THE IMPACT OF RACISM ON ABORIGINAL AND TORRES STRAIT ISLANDER HEALTH: SECTION 18C AS AN IMPORTANT SAFEGUARD*

by Romlie Mokak and Mary Guthrie

INTRODUCTION

Over the period of at least a decade, academics, health experts and researchers have developed a large body of evidence showing that racism and ill-health are linked. There is also significant evidence that racism is a fact of life for many Aboriginal and Torres Strait Islander peoples. Allowing people to 'offend, insult, humiliate or intimidate another person or a group of people' on the basis of race, [1] can potentially cause harm and thus widen the health gap between Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians. The benefits of section 18C extend beyond procedural protections against racism. While the process itself is extremely important, the overarching benefit of section 18C is that it sets a benchmark and sends a clear message: as a nation, we reject racism. Despite the improvements that have been made in Aboriginal and Torres Strait Islander health policy over the long-term, there is much more work to be done. Amending or repealing section 18C of the *Racial Discrimination Act 1975* (Cth) ('*RDA*') would have been a step backwards.

BACKGROUND

Prior to the Australian Parliament passing of the *RDA*, there were no protections against racial discrimination by either the criminal code or the common law.[2] At the outset, in the parliamentary debates, the Racial Discrimination Bill was met with significant resistance.[3] Because of these tensions, the *RDA* was drafted to allow for a reasonable balance between protection against racial discrimination and freedom of speech. Any impediment to the right to freedom of speech imposed by section 18C is qualified by 18D, which makes journalism, art, and political comment exempt from the conditions of 18C, provided it is done 'reasonably and in good faith'.[4] While the test that comment is made 'reasonably and in good faith' can be very subjective, it nonetheless provides a fair balance.

Section 18C of the *RDA* makes it unlawful for people to say or do anything that is 'likely, in all the circumstances, to offend, insult, humiliate or intimidate another' on the basis of their 'race, colour or national or ethnic origin'. It provides a process for all Australians, including Aboriginal and Torres Strait Islander people, to seek redress against racial discrimination. It is important to note that there are no criminal sanctions against racism in Australia; section 18C simply enables a process of conciliation through the Australian Human Rights Commission ('AHRC').[5] For the AHRC to investigate and resolve a complaint about unlawful racial discrimination, the complaint must be valid, and there must be sufficient details to argue that the events complained about are unlawful discrimination.[6] The AHRC does not have the power to decide if unlawful discrimination has happened.[7] Conciliation can take place in a face-to-face meeting called a 'conciliation conference', in writing or through a telephone conference, usually with the aim of seeking a resolution via an apology, a change of policy or compensation. Complainants may elect to take the matter to court, however the majority of cases are finalised through the AHRC conciliation process, with 70 per cent being successfully resolved in this way between 2015-2016.[8]

RACISM AND HEALTH POLICY

In recent years, Aboriginal and Torres Strait Islander health leaders and organisations have worked diligently and collaboratively with the Australian Government to the development of *The National Aboriginal and Torres Strait Islander Health Plan 2013-2023* ('Health Plan'), and the *Implementation Plan for the National and Torres Strait Islander Health Plan 2013-2023* ('Implementation Plan'). The vision for the Health Plan is 'the Australian health system is free of racism and inequality and all Aboriginal and Torres Strait Islander people have access to health services that are effective, high quality, appropriate and affordable'.[9] Together with strategies to address social inequalities and determinants of health, this provides the necessary platform to realise health equality by 2031. The Health Plan and the Implementation Plan went a significant way in identifying racism as a social determinant for Aboriginal and Torres Strait Islander health. Racism had not to date been acknowledged in any government policy as a serious risk to Aboriginal and Torres Strait Islander health. The Health Plan

acknowledges that 'racism is a key social determinant of health for Indigenous Australians, and can deter people from achieving their full capabilities, by debilitating confidence and self-worth which in turn leads to poorer health outcomes'.[10] Evidence suggests that racism experienced in the delivery of health services contributes to low levels of access to health services by Aboriginal and Torres Strait Islander people.[11] There are a number of pathways from racism to ill-health—experiences of discrimination, linked to poor self-assessed health status, psychological distress, depression and anxiety, and health risk behaviours such as smoking and alcohol and substance misuse.[12] The Hon Ken Wyatt MP, Assistant Minister for Health acknowledged 'what a huge step forward [it is] to have racism recognised as a critical issue to be addressed in the Implementation Plan'.[13] Further, as an Aboriginal man and Minister responsible, he said 'our people need to feel culturally safe in the mainstream health system'.[14]

Section 18C of the RDA provides a process for all Australians, including Aboriginal and Torres Strait Islander people, to seek redress against racial discrimination.

RACISM WITHIN THE HEALTH SYSTEM

The Health Plan addresses the need for the health system to be free of racism. Whether racism is experienced within, or outside of the health system, it nonetheless impacts on people's health and wellbeing. Institutionalised racism is a factor for accessing the health system and better health outcomes for Aboriginal and Torres Strait Islander people. For example, a study by the Deeble Institute in 2016 found that Aboriginal and Torres Strait Islander peoples are over-represented in rates of discharge against medical advice (DAMA).[15] DAMA has serious implications for peoples' recovery and ongoing health, and contributes further to the higher rates of chronic disease (especially diabetes, cancer and kidney disease). The study identifies a number of causal factors associated with discharge against medical advice, including institutionalised racism, a lack of cultural safety and distrust in the health system.

RACISM IN OTHER SETTINGS

The Experiences of Racism 2010-2011 survey was funded by the Lowitja Institute, and was undertaken in Victoria as part of a broader study. The research surveyed 755 Aboriginal Victorians aged 18 years and older, living in two rural and two metropolitan local government municipalities. Key findings included:

WHERE DOES RACISM OCCUR?

Racism can occur in a range of settings, such as shops and public spaces, education and employment settings and sports settings.

PREVALENCE OF RACISM

- 97% of those surveyed had experienced racism in the previous 12 months;
- More than 70% of respondents experienced eight or more racist incidents in the period.

TYPES OF RACISM

- 92% of those surveyed were called racist names, teased or had heard jokes or comments that relied on stereotypes about Aboriginal people;
- 85% were ignored, treated with suspicion or treated rudely because of their race;
- 84% were sworn at, verbally abused or subjected to offensive gestures because of their race.

THE LINK TO PHYSICAL AND MENTAL HEALTH

Participants in this survey were assessed through a modified version of the Kessler 6 scale. The Kessler scale is a well-established assessment tool that screens for psychological distress. High psychological distress is an indicator of increased risk of mental illness.[16] The survey found that people who experienced the most racism also recorded the highest psychological distress scores:

- Two-thirds of those who experienced 12 or more incidents of racism reported high or very high psychological distress.
- The survey indicates that racism has a high level of prevalence, it occurs in a range of settings, and it impacts on health and wellbeing.

SECTION 18C OF THE RACIAL DISCRIMINATION ACT

Given the prevalence of racism and its impact on health and wellbeing, an amendment to section 18C of the *RDA* would have sent a very negative signal that it is acceptable to 'offend, insult, humiliate or intimidate another person or a group of people', based on their race.[17] Many of the arguments that propose to amend or repeal section 18C centre on the right to freedom of speech, as if this were an absolute right. Section 18C of the *RDA* is not the only area of Australian law that limits freedom of expression. Defamation laws limit freedom of expression in recognition of the fact that harm to reputation can be very damaging to individuals and business and should in some circumstances be prohibited.[18] In some Australian jurisdictions there are laws regulating swearing in public.[19] We do not make any comment on this except to reiterate that freedom of speech is not an absolute right, and therefore should not be used as a rationale to amend section 18C of the *RDA*. Moreover, in contradiction to the weaponisation of the *RDA* and 18C by free-

speech advocates, 'section 18D is one of the few provisions in Australian law that explicitly protects the interest of free speech'.[20]

Other proponents of change to section 18C have put the argument that offence is taken rather than given. This argument misses the point that whether or not an act is deliberate or inadvertent, harm may be caused. We can see from the evidence referred to above that words can and do cause harm to peoples' mental health and wellbeing.[21] This is an important consideration from a health policy perspective. Section 18C – even without amendment or repeal– cannot itself address the issue of racism that Aboriginal and Torres Strait Islander people—and other Australians—continue to face. Securing an absolute, unqualified, right to free speech in Australia must be balanced against the social costs of doing so. As a nation, is it more important to allow anyone to 'offend, insult, humiliate or intimidate another person or a group of people' on the basis of race—or should we commit to laws that support the already challenging task of improving the health of Aboriginal and Torres Strait Islander Australians? Furthermore, as a nation, do we submit to political impulse, or do we uphold dignity, respect and fairness in our public discourse? In the context of the mutually agreed agenda by all Australian governments to 'close the gap' in health, education, employment and other outcomes for Indigenous Australians, the answer is clear. As the Hon. Malcom Turnbull MP stated in his Closing the Gap Prime Minister's Report 2016:

> We pride ourselves on having built an egalitarian country where everyone has the same chance to realise their dreams and to fulfil their potential. But it is not until Aboriginal and Torres Strait Islander people have the same opportunities for health, education and employment that we can truly say we are a country of equal opportunity.

In terms of Aboriginal and Torres Strait Islander health policy, Australia has made important gains in acknowledging racism and its impact on health and wellbeing in the National Aboriginal Health Plan.[22] Indeed, there is a need for racism to be addressed beyond the health system. Evidence shows that racism impacts on the health and wellbeing of Aboriginal and Torres Strait Islander people. Section 18C helps to protect hard-fought policy gains that address institutional racism and discrimination.

The report of the Parliamentary Joint Committee on Human Rights, tabled on 28 February recognised 'the profound impacts of serious forms of racism' and made 22 recommendations, none of which suggested an amendment to section 18C.[23] The report was encouraging to all those working the Aboriginal and Torres Strait Islander health sector because it made clear to the Parliament how important 18C is to those it protects, while suggesting practical changes to improve the processes around 18C. When the Parliament voted against a proposed amendment to section 18C that would replace the words 'insult', 'offend' and 'humiliate' with the term 'harass',[24] they sent a clear message that there is no place for racism in contemporary Australian society. Changes to the *RDA* would have eroded hard-fought health policy gains for Aboriginal and Torres Strait Islander peoples. As a nation, together we must strive for dignity, respect, equity and a deeper understanding of one another.

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1 *Racial Discrimination Act 1975* (Cth), s 18C.

2 Tim Soutphommasane, '40 years of the Racial Discrimination Act' (Speech delivered at the Commemoration of the 40th anniversary of the Racial Discrimination Act, Sydney, 11 June 2015).

3 Ibid.

4 *Racial Discrimination Act 1975* (Cth), s 18D.

5 https://www.humanrights.gov.au/sites/default/files/UD%20Complaint%20Process%20-April%202017.pdf

6 Ibid.

7 Ibid.

8 Gillian Triggs et al, Australian Human Rights Commission 'Annual Report 2015-2016' (Report, Australian Human Rights Commission, 11 October 2016).

9 Commonwealth of Australia, Department of Health and Human Services et al, 'National Aboriginal and Torres Strait Islander Health Plan 213-2023' (Policy Framework, Commonwealth Government and Closing the Gap, 23 July 2013) 7.

10 Ibid, 14

11 See, eg, Joan Cunningham and Yin Paradies 'Patterns and correlates of self-reported racial discrimination among Australian Aboriginal and Torres Strait Islander adults, 2008–09: analysis of national survey data' (2013) *International journal for equity in health* 12 (47) 1; Yin Paradie, Ricci Harris and Ian Anderson, 'the Impact of Racism on Indigenous Health in Australia and Aotearao: Towards a research agenda' (Discussion Paper No 4, Cooperative Research Centre for Aboriginal Health, 14 March 2008).

12 Above n 1, 7.

13 Ken Wyatt MP, 'Opening, Day One' (Speech delivered at the Lowitja Institute International Indigenous Health and Wellbeing Conference 2016, Melbourne, 7 November 2016).

14 Ibid.

15 Caitlin Shaw, 'An evidence-based approach to reducing discharge against medical advice amongst Aboriginal and Torres Strait Islander patients' (Issues Brief No 14, Deeble Institute, 16 March 2016)

16 Ferdinand, A., Paradies, Y. & Kelaher, M. 2012, *Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities: The Localities Embracing and Accepting Diversity (LEAD) Experiences of Racism Survey,* The Lowitja Institute, Melbourne; https://www.lowitja.org.au/lowitja-publishing/L023

17 *Racial Discrimination Act 1975* (Cth), s 18C.

18 Human Rights Law Centre Fact Sheet Australia's Racial Vilification Laws - http://www.hrlc.org.au/wp- content/uploads/2013/11/HRLC_Fact_Sheet_Australias_Racial_Vilification_Laws.pdf accessed 2 December 2016

19 See, eg, *Summary Offences Act 2005* (QLD) s 6; *Summary Offences Act 1988* (NSW) s 4; *Summary Offences Act 1966* (Vic) s 17.

20 https://www.humanrights.gov.au/news/stories/body-case-law-provides-clarity-18c-commissioner

21 Ferdinand, A., Paradies, Y. & Kelaher, M. 2012, *Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities: The Localities Embracing and Accepting Diversity (LEAD) Experiences of Racism Survey,* The Lowitja Institute, op cit

22 *National Aboriginal and Torres Strait Islander Health Plan and National Aboriginal and Torres Strait Islander Health Plan – Implementation Plan*, referred to above.

23 Commonwealth of Australia, Parliamentary Joint Committee on Human Rights et al, 'Freedom of Speech in Australia' (Inquiry Report, Commonwealth of Australia, 28 February 2017), ix-xiii.

24 Racial Discrimination Law Amendment (Free Speech) Bill 2016.

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