RETHINKING ACCESS TO RACIAL JUSTICE
RACE DISCRIMINATION AND FIRST NATIONS PEOPLES
By Dr Fiona Allison and Jodie Luck

Aileen Moreton-Robinson, a Goenpul woman from the Quandamooka people, asserts that the 'official' story about racism in Australia is that it exists only in 'small pockets of society or not at all'. First Nations peoples, she claims, tell quite a different story about where, when and how this problem manifests, identifying it as a significant issue with substantial personal and whole-of-community impacts.[1]

Various studies and surveys confirm this. As an example, in a 2016 Northern Territory research project, *Telling it like it is: Aboriginal perspectives on race and race relations,* 64 per cent of the Aboriginal participants reported 'never' or 'rarely' being treated the same as non-Aboriginal people.[2] The Indigenous Legal Needs Project (ILNP) was a national research project looking at First Nations' access to justice in civil and family law areas that ran from 2011–2015. Depending on the jurisdiction in which they lived, between 28 per cent and 41 per cent of ILNP participants identified having encountered race-based discrimination in the previous two years.[3] Discrimination was described by participants as long-standing and omnipresent, suffered 'at least once a day, every day'. 'You're going to face it no matter where you are … at work, at home, school, wherever'.[4] First Nations peoples' experiences of discrimination range from the interpersonal to the institutional, encompassing blatant racial abuse in public spaces, under- and over-policing, being unable to obtain a private tenancy, being unable to access or to retain paid work, as well as having interactions with mainstream systems that continually fail to accommodate cultural and other needs and perspectives.[5]

PROBLEMS OF ACCESS TO RACIAL JUSTICE

In 1966, South Australia became the first Australian jurisdiction to introduce racial discrimination laws.[6] The South Australian legislation was followed by the *Racial Discrimination Act 1975* (Cth) (RDA), with race discrimination provisions subsequently enacted in other Australian states and territories between 1977 and 1998.

Notably, when the RDA was introduced, members of parliament acknowledged the substantial level of racism towards First Nations peoples which prevailed at that time and historically, and asserted that the introduction of the RDA should provide strong legal protections to First Nations peoples in particular. During the second reading speech for the bill introducing the RDA, one member of parliament argued that the legislation was unnecessary because racism did not exist in Australia. Aboriginal Senator Neville Bonner responded: '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.'[7]

Despite the expectation that First Nations peoples would benefit from the enactment of the RDA, they still arguably 'continue to bear the greatest burden' of racism in this country.[8] Race discrimination laws have not made as strong a contribution as they might have to First Nations peoples, partly due to problems relating to access to justice.

These problems often pertain to under-utilisation of anti-discrimination legal remedies by First Nations peoples. Firstly, a very small number of First Nations peoples are initiating race-based complaints with anti-discrimination agencies relative to the extent to which they are affected by this issue. For example, the ILNP found that the vast majority of participants reporting experiences of discrimination had not accessed legal advice or help, lodged a discrimination complaint or otherwise taken formal action in response.[9] Additionally, research completed by one of the authors reveals that between 2010 and 2013 only 129 race discrimination or vilification complaints were lodged by Aboriginal and Torres Strait Islander people with the former Anti-Discrimination Commission Queensland (ADCQ), now the Queensland Human Rights Commission (QHRC). Given that during this period the Aboriginal and Torres Strait Islander population in the state was around 156,000,[10] one would expect a higher number of complaints for this population.

Secondly, attrition rates for complaints made by First Nations peoples are high. Commonly, anti-discrimination agencies will refuse to accept complaints on the grounds that they are invalid (that is, not within jurisdiction). For example, of the 129 complaints lodged with the ADCQ (see above), only

around half were accepted by the agency.[11] Other complaints may not proceed to, or settle through, conciliation, with some complainants disengaging from the process. Recent statistics from the QHRC reveal that in 2019 it received 47 complaints from Aboriginal and Torres Strait Islander people, 18 of which were concerned with race. Of these 18 complaints, 11 were classified as 'NUA' (not under the Act). Four of the remaining seven complaints were successfully conciliated, two failed to conciliate and one was referred to the Queensland Civil and Administrative Tribunal (QCAT).[12]

Finally, attrition also occurs at the point where complaints reach litigation. Of the small number of complaints that *are* litigated, few yield a positive outcome for the complainant.

Access to justice in this area is clearly problematic for First Nations peoples at *all* stages. Without dismissing the importance of access to courts and tribunals, including for the setting of legal precedent, this article focuses on the anti-discrimination complaints process. This is where almost all disputes in this area begin and end.[13] In all but one jurisdiction (Victoria), lodgement of a complaint with an anti-discrimination agency is a mandatory first step to the commencement of a legal action. It is also likely to be better for complainants – and for all parties – to satisfactorily resolve a dispute through the complaints process, rather than through litigation. Given this, access to justice issues arising within this process demand our attention.

MAINSTREAM JUSTICE SYSTEMS

All individuals have a right to access justice. This is a fundamental right in and of itself and is crucial to the exercise of all other rights, including that of non-discrimination. Article 40 of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) enshrines First Nations peoples' right to access justice, defined as 'just and fair procedures for the resolution of conflicts and disputes' and 'effective remedies for all infringements of their rights'.[14] The latter infringements include breaches of the right to be 'free and equal to all other peoples … and from any kind of discrimination', contained in Article 2 of the UNDRIP.

Access to justice is generally understood as consisting of legal procedures, outcomes and substantive law (legislation). These are all mainstream constructs, meaning that they often do not accommodate or respond to First Nations-specific needs and perspectives, including those arising through culture and colonisation. This can impede fulfilment of the UNDRIP rights to access justice and to equality.

As an example, those who are aggrieved by race discrimination bear almost the entire burden of enforcing their rights, beginning with making a complaint in writing. While requiring lodgement of written complaints is problematic for many, it may be particularly difficult for First Nations peoples, given their lower rates of literacy and the limited use in some communities of English as a first or second language. The complaints process also takes time. Many First Nations peoples have a lot of complexity in their lives, often due to their disproportionately high levels of social exclusion: a legacy of colonisation. Responding (probably simultaneously) to financial, housing, health and other problems (legal or otherwise) that are perceived as requiring more urgent attention than an incident of race discrimination means that many discrimination complaints are never lodged or pursued. Moreover, to engage with the complaints process one must believe that it has capacity to deliver 'justice'. Over the last 200-plus years, however, the legal system has been used to subjugate and dispossess First Nations peoples, leading to widespread fear and distrust of the law in First Nations communities. In the research completed by one of the authors (referred to above), one Murri participant explained why most Murris do not use the anti-discrimination complaints system: 'The law has already jailed and failed us so many times. That's what they're going to think about this system. It's the same.'[15]

To increase First Nations peoples' access to justice through the complaints system, the system needs to adapt so that it can respond to the particular strengths and experiences of First Nations peoples. Anti-discrimination agency staff are required to be neutral in their dealings with all parties to a complaint, which prevents them from offering more targeted support to First Nations complainants. Access to legal advocacy is also somewhat limited in this area. While increased access to legal help is absolutely vital, First Nations community members could be upskilled to assist complainants to navigate the complaints process. A First Nations Co-Commissioner role and Advisory Group could also be established in (better-resourced) anti-discrimination agencies in all jurisdictions to guide policy and practice of these agencies.

CHANGES TO PROCESSES AND REMEDIES

In the Queensland context, the QHRC is presently looking at ways to improve First Nations peoples' access to its complaints process. Through genuine and ongoing engagement with the community, QHRC is hoping to develop a model to underpin an alternative way of doing things which is informed by the community's needs and interests. It aims to increase the accessibility, safety and cultural sensitivity of the QHRC experience for First Nations peoples. It also aims to explore the ways in which the QHRC, as a dispute resolution service, can be informed by and draw from the traditional conflict resolution practices of First Nations peoples.

The QHRC has also recently established an Aboriginal and Torres Strait Islander Advisory Group. The Group's main focus is on assisting and advising the QHRC about its performance under the *Human Rights Act 2019* (Qld) and the *Anti-Discrimination Act 1991* (Qld) as these Acts relate to Aboriginal and Torres Strait Islander people. The Group will collaborate with the QHRC to build the capacity of Aboriginal and Torres Strait Islander people to recognise and respond to human rights and discrimination issues and promote an understanding and acceptance of human rights in Queensland.

Legislative reform that responds to and reflects First Nations perspectives is a further means of enhancing First Nations peoples' access to justice. The introduction of the *Human Rights Act* in Queensland last year is seen by the QHRC as a significant step in recognising the importance of human rights for the First Nations peoples of Queensland. This is stated in the preamble to the Act, which acknowledges the distinct and diverse spiritual, material and economic relationship of Aboriginal and Torres Strait Islander peoples with the lands, territories, waters, coastal seas and other natural resources, and the particular significance of the right to self-determination. Section 28 of the Act also refers to specific cultural rights for Aboriginal and Torres Strait Islander peoples. The QHRC sees its role as helping to promote justice and self-determination for First Nations peoples in Queensland through this provision in particular, which also recognises the right of First Nations peoples to practice and preserve their cultures.

COMMUNITY-LED RESPONSES

Probably *the* most significant barrier to accessing justice in the area of racial discrimination is the limited awareness in First Nations communities of the right to non-discrimination, and of the availability of legal remedies when this right is breached. As one Koori participant in the research by one of the authors referred to above stated, 'potentially maybe only 5 per cent would know about [race discrimination] laws ... Or it may be something they know exists but they don't know *how* to use them'.[16]

More work is needed to build First Nations knowledge of their rights with respect to race discrimination and culture. One potential strategy involves building awareness of the law among key First Nations community members and community-controlled organisations. As knowledge holders, these individuals and organisations can then inform the broader local community about their rights. This strategy might be initiated and led by communities themselves, when they are ready. It may also be done in partnership with anti-discrimination agencies, legal service providers and similar organisations.

Greater understanding of rights may lead to increased use of human rights and anti-discrimination law, but it will also, importantly, give more First Nations peoples the opportunity to assert their rights without recourse to legal processes and remedies. Though First Nations peoples are likely to want racism to stop, they may not want to engage with the law to achieve this, even when they know that they can.[17] Some may prefer to address race discrimination more directly, if they are sufficiently empowered to do so. What is referred to as 'everyday justice' involves those experiencing racism to call it out – for example, in the street, or as a parent questioning a school principal about apparent bias in their child's school classroom. This can be a very positive and effective method of attaining 'justice' as it is still framed by legal rights, but does not seek legal resolution of a dispute.[18] The empowerment required to take racism on in this way may come from strategies that recognise and strengthen the role of communities alongside increased knowledge of legal rights, as discussed

above. Additionally, this 'calling out' might be done collectively, as a community of aggrieved persons, in the place of individuals lodging single complaints of race discrimination.

CONCLUSION

Though legal responses to social problems are only part of the story, it is essential, as the federal government recognised in passing the RDA, that we have in place strong legislative protection against racism, including that which is directed at First Nations peoples. Enacting legislation, however, is not sufficient. First Nations peoples are, at present, not using race discrimination laws to challenge race discrimination. To increase First Nations access to anti-discrimination and human rights legislation, reform of the legal system, informed by First Nations needs and perspectives, is essential. We must also continue to support community-led responses to racism, including those likely to increase awareness of legal rights. Both types of strategies are likely to make a positive contribution to reducing levels of racial inequality in First Nations communities, though they must also be accompanied by measures that deliver broader political, economic and social empowerment to these communities.

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[1] A Moreton-Robinson, 'Witnessing the workings of white possession in the workplace: Leesa's testimony', *Australian Feminist Law Journal,* Vol. 26, 2007, 81 at 82.
[2] D Habibis, P Taylor, M Walter and C Elder, *Telling it like it is: Aboriginal perspectives on race and race relations*, First findings from a research partnership between the University of Tasmania and Larrakia Nation Aboriginal Corporation on race relations (2016) Darwin NT, 14, <https://www.utas.edu.au/__data/assets/pdf_file/0011/880643/Linkage-Launch-Final-300816.pdf>.
[3] See Indigenous Legal Needs Project website for reports and other material, available at <https://www.jcu.edu.au/indigenous-legal-needs-project/resources/ilnp-reports-and-papers>.
[4] M Schwartz, F Allison and C Cunneen, *The civil and family law needs of Indigenous people in Victoria*, Report (2013) Cairns Institute, James Cook University (JCU), 92–3.
[5] F Allison, *Cause for hope or despair? Evaluating race discrimination law as an access to justice mechanism for Aboriginal and Torres Strait Islander people* (2020) PhD Thesis, JCU, 216.
[6] *Prohibition of Discrimination Act 1966* (SA), DOI <https://doi.org/10.25903/5ebb247f12d94>.
[7] Commonwealth, *Parliamentary Debates*, Senate, 27 May 1975 (Hon Neville Bonner MP), 1884.
[8] A Ferdinand, M Kelaher and Y Paradies, *Mental health impacts of racial discrimination in Victorian culturally and linguistically diverse communities: Full report* (2013) Victorian Health Promotion Foundation, Melbourne VIC, 1.
[9] Eg, in Qld, only one in six participants (15.6 per cent) had taken any action. C Cunneen, F Allison and M Schwartz, *The civil and family law needs of Indigenous people in Queensland*, Report (2014) Cairns Institute, JCU.
[10] Australian Bureau of Statistics, *Census of Population and Housing: Reflecting Australia, Stories from the Census: Aboriginal and Torres Strait Islander Population 2011* (Catalogue No 2071.0, 2011).
[11] Allison, above note 5, 232.
[12] Statistics provided by the QHRC to the authors for inclusion in this article.
[13] It is possible to commence legal action in relation to race discrimination in the Victorian Civil and Administrative Tribunal without first lodging a complaint with the Victorian Equal Opportunity Commission.
[14] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007).
[15] Allison, above note 5, 261.
[16] Ibid, 254.

[17] Ibid, 232ff. See also G Bodkin-Andrews and R Craven, 'Bubalamai Bawa Gumada (healing the wounds of the heart): The search for resiliency against racism for Aboriginal Australian students' (2014) Quality and Equity: What does Research Tell Us – Conference Proceedings, Australian Council for Educational Research, Camberwell, Victoria, 49–58.
[18] M Galanter, 'Justice in many rooms: Court, private ordering and Indigenous law', *Journal of Legal Pluralism and Unofficial Law,* Vol. 13(19), 1981, 1.