

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

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## SETTING THE SCENE

### **Indigenous Legal Needs Project (ILNP) (2009-2015)**

- Between 22.6% and 40.9% of ILNP participants reported experiencing discrimination (predominantly race and direct discrimination so statistics are an under-count)
- ‘You’re going to face it no matter where you are... at work, at home, school, wherever’. ‘We deal with it on a daily basis. You would think that in this day and age it’d be easier but it’s not’: Aboriginal yarning circle participants
- Between 11.6% and 21.4% of ILNP participants reported taking any legal or other action in response to race discrimination
- Identify problematic levels of access to justice in civil and family law areas.
- Access to justice is a framework used to identify and address barriers inhibiting and through this to ensure equal access to justice processes and outcomes to assert/defend legal rights.

### **Thesis work (2020)**

- Is improving access to justice in the area of race discrimination of value to Indigenous people?
- If so, what changes are required to our legal framework to ensure better access to justice for this group?
- If not (or if the law is not the complete answer for Indigenous people), what alternative or additional methods for addressing race discrimination are most useful to Indigenous people?

# RACE DISCRIMINATION LAW & THE CIVIL RIGHTS MOVEMENT

- Movement pushed for civil and human rights for Aboriginal people— equal right to vote, equal wages and freedom of movement in public spaces, including through Freedom Ride of 1965.
- Protest > introduction of our federal *Racial Discrimination Act 1975*

*[Race discrimination law is essential to] protect Aboriginal people... right throughout the nation [so that they can] take action against anybody on their own initiative.*

*[F]irst class citizens made the laws which kept the Aborigines in their place. [The Freedom Ride 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 [and] had to be changed in a situation that was unhappy for Aborigines. Perkins (1977)*

- There were expectations and hopes amongst Aboriginal activists and government that race discrimination law would reduce inequality for First Nations communities, in particular.



Freedom ride, Moree public pool, NSW (1965)  
(State Library of NSW, The Tribune)

# INDIGENOUS RIGHTS, INDIGENOUS-LED MOVEMENT FOR CHANGE

- For some activists, Indigenous people were not owed the same as others, they were owed something different.
- They prioritised Indigenous rights, including a right to land (prior occupation), self-determination (sovereignty) and Aboriginal culture over equality/civil/human rights.
- They preferred wholly Indigenous-led direct action, including to overthrow mainstream systems altogether. These systems are at best useless but at worst racially oppressive, the law included.
- Tent Embassy (1972) focused on land rights and sovereignty, with Aboriginal flag for 'Black nation' flying at embassy. and was wholly Indigenous-led

*[The Tent Embassy is] more productive than twenty years of legal attack. We need more Embassies. We need more direct confrontation. Sykes, R (1974)*

- Similar to critical race theorists in US: saw equality law just tinkering at edges, doesn't deliver substantive change required, and deliberately quells more effective subversive/direct action



Tent Embassy: The Tribune, SEARCH Foundation

## RACISM AND FIRST NATIONS PEOPLES IN AUSTRALIA

Racism still a major problem for First Nations peoples in Australia, 50+ years after first race discrimination legislation was introduced here.

Arguably, still disproportionately more likely to face experience discrimination and racism in their daily lives than others. These problems also *differently* problematic for First Nations peoples.

- No shame in overtly discriminating against Aboriginal people.

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

- More systemic, covert racism highly prevalent too

Still segregated, just not as blatant

*Melbourne is so racist, especially with public housing. I don't want to live in crappy housing. You don't get offered nice housing in nice places by Department of Housing. Aboriginal participant*

Moree public pool – cost and rules/regulations

- Evidenced by statistical inequality – nowhere near equal to others

*Now we've got freedom. We're allowed to go wherever we want. If you walk into this RSL today, there's probably 90% Aboriginal people. Alongside this, however, is a high unemployment rate, substance abuse issues, poor educational outcomes, high levels of domestic violence and friction between townspeople and the local police force. Dubbo resident: Power (2015)*

- Framed by:
  - (a) the racism of colonisation – historical & still condoned and/or carried out by state, with child protection and criminal justice systems a focus
  - (b) denial of Indigenous rights - to land, self-determination, culture

*[Compared to migrant groups, who will eventually be accepted in society], Aboriginal people are always on the outside, kicked to the bottom and meant to stay down there. Aboriginal Legal Service*

*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? .... It would be acceptable if they meant it but it's still going on ... We'll call it child protection now. Aboriginal participant*

*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.. Human rights organisation*



# INDIGENOUS ACCESS TO RACE DISCRIMINATION LAW REMEDIES

We can't pin all racism against First Nations peoples in Australia on failure of race discrimination legislation. But it has an important contribution to make in terms of reduced racial inequalities. It cannot achieve this if those whose rights it is intended to protect are not able to use it – at all or to positive effect.

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

Legal service

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

More common Indigenous responses: angry confrontation, walking away and to a lesser extent, more measured challenges to incidents (preferred but not that easy to do).

*I call it for what it is. I come from a family heavily involved in the Aboriginal struggle for land rights and self-determination. 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.* Aboriginal participant

# BARRIERS TO RACIAL JUSTICE

Indigenous barriers to accessing justice can be shared with others but heightened for or particular to Indigenous people.

## (a) INITIATION OF COMPLAINT

Formal equality of anti-discrimination legislation: Aboriginal people are 'equally entitled to pursue their complaints' of discrimination. In reality, one must be 'sufficiently informed, motivated', 'empowered' and 'resourced' to use its 'complex legal machinery': Bertone & Leahy (2003).

Individuals must lodge written complaints

Not aware of right to equality or right to complain due to literacy but also high levels of disempowerment, fear and distrust, including of the law (for e.g.)

*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. Aboriginal participant*

*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. Aboriginal participant*

## (b) INITIATION AND PROGRESSION OF DISPUTE RESOLUTION PROCESSES

Process doesn't 'fit' with First Nations culture

*In [the mainstream] community the individual [is everything], and our system is set up to be adversarial. We speak for ourselves. [Indigenous people] are communal so they're not taught to speak out for themselves. They need that community authority to speak ... [So] they don't get the system. It's too foreign. Aboriginal Legal Service*

### (c) JUSTICE OUTCOMES ATTAINABLE

- Doesn't recognise systemic, historical inequality as discrimination
- Doesn't recognise denial of Indigenous-specific rights as discrimination

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

All-Aboriginal school that responded well to cultural needs of Aboriginal students in Alice Springs, Northern Territory was closed down by government. All students would be moved to mainstream schooling.

Parents argued discrimination under ss 9(1) and (2) of the RDA. Decision denied them rights to a form of education that strengthened self-determination and was culturally appropriate.

Tribunal found no discriminatory purpose or effect. There was no denial of opportunity to access or impact on a right to education to the extent that the latter would not be provided on an 'equal footing'. Students were being provided with the same opportunities as all other students. It was not discriminatory to not provide education that would meet their specific needs and respond to their right to self-determination and culture.

EXPANDING ACCESS TO  
JUSTICE: INCORPORATING  
FIRST NATIONS  
PERSPECTIVES

- Access to justice is a universal human right to which all are entitled, including Indigenous peoples. It's essential to the realisation of all other rights, including human and collective rights for Indigenous peoples.

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

- Human or civil rights (to equality, to access justice) do not have to cancel out Indigenous (collective rights). Rather, they must be interpreted alongside and in ways that *uphold* Indigenous collective rights.
- This requires adaptations to race discrimination legal frameworks framed by four key UNDRIP principles/rights: non-discrimination, self-determination, recognition of culture and participation in decision-making (in matters that affect Indigenous rights).

## ADAPTATIONS TO THE LAW

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

We must expand our definitions of what access to justice means in this area for Indigenous people, adhering to UNDRIP principles in ways that address Indigenous barriers to accessing justice.

- Increased Indigenous input into and leadership within discrimination ADR processes (Indigenous consultative body, Indigenous Co-Commissioner)
- Borrowing of effective adaptations to criminal justice system (e.g. Murri and Koori Courts) into the civil law system in this area
- Cultural impact statements to inform jurisprudence in this area
- Incorporate protection of cultural rights in law
- Increased capacity for anti-discrimination agencies to take action, particularly for systemic issues

## EXPANDING ACCESS TO JUSTICE: NON- LEGAL STRATEGIES

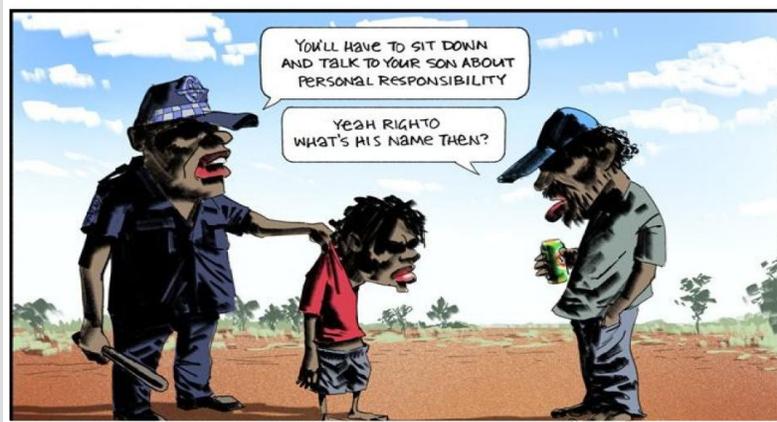
- Access to justice is consistently framed by the law. It is defined as:

*[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: Currie (2003)*
- Justice processes and outcomes must be defined by justice seekers themselves. Indigenous people may turn away from the law as institutionally racist, may prefer Indigenous, direct & non-legal responses.

*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. Aboriginal participant*

*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? Aboriginal participant*
- These responses might sit within an expanded definition of access to justice that moves beyond legal resolution of an individual's legal dispute and incorporates direct challenges of racism by individuals, social movements, for e.g.

# ADDRESSING RACISM: NON-LEGAL RESPONSES



The Australian: Bill Leak



## (a) Community-led/embedded responses

- Increasing knowledge of rights, with community holding and sharing this knowledge themselves
- ‘Naming’ racism (including without naming respondent or lodging complaint)

*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.* Aboriginal participant

- Initiatives and events that instil cultural pride in and increase cultural knowledge for Aboriginal and Torres Strait Islander people

*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.* Aboriginal participant

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### (b) The broader community's responsibilities

- Increase community awareness of responsibilities
- Bystander action
- Increase awareness of Indigenous culture and of racism against Indigenous people

*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. Education for everyone would be good, what the Racial Discrimination Act is about. Aboriginal participant*

### (c) Government responsibilities

- Ensure effective implementation of discrimination law
- Address its own racism: substantive equality frameworks, policy reform)
- Reframe its relationship with Indigenous people