

'THAT'S DISCRIMINATION!'

INDIGENOUS PEOPLES' EXPERIENCES OF DISCRIMINATION IN THE NORTHERN TERRITORY

by Fiona Allison, Melanie Schwartz and Chris Cunneen

INTRODUCTION

The Indigenous Legal Needs Project (the 'ILNP') is a national research project currently mapping priority non-criminal legal needs in 32 Indigenous communities across four Australian jurisdictions, including the Northern Territory ('NT').¹ The ILNP research is aimed at enhancing Indigenous access to civil and family law justice.

In 2011, the authors travelled through the NT conducting fieldwork for the ILNP in eight focus communities.² Information on legal needs and current legal service delivery was gathered from both community members participating in focus groups³ and during interviews with stakeholders (legal services, relevant welfare services and Indigenous organisations, for example) and was used to identify priority areas of law.⁴

This article discusses the civil law issue of discrimination, which emerged in the ILNP research in the NT as an area of priority need on the basis of the significance it was accorded by both stakeholders and focus group participants. It was also identified as a priority because there was some indication that the level of discrimination occurring was actually much higher than that reported in ILNP focus groups, and because few victims of discrimination appeared to be accessing legal or other help in response to it.⁵

INDIGENOUS COMMUNITIES' EXPERIENCES OF DISCRIMINATION IN THE NT

I said to him (proprietor of shop) 'You're a redneck. I've seen a lot of white kids, and all other different colour kids come in here, but you only scream at the black ones' (Focus group participant, Katherine)

During the ILNP focus groups, participants completed a questionnaire asking whether they had experienced specified civil and family law problems in the last two years, including discrimination on grounds such as race, marital status, and/or disability.⁶ The questionnaire also

asked where any discrimination identified had occurred (in clubs and pubs or in employment, for example) and whether legal assistance had been sought in relation to it. Participants expanded on the answers given in the questionnaires during the discussion that followed.

Nearly a quarter of all Indigenous community members participating in the NT research reported directly experiencing discrimination (22.6 per cent of participants), with Indigenous men and women identifying such experiences at almost the same rate (22.4 per cent of women and 22.9 per cent of men). Overall, only two other areas were identified as a problem with greater frequency by ILNP focus group participants: housing and tenancy and neighborhood disputes.⁷ In some communities, percentages of participants alleging instances of discrimination were substantially higher. In the community of Wadeye, for example, exactly *half* of all participants identified a personal experience of discrimination in the last two years.⁸

Significantly, the vast majority of NT focus group participants who provided detail about experiences of discrimination cited examples of *racially based, direct* discrimination, with only a single participant identifying discrimination on a ground other than race (age) and with participants rarely identifying instances of *indirect* discrimination. Employment and health care provision were the most common areas of public life in which discrimination was said to have arisen, followed by police and shops, some examples of which follow. These examples provide some indication of the way in which Indigenous participants most commonly understood discrimination within the context of this research.⁹

A female participant from Katherine, an Aboriginal health worker of 20 years, reported that her non-Indigenous co-workers 'rubbish me when I go working with them ... and I stand up to them, but then they really put you down'. A number of participants in one community alleged that non-Aboriginal doctors and nurses at their

local clinic turned them away when they sought what they perceived to be urgent medical assistance. Further, according to one of these same participants, ‘when they speak, they hurt your feelings ... and you [are only] trying to ask them to help’. Another female participant claimed to have approached a store in her community about TV rentals, as advertised in its window. The woman claimed, however, that the store worker told her when she entered the store that there were no rentals available, at which point the participant said ‘In other words, you don’t rent things to people of my colour... and she just said ‘Yes’ to me, straight out.’

Racial vilification also arose as an issue for participants. Many of the Katherine focus group participants, for example, agreed that whilst various forms of racism in the town were common, verbal expression of racism was especially bad, with one participant stating ‘Some white people see black people on the street ... and they yell out ‘black bastard’.

THE SIGNIFICANCE OF THE NT’S LEGISLATIVE AND POLICY CONTEXT

The police, the courts, the whole lot, the Liquor Act, just across the board—it’s just unbelievable. Where do you start? (NT legal service provider)

Information gathered about discrimination from stakeholder organisations was fairly consistent with that provided by focus groups. There was again an emphasis on racial discrimination. Stakeholders, however, were more likely than focus group participants to refer to a wider range of potentially discriminatory events or issues, particularly where they had some working knowledge of anti-discrimination law. This last point is a significant one, as it indicates the importance of being informed in challenging discrimination.

Stakeholders were perhaps more ready, for instance, to locate discrimination within the NT’s policy and legislative context, where the latter was seen as targeting or impacting negatively upon Indigenous communities. The Northern Territory Emergency Intervention (‘NTER’ or ‘Intervention’) in particular, introduced by the Federal Government in 2007, was identified by a number of stakeholders and by some Indigenous focus group participants as *itself* discriminatory and/or as giving rise to increased instances of discrimination.¹⁰ A male focus group participant in Darwin, for example, noted that ‘discrimination is happening for everybody ... And the Intervention is the worst one. They have taken over the rights of black people ... every right that we have’.

Another focus group participant in Tennant Creek referred to ‘those big blue [NTER] signs outside of all our communities that got ‘no alcohol, no pornographic’ ... I never seen those signs outside Canberra. It’s discrimination.’ A legal service provider also cited the example of an educated Indigenous woman on a remote community who sought employment as a Government Business Manager (‘GBM’), a position introduced as part of the NTER to improve coordination between Indigenous communities and government:

I asked her ‘why aren’t you a GBM?’ and she said, ‘I asked the current GBM how I apply to become a GBM and he said to me ‘You’ll never be employed, because you come from this community and they don’t want community members applying for the position on the basis that you could be part of one faction of the community and not look after all parts of the community’. I mean ... that’s discrimination! It’s the very people who should be in the job that are being told ‘You need not apply’.

With the NTER in place, discrimination appears to have become not just more widespread, but also more blatant.

One organisation indicated that because of the NTER: people think they can say what they like to Aboriginal people without having any recourse. I have been away a short period and I have come back and it’s [like it is] peoples’ god forsaken right to do what they feel like to Aboriginal people.

TELLING ONLY PART OF THE STORY

It’s that really insidious stuff. You can walk down the street and see it every single day, every single minute. But to be able to point at particular things and say ‘that’s racial discrimination’, that’s quite difficult (Indigenous legal service staff)

Discrimination was commonly identified as a problem in the NT. We suggest, however, that the ILNP statistical and other data may not be a wholly accurate reflection of the actual incidence of discrimination occurring in the communities visited. It is highly probable, in fact, that it provides only *part* of the story, and that the level of discrimination (and hence of legal need) within the surveyed communities is actually greater than indicated. This provides another basis for identifying discrimination as a priority area in this jurisdiction.

There appears to be some difficulty, for a start, in identifying an incident as ‘discrimination’. Indigenous people may view discrimination not as an actionable legal event, but rather as an intolerable but entrenched part of life, about which there is little one can do, for reasons discussed below.¹¹ This leads to underreporting

of the issue to legal practitioners and agencies such as the Northern Territory Anti-Discrimination Commission ('NT ADC'), and probably also during the ILNP research. Close to 80 per cent of all participants who had identified discrimination as an issue did *not* seek legal assistance, for example. The NT ADC also suggests it is not seeing the numbers of Indigenous complainants they would expect, relative to the size of the local Indigenous population and given what it perceives to be actual levels of discrimination in the community.¹²

Indirect discrimination and discrimination based on attributes other than race are fairly invisible in the data gathered from community members, but this may not indicate that these issues do not arise. It is perhaps more likely that the absence of reporting in this area reflects a lack of knowledge of relevant law and a certain resignation within communities about the occurrence of discrimination, in part due to its prevalence, but it perhaps also might be because this issue may take second or third place to more pressing problems such as a housing eviction, removal of children by welfare or incarceration. As one legal service provider suggests, for Indigenous people discrimination may be 'just a negative, nasty part of life ... people are just used to it, it's just rife in the Territory'. Further, according to a female focus group participant in Katherine:

Most Aboriginal people, the homeless ones ... they just put up with it ... They just think there's nothing they can do. They don't know that you can go to the law and take 'em up for discrimination and whatever. They don't know about them things.

The NT ADC also states that Indigenous people 'don't even know that they have any rights' and are getting 'treated pretty badly' but 'won't complain'. There may also be gaps in knowledge about relevant agencies to which complaints can be made, as was apparent during ILNP focus groups. In Wadeye, for instance, when participants were asked if they were aware of the NT ADC, only one person knew what it was.

It is not only lack of knowledge about the law or lack of access to information or assistance that hinders redress for discrimination. There are also important gaps in anti-discrimination law in the NT. Neither racial vilification nor indirect discrimination are directly prohibited by the *Anti-Discrimination Act 1992* (NT), although relevant provisions under Federal anti-discrimination law apply in this jurisdiction. Whether this has any impact on the identification and reporting of such incidents is difficult to identify, but the NT ADC referred to the

potential that indirect discrimination provisions in the NT might hold for Indigenous people: 'If we have indirect [discrimination], it obviously gives a whole heap of recourse for people, particularly Aboriginal people.'

Further, there are both genuine and perceived problems of legal proof which may deter legal action.¹³ Discrimination is described as a 'difficult one to prove' by one legal service provider: 'If you've got a client who's gone into a club and caused trouble because they are a bit drunk, it is difficult to argue that they were refused entry because of their race'. Housing provides a further example. One legal service provider suggests that there has been 'speculation about discrimination because [of Indigenous persons] being denied private rentals'. The reference to 'speculation' suggests that it may be difficult to establish that a landlord or agent's decision to decline an Indigenous person's tenancy application, including on the basis of established criteria which are likely to disproportionately disadvantage prospective Indigenous tenants (such as employment or rental history), actually constitutes less favourable treatment at law.¹⁴

For this reason, lawyers may frame discrimination as a different type of legal issue, again meaning that it remains hidden. One legal service suggested, for instance, that:

we get the occasional complaint of racial discrimination [that is] notoriously difficult to establish, but we get it feeding particularly into employment a lot. Although with the employment ones we tend to settle them on other bases, so we might allege discrimination and that is often enough to rattle the chains a bit then we'll settle on basis of other issues that came up (such as unfair dismissal).

THE BROAD SWEEP OF DISCRIMINATION IN THE NT

This 'rebadging' of discrimination as a different legal issue was also evident in the ILNP research. Problems identified by focus group participants and also some stakeholders as relating to education, consumer law, housing or employment, for instance, might also, or more appropriately, be categorised as discrimination. Again, a lack of legal knowledge and other barriers to calling discrimination what it is might be the reason why this occurs.

An example of this involves a staff member of an Indigenous community organisation who, in discussing education, did not raise the following as 'discrimination', although it might well be (on the basis of race and impairment):

[Indigenous] kids with bad hearing get picked on. My grandson was made to sit down in the corner. Teachers are being unfair to people with handicaps. Kids love going to school, but they are not being treated properly or looked after properly.

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This ‘broad sweep’ of discrimination, impacting across various aspects of Indigenous peoples’ lives—even where not always specifically categorised as discrimination—was a further basis for identifying it as an area of priority legal need in the NT.

CONCLUSION

In conclusion, the ILNP research revealed discrimination to be a pervasive problem arising in the nominated NT communities. However, it was apparent that perhaps only the more straightforward examples of discrimination might be identified as such, especially by Indigenous community members. The issue was sometimes concealed as another type of (legal) problem and it was under-reported in general, leading us to conclude that its incidence is probably far higher than that recorded by the ILNP data. Indeed, the ILNP research uncovered a range of issues likely to seriously inhibit reporting of instances of discrimination, including a certain level of acceptance of it, along with a lack of awareness of legal rights and problems relating to legal proof.

ILNP statistics also suggest relatively poor access to justice in this area of law. Although not every part of the solution, the provision of quality legal information and advice as well as service delivery by agencies such as the NT ADC needs to be adequately resourced to enable effective engagement with Indigenous communities in order to better unearth and confront discrimination when it arises.

Importantly, we also suggest that without having recourse to challenge such incidents through the law, victims of discrimination are left vulnerable to responding in ways that leave them in danger of contact with the criminal justice system.¹⁵ In discussing some of the racist comments experienced by participants in Katherine, for instance, one male focus group participant stated that, ‘If someone spoke to me like that, I’d punch ‘em. Soon as I punch ‘em, I’d be going to jail for it’. The fewer avenues available for achieving meaningful redress, the more likely it is that this type of escalation will occur. Such an escalation gives rise to a raft of further legal and other problems.

- 1 More information on the Indigenous Legal Needs Project is available at <<http://www.jcu.edu.au/ilnp/>>.
- 2 Darwin, Katherine, Alice Springs, Tennant Creek, Bulman, Wadeye, Papunya and Alpururulam are the Northern Territory (‘NT’) communities. The other three ILNP jurisdictions are Victoria, Western Australia and Queensland.
- 3 Focus groups consisted of 10 men and 10 women of different ages and backgrounds, invited to participate in the group by a local Indigenous coordinator employed by the ILNP.
- 4 All stakeholders interviewed are listed in Fiona Allison, Chris Cunneen, Melanie Schwartz and Larissa Behrendt, *The Indigenous Legal Needs Project: NT Report* (Cairns Institute, James Cook University, 2012) 166 (hereafter ‘ILNP NT Report’) <http://www.jcu.edu.au/ilnp/public/groups/everyone/documents/technical_report/jcu_113496.pdf>.
- 5 Given that the focus groups were conducted with a small number of community members on a specified number of communities in the NT, the ILNP data cannot be read as representative of the experience of *all* Indigenous people in the NT.
- 6 Thirteen areas of law were covered, ranging from employment, social security, and consumer law to credit and debt related issues. A copy of the ILNP questionnaire is available in the ILNP NT Report, above n 4, 156.
- 7 Housing and tenancy and neighborhood dispute issues were identified by 54.1 per cent and 27.1 per cent of all participants, respectively. For further detail in relation to prioritisation of legal needs in the NT see the ILNP NT Report, above n 4, 125-138.
- 8 Darwin and Katherine also reported discrimination at a relatively high rate: 33.3 per cent and 31.6 per cent of all focus group participants, respectively. The community least likely to identify discrimination was Papunya (at 5.9 per cent).
- 9 In other jurisdictions, complaints of discrimination by Indigenous people also appear most likely to be race based. In NSW, for instance, 50 of the 79 complaints received from Indigenous people by the Anti-Discrimination Board in 2010-2011 were racially based. See Anti-Discrimination Board (NSW), *Annual Report* (2011) 27; see also Western Australian statistics, Western Australian Equal Opportunity Commission, *Annual Report* (2012) 51.
- 10 For further discussion of racial discrimination and the NTER, see, for example, Tom Calma, ‘The Northern Territory Intervention: it’s not our dream’ (2010) 27(2) *Law in Context* 14-41.
- 11 For a similar dynamic identified in NSW, see Chris Cunneen and Melanie Schwartz, ‘Civil and Family Law Needs of Indigenous People in New South Wales: the Priority Areas’ (2009) 32(3) *University of New South Wales Law Journal* 725.
- 12 The NT ADC estimates that Indigenous people (about 30 per cent of the total NT population) only lodged 5-10 per cent of the 350 individual complaints it received in 2010-2011: ILNP NT Report, above n 4, 103. For discussion of similar issues at a Federal level, see Beth Gaze, ‘Has the *Racial Discrimination Act* Contributed to Eliminating Racial Discrimination? Analysing the Litigation Track Record 2000-2004’ (2005) 11(1) *Australian Journal of Human Rights* 6.
- 13 See related discussion in, for instance, Jonathon Hunyor, ‘Skin-deep: Proof and Inferences of Racial Discrimination in Employment’ (2003) 25(4) *Sydney Law Review* 535.

14 The reference to such criteria during the assessment of tenancy applications may, in certain circumstances, constitute indirect discrimination. See, for example, Jade Stanley, *Rental Market Failure: Discriminatory Obstacles Faced by Aboriginal people in the Private Rental Market* (National Housing Conference, Australian Housing and Urban Research Institute, Brisbane, 2001).

15 For more on possible escalation of civil and family law issues to criminal law problems, see Melanie Schwartz and Chris Cunneen, 'From Crisis to Crime: the escalation of civil and family law issues to criminal matters in Aboriginal communities in NSW' (2009) 7(15) *Indigenous Law Bulletin* 18.

Big Mob of Tjanpi Dogs 2007

Collection: Museum and Art Gallery of the Northern Territory, Darwin.
Image: Jo Foster ©Tjanpi Desert Weavers, NPY Women's Council

