they don't. They might respond violently, so then *they* become the offender. They might tell someone about it to get it off their chest. If they're aware, if they feel empowered and if they trust the system and organisations like VEOHRC, then they may make a complaint. S1 [NI]

As this comment suggests, two quite common responses reported by participants include combative verbal and/or physical altercation in the face of, or walking away from discrimination - which was almost always defined by participants in their responses to interview questions as an incident between one or more individuals (and often as something like vilification). Here again we see the focus by Aboriginal and Torres Strait Islander peoples on discrimination as an interpersonal experience, discussed previously in Chapters 3 and 5. A third response involved directly challenging racist attitudes or actions. Also raised, though not so frequently (perhaps because it was not identified as a 'response') was talking with friends or family. As one participant explains, 'I usually just ring my mum, Mum guess what happened today? She's great. She's like, oh, that's awful sweetie' (MF3).

Only in particular circumstances will an anti-discrimination agency be contacted. Two community members discussed lodging complaints: one about denial of access to a club, identified as successful by the participant in question, and the other about discrimination in tertiary education, which was withdrawn during tribunal proceedings.[590] Stakeholder organisations confirmed the low levels of Indigenous complaints in this area.

[590] Notably, this interviewee was a lawyer and therefore likely to be more resourced in terms of capacity to formally complain. Two complainants out of 25 interviewees is actually a comparatively high proportion, given the complaint statistics set out above.

> Everyone has problems getting proper access to justice [including as legal advice about discrimination]. It's under-funded, simple as that. Indigenous people are no different [in this regard] but given [the extent of racial discrimination against them], the numbers of Indigenous people making complaints is microscopic. It's the opposite of over-representation of Indigenous people in prison or detention. S6 [NI]

Discussed further below, each category of response varied with respect to the level of 'satisfaction' it provided, with violence seen as the least satisfactory response and calling out racism the most satisfactory response, potentially — identified by some participants as preferable, indeed, to a legal response. A small minority of participants also identified direct action and protest as always more effective than legal challenges.

3.1 Direct confrontation – anger and violence

Most participants felt that reacting to discrimination with violence or angry confrontation was not useful. This type of confrontation might well result in criminal charges, perceived by participants to be due in part to the racism inherent in both over and under-policing of Indigenous people.

> If we do retaliate to that sort of behaviour or language we'll end up in prison, not [the perpetrator]. That's why we realise we're more powerful to walk away … Most of us learn to do that. If we're locked up in the system (prison), then nobody will give a damn. BF2

> It's sad you know, but violence could be the answer, and half the time it is with Aboriginal people. You just want to punch someone, which solves nothing … If the cops come along you're the one that's going to get arrested for punching someone's lights out for calling you a 'black c', not the one who called you something. The police don't really … care that that person was being racist towards you. All they care about is that you've gone and hit this person … There's an old saying, a better man walks away. That might be a better thing to do. Sometimes it's hard. They just get to that limit and all hell breaks loose. BM2

As this last comment suggests, those interviewed spoke of anger that rises up in the face of constant discrimination, as well as the powerlessness that comes from feeling that there is little to be done to change the situation at hand. 'It makes us so angry. If you could only walk a mile in my shoes for one day' (BM1). Worn down by multiple encounters with racism, people may just 'snap'.

> We get aggressive or violent but not because we want to or have to. It's just natural because of the experience of growing up, what we've been through and gone through. You just get sick of it … And they know they're being racist to you … and you can't do nothing about it. SM1

Even without physical violence, angry outbursts and the absence of self-control also have negative outcomes, including feeding into negative societal stereotypes of Aboriginal and Torres Strait Islanders.

> You get laughed up, that's the worst when you're hurt and upset ... That makes you really wild. My [relative] … went with a white girl. She didn't know anything about black fellas until she met this boy …. That girl's mother talked bad about all Aboriginal people when they broke up. Anyways, this lady was out one night. My cousin seen her, and she was going to go off her head at this lady. And I thought, why should we do that because we're showing them what they want to think about us. We've got to be the better people. We've got to turn it around. I told the lady she didn't know blackfellas. 'You don't have no idea how good Aboriginals are. You shouldn't be so small minded because of what your daughter got her heart broken. Of course, you're not going to like that boy but don't hate us all'. SF3

3.2 Walking away and avoidance

Ignoring people and/or avoiding places where discrimination has occurred, including as a consumer of goods and services, is identified by some Indigenous interviewees as a best response - at least as more preferable to lashing out. 'I've felt good about walking away, because you know — that's their ignorance', stated one male participant in Brisbane (BM2). 'I handle discrimination pretty good. If someone says something nasty to me, I take it with a grain of salt. I used to get angry but all that did was get me put in jail. Defeats the purpose' (BM5).

> If I was discriminated against at a particular shop I'd just not go back. I did that once. I went to a car yard, I wanted to pay cash. I went with a pair of thongs and a shirt. Nobody came out and saw us, we were there 30 or 40 minutes. I said, oh well, I won't go there. I rang up a dealer – it was all too easy over the phone. I got it cheaper anyway. The car yard missed out. The majority of people just wouldn't go back there. Just avoid it or leave the job (if discriminated at work). S8 [I]

For some participants there were, however, mixed feelings about the degree of power or control that walking away produces. 'They're (the perpetrator) 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' (BF2). One participant walked away because he felt he had little choice, with the only other possible response in his eyes likely to lead to police custody.

> It's sad, really. Like sometimes I can feel empathy for those that are racist, I feel sorry for them. That's when you just walk away and leave it alone. I think — don't take on things that no longer serve you ... Sometimes you can go over and over it in your mind thinking maybe I should have done something about it. I could have got aggro at them. But I can't because I might end up in the watchhouse … I've thought about complaining about discrimination often, but I let it go. I normally walk away, still walk away angry though. BM3

3.3 Calling out racism

According to Indigenous participants, where an individual is sufficiently empowered (and depending on the situation in question) one of the more effective responses to discrimination is to call it out directly in a more measured way. This aligns with Galanter's comment set out in Chapter 2 that 'justice' can be attained when aggrieved persons directly assert their rights, including in ways that equate to 'everyday justice'. The type of responses described below are likely to fall into this category, and within an expanded definition of access to justice, to be discussed further in Chapter 8.

This approach is seen by some participants as likely to 'educate' the person engaging in discrimination: especially appropriate where discrimination is unconscious rather than malicious. In the latter case, talking with a perpetrator is unlikely to have a positive impact.[591] 'If the perpetrator is not an ignorant bigot, they may be receptive to a little education and awareness about the true history of Aboriginal people and what a proud race we are' (CM4).

> I used to work selling Aboriginal arts and crafts at my Aunty's shop. They assumed I wasn't Aboriginal because I didn't live in the desert or have black skin. They'd be so shocked when I told them about colonisation and the reasons why I'm not so dark. They'd be really receptive to that … You have to put it in context. If it's not coming from a malicious place, sometimes people don't know — they've not had contact with Aboriginal people. We're still a minority. MF5

Calling out racism might involve complaining directly to whoever has a measure of responsibility or accountability in the instance at hand, such as the owner of a pub or restaurant. To have the above positive impact, however, emotions must be kept at bay.

> I've had escalation too. Not into violence, but heated and animated discussion. When you start to use 'choice' words … I used to be the first one. I realised that when you do that people aren't listening to you. When you come with a subdued approach, then they realise they haven't got you riled up like they wanted. It's sort of like power play. I try to embarrass people in front of others, or I'll go straight to the management of a place. I say 'This is what I just copped. Do

[591] Werthein discusses this point, noting that because racism is not logical it is difficult to argue, educate or 'reason' a racist out of the views they hold. 'Speaking back against expressions of racism will rarely change a racist's basic attitudes.' This is because 'racism is rarely the product of any kind of purely cognitive process. People who propound racist beliefs are almost always motivated by emotional or psychological factors or by a supervening interest and will therefore persist in such beliefs even in the face of overwhelming contrary evidence.' In fact, Werthein claims that '[v]erbal racist attacks should not be dignified with a response in circumstances where a response would imply wrongly that the attack has a rational basis, or that the target's very humanity is a legitimate matter for 'debate''. Werthein, P (2015), 'Freedom and social cohesion: a law that protects both', in AHRC (2015b), 91, 93.

> you condone this kind of thing? What are you going to do about this so I don't need to get the authorities involved, so this place doesn't get known as one of those places in the paper?' Sometimes the person says sorry, they didn't realise ... If you maintain your level head, not the heightened anxiety, a meaningful conversation might occur. Both people are satisfied and there's mutual ground … A lot of people don't want to be seen as running a place that condones racism. CM4

The latter participant also pointed to the potential for this type of response to change attitudes other than those of the individual perpetrator of discrimination, at least when used in a public setting.

> 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! 'This guy made a fool of the other guy. I betcha that guy will never do that again. I know when I go into a pub I'm not gonna do that. I'll be more mindful when I see Indigenous people because the things this guy said, I've never heard it before.' CM4

As further examples of more direct but comparatively restrained confrontation, a woman in Shepparton describes her response both to the assault of her nephew and perceived racism on the sports field.

> The police came around. They said to my nephew 'Get in'. I said 'No, he's going home'. They said he was fighting down at the lake, rah, rah, rah … But he was actually mugged in the toilets… Police just assumed he was in the wrong. One Aboriginal boy, four white boys - they instantly jumped to that conclusion … It was a racist attack. I confronted the police. I said 'You lock him up, I'll cry racist'. That changed them. They said 'I'll let you take him home then'. When it comes to unfairness, I'll be the first one to jump up and say you're doing the wrong thing. SF1

> When I'm at the footy, maybe it's not racism but it's how [the umpires are] brought up. Maybe subconsciously they're blowing the whistle against your (all-Aboriginal) team. That's what I

> tell my kids anyway. It's very frustrating. But you make them wear it and own it. I'll say to the umpire, 'Oh gee there were a lot of decisions one way. What's going on with the other side?' ... Once they start realising people are watching them, that they're accountable, it works because it makes them think about what they're doing …You don't have to swear or curse or carry on all the time. It doesn't get you nowhere anyway. SF1

For some, direct confrontation of this nature may be a better option than accessing formal legal remedies. 'We're all treated this way, but I've never myself wanted to use the legislation. But see, 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 (S6 [I]).

As this last comment suggests, not all Indigenous people will take on discrimination in a non-combative way, including because they may not be sufficiently empowered to do so. This again is in keeping with comments by Galanter, who stated that though direct confrontation of racism may be effective it is a difficult response for disempowered individuals: and for some of the same reasons that make it hard to assert one's rights through the law.[592] 'The process of disempowerment that happened over many, many, many decades has left some Aboriginal people … [with low] self-esteem to voice their opinions, to voice their concerns' (CM4). Often a person's family environment appears to be the key factor as to why some individuals have sufficient resilience to call out racism directly.

[592] Werthein discusses how difficult it can be to confront racism, whether Indigenous or not, and racial vilification, in particular. 'Racial vilification also has a silencing effect on its targets. The targets of expressions of racism tend to curtail their own speech as a protective measure for a range of reasons.' Firstly, 'the target has a reasonable fear that a response will provoke further abuse'. Secondly, in many instances the vilifier is 'in a position of authority over the target, which further restricts the target's belief in his or her ability to respond in a meaningful way, as the target may fear victimisation', or may 'lack the confidence to challenge a person in a position of authority'. Thirdly, 'members of the majority or dominant group in society "get a lot more speech than others". Members of relatively less powerful groups within the community do not operate from a level playing field'. Werthein (2015), quoting MacKinnon, CA (1993) *Only* Words, Harvard University Press, Cambridge, Massachusetts, 1. See also Delgado, R, 'Words that Wound: A Tort Action for Racial Insults, Epithets and Name Calling' in Matsuda, M, Lawrence, C, Delgado, R, and Crenshaw, K, (eds.) (1993), *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment,* Westview Press, Colorado, 89-110, 95; Matsuda, M, 'Public Response to Racist Speech: Considering the Victim's Story', also in Matsuda et al (1993), 17-52, 24-25.

> I call it for what it is. I come from a family heavily involved in the Aboriginal struggle for land rights and self-determination …. Out of respect for my Elders, I have an obligation, a duty. There are others like me who have the same duty, mostly people who have grown up during the 70s and 80s during the period of self-determination for Aboriginal people and whose parents were at the forefront of the Aboriginal struggle prior to, and during, this period ... A lot of Aboriginal people do this, but there are many who don't. These are the people I speak up for too. I'll speak up for anyone …. I'll fight to the hilt, walk a thousand miles and back. CM4

Having capacity to confront racism might also depend on the environment or context within which it is encountered. The following comment suggests that there is less tolerance for racism in Victoria, making it easier to challenge there.

> I voice my opinion now. We're taught down here (in Victoria), it's not okay to be discriminated against. Whereas in Queensland you don't know that you've got a right to speak up. If someone was to call you a black whatever, you just take it on and don't know what to do about it. You're used to the fact there's nothing you can do about it. Moving down here … it's not okay to be spoken to like that. Now I speak up … In Queensland, there's not enough education around it. My family, my friends, they're still the same as I was when I used to live there. If something discriminatory happens they won't speak up or look for help. They don't seek help. They're kind of just used to that kind of treatment — I've had it all my life, this is how it is. They probably get it every day. They just take it on the shoulder, on the chin. MF4

That directly challenging discrimination is hard, including because racism is not always overt, is identified in the following comment provided by a participant who felt that he was being asked inappropriate questions during a job interview because of his Aboriginality. He expressed how tricky it would be, however, to confront the interviewer about this.

> It might just switch a light, where [the interviewer would] think 'he thinks I'm racist' ... I can't ask him — are you asking me this question because I'm Aboriginal? It's uncomfortable. You

> can sit there and say why are you talking to me like this, questioning me like this? And they could just say, we question everybody like this. We always ask people this. What can you say? You can't respond to that. BM4

One participant based in Cairns had involved a Federal Minister in his complaint of racial discrimination, with some success. He wanted to encourage others to stand up for their rights in a similar way.

> I took on the responsibility to address these issues .... We managed to talk with a Federal Minister, who took the time to receive my phone call and through a short conversation he changed his flight details and knocked on my door. I told him this involves an Aboriginal nation not just one voice. So, we had a group meeting ... The Minister was horrified … He asked for a letter, so we compiled a letter from the heart. [Within 3 weeks, it was addressed in Parliament and the person who was the subject of complaint was made redundant] … I felt so humble because I've never seen a grown man, a proud man, my friend, break down and cry. He cried with relief … I say to everyone just because one organisation closes their ears or the door, don't ever believe that's it. Never under-estimate the power of people … When you've been discriminated against, whether it's your religion, marital status, ethnicity, the government is there, they will deal with it. This is a classic example. Here's a humble Aboriginal group, David taking on Goliath ... If you feel you've been discriminated against, you do have a voice and the voice will be heard …. We had to stand up for our rights, we were pushed to get physically aggressive. That person [who was discriminating] wanted us to lose control … so we'd be charged … [The guy was] a Cleverman, so we also had to be clever. CM1[593]

[593] Cleverman is an Aboriginal man who practises traditional medicine and may also play a role in ceremonial life. Detailed descriptions of an Aboriginal Cleverman are available in Elkin, AP (1978), *Aboriginal men of high degree: initiation and sorcery in the world's oldest tradition*, Rochester Vermont.

Participants identified that outcomes of directly challenging discrimination are unpredictable - although sometimes because of the situation in question it will be obvious at the outset that it is not going to work well. This is likely to be the case where the discrimination in question is more consciously intended to harm, as noted above.

> It's who you make the complaint to, the way they go on with you, their tone, if they're going to be ignorant or shitty. And most of the time that would happen. If they're in a pub or a bar, and it might be too busy. 'Oh mate, I can't talk to you about this, just call the police'. [Direct confrontation] might make it worse. BM4

As a further example of this, one participant spoke of what happened when his unwell Torres Strait Islander relative was walked naked into a hospital ward by hospital staff. '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' (CM5). Another participant spoke about the dead end he reached when complaining about a sports-related incident, and a further participant spoke of doubting that what looks like a somewhat positive response will lead to actual, genuine change. Calling out racism might not achieve anything, or anything like what was intended.

> Also, there's discrimination in sports. And I don't think people see that as a big issue. But with my basketball club we've been trying to let them know there's discrimination [happening]. Basically, nothing gets done about it. They say they're doing an investigation … We're an all-Indigenous team. We put a complaint in and the club's let the other team know. There was no mediation. My nephew didn't think it was that bad, but we're telling him it is, you shouldn't be putting up with people calling you names. We've put a complaint in about the referees too. We don't know if they're being racist or just biased … We're thinking about [a formal complaint to VEOHRC] if it keeps happening. We'll have no choice. MM1

> No, never done a complaint. But I've seen it happen. Someone called my sister a black monkey for no reason in a club. My mum went off her head. My sister, she is so smart, a fully qualified

> biologist, she's been to university. She just wanted to go in there and order a feed, she didn't deserve that. She complained about it and they gave the guy a warning — 'if it happens again we're going to bar him'. This is always the answer. Kind of makes you wonder how many other times he's got away with the same thing. BM4

Use of social and other forms of media to challenge racism also appears to have mixed results but can be quite effective. 'I've done letters to the editor. I've been cut off on the radio one time. They didn't like what I was saying. I was making references to Paul Keating's speech in Redfern, which carried a lot of weight' (CM4).

> 'Itinerant' in Cairns is code word for blackfella. The Cairns Post did this whole article on itinerants, with a photo of a so-called 'itinerant'. But he comes in so infrequently that he could remember that he was in town at the specified time running an errand. He wasn't homeless. There was a Facebook page set up, Stop Racism in Cairns or something, and it really took off. That was their response to it. They didn't use the law. CM2[594]

Social media (Facebook) has been used to gather evidence and/or to complain about discrimination. 'It was at Gloria Jeans at the airport in Sydney. A customer was very dark [skinned] … and the people just totally ignored her. She was so angry she put it on Facebook on the Gloria Jean's page and she did get a response [from the company]. So that can work' (S8 [I]). Further comments on this point include the following.

> People do fight it though … After the march for Elijah (Doughty) there was a family wearing Aboriginal flags. They were at a taxi rank and they 'Facebook-lived' (videoed) it. The taxi driver said they had another fare. [The family complained]. They have tiny fines for refusal of

[594] As an example, a Facebook page has been set up to publicise and challenge racism in the media. It is called Clean Up Media Racism in Cairns Awareness Campaign (accessed 21 September 2018), available at: <https://www.facebook.com/RodneyPascoeOneVoice/>.

service. So far, it's only a $50 fine. They offered to give them a $50 voucher, but this is not going to even get them home. MM1

4 The value of access to justice to Indigenous people

Where non-legal responses are providing Indigenous people with satisfactory resolution of discrimination related problems and issues, access to legal processes and remedies may be unnecessary — or may perhaps provide an additional mechanism for responding to discrimination. The potential utility of access to justice as it is traditionally framed (as outcomes, processes and legal frameworks underpinning the same), including with respect to race discrimination, is outlined in Chapter 2. Do Indigenous people, however, *want* to use race discrimination law? They are not currently doing so to any great extent. Is this because they believe the law is inappropriate as a means of attaining justice, and as such, agree with critical Indigenous and other perspectives on discrimination law, outlined earlier in the thesis? Conversely, do they share the views of Indigenous leaders who agitated for introduction of such law in the 1960s, attributing value to such a mechanism; or those of more contemporary Indigenous leaders, who point to Indigenous access to mainstream civil law justice as making an essential contribution to Indigenous quality of life, as discussed in Chapter 2?

Thesis participants were asked what they thought about race discrimination law as a mechanism through which to tackle racial inequality. A majority identified it as a useful tool to check and change behaviour — to bring 'offenders to account', to provide 'formal redress under the Western system', and to 'give a sense of justice' (S1 [I]). It is noted, however, that most participants had not used and did not generally know enough about the relevant processes and remedies to critique them in any detail. The value they saw in race discrimination law was, therefore, to some extent symbolic. 'The laws have come about because eventually society has come to the view that it's actually not okay to treat people unfairly because of their race. If those laws were abolished, then people would have licence to do whatever they want' (S6 [I]). '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' (S8 [I]). To be *practically* meaningful participants identified that the

legislative provisions had to actually be used by Indigenous people to enforce their rights — a point stressed earlier in the thesis. 'It is good that they're there for when people need it'. 'I think it'd be good if more people used the laws though. They can tell their family, spread the word, word of mouth going around' (MF4).

Participants commented on the fact that not having sufficient capacity or opportunity to engage with the law may leave Indigenous people (feeling more) disempowered. It also increases their risk of entry into the criminal justice system due to angry (as opposed to more measured legal) reactions, noted above. 'Usually people don't put in a complaint, they think it's just going to take up too much of their time. If they don't it leads to violence, anger' (CM3). 'I think having racial discrimination laws is good. Knowing it's illegal, but that you can still get away with it [is unhelpful though]. The laws won't stop behaviour unless people use them to defend themselves. Otherwise no one's ever going to stop breaking them' (CM2).

> When Aboriginal people don't complain they feel like the person can do it again the same or even worse. Because we're not making formal complaints as much as we should they think they've got away with it. 'Next time I might not just swear, I might spit on them or hit them for being black'. BM2

Though participants did not have intimate knowledge of the detail of race discrimination law, a number of community member participants were able to cite examples of race discrimination cases that had provided 'justice' to Indigenous people in the past. 'There have been some runs on the board, Conrad Hotels, Palm Island. It was significant that they were successful … They're massive though, it's not

your everyday kind of thing' (S6 [I]).[595] 'My cousin put [a complaint] in years ago [against a pub that was] not letting Aboriginal people in, and she took it all the way with VALS lawyers. That was successful. The Publican paid a big fine and had to do cultural awareness training' (MM1).

> We fronted up at the ticket window, but it said 'private function, you can't come in'. We went back to the car … I didn't think anything of it, maybe the advert [for the event] was wrong. We watched more black people get turned away, and then we sung out to them. They said they'd been told it was a private function too. So, we all started to gather. A white mate of ours came then. I said 'you go to the window and see if you can get in'. He went up by himself, nothing was said about private function, he got his stamp. I told him to go up with some young Aboriginal girls and he tried to pay for them. They said it was a private function again. We took an anti-discrimination case against them ... The licensees were asked for $10,000. That broke them. They couldn't afford it. So, we went to another mediation at the courthouse. We got some TVs, videos and things. They went out of business. CF1

> I think about the Andrew Bolt case (see discussion below of *Eatock v Bolt*) and [the barrister] Ron Merkel just destroying him and his argument. He shot it down. That was because someone could stand up [to Bolt]. We got the test about Aboriginality [out of that], you can't just go around and say what you want. MF2

Academic commentators also point to the effectiveness of the RDA in an Indigenous context by referencing successful case law. Bielefeld and Altman, for instance, speak of the 'great practical and

[595] See *Wharton and Ors v Conrad International Hotels Corporation unreported* [2000] QADT 18. This matter concerned an incident where six Aboriginal people were ejected and refused service at a night club. Each complainant was awarded $10,000. In 2016 the Federal Court ruled that the police response to the Palm Island riots of 2004 was racially discriminatory. See *Wotton vs State of Queensland (no 5)* [2016] FCA 1457. Police were ordered to pay damages of $220,000 to three plaintiffs, paving the way for 447 other Palm Island resident complaints of discrimination (settled for $30 million and a formal apology). 'Justice has served itself' through this outcome, according to the Palm Island Mayor. See media report by Archibald-Binge, E, NITV News, 1 May 2018 (accessed June 2018) available at: <https://www.sbs.com.au/nitv/nitv-news/article/2018/05/01/justice-served-palm-island-receive-30-million-and-formal-apology-response-2004>.

symbolic value' of the RDA, and identify in this context the landmark Mabo court cases and the case of *Eatock v Bolt* (the 'Andrew Bolt case' identified in the comment above).[596] In the latter case the Federal Court found in favour of a number of Indigenous plaintiffs alleging that Bolt had vilified Indigenous people with fairer complexions in his journalism. Bolt had written that lighter skinned Aboriginal people were not Indigenous but claimed to be so in order to access certain benefits.[597] National Congress also referred to relevant case law to demonstrate the symbolic and practical importance of legislation like the RDA to 'establishing Australia's identity as a nation upholding equality and tolerance within a diverse multicultural society,' stating further as follows.[598]

> [The RDA is a] keystone for reconciliation in Australia between Aboriginal and Torres Strait Islander Peoples and the settler state. The Act featured prominently in the Mabo decision of the High Court in 1992.[599] Also, on a number of occasions it has prevented state governments from creating discriminatory laws acting against the Aboriginal and Torres Strait Islander Peoples.[600]

A minority of Indigenous interview participants (three out of a total of 24) thought that racial discrimination law was *not* of value to Indigenous people. One participant from Cairns with long-standing involvement in the Indigenous rights movement called for a return to Indigenous protest.

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[596] Bielefeld and Altman (2015), 197. See *Eatock v Bolt*.

[597] Significantly, as a result of the successful *Eatock v Bolt* decision the Turnbull government attempted to change the RDA's vilification provisions, establishing a Parliamentary Inquiry into Freedom of Speech to consider the watering down of s.18C of the RDA. It was claimed, amongst other things, that the legislation did not strike an adequate balance with the right to free speech. As Bielefeld and Altman suggest, the widespread and very vocal opposition to the proposed reforms provides evidence of the importance and value attributed to the RDA by the community. VALS, for instance, stated that racism against Indigenous people, including racial vilification, is 'prevalent and persistent' and has substantial and negative impacts. VALS pointed to various formal inquiries documenting violence and harm perpetrated against Indigenous people, such as the Human Rights and Equal Opportunity Commission's inquiry into racist violence (HREOC (1991)). Racial vilification provisions, therefore, 'are warranted, reasonable and necessary not only for the protection of Indigenous communities but the other ethnic minorities in out multicultural society'. VALS (2016), *Freedom of Speech in Australia Inquiry: Submission paper from the Victorian Aboriginal Legal Service*, Melbourne VIC.

[598] National Congress (2016), 3-4.

[599] *Mabo and Others v Queensland* [1992] HCA 23.

[600] Ibid.

> 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? NAIDOC is passive, the march down the street is passive.[601] Who said we ever had to be like that? These kids who are marching behind us, why aren't they singing out? Where is that gone? … That rebel thing, let's march the street! ... Nothing's going to happen any other way … The reason I appreciate NAIDOC, there were people in the 70s and 80s, they marched in the streets, got bashed by police, thrown into paddy wagons and watch houses, to get me the right to sit and work in organisations like this — where I don't have to only work in an Aboriginal organisation, where I was able to go to a school to get the education I did. People marched for that, people got beaten for that … I'll be fucked if I'm going to let that die …. I have an obligation to keep this going. Otherwise I'm disrespecting my Elders and all these other peoples' Elders who marched the streets back then, who set up organisations like Wuchopperen because we needed our own health care service where people really understood the health problems we had. CM4.[602]

This same participant continued as follows. 'These laws are probably not worth the paper they're written on. You may as well wipe your arse with' them. He also claimed, however, that they might be improved if further developed with 'Indigenous input', a point returned to in later chapters. Another participant also believed that the legislation was designed to silence Indigenous protest, evidenced by the degree to which discrimination still impacts on Indigenous people some decades after introduction of relevant law. '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' (MF1). A further comment was that direct action is good when there is a particular event to protest, with marches related to threatened closure of Aboriginal communities by the WA government in recent

[601] NAIDOC refers to the annual National Aboriginal and Islander Day Observance Committee.

[602] Wuchopperen is an Aboriginal and Torres Strait Islander community-controlled health organisation in Cairns.

years or the death of Elijah Doughty cited as examples, but that for every day, systemic issues legal action may be more appropriate (S7 [I]).[603]

One area in which the likely benefit of the law was specifically raised and questioned was its capacity to check government power. An Aboriginal participant in Shepparton saw the law as having potential to be especially useful in this regard, given that 'government' continues to be a major oppressor of Aboriginal and Torres Strait Islander people (in schools, police and hospitals in the instances cited by the participant). A number of other participants, conversely, pointed to deliberate attempts by government to weaken the RDA's application to Indigenous people, including by suspending it during the NTER, and to other forms of discrimination by government against Indigenous people within legislation and policy, a point raised in Chapter 3.

> I think that's why Constitutional recognition and treaties are exceptionally important because then you can't suspend racial discrimination laws whenever you feel like having an NT Intervention. That legislation is supposed to be there to protect everybody's rights. You can't just decide to selectively override certain groups' human rights because you apparently want to do something 'in their best interests'. And that's the way that government's always seen legislation that is for 'the betterment' of Indigenous people, but the perspective on betterment has always come from government, not from the people themselves. It would be so much more dangerous to not have any legislation — but there's so much room for improvement. S6 [I]

5 Conclusion

This chapter has argued for evaluating the effectiveness of race discrimination law for Indigenous people through an access to justice lens. It has returned to the stated objectives of the law, and to Indigenous and government expectations leading to its introduction, to point out that both legal

[603] See activism related to community closure on the Facebook page 'Stop the Forced Closure of Aboriginal Communities in Australia (accessed June 2019): < https://www.facebook.com/sosblakaustralia/>

protection of human rights *and* effective enforcement of those rights are necessary to ensure it has value in an Indigenous context.

Complaints data presented above highlights a number of Indigenous access to justice issues within the ADR process, including that Indigenous people are not initiating enquiries or formal complaints to any great extent, despite the degree to which they are impacted by discrimination. Their complaints are also, for the most part, confined to two areas: employment and goods and services. Moreover, a large proportion of complaints do not settle and conciliation outcomes are generally not made public and/or often do not deliver systemic outcomes.

Interview data in this chapter confirms that Indigenous people are not using the law to respond to discrimination to any great degree. Most participants believe that there is value, however, in accessing available legal remedies. Some participants pointed to positive outcomes attained to date through race discrimination complaints processes and litigation that has been beneficial for individual complainants or to Indigenous people more broadly to make this point.

The material presented in this chapter also indicates that race discrimination related dispute resolution is but one means of attaining beneficial outcomes. Questioned about current Indigenous responses to discrimination, Indigenous participants report directly confronting discrimination - with anger, sometimes with violence and/or by way of more considered assertion of rights. The latter is seen to have capacity to provide adequate resolution to Indigenous people of race-related disputes. Further responses involve walking away from, ignoring or avoiding discrimination. Examples of direct confrontation looked very much like everyday justice. There is more detailed discussion in later chapters of the appropriateness of expanding our current understanding of access to justice to incorporate this and other types of responses to race discrimination.

The interview data presented in this chapter also indicates that barriers to using effective non-legal responses to discrimination include fear and anger, not knowing of or understanding options available for addressing discrimination, the unpredictability of such challenges, location (it is easier to challenge discrimination in Victoria than QLD), as well as levels of personal and social disempowerment.

Discussed in the next chapter is that these barriers are also likely to inhibit access to legal remedies. Addressing these barriers, therefore, in legal and non-legal contexts should improve capacity for Indigenous people to use legal *and* non-legal responses, to be canvassed further in Chapter 8.

Finally, and of some significance, a small number of interview participants identified direct collective action as a much better option than legal action. One participant saw it as the only truly effective way to produce substantive change – particularly in a way that recognises and strengthens Aboriginal and Torres Strait Islander-specific rights (referred to by one participant as self-determination within Aboriginal and Torres Strait Islander health services).

Given that participants have identified race discrimination law as a worthwhile tool for addressing race discrimination, Chapter 7 will now consider Indigenous barriers to accessing justice through the complaints process and how to address these.

CHAPTER 7: BARRIERS TO ACCESSING JUSTICE THROUGH RACIAL DISCRIMINATION LAW

Discussion in Chapter 6 indicates that discrimination against Aboriginal and Torres Strait Islanders in almost all cases appears to go unchallenged through the law. Indigenous people are not making enquiries or lodging complaints in high numbers. As such, they cannot access remedies through ADR processes, courts or tribunals. When they do engage with the complaints process, moreover, they are attaining outcomes that may well not equate to 'justice'. Also revealed is that Aboriginal and Torres Strait Islander peoples see the law as having utility as a mechanism through which to tackle race discrimination. However, as identified previously there are significant barriers inhibiting effective access to justice in this area. Race discrimination law will have real difficulties in achieving its objectives, including reduction of discrimination and promotion of equality, if it is not working effectively as an access to justice mechanism.

Closer examination of barriers to accessing justice is required as a first step to addressing this situation. Chapter 3 discussed barriers within race discrimination jurisprudence and legislation and their particular application to Aboriginal and Torres Strait Islander people in three key areas. Chapter 7 returns these same issues, but with a focus on their impacts on initiation of Indigenous complaints and on progression of these complaints once lodged. It is focused, therefore, on processes, outcomes and legal frameworks of the access to justice framework – but as these apply to within the race discrimination complaint mechanism context. Indigenous thesis participant viewpoints inform the discussion, but particularly when exploring what happens with complaints once lodged there is some reliance on literature, given that few thesis participants had engaged with and/or were able to comment in detail on the workings of the complaints process.

The chapter also returns to barriers to access pertaining to both justice-providers (formalistic laws, slow legal processes, bias, for example) and justice-seekers (such as distrust or other negative perceptions of the legal system). Other potential categorisations of barriers are evident in the discussion, however. These include personal, social, cultural, political, economic, historical, and geographical categories.

Problems of access may not fit neatly into a single category, and multiple barriers may also arise simultaneously. This points to the complexity of these problems and to the necessity of having multi-layered responses to them, discussed further in Chapter 8.

1 Initiating a complaint of discrimination

We turn first to barriers likely to impact on initiation of a complaint. These align, in part, with barriers discussed in Chapter 3 as associated with the individual complaints-based model. Some of the issues raised in this context also affect the processing of complaints once lodged, discussed later in this chapter. Where this is the case they will be discussed in both contexts.

The following comment made by an Indigenous staff member from an anti-discrimination agency refers to barriers Aboriginal and Torres Strait Islander people commonly face in making a complaint of discrimination. The scenario described is seen as typical by this staff member, both in terms of Indigenous experiences of discrimination and difficulties in responding to these experiences. The comment also illustrates, as noted above, that individuals will commonly experience multiple barriers simultaneously. Reflective of the diversity of Indigenous people, an additional important point to raise, however, is that though we can speak of 'typical' Indigenous barriers to accessing justice, these may be differently encountered by individuals, depending on factors such as geographical location, level of education, age, personal situation (including one's level of resilience), and so on – a point raised earlier in discussion of non-legal responses to discrimination.

> I had a mother explain a week ago that her 9 and 11-year olds were wearing their helmets and riding their bikes and they got pulled over by police in a paddy wagon. They were told to empty their bags. They'd done nothing wrong. They emptied their bags and police took a photo [of them]. They started getting mouthy and police put them in a paddy wagon and took them home ... The mother's thinking — I know it's because of race, but how do I prove that? Do I go through the process of complaining (to an anti-discrimination agency) and get [turned away]? I could complain to police but then they'll just target my family …. Even though she was distraught I know [the mother won't complain] the more time that goes past … S6 [I]

The speaker then concludes by stating: 'If you look at our stats, if you were to see how many enquiries I get from Indigenous people compared to how many complaints are actually lodged ...'. That there is initial contact with the agency in question by Aboriginal and Torres Strait Islander peoples is perhaps positive. However, the point made is an important one and is confirmed by complaint statistics presented in the previous chapter.

1.1 Individual complaints-based model and initiating a complaint

The individual complaints-based model, as noted, imposes upon individuals aggrieved by a breach of discrimination law close to full responsibility for enforcing their rights, commencing with lodgement of a complaint. Broadly speaking, it is not possible for anti-discrimination agencies to actively search out and prosecute a particular breach of discrimination law.[604] As detailed earlier, they are generally triggered into action in terms of complaint and investigation work (as are courts and tribunals in terms of adjudication of disputes) only after an aggrieved person (or persons) step(s) forward to raise allegations of discrimination.

The individual complaints-based model was recognised by commentators at or soon after commencement of the RDA as problematic for most complainants, given their level of disempowerment.[605] Writing in 1984, Trlin suggested, for example, that though the number of

[604] Tahmindjis states that anti-discrimination agencies cannot investigate, intervene, prosecute or punish acts of race discrimination, nor investigate systemic racism (though note the discussion earlier about the inquiry function of these agencies). He refers to them as the 'most toothless human rights instrument'. Tahmindjis (1995) 120, 122.

[605] Kelsey, for instance, wrote in 1975 of the 'ineffectiveness of a complaint-based procedure to achieve the purposes' of the *Race Relations Act* (1968) (UK). Victims of 'specific acts of discrimination' may have language difficulties, he states. They may be reluctant 'to complain, fearing the humiliation and uncertainty that may arise' and 'to encounter the forces of authority which to them appear hostile and alien'. Moreover, discrimination may be 'so subtle that the 'victim' may be unaware of the fact of discrimination or may just stay away from places and situations' where it occurs, reinforcing the general isolation of minority groups. For Kelsey, this partly explains why a number of years after introduction of the UK Act, although 'some of the more obvious symptoms of discrimination have disappeared in Britain, there is no evidence of substantial changes either in attitude or in the structure of society of which acts of discrimination are merely the overt symbol.' Kelsey (1975), 73.

complaints received by the Commissioner for Community Relations in the first 7 years of operation of the RDA was 'impressive' it 'cannot be treated as a true indicator of the extent of racial discrimination in Australia.'[606] He suggested that the complaints lodged represented 'probably no more than the tip of the proverbial iceberg' in terms of actual experiences of discrimination. Trlin cites a number of barriers deterring lodgment of complaints, as follows:

a) the 'ability of individuals to recognise an act of racial discrimination against them, and their awareness that such an act is unlawful';
b) the 'willingness of individuals to consciously tolerate discriminatory practices inflicted on them or, conversely, their willingness and ability to pursue the matter via the appropriate channels';
c) an aggrieved person's 'awareness of the existence of the Office of the Commissioner and individual ability to either establish contact with or gain access to it';
d) the 'presence or absence in any local community of informed persons' to encourage or assist with lodgment of a complaint; and
e) the 'potential complainant's confidence in the efficacy' of the RDA.

These issues appear largely to pertain to 'justice-seekers'. Trlin suggested, however, that they may be best addressed through reform of legislative provisions mandating that individuals enforce their rights. As nothing has changed in this regard the issues listed are still applicable, including or perhaps especially for Aboriginal and Torres Strait Islander peoples.

As discussed previously, Indigenous people experience discrimination and barriers to accessing justice differently to other groups. One example arising in the present context is that assertion of individual rights may be culturally inappropriate. As one participant in Cairns states, they can complain 'as a collective, but not on their own' (CM4).

[606] Trlin (1984), 250-1.

> 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]

Indigenous participants also identified it as an injustice that when criminal laws are breached there are penalties imposed by the State, which Indigenous people feel the full and disproportionate brunt of, and yet they are also primarily responsible for enforcing legislation designed to protect them as victims of discrimination. Some participants called for the same level of intervention the State uses against Indigenous offenders to be used against non-Indigenous perpetrators of discrimination, including imposition of harsh penalties (extending to incarceration).[607]

> It's hard because *you* have to make the complaint. There's a law to say you can't steal a car, but if you do you get charged and get in trouble. You have laws to say you can't discriminate but people do it all the time and nothing happens …. The police do something if a car is stolen. There's no need to fight for action. But if discrimination happens to us, we have to stand up. MF1

> What are the consequences for someone … found guilty of racial discrimination? Aboriginal people associate prison as a consequence of breaking the law …. because that's what's happened to them. Stealing from a shop — you go to jail … What happens to the perpetrator [of discrimination]? … I don't know that the law is effective because I don't see anyone going to jail for it. It's a very serious thing — that constant oppression can result in someone suiciding but there's no consequence. CM4

In general terms, expecting aggrieved individuals to lodge a complaint acts as a deterrent to legal action, as those likely to be impacted by discrimination are also likely to be comparatively marginalised. Given 'the burdens on the individual, asking someone to advocate for themselves — it's a really complex area

[607] Perkins too wanted criminal rather than civil sanctions imposed on perpetrators, noted in Chapter 4.

of law. It's not realistic to ask that of people'. 'They might think 'that's not for me, I'll go to the media [instead] because those options don't meet my needs' (S5 [NI]).

Given the levels of social exclusion they face Indigenous people may have greater difficulty than others in asserting their right to non-discrimination, including at the point of entry into the complaints process. Nielsen points out that the formal equality of anti-discrimination legislation gives the appearance that Aboriginal people are 'equally entitled to pursue their complaints' of discrimination. However, they are largely excluded, in reality, and otherwise unable to draw benefit from the complaints process because they must be 'sufficiently informed, motivated', 'empowered' and 'resourced' to use its complex legal machinery'.[608] This is not the case for most Aboriginal and Torres Strait Islander peoples.

The next section considers barriers identified by Trlin, but with a focus on their application to Aboriginal and Torres Strait Islander peoples.

1.2 Knowing about the law

Requiring an individual to come forward with a complaint is problematic in an Indigenous context due to the limited knowledge of discrimination law in Indigenous communities. Almost all Indigenous interviewees stressed that not knowing about discrimination law is the greatest hurdle to effective Indigenous access to justice in this area.[609] 'The highest barrier is that people don't know about it. I don't think *anybody* knows about this. I myself didn't know' (MF4). 'Not knowing about the law is the biggest barrier'. 'I'm upset with NITV (National Indigenous Television). They should say more about black people's issues. We don't want to hear singing!' (CM5).

Aboriginal and Torres Strait Islander people may have little difficulty in identifying that they've been discriminated against, as discussed in Chapter 5. They most commonly identify this as occurring,

[608] Bertone, S and Leahy, M (2003), 'Multiculturalism as a conservative ideology: Impacts on workforce diversity', 41(1) *Asia Pacific Journal of Human Resources*, 101, 113, quoted in Nielsen (2008), 7.

[609] See also Allison (2013a), Allison (2014b).

however, as instances of interpersonal, direct discrimination, impacting upon them as individuals.[610] Participants confirmed that most Indigenous people will see the law as providing redress only in this type of situation, inhibiting use of provisions with potential to deliver more substantive change, including indirect discrimination provisions.

> If someone says 'I can't report my income to Centrelink' [because of the way the system is set up], it's not necessarily going to look like discrimination. It's asking too much to expect the individual to make that connection as well. I think there is a poor understanding of indirect discrimination … When people hear 'discrimination', they think of one-off incidents, or racial slurs, or the taxi cab not picking me up. Discrimination law is seen as designed to compensate for individual harm as the result of discriminatory conduct. Indirect discrimination is not so widely understood, which is a shame because I think that claims of indirect discrimination have more capacity to benefit a wider group. [Participant cites the example of payday lending with its high rates of interest and its deliberate targeting of and impacts on Indigenous communities]. Arguably, that's direct discrimination too, but you could argue it's about a practice that's impacting disproportionately on a particular group because of their race. So, there is definitely capacity for discrimination law to have some systemic outcomes but it could be better designed for that. S5 [NI]

There is also limited awareness of a legal right to complain and of the complaints process.[611] As a result, Aboriginal and Torres Strait Islander people will rarely identify discrimination as a legal issue with a potential legal remedy, even in its most obvious forms.[612] As an Indigenous participant in Melbourne claims, 'potentially maybe only 5% would know about these laws to use them. Or it may be something

[610] Similar limitations in knowledge and understanding are evident within the Freedom Ride survey responses and in the ILNP research, discussed previously.

[611] Allison (2013a), 8.

[612] During thesis interviews participants stated that whilst there is some familiarity with criminal law, native title and certain types of civil law (identified by participants as 'family or financial law') there is almost nothing known about discrimination law.

they know exists but they don't know *how* to use them' (MF3). This helps to explain, in part, the low levels of both Indigenous enquiry and complaint.[613]

Limitations in knowledge are at times exacerbated for Indigenous people due to difficulties they have in accessing information about the law through legal and other advocacy services and anti-discrimination agencies. This is discussed further below, but relevant factors include geography, distrust and/or under-resourcing of these services and bodies. Some Indigenous participants suggest that Aboriginal and Torres Strait Islanders are also deliberately kept in the dark about their rights. 'It's one thing a white man doesn't like, an educated black man. They don't want the black man knowing their right'. 'When you talk about discrimination we haven't been taught the laws because they don't want us to be educated' (BM1). Others attribute lack of knowledge in this area to Indigenous people having to prioritise 'survival'. This and perceptions of 'trickery' associated with the anti-discrimination legal regime are attributable to Indigenous experiences of oppression, including colonisation.[614]

> We had a Constitutional Reform event with local Elders recently. Someone asked 'Where can I buy a copy of the Constitution'? She thought it came in a book form from ABC bookshop. Somebody said, just Google it. Then this lady said 'Well I don't even use the Internet'. A lot of our people, they don't have computers, especially older people. We're so far behind. We're still trying to survive. We haven't even put our hands on a keyboard ... I've looked at the Anti-Discrimination Act. It's hard. We need a workshop on discrimination. Bring the Act, show

[613] This is perhaps also why some Indigenous enquiries do not proceed to complaints — if Indigenous people, due to limited knowledge, are bringing matters to agencies which are outside of jurisdiction.

[614] Watson states that the 'preoccupation for many Nungas has become survival — against oppression, depression and death. The overall quality of life has deteriorated due to the pre-occupation with life and death issues. The right to life is at stake', Watson (1996), 111. Quoting Foucault, Bird also states that in the context of accessing justice 'knowledge is power'. Socially excluded groups will be 'empowered by an understanding of their rights', including those associated with discrimination law. However, knowledge is not 'available equally to all citizens'. Power is inevitably 'unevenly distributed' — both that which comes from knowledge of rights and through exercising of those rights. Bird (1995), 290.

them how big it is, and point out the sections of the Act that pertain to us. And then go from there. CF1

1.2.1 Confidentiality and its impact on knowledge of rights

An additional process-related point identified as impacting on Indigenous people, including on their awareness of rights, is that conciliation is traditionally conducted in private. Conciliation outcomes are also confidential in nature.[615] There are a number of reasons why this is the case. Confidentiality is seen, for instance, as likely to encourage 'open exploration and efficient resolution of disputes.'[616] Without confidentiality, it is thought, respondents may be reluctant to participate in dispute resolution and/or complainants to lodge complaints.[617]

Confidentiality may well be preferred by Indigenous complainants fearful of possible repercussions associated with lodgement of a complaint, discussed further below. Some Indigenous participants, in fact, asked for higher levels of confidentiality, suggesting that the law ought to allow for anonymous complaints or more class actions in which they are part of a larger group of aggrieved complainants. 'You also have to ID yourself in Victoria. Perhaps it would be good if an advocate or VALS could lodge a complaint on your behalf, or there could be a class action' (S1 [I]).

As discussed in Chapter 6, however, a key function of anti-discrimination law and the agencies tasked to administer this law is educative. Confidentiality inhibits capacity to educate both potential

[615] As discussed in Chapter 6, these outcomes often include a 'private apology', 'private agreement', 'respondent's explanation satisfactory to complainant' or similar. Note that confidentiality may extend to restrictions on admissibility of information and discussions surrounding conciliation in a court or tribunal if a matter goes to hearing. See, for example, s. 94(2) ADA (NSW)).

[616] Raymond, T (2005), 'Alternative Dispute Resolution: an effective tool for addressing racial discrimination?' in AHRC (2015b), 168, 172.

[617] Chapman, A (2000), 'Discrimination Complaint Handling in NSW: The Paradox of Informal Dispute Resolution', 22(3) *Sydney Law Review* 328.

perpetrators of discrimination and their targets about relevant rights and responsibilities.[618] Speaking from an Aboriginal perspective, Solonec is critical of this approach.

> [The] complainant is sworn to secrecy about the settlement received. While this may effectively conciliate that particular case, it does nothing to prevent or eliminate the same thing happening to others. This appears to contradict the (WA) EOA's object of promoting 'recognition and acceptance within the community of the equality of persons of all races.'[619]

Participants also identified that the more the law is seen by Indigenous communities as working to combat discrimination, the more inclined Indigenous people will be to use it. 'You hear all these big things - racism, discrimination, enforce your rights, these are your rights. But if you don't see it in practice people don't know how to go about it' (MF5).[620]

1.3 The prevalence of discrimination

We return to Gaze's comment above: that 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.' As seen in Chapter 5, discrimination occurs in all areas of contemporary Indigenous daily life. It is both direct and more systemic in nature. It also has a long-standing connection with and has manifested as colonisation. The higher the degree of discrimination a group experiences, the more

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[618] Raymond points out that, dependent on the jurisdiction in question, there may be no legislative requirement for confidentiality. Then it is up to the parties as to whether a matter is confidential. She claims that regardless of confidentiality, what happens at conciliation *can* lead to more substantive reform, as the 'subject matter of complaints and complaint trends over time' inform the 'separate educative and strategic advocacy work of' bodies such as the AHRC. 'It is important to also acknowledge', she claims, 'that even where a complaint is resolved purely on the basis of a confidential individual remedy, the issues raised by the dispute may trigger broader system analysis and intervention to prevent recurrence of the problem that is not directly observable or articulated.' Similar points are made below about neutrality. Raymond (2015), 170.

[619] Solonec, T (2000), 'Racial Discrimination in the Private Rental Market: Overcoming Stereotypes and Breaking the Cycle of Housing Despair in Western Australia', 5(2) *Indigenous Law Bulletin* 4.

[620] It was suggested by some participants that at the very least there should be greater discretion to publish more detail about conciliated matters, particularly if in the public interest. There is some publication of de-identified complaints outcomes, for instance, in the AHRC Complaints Register (discussed in a previous footnote).

difficult it may be to challenge. In Indigenous communities there appears, for instance, to be a certain level of immunity to or resignation towards race discrimination because of its prevalence — on the surface at least, and most likely as a coping mechanism. That it is such a significant problem also leaves Indigenous people feeling that a complaint would achieve very little. There is a sense that this is how it's always been and always will be. '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). 'A lot of Aboriginal and Torres Strait Islander people will be like — water off a duck's back. It happens so often. You almost become immune to it'. 'I can't change this whole system, it's bigger than me. Nothing's going to happen' (S6 [I]).

> In the heat of the moment it is really appealing because you're angry. Yes, I'm going to take this further. And then when you calm down there's this realisation that nothing's going to change. People are always going to be like this. It's like, why would I bother? You have to have a really thick skin to take it all the way and if you do you've got to prepare for the worst, you might not get what you want out of it. MF5

Additionally, one participant asks, which particular issue (of many) do you select for the basis of a complaint? 'The law requires an individual to identify some impugned conduct. When they're facing discrimination from a variety of sources' and in 'multiple areas of life, choosing which battle to pick can be quite difficult and quite an arbitrary exercise' (S5 [NI]).

A point related to this last comment and raised above is that taking steps to challenge discrimination is less of a priority than 'survival'. Significant levels of social exclusion within Indigenous communities gives rise to a multitude of social and legal issues (such as homelessness, poverty and criminalisation). Responding to these issues is likely to take precedence over lodgement of a complaint about discrimination, other than when the incident in question has an especially debilitating or immediate impact. 'Personal capacity is also an issue. You've got maybe community corrections orders, drug and alcohol issues, housing and child protection issues [to cope with]. It's a lot to be dealing with on an emotional level' (S2 [NI]).

> I think one of the barriers would be — do I have it in me to take it further? 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. MF5

> I probably would [complain if it] was in the workplace, somewhere where I am every day and I want something done. Even like my local Coles or shops, because I have to go there every day. If it's a random person, I'd probably take it on the shoulder. Which I know is not really addressing it. MF4

1.4 Dispossession of colonisation, including through the law

Colonisation has given rise to particular Indigenous experiences of racism, as we have seen: including denial of history, land, self-determination and culture. It has also affected Indigenous access to justice in specific ways. Similar to comments made in Chapter 6 concerning more effective non-legal challenges to race discrimination, Indigenous participants describe reduced capacity to assert one's rights through race discrimination law due to the disempowerment that has occurred through colonisation. A female participant in Shepparton describes this as follows: 'We're a humble race and very submissive because of what's been done to us' (SF1). Another participant stated as follows.

> 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

Despite a shared history of oppression, some Indigenous participants are more comfortable than others with confronting discrimination. As stated, barriers may affect individuals differently based on factors that include personal resilience and/or history.

> Depending on you as a person — are you a confrontational person who will call someone out? Hey, that's racist! I'm not really a confrontational person. I'm more of a — oh I guess I'm not

> going to talk to that person again. I'd rather avoid them than having to listen to them spew that kind of garbage. MF3

As discussed, critical race theorists argue that the law will never be useful to racial minorities as it only ever reinforces racial hierarchies of power. This makes some sense in an Indigenous context too. A significant point (and one raised by Indigenous activists at the time of enactment of race discrimination law), legal processes have more commonly been used as a weapon of subjugation against Aboriginal and Torres Strait Islander peoples than as protection against harm (even where they claim to be doing the latter). Stolen Generations policy and associated law, the NTER and interpretation of special measures within policy and legal settings (discussed in Chapter 3) are all instances of the latter. The law has, in fact, been framed and applied so as to protect *non*-Indigenous people from sanctions that might arise from injustices committed against Indigenous people, with the legal concept of Terra Nullius one example of this and the following comment touching upon another.

> I think there's a law that stops them now, but back in the day when they were first arriving [in Australia] they were pretty much making the law and justice system. They were raping and killing people. … [T]hey did it so they could discover Australia. They've got a law today, it's called murder … [but] no one's accountable for what happened back then. And it wasn't just one or two murders, it was … massacres here, massacres there. BM5

In the post-civil rights period, the most common Aboriginal and Torres Strait Islander experience of the law identified in interviews was of action brought *against* them as 'wrong-doers' in criminal proceedings, and also to a lesser extent as parents whose children are at risk of being removed. Participants pointed to Indigenous overrepresentation in both the child protection and justice systems as evidence that there is no 'justice' in the legal system for Indigenous people. This perception gives rise to significant barriers to entering and engaging with the anti-discrimination complaints system. As a female participant in Cairns suggests, 'you have to re-educate people about these [anti-discrimination] laws', because 'law' is always associated with punishment by Indigenous people rather than 'justice' (CF1). This is borne out in the following comments.

> It's up to the individual [which way to deal with it]. There are some that would use the law, but I've dealt with the law a lot. 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. BM5

> The numbers of Aboriginal people in prisons and youth detention centres demonstrates there is an issue regarding the relevance of 'White Man's Law' for Aboriginal people … The law is never used in favour of us, it's always used against us. We don't even have laws that protect our children. You have the Child Protection Act, but in there littered through are provisions that still take our children away. In a nutshell, it's about the relationship between Aboriginal people and the law and authority. You can go there fighting for something you know is just and right and walk out of there feeling like you're the one that's done wrong CM4.

Also resulting from contact with these systems, Indigenous participants felt that the legal system will never be able to distinguish between Indigenous people as victim and offender: evidenced, for instance, as under-policing of Indigenous victimisation, discussed in Chapter 5, but also in criminal charges potentially laid against them when they react angrily to a racist incident, discussed in Chapter 6. This is illustrated by a comment by male participant in Brisbane, who identified as a barrier to access having 'no faith in the law. The courts will look at the criminal record of an Aboriginal person if they put in a complaint about discrimination' (BM3).

Indigenous people often see themselves (and are commonly seen within the legal system too) as passive recipients of punitive intervention rather than individuals with agency, able to assert their civil law rights. Civil law processes, in general, are quite different to criminal law. Persons must deliberately engage with them in order to access remedies and to enforce their rights.

> Discrimination is a matter that requires proactive steps. You have to identify that you have a discrimination problem, find a way to access legal advice, etcetera. But with criminal law you get a summons to attend court, there's more serious consequences if you don't comply. If you don't pursue your discrimination claim, nobody's going to care. S5 [NI]

Indigenous participants reported various pointless or negative instances in which they'd tried to assert their rights through the law and through other formal systems of complaint. Problems of access to justice are not exclusive to the area of discrimination, a point returned to in Chapter 8. Past negative civil justice experiences in general are likely to act as a deterrent to raising future complaints of discrimination.[621]

Significantly, there is particular lack of faith in attaining 'justice' when rights are breached by agents of the law or within the legal system itself — including as police harassment or violence. A major issue in the latter context is perceived and/or actual lack of independence of the complaint handling systems in question.[622]

> Every court, every tribunal, every administrative body …. Every now and then you might get a rare win, but that's always outweighed by the negative experiences. They're losing kids because they don't know how to engage with the system, child protection, youth justice, housing, education … Even the complaints mechanisms within each of those, they just wouldn't bother .... It's just — 'I won't go back'. Just like if you go to a GP and he's not good, you wouldn't go back. S8 [NI]

[621] Previous attempts to assert rights without success are identified as a barrier to accessing anti-discrimination processes for Aboriginal women. McCaskill, H and Molone, P (1994), *A Consultation Project with Aboriginal and* Torres *Strait Islander Women*, Sydney NSW, 54, cited in Goodstone and Ranald (2001), 54. These commentators similarly note that problems of access to services are not limited to bodies such as the ADB (NSW) or AHRC. Indigenous people may previously have tried to use complaint mechanisms attached to other government agencies but got nowhere. Ibid. Sandefur suggests too that it is not just lack of knowledge of the law that inhibits access, but also past negative experiences of it. She states that being familiar with the legal system can lead to inaction rather than assertion of legal rights. Sandefur, R, 'The importance of doing nothing: Everyday problems and responses of inaction' in Pleasence, P, Buck, A and Balmer, N (eds) (2007), *Transforming lives: law and social process*, London, HMSO.

[622] See discussion of Indigenous complaints about police in Victoria, for instance. VicPol Ethical Standards Unit and Department of Justice, Indigenous Issues Unit (2008), *Koori Complaints Project: An Initiative of the Victorian Aboriginal Justice Agreement*, 2006-2008, Victoria and Police Accountability Project (2017), *Independent Investigation of Complaints Against Police*, Policy Briefing Paper, Melbourne Victoria.

> There's no change ... I won't let people talk down to me. I won't bother with people who have no respect for me. But the dealings I've had with the hospital … I was in hospital. I can't take pethidine unless I take another medication or I get violently ill. I was very, very ill, really ill. I told [the nurse], I can't have that injection without that tablet. She took it upon herself just to jab me in the leg and leave me violently sick all night. She didn't want to hear me. I reported her. I've made a complaint. And she's still working there. You're damned if you do and you're damned if you don't. SF1

> All the fighting black fellas been doing in court, the outcome doesn't go anywhere. I think, you know, why would we want to fight it for? We're not going to get anywhere. There'd be no point in it from an Indigenous perspective ... One of my cousins in Mt Isa got bashed by police and went through court and everything and there was no outcome from it, you know. That's why none of them don't bother. They've failed before they even start. BM5

Defending one's rights is seen as having the potential to cause *additional* harm; manifesting for interview participants as not being believed or responded to appropriately, as further victimisation, and/or as violence, for instance. 'I can't do nothing about' my rights around police. 'If I do anything about it I get arrested, on the spot. I'm not allowed to have my rights as a man, as a human being, full stop. They take away my dignity, my respect' (BM1).

> I think that the system sometimes has you worn down. I know women, friends who've been sexually assaulted, raped, bashed by coppers. Most become complacent. Because it's all the time. 'Oh, they're not going to do anything about it, they're not going to believe me.' They'd rather just be angry. MF2

As one participant stated '[t]here's real distrust that you'll be believed. This is not just for race discrimination, any situation where you've been a victim. No one will believe what you say happened actually happened' (S7 [I]). The belief that complaining is useless and that accounts will not be responded to appropriately is likely to exacerbate problems related to proof, discussed previously and in further detail below. Knowing that you bear responsibility to prove allegations raised may be

especially difficult for and deter complaints from Aboriginal and Torres Strait Islander peoples, in particular, given their significant lack of faith in the legal system.

Distrust in this context extends to all law, policy and institutions connected with mainstream government, including those related or connected with anti-discrimination — and again, this is linked to past racial oppression. As one participant in Cairns states, why use race discrimination legislation? That's like '(r)elying on the people who caused the problems to fix them for us' (CM4). A further comment is as follows. 'They don't trust government institutions, as having worked in a counter-productive way to Aboriginal rights and equality. These laws and processes are established under a system that stole the land, genocided their culture and their people. It's a prevalent view' (S2 [NI]).

Given the punitive and disempowering nature of past and present interactions between government agencies and Indigenous communities, there is likely to be a high level of suspicion where any organisation is branded as 'government'. Agencies tasked with administering anti-discrimination law are often seen as a government agency from which Aboriginal and Torres Strait Islanders might expect very little — particularly where they need to complain about 'another' government institution (such as public housing or police).[623] This helps to explain a belief shared by most Indigenous interview participants that an Indigenous complaint of discrimination will go nowhere, making it difficult to initiate *and* to see a matter through to the end, discussed later in this chapter. 'Aboriginal people don't take it to that level with a complaint and rarely follow through with it because they think they're going to be thrown into the deep end, and it will just get swept under the rug anyway, it won't get solved. This is about lack of trust' (BM4). 'I probably wouldn't use the law. I don't see any good coming of it. You make a complaint and nothing gets done. They push your complaint to the side'. 'They say they're doing something, but nothing gets done' (MF1)

[623] And yet, as noted above, given that government is such a frequent and long-standing oppressor of Indigenous people it *needs* to be held accountable in terms of its treatment of and interactions with Indigenous communities, as discussed in Chapter 5. See also discussion in Allison et al (2017).

It also explains why non-legal responses, including those identified by Indigenous people in Chapter 6, may be seen as more effective than or otherwise preferable to legal responses. Direct collective action, for instance, can be wholly developed and led by Aboriginal and Torres Strait Islander people. As one Indigenous participant suggested, Indigenous people may prefer to confront racism head-on (referred to in the following comment as a 'Malcolm X' style approach). Conversely (and reminiscent of the divergence of opinion on this point amongst Indigenous activists in the mid-20th century), reliance on legal or other mainstream systems (referred to as a 'Martin Luther King' style approach) may be seen as, at best, a waste of time. To identify legal action as valuable, you have to have 'faith' that it will deliver justice - unlikely for many Indigenous people. The participant quoted here is an Indigenous solicitor and perhaps for this reason felt that the legal system should be (and *was*) capable of providing Indigenous people with effective means to challenge their oppression.

> When you look at two different approaches — at the peaceful approach, a gentle approach, a Martin Luther King approach, or a Malcolm X approach — I know that my friends take a more Malcolm X approach. For us to be gentle and fight without violence we'd have to have faith in the conscience of our oppressor and we for sure don't. We don't do anything about it [through law] because we don't have faith … that [the] system [will] enforce our rights or [will] even listen. Because I'm a solicitor, you can be damned sure I'm going to … put the fight up every day. I do it, but I'm sure most of my friends don't … I've thought about this so much because it bothers me we're still talking about the same stuff. MF2

1.5 Fear, anger and other emotions

Indigenous participants suggested that initiating a discrimination complaint is likely to stir up difficult emotions such as shame, fear and anger. Anger was discussed in Chapter 6 as leading to less than constructive non-legal Indigenous responses to discrimination, including violent retaliation. Just as these emotions may impact on non-legal responses, they can also deter Indigenous people from lodging a complaint and/or might impact on their engagement with the dispute resolution process once a complaint is lodged, discussed further below. '[E]specially when you know that person has been racist

to you, you've got to face them.' 'It might make things worse. You might feel shame or be uncomfortable talking about it' (BM2).

> Stepping out of your way, going to this organisation and people you don't know, you might not be comfortable with — and retelling the story of your trauma, that's a big step. Some people don't want to relive it, some people just experience it as they have 100 times, they see it, they forget about it. Maybe it's not actually forgotten. It's there as trauma, it's not dealt with properly. This is why it leads to mental health issues. S1[I]

As this comment suggests, emotions impacting on access to justice in this area might well be the result of previous experiences of discrimination. Whilst all complainants may grapple with these feelings, for Indigenous people they are at times specifically connected with processes of colonisation.

> 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. That Stolen Generations, there's brothers and sisters that haven't seen each other for 30 or 40 years. I guess a lot of those Murris 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? BM5

There is also for some Indigenous people a very genuine fear of retaliation, again potentially impacting on a decision as to whether and how to respond to discrimination. The use of racist violence or violence in retaliation to assertion of rights by Indigenous people is seen as a real possibility, as the following comments suggest.[624] 'The person might want to go to court or they might just want to vent. They might feel 'No, I don't want to [challenge it legally]. I don't feel safe. I'm worried they're going to kill me or hurt me. I don't want to be in the same room as them' (S8 [I]). 'They're probably also scared, because

[624] Racist violence against Aboriginal and Torres Strait Islanders *is* still a real possibility. It was highlighted as relatively common in the *Reconciliation Barometer* data for 2016 and in the Vic Health study (see Chapter 5), for instance. ILNP participants also spoke of Klu Klux Klan-type activity in their communities. See Schwartz et al (2013), 103. See also HREOC (1991) and Goodstone and Ranald (2001), 15.

it could be about someone high in the community they don't want to take on, or police', 'scared for their families, scared for what will happen to them' (MF4). 'Some people won't and it's not that it makes racism okay, but for fear of retaliation or it becoming blown out — if it's not dealt with properly the racist barrage will keep coming and it will get more volatile. This is their fear' (CM4).

Some stakeholder organisations understood community members' fears, particularly where allegations concerned a government agency: a reflection of the historical and ongoing disempowerment of Indigenous people in their relationship with government.

> That's really hard because my fear is that if they call their Child Protection worker racist they get tarred as a difficult client, an abusive client. The word racist is equivalent to calling them an asshole. It's so hard. How can they call it out but continue to use that service and be protected, if they need to? S3 [NI]

As an example of the way geographical location affects access to justice, it is noted that the smaller the community in which a person lives, the greater the prospect and fear of retaliation (because individuals are more easily identified).

> I went and made a complaint for a client when I was working with (named service) and I spoke to the police complaints section. He said, 'we're not getting complaints from the Aboriginal community. I can't remember the last one we had …. They are being mistreated. Why are they not complaining?' They'll think they're not going to get anywhere. If you're in a regional community they're no doubt shit scared, like in Shepparton or something. S3 [NI]

There are, of course, very real examples of society more generally putting Indigenous people who speak out about discrimination 'back in their place', shouting them down, literally and otherwise. As an example of this, in 2016 Adam Goodes, a star Aboriginal footballer, called out a child spectator who had referred to him during a match in racist terms. He was jeered and booed by spectators at subsequent

games and subjected to other negative personal and professional impacts.[625] This example was commented on by a number of participants. It is indicative of mainstream society's need to control Indigenous people as a threat to mainstream society because of both their claims to land and sovereignty and the connection they represent to injustices associated with invasion and colonisation.

> They're accepted — until they are seen to do something which had anyone else done it they'd never blink an eye. Then they're dropped and never forgiven and their whole career is tarred or marred — no matter how good a sports person they are, like Goodes for example. And then it was like — how could you be Australian of the Year? He called out a girl on racial discrimination. He did the right thing. S6 [I]

> It's not surprising really that discrimination law isn't being used as frequently as it could be, particularly by those facing the worst disadvantage (Indigenous people). It's asking a lot of them and not really promising a lot. There's too many uncertainties. Repercussion is a real problem, and it's worse for Indigenous people. There are so many examples in the media of people challenging racism and vilification, and then being victimised. S5 [NI]

Government has relatively recently pushed for the weakening of the RDA's racial vilification provisions, in part in response to a number of high-profile Indigenous complaints of vilification, including that which culminated in the case of *Eatock v Bolt*, discussed previously.[626] In 2016, the Turnbull government set up the Parliamentary Joint Committee on Human Rights: Freedom of Speech in Australia Inquiry to consider the potential watering down of s. 18C of the RDA. Conservative

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[625] An example of public media commentary on this issue is seen in Flannagan, M, 'The limits of sport's influence', Sydney Morning Herald, 14 October 2016 (accessed July 2018), available at: <https://www.smh.com.au/opinion/the-limits-of-sports-influence-20161014-gs27sb.html>.

[626] A further case involved an Indigenous employee at Queensland University of Technology who lodged a complaint against non-Indigenous students about posts they made online after their ejection from an Indigenous computer lab. *Prior v Queensland University of Technology and Ors* [2016] FCCA 2853. See discussion in Forrester, J, Zimmerman, A and Finlay, L, 'QUT discrimination case exposes Human Rights Commission failings', The Conversation, November 7 2016 (accessed July 2018), available at: <https://theconversation.com/qut-discrimination-case-exposes-human-rights-commission-failings-68235>.

politicians,[627] as well as some of those making submissions to the Inquiry, all dismissed as not 'real,' trivial or somehow indicative of a lack of resilience on the part of those aggrieved any offence or humiliation caused by vilification (as courts and tribunals have done in Indigenous-focused case law, discussed in Chapter 3).[628]

Further illustrating that retaliation is a real possibility, one of the Indigenous complaints triggering this response by Government related to a cartoon by Bill Leak published in *The Australian*. It depicted an Indigenous father who did not know his son's name, a beer can in hand. An Aboriginal woman lodged a complaint to the AHRC about the cartoon but then withdrew it, claiming to have felt threatened during the complaints process by the newspaper.[629] Demonstrating that non-legal responses are also important, an ultimately more effective response to the cartoon, in this instance, was the posting online by Indigenous people of a multitude of positive images of Indigenous fatherhood.[630]

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[627] These include Senators Bernardi and Leyonhjelm. See Bernardi's petition to change the law (accessed July 2018), available at: <https://www.corybernardi.com/18c_petition>.

[628] The Young Liberals (NSW), for instance, took issue in their submission with what they saw as the view of the courts that the standard against which to measure whether offence had been caused was that of the person/group targeted by the alleged vilification. 'This approach is simply untenable in a free society and is manifestly open to abuse. It subjects defendants to a standard which is not necessarily held by the community at large but by an *abnormally sensitive* person or group of people' (emphasis added). Young Liberals (New South Wales Division) (2016), *Submission to the Parliamentary Joint Committee on Human Rights: Freedom of Speech in Australia Inquiry*, 5. In contrast, National Congress described the push for reform as 'picking on the most vulnerable members of society'. National Congress (2016), 6. Moreton Robinson describes the phenomenon evident in the Young Liberal's submission in her discussion of a case involving workplace bullying of an Indigenous nurse by non-Indigenous nurses. She claims that when Indigenous people complain about discrimination they are often labelled troublemakers or as 'too sensitive', an approach 'strategically employed as a race blind technique to mask the racism that underpins it'. Moreton-Robinson (2007), 92.

[629] McCormack, Ange, "I felt degraded, humiliated": meet the woman who took Bill Leak's cartoon to the Human Rights Commission', Australian Broadcasting Corporation, 16 November 2016 (accessed July 2018), available at <http://www.abc.net.au/triplej/programs/hack/why-i-took-bill-leak-cartoon-to-the-human-rightscommission/8030268>.

[630] ABC News, '#Indigenous dads counter Bill Leak cartoon with stories of fatherhood', 6 August 2016 (accessed July 2018), available at: <http://www.abc.net.au/news/2016-08-06/indigenous-dads-counter-bill-leak-cartoon-with-stories/7697668>.

1.6 Problems related to proof

The heavy onus of proof placed on plaintiffs is raised in Chapter 3. It is suggested that it is close to impossible to prove allegations of race discrimination in a court or tribunal setting.

> In most jurisdictions the individual has to prove the elements of their claim. And this can be a challenge because there's often an information vacuum. The person discriminating often has all the information. The person who has been treated poorly has to make out those elements. S5 [NI]

This has a number of impacts on the complaints process for Indigenous people, both in terms of initiation and progression of complaints. Firstly, agencies make decisions during the processing of a complaint based on an assessment of its merit. This may lead to the termination or declining of a relatively 'weak' complaint, for instance. Moreover, perceptions of a complaint's merit may impact on a complainant's decision (and legal advice provided to a complainant) about whether or not to lodge it. As discussed above, though complainants do not have to 'prove' their allegations during ADR as they would in a court or tribunal they must present sufficient evidence to substantiate their complaint to the agency initially (so that it will be accepted) and then to the respondent.

Difficulties in proving allegations may deter Indigenous complainants, in particular, given their especially high level of distrust of all legal or quasi-legal processes, as noted above — especially if the issue at hand involves discrimination that is anything less than overt.[631] 'Usually it's when people are drinking, going out they think maybe their head wasn't right. 'Maybe they'll just blame me, because I was drinking'. It's your word against theirs, so I think that's why people don't complain' (MM1)

> One of my clients told me the school had said her kids had gone 'tribal', a completely inappropriate use of language …. This is a principal of a school, he said they need to be with

[631] The Wirringa Baiya study identified that Indigenous women would not complain about discrimination as they felt that they couldn't prove their case, that respondents would cover up evidence or were 'too clever', and/or that the discrimination in question was too subtle. Goodstone and Ranald (2001), 56.

> other people of their own kind. We just decided to change the kids' school because — it's just pointless. A lot of them avoid, they remove themselves from the situation. It's not winnable. Even if you were to try to fight it they can excuse it away. 'Oh, I would have said tribal for any kid' …. If they're discriminated against in a shop they can say, we follow everybody around. The onus is on you to prove it, it's too hard. S3 [NI]

Indigenous complainants may also (be encouraged to) initiate action in a different area of law so as to not have to deal with this onerous burden of proof.[632] This is probably only problematic if they are not able to attain a good outcome through alternative channels (though it does little to improve Indigenous access to race discrimination legal remedies).

> It might be that they need to make a complaint directly (outside of anti-discrimination law). This can have a good outcome. If it's an issue in a health context, they could go directly to the health service. Or if it's a prison issue they might go to the Ombudsman …. Whilst there might be an element of discrimination it might be difficult to prove. Often in a housing context it's omissions, so people aren't getting back to people as quickly as they should — perhaps because they've categorised them as 'Aboriginal', or as difficult chronic substance abusers. They're put on the bottom of the pile. It's going to be difficult to get a claim up, so the resolution lies more in housing or whatever space it is in. If we had a real estate agent who was evicting an Aboriginal and Torres Strait Islander person for arrears and racially abusing them and you could prove it, you'd definitely [try for a discrimination complaint] …. But we've not come across one yet where it's been that easy to prove. S4 [NI]

Problems associated with evidence and proof may also knock complaints out once lodged. For instance, during settlement negotiations conducted in 'the shadow of the law' complainants may 'have little bargaining power in cases where proving that their treatment was because of race is difficult', Gaze

[632] They might, for instance, tackle employment related discrimination through employment rather than anti-discrimination law.

suggests.[633] One stakeholder participant commented that the anti-discrimination agency in their jurisdiction seemed to take a fairly generous view of evidence required to accept a complaint, however. 'They're really good. They seem keen to assist where they can' (S4 [NI]).[634]

> I usually get employment discrimination matters (for clients), quite obvious ones - and when that happens the other workers won't back up that Aboriginal person because they're worried they're going to lose their job. So, they lose their evidence. X and Y said he's said this, but they're scared to lose their job. S8 [NI]

1.7 Access to complaint agencies and legal services

Along with lack of trust in anti-discrimination agencies, there is also very limited knowledge in Indigenous communities of what these agencies do, or even that they exist. As one participant stated: 'I wish there was' a place 'apart from family. Like a place where you can say — I got discriminated against on the street. I don't know any place to go to for that. I wouldn't know where to go' (BM4). This problem is partly attributed to geography. Though there are exceptions, including in QLD (ADCQ offices are located regionally in, for instance, Cairns, Rockhampton and Townsville), agencies are generally situated in city centres - metaphorically and otherwise a 'world away from the lives' of those that might approach them for assistance with better access.[635] Agencies are not likely to have a significant profile in, and do not often conduct outreach to (although they do conciliate in) regional and remote parts of Australia. Their under-resourcing makes it difficult for them to lift their profile or otherwise engage with many communities.[636]

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[633] Gaze (2015), 79.

[634] Perhaps what has also happened in these cases, however, is that legal advice has separated out those cases that have some merit (and are worth lodging as a formal complaint) and those that are more problematic in this regard.

[635] Bird (1995), 289.

[636] See, for instance, Allison (2012), 103.

This may have particular impacts on Indigenous people. Most Aboriginal and Torres Strait Islander people live in non-remote areas but more Indigenous than non-Indigenous people live remotely.[637] Moreover, whilst all persons located outside centres may find it difficult to engage with the complaints process Indigenous people also generally have proportionally less access to technology likely to alleviate problems associated with distance (phones, internet).[638] As a result, participants suggested that there may be much less awareness of and access to discrimination-related rights and remedies the further outside of a city centre you live.

> Maybe people that are more suburban would use [the complaints mechanism] — like the Aboriginal middle class. But in communities where discrimination might be more common — I don't think so, given that out there a lot of people have trouble even getting to court dates (for criminal matters). Methods of communication are difficult. They don't have phones and all that. MF3

> I think in remote areas a lot of Indigenous people would have similar experiences [of discrimination] … Probably why [anti-discrimination law is not] reaching so much out to remote communities, the people there are not trained to recognise discrimination … There's not enough education to empower people to stand up on remote communities. They don't realise that even though they're remote, there is help. CM1

Access to legal services is also compromised. Legal services can provide information about the law and the complaints process. They may offer support and advocacy once a complaint is lodged — effectively 'walking beside' complainants through the latter process. They are, in fact, a crucial component of effective access to justice. And yet, Indigenous people are not accessing to any great extent legal assistance and advice for discrimination before or during the complaints process.

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[637] Most Indigenous Australians live in non-remote areas (79%, in 2011) rather than remote areas (21%). By comparison, however, 98% of non-Indigenous Australians live in non-remote areas and 2% in remote areas. Australian Institute of Health and Welfare (2015), *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples 2015*, Cat No. IHW 147, Canberra.

[638] Goodstone and Ranald (2001), 15.

ILNP data cited in Chapter 2 on levels of Indigenous access to legal and other help for discrimination issues is relevant in this context. The thesis also sought data from complaint handling agencies measuring the extent to which Indigenous complainants were represented during the complaints process, again for 2010-2013 (Table 6: Appendix D). In all jurisdictions for which data was provided (sometimes substantially) less than half of the complainants were assisted by an advocate. Only 27 (out of a total of 137) Indigenous complaints in QLD had the benefit of representation (20%), for instance. Demonstrating the importance of advocacy, 110 matters lodged by Aboriginal and Torres Strait Islander people in QLD did not involve representation and 56 of these matters were 'not accepted' by the ADCQ.[639] Of 48 matters in Victoria only three were accompanied by advocacy (6%).[640]

To some extent advocates and lawyers have been written out of the complaints process at both ADR and court/tribunal levels. At an ADR level, complainants may be encouraged to draft their own complaints[641] and to proceed without legal representation.[642] Whilst this is perhaps intended to render processes 'easy to access' and 'relatively free of technicalities and legal forms' Indigenous people are very likely to benefit from better access to advice, support and information in this area, including so as to address their relatively disempowered position. [643]

Limited representation may also be partly attributed, however, to problematic access to lawyers. As is the case with complaint handling agencies there is little awareness within Indigenous communities of who to approach for legal help with discrimination. There is also lack of availability of (free or subsidised) *specialised* legal advice about and assistance for discrimination matters for Aboriginal and Torres Strait Islander people. Indigenous Family Violence Prevention Legal Services address legal need

[639] Of these advocates 12 were from private firms, 13 were from ATSILS and 2 were from Legal Aid.

[640] No data on representation was provided by the AHRC, the third focus jurisdiction. Chapman also identifies complainants as largely under-represented, particularly when compared to respondents. Chapman (2000), 345-6.

[641] For example, see s. 46P, AHRCA and s. 88(1)(a) ADA (NSW).

[642] They may be required to seek leave to have representation. See, for instance, s. 46PK(4) HREOCA, s. 93 ADA (NSW) and s. 163 ADA (QLD).

[643] Plevitz de, L (2003), 'The Briginshaw Standard of Proof in Anti-Discrimination Law: 'Pointing with a Wavering Finger'', 27(2) *Melbourne University Law Review* 309, 332.

related to family and domestic violence and whilst there is variation across different jurisdictions and services, ATSILS have always had a predominant focus on criminal justice issues. This focus on criminal law is largely due to high rates of Indigenous over-representation in the criminal justice system and because responses to criminal law issues have a level of urgency, given the risk of incarceration and other serious penalty. ATSILS are already vastly under-resourced to undertake criminal law work, so trying to also meet civil and family law need in Indigenous communities is extremely difficult.[644] As one VALS' Customer Service Officer stated 'VALS' workers are not educated enough [about discrimination law] to give advice. And sometimes I don't want to know' about these issues 'because I'm overworked as it is. Resources are such a big problem. With more resources we could do a lot more' (MM1). Where Indigenous legal services do assist with discrimination matters, Indigenous community members may also not know this. They may commonly associate such services with criminal law only, given that this is the type of issue they are most likely to come into contact with lawyers about. [645]

Whilst ATSILS are the primary provider of culturally safe legal services to Indigenous people other legal services, including Community Legal Centres (CLCs) or Legal Aid Commissions, may take on discrimination matters. However, the extent to which Aboriginal and Torres Strait Islander peoples are accessing such services appears to be relatively low, in general, including due to cultural barriers associated with non-Indigenous service provision.[646] Moreover, underfunding impacts on *all* legal services, whether Indigenous or otherwise.[647] As one participant states: 'Services are limited, they're underfunded. Funding is patchy and not sustained. The CLC sector has had cuts, which means the vulnerable members of society suffer' (S2 [NI]). Funding issues are an example of an economic (and in some respects a political) barrier that inhibits access to justice and that cannot be addressed from within the legal system. Furthermore, whilst legal services have a comparatively larger geographic presence than complaint agencies distance is still a factor that inhibits access to legal help where people

[644] Schwartz, M and Cunneen, C (2009), 'Working Cheaper, Working Harder: Inequity in Funding for Aboriginal and Torres Strait Islander Legal Services', 7(10) *Indigenous Law Bulletin*.

[645] See, for instance, Allison et al (2012), 126.

[646] See, for instance, Schwartz et al (2013), 215.

[647] See, for instance, Allison et al (2012), 147ff.

are living outside centres.[648] Lack of specialisation in the area of race discrimination, referred to above, is also an issue. If a lawyer determines a case has no merit without relevant expertise an individual may be deterred from lodging a complaint — not a bad thing if the legal advice in question is sound, more problematic if it is not.[649]

2 Effectiveness of processes of dispute resolution after lodgement

An Indigenous participant in Melbourne who had never formally complained about discrimination, despite experiencing it multiple times, stated that once you know you can make a complaint 'having to decide whether it's worth it is the [next] big question' (MF5). What happens within the complaints process once Indigenous complaints are lodged? Does the process work sufficiently well to warrant lodgement? The following section considers these questions in the context of two access to justice issues discussed in Chapter 3: the inherent limitations of the law, including to deliver substantive outcomes, and institutional racism.

2.1 Looking critically at ADR processes

It has been suggested, including at around the time of enactment of the RDA by both government and some Indigenous activists (detailed in Chapter 4), that conciliation is an effective and appropriate tool for Indigenous people seeking to resolve race discrimination related disputes — or that it is at least a better option than litigation.[650] This view is based, to a degree, on generic positives associated with

[648] See Allison (2014a).

[649] The ILNP found that in some cases lawyers have limited knowledge of this area of law, incorrectly identifying provisions as more limited than they actually are (under-estimating the protection offered against indirect discrimination, for instance). By telling potential complainants that they did not have a case they deterred them from taking legal action that might well have been successful. Schwartz et al (2013), 107.

[650] Whitlam, for instance, was keen to highlight that the Act would introduce 'conciliation procedures to promote understanding and co-operation between aborigines (sic) and other Australians'. Whitlam, G (1972), 30-31. During Parliamentary debates Senator Chaney also suggested that conciliation under the RDA would be important to Indigenous people, as approaching courts would be very difficult for them. With their limited conceptual understanding and imperfect control of the English language, to 'put those people into a legal battle is to do them very little good'. Commonwealth, *Parliamentary Debates*, Senate 22 May 1975, 2 (Chaney).

conciliation and ADR. ADR is seen, for instance, as more accessible than litigation because it is cost-free, relatively quick and offers the 'possibility of more flexible outcomes'.[651] It has also been referred to as 'empowering and relationship enhancing' and its lack of legal formality as 'of particular value in dealing with claims of less overt discrimination' by Raymond.[652] She claims that allegations involving less blatant discrimination, though probably 'the more likely form of discrimination in society today', can be 'very difficult to prove in judicial proceedings'.[653]

Some Indigenous interview participants, as noted in previous chapters, identified 'successful' outcomes attained through conciliation in a discrimination law context they and/or others had achieved, suggesting that there *are* benefits to be drawn from the ADR process. A few stakeholders commented (mostly) positively on conciliation as a method of dispute resolution, including as follows.

> The way that it stays fairly informal at the early stages is good. There are certain areas of law like criminal law where things become formal immediately in terms of tribunals or courts. That's always a mistake when you're trying to assist disadvantaged groups or people who are vulnerable, which discrimination law clearly is …. Most of the time the process brings the other party into line and gets some sort of outcome. It works well … [Though sometimes] … because the mediation is not compulsory, the respondents don't want to be part of it, the complainant drops off. S4 [NI]

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[651] Chapman (2000), 322.

[652] Raymond (2015), 171. A similar preference for ADR of discrimination disputes is put forward by the UN. United Nations Centre for Human Rights (1995), *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotional and Protection of Human Rights United Nations*, New York and Geneva. As a further example, Abel praises ADR as follows. 'It expresses values that arouse deserved support: harmony rather than conflict; mechanisms accessible to the many, rather than privileges offered to the few. It operates swiftly and inexpensively; it allows all citizens to participate in decision-making, rather than restricting authority to professionals; it is convivial rather than esoteric; its purpose is to restore all the authenticity of justice to those who would otherwise have to make do with purely formal justice'. Quoted in Dufresne, J, 'From the rule of law to philia', in Department of Justice (Canada) (2000), *Expanding Horizons: Rethinking Access to Justice in Canada*, Proceedings of a National Symposium, Canada 48, 54.

[653] Raymond (2015), 171.

ADR has, however, also attracted criticism similar to that associated with formal justice. Reminiscent of arguments raised by critical race theorists, conciliation and its outcomes have been identified, for example, as 'indicative of the tokenism of discrimination law and the way in which it can provide a semblance of justice which detracts from action to achieve substantive social change', discussed in some detail below.[654]

2.2 Outcomes of the complaints process: measuring effectiveness

Chapter 3 identified limitations in ADR outcomes achieved over a three-year period through race discrimination litigation. These limitations are attributed to the law's predominant focus on the individual as both complainant and respondent and (associated with the latter) the type of harm generally remediated through race discrimination law, including as the judiciary frequently emphasis formal over substantive equality. These limitations may make it particularly difficult to 'fit' within the law (and to thereby attain redress for) experiences of discrimination that are particular to or that disproportionately impact on Indigenous people, including higher levels of socio-economic disadvantage and denial of Indigenous culture, self-determination and land rights.

The complaints data in Chapter 6 points to similar limitations in outcomes achieved or achievable for Indigenous complainants through the complaints process. Firstly, certain types of issues are more commonly raised in Aboriginal and Torres Strait Islander complaints: predominantly direct discrimination in the areas of employment and goods and services. Whilst these are issues of some import other significant issues, including those highlighted by thesis participants, are noticeably absent. Settled Indigenous complaints generally also address the particular situation of the individual complainant and only in certain ways (provision of financial compensation or an apology, most often). Not many of the outcomes recorded include more substantive settlement terms — those likely to address patterns of behavior or more systemic discrimination. Moreover, the complaints data also indicates that a significant proportion of Indigenous complaints have no resolution at all: where the complainant drops

[654] Ibid, 173.

out of the process or the process somehow pushes the complaint out (for lack of substance, because conciliation has failed, for instance).[655] Given this, an Indigenous person might quite reasonably question whether it is worth lodging a complaint — and in particular, whether justice is actually achievable through the complaints process.[656]

There was little comment provided by Indigenous community member interviewees about the complaints process as almost none of them knew much about or had used it (though they identified some of the barriers inhibiting *commencement* of a complaint as likely to also impact on *progression* of a complaint, discussed further below). However, the following stakeholder comment pinpointed process-related issues impacting on Indigenous engagement with ADR in this area, suggesting that current approaches may be not appropriate, in broad terms, for Aboriginal and Torres Strait Islander complainants. In contrast, another Indigenous stakeholder participant thought that ADR-type processes, in particular, were culturally appropriate for Indigenous people (S7[I]).

> [Indigenous people] do come forward [and complain to lawyers and similar], but for whatever reason [they drop off]. You'll get some complaints that have no substance, you'll get others where the complainant has been discriminated against but the process isn't going to assist them or be right for them. Maybe they can't prove what's happened. Or they don't have the skills to engage in the process or the nature of the process is not the type of thing that they want to use to resolve it. S6 [I]

[655] The data set out in Chapter 6 indicates that 27% of Indigenous complaints resolved at conciliation in Victoria and WA, 24% in the NT, 15% in SA, 22% in NSW, and 20% in Tasmania. As noted, the AHRC data is not clear in this regard, revealing that just over half of all Federal level complaints went to *and/or* were resolved at conciliation.

[656] As Van de Meene and Van Rooij state '[s]tatistics counting how many people access a court or complaint handing agency when encountering discrimination' does not 'necessarily tell us anything' about whether 'people's concerns have been addressed' or inequalities reduced: in other words, that justice has been 'served'. Van de Meene and Van Rooij (2008), 23.

In terms of outcomes generally produced by the complaints process, it is difficult without further research to say definitively whether these are satisfactory to Indigenous complainants or not, though we have seen in earlier chapters that Indigenous people are happy with and/or see as positive resolution of past Indigenous complaints or litigation concerning race-discrimination. One stakeholder, however, suggests that ADR outcomes may often be (only just) better than no outcome at all.

> Where individuals have used the conciliation process …. they've had pretty good success at getting apologies and compensation but it's often not enough. The damage is sort of done …. They're more satisfied than they were when they had no outcome though, even if it's not [exactly commensurate with the harm suffered] S4 [NI]

Another Aboriginal stakeholder participant, however, suggested that an apology 'goes a long way in Indigenous communities' and may be a better outcome than monetary compensation (S7 [I]). For one participant, class actions in this area mean not just safety in numbers, as noted above, but also an increased likelihood of achieving more systemic change (and potentially of more probative weight being given to the allegations raised, helping to address problems of proof). 'People are set in their ways but if you had a whole heap of people saying this is our experience, this needs to change. Making a complaint is trying to change things for other people' (MF1). This suggests that Aboriginal and Torres Strait Islander people would like to see substantive reform achieved through discrimination law, and that outcomes delivering redress for an individual complainant alone may not be sufficient, or at least may be only one part of a more satisfactory justice outcome. The latter may encompass, for instance, delivery of education and training about rights and responsibilities to a respondent or policy reform, likely to benefit multiple individuals.

Nielsen points to Aboriginal peoples' questioning of discrimination law's capacity and intent to make a genuine difference as appropriate, given the likely outcomes of its dispute resolution processes. She claims that it is difficult to attain substantive reform in this area, that the 'best' racial discrimination law 'can offer an Aboriginal person is the "opportunity" to persuade white people to release their grip upon privilege through a[n] [ADR] process that actually supports white privilege because it imposes no

demand that it must change'.[657] Here she cites the example of a respondent who settles a complaint for reasons other than remorse and/or a desire to become racially tolerant (for example, on a commercial basis). Some Indigenous people interviewed for the thesis expressed similar views, including one participant who commented on a complaint of racism she made to a hospital (though not through anti-discrimination processes). 'Everyone has an opinion. How do you change a whole hospital's opinion? They might have to change the way they are in the hospital, it's only because they have to do it (because of a complaint), not because they feel bad' (MF1).

The higher likelihood of achieving unsatisfactory rather than satisfactory outcomes may deter potential Indigenous complaints. As one stakeholder commented, Indigenous people may not initiate a complaint because they 'believe that nothing's going to be done. This might be more than the trust issue, perhaps there's not significant enough redress under the law' (S1 [NI]). Another participant, however, pointed to a range of positive outcomes achievable through ADR, not all of which are measurable through the type of statistics set out in Chapter 6.

> Discrimination law *can* help with racial discrimination as it provides some individual relief for harm caused — financial compensation, an apology - and there can be other outcomes that are directed at maintaining relationships, so that someone can safely return to work, for instance. This can involve training on equal opportunity and discrimination for the key people involved, or orders that prevent ongoing discriminatory conduct. Discrimination can be ongoing, it's not always one-off. As an example, the law might lead to lifting a ban on someone accessing a store. There's limits to what financial compensation can achieve … in terms of undoing harm, but outcomes like training or changes to policies and practice can benefit others. They can have a more systemic impact. Initiating claims of discrimination can help to educate the person who has discriminated, the 'duty holders' — and potentially act as a deterrent. In some instances, the complainant finds validation in the process of complaint, particularly in terms of having an

[657] Nielsen (2008), 7-8.

> opportunity to vocalise to the respondent the impact the conduct has had on them. To give the sense that they're challenging it. Of course, that's not the case for everyone. S5 [NI]

We turn now to consider in more detail barriers impacting on justice outcomes for Aboriginal and Torres Strait Islander peoples engaging with the complaints process.

2.3 Barriers to attaining effective ADR outcomes

As occurs with respect to access to justice at a formal justice level (in courts, tribunals and substantive law) and at the point of entry into the complaints process, barriers that are particular to, or that have particular consequences for Aboriginal and Torres Strait Islander people also impede access to justice *after* lodgement of a complaint. In many respects, barriers impacting on outcomes before and after lodgement are, in fact, very similar. Poor access to legal and other support; emotions (fear, stress and anger); limited knowledge of rights; as well as having to focus on 'survival' may both deter initiation of a complaint and lead to its withdrawal, for instance.

> If it was really, really bad I don't think an Indigenous person would want to sit across from them (in conciliation). They'd be so angry and uncomfortable. There'd be too much emotion. But if it was something small, maybe, I reckon it'd be an okay idea. I'd have to say it would depend on what actually happened. That's a bit of a grey area. MF4

> I was very young [when I was going through the complaints process] so I just pulled out. It was too much information. The lawyer wasn't that good. I often wondered if it'd be different if I had a different lawyer. Also, just the stress of it all. I was still living at the place I was discriminated at. I just folded, it was too much pressure. MF2

Distrust of the law, detailed above, also impacts after lodgement. Previous research indicates that Indigenous complainants often feel that the discrimination complaints process is biased against them.[658]

[658] NSW Law Reform Commission (1997), *Discrimination complaints handling: A study*, Research Report No. 8, Sydney, 51-2.

They may perceive prejudice within the 'prevailing culture' of the complaint handling agency in the way it deals with their complaint.[659] This relates to discussion in Chapter 3 on institutional racism within the law. As is the case with courts, whilst bias within the complaint process may sometimes be deliberate and conscious, it is more likely to arise where agencies fail to respond to Indigenous-specific circumstances and perspectives, including Indigenous cultural difference and disempowerment. This has been identified with respect to ADR processes generally, which may 'work against Indigenous needs' and thereby 'perpetuate disadvantage'.[660]

Anti-discrimination organisations are mainstream institutions, first and foremost. Indigenous people have not had any say in their design and development, as is the case with race discrimination legislation. Indigenous complainants are generally expected to work within the existing structure and practice of these agencies, which may not 'fit' well because they are just too 'white'.[661] They are not specifically set up to meet Indigenous needs. As one Indigenous woman puts it, asking an anti-discrimination agency to assist with an Indigenous complaint of discrimination is like asking a man to help you get through a difficult childbirth.[662]

2.3.1 Bureaucracy, language and literacy

One example of the mismatch between Indigenous needs and ADR mechanisms, including those used to resolve race discrimination disputes, is that they are perhaps 'too slow and cumbersome to be of any use to Indigenous Australians'.[663] This was raised as a barrier to access by interview participants, and

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[659] Thornton (1995), 88.

[660] National Alternative Dispute Resolution Advisory Council (NADRAC) (2006), *Indigenous Dispute Resolution and Conflict Management*, ACT, 3.

[661] Ibid, 5.

[662] Cited in Goodstone and Ranald (2001), 55.

[663] Rees et al (2008), 51-2, indicating that 45% of Indigenous complainants in NSW thought that the ADB processes took too long. See also discussion by Partlett of the need for agencies to have the power to grant injunctions to 'preserve the status quo' in situations where, for instance, a job or housing is at stake because of the length of time taken to process a complaint. Partlett D, (1977), 'The Racial Discrimination Act 1975 and the Anti- Discrimination Act 1977: aspects and proposals for change', 2 *University of New South Wales Law Journal* 152, 171.

is a reflection of the formalism and bureaucracy of quasi legal and legal systems and institutions, as well as of poor resourcing of anti-discrimination agencies — though agencies have made concerted efforts to cut back on delay in recent years.[664] Delay may cause individuals to not initiate and/or to drop complaints because they may have moved on from the incident in question or might not want to deal with the anxiety and uncertainty of an unresolved complaint some months or sometimes years after commencing action, particularly where they have multiple competing, significant priorities (which may be the case for many Indigenous people). 'Most people wouldn't go to ADCQ or Human Rights to complain.' 'I wouldn't know anybody that would want to go through that process because they'd see it as cumbersome' (S8 [I]). 'It's quite a long process and I know for a fact, speaking for myself, I wouldn't [complain] because nothing's going to happen for a while. If I want something done, I want it done there and then' (MF4).

Language and literacy are also likely to impact upon Indigenous engagement with the complaints process in terms of both initial engagement and seeing complaints through to resolution. This jurisdiction is paper-driven, to a large extent. Though perhaps reasonable (for instance, to ensure procedural fairness), this may be seen by Indigenous people as 'too much white fella's way' — a significant cultural barrier to access.[665] Comparatively low Indigenous levels of literacy and of command of English as a first language, in particular, renders the requirement to lodge a complaint in writing problematic.[666] Raising problems related to proof, discussed above, Indigenous people may also

[664] See for instance, discussion in EOC (WA) (2012), *Annual Report*, Perth WA, 34.

[665] Goodstone and Ranald (2001), 16, quoting McCaskill and Molone (1994). It is also suggested that a reasonable proportion of Indigenous people do not maintain a fixed residential address for long enough to receive the correspondence in question, quite apart from difficulties related to reading and responding to it. Ibid. The difficulties this particular requirement presents to Indigenous people was identified at commencement of the RDA. Writing soon after introduction of this Act, the Commissioner for Community Relations identified as a 'crucial difficulty' 'the willingness and ability of an aggrieved person to lodge a complaint, especially a formal written complaint'. The Commissioner invited Australians 'to envisage' what the requirements for lodgment of a complaint 'means to members of Aboriginal and ethnic groups who do not find it easy to relate to authorities and bureaucracies and may also be struggling with English'. Commissioner for Community Relations (1980), 34.

[666] One in ten Aboriginal and Torres Strait Islander people reported in the 2016 Census speaking an Indigenous language at home, but 85% of them also reported speaking English 'well' or 'very well'. ABS (2016a). As

not record on paper evidence to be used in substantiating their allegations. Further, they might be alienated by written material provided to them during the complaints process (for instance, the respondent's written reply to their allegations).[667]

2.3.2 Neutrality within ADR

Neutrality is identified as a fundamental principle underpinning the work of anti-discrimination agencies. It is seen as 'central to fairness and justice', much as it is in the formal legal system.[668] Parties to a dispute are treated as operating on an equal playing field, with the agency sitting between them (metaphorically and literally) assisting to negotiate a settlement that is mutually agreeable. Agencies do not act as adjudicators.[669] They cannot mandate or, once a matter is finalised, enforce outcomes.

Reminiscent of issues raised in Chapter 3 about the colour blindness of the formal equality of the law, commentators have identified problems with neutrality associated with ADR, including that it fails to adequately respond to power discrepancies between parties, delivering discriminatory outcomes. Chapman, for instance, claims that processes of investigation and conciliation of discrimination complaints are 'implicitly constructed on a dispute between two formally equal parties', which fails to recognise or 'explicitly and directly' address substantive differences 'in knowledge, resources and negotiating skills' between complainants and respondents. In an Indigenous context, it might be said, these substantive differences arise, in particular, due to culture and colonisation. Furthermore, 'where

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evidence of literacy issues, however, only 34% of Year 5 Indigenous students living very remotely were at or above national minimum literacy standards, compared with 95% of non-Indigenous students living in major cities. Australian Curriculum, Assessment and Reporting Authority (ACARA) (2017), *NAPLAN Achievement in Reading, Writing, Language Conventions and Numeracy: National Report for 2017*, ACARA, Sydney.

[667] Goodstone and Ranald (2001), 54.

[668] Raymond (2015), 171. 'This connection between third party neutrality and fairness takes on heightened importance in ADR in light of the non-reviewable and privatised nature of such processes', according to Raymond. Ibid. See also Astor, H, (2007), *Mediator Neutrality: Making Sense of Theory and Practice*, Legal Studies Research Paper No.07/46, University of Sydney Law School.

[669] The ADCQ, for example, announces on its website that it 'does not have the power to decide if unlawful discrimination has occurred, and it does not take sides' (accessed July 2018), available at: <http://www.adcq.qld.gov.au/complaints>.

difference exists, identical treatment compounds underlying inequality'.[670]

> [In] treating complainants and respondents the same, the procedures of the NSW Board (ADB NSW) create a space in which parties with superior bargaining power and access to resources are able to use that power in the negotiation processes. In this way, complaint-handling procedures do not deliver practices that are, in reality, neutral as between parties. Rather, they favour parties with greater resources and bargaining power, typically respondents'.[671]

As one stakeholder participant pointed out, sometimes special measures must be put in place to ensure substantive equality. This the participant described as a valid response to the social disadvantage of groups like Aboriginal and Torres Strait Islander people, as follows.

> There's misunderstanding about what substantive equality is and what it looks like. People talk about reverse racism or discrimination, not understanding that equality is not just about equal treatment. It's about taking measures to ensure equal outcomes. That's appropriate and fair where there's a group that suffered historical disadvantage. Equal treatment can lead to inequality, in fact. S5 [NI]

Indigenous complainants may want differential treatment. They may prefer that complaint agencies directly prosecute breaches of anti-discrimination law, discussed further in Chapter 8, but they might also want or expect them to more actively assist in resolution of a dispute: because they feel they have been wronged, because of their relative position of disempowerment, and perhaps because of their different understanding of mediation processes.[672] When this doesn't occur they can identify the process as unfair, as favouring the respondent, and/or as not adequately responding to their victimisation.

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[670] Chapman (2000), 345.

[671] Ibid. See also, for instance, Delgado, R, Dunn, C, Brown, P and Lee, H (1985), 'Fairness and formality: Minimising the risk of prejudice in Alternative Dispute Resolution', 6 *Wisconsin Law Review* 1359

[672] Indigenous people may not understand the concept of a 'neutral third party' in the context of conciliation, for instance. NADRAC (2006), 5.

As a further point, poor levels of legal representation of complainants means imbalances of power are unlikely to be addressed, imbalances that neutrality appears to ignore. As the following comment by a stakeholder suggests, advocacy can have a significant positive impact on outcomes.

> I think advocacy is very important. I know that VEOHRC have conciliators that will try to guide a person through but there's a few problems with that. That conciliator is not advocating for that person, they're trying to make everything work smoothly. They're probably guided by efficiency as they're likely to have a few matters and they need to move them off their desk. It's an adversarial system. I do think [complainants] need an advocate, if only to ensure they have limited exposure to [the respondent] ... Advocacy is really important — not so much about making complicated legal submissions but there's real enmity [between parties] and you need to be a bit of a shield. S4 [NI]

Neutrality is in other ways seen as likely to work against 'rather than contribute to, the social reform objectives of anti-discrimination law'.[673] Raymond points to and then refutes criticisms of the lack of substantive outcomes achievable through race discrimination dispute resolution. Some believe, according to Raymond, that the 'social context of the dispute, including group issues, would only be relevant to the process and outcomes of ADR when raised by the parties', in keeping with the principle of neutrality. Whether or not this occurs, however, is 'dependent on the parties perceiving the dispute in broader societal or structural terms and being willing to consider remedies that extend beyond individual redress.'[674] Where this does not happen — and as described previously, Indigenous people often limit their definitions of discrimination to the interpersonal rather than the structural — discrimination is separated from its wider context, with issues 'reduced to the level of misunderstandings and "one-off" incidents'. Outcomes are also then focused 'on individual redress with

[673] Raymond (2015), 171.

[674] Ibid.

no need or incentive for 'frequent-flyer' respondents, such as government and corporations, to address systemic causes of discrimination.'[675]

Raymond argues that conciliators are working within a legislative framework intended to achieve 'public interest goals', including the elimination of discrimination. They quite legitimately, therefore, might intervene during the dispute resolution process, providing information about legal rights and responsibilities and about potential 'terms of resolution': referring, for example, to how other complaints have been resolved (in and outside of courts and tribunals) and ensuring that 'the terms on which [a] dispute is resolved must concur with, or at least not detract from, the law'.[676] This may include discussion of more systemic outcomes. In this way, it is claimed, conciliation can and does 'contribute to the social reform objectives of anti-discrimination law such as the RDA'.[677]

Though there may well be *potential* for ADR processes to have positive and systemic impacts, these are not so evident in the Aboriginal and Torres Strait Islander complaint statistics set out in Chapter 6. Raymond, however, also appropriately points to survey data and other evidence that suggests that contributions of discrimination related ADR processes to substantive reform cannot always be

[675] Ibid, 171-2. See also Imbrogno, A (1999), 'Using ADR to Address Issues of Public Concern: Can ADR Become an Instrument for Social Oppression?' 14(3) *Ohio State Journal on Dispute Resolution* 855.

[676] Ibid. This was the experience of the researcher during her work at AHRC.

[677] Data gathered by the AHRC for the period 1 July 2013 – 31 December 2014 and cited by Raymond reveal that 20% of RDA complaints (though there were not *Indigenous* RDA complaints) led to systemic outcomes, including development or review of anti-discrimination policies and development or facilitation of cross-cultural or anti-discrimination training, changes to workplace and service delivery policies, and agreements for respondents to spend time and undertake joint cultural activities with the complainant and/or within the complainant's racial group. These types of outcomes can have significant impacts, both in the short and longer term, by 'setting behavioural standards, reinforcing norms of non-discrimination and encouraging attitudinal change', Raymond states. Ibid, 180. As an example of substantive change produced through ADR, Raymond identifies a representative complaint made under the RDA by an Indigenous community leader in the NT against both State and Commonwealth governments. At conciliation, a commitment was made to provide funding of $7.2 million to construct new school classrooms, improve school attendance, assist students with disabilities, and provision of literacy/numeracy and job readiness training to adults in the community. Ibid

measured with reference to final terms of a settlement. ADR may, for instance, lead to changed perspectives and increased awareness of legal rights and responsibilities of the parties concerned.[678]

3 Conclusion

The aim of Chapter 7 has been to ascertain why it might be harder for Aboriginal and Torres Strait Islander peoples to seek and attain adequate remedies for discrimination through the complaints process.

As stated at the start of the chapter, barriers to access sit within and outside of the legal system, including within justice-seekers, as well as being personal, social, cultural, political, economic, historical and geographical. Both the present chapter and Chapter 3 have identified barriers impacting on access to justice through race discrimination law that fit each and all of these descriptions. These range from a lack of attention to cultural 'difference' within the complaints process; limitations in terms of personal resilience and self-esteem, affecting capacity to initiate a complaint; to disproportionate representation of Indigenous people in non-urban populations, impacting on access to complaint agencies and lawyers.

Chapter 7 has confirmed that barriers to access are different for or differently experienced by Indigenous people, largely due to culture and to Indigenous-specific experiences of racism and discrimination. The complaints system does not, in general terms, adequately respond to this difference, which means it can be institutionally racist - just like the formal justice system. Generations of discrimination against Indigenous people have reduced their access to resources required to initiate a complaint of discrimination, for instance, but the neutrality of the latter system makes little or no adjustments in response. Long-standing encounters with racism have also led to higher levels of socio-economic disadvantage, which the anti-discrimination regime then struggles to provide a response to. Moreover, discrimination and racism targeted at Indigenous people has included denial of self-determination and culture, which the latter regime renders invisible or fails to attend to, to a significant extent.

[678] Raymond (2015), 177ff.

Evidence presented in this and previous chapters indicates that Indigenous people do see value in using racial discrimination law, as long as it can provide genuinely effective pathways to justice. With this in mind, the next chapter sets out suggested strategies for change. These requires constructive thinking about reform of the legal system. But given the myriad of problems associated with accessing justice in a legal context, identifying and strengthening effective non-legal strategies with capacity to reduce discrimination is also essential and is discussed in some detail.

CHAPTER 8: SUGGESTIONS FOR A WAY FORWARD - LEGAL AND NON-LEGAL STRATEGIES TO REDUCE RACE DISCRIMINATION AGAINST INDIGENOUS PEOPLE

Chapter 8 sets out suggested directions for change likely to help address the problem of race discrimination as it impacts on Aboriginal and Torres Strait Islander peoples. As is the case for the thesis overall, it is structured around Indigenous perspectives on the latter, including those shared during thesis interviews. In particular, interview participants have been asked if there were ways to make race discrimination law more useful for Indigenous people. They were also asked what strategies or approaches other than more effective access to the law might help to tackle the problem of racial inequality or injustice. Their responses are included in this chapter.

The chapter takes a broad-brush approach to many of the strategies highlighted. They are, in general, relatively briefly canvassed, though they are often significant enough to warrant more detailed consideration. This is beyond the capacity of the thesis, including as further research is required to address current knowledge gaps. For instance, limitations in terms of Indigenous commentary on potential reform of race discrimination related legal processes and remedies means there is limited detail provided below on the same. As identified in Chapter 7 in discussion related to identification of problems of access, Indigenous views on detailed reforms were difficult to gather from participants as most had neither intimate knowledge nor direct experience of relevant process and remedies.[679] This is an example of an area in which additional research would be of benefit: research that is solely focused on legal reform and conducted with Aboriginal and Torres Strait Islander people who have used and/or have sufficient knowledge of anti-discrimination mechanisms.

Chapter 8 pulls together discussion in previous chapters related to barriers to accessing justice through existing legal processes, outcomes and frameworks. These barriers largely revolve around failure of the anti-discrimination legal regime to recognise and respond to Indigenous-specific perspectives. Key strategies within the latter regime likely to help address these barriers are identified, along with

[679] Those participants that did have this knowledge because they were working in anti-discrimination agencies or were advocates in this area were largely non-Indigenous, so could not provide Indigenous perspectives.

Indigenous principles and frameworks useful for expanding the concept of access to justice to incorporate these perspectives.

Chapter 8 also explores the bolstering of strategies and approaches situated *outside* the law. These encompass initiatives, effort and reforms positioned within social, political, economic and other contexts, and to be implemented by and within Indigenous and non-Indigenous communities and by government. Looking outside the law to address Indigenous barriers to accessing justice is essential as not all barriers, as noted earlier, are located within or are resolvable (completely or at all) through the law, including those that pertain to 'justice seekers'. Additionally, not all Indigenous people *want* to use the law as a response to discrimination. Effective non-legal strategies with potential to deliver 'justice' to Indigenous people highlighted previously in the thesis include direct confrontation of discrimination by individuals and groups. These and other approaches and initiatives, particularly those likely to build capacity of Indigenous people and communities 'to deal with problems on their own and in their own way' (whether through the law or otherwise), are considered below.[680] Also discussed is whether some of the strategies in question might fit within an expanded conceptualisation of access to justice that not only incorporates Indigenous definitions of the latter, but that also expands the concept beyond legal dispute resolution.

1 Critical views of access to justice as a purely law-centred framework

> We know that inequality is not just about having laws to prevent discrimination. Curing inequality is not just about that. If you're looking at inequality in employment, there's introducing minimum wages and so on. There's limitations on what the law can do to address entrenched inequality. Ideally, you don't want to rely on those laws at all. S5 [NI]

This comment describes non-legal responses to race-based inequality as sometimes more effective than legal remedies. Prior to moving on to investigation of law-related reforms, the following discussion

[680] Van de Meene and Van Rooij (2008), 12.

considers this point, and the incorporation of non-legal responses or strategies within a broader re-conceptualisation of access to justice.

Commentators have raised criticisms of access to justice with some relevance to Indigenous people but with broader implications, too. Sackville, for instance, has called for injection of a 'note of realism' into our discussion of the concept of access to justice and what it might achieve.[681] An early proponent of the concept, he explains that the ideal of access to justice is premised upon the principle that all should be equal before the law. It also carries with it an implicit promise, he states, that the law and the legal system will provide effective access to justice 'if not in the short term then ultimately' — thereby 'ameliorating the unjust legal consequences of inequality within society'. Given what he sees as the relative failure of access to justice in this regard, Sackville acknowledges that 'there will always be a substantial gap between the ideals implicit in the concept' and the 'ability to realise those ideals'.[682]

Sackville questions the capacity of access to justice to address inequality, both in the law and in society. Similar to arguments raised within CRT, Sandefur also writes that there may be potential within the civil justice system to reduce, but also to 'reflect' and 'create' inequalities — particularly where the system represents and reinforces the perspectives of dominant rather than marginalised groups.[683] Garth also points to contradictions inherent in having an 'ideology that promotes equal access' to justice through the law 'as a key to formal and substantive justice', given that the 'law and lawyers are deeply embedded in relationships of economic, political and social power'. For Garth, law 'serves power, or

[681] Sackville, R (2011), 'Access to Justice: Towards an Integrated Approach' 10 *Judicial Review* 221, 233.

[682] Ibid.

[683] Sandefur, R (2008), 'Access to Civil Justice and Race, Class, and Gender Inequality' 34 *Annual Review of Sociology* 339, 340. Specifically, she states as follows. 'Civil justice experiences can reflect inequality in the sense that inequalities that exist prior to contact with or in some other way outside law and legal institutions are reproduced when people and groups come into contact with justiciable events or legal institutions. Such experiences can also create inequality, in the sense that differences between people or groups become disparities through contact with justiciable events or legal institutions. Finally, civil justice experiences can destroy or destabilize inequality, as disparities are reduced through contact with justiciable events or legal institutions.' Ibid, 346.

the powerful would not invest in law'. That 'law is a potential solution to any kind of social problem should not be taken for granted'.[684]

One might reasonably ask, as some have done, whether we ought to throw 'the baby out with the bathwater' — to give up on the law altogether as a mechanism to create equality across society.[685] Speaking on the 40th anniversary of introduction of the RDA, Gaze identified difficulties related to the Act's enforcement, evidenced by its poor track record in delivering positive outcomes to litigating complainants.[686] Despite this, however, she does not argue for discarding the legislation entirely but for working harder on reforms that will enable it to play its intended and important role — provision of a remedy for those harmed by race discrimination.[687] Legal reform, she states, 'is not the complete answer to problems of discrimination in our society — many other avenues, both social and legal, need to be

[684] Garth, B, 'Comment: A revival of access to justice research?', in Sandefur, R (ed.) (2009), *Access to Justice*, Sociology of Crime, Law and Deviance (Volume 12), Emerald Group Publishing Limited, 255 – 260.

[685] This is the chapter title used by Tahmindjis in Tahmindjis (1995). Jagose would say yes. He points to the limited success in meeting the law's obligations because reduction of race discrimination requires 'both an intense analysis of the underlying causes of racial discrimination and a willingness to question the basic tenets of the social framework in which it is manifested'. The RDA, it is argued, is not up to this task. New legal tools are required for the resolution of racial conflicts since the existing machinery frequently 'preserves the established inequalities and patterns of discrimination'. 'Mere tinkering' with the existing machinery will not suffice'. Jagose, P, (1987), 'Section 9A of the Race Relations Act 1971: The 'Tigger' of New Zealand's Race Relations Legislation' 5(4) *Auckland University Law Review* 494, 500.

[686] Gaze (2015), 80.

[687] Gaze states as follows. 'Because we know much more now than 40 years ago about discrimination, the harms that it causes, and the difficulties facing efforts to use laws to discourage and reduce it, it is very important that we act on the knowledge that we now have. If, as a society, we really believe that discrimination is not acceptable, then we need to ensure that the law provides a way to combat it and a remedy for those who suffer from it. At present, this is not happening'. She continues as follows 'Efforts to reform and review the legislation have been initiated several times, but often the moment has passed without any change'. Speaking specifically of racial vilification provisions, Louis and Hornsey also state that though some may ask if this issue 'persists despite laws that attempt to reduce it, does this mean that the laws are ineffective and should be repealed?' This, they state, is 'analogous to asking, if people continue to murder despite millennia of laws prohibiting it, should we repeal the laws against murder? We would say no.' Louis, W and Hornsey, M, (2015), 'Psychological dimensions of racial vilification and harassment' in AHRC (2015b), 89, 89.

established and developed'. However, it will always be necessary to have mechanisms that 'provide compensation and relief for the individuals who suffer discrimination'.[688]

> Discrimination is a serious injury suffered by individuals, and it cannot be left unremedied. No amount of proactive prevention, or measures to pursue substantive equality pro-actively, will prevent some cases of discrimination occurring, and we will always need a law that does what it claims to do and makes the prohibition of racial effective.[689]

As discussed in earlier chapters, Indigenous people also identify protection against race discrimination as of value. Identified below is that they also see access to justice through mainstream legal systems as crucial, but in an adapted form so as to better respond to and reflect Indigenous perspectives.

1.1 Expanding current definitions of access to justice

What is required is an expansion of the concept of access to justice to ensure that it encompasses non-legal definitions of processes of attaining justice and the form of justice attainable adequately, but in ways that also incorporate Indigenous perspectives of how this expansion might apply in an Indigenous context.

As discussed in Chapter 2, access to justice should incorporate direct challenges to discrimination by aggrieved persons, defined as 'everyday justice'. This is seen by Indigenous people as an effective non-legal method of addressing discrimination (identified in Chapter 6). Problems arising in daily life challenged in this way may constitute, at some level, potential or actual legal disputes involving legal rights: even though resolved without explicit reference to and/or delivering 'justice' rather than explicitly legal outcomes. Additionally, justice may be sought and attained independent of a particular legal dispute but still be linked to legal rights, including through broader-scale advocacy (such as legislative reform) and/or averting legal disputes or problems from arising altogether — for instance,

[688] Gaze (2015), 80.

[689] Ibid.

by preventing discriminatory behaviour through increased awareness of relevant responsibilities under race discrimination law.[690]

Further extending access to justice, however, means adding to or travelling a larger distance away from our consistent framing of the concept as legal. Paquet defines the 'rights and entitlements' focus of our justice system as being in 'sharp contrast' with the 'needs based claims' of citizens — 'the need to ensure that one can walk safely at night in our cities, the need for a divorce that will not cost $100,000', and so on.[691] Constantly emphasising rights, she claims, means that the justice system does 'not serve the community well'. She argues, instead, for an approach that better encapsulates and responds to 'citizen needs'.

> It may be argued that the focus on rights has led the system either to ignore needs, or to regard rights as the only way to ensure that the needs for justice are met. In fact, there are all sorts of other legitimate problem-solving mechanisms that come to mind and all sorts of new actors that appear useful when needs are becoming the focus of attention. Indeed, the purpose of the real justice system is to eliminate servitude, to attenuate unfreedoms. A needs-based approach [and] … the very creation of many wickets where citizens could find alternative ways to resolve their problems or satisfy their needs would do much to increase their freedom.[692]

Parker also suggests that access to justice is about 'the availability of suitable arrangements or processes for people to claim *justice*, not just to use the law'. In a legal context justice is commonly defined as 'people getting what they deserve' and/or as 'giving each person his or her due'.[693] Justice is not, however, *only* a legal construct: sitting as it does within a wider socio-political context. Parker frames it, for instance, as 'the social good', or as 'ideals we ought to accept for living together and governing

[690] Van de Meene and Van Rooij (2008), 16.

[691] Paquet, G, 'The judgement of wider courts' in Department of Justice (Canada) (2000), 80, 80.

[692] Ibid.

[693] Parker (1997), 45.

ourselves in communities'.[694] Access to justice, then, equates to 'the means by which people seek to secure the type of social and individual relations they think are right, and to rectify them when they have gone wrong in particular circumstances.' This might incorporate 'having the means to make a claim in an individual dispute about what is the right way to solve it or seeking to change institutional practices and culture to conform to relevant social and political ideals.'[695]

> This definition makes for a very broad notion of justice; to see it as tied in this way to a criterion of social and political assessment is to see it as being concerned with much more than civil dispute resolution or criminal justice. Although it clearly includes legal and quasi-legal justice arrangements, the definition also embraces even the most informal methods of dispute resolution as well as a variety of forms of political participation (including informal political participation in social movements) by which people make more general claims about the way their societies should be organised and resources distributed.[696]

Earl also suggests that though 'sociologists of law often mean access to formal and fair legal dispute resolution when they discuss access to justice', it is possible to expand this to a range of non-legal strategies, all of which have 'important orientations to some sense of personal or social justice or fairness.'[697] Individuals can, for example, 'lump it' ('not act to address their troubles'), 'file a lawsuit', 'pursue psychological counseling', 'use available organizational processes for dispute resolution such as union bargaining', 'or lobby their elected officials'. Social movements too are 'often oriented toward some sense of social justice.' Earl states that we must work on 'understanding and improving access to

[694] Parker (1997), 47. Similarly, for Currie, the 'idea of justice is a thread that runs through all social institutions, embodying very fundamental social values of fairness and equality of treatment.' Currie (2009), 83.

[695] Parker retains our understanding of access to justice as including processes and outcomes, referring to 'procedural ways' applied to attain the 'justice to which we want access'. Parker (1997), 47.

[696] Ibid.

[697] Earl, J (2015), 'When bad things happen: Toward a sociology of troubles', 12 *Sociology of Crime, Law and Deviance* 231, 232, 251.

fairness and justice in this broader context – where justice might be delivered by a court, a mediator, or a policy-maker who responds to a social movement or the rise of a social problem'.[698]

1.2 Using multiple strategies for reducing racism: resolving tensions between legal and direct action

According to the above definitions of access to justice, the law is 'just one means of doing justice among many' that may encompass 'social and political action in formal and informal arenas' and 'requests for dialogue and justification in families, clubs, workplaces and other institutional arenas.'[699] It is suggested that every strategy falling within this broader definition is useful, and indeed essential — likely to work well and in fact to deliver better results when used in combination.

Parker asserts, for example, that delivery of more effective justice outcomes is possible when formal justice mechanisms are used *alongside* other strategies. She suggests, for instance, that although the coercive nature of the law is helpful in certain contexts, what ought also to be encouraged is a 'proliferation of non-coercive, community-based methods of social ordering'. She also suggests that social movements and legal (or quasi-legal) action may complement each other.[700] In fact, ADR and litigation, she claims, 'cannot go far towards achieving justice by themselves if they are not embedded in a context in which groups and individuals are striving for social change using processes of representative democracy and social movement politics external to the law.' Similarly, commentators

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[698] Ibid.

[699] Parker (1997), 57.

[700] Ibid. Earl also comments on the common scholarly approach to the study of responses, including social movements and legal action, to 'troubles' such as racism or discrimination. This approach often sees these responses as competing with one another when they could potentially *all* be of use to persons affected by 'troubles'. 'Currently, scholars tend to study how a single alternative such as filing a lawsuit competes against doing nothing (for instance).' '[W]e as scholars are losing more than we are gaining by divvying up troubles and forms of resolution into fairly discrete sub-fields (such as litigation or protest) instead of seeing this work as connected ... I argue for continued research on troubles in related sub-fields, but with a much more explicit sense of connection to one another and sensitivity to emerging common findings, to potential ideas and mechanisms that might be imported into these conversations based on larger dialogues, and to the development of a sociology of troubles literature.' Earl (2015), 248.

concerned with the US civil rights movement point to introduction of legal rights as both a positive (intended) byproduct of and as buttressing protest action.[701]

Additionally, no matter what form of access to justice is employed, it *must be defined by those whom access is intended to benefit*. This is essential as 'what works' in one community or for one group may not work in or for another. McEown points to top-down decision-making about what constitutes effective access to justice as inappropriate, speaking in this context of its consistent framing as legal dispute resolution.[702] 'What seems to be missing from all of this is any kind of cooperative effort that recognizes and respects the individuals trying to get help with a problem that they and the government have clearly defined as having a legal solution.' Where is 'the venue', she asks, to discuss the different views of justice and to learn about other ways to provide justice?'[703]

This points to the various methods employed during the Indigenous rights movement to enact change — direct action, as well as litigation, law reform, using media to change public opinion, and so on — as all having some capacity to deliver 'justice' *and* as being compatible rather than in conflict. As such, a range of strategies may be employed to address racial inequality impacting on Indigenous people, including strategies outlined in this chapter, as long as any methods and approaches used *also* incorporate Indigenous perspectives.

We turn now to consider how we might reform access to justice as a *legal* construct in the race discrimination area to better reflect and to reinforce Indigenous definitions of justice.

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[701] Contrary to arguments raised by critical race theorists, McCammon and McGrath highlight the importance and value of use of the law and litigation within social movements for change in a US context. McGammon, H and McGrath, A (2015), 'Litigating change? Social movements and the court system', 9(2) *Sociology Compass* 128. The complementary nature of litigation and protest in the US civil rights context is discussed by other commentators. See Meyer, D and Boutcher, S (2007), 'Signals and Spillover: Brown v Board of Education and other Social Movements' 5(1) *Perspectives on Politics* 81 and Coleman, C, Nee L, and Rubinowitz, L (2005), 'Social Movements and Social- Change Litigation: Synergy in the Montgomery Bus Protest' 30(4) *Law and Social Inquiry* 663.

[702] McEown, C 'The role of citizens and communities' in Department of Justice (Canada) (2000), 77, 79.

[703] Ibid.

2 Reforming access to justice: incorporating Indigenous perspectives

The latter reform is essential as Indigenous 'understanding[s] of their rights, including access to justice' are 'informed by their unique outlooks on, and practices associated with, justice'. These 'may in some respects differ from dominant approaches to justice' according to Xanthaki.[704] With this in mind, the following section considers what access to justice redefined within an Indigenous context might look like. It considers reform of legal dispute resolution processes (including ADR and litigation) and of legislation and policy, and increased inclusion within Indigenous conceptualisations of *civil law* access to justice. Also discussed is how this different definition might resolve tensions between recognition of Indigenous rights to equality and Indigenous-specific rights.

2.1 UNDRIP principles and Indigenous access to justice

As identified in Chapter 2, all individuals have a right to access justice. Access to justice is crucial as a stand-alone right and to the exercise of all other rights, including that of non-discrimination. Non-discrimination is also essential to effective access to justice, which should be *equally* available to all persons.[705]

Achieving true 'equality' in an access to justice context, however, means firstly distinguishing between the different forms it might take. As described previously, *formal* equality revolves around same treatment — meaning that we all enjoy access to justice *in the same form*. *Substantive* equality, on the other hand, treats different groups or individuals differently. Substantive equality in terms of access to justice requires that processes and outcomes are suitably adapted to account for relevant *differences*.

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[704] Xanthaki, A, Normative directions', in Littlechild and Stamatopoulou (2014), 20, 27.

[705] Congress describes the right to non-discrimination contained in Article 2 of UNDRIP as applying to access to justice. It involves 'procedural and substantive protections across political, social, cultural, economic and environmental areas, as well as the *right to impartiality, non-discrimination and access to fair and just remedies for breaches of rights'* (emphasis added). National Congress (2014), 51. As noted in earlier chapters, Article 2 of UNDRIP states: 'Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.'

Contrary to generally-held expectations, and as discussed in earlier chapters, substantive equality is more likely than formal equality to produce genuinely equal outcomes, including in an access to justice context. Xanthaki points out that States may 'wish to treat all individuals living within their territory in the same way' in terms of access to justice provided, arguing against development of 'additional protection' or 'additional rights for Indigenous Peoples' as this is 'discriminatory'.[706] She asserts that this argument, however, is based on 'an ill-perceived principle of equal treatment', as well as being contrary to international law. For differentiation of treatment 'will not constitute discrimination if the criteria for such differentiation are legitimate'.[707]

States are, in fact, obligated to treat Indigenous peoples differently so as to realise their human rights, including their right to access justice. Article 40 of UNDRIP, for instance, enshrines a right to access justice for Indigenous peoples, defined as both 'just and fair procedures for the resolution of conflicts and disputes' and 'effective remedies for all infringements of their rights'. Article 15(2) of UNDRIP also requires that States take 'effective measures' to combat prejudice and eliminate discrimination.[708] Failure to make necessary adaptations (according to this 'legitimate' criteria) renders access to justice institutionally racist or discriminatory as it applies to Indigenous people.[709]

Legitimate criteria used for adapting access to justice are found in the UNDRIP. The Declaration is underpinned by four key principles, also constituting rights enshrined within various UNDRIP articles. One of these principles refers to non-discrimination and equality (Article 2). The other three principles, unique to Indigenous people are self-determination (Article 3), respect for and protection of culture

[706] Xanthaki (2014), 26-7. A simple example of this, she suggests, might be developing materials for Indigenous people in traditional language on how to enforce rights.

[707] Ibid.

[708] Article 6 of ICERD also refers to States obligations to provide *effective* protection against discrimination.

[709] As the UN Human Rights Council argues, without 'the application and understanding of traditional Indigenous conceptions of justice, a form of injustice emerges which creates inaccessibility and is based on unacceptable assumptions'. Expert Mechanism on the Rights of Indigenous Peoples, *Access to Justice in the promotion and protection of the rights of indigenous peoples; restorative justice, indigenous juridical systems and access to justice for women, children and youth and persons with disabilities.* A/HRC/EMRIP/2014/3/Rev.1, Para. 8.

(Article 11), and participation in decision-making (Article 18).[710] The latter right refers to decision-making 'in matters which would affect' Indigenous rights 'through representatives' chosen by Indigenous people, 'in accordance with their own procedures', as well as to the maintenance and development of 'their own indigenous decision-making institutions'.

Indigenous peoples point to these four principles as important in their own right and, alongside Article 40 of the UNDRIP, as essential components of Indigenous access to justice.[711] In an Australian context, National Congress has called for more comprehensive implementation by our Government of the UNDRIP as a framework for facilitating effective Indigenous access to justice.[712] It has suggested that the Declaration is not being applied in any coordinated way across our 'Parliament and the bureaucracy', leading to reduced efficacy of all law and policy related to or impacting on Indigenous

[710] Article 3 of UNDRIP states that 'Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.' Article 11 states that '[1] Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature. Article 11 [2] refers to States providing redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, for the taking of cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

[711] The International Indian Treaty Council, for instance, states that these Articles 'provide a principled, rights-based, but as yet unimplemented, normative framework for access to justice'. International Indian Treaty Council, 'The United Nations Declaration on the Rights of Indigenous Peoples for access to justice, restitution, and non-recurrence regarding violations of rights affirmed in treaties between Indigenous nations and States', in Littlechild and Stamatopoulou (2014), 41, 43. That the UNDRIP has application to recognition of rights for Indigenous people, including a right to access to justice and to be free from race-based discrimination is evidenced in UN sources. The UN has referred to the UNDRIP as 'an instrument for achieving justice' and as 'an important foundational framework for the realization of the rights of Indigenous peoples. Its implementation can support the attainment of access to justice for Indigenous peoples.' A/HRC/24/50, para. 9. Cited in HRC/EMRIP/2014/3, para. 11. The Committee on the Elimination of Racial Discrimination has also recommended UNDRIP as a guide 'to interpret the State party's obligations under the Convention (ICERD) relating to indigenous peoples.' Committee on the Elimination of Racial Discrimination, Concluding Observations, United States of America, CERD 72nd Sess., UN Doc. CERD/C/ USA/CO/6 (2008) para. 29.

[712] Congress (2014).

people.[713] Also stated by Congress is that legislation such as the RDA is unlikely to be an adequate access to justice mechanism for Indigenous people. Firstly, the Act provides some human rights protection for this group, but these protections face ongoing threats (including through suspension of the RDA during the NTER).[714] Additionally, the RDA does not incorporate, was not designed, and is not interpreted with reference to the above UNDRIP principles.

2.1.2 Resolving tensions between Indigenous and civil rights

The latter point is not dissimilar to concerns raised by Indigenous activists questioning the appropriateness of mainstream human rights law as a vehicle for the protection of the rights of Indigenous people — at least when not defined with reference to Indigenous-specific frameworks and/or perspectives. As detailed in Chapter 4, Aboriginal activist Anderson dismissed Western law as largely ineffective. He called for a return to direct action by Indigenous people and for a Treaty within which Indigenous human rights could be enshrined. For Anderson this is the only way to deliver true 'freedom' to Indigenous people. Houston, as we have seen, also champions a form of 'freedom' broader than that highlighted during the Freedom Ride — one that gives full effect to one's life choices and that enables realisation of an '*Aboriginal conception* of a valued life'.

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[713] Australia was one of four countries to vote, initially, against the UNDRIP (in 2007). In 2009 Australia endorsed the Declaration but its implementation by government since that time has been inconsistent, meaning that Indigenous participation 'in the design, development, implementation and evaluation of laws and policies is encouraged in some sectors, in other sectors it is not. Consequently, laws and policies that affect Aboriginal and Torres Strait Islander Peoples are not coordinated or strategically linked across sectors. In many instances policy responses are not culturally appropriate, or needs-based, and they are more often than not imposed on Aboriginal and Torres Strait Islander people and their communities as a blanket approach, rather than being implemented either in partnership with or by Aboriginal and Torres Strait Islander Peoples.' Ibid, 59-60. Congress has also suggested that the Government's continued assertion that UNDRIP is not legally binding, its refusal to recognise it as a 'document that sets the standards by which existing human rights obligations apply to Aboriginal and Torres Strait Islander peoples' hinders Indigenous participation in development of law and policy. Ibid, 59. The UN General Assembly has confirmed the status of the Declaration as binding, though not a treaty. United Nations General Assembly, *Rights of indigenous peoples*, UN Doc A/66/288 (2011) para 68.

[714] National Congress (2014), 57-8.

'Value' for Anderson and Houston appears to refer to attainment of both individual and collective (Indigenous) goals, including self-determination. Discussed in earlier chapters is that Indigenous people involved in the Indigenous rights movement of the 1950s-70s also agitated for both collective and individual (civil or human) rights for Aboriginal and Torres Strait Islander people. These two sets of rights are also interconnected within the UNDRIP. The Declaration bestows upon Indigenous people an entitlement to enjoy human rights (including to non-discrimination and access to justice) and Indigenous-specific rights (to culture, self-determination, land and so on). Rather than being separated or incompatible, these rights are indivisible. Human rights for Indigenous peoples must be defined and enforced in ways that reflect and reinforce Indigenous perspectives. Human rights in an Indigenous context incorporate or are underpinned by Indigenous-specific rights.[715] The relationships between the two sets of rights is highlighted in discussion of race discrimination case law in Chapter 3. It is also clearly evident in Article 40 of the UNDRIP, which refers to Indigenous access to justice as encompassing effective processes and remedies that respond to infringements of 'individual and collective rights', with relevant decision-making also required to give 'due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned *and* international human rights'. When looked at this way, tensions between 'equality' and 'particularity' raised earlier in the thesis, including in an access to justice context, may be effectively resolved.

We now consider in more specific detail at how a re-conceptualised access to justice might be adhered to UNDRIP principles, in particular as it applies in a race discrimination context.

[715] As an example of this perspective on rights, Victoria's inaugural Commissioner for Aboriginal Children and Young People identified a right to culture for all Koori children, alongside '*other core human rights*'. Moreover, these cultural rights, he states, 'directly impact on a child's ability to meaningfully enjoy *every other human right and freedom*' (emphasis added). This indicates both that cultural rights are human rights and that human rights cannot be realised for Indigenous people without simultaneous recognition of cultural rights. Jackomos, A, 'International Human Rights Day oration: linking our past with our future, how cultural rights can help shape identity and build resilience in Koori kids', 4 December 2017, Peninsula Community Theatre, Mornington.

3 Justice system reform

As a first point (and as indicated in Article 40), redefining access to justice according to UNDRIP principles requires both establishment and maintenance of wholly Indigenous developed and led initiatives or strategies *and* suitable modification of mainstream justice systems.[716]

National Congress, for example, refers to access to justice as the 'ability of Aboriginal and Torres Strait Islander Peoples to form and develop our own distinct institutions', as well as to 'fully participate in decisions that affect us', including those made by and within non-Indigenous institutions, such as courts and tribunals.[717] Congress points to the importance of adapting mainstream justice systems as Indigenous people need to 'successfully navigate our way through the Western justice system that has been imposed on us, while maintaining our own cultural institutions that provide the legal and moral frameworks by which we live our daily lives'.[718] Indigenous people, by necessity, 'interact on a daily basis with the western justice system' in areas that encompass criminal and civil law, and as 'access to services, including housing, education, employment, social security'.[719] Given the huge 'impact' this justice system has 'on many areas of our lives', where Indigenous capacity to engage with it in a

[716] Article 5 of UNDRIP refers to Indigenous peoples' 'right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining the right to participate fully in the political, economic, social and cultural life of the State'. Article 34 of UNDRIP further states that 'Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.' That UNDRIP principles apply to adaptations of mainstream systems and to Indigenous-specific mechanisms is made clear in Xanthaki's statement, as follows. 'In addition to the principle of non-discrimination, Indigenous rights to access relate to Indigenous cultural rights. These rights must be taken into account both when the *national system of justice is reviewed and assessed and when separate Indigenous judicial systems are established'* (emphasis added). Xanthaki (2014), 20.

[717] National Congress (2014), 71.

[718] Ibid.

[719] Congress cites child protection, credit and debt and consumer laws as examples of relevant areas of law. Further, referred to alongside access to services is access 'to our lands, territories and resources, including land rights, native title, cultural heritage'. Ibid.

productive and positive way is inhibited (including through difficulties associated with access to justice) negative consequences follow.[720]

Tahmindjis has made similar comments, describing Western law as exerting significant control over Indigenous peoples' lives. Reform of the mainstream legal system is required (including in terms of the access to justice it provides) rather than its abandonment or acceptance. Law, he claims, 'cannot be ignored *precisely because of its power to define*'. It is a 'site of political struggle' and a 'form of power — although only one form' but 'precisely because of this, it is still useful.'[721]

There have been various initiatives implemented within the Australian *criminal* justice system that to some degree give 'due consideration' 'to the customs, traditions, rules and legal systems of the indigenous peoples concerned' (Article 40). Examples include Indigenous sentencing courts such as the Murri and Koori Courts in QLD and Victoria (respectively) and Community Justice Groups in QLD.[722] Though these types of initiatives increase Indigenous participation and control in a legal setting *to a degree*, they appear to embody a 'hybrid' system of justice, rather than representing wholly Indigenous developed or led initiatives.[723] Hybridity occurs where 'traditional legal bureaucratic forms of justice' are combined with 'elements of informal justice and Indigenous justice'.[724] Further research is required to identify how methods and principles associated with these initiatives are being effectively borrowed

[720] Ibid.

[721] Tahmindjis (1995), 123 (emphasis added). He also notes, however, that '(e)qually we must not privilege the law in this regard … and the net must therefore be cast wider to use the law in conjunction with other strategies.' Ibid.

[722] Discussed, along with other initiatives, in Cunneen, C (2009b), 'Criminology, Criminal Justice and Indigenous People: A Dysfunctional Relationship?' 20 *Current Issues Criminal Justice* 332.

[723] Ibid. These initiatives may be seen as somewhat limited in various other ways, which include their geographic coverage and their focus, in general, on criminal law. See discussion Marchetti, E (2014), 'Delivering Justice in Indigenous Sentencing Courts: What this Means for Judicial Officers, Elders, Community Representatives and Indigenous Court Workers', 36(4) *Law and Policy* 341; Marchetti, E and Daly, K (2007), 'Indigenous sentencing courts: Towards a theoretical and jurisprudential model', 29(3) *Sydney Law Review* 416; and Porter, A (2016), 'Decolonising Policing: Counter-policing, night patrols and safety', 24(2) *Theoretical Criminology* 548.

[724] Cunneen (2009b) 323, 335.

from and/or might be expanded for use in a *civil law* context - and with respect to discrimination law, in particular.[725]

3.1 Complaint handling system reform

3.1.1 Responding to culture, Indigenous participation and leadership

Interview participants and other Aboriginal and Torres Strait Islander peoples have made suggestions for reform of the race discrimination complaints process, all of which reflect and strengthen the above principles, particularly respect for and protection of culture. These suggestions sit closer to the aforementioned examples of hybrid models of justice. Additional and perhaps more substantive adaptations to the complaints system to those outlined here are worth considering, based on further research with Indigenous people.

Suggestions provided include using spaces for conciliation that are culturally relevant and/or safe for Indigenous people and embedding more Indigenous staff in complaint agencies, as conciliators or otherwise.[726] One participant equated this to the role Indigenous people currently play in Indigenous sentencing courts such as Koori or Murri Court.

> They need more Indigenous people in the system to approach them. If a white fella comes up and talks to them about it 'oh you talk shit'. If a blackfella comes up 'oh yeah hey'. 'That true sister, brother?' That approach, seeing an Indigenous person. It needs more Indigenous figures. Blackfellas all got respect for each other. They'll have respect if that blackfella comes up to them. BF2

[725] During the ILNP, for instance, there was discussion of expansion of the Koori Court in Victoria to hear civil and family law matters. See Schwartz et al (2013), 206. Other examples currently in existence include Indigenous-led intra-familial and other dispute resolution such as the Mornington Island Restorative Justice Project. See Brunton, C (2014), *Mornington Island Restorative Justice Project Evaluation: Final Report,* Commonwealth of Australia.

[726] NADRAC (2016), 4-5.

> Same way that Murri Court works. In a normal court, it's a white judge up there. If there's aunties and uncles, we still feel like we've got a chance to stay out of jail because they know. They've been through it too … If they know there's an Aboriginal mediator then they're going to use it as it's not just a white man's thing. BM5

This same participant thought that alongside legal representation in conciliation conferences, upskilling and inclusion of Indigenous community members as support people available throughout the entire complaints process could be beneficial — 'someone a bit more experienced or confident than you' (BM5). This would be a role in addition to that of lawyers or Indigenous agency staff, perhaps similar to that of Indigenous Field Officers or similar employed by legal services to assist Aboriginal and Torres Strait Islander clients with (for the most part) criminal law matters.

A further recommendation by participants was for establishment within each anti-discrimination agency of an Indigenous consultative body, reference group or similar that could share knowledge and expertise. This might contribute to identification of systemic discrimination impacting Aboriginal and Torres Strait Islander peoples, but could also give voice to Aboriginal and Torres Strait Islander perspectives on effective anti-discrimination 'system' responses; providing advice, for instance, to agencies on culturally appropriate policy and practice related to processing of disputes.[727]

> In terms of community engagement more generally … [agencies] need to represent community, otherwise they're not in touch. … [An Indigenous consultative body is] an option, it *would* have potential but it depends on the value seen in holding a meeting a month, requiring them to come in, ensuring morale [in the group] is maintained. It's also about [agency] commitment and resources. Ideally yes, [agencies] should do it — but they need to do it right. S1[I]

Outside of thesis interviews a suggestion has been made for establishment of the position of an Aboriginal and Torres Strait Islander Commissioner or Co-Commissioner in agencies other than the

[727] There is already some consultation with community-controlled orgs and with community members by agencies, including the ADCQ and VEOHRC. For instance, the ADCQ has recently consulted with Aboriginal and Torres Strait Islander peoples in QLD about protection of human rights. See also AHRC (2015a).

AHRC, which already has an Aboriginal and Torres Strait Islander Social Justice Commissioner position.[728] The consultative body and/or Co-Commissioner would have a different role to that of Indigenous-specific anti-discrimination agency units, which some but not all agencies already have — an oversight that also should be addressed.[729] A consultative body, for instance, would have membership drawn from community members rather than from being drawn (solely) from Indigenous agency staff.

3.1.2 Moving away from the individual complaints-based model

Personal and social disempowerment of Aboriginal and Torres Strait Islander people as a barrier to accessing justice, including through the complaints process, has been discussed in detail above. The result of this particular barrier, according to one stakeholder participant, is that currently 'what you end up seeing' at anti-discrimination agencies 'is the complaint [about an incident] that happens to the angry (or more assertive) person because they'll be the one to take action' (S6 [I]).

To address this, participants recommended amending legislation to remove barriers that impact on disempowered Indigenous complainants. These encompass the requirement that a complaint be in writing, with one stakeholder suggesting that in the jurisdiction in which they work assistance might be provided to persons with a disability to write up a complaint (through transcription of their account of discrimination) but not to Indigenous people (without a disability).

More commonly, participants indicated a preference for complaint agencies to have greater capacity to commence or prosecute a case of discrimination without having received a complaint from a member of the public. Agencies might, for instance, in collaboration with Aboriginal and Torres Strait Islander

[728] North Australian Aboriginal Justice Agency (NAAJA) (2018), *Discussion Paper: Modernisation of the Anti-Discrimination Act, Submission of the North Australian Aboriginal Justice Agency*, Darwin NT, 9. The key role of the ATSI Social Justice Commissioner is discussed by Gaze (2015), 67.

[729] Aboriginal complaint statistics apparently increased in NSW after resourcing of the ADB's Aboriginal Unit, discussed by Goodstone and Ranald (2001), 14 -15, citing Gardner, M and Lowe, A (1995), *Why should Complaints from Aboriginal and Torres Strait Islander people be handled by Aboriginal and Torres Strait Islander staff?* Unpublished, Aboriginal Outreach Program, Anti-Discrimination Board, Sydney.

communities identify systemic and/or frequently experienced issues of discrimination.[730] These issues could then be dealt with by the agencies as if a complaint had been lodged (rather than by way of inquiry).[731] Stakeholders identified this as likely to be especially useful in relation to discrimination by government agencies.

> I think if there was a statutory body that had greater powers of investigation and enforcement, rather than putting all the onus on individuals to bear the cost and stress of making a claim. Systemic issues of discrimination often involve government practice or policy. In these cases, it is particularly important to have this approach, it's so hard for Indigenous people to stand up against government …. [There's fear or risks] of being further victimised if they bring a complaint. That's also a real deterrent for individuals. If there was a statutory body armed with the power to take on those risks … S5 [NI]

Neutrality, however, is seen as a major hurdle to using this approach in a race discrimination context. Complaint agencies, it is suggested, cannot have a 'separate advocacy role. It might be seen that they're not objective. It'd be awesome if they could go out and investigate, but that would null and void their

[730] One issue raised during stakeholder interviews was frequent discrimination against Aboriginal Liaison Officers in Victorian hospitals, as but one example of a multitude of systemic issues.

[731] The AHRC may initiate 'public inquiries' into certain matters and in limited circumstances, but as Rees et al point out, this leads to publication of a report and does not give rise to any enforceable rights or obligations. The Commission can inquire into (1) 'any act or practice that may be inconsistent with or contrary to any human right' but only when the conduct in question is *by or on behalf of the Commonwealth /authority of the Commonwealth or under an enactment*; and (2) 'any act or practice, including any systemic practice, that may constitute discrimination' (including on the basis of race) in relation to *employment or an occupation* (emphasis added). See discussion at the AHRC site (accessed February 2018) at: <https://www.humanrights.gov.au/our-work/legal/projects/human-rights-reports>. State and Territory inquiries are also provided for under legislation (for instance, s. 13(1) ADA (NT)). See discussion by Partlett about earlier legislative provisions that allowed for the Commissioner at a federal level to conciliate either when an individual complaint was lodged *or* 'where it appears to the Commissioner that a person has done an act that is unlawful' (s. 21 RDA, now repealed). Partlett states that this provision 'takes cognizance of the fact that it would be a fundamental weakness' of the legislation 'to rely solely on complaints made by individuals'. Partlett (1977), 156.

impartiality' (S6 [I].)[732] Some Indigenous people, including thesis participants, also wish that complaint agencies could act 'like police and stamp on' discrimination, with criminalisation of discriminatory acts seen as both reasonable and likely to be effective.[733] It is both difficult for Indigenous people to come forward and the law has not got 'enough teeth'. As such, it 'would be desirable to have some *real* consequences for people who blatantly, openly and continuously discriminate against Aboriginal people because of race'. 'It has to be enforced by police' (MM1).

Other participants did not think it at all appropriate to involve police.[734] 'I think it'd be even more difficult if it was a criminal law matter. It would be up to police to pursue charges. It would make the threshold even higher' (MF5). Racism against Indigenous people by police is discussed in earlier chapters as a common problem arising for Indigenous people. If matters had to be brought to the attention of police Indigenous people might be complaining about incidents of discrimination both *by and to* police.[735] They would presumably also have little trust that police would enforce any law to protect rather than punish, given their historically negative interactions with Indigenous communities.

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[732] This approach is used by regulatory agencies such as the Australian Securities and Investments Commission (ASIC), which initiates legal prosecution of breaches of credit and debt laws. See, for instance, ASIC's successful prosecution of an unscrupulous car dealer in Cairns who was preying on Indigenous consumers, selling them poor quality vehicles and lending them money to purchase them at a very high interest rate. Archibald-Binge, E, 'Car dealer hitting Indigenous customers with 48 per cent interest loans fined $1.2m', NITV News, 7 April 2017 (accessed June 2018), available at: <https://www.sbs.com.au/nitv/article/2017/04/07/car-dealer-hitting-indigenous-customers-48-cent-interest-loans-fined-12m>.

[733] See also Goodstone and Ranald (2001), 56.

[734] Commentators are critical of this approach. Kelsey, for example, is critical of use of criminal prosecutions in a discrimination context. He points to 'difficulties inherent in establishing a case beyond a reasonable doubt', meaning that 'few prosecutions are brought'. He adds that 'criminal proceedings are inconsistent with a desire to conciliate and educate' and 'are more likely to harden attitudes and exacerbate prejudice'. Kelsey (1975), 65. McNamara also claims that 'in terms of offering an effective response to the needs of victims of racial vilification criminal laws and formal prosecutions run a distant second to human rights laws and conciliation-based proceedings'. McNamara, L (1995), 'The merits of racial hatred laws: beyond free speech', 4 (1) *Griffith Law Review* 29, 54. Of note, one of the difficulties of the early South Australian legislation was that Indigenous people had to turn to police to make a complaint of discrimination.

[735] This doesn't work in complaints raised against police and also assessed by police, as discussed in Chapter 6.

3.2 Formal justice mechanisms reform

The formal legal system must *also* be adapted to adhere to UNDRIP principles. This entails reform of legislative frameworks and formal dispute resolution processes, as well as improvements to legal or justice outcomes derived through the latter. Key to this reform (and to the effectiveness of such reform) is increased Indigenous input into development of law in this area.[736] As Indigenous thesis interview participants highlighted, to be useful to Indigenous people legal protection against race discrimination must better respond to and reflect their knowledge and experience, with learnings in this regard gathered in genuine consultation with Indigenous people.[737]

This input might be used to consider changes to legislation. **'**Involve Aboriginal people in the research and development of legislation [in a meaningful way], instead of just having the 'Aboriginal Stamp of Approval' that says Aboriginal people were consulted' (CM4). In keeping with discussion above about expansions of the concept of access to justice this is seen as a *justice outcome in and of itself*. As one participant suggested, it is 'critical that any legislation reflects the needs of the people that it's intended to represent. That's a fundamental part of justice' (S2 [NI]).[738] Indigenous people are also, however, largely excluded from the setting of race discrimination related legal precedent because they so rarely litigate. We turn to this issue first.

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[736] Some Indigenous activists may have pushed for introduction of race discrimination law in Australia, but they played no part in its actual design. This was recognised by Briscoe, as discussed in Chapter 4, when he raised the following question. '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 legislation was not effective, he claimed, because it 'never involved Aboriginals. They weren't able to ratify it and subsequently don't have any respect for it'. Quoted in Nettheim (1974), 36. As noted in Chapter 3, there was (very minimal) representation of Aboriginal and Torres Strait Islander peoples in Parliament during the debate leading to the introduction of the RDA.

[737] Congress too has referred to the importance of Indigenous participation in the 'design, development, implementation and evaluation of laws', which requires seeking out and *genuinely responding to* Indigenous perspectives. National Congress (2014), 59-60.

[738] Of note, one Aboriginal interview participant suggested that we need a law like the RDA 'for Indigenous people', thinking that the current legislation was only for non-Indigenous people.

3.2.1 Increasing legal precedent and improving judicial outcomes

Indigenous people should have opportunity to access both informal and formal justice systems when impacted by discrimination. Formal legal adjudication may be a better option than ADR because of its capacity to set legal precedent and otherwise change behaviour.[739] Thesis participants identified Indigenous participation in the development of legal precedent as particularly important.[740]

> [We need more test cases that make systemic changes]. It's a bit of a carrot to have a [conciliation] system there. You can have a crack at this first, we can go to VCAT if you don't like the outcome. What you find is that they're weighing up further months of work (for litigation), versus something that might be sub-optimal but it gives them something. [It] … is kind of anti-law reform — unless conciliators or [the complaints agency] can publish really detailed accounts of outcomes or change the way they obtain consent to discuss case studies. S4 [NI]

> The majority of claims resolve out of court or a tribunal, and on a confidential basis. There's a limited ability for the law to publicly educate duty holders, but also to empower complainants to say, this happened and there's a declaration that this or that was unlawful. It's out of the public view. But also, to provide a precedent so that people bringing claims can say — in this case, this was decided. My case is the same so I've got a good case as well. S5 [NI]

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[739] See discussion in Thornton (1995), 85.

[740] See, for instance, Fiss, O, (1984), 'Against Settlement', 93 *Yale Law Journal*, 1073. Partlett asserts that the 'right to be free from racial discrimination should be seen to have equal standing with other rights that may be enforced and defended directly in court'. Partlett (1977), 169. Setting good legal precedent is identified by Van de Meene and Van Rooij as important because it influences resolution of disputes outside of courts. The 'shadow of state law and the state judicial system' tend to 'strengthen alternative, nonstate dispute settlement mechanisms. The 'possibility that one of the parties may take the matter to court is likely to stimulate the parties to settle cases before they have to face court sanctions. This means that it is still necessary to reform substantive law and the state-based forums in which disputes are adjudicated, as well as set up initiatives and build capacity elsewhere.' Van de Meene and Van Rooij (2008), 17.

Barriers to initiating litigation include the uncertainty of outcomes and, if a matter is litigated, attainment of poor or problematic justice outcomes.[741] Discussion of case law in Chapter 3 suggests there is much room for improvement in the latter regard.

Participants did not discuss specific strategies likely to address these and other barriers during interviews. However, learning from and extending adaptations made within the criminal justice system might be one way forward, discussed previously. Additionally, in writing of poor Indigenous access to justice in this area Tahmindjis has argued for introduction of CRT into race discrimination related law and jurisprudence. This could involve calling on expert testimony and/or use of cultural impact statements during litigation 'so that legislation and case law are no longer used to screen out relevant racial perspectives.'[742]

3.2.2 Legal frameworks

Constitutional reform and Treaty

One means of increasing Indigenous participation in development of legal frameworks is through amendment of our Constitution. A process of consultation has been underway with Indigenous

[741] Stakeholder participants pointed to awards of compensation for hurt and distress flowing from race discrimination litigation as being comparatively low. This deters Indigenous litigants as it means there is little incentive to go to hearing. Complainants settle confidentially, which may be a better outcome in some cases but it also means that no legal precedent is set.

[742] Environmental impact statements are used in adjudication of legal matters related to land use, as an example. This also occurs in a human rights context through the Victorian and ACT *Human Rights Acts*, discussed further below. The ACT *Human Rights Act* (2004), for instance, requires that the Attorney-General prepare a compatibility report for all new bills to ascertain their consistency with human rights (s. 37). A standing committee must also report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly, and courts and tribunals must interpret acts and statutory instruments in a way that is compatible with the *Human Rights Act* (s. 38). The ACT Supreme Court can also make a declaration of incompatibility between a statutory provision and the Act and notify the Attorney General of this, with the relevant provision then being considered by the Legislative Assembly (ss. 32, 33). Additionally, the ACT Human Rights Commission can review the effect of ACT legislation and common law on human rights and report its findings to the Attorney General (s. 41 *Human Rights* Act). See ANU's research into the *Human Rights Act* (accessed June 2018), available at: <http://acthra.anu.edu.au>.

Australians in recent years considering potential Constitutional amendments. These encompass establishment of an Indigenous body or similar that would ensure stronger Indigenous representation in Parliament. As the Referendum Council working on this reform has stated, this would increase Indigenous input into development of more effective law and policy, including (potentially) legislation designed to protect Indigenous human rights.

> It is critical that Aboriginal and Torres Strait Islander peoples are engaged in the development and implementation of laws, policies and programs that affect them and their rights. This is important in achieving better policies and outcomes for Indigenous peoples, and a fairer relationship with government. It may also help prevent discriminatory laws and policies being enacted.[743]

An additional area of Constitutional reform currently being debated is inclusion of a guarantee, binding on Federal Parliament, against racial discrimination. According to commentators, a 'constitutionally entrenched safeguard against racial discrimination, worded in a manner that will provide an effective check on oppressive exercises of parliamentary power by benevolent despots' is required in Australia.[744] This 'oppressive exercise of power' has, to date, undermined the rights of Indigenous people, including a right to self-determination (for instance, through the NTER).[745] Reflecting once again that Indigenous people want protection of human and Indigenous-specific rights, prominent Aboriginal academic Megan Davis, who has been leading discussion with Aboriginal and Torres Strait Islander communities about Constitutional change, also states as follows. 'In Australia, Indigenous interests (or rights) have been accommodated in the most temporary way, by statute. What the State gives the State can take

[743] Referendum Council (2016), *Discussion Paper on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples*, 11.

[744] Bielefeld and Altman (2015), 204.

[745] According to Bielefeld and Altman, constitutionally entrenched procedural protections 'are necessary to ensure that Indigenous peoples have more than merely an opportunity to comment upon the government's unilaterally imposed policies. Indigenous peoples should have a key role in defining policy for their communities, a role which cannot be legitimately usurped by the government-appointed largely government-partisan members of the Indigenous Advisory Council.' Ibid, 204-5.

away, as has happened with ATSIC (Aboriginal and Torres Strait Islander Commission), the RDA and native title'.[746]

An Indigenous thesis participant also pointed to the necessity for Australian Constitutional change *or development of a Treaty* between Indigenous people and government (as advocated by Anderson) to avoid it shifting the goal post in terms of protection of Indigenous rights whenever it feels like it.[747] As noted above, Treaty provides opportunity for melding of protections of Indigenous-specific and human rights.[748]

> If you don't have the proper foundations laid (through Constitutional change or Treaty), there's still going to be ways for interpretation [that reflects Indigenous perspectives and needs] to be argued against. Look at the *Native Title Act* and the two Mabo cases compared to now. The specifications and restrictions [they've introduced to water it all down] .... Every time a case is won, the goal post is moved. It just makes it harder. S6 [I]

Development of a Treaty is a goal sought by many Indigenous Australians, including as a preference to Constitutional reform.[749] A Treaty embodies the right to self-determination, as well as responding to Indigenous experiences of invasion and colonisation. As contemporary Aboriginal activist Luke Pearson describes it, demands for a Treaty are grass-roots, compared to what he perceives as a top-

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[746] Davis, M (2009), 'A woman's place…' 24 *Griffith Review* 156, 157.

[747] Of note, articles within the UNDRIP identified as of particular importance to ensuring effective Indigenous access to justice include Article 37, which is concerned with treaties, agreements and constructive arrangements, according to the International Indian Treaty Council (2014), 41.

[748] Indigenous leader Patrick Dodson called in 1999 for a Treaty which recognised the right to human rights and fundamental freedoms recognised in national and international law and Indigenous-specific rights. Dodson, P 'Until the chains are broken', 4th Vincent Lingiari Memorial Lecture, 1999. See also discussion in Behrendt, L (2002) 'Self-determination and Indigenous policy: rights framework and practical outcomes', 1 *Journal of Indigenous Policy* 43.

[749] The Uluru Statement from the Heart refers to both Constitutional reform (including 'establishment of a First Nations Voice enshrined in the Constitution') and Makarrata (Treaty) 'to supervise a process of agreement-making between governments and First Nations and truth-telling about our history'. Referendum Council, *Uluru Statement from the Heart,* National Constitutional Convention 2017.

down push for 'Recognition' through Constitutional reform.[750] This involves acknowledgement of the First Nations status of Indigenous Australians. Reflecting similar concerns raised in relation to mainstream human rights law, Pearson also claims that 'Treaty empowers Aboriginal people *in the process* as well as in the outcome'. Moreover, First Nations peoples in Australia 'are not confident' that Constitutional reform 'will empower people after the fact either.' [751]

Human rights legislation

There has been a call for governments to introduce stand-alone human rights legislation incorporating provisions that protect Indigenous rights, including to culture and self-determination, alongside rights to non-discrimination or equality — or to add such provisions into existing legislation.[752] Three jurisdictions have already legislated to protect Aboriginal cultural rights in stand-alone human rights legislation: the ACT in 2004, QLD in 2019 and Victoria in 2006.[753]

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[750] This might acknowledge, for instance, 'that the continent was occupied by Aboriginal and Torres Strait Islander peoples before the arrival of the British', and/or the 'continuing relationship between Aboriginal and Torres Strait Islander peoples, their lands and waters, and their cultures, languages and heritage.' Referendum Council (2016), 8-9.

[751] Pearson, L, 'Treaty versus Recognition, the importance of self-determination', IndigenousX, 28 April 2016 (accessed June 2018), available at: <https://indigenousx.com.au/?s=luke+pearson>.

[752] See, for instance, ADCQ (2016), *Human Rights Inquiry, Anti-Discrimination Commission Queensland Submission to Queensland Parliament, Legal Affairs and Community Safety Committee*, QLD. Discussion concerning national human rights legislation has arisen over the years. A *Human Rights Bill* was introduced in 1973, for instance, by the Labor Government alongside introduction of the RDA but did not have sufficient bipartisan support to pass into law. McGinty also claims, significantly, that a Human Rights Act or similar was considered but not introduced at Federation due to a desire to discriminate against Indigenous people. McGinty, Hon. Jim (2010), 'A Human Rights Act for Australia', 12 *University of Notre Dame Australia Law Review* 1.

[753] The ACT *Human Rights Act* (2004) sets out various rights, including a right to protection of the cultural rights of Aboriginal and Torres Strait Islander people (s. 27), who must not be denied the right to maintain, control, protect and develop their cultural heritage, languages and knowledge and kinship ties. Other provisions of the *Human Rights Act* have been used by Aboriginal people for protection of Indigenous rights, including s. 14 (protection of freedom of thought, conscience, religion and belief). An Aboriginal man charged with stealing a coat of arms from Old Parliament House to take to the Aboriginal Tent Embassy, for example, appealed his conviction on the grounds that the Supreme Court lacked jurisdiction over Indigenous people, inter alia, citing s. 14 of the *Human Rights Act*. The case was dismissed. Articles 27 and 28 of the *Human Rights Act* (QLD) (2019) protect cultural rights of Aboriginal and Torres Strait Islander people in QLD.

VEOHRC explains the *Charter of Human Rights and Responsibilities Act* (2006) (VIC) (the 'Charter') as intended 'to get things right at the planning and policy stages', requiring the 'Victorian Government (public servants, local councils, Victoria Police and other public authorities) to act compatibly with human rights, and to consider human rights when developing policies, making laws, delivering services and making decisions'.[754] The Charter enshrines a right to equal and effective protection against discrimination and to enjoy human rights without discrimination (s. 8) and to cultural rights (s. 19). Article 19(2) expressly states that Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community (a) to enjoy their identity and culture; (b) to maintain and use their language; (c) to maintain their kinship ties; and (d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

The case of *Cemino v Cannan and Ors* [2018] VSC 535 illustrates the potential for this type of law. In this case Victoria's Supreme Court held that a decision by a Magistrate to decline transfer of an Aboriginal defendant's case to the Koori Court, which did not sit locally, was a breach of Article 19(2) and 8(3) (right to equality) of the Victorian Charter. The Magistrate made this decision, in part, because he and other Magistrates had completed cultural awareness training, suggesting that this would mean that the defendant's cultural needs were sufficiently met. The Magistrate was found to have acted unlawfully in making this decision.[755]

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[754] See discussion on the Charter on the VEOHRC website (accessed January 2019): <http://www.humanrightscommission.vic.gov.au/the-charter>.

[755] The Supreme Court stated as follows. 'The Koori Court was established for purposes that included addressing systemic disadvantage faced by Aboriginal people who have been over-represented in the criminal justice system, in imprisonment and in deaths in custody. The Koori Court seeks to reduce that systemic disadvantage by providing special measures and accommodations so that the procedure is less disadvantageous for Aboriginal offenders; it protects against indirect discrimination on the basis of race. It is a means through which systemic disadvantage in the justice system is mitigated in pursuance of the s 8(3) right.'

Jackomos describes the Charter as 'an incredibly positive step. It is the right step'. He argues, however, that it is not enough to *state* that a right to culture will be protected by enshrining it in legislation. 'Whilst it is terrific that the right to culture is embedded in such documents', he states, 'the challenge is what actually happens in the daily experience of Aboriginal people. How accessible are these rights and do they make a difference?' Jackomos points to difficulties of enforcement, noting that the Charter does not 'give rise to individual causes of action and the courts cannot strike down offending legislation —parliamentary sovereignty is maintained. In other words, the rights of minorities, our Aboriginal children, remain subject to the democratic process of majority decision-making'.[756]

3.3 Indigenous-led advocacy, including as legislative and policy reform

To achieve better access to justice (including as better and increase legal precedent) for Aboriginal and Torres Strait Islander people affected by discrimination access to legal assistance and representation needs to be increased. Additional funding is required to enable the substantial levels of Indigenous legal need in this area to be met.

> Resourcing needs to increase. It'd be better if ATSI people in VIC knew there was a dedicated lawyer at VALS to help with this stuff, or you weren't going to get turned away from VLA (Victoria Legal Aid) because you lived with someone with money. All those resource-related barriers are a shame because that's what stops people, and in the ATSI community it's probably worse. So, if word gets around that VALS can't help you, that does the rounds. It might be incorrect but it will stop people coming forward. S4 [NI]

The emphasis must be on increased funding for *Indigenous* legal services, as a priority.[757] As

[756] Jackomos (2014). See also discussion in Young, M B (2015), *From Commitment to Culture: the 2015 Review of the Charter and Human Rights Responsibilities Act 2006*, Melbourne Victoria.

[757] *The Redfern Statement*, for instance, demands that government 'adequately fund Aboriginal and Torres Strait Islander Community Controlled front-line legal services', including to increase responses to unmet *civil and family law* need. Aboriginal and Torres Strait Islander Peak Organisations, *The Redfern Statement*, 9 June 2016, 10. See also Recommendation 2, National Congress (2013a), *National Justice Policy* and Article 39 of the UNDRIP (refers to a right to financial and technical support from States to ensure Indigenous access to justice).

participants suggested, 'culturally safe processes and legal assistance to facilitate access to advocacy and support' are essential (S2 [NI]). The importance of the role of these and other Indigenous community-controlled organisations to addressing discrimination and to improving access to justice, including because of their high level of engagement with their respective communities, was regularly stressed during interviews. These organisations are elsewhere identified as 'an intrinsic aspect of the right to self-determination', playing 'an essential role in providing services to and empowering Aboriginal and Torres Strait Islander peoples'.[758] This point is captured in the following stakeholder comment.

> Aboriginal community control is really critical … You're actually building capacity across a community and its ability to advocate on behalf of Aboriginal people [through such community control]. That kind of investment needs to be made. We often find that mainstream organisations are given funding for programs but this should be given to an Aboriginal community-controlled organisation. That department or program then needs to come to the organisation about how to support them in partnership, not the other way around. S2 [NI]

It was also suggested, however, that mainstream legal services (Legal Aid Commissions, CLCs, non-Indigenous private practitioners) might provide greater legal assistance to Indigenous people than is presently the case, ensuring that Aboriginal and Torres Strait Islander peoples have a choice in terms of service provision — but only where this does not undermine the primacy of Indigenous legal services.

> You can get Indigenous-specific legal services to help with this, but you need to be able to get help from everyone. Why can't mainstream, private practice lawyers help — those with more experience? …. We need to make Indigenous affairs everyone's issue, like we do with DV. DV is men's concern? No. It's not. Why can't we do that with Aboriginal issues? We're creating separate health care plans, models of education and so on. It doesn't help to close the gap where

[758] Schokman and Russell (2017), 24. They note that in addition 'to delivering valuable community services, community controlled organisations play a critical role in providing a voice for Aboriginal and Torres Strait Islander communities, advocating on their behalf and representing their interests'. Ibid.

> they set up separate service models. Why can't I go to Maurice Blackburn for a racial discrimination case, even if its subsidised somehow? ATSILS are under-funded and understaffed. They can't take it on fully. CM2[759]

As a further point, legal services (again, particularly Aboriginal community-controlled) should be sufficiently resourced to provide (alongside legal representation and advice) community legal information (discussed further below) and to undertake law and policy reform with respect to race discrimination. Indigenous legal service leadership of the latter reform work falls within an expanded definition of access to justice: one that steps outside of legal dispute resolution and reflects and reinforces UNDRIP principles.[760] Where effective, this type of reform will have positive impacts on Aboriginal people *as a collective*, including by averting disputes *before they arise*.[761] It also goes some way to addressing Indigenous disempowerment as a barrier to accessing justice by providing an alternative to imposition of the burden of asserting rights on aggrieved (marginalised) individuals.

Comments by participants suggest that there is already important law and policy reform work being undertaken by Indigenous-led bodies or organisations, including ATSILS.[762] It is suggested, however, that no one (in power) is listening to what's being said by Indigenous people and organisations that are

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[759] See commentary in a DV context in VicHealth's bystander project (accessed June 2018) available at: <https://www.vichealth.vic.gov.au/media-and-resources/publications/bystander-research-project>. This project refers to DV as being 'everybody's business.' Bystander action in a race discrimination context is discussed below.

[760] Schokman and Russell state that the 'operation of strong, independent and effective representative organisations is vitally important in the context of the historic dispossession and disenfranchisement of Aboriginal and Torres Strait Islander peoples. Particularly given the ongoing impacts of colonisation, representative bodies play a central role in giving a voice to Aboriginal and Torres Strait Islander peoples and ensuring that laws, policies and programs are culturally appropriate and responsive to the issues they face.' Schokman and Russell (2017), 15.

[761] As an example, reform of policies such as the three strikes policy used by public housing providers could decrease numbers of evictions of Indigenous tenants.

[762] This may be criminal law and violence focused, particularly at a national level (discussed below), though sometimes also covers human rights and discrimination issues. ATSILS, for instance, has been engaging in reform work in civil and family law areas. NAAJA has also produced submissions on discrimination law and housing policy. See also NATSILS submissions. See sites for NAAJA and NATSILS (accessed May 2018), available at: <http://www.naaja.org.au/reform/submissions/> and <http://www.natsils.org.au/PolicyAdvocacy.aspx>.

agitating for change. The following comment on the Aboriginal Justice Forum (AJF) in Victoria provides an example of this. The AJF was established through the Victorian Aboriginal Justice Agreement (VAJA), discussed later in this chapter. It is wholly constituted by and advocates on behalf of Kooris in relation to systemic (generally criminal) justice issues.

> Conciliation is generally about individual incidents or matters. The systemic stuff, it takes a lot more thinking. Community members probably won't identify that. We try to address it at a state level, like at the Aboriginal Justice Forum. We're looking at the detention centres at the moment. Trying to uphold cultural rights within the centres, have detainees have access to cultural programs. This is a step towards changing things institutionally. But a lot more work needs to be done to solve those problems and they're all inter-related. S1 [I]

> There's lots of leadership, they just need to start listening. They don't want to hear it because it is the opposite of their policy platform. No, your AMP (Alcohol Management Plan) is not working. No, your (NT) Intervention is not working. No, your welfare reform card is not working. They ignore it ... They consult all the time … Abbott would go to Garma, sit on the ground, call them Aunty or Uncle.[763] They're not his Aunty or Uncle!! They take these great photos ... But then they don't really understand Indigenous people because they don't want to. My Aunty says 'I do know what you're saying, and I do want to have a say, I know what's going on, I'm just taking time to express it.' They're like 'okay Aunty, let's go and have a cup of tea'. CM2

Government also constantly places limitations on the capacity of Indigenous representative organisations to advocate for change for Indigenous people, including through funding instability and restraints.[764] These organisations require adequate and stable funding, but also an assurance (and actions to back this up) that government will listen and respond to what they have to say.

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[763] This refers to the Garma Festival of Traditional Cultures held annually in north-east Arnhem Land, NT.

[764] Instability has also come from constant legislative and policy change. See NATSILS (2013a), *Fact Sheet: Funding cuts to Aboriginal and Torres Strait Islander Legal Services.*

Also relevant in this context is the Social Justice Commissioner position within the AHRC, identified as 'unique in the world'. The position was established in 1992, in response to Royal Commission into Aboriginal Deaths in Custody (RCIADIC) recommendations. The Commissioner is seen as playing a 'valuable role' in law and policy reform work, placing 'consideration of human rights in the hands of parliament.'[765]

Concerns have been expressed however about 'the lack of political will among governments and lack of engagement by parliament on issues raised by the Social Justice Commissioner', however, with the vast majority of the Commissioner's recommendations still unimplemented. This has restricted what can be accomplished through the role on behalf of Indigenous Australians. It is suggested that Federal Parliament should 'enact a legislative requirement or adopt other mechanisms such as parliamentary committees' that mandate a formal response to the Commissioner's reports once tabled.[766]

3.4 Expanding conceptions of Indigenous access to justice into civil and family law spaces

There is still insufficient (but definitely a growing) awareness, including by Indigenous people themselves, that access to justice encompasses Indigenous interactions with *civil and family law* systems. Indigenous definitions of justice and of access to justice are often relatively limited in focus in this regard. Aboriginal legal services have a predominant focus on criminal law, for instance, given rates of Indigenous over-representation. This is evident, for instance, in National Aboriginal and Torres Strait Islander Legal Services' (NATSILS) submission on Aboriginal and Torres Strait Islander access

[765] Schokman and Russell (2017), 17.

[766] Ibid. Anaya, UN Special Rapporteur on the Rights of Indigenous People, states that the role provides 'an exceptional model for advancing the recognition and protection of the rights of Indigenous people'. Anaya, J, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: The situation of Indigenous peoples in Australia, UN Doc A/HRC/15/37Add.4, para 78 (accessed February 2019), available at: <http://unsr.jamesanaya.org/PDFs/Australia3.pdf>. Anaya is quoted in National Congress (2013b), *Statement to the Expert Mechanism on the Rights of Indigenous Peoples, Expert Seminar on Access to Justice for Indigenous Peoples including Truth and Reconciliation Commission Processes*.

to justice to the UN's Expert Mechanism on the Rights of Indigenous people.[767] And yet (and as noted in previous discussion), improved civil and family law justice is essential to reduction of Indigenous contact with the justice system, as well as being important in its own right.

The following comment from a previous Aboriginal and Torres Strait Islander Social Justice Commissioner broadly defines 'justice' ('social justice', in this instance) as follows.

> Social justice is what faces you in the morning. It is awakening in a house with adequate water supply, cooking facilities and sanitation. It is the ability to nourish your children and send them to school where their education not only equips them for employment but reinforces their knowledge and understanding of their cultural inheritance. It is the prospect of genuine employment and good health: a life of choices and opportunity, free from discrimination.[768]

As discussed at the start of the thesis, each of the issues identified by the Commissioner as 'justice' issues are likely to have legal rights attached to them: rights impacted by poor access to civil law justice. Civil law rights *in a range of areas* (such as employment, education or housing) might be accessed as an alternative or in addition to those contained within race discrimination legislation so as to increase 'equality' of outcomes (and social inclusion) for Indigenous people. Indigenous access to justice is inhibited, however, across *every* area of civil law, not just with respect to discrimination law. Indigenous

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[767] NATSILS (2013b), *Submission to the Expert Mechanism on the Rights of Indigenous People: Access to justice for Aboriginal and Torres Strait Islander peoples in Australia*. The UN's Expert Mechanism on the Rights of Indigenous People also explains that a focus on Indigenous access to justice is essential, given 'the gravity of the issues facing indigenous peoples, including discrimination … in the criminal justice system'. 'Over-representation of indigenous peoples in incarceration is a global concern'. Expert Mechanism on the Rights of Indigenous People, Report of the Expert Mechanism on its 5th session. A/HRC/21/52, 4. In Congress' Statement to the Expert Mechanism on the Rights of Indigenous people, in contrast, criminal justice issues are identified as 'a major concern for Aboriginal and Torres Strait Islander People, and they are also a major focus of the justice response in Australia.' Congress then goes on to state as follows. 'Unfortunately, little attention is paid to civil and family law issues and the collective rights of Aboriginal and Torres Strait Islander Peoples to develop and maintain our own institutions that support access to justice.' Ibid, 41.

[768] Dodson, M (1993), *Annual Report of the Aboriginal and Torres Strait Islander Social Justice Commissioner,* NSW.

access to *all* civil law rights, therefore, must be improved (a focus of the ILNP research) — again, with reference to the above UNDRIP principles. Some participants picked up on this by stating that access to justice in the context of discrimination 'needs to be about rights across the board'. Access to justice in the child protection system was highlighted as an example, but other areas of law cited by participants included housing and education. 'Aboriginal peoples' experiences of the child protection system are so disempowering and debilitating.' This and similar 'negative systems' continue to '— and disempower is not really the right word, it's like completely [bring down] Indigenous people' (S2 [NI]).

> You've got DHHS (Department of Health and Human Services (Victoria)) telling Aboriginal people not to seek legal advice early on, they don't need it. Their children are removed from their care. It's very hard when someone's in that state and has lost care of their children to find the emotional strength to take things on …. I think that influences peoples' willingness to engage with mainstream society and its systems more broadly [including the legal system in response to discrimination] when you have experiences like they've had. Particularly when you have families who are part of the Stolen Generations. It's a cumulative experience of feeling really helpless and oppressed. S2 [NI]

4 Building Indigenous resilience

Lentin argues for a return to community-led activism against racism, claiming that communities have historically been significant and effective 'sites of active resistance' to this problem, particularly in its more systemic forms. She points to 'co-option of the bulk of anti-racism activity by the state' in more recent times, including through introduction of legislation.[769] This might occur by way of Indigenous-led direct action or protest, discussed throughout the thesis. The focus in this section, however, is on other strategies embedded within or driven by Indigenous community likely to build on existing Indigenous capacity to resist or otherwise reduce the negative impacts of race discrimination. These strategies have largely been identified through thesis interviews, wherein participants highlighted

[769] Lentin, A (2008), 'After anti-racism?', 11(3) *European Journal of Cultural Studies,* 312.

effective non-legal initiatives or approaches likely to help reduce race discrimination against Aboriginal and Torres Strait Islander peoples.[770]

Of note, the strategies described may address barriers that sit outside the law (including 'justice-seeker barriers) but that inhibit Indigenous access to justice as legal dispute resolution. Decreasing these barriers should lead to positive legal outcomes for Indigenous people. Addressing non-legal barriers to accessing the law may also assist Indigenous people to respond to or combat discrimination *without* recourse to the law, in whatever form they choose. This is because similar barriers often inhibit Indigenous legal *and* non-legal responses to discrimination, as discussed in Chapter 7; and it is positive because, as discussed, justice (and access to justice) does not only revolve around successful legal action. Indigenous people have identified direct inter-personal challenges to discrimination and collective action aimed at achieving wider social reform as preferred and/or as likely to complement legal dispute resolution. Additionally, non-legal responses such as direct action are important not just because they might be preferred, but also as they can be used to confront racism in all its forms — compared to legal responses, which are triggered after an event or issue that constitutes discrimination *as defined by the law*.

Personal and social disempowerment is a good example of a barrier impacting on both legal and non-legal responses. Addressing this barrier — by re-empowering Indigenous people — increases potential to effectively use both types of responses.[771] There is a lot of focus within the strategies identified below

[770] Nissim highlights the importance of increasing capacity of those experiencing racism to respond to it effectively, including through improved access to redress and otherwise. Our focus, she claims, is often on altering the behaviour of (potential) perpetrators of racism. This she refers to as 'primary prevention' — and while it is required, we should also be building the resilience of victims of racism to lessen its impact. This she refers to as 'secondary prevention'. Nissim (2014), 3-4.

[771] Van de Meene and Van Rooij state as follows. 'Unequal power relations undermine poor people's ability to exercise and protect their rights, to access services and institutions, and to participate in economic, political and social processes. Scholars now agree that (legal system-related) reforms are more successful when they are complemented by efforts to address asymmetric power structures. With raised awareness and increased capacities, the poor and the community groups that support them are better qualified to overcome unequal power relations, both within and outside the legal system.' Ibid, 15.

on Indigenous empowerment, as individuals and as capacity building of whole communities. In this respect, these strategies often reflect and/or adhere to community development principles. In an Indigenous setting, these have a focus on self-determination and strengthening of culture and family. They have been applied more often in an Indigenous health than an Indigenous justice context.[772] They are also more likely to be considered in an Indigenous criminal justice context, but have much to offer in a civil law context.[773]

4.1 Calling out race discrimination

4.1.1 Educating about rights

A study conducted by Bodkin-Andrews and others with high-profile Indigenous Australian participants, Bubalamai Bawa Gumada or 'Healing the Wounds of the Heart', sought to identify factors likely to increase Indigenous resilience to racism. This study confirmed Indigenous people 'naming' or calling out discrimination as a constructive and positive response to discrimination, previously discussed in Chapter 6.[774] Discrimination may be 'named' as 'unlawful' through use of or with reference to discrimination law. Of significance, this is identified in the latter study (particularly where it involves

[772] See for instance, Aboriginal Health and Medical Research Council (AHMRC) (2015), 'Aboriginal *Communities Improving Aboriginal Health: An evidence review of the contribution of Aboriginal Community Controlled Health Services to improving Aboriginal health*, AHMRC, Sydney.

[773] The application of community development principles in criminal justice contexts in Australia is evident in implementation of justice reinvestment. See, for instance, discussion in Allison, F (2016), *Justice Reinvestment in Katherine: Report on Initial Community Consultations*, JCU. See also Curran, L, Alikki, V and Barnett, PT (2017) 'Reflecting on community development practices: improving access to justice by working with communities to effect change' 19(1) *Flinders Law Journal* 37.

[774] Bodkins-Andrews, G et al (2013), 'Promoting resiliency to counter racism, the lived wisdom within Aboriginal voices', *InPsych*, 14, n.p. The effectiveness of this response is attributed, in part, to the fact that it defines racism as something external rather than internal to those it targets. Bodkin-Andrews refers to 'internalised racism' as the blaming of one's own cultural or ethnic identity for perceived (negative) differences. One Bubalamai Bawa Gumada participant describes this as follows. 'As a victim of racism, I had automatically assumed that every non-Indigenous person was automatically better than me. So they automatically had better houses, better cars, better moral values'.

legal action) as the final but 'arguably the most powerful' factor in building resilience to racism within Indigenous people.

Thesis participants agreed with this, to a point — highlighting, however, the benefits of taking such action collectively. 'We need to come together and speak up that it's not right, there are laws there' (MF4). This will only happen, however, with increased Indigenous knowledge of rights in this area. [775]

Limited knowledge of legal rights in this area was identified in Chapter 7 as the *most* significant Indigenous barrier to accessing justice. We have also seen how restrictively Indigenous people often define discrimination at law. Increasing knowledge was seen by many interview participants as a priority. 'It's something every community should have … education about their rights as human beings to be treated equally' (SM1). 'People need to be taught how to react to racism'. These 'laws are hidden from us. They need to become clear to Indigenous people so they can use them' (CM5). One participant noted that Indigenous people 'have a strong history of fighting for their rights. They should respond to increased knowledge of rights in this area well' (S7[I]).

[775] Other research suggests that explicit naming and rejection of racism by Indigenous leaders, including as something 'unlawful', can help to reduce it as it encourages others in the community to speak out. Nissim (2014), 10. This approach has been used in the 'Racism. It Stops With Me' campaign, developed by the AHRC in partnership with National Congress and others. The aims of the campaign include to ensure that more people recognise that racism is unacceptable, to give people the tools and resources to take practical action against racism, and to empower individuals and organisations to prevent and respond effectively to racism. After Aboriginal footballer Adam Goodes called out discrimination during a football match he went on to become a spokesperson for this campaign, talking with Indigenous people about their power (and right) to call out inequality. Goodes stated in a campaign video that racism will only be reduced if responded to. 'A year ago, I took a stand, a stand against racism. When you see or hear something racist it's hard to know what to do but you can always do something. If it feels safe you can speak up or you can report it to someone who can help. But if you say nothing or do nothing, nothing changes. Racism, it stops with me.' This video and material on the campaign (accessed November 2018) is available at: <https://www.youtube.com/watch?v=_mtw5ZAtbaY> and <https://itstopswithme.humanrights.gov.au/.

Legal education is commonly delivered by legal services, complaint handling agencies and others involved in justice service provision (or 'justice providers').[776] Discussion on education about rights, however, has been purposefully included in this section, rather than above as reform of the legal system. It is important to frame education about rights as something that might be led by and embedded within Indigenous communities ('justice seekers'). Additionally, even with improved knowledge of rights not everyone who encounters discrimination will challenge it through the law, with everyday justice an alternative potential response. Knowing how you should be treated according to the law may help Aboriginal and Torres Strait Islander people to advocate for themselves directly, without accessing legal processes.

Participants thought that dissemination of information about discrimination law should start early, including in primary school (see further below). It ought also to be very accessible, provided in spaces and through mechanisms with which Indigenous people are most likely to engage. 'Advertise it more - news, media, TV, mailboxes, actual services that Aboriginals use, pubs — that's how you get it out there. If you don't see it, how would you know how to address it?' (SM1). 'Workshops would be great, it'd be awesome. Most Aboriginal people don't know their rights. They need to know they don't have to talk to the police. They can go and talk to somebody else. It you can get that message out there, they might be less angry' (SF1).

> People need to know more about these laws. Definitely. I don't know about them. Even in Aboriginal Hostels like this, if there was a simple way of explaining — if you're discriminated against this is what you can do. Maybe that might get the ball rolling with Aboriginal people actually talking about – look I was racially abused on the street today. BM2

[776] The AHRC, for instance, has prepared educative material about the RDA and the complaints process for Indigenous Australians (accessed February 2018), available on the AHRC website at: <http://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/know-your-rights>. It has also developed and disseminates material about the RDA to a broader audience but of specific benefit to Indigenous people. AHRC (2015c).

Initiatives to improve the capacity of and opportunity for Indigenous community members to educate each other about rights should be supported. Providing information about the law at Indigenous-focused events like NAIDOC was discussed by participants as an example of this.[777] One Torres Strait Islander participant who works to enhance social justice in his local community without any formal resourcing also claimed that he would love to run regular workshops for community members on discrimination but requires money to do so. This type of strategy is likely to be effective as it empowers Aboriginal and Torres Strait Islander people as both holders and disseminators of knowledge. Indigenous community-controlled organisations, including both legal and health services (Aboriginal Community Controlled Health Organisations (ACCHOs)) should also be key sources of information.[778]

Another way of facilitating access to information about discrimination involves Indigenous people who have used the complaints process talking with others about their experiences, on an informal basis or otherwise. Positive examples of dispute resolution shared by and within Indigenous communities is identified by interview participants as likely to encourage others to challenge race discrimination, including as it will help address distrust of the legal system. One participant stated as follows. 'Justice has to be seen to be done'. 'Good examples' of justice attained through legal processes need to be seen (MF2). Another participant commented on this point. 'If they see some progress with it, if they do see a black fella that stands up and uses the laws and actually wins, then they'll think it's worthwhile' (BM5). This could be a strategy those tasked with providing education, including anti-discrimination agencies, might utilise or expand further if it is already in use.

> In an ideal world if Aboriginal people start complaining more and making formal complaints about what they've been through or going through that would help. Cause then they'll go back

[777] One stakeholder participant pointed to a spike in contact by Indigenous people with a particular discrimination complaints agency after an event like this as proof of its effectiveness.

[778] Health services are appropriate sites for dissemination of this information, given links between discrimination and health outcomes, discussed in Chapter 2. See also Currie (2009), 76. Currie points to the health consequences of *not* being able to address legal problems, including discrimination. He suggests that problematic health issues arising in a discrimination context may lead to increased contact with health services, which points to health services as being good point of access to information about rights related to discrimination. Ibid.

and talk to their family and if it ever happens to them, they'll feel more comfortable making a formal complaint to whoever. You just need to get that ball rolling. BM4

4.1.2 Reporting discrimination (without legal action)

Another way of calling out discrimination highlighted in interviews by participants was reporting discrimination without having to make a formal complaint and/or without naming and/or seeking accountability from a particular respondent, including because of a fear of repercussions. This works, in part, because accounts of discrimination can be framed according to Indigenous perspectives, without having conform to legal definitions of what is or isn't 'discrimination'.[779]

In a comment that speaks to civil law need and Indigenous inequity across a range of areas, one participant stated as follows. 'There's a lot of different things to complain about — housing, or Centrelink. There's no single organisation, like a safety hub, which people can go to for all this different stuff' (S8 [I]). Participants spoke of wanting an organisation with a shopfront where they can learn about their rights but also have a say about incidents and issues, including anonymously if need be. ''I feel happy that I did that but that's as far as I want to take that.' They don't necessarily want to go on to a full procedure because of a fear it might backfire' (BM2).

> You know what I think would be great, if there was a place where Aboriginal people who've been racially abused, there should be a place where they feel comfortable to go to — to voice their anger about it — and give them a bit more knowledge about what they can do about it. BM4

[779] Delgado discusses how use of the language of colonisers or of the racially dominant group in law re-colonises and oppresses racial minorities, including in a civil rights context. He cites the example of Aboriginal children being forced to speak English as part of the process of colonisation. Other critical race theorists, including Freeman, have argued that for racial minorities the 'very structure of anti-discrimination law' means they lose, even when they have won (because their experiences are moulded according to and by mainstream law). Cited and discussed in Delgado (2007), 1705-1706.

This type of initiative may help reduce feelings of powerlessness that arise from not responding at all to discrimination and/or negative repercussions (criminal charges, for example) resulting from more violent or reactive reactions, discussed in Chapter 6 as unlikely to yield positive results.[780]

VEOHRC previously ran a 'Report Racism' initiative, an online tool that those who had experienced racism could use to (anonymously) report it to a third party (including police and VALS).[781] It has had mixed results, as the following comment suggests — including low Indigenous participation, attributed in part to involvement of police as a participating organisation — but the concept itself is probably useful.[782] At the very least, it enabled participating organisations, including VEOHRC, to gather information about pressing issues for the community (which might then feed into inquiries or similar).

> It was going to the community and saying — why don't you tell us about racism. How's that going to solve this problem? Well, it's evidence gathering. We need more information on racist incidents. This informs us and allows us to advocate on a broader systemic level to government and whoever else. Some people feel better when they get something off their chest. But directing it to community — it might be some sort of healing. The racism is out there — how do we change that? S1 [I]

The People's Hearing into Racism and Policing was also held in Victoria, set up by a local Community Legal Centre and a community-based advocacy group.[783] Through the forum in question individuals

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[780] The Bodkins-Andrews study highlighted the importance of responding to discrimination when 'you are in control of your emotions to avoid more violent responses, seen as likely due to the emotional impacts of racism. The latter responses would [however] perpetuate and reinforce racism.' One study participant stated as follows. 'The best advice I can give is count to 10 and take a big breath before you respond, because your response is going to be important to you for the rest of your life ... [A]cting in anger is not always the best way to conduct yourself, although sometimes you can't help that.' Bodkin-Andrews (2013).

[781] Details of this initiative are available at the Report Racism website (accessed June 2018): <http://www.reportracism.com.au/>.

[782] Only 15 out of 172 Report Racism participants identifying their cultural or ethnic background were Indigenous. See VEOHRC (2013b), *Reporting Racism: What you say matters*, VEOHRC, Victoria, 8.

[783] This initiative is detailed at the Imara Youth site (accessed June 2018): <http://www.imarayouth.org/about-peoples-hearing/>.

had the chance to publicly call out racial discrimination and racism without naming perpetrators or proceeding to formal complaint, and to describe the effects that these issues had upon them.[784]

4.1.3 Networks of support: family and community

Ferdinand and colleagues cite evidence of the beneficial effects on mental health of 'active /expressive' responses to racism. They claim that 'some form of response to racism by its targets may be more beneficial than no response', noted above and identified in Chapter 6 — but that 'it may be most beneficial if that response is non-confrontational'.[785] As such, initiatives that involve provision of support by friends, families and others to those targeted by discrimination are likely to have value to Indigenous people.[786] Other research also suggests that talking to someone and/or the presence of social supports improves one's reaction to racism and/or the way it impacts on you.[787] As many Indigenous people may walk away from discrimination, this strategy or approach provides an outlet through which relevant experiences can be 'offloaded' in a healthy way.

Indigenous participants described the opportunity to talk about discrimination to family, friends and community members as worthwhile. As noted in Chapter 6, one participant spoke of the family home as a place of sanctuary against racism. The family unit, in particular, is seen by thesis participants as also increasing self-esteem and cultural pride in family members and as likely to also increase their capacity to directly challenge discrimination.

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[784] Other examples include the work of the *Online Hate Prevention Institute* (OHPI). OHPI is focused on online responses to racism (on Facebook and other social media and on various race hate sites). It produces reports on significant online hate events and analyses online targeting of Indigenous, Muslim and Jewish Australians by racists. In 2014, it launched '*fightagainsthate*' (FAH) that allows registered members to name and report racist and other hate material they find on the internet. Reports from OHPI and FAH appear to be encouraging social media sites to enforce their standards against online racism. Details are available on the OHPI site (accessed June 2018): <https://ohpi.org.au>.

[785] Nissim (2015), 15.

[786] Ferdinand et al (2013), cited, along with other research, in Nissim (2014), 14.

[787] Priest N et al (2012), 'A systematic review of studies examining the relationship between reported racism and health and wellbeing for children and young people', 95 *Social Science and Medicine* 122.

> At the end of the day, and I'll always say this to our children, it's how you get through it. What does that person's opinion mean to you? Is it worth the pain and suffering? It's not worth it, it's really nothing to us. But if it's someone with authority [that's different — you have to challenge it]. SF1

> One thing my father helped us with — to be comfortable in our own skin, including who we are as Aboriginal people. I've never been ashamed to be Aboriginal. I never put my head down because I'm Aboriginal. I've seen families that do the same, and I've seen families that don't. In a way we've grown up mainstream, but my parents have been insistent that we embrace our culture. (Participant discussed being bullied by another Aboriginal boy because of his Malay heritage) It troubled me. I went to my father ... He said: 'When people come at you like that know that all four of your great-grandmothers are full blood Aboriginals, and you know where they come from and their land' … I call it for what it is, I've been raised like that. If I get isolated because of that the problem doesn't sit with me. CM4

Families cannot always provide resources in this regard, however. 'Pride should start at home, in yourself and your family — whatever's out there you can face the world. There are sadly families that are broken to the degree they can't build themselves up. They need help'. When this is the case others can step in, including the broader community or (preferably Indigenous and community led) services or programs. 'I think this is how people learn to deal with these issues … [It] … gives you the tools to empower yourself instead of fighting with your fists – go report it or defuse it' (SM2).

Nissim too writes of an 'antidote' to 'minority stress' as 'the presence of shared, supportive environments for those with a common experience of racism'.[788] Watts-Jones has identified such environments as a 'sanctuary', 'or places which offer protection from the 'savagery of racism''.[789] In an Indigenous context, 'sanctuary' might resonate with the concept of 'cultural safety'. This is likely to

[788] Nissim (2014), 9.

[789] Watts-Jones, D (2002), 'Healing Internalised Racism: The Role of a Within-Group Sanctuary Among People of African Descent', 41(4) *Family Process* 591, 592-3.

be an 'environment that is safe for people: where there is no assault, challenge or denial of their identity, of who they are and what they need. It is about shared respect, shared meaning, shared knowledge and experience of learning, living and working together with dignity and truly listening.'[790] Whilst this may be the family home, as above, events or organisations developed or operating specifically for this purpose might provide space for such sharing to occur.[791] Indigenous organisations, including ACCHOs, might provide such a space. Thesis interview participants spoke of the power of communicating about experiences of discrimination with each other through gatherings. '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. It helps a lot' (BM4).[792]

In a legal context, further thought might be given as to whether and how key sites of access to justice, such as complaint handling agencies or legal services, might be perceived as places of sanctuary by Indigenous people: places in which accounts of discrimination are more easily shared.

[790] Our previous Social Justice Commissioner, Mick Gooda, has also stated that cultural safety 'requires the creation of environments of cultural resilience within Aboriginal and Torres Strait Islander communities …. where we feel safe and secure in our identity, culture and community.' Gooda, M (2011), 'One's identity is for the individual to determine', *Sydney Morning Herald,* 25 November 2011.

[791] The Gathering Place in Western Melbourne, as an example, aims to 'bring together our people at a gathering place that celebrates our community's culture and identity, enhancing the self-determination and well-being of our people. It will provide a healthy and proud "Indigenous Australian" community through motivation, education and cultural acknowledgement, whilst giving the Western Suburbs Indigenous Australians a sense of belonging and ownership'. Details are available on the Gathering Place's website (accessed June 2018): <http://www.gatheringplace.com.au/index.html>.

[792] Having someone you can trust when discrimination occurs was identified in the Bodkin-Andrews study as a key factor in strengthening Indigenous resilience to discrimination. As one participant in that study stated '[o]ffload that incident immediately to your best friends. Do not hold it and let it fester. Have a joke with another Koori who will laugh with you and get rid of it … Just disburse it from your system, disburse it from your being.' Bodkin-Andrews (2013).

4.1.4 Increasing pride in and knowledge of culture and history

Indigenous participants pointed to *whole-of-community* solutions to racism, manifesting not just as asserting rights collectively, including by way of direct action, but also as initiatives and events that instil cultural pride within Aboriginal and Torres Strait Islander people — an important weapon *and* shield against race discrimination. Indigenous role models are thought to achieve similar things. Further positive initiatives encompass Facebook groups, posts and pages created by Aboriginal and Torres Strait Islander people. An example of this was described in Chapter 7: the posting online by Indigenous people of multiple positive images of Indigenous fatherhood in response to Bill Leak's racist cartoon about an Indigenous dad.[793]

These types of strategies can build confidence and resilience within Indigenous people, again likely to improve responses to discrimination in *and* outside of the law. As the following comment suggests, they also directly challenge racism by breaking down racist stereotypes. 'We challenge racism every day — getting more Aboriginal doctors, solicitors ... Our people empowering themselves, believing in themselves – doesn't matter what you're wearing or who you are' (MF2).

> 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. The all-stars are the finest AFL players in our country, most of them are Aboriginal. This heightens the status of Aboriginal people generally. Sports is the only area where we have a level playing field, and where we can sometimes go above. The Aboriginal All-Stars are idolised. This increases our profile. CM4

[793] See a further positive example on the Facebook pages 'I Am Proud To Be Aboriginal and Torres Strait Islander' (which promotes positive messages about cultural identity) and 'Proud to Be Indigenous Week'. These pages (both accessed June 2018) are available at: <https://www.facebook.com/IAmProudToBeAboriginal> and <http://firstpeoples.org/wp/proud-to-be-indigenous-week-may-20-26th>.

Educating Indigenous people about culture and history is identified by thesis participants as key to improving Indigenous responses to discrimination, including because of what it offers in terms of building cultural pride. History in this context incorporate the efforts and bravery of past Indigenous leaders, including activists such as Charlie Perkins.[794]

Denial of history and culture has been a form of racism particular to Indigenous people, as discussed. Education of Indigenous people about history and culture is therefore a further powerful response in and of itself to this form of racism.

> Ignorance about Indigenous history and culture is also amongst Indigenous people because it gets taken away from you. If you don't have the background, if your Elders were taken from you with their knowledge of historical activities and matters then you miss out. A lot of Indigenous people have missing identities, being discriminated against for God knows what reason. It's a vicious cycle. S8 [I]

Notably, participants suggested that some Indigenous people reject or chose not to engage in their identity because of racism. To combat this, Elders need to be out there strengthening identity, talking to young people (S7 [I]).

5 Role of the broader community in reducing race-based inequality

Participants placed significant emphasis on strategies requiring mainstream society to take more responsibility for or to play a greater role in preventing or reducing race discrimination. As one participant stated: 'The law is a very blunt instrument for dealing with complex social issues. It's

[794] The Bodkin-Andrews study identified the importance to resilience against racism of the 'maintenance and promotion of Aboriginal and Torres Strait Islander identity, which might include pride in Aboriginality and pride and morale gained from previous Indigenous activists and leaders.' As one participant in the project stated as follows. 'You have the ability to walk into anything that you would like to do, because there are people before you who had fought for your rights ... Whether it was the Charlie Perkins of the world, whether it was your Nan, it is somebody who has stood up and said, we are who we are. We're Aboriginal and we will stand up and be counted.' Bodkins-Andrews (2013).

actually societal change' that's needed (S6 [I]).

Though racism can take institutional forms (evident in law and policy), a lot of discrimination occurs against Indigenous people at a community level — as racism on Facebook, on the street, in shops and pubs, for instance. This was identified in discussion of social mores and racism during the time of the Freedom Ride and it is still the case today. It is important, therefore, that community-level attitudes are altered so as to combat race discrimination. Increasing community member responses to racism is also seen as beneficial, discussed below as 'bystander action'.

Notably, a number of the strategies described in the following sections may well fit within broader definitions of access to justice. These encompass, as Parker suggests, 'the means by which people seek to secure the type of social and individual relations they think are right, and to rectify them when they have gone wrong in particular circumstances.' They are also often almost mirror images of (and complimentary to) those discussed in the previous section, but here refer to *non*-Indigenous community efforts and responses. For instance, increasing Indigenous knowledge of culture and history empowers Indigenous people as targets of racism. Increasing non-Indigenous knowledge of culture combats ignorance that feeds racism against Indigenous people.[795]

5.1 Changing community attitudes: acknowledging racism and discrimination

As critical race theorist Peggy Davis points out '[d]enial and persistence of discrimination are interconnected' for it is 'difficult to change an attitude that is not acknowledged'.[796] As this comment

[795] As an example of this double-pronged approach to education, Partlett claims that the complaints mechanism must be 'buttressed by an extensive educational programme'. This programme must 'enable the public to realise the part they can play in eliminating discrimination and to understand the problem of minority groups', as well as educating 'minority groups about their rights and of the steps which they may take if they meet discrimination'. Agencies, he claims, can't properly administer 'their complaints or enforcement mechanisms unless the public is involved in eliminating discrimination'. Partlett (1977), 159-60.

[796] Davis, P, 'Law as Microaggression' in Delgado, R and Stefancic, J (eds.) (2000), *Critical Race Theory –The Cutting Edge,* Temple University Press (2nd ed.), 141, 144.

suggests, we must recognise that discrimination exists as an essential first step to reducing its incidence. If we continually deny its presence we are also justified in doing nothing to eliminate it.[797]

Presently, there is limited awareness of racism as it impacts on Indigenous people in Australia. As one Indigenous thesis participant stated, people 'need to take notice of' discrimination and 'know how much it goes on' (MF1).[798] Another participant claimed as follows. 'At the moment there's not much news about Aboriginal people and racism' (MM1). There needs to be greater understanding of what discrimination means, particularly in a legal sense; that we are all bound to comply with race discrimination law and to adhere to the norms it has established and reflects. Education about rights for marginalised groups is important. However, as one participant states, we 'need more education or an awareness raising campaign for perpetrators too', but in relation to responsibilities (S4 [NI]).

> CLE (Community Legal Education) 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. S8 [I].

Rather than relying so heavily on *reactions* to discrimination once it has occurred this should help decrease its occurrence to begin with. At various points of the thesis it is suggested that there has been a shift in social mores and behaviour, leading to reduction of (at least, more overt) discrimination, including due to introduction of race discrimination law. This points to the importance of education,

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[797] Partlett's comments also still hold true in this context, though now 40 years old. He claims that our 'legal structure exists to make a significant start in the elimination of racial discrimination in our society.' The 'problems of official apathy and lack of realisation in the community' about discrimination, however, 'are of vital importance' to and must be 'primary targets' of any strategy aiming at social reform. Partlett (177), 174. Official apathy is dealt with in discussion of government responses to racism below.

[798] The discussion that ensued after the death of Elijah Doughty, discussed previously, and the justice system's response to his killer was seen as painful but necessary, for instance. See Wahlquist, C, 'Sentence for Elijah Doughty's killer sparks anger, was justice served?', The Guardian, 27 July 2017.

and of the educative function of anti-discrimination law to changing social attitudes and practice. Greater public awareness and acknowledgement is required of race discrimination against Indigenous Australians, in particular, and including of our racist past.[799] Failure to recognise and respond to this past has significant negative consequences, including the fuelling of further racism, but is also a form of racism in itself, according to Indigenous people. Ignorance in this area creates or feeds into existing racist attitudes and racial tensions between Indigenous and non-Indigenous people.[800] 'You don't know this stuff (history of colonisation) unless you *want* to go out and learn about it. It's not tangible. It's a bit of a dark history — so let's hide it under a rock. This breeds ignorance' (S3 [NI]).

> Guilt and anxiety [about our past] are in the country as a whole, even if individuals don't hold it themselves. If you look at significant events like Australia Day, [for us it's about] invasion and survival. We've got war memorials that don't recognise the frontier wars. We've got the Constitution, that's still racist. Australia's first two pieces of legislation in Parliament were racist: to allow for indenture of Pacific Islanders and to keep out coloured people. These symbolic things, they have [ongoing] ripple effects in the nation. And although individual attitudes and beliefs are changing, there's a symbolic wound that has to be healed to change things … The longer things are swept under the carpet, and there's this culture of denial about our past, the longer it's going to take to be reconciled and for our culture to be accepted. S1 [I]

Where Indigenous people do not name racism for what it is, they may internalise it.[801] Conversely, the broader community is also able to *externalise* it when it remains unacknowledged. For instance, without

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[799] An initiative that may assist with this is All Together Now's phone app, allowing individuals to 'walk in the shoes of an Indigenous person' for a week. Information on this app is available at the All Together Now website (accessed June 2018): <https://alltogethernow.org.au/everyday-racism/>.

[800] Australians Together is a non-profit group with the following objective. 'By listening to the voices of Indigenous Australians, we help non-Indigenous people learn the true story of our shared history, understand how it's still having an impact today and imagine new ways to live together more respectfully.' Information is available on the Australians Together website (accessed May 2018): <https://www.australianstogether.org.au/stories/>.

[801] Discussed above. See Bodkins-Andrews (2013).

sufficient understanding of our history it is easy to deny or ignore the links between Indigenous socio-economic disadvantage and racism. Instead, disparities in outcomes between Indigenous and non-Indigenous people is attributed to individual and collective failings of Indigenous people: again, leading to racist attitudes. Participants discuss this as follows.

> One thing I did learn in law school — with Indigenous people and other minority groups, we don't start from a level of equality. You guys are starting off here, we're still here. We need to be on your level before we can get equality. People say you get the same as me. But we didn't start out at the same point or start line. You had a head start. We're still running to catch up to you. We're never going to catch up to you until we can bridge that gap … Mainstream Australia have a hard time accepting that. MF5

> They think things are getting better, so why do blacks think they deserve everything? Government's been trying to help them, why do they still want more? .... On the surface with the legislation and agencies that try to help ATSI communities, a lot of people that don't know too much about it think 'well, help yourselves' rather than understand the long-standing, ongoing history or issue that you can't just break. That mentality has not changed for the greater majority of people. The help and money that gets thrown at ATSI people, with no consultation, but if they went to communities and saw people living in the conditions they live in they'd probably have a massive freak out maybe that would change their views. S6 [I]

Limited understanding in this context also underpins commonly held views that Indigenous people are unfairly 'privileged' in the 'handouts' that government provides to them.[802]

> A close friend of mine shocked me. They asked, 'Don't all Aboriginal people get given a farm or property?' I was like, 'Oh, if I got that I'd be there. I love chooks and fresh stuff'. I've had

[802] This type of racism was evident in Bolt's article about people falsely claiming Aboriginality to access certain benefits and privilege that led to the *Eatock v Bolt* case, and in *Combined Housing Organisation v Hanson*, discussed in Chapter 3.

people jump in my car and asked if it's a government car. I pay for this out of my own hard owned money. To me that's not racism it's just ignorance. SF3

5.2 Bystander action

Focusing on the role community members might play in this area includes upskilling them as 'first responders' to racism, including by way of 'bystander action'.[803] A classic and well-known example of bystander action involves individuals filming and potentially also confronting those perpetrating racial vilification against racial minorities in a public place, such as public transport. It goes beyond this, however, as bystanders can be individuals *or* organisations: that is, anyone willing to take a public stand against race discrimination.[804]

[803] Nelson defines bystander action as action 'taken by a person or persons (not directly involved as a target or perpetrator) to speak out about or to seek to engage others in responding (either directly or indirectly, immediately or at a later time) to specific incidents of racism and also to behaviours, attitudes, practices or policies that contribute to racism.' Russell, Z et al (2013), *Choosing to act: Bystander action to prevent race-based discrimination and support cultural diversity in the Victorian community: Research report*, VicHealth, Melbourne Victoria, 17. Bystander action was supported by the VEOHRC as part of its Reporting Racism initiative. See VEOHRC (2013b). Anti-racism bystander action is also a focus of All Together Now. All Together Now seeks to prevent interpersonal racism 'by educating people about what racism is, and how they can effectively speak out against it. Australian academic research shows that when a person says something racist, they do so because they overestimate the number of people around them who agree with their point of view.' Bystander action 'helps other witnesses understand that racism is unacceptable.' Information is available on the All Together Now site (accessed June 2018): <https://alltogethernow.org.au/>.

[804] VicHealth includes within its definition of bystander action 'action taken to identify, speak out about or seek to engage others in responding to specific incidents of discrimination and intolerance' or 'in response to behaviour, attitudes, practices or policies that contribute to race-based discrimination and intolerance. It might also include *responding to practices in organisations* that are discriminatory or may contribute to discrimination' (emphasis added). Russell et al (2013), 7. For instance, the 'Racism. It Stops With Me' campaign discussed above asked organisations to commit to the campaign, to develop anti-racism strategies and initiatives and to 'become part of a community of people who lead by example.' The Football Federation of Victoria's *Don't Stand By, Stand Up* program is an example of a bystander organisation, with detail available on the organisation's site (accessed April 2018): <http://www.footballfedvic.com.au/dont-stand-by-stand-up/>.

We have seen effective bystander action on a large scale in the context of sexual and other violence against and misogyny directed towards women.[805] Most recently, it is evident on a global level in the #MeToo movement, which uses shaming, social isolation and other strategies to combat sexism, sexual harassment and violence.[806] Research suggests that bystander action helps to reduce the incidence of racism. It works by challenging social norms underpinning racism or any other social issue upon which it is focused. As a community-based sanction against discrimination it may be more effective than *or* might work alongside legal sanctions.[807] It is also somewhat akin to community-led direct action (and perhaps to a lesser extent, everyday justice), in that it harnesses community members (rather than only or primarily institutions) to take a stand against racism. Additionally and positively, though similar to strategies involving those targeted by discrimination naming it for what it is (discussed above) bystander action can be differentiated as it requires a third party to speak up about rights in place of someone likely to be more marginalised.

Thesis interview participants commented on strategies that to some degree fall within definitions of bystander action, as follows. 'Name and shame, well it's done to us. [Do it] how they do it to us. But still, you'd be worried about repercussions. You'd put a target on yourself' (SM1).

> [Pubs and similar] should have something written on a board saying 'we don't discriminate against Aboriginal people' so people know that just 'cause they're being chased away from the place, it's not about culture. It is tacky and makes you feel belittled, like you're very low standard, you're nothing. Here's the drunken white people coming up, and they go in but the black people aren't allowed. CM3

[805] See, for instance, VicHealth's campaign 'More than ready: bystander action to prevent violence against women'. Information on this campaign is available on VicHealth's website (accessed April 2018): <https://www.vichealth.vic.gov.au/media-and-resources/publications/bystander-research-project>.

[806] Information about the MeToo# campaign is accessible at the following link (accessed June 2018): <https://metoomvmt.org/>.

[807] See Pedersen et al (2005).

Others were more direct, stating that the 'broader, mainstream community needs to play its part.' People may think what when they witness discrimination that it is 'terrible, but not their business. They are worried about patronising Indigenous people, as coming across as being their 'saviour''. They called for education so that if you do 'see discrimination in a shop, for instance, speak up, get involved' (S7 [I]).

5.3 Connecting with Indigenous people and culture

Also identified is the need to increase awareness within the broader community about Aboriginal people and their culture. 'Before you can go there (expect laws to change behaviour), set up some course for white men only about Aboriginals. They need to learn about us before they can judge us. They always judge a book by its cover' (CM5).

> Mainstream society fails to understand because they don't go out there and live it. People are quick to make judgements on culture, they're quick to criticise but have no experience. There is so much sensationalism in how people view Aboriginal people. When they judge one person, they believe all Aboriginal people are like that. CM1

Lack of direct contact between Indigenous and non-Indigenous people contributes to racist attitudes. Where positive contact is increased, informally or otherwise, attitudes may be changed. Bringing Indigenous and non-Indigenous people together outside of (reactive) dispute resolution processes should be of benefit in this context.

Deliberately constructed and/or naturally occurring relationships or interactions are both potentially useful in this context. As the following comments suggest, these can increase understanding between groups and challenge negative beliefs. 'There's a program at one police station where they go and play cricket with Aboriginal people. They have a better understanding of the community, they're interacting with them rather than always just looking to lock you up. Make it a positive not a negative. It was really good' (SM2).

> People who don't like Aboriginal people maybe were in a bad situation with them and they stamp us all like that. I used to have a friend like that. When he was younger he had run-ins with Aboriginal people. He didn't like them. As he got older and I met him, he's completely changed ... I used to work at the City of Melbourne. A guy there said 'I've never met an Indigenous person. There were Indigenous people at my school but I was scared to go up and talk to them.' He was in his 20's. Through work I've met so many wonderful non-Indigenous people and I've been the first Aboriginal people they've met. They're fantastic. MF4

> I saw one study and I agree. When there are positive interactions there's positive affirmation. Say a meeting between landlords and community orgs, they get to meet each other and talk. Supermarkets, football clubs … those positive interactions where beliefs and stereotypes are blown out of the water. That builds understanding too. Once it boils down to it, we're all people, we all tend to like some of the same things. We share a lot of beliefs and attitudes. [Discrimination though is] also human, it's part of human nature. S1 [I][808]

Mainstream media also has a key role to play in this. Participants pointed to high profile Indigenous people such as Stan Grant and what he is able to achieve by challenging mainstream narratives through the media, for instance (S7 [I]).

Do Aboriginal and Torres Strait Islander people need to 'move forward' too, in some respects, from past experiences of colonisation - without denying these experiences? Some Indigenous participants thought so. 'The way I see it, you can't blame every white fella for what someone's done. So there's no

[808] Commentators have made similar findings. 'The suite of factors that are needed to address racism is large. Beyond laws of deterrence and punitiveness, where racism is motivated by antipathy toward an outgroup, deterrence needs to include Reconciliation, which is attention to and improvement of the relationships between the groups. For example, measures that improve the status of Indigenous Australians or the likelihood that White/European Australians will listen to Indigenous voices should lower racial vilification, all other things being equal.' Louis and Hornsey (2015), 89. See, for instance, the Building Bridges Kar Kulture initiative, which brought together Sudanese and young people from other cultural backgrounds to work together to restore vehicles. Information available on the VicHealth website (accessed August 2018): <https://www.vichealth.vic.gov.au/media-and-resources/video-gallery/building-bridges-kar-kulture>.

good holding a grudge on everyone. All you can do is make things better for the future, you can't change the past' (BM5). 'Some Aboriginal people don't want any Australian colonisers around, they want to be separate completely. But we have to work together because no one's leaving the country, we can't extradite the coloniser. So how do we work together to build a better future for both teams?' (S1 [I])

> We need to look at the white people, we need to work with them. We need to find out why they are doing this, why they hate us …. Aboriginal people might think all white people are bad, but there are a lot of white people who are friends. It's a minority that is causing a problem. CM5

Also identified as decreasing levels of ignorance that feeds racism is increased positive public profiling of Indigenous people, a point alluded to above in the context of discussion about cultural pride. 'If they want to put stuff on media, they should show Aboriginal people like me that are supporting their family and want to go out and do nice things and live in a nice house' (MF1). 'A lot comes out of ignorance, people don't understand Aboriginal people or culture. They believe what they see in the media. They're impacted by negative stereotypes. Out of that comes prejudiced behaviours that they might not even be aware of' (S1 [I]).

> Firstly, having more Indigenous people on TV and in the media, not necessarily flying the Aboriginal rights flag, talking about racial anything, closing the gap … seeing them on Neighbours. Deborah Mailman or Leah Purcell, there's not enough. Often, they're on Redfern Now or the Straits. They're not part of the mainstream. Our faces aren't seen unless we're complaining or there's a sad story. CM2

5.4 Schools as a site of change

The above issues and strategies often came together during interviews in discussion about schools as important sites of societal change, including because talking with children at this stage of life is where we will see the most significant (positive) impacts. Given the focus on schools in interviews, they are considered separately, here. 'These poor kids are so confused but they grew up in a home where they

think, Aboriginal people have everything. The government gives us everything. I said, 'where's *my* rolls Royce and beautiful home? Whoever said that is lying to you' (SF1).

> The more they learn about history, the more they realise that they're in the wrong, their ancestors. A lot of white kids were grown up brainwashed. It's hard to go against your parents. They were taught certain things. But as they grow older they learn and start mixing with Aboriginals and getting to know people they can change their mind. That makes it better for the next generation. Their kids won't get taught the same thing as they were. BM5

Schools are also seen as part of the problem where they fail to teach children enough about Australia's racist past and racism generally, inclusion of Aboriginal and Torres Strait Islander people, and Indigenous culture. This needs to be addressed as an instance of institutional racism (within the education system), and so as to reduce discriminatory attitudes held by individuals (as they grow into adults) within the community. 'The curriculum is the biggest part of this. If we can get kids in school to accept that Aboriginal culture is Australian culture this will help with reconciliation' (S1 [I]).

> People aren't born racist. So as babies, people are taught to discriminate. I learned about how Captain Cook discovered Australia when I was in school. At home I was learning a different story. Institutionalised racism that continues to reinvent itself. As children, people are taught to discriminate by reinforcing false beliefs. So where does it change? In schools. CM4

> The reasons why people are being discriminated against are far more complex than the RDA could ever contemplate. It's an education issue really. At school when I was a student we weren't really told anything about Aboriginal people. A lot of people discriminating against them could probably say the same thing. Would they be putting them in the back of the queue or knocking them back for a drink if they knew more about dispossession? I guess it starts with kids. S4 [NI]

> People need to know about Indigenous culture and history. There's such a lack of that in schools. They did 2 weeks of it in Year 9 history. I'm 27 and I meet people who've never met

an Aboriginal person - or think that they haven't because of their ideas of what an Aboriginal person is. They've got these ideas. Education could play a big part in bridging this stuff. MF5

Some participants identified that there had been positive shifts in this area already: identifying curriculum changes, more positive stories about Indigenous people and Indigenous culture used in learning, for instance.[809] 'This [shift in education] tends to start changing attitudes and beliefs that leads to behaviour change. We see more reconciliation events, welcome ceremonies, which tend to foster greater understanding' S1 [I].

6 The role of government in reducing discrimination

6.1 Social, policy and legal reform agenda

A decade ago the Aboriginal and Torres Strait Islander Social Justice Commissioner criticised our government for failing to fulfill its responsibilities related to protection of Indigenous human rights.[810] The Commissioner claimed that as a nation we 'have parked most human rights at the door'. We do not, in general, have 'any formal mechanisms for considering how laws and policies impact' on such rights or for 'providing redress where rights are abused.' This, he suggested, has the greatest negative impact on the 'most vulnerable and marginalised': that is, Indigenous Australians. He called on government to 'adopt legislative, judicial, administrative, educative and other appropriate measures' to secure adequate recognition and protection of rights for Indigenous people, and to develop and

[809] See, for instance, All Together Now's phone app for children teaching them about discrimination and the Racism. No Way campaign's anti-racism resources for schools, available on the following sites (accessed June 2018): <https://alltogethernow.org.au/app-for-children-2/> and < http://www.racismnoway.com.au/>.

[810] The Commissioner further stated as follows. 'The acceptance of international human rights obligations is not merely a rhetorical action. It places legal obligations on government to put in place formal measures and resources to ensure the protection and enjoyment of rights within Australia. This includes incorporating the human rights standards into domestic law… and allowing for people to seek an enforcement of these rights before national courts and tribunals'. AHRC (2008), *Social Justice Report*, AHRC, 21.

implement 'mechanisms to ensure that the courts, the executive and the Cabinet have human rights at the forefront of their thinking at all times'.[811]

The following discussion considers the role of government in addressing the problem of race discrimination as it impacts on Indigenous people. That further action is required on the part of government to address this issue was clearly identified by participants. 'I think it's getting worse! You see it everywhere'. However, 'none of the government do anything about it, they just talk about it but there's no action. They don't seem to care, whether it's Liberal or Labor' (BM3).

Though government is obligated to ensure that human rights laws are enforceable legally, particularly by those they are intended to protect (discussed above as adaptations to the justice system, or better funding for legal services, for instance), its role is much broader than this. It must firstly 'uphold the law' itself, discussed further below, but also play a 'vital role in discouraging discrimination' and implementing law 'beyond the sphere of legislators and policy makers'.[812] Participants spoke of this as follows.

> [It's] not just legislative reform — it's actually a broader social reform agenda that's needed [to tackle race discrimination]. You can change the law all you like but there's a whole suite of other things that need to happen. Just like family violence reforms [in Victoria], you look at the continuum of racism and discrimination, you look at the underlying causes, look at the institutionally embedded processes that enable those types of things to reoccur. S2 [NI][813]

[811] Ibid. He continues as follows. 'The end result is a legal system that offers minimal protection to human rights and a system of government that treats human rights as marginal to the day to day challenges that we face'.

[812] Bielefeld and Altman (2015), 205. This broader role is evident in obligations imposed on government with respect to the implementation of human rights at an international level, including those enshrined in the ICERD – discussed in Chapter 4, and including undertaking to eliminate racial discrimination by individuals, and by 'governments, public authorities' and 'organisations' and introduction of 'social, cultural and educational' development programs.

[813] Family violence legislation offers legal protection, but this must be accompanied other strategies (such as education of the community about gender equality). This is evident in the 227 recommendations made by the Victorian Royal Commission into Family Violence. Royal Commission into Family Violence, State of Victoria (2016), *Royal Commission into Family Violence: Summary and recommendations*, Parl Paper No 132 (2014–16).

In this context, government might introduce and/or support existing or new *non*-legal strategies and initiatives, including those highlighted in preceding sections of this chapter. As an example, it might help increase community awareness of discrimination and its impacts on Aboriginal and Torres Strait Islander peoples, perhaps through a formal inquiry, one participant suggested. 'I think government should be doing something more about it. They need to have a government summit about it, a Royal Commission — not just for one or two days. They need to talk for a long time to sort that problem out' BM3. There was some scepticism, however, as to whether an inquiry would lead to genuine change. Previous inquiries or commissions appear to have had little impact, including because government then fails to implement relevant recommendations, with the RCIADIC a prime example of this.[814]

> Everyone was outraged when they saw the kid in the spit hood (in Don Dale in Darwin).[815] The outrage has kind of died down now, even though there's the Royal Commission … It lasts for a moment and then everyone gets on with their lives. I don't know how to fix that … It might be too much detriment for the families to get that reaction through publicity, especially if they then get targeted by police. You want to motivate people to help make change, but it's a big toll on victims. S6 [I]

6.2 Addressing racism within government

To state the obvious, government must not itself violate the rights of Indigenous people. Not only does this breach relevant laws, where government perpetrates discrimination against Indigenous people it cannot then reasonably expect or demand racially appropriate (and lawful) behaviour from the wider community.[816] It will implicitly condone and even encourage race discrimination at a societal level through the latter action. Participants identified this as occurring after introduction of the NTER, as but

[814] Johnston (1991).

[815] This is a reference to the ABC Four Corners program on juvenile detention in the NT. The program aired in July 2016 and exposed a raft of human rights abuses of detainees, most of whom were Indigenous. ABC 4 Corners, 'Australia's Shame' ABC, 25 July 2016.

[816] Bielefeld and Altman claim that if 'Australia aspires to be a post-racist State, our governments and laws must vigorously refuse to perpetuate racial discrimination'. Bielefeld and Altman (2015), 205.

one example. One participant states that '[c]ommunity attitudes won't change until the policies and laws do. It won't filter down' (CM4). Another participant stated: '[i]f it is okay systemically to discriminate against Indigenous people, it is then accepted socially. That's why community attitudes haven't changed. You just have to look at social media' (S7 [I]).

Although some concerns were raised by community member interviewees about institutional racism within government, these participants more frequently complained of often quite blatant racism of government staff rather than government systems (other than the justice and to some extent the child protection systems). For many participants, the racism of government sits at the coalface of its interactions with Indigenous people.[817]

> I think it comes down to people within systems. They're not systems thinkers so they don't understand. If you had more educated people who weren't racists working in the police force or in DHHS … [Non-Indigenous people] have had opportunities to get into the systems through education, but they abuse the power they have. It's the people that enforce the systems. MF2

Government needs to acknowledge that such racism exists and then do something about it, according to participants. Strategies might include increasing staff members' knowledge of Indigenous culture (cultural awareness training) and of their obligation to comply with discrimination law.

> Many government workers are given Indigenous portfolios, but not given cultural awareness training. It's crazy. Aboriginal people wouldn't go into another nation without knowing about their culture. The moment you deal with Aboriginal people, you *must* go through an awareness program. CM1

> Some police are racist. I've had police officers say 'little dog, black c', and the rest of it …. No matter where you go you'll find they discriminate. It's in every community. The young police officers are probably the worst, trying to get their little brownie points. They don't know how

[817] A similar phenomenon is evident in the ILNP data, discussed in Chapter 5.

> to deal with Aboriginal people, especially if they're intoxicated … There should be a program for young officers to learn how to handle a situation where an Aboriginal's involved. BM2 and BM4

> 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. SF5

6.2.1 Institutional racism and socio-economic outcomes

Discrimination by government need not be overt. Institutional racism, including by government, has been discussed throughout the thesis. It is evident in Australia's colonial history, and in denial of that history, for example (though not always immediately recognisable as racism to the broader populace).[818] Given this, express recognition of Australia's colonial history would, in a sense, be a justice outcome in and of itself for Indigenous people, participants suggested.

> If the Federal and State Governments were to come clean on the true history and past injustices of Aboriginal people in Australia .... This is still reflected in policy and legislation today — all of the places where systemic and institutionalised racism continues to impact Aboriginal people on a large scale. CM4

Institutional racism also emerges within government systems when they fail to account for Indigenous needs, leading, for instance, to poor Indigenous socio-economic outcomes. Examples of this were referred earlier in the thesis (for instance, institutional racism in health services leading to poor health outcomes). Though these outcomes might be addressed (with improved Indigenous access to justice) through race discrimination law, government must work harder to tackle them by way of policy and legislative development and/or reform that avoids discriminating against Indigenous people in the first

[818] Davis states that the law 'can have a profound impact upon culture and social norms. Yet there is much denial in Australia of the persistence of ongoing discrimination in law and policy'. Davis (2000), 144.

place. This is essential for Indigenous political, social and economic development *and* for realising human rights within Indigenous communities, but it is also significant as it shifts the onus for reducing discrimination onto government.

Addressing institutional racism within government systems enhances human rights in two ways. Firstly, though they are not always identified as associated with human rights (by Indigenous people or by society at large, as seen in the thesis findings on Indigenous accounts of discrimination and/or racism) poor Indigenous socio-economic outcomes represent a form of racism (a breach of human rights) in and of themselves.[819] Improving these outcomes therefore reduces racism or racial inequality, again delivering a justice outcome outside of dispute resolution. This was recognised by the Aboriginal and Torres Strait Islander Social Justice Commissioner, as follows.

> A deceptively complex issue that we face in adequately protecting Indigenous peoples' human rights is to recognise that eradicating poverty and overcoming Indigenous disadvantage is one of the most profound human rights challenges that we face in Australia. We must redefine how we conceive of poverty so it is squarely addressed as a human rights issue.[820]

Secondly, these outcomes are associated with and underpin Indigenous social exclusion. Social exclusion is identified in Chapter 2 as a barrier to accessing justice. Improving socio-economic outcomes directly increases social inclusion. This re-empowers Indigenous people, thereby increasing their capacity to exercise human (and all other) rights, which then breaks the cycle of social exclusion. Links between improved outcomes and social inclusion is described by one participant as follows. For Indigenous people the 'key to independence is through employment, and education brings you that. And proper healthcare, housing, welfare — it's all connected. We can't separate it' (CM4).

In terms of policy-level reform aimed at improving outcomes, the Commonwealth's Closing the Gap strategy is directed towards reducing disparity between Indigenous and non-Indigenous people in a

[819] Schokman and Russell (2017), 12.

[820] AHRC (2008), 23.

range of areas, including health and education. Though some progress has been made through the strategy, commentators point to a number of problems.[821]

Markham and Biddle suggest that policy goals are not always matched by policy actions in Closing the Gap and measures taken to reduce disparities are not evaluated, and where they are the 'voices of those affected' by policy are not consulted.[822] 'Most importantly', it is claimed, 'the Closing the Gap framework has never tackled head-on the most important gap of all: the gulf between the political autonomy and economic resources of Indigenous and non-Indigenous people.' This might be addressed by passing a level of economic and other control back to Aboriginal and Torres Strait Islander peoples, highlighted in the comment that follows (and returned to below).

> There has been little in the Closing the Gap agenda that has empowered Indigenous people to implement local solutions to the issues that they identify as being problems. If the promised 'refresh' of Closing the Gap does not put resources — and the power to direct them — into Indigenous hands, the prospects for closing socioeconomic gaps are likely to remain distant.[823]

Also suggested as a strategy to reduce racism within government is that we move away from a complaints-based to a standards-based approach, as presently occurs with the *Disability Discrimination Act* (CTH) (1992).[824] This type of strategy is designed to avert the occurrence of racism. It encourages or mandates compliance by organisations and institutions, including government institutions, with standards identified as likely to achieve this aim. The relevant standards and obligations may be

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[821] Markham, F, and Biddle, N, 'Three reasons why the gaps between Indigenous and non-Indigenous Australians are not working', The Conversation, February 13 2018.

[822] For instance, though aiming to reduce gaps related to employment, health and schooling government has abolished the Commonwealth Employment Development Program (CDEP), which has impacted on achievement of employment-related targets within Closing the Gap. Evidence suggests that the NTER has also widened health and school related gaps. Ibid.

[823] Ibid.

[824] See s. 31, *Disability Discrimination Act* (CTH). Use of Indigenous or cultural impact statements in the development of policy is one suggestion, referred to earlier as potentially useful in a legislative or jurisprudential space.

embedded within a legal framework or sit outside of the law. They would ordinarily require government, for instance, to make certain adaptations to existing systems and the frameworks within which these systems operate.[825]

In WA, the EOC has published and works with WA's public service organisations to implement *The Policy Framework for Substantive Equality*.[826] This work is focused on adapting government systems to better meet client needs through a staged process in three key areas: policy and planning, service delivery, and employment (recruitment, retention) and training. It commences with a commitment made by the relevant government organisation to implement the Framework, then moves on to identification of client groups and their particular needs, setting of objectives and targets, developing of strategies to address needs and review and evaluation of progress.[827] Of interest, the EOC has undertaken a similar

[825] The intention here would be to accommodate Aboriginal and Torres Strait Islander 'difference' in government policy/practice, including public service delivery, through these adaptations, a point discussed throughout the thesis. Worth nothing too is that anti-discrimination law in Australia does impose a *positive duty not* to discriminate, but only in certain circumstances. Victoria introduced a statutory duty to take positive steps to eliminate discrimination following a 2008 review of the EOA (VIC), for example. The review recommended that the VEOHRC have capacity to conduct own motion inquiries into alleged breaches of this statutory duty and to issue relevant guidelines, approve voluntary action plans and, if necessary, issue enforceable undertakings or compliance notices. An organisation or person might develop an action plan detailing steps required for compliance, and though not legally binding, this could be considered by a tribunal if it is relevant to a matter before it. This approach moves away from a 'negative duty not to discriminate' towards a 'positive duty to eliminate discrimination', according to Rees et al (2008), 176. As stated in the 2008 review, 'the complaints-based system cannot adequately address systemic discrimination'. 'It puts the onus on the individual victim to complain and not on the organisation to comply. Recasting the duty as a positive requirement would encourage compliance with the law even in the absence of a complaint'. Gardener J (2008), *An Equality Act for a Fairer Victoria: Equal Opportunity Act Review Final Report*, VIC, 38-9, 40. The DDA (CTH) also requires that public authorities, educational institutions and providers of goods, services and facilities develop action plans aimed at furthering the objects of the legislation: Rees et al (2008), 174. However, there are no similar provisions in the RDA.

[826] EOC (WA), (2014).

[827] The EOC provides on its website reports and implementation plans completed by various agencies, including those of the Department of Transport related to access to licensing services by Aboriginal and ethnic minority groups. Department of Transport (WA) (2012), *Aboriginal people and ethnic minority groups accessing driver licensing* service: *substantive equality framework assessment*, Perth WA and Department of Transport (WA) (2015), *Substantive Equality Implementation Framework*, Perth WA.

process to improve its own engagement with Aboriginal people, in particular. Strategies identified include developing more flexible enquiry processes (greater use of interpreters and changed hours of service), the collection of complaints and enquiries data to assess trends, and consultation with Aboriginal groups on appropriate modes of communication with Aboriginal people. These are useful ideas to be considered alongside strategies and approaches for adaptation of the complaints process outlined earlier in this chapter. The collection and analysis of data is particularly important. Ideally, all anti-discrimination agencies would gather and use Aboriginal and Torres Strait Islander data, including to evaluate the effectiveness of measures introduced to improve their engagement with complaints mechanisms.[828]

Some QLD participants pointed to 'the matrix' framework developed by QLD-based researchers for identification, measurement, monitoring and reduction of institutional racism within public hospitals and health services, but as having the potential to be implemented in other government service or system contexts.[829] Ideally, a framework of this type would mandate assessment by or of organisations of their performance against relevant measures so as to access accreditation or funding, for instance.

> [The matrix is] … about auditing your organisation, your practice and policy, using only publicly available information, against a list of criteria. It's meant to be an objective and measurable assessment of an organisation's …institutional racism. You get a score, and you do it annually to see if it's getting better or worse after implementing suggestions to increase your score … We need something more proactive like this. There's never going to be enough legal services or support and people are just not going to engage with [the complaints process]. I'm not sure how we get around that. Even if [there was CLE] in all communities, we told everyone about the law, there's still those barriers to overcome on a daily basis. So, I think *the system*

[828] EOC (WA) (2009b), *How does the Equal Opportunity Commission reach Aboriginal people and ethnic minority groups: Needs and impact assessment*, Perth WA.

[829] Marrie, A and Marrie, H (2014), *A matrix for identifying, measuring and monitoring institutional racism within public hospitals and health settings*, Bukal Consulting, Gordonvale QLD.

has to change. We have to have these rules in place to minimise the discrimination that people using services experience. Discrimination law – it's not enough. S6 [I]

6.3 A new relationship with government

One key measure of this standards-based 'matrix' focuses on Indigenous governance within organisations. Interview participants also pointed to increased Indigenous representation within government agencies at sufficiently high levels as likely to help change things 'from the inside out'. 'Until you get ATSI people involved at every level of every organisation you're not going to get anywhere' (S6 [I]).

Key to addressing Indigenous disenfranchisement and disadvantage is recognition and strengthening of core Indigenous principles, including self-determination. Writing last century Rowley suggested that the roots of Indigenous inequality can be found within wider political systems that continue to disempower them. He claims that a political response that returns power to Indigenous people is required, more so than 'education and training, housing schemes, health measures*, the end of all discriminatory legislation, outlawing of discrimination*'. These can achieve nothing unless 'a creative effort to produce [Indigenous] leadership and a chance for this leadership to operate can be made'.[830]

Participants also spoke of the importance of political and other leadership to reducing racial inequality of Indigenous people. 'I just don't see the system we have in place changing too much. We need to make it work better for us. We need more people in positions of power, to have influence and make that change' (MF5). 'Aboriginal communities have been saying things from the start but they're not listened to. Aboriginal communities have the solutions but policies and programs are developed without them, or with tokenistic consultation' (S2 [NI]).

[830] Rowley (1967), 96 (emphasis added). He continues. 'The core of the Aboriginal problem is political in the wider sense. The Aboriginal needs, within an administrative framework which makes this possible, and with government assistance, freedom to decide with other Aboriginals what he wants, and the chance to use his own efforts to get it. Above all he requires the kind of organisation which will give him hitting power to advance his interests in legal-liberal society'. Ibid.

A new type of relationship between Aboriginal and Torres Strait Islander peoples and government must be forged: one that is likely to improve outcomes for Indigenous people, including but beyond those related to justice — again, underpinned by the aforementioned principles.[831] Congress, for instance, has called for improved relationships between 'the State and Aboriginal and Torres Strait Islander Peoples', based on 'principles of justice, democracy, respect for human rights, non-discrimination and good faith'. This will be achieved, it is suggested, by government working with Indigenous people 'to ensure that policy and legislative structures empower, enable and facilitate access to justice, as well as political, social, cultural and economic development'.[832]

Formal frameworks are likely to be useful to reconfiguring governments' relationship with Indigenous Australians, recognised in the push for Constitutional reform — or probably even more so, in the signing of a Treaty with Indigenous people. There is some history of Indigenous focused, justice-related frameworks in Australia, including at a national level. The Standing Committee of Attorneys-General (SCAG) developed a *National Indigenous Law and Justice Framework 2009-2015* (now lapsed and not renewed) to support COAG's 'Close the Gap' agenda.[833] Congress also released a *National Justice*

[831] We appear to have done this much better in a health space than in the justice space. Despite the type of criticisms of the Closing the Gap strategy outlined above, the Social Justice Commissioner stated in 2008 that it had made some headway on improving health outcomes because of the approach it had taken: for instance, agenda setting and planning carried out in close collaboration with peak Indigenous health organisations, stressing the importance of Indigenous participation and leadership in responding to health issues in Indigenous communities, and monitoring progress through established benchmarks and targets. This provides a 'template' for our responses to 'all areas of poverty, marginalisation and disadvantage' Indigenous people face, he stated. AHRC (2008), 24.

[832] National Congress (2014), 65.

[833] Standing Committee of Attorneys-General (SCAG) Working Group on Indigenous Justice (2009), *National Indigenous Law and Justice Framework 2009-2015*, Canberra ACT. The Framework aims to 'build a sustainable whole of government and community partnership approach to law and justice issues'. It has five inter-related goals, which include 'to improve all Australian justice systems so that they comprehensively deliver on the justice needs of Aboriginal and Torres Strait Islander peoples in a fair and equitable manner' and 'to strengthen Indigenous communities through working in partnership with governments and other stakeholders to achieve sustained improvement in justice and community safety'. Though the focus is predominantly on criminal justice, highlighted within the Appendix on good practice connected with the Framework is civil law related best practice. See Standing Committee of Attorneys-General (SCAG) Working Group on Indigenous Justice (2012), *National Indigenous Law and Justice Framework: Good Practice Appendix*, Canberra ACT.

Policy. Both of these frameworks are primarily concerned with criminal justice, though the *National Justice Policy* includes within its targets a doubling of the number of Indigenous people accessing legal assistance for family and civil law matters. It also refers to access to civil and family law justice as part of a holistic approach to 'justice'.[834]

In recent decades Indigenous Justice Agreements (IJAs) have been utilised at a State and Territory level to improve Indigenous justice outcomes, with varying degrees of success.[835] IJAs are bilateral agreements negotiated between peak Indigenous organisations and government, again primarily aimed at reduction of Indigenous over-representation in the criminal justice system.[836] IJAs were referred to above in identifying the work of the AJF. The AJF is an example of Aboriginal Justice Advisory Councils (AJACs) established by nearly all State and Territory governments alongside IJAs to advise government on justice issues and to monitor RCIADIC recommendations. Many have now either been abolished or allowed to collapse, but when working effectively (including because sufficiently supported), they have made positive contributions (and still do, in the case of the AJF).[837] Also when working well IJAs (in combination with AJACs) reflect and strengthen the above UNDRIP principles,

[834] National Congress (2013a).

[835] See discussion in Allison, F and Cunneen, C (2013b), *Indigenous Justice Agreements*, Current Initiatives Paper No. 4, Indigenous Clearing House, Attorney Generals Department (CTH), Canberra ACT.

[836] There are some exceptions to this criminal justice focus, however. For instance, a second iteration of the Victorian Aboriginal Justice Agreement, VAJA2 (superseded by VAJA4 in 2018), included as one of its two aims the need to ensure that Kooris 'have the same access to human, civil and legal rights, living free from racism and discrimination, and experiencing the same justice outcomes (as the broader community) through the elimination of inequities in the justice system'. Department of Justice (Victoria) (2000), *Victorian Aboriginal Justice Agreement*, VIC. VAJA4 also refers to identifying and responding to systemic racism and discrimination in the justice system in its 10 listed actions. Department of Justice (Victoria) (2018), *Burra Lotjpa Dunguludja, Victorian Aboriginal Justice Agreement, Phase 4,* VIC. The NT Aboriginal Justice Agreement (currently in development) also refers to reducing social disadvantage (as a contributor to Indigenous incarceration), which may require efforts directed towards or likely to reduce race discrimination and inequality. Department of the Attorney General and Justice (NT) (2017b), *Aboriginal Justice Agreement: Fact Sheet*, NT.

[837] The AJF, still in existence in Victoria, is the longest standing AJAC. The researcher and her colleague have highlighted the loss of Indigenous representative bodies as diminishing 'opportunity for genuine Indigenous participation in policy development, implementation and independent oversight' in relation to justice issues. See discussion Allison and Cunneen (2013b), 2.

including that of self-determination. The NT Aboriginal Justice Agreement (presently in development), for instance, is defined by the NT Government as an agreement 'that will recognise, reassert and support traditional leadership to improve the lives of Aboriginal people and make communities safer'.[838]

All of these frameworks and agreements, but particularly better examples of the IJAs, provide important precedent for ways in which government and Indigenous communities might work together to improve Indigenous justice outcomes. Important lessons learnt through the establishment, implementation and evaluation of IJAs might be used in establishing a new national framework designed to enhance Indigenous access to criminal *and civil law* justice.

7 Conclusion

This chapter begins by considering flaws inherent within the law and within the concept of access to justice where it is defined as a solely legal construct, including a tendency to reinforce power rather than create equality. It argues for an expanded understanding of access to justice that places it outside the law, completely or in part: enabling it to better reflect and respond to needs and perspectives of *all* members of society (not just lawyers). Strategies falling within this broader definition of access to justice may include those preferred by Indigenous people, including direct interpersonal or collective action, but it is suggested that multiple legal and non-legal strategies are likely to be more effective than using only one or the other type of strategy.

The chapter then turns to reform of race discrimination related legal dispute resolution processes and frameworks to improve its responses to Indigenous justice needs and perspectives. Prioritisation of substantive over formal equality is discussed, requiring that processes and outcomes are suitably

[838] The NT Agreement's aims include to 'develop a road map of Aboriginal justice issues that engage Aboriginal leadership' and 'to reassert local Aboriginal power and recognise the role of cultural authority'. Department of the Attorney General and Justice (NT) (2017b). As identified in previous work of the researcher and her colleague, effective IJAs have also provided for 'inclusive, ongoing engagement with Indigenous communities throughout the entire 'life'' of the framework in question; that is, during their 'initial design, implementation, monitoring, and evaluation.' This points to and reinforces the importance of Indigenous capacity building, participation and self-determination. Allison and Cunneen (2013b), 3.

adapted to account for Indigenous *difference* (for without this adaptation, the law becomes a further site of race-based discrimination). Criteria to be applied in making these adaptations are found in the UNDRIP, including principles of and rights to self-determination and respect for culture. Also noted is that the UNDRIP demands recognition of both these and other Indigenous-specific rights *and* of human (or civil) rights for Indigenous people. Rather than being incompatible these rights are indivisible: both depend on each other – though human rights, as Indigenous activists have suggested, must be defined in ways that uphold rather than undermine Indigenous rights.

The chapter turns to more specific ideas for reform of the legal regime related to race discrimination, all of which are intended to reinforce UNDRIP principles. This involves changes to and maintenance of mainstream systems, as well as wholly Indigenous-led strategies. Potential changes to the complaints process, including those that strengthen Indigenous culture, are considered first. Reform of legislative frameworks and more formal dispute resolution processes and improvements to legal outcomes derived through the latter are then explored. It is suggested that more Indigenous input is required in development of law in this area, both as litigation and the setting of legal precedent and as legal frameworks. Discussion of ways in which frameworks might be re-worked so as to reinforce UNDRIP principles encompass Constitutional reform, signing of a Treaty with Indigenous Australians and stand-alone human rights legislation. Indigenous-led advocacy as legal advice and representation, and as as legislative and policy reform (and increased resourcing to support this work), is also highlighted as essential.

The remainder of the chapter is not so focused on legal reform, though it is noted that some of the strategies and initiatives in question may increase Indigenous legal challenges of race discrimination. It is highlighted that non-legal responses to racism as it impacts socially and more personally are important, given inherent limitations of the law and that some may prefer to avoid legal action. Some focus is placed initially on Indigenous community-led and embedded strategies likely to build on existing capacity of both Indigenous people *and* communities to resist racism. Approaches considered here include education about rights led by Indigenous people and organisations; calling out or sharing experiences of race discrimination other than through the law (within formal or informal gatherings or

other ‘safe’ spaces, including family and community); and increasing Indigenous pride and knowledge of culture and history (including the history of Indigenous activism)

Shifts within the broader community and the role it might play in avoiding discriminating and responding to discrimination are then discussed. Ideas canvassed include changing community attitudes towards Indigenous people and the racism they experience. This requires, for instance, increased knowledge of past and present racism, and of Indigenous people and culture. Bystander action is also discussed as community-based sanctioning of race discrimination. Finally, the role of government is highlighted, which includes ensuring that race discrimination provisions are enforceable, but encompasses efforts directed towards broader social, policy-oriented and political reform. Initiatives to address institutional racism within government, for instance, include introducing standards-based approaches to eradicating system-wide policy and practice that fails to accommodate the different needs of and therefore discriminates against Indigenous people. A new relationship between government and Indigenous Australians is also identified as essential, underpinned perhaps by formal frameworks and reinforcing, once again, core UNDRIP principles, including of self-determination.

CHAPTER 9: CONCLUDING COMMENTS

The principal inquiry of this research is focused on measuring the value of race discrimination law for Indigenous Australians, particularly as an access to justice mechanism. Additional subsidiary questions have been explored to respond to this inquiry. The first of these has considered how effectively race discrimination law is currently working to reduce Indigenous experiences of race discrimination. The second has explored Indigenous perspectives on strategies and approaches most likely to help tackle the problem of race discrimination. Included within this question is another: that is, whether Indigenous people see race discrimination law as useful for addressing this problem and improving Indigenous access to justice (as legal processes, outcomes and frameworks) as a worthwhile goal. A third question has investigated how current legal and other responses to race discrimination might be enhanced or strengthened to ensure their contribution to reducing race-based inequality experienced by Indigenous Australians. This has involved exploration of ways to reconceptualise in an Indigenous context access to justice through race discrimination law, given that the researcher has identified that Indigenous people *do* see value in this law.

Chapter 9 sets out findings developed in response to each of the above questions, pointing out relevant implications for law and policy along the way. The chapter also highlights aspects of the research that represent novel or important contributions to existing knowledge of the issues at hand, along with areas that may require further research in order to produce a fuller picture of the issues raised.

1 Key contributions of the research

It is useful to begin this chapter by presenting more significant contributions the research has made, with others highlighted as the chapter progresses. A certain amount of information related to Indigenous problems of access to justice arising with respect to race discrimination law had been published prior to this research. The thesis has taken what we already know and built upon it. For instance, the contributions made include increasing understanding of whether Indigenous access to justice with respect to race discrimination is currently problematic and if so in what ways. Other areas in which current knowledge has been added to encompass whether improving access to justice in this area is

actually of any value to Indigenous people and if so how this might be achieved. These issues have not been previously explored at a level as detailed as that presented in this thesis, and certainly not with the same degree of input from Indigenous people.

The focus of the thesis has been on gathering and presenting Indigenous perspectives, historical and contemporary, to answer the research questions. Aboriginal and Torres Strait Islander experiences, voices and expertise have been used to design and complete research tasks, and in the analysis underpinning the research findings. This has been gathered through fieldwork conducted with Aboriginal and Torres Strait Islander peoples, but has also been drawn from other sources, such as the Freedom Ride surveys. Reliance on Indigenous perspectives is also evident in the use of the UNDRIP to formulate an Indigenous-specific conceptualisation of access to justice. This significant level of Indigenous input is absolutely crucial to the validity of the research and its outcomes. Indigenous people must be active participants in the development of solutions to problems impacting on them, including race discrimination — a point emphasised in the research findings and principle adhered to in the research methods employed by the researcher.

On this point it is noted that consideration of Indigenous access to justice, including as a mechanism for responding to race discrimination, to some degree casts Indigenous people as marginalised, as victimised and as requiring protection from the law. This, in some respects, reflects the very nature of access to justice, which attempts to address marginalisation as it arises within and outside of the law. The thesis has tried to strike a balance between recognising the disenfranchisement of Indigenous people as well as their strengths, resilience and knowledge, with the latter key elements of any solution designed to address the problem of racism and problems related to access to justice in this area. The research has thus applied a strengths-based over a deficit discourse to explore the focus issues.[839]

[839] Deficit discourse in an Indigenous context uses language of negativity, deficiency and disempowerment to describe Indigenous people. Rather than addressing disempowerment this may contribute to it, leading to poor outcomes. See, for instance, Fogarty, W et al (2018), *Deficit Discourse and Strengths-based Approaches: Changing the Narrative of Aboriginal and Torres Strait Islander Health and Wellbeing*, The Lowitja Institute, Melbourne.

Additionally, in focusing on Indigenous perspectives it has been essential to recognise within the research the diversity of Indigenous voices. This diversity is evident, for instance, in conflicting Indigenous views on whether mainstream race discrimination law is of any use to Aboriginal and Torres Strait Islander people. The research has considered whether and how conflict between these and other conflicting viewpoints may be reconciled.

To return to the issues explored, previous research highlights discrimination, and in particular race-based discrimination as having considerable negative impacts on Indigenous people. Improved access to justice in this area has also been identified by Indigenous people as likely to be of benefit. As such, the research adds to knowledge on issues that Aboriginal and Torres Strait Islander peoples identify as needing to be better understood (and then responded to, based on this enhanced understanding). This knowledge should, if implemented, make some contribution to reducing the aforementioned negative impacts.

The research may also have broader application: potentially of use, with relevant adaptations, to other racial minority groups, particularly in the argument it has made for broader conceptualisations of access to justice that also take account of the needs of particular sectors of society. It may also be of use to investigation of problems and solutions associated with Indigenous access to justice in other areas of civil law. It has considered, too, perspectives that are critical of mainstream definitions of access to justice, identifying it as too restrictive where wholly framed by the law. It has investigated and made recommendations for an expansion of these definitions to incorporate attainment of justice as a process and outcome that is not so wedded to the law, and that therefore may be better able to meet the needs of specific groups. In particular, it has identified how this expansion might be applied in an Indigenous specific context, a further novel contribution of the research.

2 Summary of key research findings

2.1 Comparing racism — past and present

The thesis has explored how effectively race discrimination law is presently working for Indigenous people as an access to justice mechanism, with reference to both substantive and procedural access as it plays out in alternative dispute resolution and more formal justice settings. It has argued that the successes and failures of this law should be judged with reference to whether it is attaining its stated goals, which include reduced race-based inequality. The thesis provides evidence of continuing and disproportionately high levels of race discrimination and racism impacting on Indigenous people. This, it is argued, points to the ineffectiveness of race discrimination law as a mechanism for reducing race discrimination against Indigenous Australians.

Analysis of past and present Indigenous experiences of discrimination and racism within the research has concentrated on two time periods: the 1960s-1970s, when race discrimination law was first introduced into Australia, and contemporary times. The thesis has analysed material gathered during the 1965 Freedom Ride, in particular. As noted, this analysis has not been carried out prior to the present research. It therefore represents an original contribution to our understanding of Indigenous history and the history of Indigenous activism in Australia.

The Freedom Ride analysis depicts flagrant breaches of the basic human rights of Aboriginal people in 1960s NSW, but also points to limited understanding of discrimination at this time - excluding more systemic issues of inequality. The research then moves forward in time, asserting that whilst there have been some positive changes there are also broad similarities in Indigenous experiences of discrimination in mid-20th century and modern-day Australia.

Contemporary data points to continuing, entrenched discrimination against Aboriginal and Torres Strait Islander peoples today — in housing, employment, health, on the street and in social media, and in government systems, particularly justice and child protection. Aboriginal and Torres Strait Islander people are still subject to high levels of social exclusion, manifested as disproportionate levels of

poverty and other negative socio-economic outcomes, as well as an absence of autonomy. Indigenous people in 2019 are still asking for and are much less likely than other groups to have access to the basic necessities of life - adequate housing, equal opportunities to employment and education, and so on. They want and need a much greater say in their own affairs, as was the case for Freedom Ride survey respondents.

Described as 'insidious' due to its prevalence and invisibility, institutional racism continues to play a key role in Indigenous social exclusion (though perhaps now less intentionally than in 1960s Australia). Often difficult to spot (and therefore to confront), it is identified as the most common form of racism impacting on Indigenous people today. It sits within government and other systems and policies, defined as a failure to take adequate account of Indigenous cultural needs and perspectives – an example of the 'invisibility' of Aboriginal and Torres Strait Islander peoples. This 'invisibility' coincides or contrasts with the significant degree of scrutiny, control and containment of Indigenous people that occurs through formal policy, institutions and otherwise. Examples of this include the under and over-policing of Indigenous communities, and store-keepers serving Indigenous people last and tailing them closely as a likely thief, making them feel unwelcome enough that they will avoid the store in question in future. This community-level behaviour leads to a form of segregation that is less obvious than but similar in its effects to those of the 'colour bar' of the 1960s.

Variations in race discrimination and access to justice, including by location

As an aside - as noted previously, the intention at the start of this research was to investigate the potential impacts of place-based history, and of population size, distribution and location on the incidence of discrimination and access to justice. There was also some intention to consider gender-based differences.

It is not possible from the data gathered to draw too many firm conclusions on the latter, particularly in relation to gender differences. Turning first to the impacts of history on discrimination and access to justice the somewhat limited results of the research indicate that thesis participants considered QLD to

be considerably more racially divided than Victoria, and that as a result, race discrimination as much harder to challenge in QLD. No connections were drawn, however, between this greater racial division in QLD and the respective histories of race relations in QLD and in Victoria. History is quite likely to have played its part, and more detailed research on this point would be worth undertaking.

Research findings discussed at the beginning of the thesis indicate that the relationship between location, population distribution and size on experiences of discrimination and access to justice are mixed and somewhat complex to interpret. These findings suggest that access to justice may be higher in urban centres, and the present research confirmed that remoteness inhibits access to legal advice, complaint agencies and to information related to race discrimination law.

Participants identified that race discrimination is likely to impact on all Aboriginal and Torres Strait Islander peoples, but with some potential variation dependent on factors such as social status, skin colour *and location*. They were undecided as to whether cities were more racist than country towns or vice versa. Mixed views were also expressed about the impacts of population distribution on discrimination. Some participants felt that the more multicultural a place (such as the Torres Strait or Melbourne), the less the discrimination. Other participants felt that a larger Indigenous presence within a mixed population decreases the incidence of discrimination (in places like Cairns). Discussion on this point, however, was generally centred around inter-personal discrimination, which requires contact between individuals. Institutional racism touches all Aboriginal and Torres Strait Islander peoples, no matter where they live. No views were shared on impacts of population distribution on access to justice.[840]

2.2 Evaluating race discrimination law as an Indigenous access to justice mechanism

The thesis attributes ongoing and significant problems of race discrimination against Aboriginal and Torres Strait Islander peoples to the poor performance of race discrimination law in an Aboriginal and

[840] Though as above, it was suggested that the greater the discrimination (which may depend on population distribution) the harder it is to challenge.

Torres Strait Islander context, to at least *some* degree. This poor performance is attributed to problems of Indigenous access to justice.

From its earliest beginnings race discrimination legislation was never seen as 'the full story' of how to tackle the problem of racism (of which discrimination is but one component). The present circumstances of Indigenous people, as such, cannot be wholly attributed to its failings. Nor can it be held entirely responsible for changing these circumstances. It is argued, however, that it is both appropriate and necessary to assess contributions law in this area has made to date for Indigenous people with reference to how it is working for them as an access to justice mechanism. This argument is based on recognition within the laws themselves that access to justice is fundamentally important to reducing discrimination. Elsewhere commentators have also suggested genuinely effective methods of enforcement are essential to protection of human rights. Moreover, assessing the value of race discrimination law as an *Indigenous* access to justice mechanism is justifiable given that government singled Indigenous people out as key beneficiaries of this law (at least, at a federal level) at the time of its introduction. Primary sources from this period indicated that Aboriginal and Torres Strait Islander peoples were owed, needed and would be provided with protection under the RDA.

2.2.1 Our existing access to justice framework and Indigenous people

Identified throughout the thesis is that our access to justice is generally understood as access to dispute resolution processes through which legal rights are asserted and defended, including those related to non-discrimination, and the outcomes thereby attained. Analysis presented in the thesis of Indigenous access to justice (according to the latter definition) has found it lacking.

In terms of engagement with informal and formal dispute resolution processes, the research reveals that Aboriginal and Torres Strait Islander peoples are rarely engaging with them. The relatively small numbers of formal complaints lodged with agencies stands out as especially problematic, given the significant levels of discrimination in Indigenous communities and that lodgment is such an essential

first step in terms of process to addressing this issue legally.[841] Reasons for low levels of complaint are identified in the thesis as including fear and other emotions, poor knowledge of the right to non-discrimination and to complain where this right is breached, resignation towards the problem of discrimination, and poor access to complaint agencies and legal help. All of these factors are exacerbated by the more structural issue of the individual complaints-based model embedded within race discrimination legislation. This model places a very heavy onus on individuals to enforce their rights and (generally) to prove the allegations raised. It is also identified that Indigenous people very rarely use litigation to resolve race discrimination disputes, which then precludes access to formal justice outcomes. This is likely to be due, to a large degree, to similar (and additional) barriers that deter lodgement of complaints.

Findings drawn from complaints statistics, case law and other sources are that when Indigenous people do engage with formal and informal race discrimination related dispute resolution processes they may not be attaining satisfactory justice outcomes – a further substantial failure of our existing access to justice framework. The types of discrimination upon which complaints are based (and therefore the litigation which follows complaints) are fairly restricted. Complaints usually focus on just two areas, despite the breadth of Indigenous experiences of discrimination. Direct discrimination is also more likely to be the subject of complaint and litigation than indirect discrimination. Whilst it is true that these restrictions are partly due to limitations within the law (for instance, how discrimination is defined), a further significant problem is lack of understanding (including but not only by Indigenous people) of the potential scope of the protection on offer. Indirect discrimination provisions, for instance, are not commonly employed, despite the potential they hold to challenge institutional racism. Often

[841] As an important aside, the research has used both qualitative and quantitative data for the latter analysis, which has included complaints statistics requested from anti-discrimination agencies. These statistics make come contribution to measuring the effectiveness of race discrimination law as an access to justice mechanism for Aboriginal and Torres Strait Islander peoples. It is suggested that these or similar statistics be regularly gathered, analysed and used by agencies for this purpose (where this is currently not being done). Ideally, this analysis and the data itself should be made publicly available.

discrimination is only seen as involving a number of individuals, one or more of whom is engaging in relatively blatant discriminatory behaviour such as vilification on the street or at work.

Problems also arise during the processing of Indigenous disputes. The thesis indicates that the majority of Indigenous complaints lodged with agencies fail to settle, and in a substantial number of cases are withdrawn, abandoned, declined or terminated. Where complaints do settle, outcomes are, again, somewhat narrow. The thesis has pointed to the latter outcomes as unlikely to be identified as satisfactory by Indigenous people. Jurisprudence discussed in the thesis also indicates that court and tribunal interpretation of race discrimination law often fails to respond appropriately to Indigenous perspectives and experiences. Only the most obvious instances of discrimination appear to have a good (or any) chance of success, with more systemic issues or matters aimed at reinforcing Indigenous views on rights much more difficult to establish.

2.2.2 Explaining problems of Indigenous access to justice: institutional racism in the law

Problems of Indigenous access to justice in this area may be attributed to institutional racism of the law. This is defined within the thesis as a failure to take adequate account of the particularity of Indigenous people, including in terms of the form of access to justice to which they are provided.

As the research has highlighted, the concept of access to justice is focused on *equality*, both in the law and in society. Access to justice is identified, firstly, as essential to the recognition of all other rights, including a right to equality, but also as a human right in and of itself to which *all persons* are therefore *equally entitled*. It is aimed at ensuring that barriers preventing more marginalised individuals from accessing the law to the same degree as others are eradicated, as far as possible. As such, it seeks to ensure *equality before the law*. This is identified as important because being able to exercise rights (through adequate access to justice) should help to increase *social equality* for marginalised individuals. Barriers to social inclusion (or equality) such as poverty or race might be challenged through discrimination, credit and debt, employment and other laws (where relevant rights have been breached).

The *concept* of access to justice is worthwhile, including because of its intention to address inequality. Its *conceptualisation*, however — that is, the way in which *processes required to attain justice and what form this justice takes* are defined — is somewhat more problematic. The thesis has argued that whilst barriers to ensuring equal access to legal processes and remedies may be broadly similar for all marginalised groups they are often experienced differently by different groups. Different groups may also have specific barriers to contend with. As such, what is required to ensure that these groups have equal opportunity to access justice will *also* differ. Not everyone defines justice, nor the issues inhibiting and/or best methods of attaining it in the same way. What presently occurs, however, is that the *same form* of access to justice is provided to everyone. To achieve genuine equality of access to the law (and through this, societal equity) access to justice must be *substantively* equal. Access to justice must be (re-)conceptualised so as to reflect and respond to the particular issues impeding access to justice for and definitions of 'justice' deemed appropriate by differently marginalised groups. Failure to do this not only leaves these groups without access to justice, it also maintains and/or exacerbates existing inequality.

The thesis has identified Aboriginal and Torres Strait Islander difference in this context as arising due to their First Nations status. This includes their experiences of colonisation, and their respective cultures. These factors lead to Aboriginal and Torres Strait Islander-specific experiences of inequality or discrimination. The justice they seek in response also takes a different form. As examples of this, thesis participants have identified denial of rights to self-determination and of culture as discriminatory, as argued in various race discrimination cases discussed in the thesis. The law, however, often fails to recognise these rights or their denial as discrimination, perpetuating the same racism that had brought Indigenous plaintiffs to the civil law justice system to begin with.

2.3 Indigenous perspectives on the utility of race discrimination law

2.3.1 Indigenous support for race discrimination law

Identified as part of a broader inquiry conducted within the research into Indigenous perspectives on the best strategies and approaches for addressing the problem of race discrimination is that presently

Indigenous people are almost always using non-legal responses to this problem. Also identified is that these responses can and do provide 'justice' (satisfactory resolution of issues), most commonly through direct challenges of individual perpetrators of discrimination (but by also avoiding physically or otherwise aggressive confrontation). This type of response has been identified by various commentators as 'everyday justice'.

The research has explored whether Indigenous people believe that remedies provided by race discrimination law are also or alternatively of use as a response to discrimination, even though they rarely seek these out. Contemporary policy submissions of Indigenous organisations, including those advocating for retention of existing protections under s. 18C of the RDA, indicate support for the law as an access to justice mechanism. It is also supported within the UNDRIP, which refers to an Indigenous right to access justice through mainstream and other justice mechanisms for resolution of a broad range of disputes, including those related to human rights. There was substantial support amongst Indigenous thesis participants for *the idea* of using race discrimination law. As is the case for access to justice, however, race discrimination law may be a good concept – but whether and how it works in practice is a good measure of its actual value, according to participants. Some were able to point to positive outcomes achieved to date by Indigenous people through race discrimination dispute resolution processes to demonstrate that it does and can work.

Significantly too, historical sources were used in the thesis to identify what Indigenous people expected of race discrimination law when it was first introduced — a further example of the contribution made by the research: in this instance to an understanding of Indigenous history, including Indigenous activism and the Indigenous rights movement of the 1950s-70s, and to Australia's history of protection of human rights. Primary material to emerge from the Indigenous rights movement indicates that Aboriginal and Torres Strait Islander leaders of this period advocated for introduction of race discrimination law, identifying it as an appropriate tool through which to challenge the entrenched racism they and all other Aboriginal and Torres Strait Islander peoples faced.

2.3.2 Indigenous criticisms of race discrimination law

The research has also presented contrary Indigenous perspectives on the value of race discrimination law, arising both during the Indigenous rights movement and more recently. Some Indigenous people have been critical of mainstream law as a tool through which to challenge racist *and* colonial oppression of Indigenous people, given that the legal system has been part of this oppression. Their preference is for wholly Indigenous-led and defined methods (such as protest or development of a Treaty) for achieving end-goals that will lead to more substantive and meaningful change for Indigenous people. These methods and this change, once again, must recognise (and strengthen) what is particular about Indigenous Australians, which includes their rights to land, sovereignty and culture.

The thesis has explored the application of CRT in an Indigenous Australian context alongside Indigenous research methodology, identifying their key alignments and points of difference. This work has added to (somewhat limited) research conducted in Australia in this area to date and again, therefore, represents an important contribution to existing knowledge. Both critical race theorists and Indigenous critics of race discrimination law identify, correctly, that racial minorities are unlikely to use human rights law to enforce their rights. When they do the outcomes produced may well serve the interests of the racially dominant, perpetuating rather than challenging racial inequalities. Both groups of critics question the capacity of law to acknowledge and respond to minority experiences of discrimination, and to their definitions of and preferred methods of achieving justice. Both also point to introduction of civil rights law as likely to silence and/or as incompatible with more effective activity, such as public protest. This is seen effective because or where defined and led by minorities themselves (rather than mainstream structures or institutions such as courts, required to enforce legal rights). They also see it as much more likely than the law to deliver substantive social reform, including because it is not so bound by legal constraints. Both groups see the law as ultimately irredeemable, given that it is grounded in and commonly displays the same racist behaviour found in society which it is supposedly intended to correct.

The criticisms raised by both groups are valid, without doubt. The perception of Indigenous Australians, in particular, that *any* law created by their oppressors (including legislation apparently intended to

address their oppression) is unlikely to provide them with 'justice' is reasonable. It is borne out by the suite of problems associated with Indigenous access to justice outlined in the thesis, including those related to jurisprudence in this area, all of which are broadly attributable to institutional racism of the law.

2.3.3 Bringing different perspectives together

The thesis has applied these criticisms to research questions related to the current effectiveness of Indigenous access to justice through race discrimination law and whether it is worth addressing problems of access inhibiting this effectiveness.

It has firstly concluded, based on all the evidence, that race discrimination legislation in Australia does appear to have been genuinely intended to contribute to reduction of racism, including against Indigenous people. That it has not reached its potential in this regard is most likely attributable to the fact (rather than being wholly intentional) that the law is a mirror reflection of broader society. The same issues that lead to inequality outside the law are located within it, a point raised by critical race theorists and Indigenous people more critical of mainstream human rights legislation. This leads commentators to question, with good reason, why we continue to rely on access to justice (as a legal construct) to resolve problems of social inequality. The law will inevitably struggle to achieve this goal.[842]

Also concluded is that the law is not *completely* irredeemable, however, despite its considerable limitations. It has arguably made some inroads into more blatant forms of discrimination, as well as contributions other than through dispute resolution: for instance, positive changes to societal attitudes,

[842] Also concluded is that it is unlikely to have been intended to and/or did not, in effect, silence Indigenous protest. Direct action by and on behalf of Indigenous people continues today. A recent example involves protest marches aimed at changing the date of Australia Day from 26th January. See discussion, for instance, in ABC reporting. ABC news, 'Invasion day protests held around the country as debate over Australia Day continues', 26 January 2019 (accessed January 2019):
<https://www.abc.net.au/news/2019-01-26/australia-day-protests-draw-thousands-calling-for-date-change/10752882>.

particularly through its educative and inquiry functions. It is fair to say, however, that in general terms it has not contributed much to date as an access to justice mechanism (or at least might have contributed more than it has) to reducing discrimination against Indigenous people. The thesis argues that race discrimination law is worth reforming and retaining, nevertheless. This reform, if effective, should help enhance the contributions of this law to Aboriginal and Torres Strait Islander peoples, enabling it to meet early and more contemporary Aboriginal and Torres Strait Islander expectations that it has the capacity to deliver effective justice outcomes. It is stressed that whilst there are still tensions amongst Aboriginal and Torres Strait Islander peoples, many have identified prohibition of race discrimination, as the research makes clear, as an essential means of asserting and defending their human rights. Given this, it cannot be discarded altogether.

2.4 The way forward – legal and non-legal pathways

Tensions discussed throughout the thesis between equality and particularity for Indigenous people has two parts: the first being the way in which justice is attained, and the second what this justice looks like. As a way of resolving this tension the research has proposed a series of strategies and approaches likely to empower Indigenous people and communities to respond to race discrimination *as they see fit*.

This may involve legal action, with suggestions therefore made to enable reform of access to justice as a legal construct. It may also include non-legal responses. Non-legal strategies identified by Indigenous people as potentially effective include everyday justice and collective direct action or protest. These are as valid, and for some more valid, than accessing justice through the law. They are recognised by commentators, additionally, as potentially falling within an expanded definition of access to justice: one that has little or no focus on dispute resolution and legal frameworks and/or that is likely to facilitate assertion of legal rights but without initiation of legal action.

2.4.1 Reforming justice systems to accommodate Indigenous perspectives

The thesis highlights the importance of configuring access to justice in a race discrimination law context to ensure it accords with Indigenous definitions of justice and how to attain it. The UNDRIP is used to

guide this re-configuration. Considered in detail is potential application of its key principles and rights to the anti-discrimination complaints system and court and tribunal processes, as well as in other contexts, including Constitutional reform and development of a Treaty. The UNDRIP is useful in this regard as it clearly acknowledges and responds to Indigenous-specific experiences of discrimination (including as colonisation). It points to the importance to Indigenous people of upholding of their right to non-discrimination as a response to the latter experiences, but also identified as crucial is recognition of collective rights of culture, self-determination, and so on. The Declaration also suggests that both mainstream and wholly Indigenous mechanisms should be available to Indigenous people as a means of asserting these rights. The UNDRIP therefore provides a retort or response to Indigenous criticisms of the appropriateness of mainstream legislation (including race discrimination legislation) as an Indigenous justice mechanism, and perhaps helps reconcile diverse Indigenous viewpoints on this issue.

The thesis also suggests that though more comprehensive research may be required to map out further details about appropriate adaptations (using UNDRIP principles and rights) to the civil law system, particularly in terms of its administration of race discrimination law, we might as a start, borrow or learn from existing effective adaptations to the criminal justice system. Whether and how this might be usefully done should be determined in consultation with Indigenous people.

2.4.2 Expansions of access to justice beyond the law: non-legal responses to racism

The research has considered a range of *non*-legal mechanisms likely to deliver 'justice' outcomes (broadly defined) to Indigenous people. This part of the research represents an important contribution to our understanding of the concept of access to justice as something more than individual legal dispute resolution.

The glue that binds all mechanisms likely to be useful to Indigenous people seeking justice is adherence to the principles and rights enshrined in the UNDRIP, including self-determination and cultural recognition. This is evident in the legal *and* many of the non-legal strategies highlighted in the research, particularly those identified as likely to empower Indigenous people and the way they respond to race discrimination. The non-legal strategies discuss include but encompass more than direct action and

everyday justice. They extend, for instance, to building existing capacity of Indigenous-led legal services to engage in law and policy reform likely to cut back discrimination at its roots; increasing community pride in its culture and knowledge of its history of activism; and resourcing community members as holders and disseminators of knowledge on human rights. In general, the strategies in question point to Indigenous communities, individuals and families as principal sources of Indigenous re-empowerment, reflective of use within the thesis of a strengths-based approach, identified above.

Empowerment of Indigenous people is essential to enhancing their responses to race discrimination. They also, however, place reasonable demands and expectations on the non-Indigenous community and on government to combat injustices and inequalities targeted at Aboriginal and Torres Strait Islander people.

Described as a first step in this regard is increased awareness and acknowledgment by community members and government of the extent to which racism and race discrimination continues to impact on Aboriginal and Torres Strait Islander peoples, and that it began with our arrival on Aboriginal and Torres Strait Islander land in 1788. The strategies that follow this first step aim to reconfigure our relationship with Indigenous people politically, socially and personally in ways that recognise their status as First Nations Peoples. This again reflects the importance of protecting Indigenous human rights, but in ways that recognise their particularity.

3 Conclusion

The research points to numerous obstacles to addressing racial injustice through race discrimination law. These are attributed to problems within all elements (legal processes and outcomes and legislation) of our current race discrimination related access to justice framework. To return to Moriarty's comments about the early South Australian discrimination legislation, with all of these obstacles lined up in a (very long) row there is much cause for despair in terms of what this law presently offers to Aboriginal and Torres Strait Islander people. We might also return, however, to the hope Indigenous peoples initially attached to introduction of legislative protection against race discrimination. The research has concluded that there is *still* reason for Indigenous people to be hopeful, and that they

continue to see some value in race discrimination law — but that reformed thinking, legislation and policy is required in order to realise this value.

Houston spoke of an Aboriginal conception of a valued life. He suggests that Aboriginal people attribute worth to their rights as human beings and as members of a colonised and sovereign nation. This is the lens through which the above reforms must be enacted. Race discrimination law as an access to justice mechanism only has meaning in an Aboriginal and Torres Strait Islander context when this dual identity and duality of rights are appropriately recognised.

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APPENDIX A: Thesis Interview Questions

Access to Justice: Racial Discrimination Law and Indigenous Australians

Stakeholder Interview Questions

1. How much is racial discrimination a part of the lives of Indigenous Australians, in your opinion? In what ways and how often does it occur?

2. Is it different for Indigenous and non-Indigenous people?

3. Do you think that racial discrimination against Indigenous people in Australia is getting better or worse over time?

4. How do you think Indigenous people generally respond to racial discrimination when it happens? Do many people use racial discrimination law, for example?

5. Can racial discrimination law help Indigenous people with racial discrimination, in your opinion?

    a. If yes, why?

    b. If not, why not?

6. Are there ways to make this law more useful for Indigenous people?

7. What else can be done to reduce discrimination against Indigenous people?

Access to Justice: Racial Discrimination Law and Indigenous Australians

Community Member Interview Questions

1. Have you experienced racial discrimination? In what ways?

2. Do you think that racial discrimination against Indigenous people in Australia is getting better or worse over time?

3. How is it different for Indigenous and non-Indigenous Australians?

4. What do you do about racial discrimination when it happens?
   What do you think most Indigenous people do about it?

5. Do you know about racial discrimination law?

6. Have you ever used the law to protect yourself when you've been discriminated against?

   a) If yes, how did it go?

   b) If not, why not?

7. Do you think many Indigenous people would use these laws?

   a) If yes, why?

   b) If not, why not?

8. Do you think it's good that there are laws to protect Indigenous people against discrimination?

9. Are there ways to make these laws more useful for Indigenous people?

10. What else can be done to stop discrimination against Indigenous people?

APPENDIX B: Freedom Ride Aboriginal Attitudes Questionnaire

S.A.F.A. Form No.1/1965 Name: Age: Under 21 / Over 21 M/Female

ABORIGINAL QUESTIONAIRE

TOWN: _____

1.	Are the white people giving the Aborigines a fair chance?	Yes/No
2.	Would good education benefit the Aborigines?	Yes/No
3.	Are the Aboriginal people as good as the white people in every way?	Yes/No
4.	Should the Aborigines be given more say in their affairs?	Yes/No
5.	Do you know how many Aborigines are on the Aboriginal Welfare Board?	Yes/No
6.	(a) If a committee of white people and Aborigines was set up in the town to deal with Aboriginal assimilation would you like to see 50/50 representation on it?	Yes/No
	(b) Would you like a majority of white people?	Yes/No
	(c) Would you like a majority of Aboriginal people?	Yes/No
7.	Do you think the Aboriginal Welfare Board is doing a good job?	Yes/No
8.	Is it harder for Aborigines to get jobs in the town than white people?	Yes/No
9.	Is there much discrimination against Aborigines in this town or this State?	Yes/No
10.	Do you think that the Aboriginal situation has improved at all over the last 20 years?	Yes/No
11.	Aborigines are not counted in the census and are not accepted for military service - do you think this is wrong?	Yes/No
12.	Do you think that Aboriginal people are happier than white people?	Yes/No
13.	Can you say that you have never been to the doctor?	Yes/No
14.	Do you take your babies to the Baby Health Centre (if there is one)?	Yes/No
15.	Did all your children get their needles from the doctor when they were small?	Yes/No

==========

Circle Answer

16. Would you prefer your home to be: Gift/Purchased by Loan/Rented?

17. Should Aborigines be: on reserves/or in towns?

18. Why do you think jobs are hard to get: Colour/Ability/or Class Distinction?

19. Do you think the Aborigines should stand up to their rights/or just accept the situation as it is?

20. Should Aborigines preserve some of the old customs/or adopt all the new ones?

21. Is there: often/sometimes/hardly ever someone in your family who is sick?

22. Do you believe, if someone is sick, in waiting to see if they will get better/ or in calling for medical help immediately?

23. When you seek medical help whom do you see first: your friends/Matron/ Hospital/Doctor?

24. Is visiting the doctor: easy/not too bad/hard to do?

25. Were your children born: at home/in hospital?

Write Answer

26. In what ways are Aboriginal people discriminated against?

27. If your children had a chance to go on to higher education, what things could prevent you from allowing them to do?

28. How do you think the Aboriginal situation could be helped?

29. What do you think should be done to help raise the health standards of your people?

APPENDIX C: Freedom Ride Survey Data Analysis - Tables

Table 1. Are the white people giving the Aborigines a fair chance? [Question 1]

YES	NO
68	53
56.2%	43.8%

Total = 121 (16 blank)

Table 2. Would good education benefit the Aborigines? [Question 2]

YES	NO
128	3
97.7%	2.3%

Total = 131 (6 blank)

Table 3. Are Aboriginal people the same as the white people in every way? [Question 3]

YES	NO
114	4
96.6%	3.4%

Total = 118 (19 blank)

Table 4. Should the Aborigines be given more say in their affairs? [Question 4]

YES	NO
115	5
95.8%	4.2%

Total = 120 (17 blank)

Table 5. Do you know how many Aborigines are on the Aboriginal Welfare Board? [Question 5]

YES	NO
13	102
11.3%	88.7%

Total = 115 (22 blank)

Table 6a. If a committee of white people and Aborigines was set up in the town to deal with Aboriginal assimilation would you like to see 50/50 representation on it? [Question 6a]

YES	NO
93	8
92.1%	7.9%

Total = 101 (36 blank)

Table 6b. Would you like a majority of white people [represented on the committee]? [Question 6b]

YES	NO
2	59
3.3%	96.7%

Total = 61 (76 blank)

Table 6c. Would you like a majority of Aboriginal people [represented on the committee]? [Question 6c]

YES	NO
16	52
23.5%	76.5%

Total = 68 (69 blank)

Table 7. Do you think the Aboriginal Welfare Board is doing a good job? [Question 7]

YES	NO
55	64
46.2%	53.8%

Total = 119 (18 blank)

Table 8. Is it harder for Aborigines to get jobs in the town than white people? [Question 8]

YES	NO
70	50
58.3%	41.7%

Total= 120 (17 blank)

Table 9. Is there much discrimination against Aborigines in this town or this State? [Question 9]

YES	NO
53	67
44.2%	55.8%

Total = 120 (17 blank)

Table 10. Do you think that the Aboriginal situation has improved at all over the last 20 years? [Question 10]

YES	NO
94	26
78.3%	21.7%

Total = 120 (17 blank)

Table 11. Aborigines are not counted in the census and are not accepted for military service. Do you think this is wrong? [Question 11]

YES	NO
84	16
84%	16%

Total = 100 (37 blanks)

Table 12. Do you think that Aboriginal people are happier than white people? [Question 12]

YES	NO
89	21
80.9%	19.1%

Total = 110 (27 blank)

Table 13. Can you say that you have never been to the doctor? [Question 13]

YES	NO
32	97
24.8%	75.2%

Total = 129 (8 blanks)

Table 14. Would you prefer your home to be gifted, purchased by loan or rented? [Question 16]

Gifted	Loan	Rented
16	70	37
13%	56.9%	30.1%

Total = 123 (14 blank)

Table 15. Should Aborigines be on reserves or in town? [Question 17]

Reserves	Town	Not sure
11	111	2
8.8%	88.8%	2.4%

Total = 124 (13 blank)

Table 16. Why do you think jobs are hard to get: colour, ability or class distinction? [Question 18]

Colour	Ability	Class	Combination
44	33	12	4
47.3%	35.5%	12.9%	4.4%

Total = 93 [44 blank]

Table 17. Do you think the Aborigines should stand up (for) their rights or just accept the situation as it is? [Question 19]

Stand up	Accept
121	3
97.6%	2.4%

Total = 124 (13 blank)

Table 18. Should Aborigines preserve some of the old customs or adopt all of the new ones? [Question 20]

Old customs	New customs
36	86
29.5%	70.5%

Total = 122 (15 blank)

Table 19. In what ways are Aboriginal people discriminated against? [Question 26]

Access to public facilities/services	58
School/Education	7
Health	10
Housing	27
Police	6
Work	25
Other	6
Positive (none)	19

(Total of 105 survey responses)

Table 20. If your children had a chance to go on to higher education, what things could prevent you from allowing them to do so? [Question 27]

Financial capacity	62
Lack of desire	10
Other	10
Nothing	23

(Total of 86 survey responses)

Table 21. How do you think the Aboriginal situation could be helped? [Question 28]

Housing	46
Employment	14
Education	15
Other	32

(Total of 86 survey responses)

Table 22. What do you think should be done to help raise the health standards of your people? [Question 29]

Health Services	12
Housing/Living Conditions	49
Education	7
Other	2
No problem	9

(Total of 62 survey responses)

APPENDIX D: Indigenous Complaints Data Summary - Tables[843]

1. NUMBERS OF ABORIGINAL &/OR TORRES STRAIT ISLANDER RACE-BASED ENQUIRIES RECEIVED - BY JURISDICTION[844]

Total race discrimination enquiries received (including vilification)	FED	WA	NT	QLD	NSW	VIC	TAS	SA
2010-2011	N/A	N/A	N/A	N/A	N/A	48	0	35
2011-2012	N/A	N/A	N/A	N/A	N/A	40	1[845]	24
2012-2013	N/A	N/A	N/A	N/A	N/A	61	3[846]	26
TOTAL 2010-2013	N/A	N/A	N/A	N/A	N/A	149	4	85

2. NUMBERS OF ABORIGINAL &/OR TORRES STRAIT ISLANDER RACE-BASED ENQUIRIES RECEIVED - BY JURISDICTION AND BY AREA[847]

2.1 VICTORIA

2010-2011

Employment	Goods & Services	Accom'n	Education	Clubs	Sport	No area/ no jurisdiction	TOTAL
15	23	2	3	1	2	2	48

[843] Note, the statistics capture information about enquiries and complaints in instances where the inquirer/complainant *is identified as* Aboriginal and/or Torres Strait Islander. There may be additional enquiries/complaints by individuals who are *not identified as* Aboriginal and/or Torres Strait Islander.

[844] Note, these figures do not measure numbers of individuals making enquiries, but numbers of enquiries (it is possible an individual might make more than one enquiry).

[845] This is an ATSI enquiry, but it is not clear whether this was race-based.

[846] All 7 enquiries are ATSI enquiries, but only 3 are specifically identified as race-based.

[847] Note, these figures do not measure numbers of individuals making enquiries or numbers of enquiries, but the type of area that was the subject of an enquiry. An enquiry may relate to more than one area.

2011-2012

Employment	Goods & Services	Accom'n	Education	Clubs	Sport	No area/ no jurisdiction	TOTAL
15	9	8	3	0	0	5	40

2012-2013

Employment	Goods & Services	Accom'n	Education	Clubs	Sport	No area/ no jurisdiction	TOTAL
22	17	2	7	0	2	11	61

TOTAL: 2010-2013

Employment	Goods & Services	Accom'n	Education	Clubs	Sport	No area/ no jurisdiction	TOTAL
52	49	12	13	1	4	18	149

2.2 TASMANIA

2011-2013[848]

Employment	Goods & Services	Accom'n	Education	Clubs	Other/ Unknown	General EO	TOTAL
1	1	1	0	0	1	0	4

[848] No ATSI enquiries are recorded for 2010-2011. There was only 1 ATSI enquiry in 2011-2012, with no indication of area. In 2012-13, a total of 7 enquiries are recorded. However, only 3 are specifically identified as about race and for 4 enquiries in 2012-2013 there is no indication of ground or area.

2.3 SOUTH AUSTRALIA

2010-2011

Employment	Goods & Services	Housing/ Land/ Accom'n	Education	Clubs/ Assoc.	Other/ Unknown	General EO	TOTAL
9	17	-	4	3	1	1	35[849]

2011-2012

Employment	Goods & Services	Housing/ Land/ Accom'n	Education	Clubs/ Assoc.	Other/ Unknown	General EO	TOTAL
13	4	1	2	2	1	1	24[850]

2012-2013

Employment	Goods & Services	Housing/ Land/ Accom'n	Education	Clubs/ Assoc.	Other/ Unknown	General EO	TOTAL
13	7	2	4	-	-	-	26[851]

TOTAL: 2010-2013

Employment	Goods & Services	Housing/ Land/ Accom'n	Education	Clubs/ Assoc.	Other/ Unknown	General EO	TOTAL
35	28	3	10	5	2	2	85[852]

[849] SA provides a total of 53 enquiries, 35 of which were about race. Within these 53 enquiries, the next most common grounds after race were bullying (3 enquiries), age and 'general complaint' (2 each), with 5 of the enquiries categorised as 'no EO ground'.

[850] SA provides a total of 42 enquiries, 24 of which were about race. Within these 42 enquiries, the next most common grounds after race were disability (4 enquiries), victimisation and age (2 each), with 4 of the enquiries categorised as 'no EO ground'.

[851] SA provides a total of 36 enquiries, 26 of which were about race. Within these 36 enquiries, the next most common grounds after race were disability (3 enquiries) and 'general EO matters' (2), with 2 of the enquiries categorised as 'no EO ground'.

[852] 85 out of a total of 117 enquiries were race-based.

3. NUMBERS OF ABORIGINAL &/OR TORRES STRAIT ISLANDER RACE-BASED COMPLAINTS RECEIVED – BY JURISDICTION[853]

Total race discrimination complaints received (including vilification/ harassment)[854]	**FED**[855]	**WA**	**NT**	**QLD**	**NSW**[856]	**VIC**	**TAS**	**SA**
2010-2011	143[857]	69[858]	26[859]	-	57[860]	18[861]	9[862]	14[863]

[853] Note, these figures do not measure numbers of complainants. They measure numbers of complaints. It is possible an individual might make more than one complaint.

[854] The EOC (WA) prohibits racial harassment.

[855] All complaints are lodged by ATSI complainants, but not all on the ground of race. Additional grounds include 'colour', 'descent' and 'ethnic origin', as well as racial hatred.

[856] NSW has not provided numbers of complaints lodged for each year separate to numbers of race complaints by area. It is possible that an agency might have a smaller total number of complaints than the number of complaints counted by area as a complaint may fall under more than one area.

[857] 23 AHRC complaints related to racial hatred, 210 complaints to race, 20 complaints to 'colour', 3 complaints to 'descent' and 4 complaints to 'ethnic origin'. Note that these figures do not add up to the total of 143 complaints, as complainants may have more than one ground on which their complaint is based. The AHRC also provides statistics indicating whether these complaints allege direct or indirect discrimination. During this time-period, 81 complaints related to indirect (race) discrimination.

[858] Of a total of 126 complaints lodged by Aboriginal people, 58 complaints related to race, 11 to racial harassment and 57 to 'other'. Two complaints related to victimisation.

[859] A total of 244 complaints were lodged, with 26 of these lodged by Indigenous people and in relation to race.

[860] 7 of these complaints related to racial vilification.

[861] 16 of these complaints related to direct discrimination and 2 to indirect discrimination.

[862] 9 complaints involved 'inciting hatred', 9 involved direct discrimination and 4 of these direct discrimination complaints also involved indirect discrimination.

[863] Of a total of 21 complaints lodged 14 related to race. The next most common grounds of complaint after race were disability and sexual harassment (2 complaints of each).

2011-2012	174[864]	100[865]	35[866]	-	69[867]	15[868]	3[869]	6[870]
2012-2013	221[871]	103[872]	26[873]	-	44	15[874]	8[875]	10[876]
Total 2010-13	538	272	87	137[877]	170	48	20	30

[864] 42 AHRC complaints related to racial hatred, 155 complaints to race, 26 complaints to 'colour', 7 complaints to 'descent' and 3 complaints to 'ethnic origin'. During this time-period, 19 complaints related to indirect (race, 'colour' or 'descent') discrimination. Note that these figures do not add up to the total of 174 complaints, as complainants may have more than one ground on which their complaint is based. Five complaints related to victimisation and two to incite doing of unlawful act.

[865] Of a total of 193 complaints lodged in by Aboriginal people 92 related to race, 8 to racial harassment and 93 to 'other'.

[866] A total of 202 complaints were lodged, with 35 of these lodged by Indigenous people and in relation to race.

[867] 5 of these complaints related to racial vilification.

[868] All 15 complaints related to direct discrimination.

[869] All 3 complaints related to direct discrimination.

[870] Of a total of 12 complaints lodged in SA 6 related to race. The next most common ground of complaint after race was disability (2 complaints).

[871] 44 complaints related to racial hatred, 289 complaints to race, 25 complaints to 'colour', 16 complaints to 'descent' and 1 complaint to 'ethnic origin'. During this time-period, 103 complaints related to indirect (race, 'colour' or 'descent') discrimination. Note that these figures do not add up to the total of 221 complaints, as complainants may have more than one ground on which their complaint is based. Five complaints related to victimisation were excluded.

[872] Of a total of 185 complaints lodged 97 related to race, 6 to racial harassment and 82 to 'other'. WA has also provided statistics for 2013-2014, which indicate a sharp decrease in numbers of complaints in this period compared to earlier years for which data is provided. In 2013-2014, of a total of 81 complaints lodged by Aboriginal people, 40 complaints were race-based, 12 complaints related to racial harassment and 29 were based on 'other' grounds.

[873] 162 complaints were lodged, with 26 of these lodged by Indigenous people and in relation to race.

[874] Only one of these 15 complaints related to indirect discrimination.

[875] 7 complaints involved direct discrimination, one involved indirect discrimination, and 2 involved direct discrimination and inciting hatred.

[876] Of a total of 22 complaints lodged 10 related to race. The next most common grounds of complaint after race were disability (5 complaints), caring responsibilities and 'association with a child' (2 each).

[877] This is a total of all QLD complaints for the relevant period lodged by Aboriginal and/or Torres Strait Islander peoples and/or by non-Indigenous parent, spouse or partner on behalf of or in association with an Aboriginal and/or Torres Strait Islander child/person. Of these 137 complaints the majority (121) related to race and 8 to racial vilification (129 in total). As all other data (by area, outcomes, etc.) is for all 137 complaints this figure rather than the total of 129 race-related complaints has been included here.

4. NUMBERS OF ABORIGINAL &/OR TORRES STRAIT ISLANDER RACE-BASED COMPLAINTS RECEIVED - BY JURISDICTION AND AREA[878]

4.1 FEDERAL[879]

The data does not break figures down for each financial year. A total for all 3 years has therefore been provided.

[878] Note, these figures do not measure numbers of individual complainants or complaints, but numbers of areas that have been the subject of complaint. There may be more than one area for any individual complaint lodged.

[879] The following data drawn from AHRC Annual Reports is somewhat useful for drawing comparisons between the requested data (2010-2013) and more recent (publicly available) data. Note that where the figures provided are calculated by the researcher (rather than being provided by the agencies), they should be used with some caution, as they may not be an entirely accurate representation of the relevant data, including for the purposes of comparison with the requested data, as agencies often have particular methods or formulae for calculating figures included in Annual Reports and similar. The same point applies to data in footnotes below drawn from NSW and WA agency Annual Reports. The AHRC indicates that it counts complaints 'by complainant' in its reports (rather than by respondent, or by ground/area raised in complaints). The AHRC's 2014-2015 Annual Report indicates that 561 complaints were lodged under the RDA. If these are calculated 'by complainant' this should equate to somewhere close to 561 complainants, though there is no indication of whether or identification of matters where a complainant may have lodged more than one complaint. The report also states that 38% of RDA complainants identified as Aboriginal and/or Torres Strait Islander. This equates to 213 Indigenous complainants. AHRC (2015) *Annual Report*, Sydney NSW, Tables 9, 12, 140-141. Additional reporting on Aboriginal and Torres Strait Islander complaints to the AHRC for 2014-2015, set out in the Commission's *Social Justice Report*, indicates that 211 complaints lodged under the RDA were lodged by Aboriginal people. AHRC (2015), *Social Justice Report*, Sydney NSW, Table 1.1, 172. The AHRC explains discrepancies between these sets of statistics as due to different reporting sources used for data analysis. In 2015-2016, 429 complaints were lodged under the RDA and 54% of RDA complainants identified as Aboriginal and/or Torres Strait Islander. This equates to 231 Indigenous complaints: AHRC (2016) *2015-2016 Complaint Statistics*, Sydney NSW, Tables 10, 12. Additional reporting in the 2015-2016 *Social Justice Report* indicates that 211 complaints lodged under the RDA were lodged by Aboriginal people. No complaints were lodged by Torres Strait Islanders. AHRC (2016) *Social Justice Report*, Sydney NSW, Table 1.1, 172. In 2016-2017, 409 complaints were lodged under the RDA, and 25% of the RDA complainants identified as Aboriginal and Torres Strait Islander. This equates to 102 complaints: AHRC (2017) *2016-2017 Complaint Statistics*, Sydney NSW, Tables 10, 12.

2010-2011

Employment	Goods & Services	Land, Housing, Accom'n	Education	Other section 9	Access to Places, Facilities	TOTAL[880]
21	36	3	1	74	1	136

2011-2012

Employment	Goods & Services	Land, Housing, Accom'n	Education	Other section 9	Access to Places, Facilities	TOTAL
96	46	1	1	6	1	151

2012-2013

Employment	Goods & Services	Land, Housing, Accom'n	Education	Other section 9	Access to Places, Facilities	TOTAL
59	126	4	5	97	0	291

TOTAL 2010-2013

Employment	Goods & Services	Land, Housing, Accom'n	Education	Other section 9	Access to Places, Facilities	TOTAL
176	208	8	12	177	2	583

[880] This total excludes racial hatred statistics, which are incorporated both within the statistics measuring complaint by area and by ground (see above). The racial hatred statistics included within the complaint by area data are roughly similar to those provided in the complaint by ground data. For 2010-2011 racial hatred complaints totalled 21, in 2011-2012 they totalled 40 and in 2012-2013 they totalled 41 (102 over a three year period).

4.2 WESTERN AUSTRALIA[881]

2010-2011

Employment	Goods, Services & Facilities	Accom'n	Education	Clubs	Access to Places & Vehicles	TOTAL
25	16	24	1	0	3	69[882]

2011-2012

Employment	Goods, Services & Facilities	Accom'n	Education	Clubs	Access to Places & Vehicles	TOTAL
20	36	41	2	0	1	100[883]

[881] In 2015-2016, 93 complainants to the EOC identified as Aboriginal and Torres Strait Islanders, but though the majority of these complainants are likely to be complaining about race an exact number of race-related Indigenous complaints/Indigenous complainants raising issues related to race is not provided. Of some interest (as it illustrates the value of outreach and engagement work) the EOC attributes what it refers to as an 'increase' in Aboriginal and Torres Strait Islander complaints in this year to two outreach visits conducted in the east and west Kimberley in 2015-2016, as well as an increase in Indigenous complaints against retail outlets, particularly petrol stations requiring Aboriginal and Torres Strait Islanders to pre-pay for fuel. EOC (WA) (2016) *Annual Report*, Perth WA, 115. In 2016-2017, 11% of complaints to the EOC (which totalled 430 complaints) were lodged by Aboriginal people. This equates to a total of 47 complaints lodged by Aboriginal people. Again, however, these may not all be race related. The decrease from 2015-2016 is attributed to not conducting outreach in areas with high Aboriginal populations. EOC (WA) (2017), *Annual Report*¸ Perth WA, 29.

[882] WA provides within these statistics numbers of direct, indirect and both direct and indirect complaints. In 2010-2011, 5 complaints related to indirect discrimination and 5 to both direct and indirect discrimination.

[883] 32 complaints related to indirect discrimination and 12 to both direct and indirect discrimination

2012-2013

Employment	Goods, Services & Facilities	Accom'n	Education	Clubs	Access to Places & Vehicles	TOTAL
15	31	50	5	0	2	103[884]

TOTAL 2010-2013

Employment	Goods, Services & Facilities	Accom'n	Education	Clubs	Access to Places & Vehicles	TOTAL
60	83	115	8	0	6	272

4.3 NORTHERN TERRITORY

2010-2011

Work	Goods, Services, Facilities	Accom'n	Education	Clubs	No area	Insurance	TOTAL
18	4	0	2	0	2	0	26

2011-2012

Work	Goods, Services, Facilities	Accom'n	Education	Clubs	No area	Insurance	TOTAL
20	13	1	0	0	1	0	35

[884] 19 complaints related to indirect discrimination and 17 to both direct and indirect. WA has provided statistics for 2013-2014, as noted above, with a sharp decrease in numbers of complaints in this period compared to earlier years for which data is provided. In 2013-2014, 13 complaints related to accommodation, 21 to employment, 17 to goods, services and facilities and one to clubs. A total of 52 complaints were lodged in total, only 3 of which related to indirect discrimination or both indirect and direct discrimination.

2012-2013

Employment	Goods, Services, Facilities	Accom'n	Education	Clubs	No area	Insurance	TOTAL
7	17		2	0	0	0	26

TOTAL 2010-2013

Employment	Goods, Services, Facilities	Accom'n	Education	Clubs	No area	Insurance	TOTAL
45	34	1	4	0	1	0	87

4.4 QUEENSLAND

2010-2013

Work	Goods & Services	Accommodation	Education	Administration of law or program	Local government	TOTAL
64	30	16	2	13	2	126[885]

[885] This data details areas for all complaints, including those relating to grounds other than race (see above). It excludes vilification, victimisation and similar complaints, which do not require an 'area' under the Act.

4.5 NEW SOUTH WALES[886]

2010-2011

Employment	Goods & Services	Accommodation	Education	Clubs	Other/ Unknown	TOTAL
24	17	4	1	3	1	50

2011-2012

Employment	Goods & Services	Accommodation	Education	Clubs	Other/ Unknown	TOTAL
18	40	4	1	0	1	64

2012-2013

Employment	Goods & Services	Accommodation	Education	Clubs	Other/ Unknown	TOTAL
12	23	4	1	3	1	44

[886] By way of comparison, in NSW in 2014-2015 Aboriginal and Torres Strait Islanders lodged 73 complaints with the ADB (7% of all ADB complaints, which totalled 1058 complaints). The majority of these complaints related to race (53% or 39 complaints). Racial vilification accounted for an additional 4% of complaints (3 complaints). Racial discrimination matters primarily related to employment (15 complaints), followed by goods and services (12), accommodation (6), clubs (4 complaints) and education (2 complaints). ADB (NSW) (2015) *Annual Report*, Sydney NSW, 14, 22-23. In 2015-2016, 3,602 enquiries were made to the NSW ADB, of which 179 related to 'Aboriginal issues'. Aboriginal and Torres Strait Islanders lodged 47 complaints, which represents 5% of all ADB complaints (911 complaints in total). The majority of complaints lodged by Aboriginal and Torres Strait Islanders related to race (69% or 32 complaints). Racial discrimination matters primarily related to employment (21 complaints), followed by goods and services (17 complaints), education (2 complaints) and accommodation and clubs (1 complaint each). Employment matters accounted for 48% and goods and services for 36% of Indigenous complaints lodged across all grounds. ADB (NSW) (2016) *Annual Report*, Sydney NSW, 13, 28. The ADB points out that Aboriginal people constituted 2.1% of the total NSW population over these two reporting periods (2014-2016).

TOTAL 2010-2013

Employment	Goods & Services	Accommodation	Education	Clubs	Other/ Unknown	TOTAL
54	80	12	3	6	3	158

4.6 VICTORIA

2010-2011

Employment	Goods & Services	Accommodation	Education	Clubs	Sport	TOTAL
3	14	0	0	1	0	18

2011-2012

Employment	Goods & Services	Accommodation	Education	Clubs	Sport	TOTAL
5	8	1	0	1	0	15

2012-2013

Employment	Goods & Services	Accommodation	Education	Clubs	Sport	TOTAL
7	4	0	3	0	1	15

TOTAL 2010-2013

Employment	Goods & Services	Accommodation	Education	Clubs	Sport	TOTAL
15	26	1	3	2	1	48

4.7 TASMANIA

2010-2011

Employment	Facilities, Goods & Services	Accommodation	Education	Clubs	TOTAL
2	6	4	0	1	13

2011-2012

Employment	Facilities, Goods & Services	Accommodation	Education	Clubs	TOTAL
1	1	1	0	0	3

2012-2013

Employment	Facilities, Goods & Services	Accommodation	Education	Clubs	TOTAL
1	6	2	0	0	9

TOTAL 2010-2013

Employment	Facilities, Goods & Services	Accommodation	Education	Clubs	TOTAL
4	**13**	**7**	**0**	**1**	**25**

4.8 SOUTH AUSTRALIA

2010-2011

Employment	Goods & Services	Housing/ Land/ Accom'n	Education	Clubs	Other	General EO	TOTAL
8	5	1	0	0	0	0	14

2011-2012

Employment	Goods & Services	Housing/ Land/ Accom'n	Education	Clubs	Other	General EO	TOTAL
4	1	0	0	1	0	0	6

2012-2013

Employment	Goods & Services	Housing/ Land/ Accom'n	Education	Clubs	Other	General EO	TOTAL
4	4	2	0	0	0	0	10

TOTAL 2010-2013

Employment	Goods & Services	Housing/ Land/ Accom'n	Education	Clubs	Other	General EO	TOTAL
16	10	3	0	1	0	0	30

5. OUTCOMES OF ABORIGINAL &/OR TORRES STRAIT ISLANDER RASE-BASED COMPLAINTS – BY JURISDICTION

5.1 FEDERAL[887]

[887] In 2014-2015 one quarter (104) of all complaints finalised under the RDA were terminated and just over half went to conciliation (52% or 202 complaints). This is similar to figures for *all* AHRC complaints for this year – a common pattern across recent years. Of all AHRC complaints, 23% and 51% were terminated or went to conciliation, respectively. The remainder were withdrawn, discontinued or closed administratively. Two thirds (67%) of those conciliated under the RDA were successfully resolved (compared with 72% of all AHRC complaints that went to conciliation). AHRC (2015) *Annual Report*, Chart 3, 143. The *Social Justice Report* data for the same period provides detail on outcomes for finalised Indigenous complainants, as follows. Of a total of 197 finalised Indigenous complaints in this financial year, 121 complaints (61%) went to conciliation, and the remainder were discontinued, withdrawn or terminated/declined (76 complaints or 39%). AHRC (2015), *Social Justice Report*, Table 1.2, 173. In 2015-2016 around one in six complaints finalised under the RDA in 2015-2016 were terminated (14% or 55 complaints) and over two thirds of complaints went to conciliation (70% or 268 complaints). Note that 19% and 52% of *all* AHRC complaints in 2014-2015 were terminated or went to conciliation, respectively. The remainder were withdrawn, discontinued or closed administratively. More specifically, 30 complaints were withdrawn, 29 discontinued and 14 were closed administratively. A majority (84%) of those conciliated were successfully resolved (compared with 76% of all AHRC complaints that went to conciliation). AHRC (2016) *Annual Report*, Tables 6, 7, 18. *Social Justice Report* data for 2015-2016 provides additional detail on outcomes for Indigenous complainants, as follows. Of a total of 249 complaints by Indigenous people finalised in this financial year 196 (79%) went to conciliation. The remainder were discontinued, withdrawn or terminated/declined (52 complaints or 21%). AHRC (2016), *Social Justice Report,* Table 1.2, 173. In 2016-2017 around one in six complaints

5.1.1 Progress of matters[888]

2010-2011

Terminated - no reasonable prospect conciliation	Terminated – other reasons	Withdrawn	Discontinued	Conciliation	Admin Closure	TOTAL
24	15	14	0	105	4	162

2011-2012

Terminated - no reasonable prospect conciliation	Terminated – other reasons	Withdrawn	Discontinued	Conciliation	Admin Closure	TOTAL
28	13	6	1	119	4	171

2012-2013

Terminated - no reasonable prospect conciliation	Terminated – other reasons	Withdrawn	Discontinued	Conciliation	Admin Closure	TOTAL
55	9	13	29	49	6	161

(16% or 74 complaints) finalised under the RDA were terminated and half of all complaints went to conciliation (50% or 228 complaints). Note that 19% and 45% of *all* AHRC complaints in 2016-2017 were terminated or went to conciliation, respectively. The remainder were discontinued, withdrawn or closed administratively. More specifically, 95 complaints were discontinued, 63 were withdrawn and 14 were closed administratively. A majority (84%) of those conciliated under the RDA were successfully resolved. Note that 75% of *all* AHRC complaints that went to Social Justice Report data is available for 2016-2017.

[888] The AHRC advises: 'When calculating outcomes as a percentage of total complaints finalised we extract 'Administrative Closures' from the total as these were, in essence, invalid complaints. This approach should be used if calculating outcome percentages to be consistent with AHRC data'.

5.1.2 Outcomes of conciliation

2010-2013

ACTION	2010-2011	2011-2012	2012-2013
Action ceased		1	1
Action taken against named individuals	1		
Apology – Private	6	21	12
Apology – Public	3	3	
Complainant satisfied with response/info provided		5	20
Education – enrolment provided			1
Education – revised terms, conditions	1		1
Employment – revised terms, conditions		1	
Employment – other opportunity provided			1
Financial Compensation	15	14	9
Goods, services, facilities (GSF) – provided	5	1	1
GSF – physical modifications		1	
GSF – revised terms conditions	3	1	2
Material removed from website etc	2	1	

Policy: EEO, antidiscrimination – developed, revised/reviewed		1	
Change in policy/practice (internal staff)	7		
Change in policy/practice (external customers)	1		
Private agreement	67	70	2
Statement of regret – Private	14	7	3
Statement of regret – Public		1	
Statement of service	1	2	
Training: EEO, antidiscrimination -introduced, reviewed/revised	4	6	1
Training: EEO, antidiscrimination - for named individual(s)	8	1	2
Training – other		2	1
Undertaking to cease action		2	
Other	6	7	7
TOTAL	**142**	**148**	**64**

5.2 WESTERN AUSTRALIA

5.2.1 Progress of matters

2010-2011

Withdrawn	Lapsed	Dismissed[889]	Conciliation	Referred to SAT	TOTAL
12	12	19	25	1	69

2011-2012

Withdrawn	Lapsed	Dismissed	Conciliation	Referred to SAT	TOTAL No. Complaints
14	36	28	21	1	100

2012-2013

Withdrawn	Lapsed	Dismissed	Conciliation	Referred to SAT	TOTAL No. Complaints
7	35	30	27	4	103

[889] Dismissed as misconceived, trivial or lacking in substance.

5.2.2 Outcomes of conciliation

2010-2011

Outcome	2010-2011	2012-2012	2012-2013	TOTAL
Apology	4	5	1	10
Education/ EO Program	8	2	2	12
Monetary Settlement	1	0	2	3
Private Settlement	0	0	0	0
Policy Change	2	0	0	2
Provision Accommodation	1	7	12	20
Provision of Conditions & Settlements	0	1	2	3
Respondent's Explanation Satisfactory to Complainant	6	6	8	20
Undertaking to Cease Action	3	0	0	3
TOTAL Matters	**25**	**21**	**27**	**73**

5.3 NORTHERN TERRITORY

5.3.1 Progress of matters

2010-2011

With-drawn	Notice of Lapse/ Lapse	Rejected	Dis-missed	Settled Outside	Early Interven-tion	Conciliation	TOTAL Complaints
1	8	6	0	0	0	10[890]	26

[890] All 10 complaints that went to conciliation were work-related.

2011-2012

With-drawn	Notice of Lapse/ Lapse	Rejected	Dis -missed	Settled Outside	Early Interven -tion	Conciliation	TOTAL Complaints
5	4	12	0	0	5	9[891]	35

2012-2013

With-drawn	Notice of Lapse/ Lapse	Rejected	Dis -missed	Settled Outside	Early Interven -tion	Conciliation	TOTAL Complaints
1	1	20	1	2	0	3[892]	26

5.3.2 Outcomes of conciliation

2010-2011

Settled Outside	Settled at Conciliation [893]	Dismissed[894]	TOTAL no. of Complaints
2	6	0	10

2011-2012

Settled Outside	Settled at Conciliation	Dismissed	TOTAL no. of Complaints
0	5	3	8[895]

[891] 4 complaints that went to conciliation were work-related and 4 related to goods, services and facilities.

[892] 2 complaints that went to conciliation related to goods, services and facilities and one was work-related.

[893] 4 matters were settled at the hearing stage.

[894] NT defines this category as dismissal following investigation where there is insufficient prima facie evidence to substantiate the complaint.

[895] 9 complaints are identified as proceeding to conciliation in 2011-2012 in the NT but outcomes are only provided for 8 conciliated complaints.

2012-2013

Settled Outside	Settled at Conciliation	Dismissed	TOTAL no. of Complaints
0	3	0	3

5.4 QUEENSLAND

5.4.1 Progress of matters (2010-2013)

<table>
<tr><td colspan="3">Accepted</td><td>Not accepted[896]</td><td>TOTAL</td></tr>
<tr><td colspan="3">72</td><td rowspan="5">65</td><td rowspan="5">137</td></tr>
<tr><td>Conciliated</td><td colspan="2">Unresolved</td></tr>
<tr><td>47</td><td colspan="2">25</td></tr>
<tr><td></td><td>Referred to QCAT</td><td>Lapsed or complainant lost interest post-conciliation</td></tr>
<tr><td></td><td>18</td><td>7</td></tr>
</table>

5.4.2 Outcomes of conciliation (2010-2013)

Apology – personal, written, public	Financial compensation	Reference	Training by ADCQ or cultural awareness training	Reinstatement	TOTAL
21	30	1	8	1	61

[896] Reasons given for this were because the complaint was out of time, did not provide sufficient information to indicate a contravention of the Act, rejected because misconceived or lacking in substance.

5.5 NEW SOUTH WALES

5.5.1 Progress of matters

2010-2011

Abandoned s. 92C	Declined s. 89B	Declined s. 92	Withdrawn s. 92B	Referred to Tribunal	Settled/ Conciliated	TOTAL
17	5	5	9	12	15	63[897]

2011-2012

Abandoned s. 92C	Declined s. 89B	Declined s. 92	Withdrawn s. 92B	Referred to Tribunal	Settled/ Conciliated	TOTAL
8	6	4	6	5	19	48[898]

2012-2013

Abandoned s. 92C	Declined s. 89B	Declined s. 92	Withdrawn s. 92B	Referred to Tribunal	Settled/ Conciliated	TOTAL
11	6	12	17	7	6	59[899]

5.5.2 Outcomes of conciliation

2010-2011

Apology - private	Financial compensation	Policy change	Complainant satisfied with respondent response	Training	Employment options improved	TOTAL
6	9	1	2	2	1	15[900]

[897] Two of these matters involved racial vilification, one of which was abandoned and one withdrawn.

[898] Six of these matters involved racial vilification, two of which were abandoned and four withdrawn.

[899] Two of these matters involved racial vilification, one of which was abandoned and one withdrawn.

[900] Included in this total is one count of 'disabled access achieved', excluded from this Table as it does not relate directly to race.

2011-2012

Apology - private	Financial compensation	Policy change	Complainant satisfied with respondent response	Training	Employment options improved	TOTAL
3	6	2	12	2	1	19

2012-2013

Apology - private	Financial compensation	Policy change	Complainant satisfied with respondent response	Training	Employment options improved	TOTAL
0	3	0	3	0	0	6

5.6 VICTORIA

5.6.1 Progress of matters and outcomes of conciliation

2010-2011[901]

Conciliation		Withdrawn by complainant	Declined (lacking in substance)[902]	Closed – unable to be resolved (conciliation inappropriate)[903]	TOTAL
14		2	1	1	18
Resolved	Unresolved				
3	11[904]				

[901] All lodged under the EOA (1995).

[902] This matter was declined under s. 108 of the then EOA (1995) (lacking in substance). Such matters may then be referred, at the request of the complainant, to the Tribunal within 60 days; or, after 60 days it would be dismissed. Victoria indicated that this complaint was later dismissed.

[903] This closure occurred under s. 113 of the then EOA (1995) (unable to be resolved – conciliation inappropriate). Such matters may then be referred, at the request of the complainant, to the Tribunal within 60 days; or, after 60 days it would be dismissed. Victoria indicated that this complaint was later dismissed.

[904] 8 matters were referred to the Tribunal, upon request by the complainant, and 3 were dismissed.

2011-2012[905]

Resolved	Declined to offer dispute resolution [906]	Closed – 'unresolved'[907]	Respondent or complainant withdrew from dispute resolution[908]	TOTAL
4[909]	2	6	3	15

2012-2013

Resolved	Declined to offer dispute resolution[910]	Respondent or complainant withdrew from dispute resolution[911]	TOTAL
6	1	8	15

[905] There's no reference in the following years to 'conciliation', only to 'resolution' (or not), perhaps due to change in the Act in 2010. Complaints in 2011-2013 were lodged under the EOA (2010).

[906] Under s. 116 of the EOA 2010, the Commission may decline on certain grounds, including where it is not considered appropriate to provide or to continue to provide dispute resolution (there is no longer a 'lacking in substance' decline ground. There is also no referral to the Tribunal process. A person now makes direct application to the Tribunal). One of these matters was declined as the parties would not engage in dispute resolution, and the other because it was considered the Commission could not assist parties to progress dispute resolution.

[907] There is no indication from Victoria about why these matters were 'unresolved', and whether they went to conciliation.

[908] Section 118 of the EOA 2010 provides that either party may withdraw from dispute resolution at any time by informing the Commission that they no longer wish to participate.

[909] Victoria indicates that these matters were 'resolved', but there is no indication as to whether they went to conciliation. Also included here are two matters identified as closed because 'unresolved'. Again, it is not clear that this means 'unresolved' after or during conciliation. Victoria indicated that one of the latter two complaints (closed as 'unresolved') was later dismissed.

[910] This matter was declined as the respondent would not engage in dispute resolution.

[911] In 4 of these matters the respondent withdrew, and in 4 the complainant withdrew.

5.7 TASMANIA

5.7.1 Progress of Matters

2010-2011

Reject - ed	With-drawn	Dismissed – post investigation [912]	Resolved - early resolution	Referred to Conciliation	Referred to ADT[913]	TOTAL
0	0	2	1	2 (both resolved)	4 (all 4 dismissed) [914]	9

2011-2012

Rejected	With-drawn	Dismissed - post investigation	Early Resolution	Conciliation	Referred to ADT	TOTAL
1[915]	2[916]	-	-	-	-	3

2012-2013

Rejected	With-drawn	Dismissed	Early Resolution	Referred to Conciliation	Referred to ADT	TOTAL
3[917]	1	1[918]	1	1 (unresolved)	1[919]	8

[912] Dismissed under s. 64(1)(a) as trivial, misconceived or lacking in substance

[913] This appears possible without the matter going through conciliation.

[914] The reasons given for dismissal were failure of complainant to attend for one matter, by consent of all parties for 2 matters, and 'pre-hearing' for one matter

[915] This was rejected under s. 64(1)(g) (complaint more effectively dealt with elsewhere) and s. 64(1)(a) as trivial, misconceived or lacking in substance

[916] One matter was withdrawn because of concerns 'agency would dispute all documentation', the other because a restraining order was sought in place of the complaint

[917] One of these matters was rejected under s. 64(1)(g); one under ss. 64(1)(a), (b) (complaint does not relate to discrimination or prohibited conduct) and (g); and the third under ss. 64(1)(a), (b) and (f) (already dealt with elsewhere). The matter dismissed under ss. 64(1)(a), (b), (g) was reviewed by the ADT, with the rejection confirmed.

[918] This matter was dismissed under s.64(1)(a) and (b).

[919] This matter was not finalised at the time of provision of this data by Tasmania.

5.7.2 Outcomes of Conciliated Matters and Matters Settled at Early Resolution

2010-2011: Conciliated Matters and Matters Settled at Early Resolution

Apology	CAT (Civil and Administrative Tribunal)	Financial	Other	TOTAL
2	2	1	1	3

2012-2013: Matters Settled at Early Resolution

Apology	CAT	Financial	Other	TOTAL
1	1	0	0	1

5.8 SOUTH AUSTRALIA

5.8.1 Progress of Matters

2010-2011

Not initiated	Withdrawn	Declined	Conciliation	Referred to tribunal	TOTAL
5	5	3	1	0	14

2011-2012

Not initiated	Withdrawn	Declined	Conciliation	Referred to tribunal	TOTAL
1	1	1	1	2	6

2012-2013

Not initiated	Withdrawn	Declined	Conciliation	Referred to tribunal	TOTAL
1	5	1	3	0	10

5.8.2 Outcomes of Conciliated Matters

2010-2011

Apology	Staff Training /Development Program	Financial Compensation	Private Agreement	Undertaking to Cease Action	TOTAL Matters
1	1	0	0	0	1

2011-2012

Apology	Staff Training/ Development Program	Financial Compensation	Private Agreement	Undertaking to Cease Action	TOTAL Matters
1	1	1	0	0	1

2012-2013

Apology	Staff Training/ Development Program	Financial Compensation	Private Agreement	Undertaking to Cease Action	TOTAL Matters
0	0	0	1	1	3

5.8.3 Race complaints made by Indigenous people referred to Tribunal - outcomes[920]

	2011-12	Total
Dismissed	1	1
Tribunal dismissed complaint as outside jurisdiction	1	1
Withdrawn	1	1
Total	3	3

[920] NB these statistics don't add up to referral numbers above. There was an additional race discrimination Tribunal decision in 2011, although the original complaint was received in 2009-10. That was *Haynes V Ceduna Community Hotel Limited* [2011] SAEOT 7. This complaint was upheld and damages awarded for injury to feeling ($3,000 in compensation).

6. LEGAL AND OTHER ADVOCACY PROVIDED DURING/FOR ATSI COMPLAINTS

6.1 NORTHERN TERRITORY

2010-2011

Advocate[921]	No Advocate	Unknown	TOTAL Matters
17	9	-	26

2011-2012

Advocate	No Advocate	Unknown	TOTAL Matters
13	23	-	35

2012-2013

Advocate	No Advocate	Unknown	TOTAL Matters
11	17	-	26

6.2 QUEENSLAND

Advocate	No Advocate	TOTAL Matters
27	110	137

6.3 NEW SOUTH WALES

2010-2011

Advocate	No Advocate	Unknown	TOTAL Matters
19	22	22	63

[921] Three of these advocates were parent advocates.

2011-2012

Advocate	No Advocate	Unknown	TOTAL Matters
7	41	-	48

2012-2013

Advocate	No Advocate	Unknown	TOTAL Matters
17	42	-	59

6.4 VICTORIA

2010-2011

Advocate	No Advocate	Unknown	TOTAL Matters
1	17	-	18

2011-2012

Advocate	No Advocate	Unknown	TOTAL Matters
0	15	-	15

2012-2013

Advocate	No Advocate	Unknown	TOTAL Matters
2	13	-	15

6.5 TASMANIA

2010-2011

Advocate	No Advocate	Unknown	TOTAL Matters
5[922]	4	-	9

[922] TAC (Tasmanian Aboriginal Centre) represented complainants in five of these matters

2011-2012

Advocate	No Advocate	Unknown	TOTAL Matters
1[923]	2	-	3

2012-2013

Advocate	No Advocate	Unknown	TOTAL Matters
2[924]	6	-	8

6.6 SOUTH AUSTRALIA

2010-2011

Advocate	No Advocate	Unknown	TOTAL Matters
3	11	-	14

2011-2012

Advocate[925]	No Advocate	Unknown	TOTAL Matters
2	4	-	6

2012-2013

Advocate[926]	No Advocate	Unknown	TOTAL Matters
4	6	-	10

[923] Represented by TAC

[924] Represented by TAC.

[925] One of these advocates was a friend.

[926] One of these advocates was a friend of the complainant.