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# INSTITUTIONAL RACISM, THE IMPORTANCE OF SECTION 18C AND THE TRAGIC DEATH OF MISS DHU

by Alice Barter & Dennis Eggington

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## INTRODUCTION

The contemporary incarceration of Australia's First Peoples must be viewed in its historical and political context. This country is founded on a hierarchy of power which encourages white men into positions of dominance and subjugates Aboriginal people, especially Aboriginal women. In 2014, 22-year-old Yamatji woman, Miss Dhu, died while in police custody. She was a victim of institutional racism. Currently there are calls to amend the *Racial Discrimination Act 1975* (Cth) (the *RDA*) to reduce the protections afforded to minority groups, including Australia's First Peoples. Section 18C provides an important reproach to overt racism and an opportunity for community members to combat discrimination, including institutionalised racism. This paper highlights the intersectionality of institutional racism and gender discrimination by examining the tragic death of Miss Dhu and the importance of federal anti-racism legislation as well as the role of the Aboriginal Legal Service of Western Australia (ALSWA) in striving to ensure equality and fairness for Aboriginal people.

## HISTORICAL CONTEXT

The current over-representation of Australia's First Peoples in the criminal justice system is part of the political process that has direct historical continuity with the processes of colonization [sic] and dispossession.<sup>1</sup> Since colonisation, Aboriginal people have been marginalised from full participation in Australian life by successive government policies. The criminal justice system was used as one of the means of 'civilising' Aboriginal people, particularly during the governorship of Charles Fitzgerald in Western Australia from 1848–1855.<sup>2</sup> In Western Australia, Aboriginal people were first legislated against in the 1840s and, since then, they have been subjected to an increasing range of discriminatory laws. For example, in 1871 the Western Australian Parliament banned public executions; however, the legislation was amended to allow for the public execution of Aboriginal people. This law remained in force until repealed in November 1952.<sup>3</sup> Towards the end of the 19<sup>th</sup> century, Aboriginal workers faced long terms of imprisonment if they tried to leave their employment, as they were an integral

part of the pastoral industry in north Western Australia. At the turn of the century Aboriginal people were also imprisoned for entering certain town sites, consuming alcohol, speaking their language, and in the case of Aboriginal women, cohabiting with non-Aboriginal men.<sup>4</sup> There was also extra-curial or vigilante punishment and imprisonment. Across the country, Australia's First Peoples were captured and imprisoned by colonists and shot if they tried to escape for crimes such as 'assertiveness'.<sup>5</sup> There was also extreme frontier violence as part of the invasion of the country; 'for the facts are easily enough established that homicide, rape, and cruelty [towards First Nations people] have been commonplace over wide areas and long periods.'<sup>6</sup> There have long been reports of Aboriginal women experiencing sexual and other violence by white men, especially those in positions of power. Contemporaneously, there has been allegations reported to the ALSWA of police officers sexually assaulting Aboriginal women. There is also the shocking depiction of a male police constable dragging Miss Dhu out of the police station as she was dying.

## THE DEATH OF MISS DHU

On 2 August 2014 Miss Dhu was arrested because she had failed to pay fines and had to serve 4 days in custody to 'cut-out' those fines. She had previously had her rib broken in an act of domestic violence and she was in significant pain when she was arrested. She was taken by police officers to the Hedland Health Campus ('HHC') on 2 and 3 August 2014 where she was stereotyped, judged and discriminated against. In her findings in the inquest into the death of Miss Dhu, State Coroner Fogliani concluded that Ms Dhu's treatment and care at HHC on 2 and 3 August 2014 fell below the standards that should ordinarily be expected of a public hospital.<sup>7</sup> Miss Dhu was also treated atrociously by the police officers who were responsible for her care as a person who had lost her liberty; detained in their custody. They also stereotyped, judged and discriminated against her. They thought she was 'faking' her symptoms, relied solely on their own preconceptions and dismissed her as a young, Aboriginal drug user. State Coroner Fogliani found that some of the officers' dealings with Miss Dhu

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were ‘unprofessional and inhumane’ and that institutional racism played a part in her death.<sup>8</sup>

## INSTITUTIONAL RACISM

In her findings, State Coroner Fogliani referred to the notion of institutional racism:

Professor Thompson described the societal patterns that lead to particular negative impacts, such as being treated less well, as ‘institutional racism’:

‘Institutional racism refers to societal patterns that have the net effect of imposing oppressive or otherwise negative conditions against identifiable groups on the basis of race or ethnicity. Institutional racism is manifested in our political and social institutions and can result in the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin.’

I do not find that any of the HHC staff or police were motivated by conscious deliberations of racism in connection with their treatment of Ms Dhu, nor does Ms Dhu’s family make that submission. It is important to be clear on this point.

However, it would be naïve to deny the existence of societal patterns that lead to assumptions being formed in relation to Aboriginal persons. This is not a matter only for HHC, or its staff or the police. It is a community wide issue and until there is a seismic shift in the understanding that is extended towards the plight of Aboriginal persons, the risk of unfounded assumptions being made without conscious deliberation continues, with the attendant risk of errors.<sup>9</sup>

Institutional racism, or being treated less favourably than people from the dominant cultural group, is experienced daily by First Nations people. For this reason, the values espoused in the *RDA*, particularly section 18C are so important to encourage all community members to be aware of their internal biases and to constantly scrutinise their own actions, especially where those people are in positions of power, such as medical professionals and police officers.<sup>10</sup>

### MISS DHU’S EXPERIENCE AT HEDLAND HEALTH CAMPUS

In the evening of 2 August 2014 police officers took Miss Dhu to the Hedland Health Campus to have her cleared fit to be held in custody. The doctor who examined her gave evidence at the inquest that when she treated Ms Dhu she found her to be ‘angry, very agitated, quite loud and a little bit disruptive’ to the emergency department,<sup>11</sup> and she recorded the discharge diagnosis as ‘behaviour issues.’<sup>12</sup> This description of Ms Dhu’s demeanour was simply not correct and did not accord with the evidence of other

witnesses and the CCTV footage of Miss Dhu walking into and out of the hospital shortly before and after the doctor saw her. State Coroner Fogliani made the following finding: ‘Those images show a young woman walking slowly, hunched over, and with a serious and subdued demeanour. There is no indication whatsoever of an aggressive stance or attitude on the part of Ms Dhu on the CCTV.’<sup>13</sup> In giving evidence at the inquest, Professor Thompson said ‘I think if that had been a white middle class person, there would have been much more effort made to understand what was going on with that person’s pain. So that’s really what institutional racism represents.’<sup>14</sup> The diagnosis of ‘behaviour issues’ on Miss Dhu’s first presentation at HHC contributed to the diagnosis of ‘withdrawal from drugs’ and ‘behavioural [sic] issues’ on her second presentation to the hospital when her life could have been saved. Her treatment was influenced by ‘premature diagnostic closure’ and the unconscious bias that is reflected by institutional racism.<sup>15</sup>

**Institutional racism is manifested in our political and social institutions and can result in the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin.**

### MISS DHU’S EXPERIENCE AT SOUTH HEDLAND POLICE STATION

While in police custody at South Hedland Police Station, Miss Dhu was in a position of complete powerlessness. She could not speak with her family, seek medical assistance, decide what to eat or decide when to shower. Most of the police officers were white males and most of the police officers showed indifference to her. Some treated her with contempt. While Miss Dhu lay dying, desperately seeking help, there is evidence a police sergeant bent down and whispered in her ear ‘You are a fucking junkie, you have been to the hospital twice before, and this is not fucking on... you will fucking sit this out. We will take you to hospital but you are faking it.’<sup>16</sup> The police officers did not treat Miss Dhu as a fellow human being, instead they ignorantly dismissed her, relying on their own preconceptions.

This case epitomises the problem of institutional racism in Australia. The interaction between Miss Dhu and the people entrusted with her care, and importantly, the interaction between the medical staff and the police, demonstrates that their racist assumptions convinced them to believe she was ‘faking’ her symptoms in the

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face of clear evidence to the contrary. State Coroner Fogliani concluded:

Regrettably the actions of some of the clinicians at HHC were affected by premature diagnostic closure, and errors were made. Ms Dhu's suffering as she lay close to death at the Lock-Up was compounded by the unprofessional and inhumane actions of some of the police officers there. All of the persons involved were affected, to differing degrees, by underlying preconceptions about Ms Dhu that were ultimately reflected, not in what they said about her, but in how they treated her.<sup>17</sup>

The way Miss Dhu was treated highlights the need for strong anti-discrimination legislation to address the power imbalances and prejudices that exist in the Australian community.

## Section 18C ... operates in practice as a powerful tool for encouraging empathy, understanding and reconciliation.

### SECTION 18C OF THE RACIAL DISCRIMINATION ACT 1975 (CTH)

#### LEGISLATIVE BACKGROUND

The RDA was enacted to give effect to Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination. In October 1975, at a ceremony for the proclamation of the Act, then Prime Minister Gough Whitlam described the legislation as 'a historic measure', which aimed to 'entrench new attitudes of tolerance and understanding in the hearts and minds of the people'. It was based on the fundamental belief that all Australians irrespective of race, colour or national or ethnic origin are entitled to fair treatment. Section 18C of the Act was inserted with the passage of the *Racial Hatred Act* in 1995. The Attorney-General, Michael Lavarch, stated in the Second Reading Speech that this legislation:

is an appropriate and measured response to closing the identified gap in the legal protection of all Australians from extreme racist behaviour. It strikes a balance between the right of free speech and the other rights and interests of Australia and Australians. It provides a safety net for racial harmony in Australia and sends a clear warning to those who might attack the principle of tolerance. And importantly this bill provides Australians who are the victims of racial hatred or violence with protection.<sup>18</sup>

The Explanatory Memorandum stated that the 'Bill is intended to strengthen and support the significant degree of social cohesion demonstrated by the Australian community at large'. It also

highlighted, in regard to freedom of speech, that there is 'no unrestricted right to say or publish anything regardless of the harm that can be caused'.<sup>19</sup>

Section 18C was introduced in response to recommendations of major inquiries including the *National Inquiry into Racist Violence*, the Australian Law Reform Commission's *Multiculturalism and the Law* report and the *Royal Commission into Aboriginal Deaths in Custody*. These inquiries found that racial hatred and vilification can cause emotional and psychological harm to their targets, and reinforce other forms of discrimination and exclusion. They found that seemingly low-level behaviour can soften the environment for more severe acts of harassment, intimidation or violence by impliedly condoning such acts.<sup>20</sup>

#### THE IMPORTANCE OF SECTION 18C

Section 18C provides an important reproach to overt racism and an opportunity for all members of the Australian community to combat discrimination, including institutionalised racism. The provision operates in practice as a powerful tool for encouraging empathy, understanding and reconciliation. The overwhelming majority of complaints are resolved with conciliation and very few complaints are litigated. The relatively small number of litigated cases highlights the conciliatory and educative character of the legislation. As the *Royal Commission into Aboriginal Deaths in Custody* observed, the 'voluntary settlement of a complaint through conciliation may hold the best promise of altering personal attitudes. Through the respondent's confrontation with the individual he/she has discriminated against, and the realisation of the offence caused, a genuine shift in understanding may be achieved'.<sup>21</sup> The former Attorney-General Michael Lavarch and the Honourable John Brown emphasised the educative role of legislation during the second reading speech for the Racial Hatred Bill 1994. Mr Brown said 'provisions of legal penalties can have a powerful educative effect. The socialising process for all people follows from a mixture of learning from example, as kids do in the home, and learning from sanctions, which may be simple admonitions from their parents or social attitude, which sometimes becomes encapsulated in our legal framework'.<sup>22</sup> Further, the Honourable Clyde Holding espoused 'this legislation asserts our values as a community. It is about community values. We are saying that this sort of activity cannot and will not be tolerated'.<sup>23</sup>

Some critics of section 18C argue that the prohibition of individual acts of overt racial discrimination fails to affect the systemic prejudice from which institutional and blatant racism originates. Margaret Thornton contends:

Racism ... by its very nature, is endemic, that is, it is diffused throughout the social fabric. There is no clearly identifiable [person] who can be

held liable for a harm that is buried deep within the social psyche and that has developed the status of a self-serving 'truth' as a result of replication and longevity. The disjuncture between racism and an act of racial discrimination is a major limitation of the *RDA* or, indeed, any legislative schema based on an individual complaint-based model, as a mechanism for effecting change.<sup>24</sup>

However, an individual's thoughts and actions are influenced by community interactions, education and political leadership. The role of parliament in setting appropriate standards is vital as the law reflects our values as a society. The *RDA* has a powerful educative effect and is complemented with community education and the raising of awareness of discrimination.

### THE ROLE OF THE ALSWA

The ALSWA provides legal services to Aboriginal people that they would otherwise not receive. It also provides community legal education and outreach services to regional and remote communities. Under its funding agreement with the Commonwealth Government, ALSWA is required to deliver services in line with the *National Strategic Framework for Legal Assistance*.<sup>25</sup> One of the key principles in this framework is that 'people are empowered to understand and assert their legal rights and responsibilities and to address, or prevent legal problems.'<sup>26</sup> It is further stated that:

Many people are unaware that they have legal problems or that legal remedies exist, and take no action to resolve their legal problems. The successful resolution of legal problems is highly dependent upon a person's level of knowledge and capability. While it is not possible to address all unmet legal need, it is important to empower people to understand their legal rights and how they can access legal assistance...Access to information and support facilitates positive participation in the justice system, particularly for Indigenous communities. It also builds resilience in communities, enhancing access to justice for disadvantage people and strengthening the rule of law.<sup>27</sup>

ALSWA has been involved in many successful conciliations under section 18C that have resulted in both parties empathising with the other and moving forward together in solidarity. In some cases, the respondent has agreed to arrange cultural awareness training for employees and anti-racism community events.

### CONCLUSION

Miss Dhu was treated appallingly and inhumanely by the health professionals and police officers who were involved in her care. If she had been treated fairly and as an equal human being, she would probably still be alive. Unfortunately, her story is not unique. The individual actions of the medical staff and police officers towards her reflect deeply entrenched prejudices and widespread ignorance. Section 18C is an effective provision because it sends

the community a message that racial discrimination will not be tolerated and is adverse to a cohesive society. Section 18C is also a powerful educative tool and a reflection of community standards. We must all scrutinise our own personal and historical prejudices and strive to achieve a fair, equal, unified society.

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- 1 Richard Edney, 'Self-Determination and Aboriginal Imprisonment' (Paper presented at the Best Practice Interventions in Corrections for Indigenous People Conference convened by the Australian Institute of Criminology, Sydney, 8-9 October 2001).
- 2 Mark Finnane, 'Settler justice and Aboriginal homicide in late colonial Australia' (2011) 42(2) *Australian Historical Studies* 244, 248.
- 3 Chris Cunneen, 'Colonial Processes, Indigenous Peoples, and Criminal Justice Systems', in Michael Tonry and Sandra Bucerius (eds), *The Oxford Handbook of Ethnicity, Crime, and Immigration* (Oxford University Press, 2013) 18.
- 4 Anna Haebich, *For Their Own Good: Aborigines and Government in the South West of Western Australia 1900-1940*, (Nedlands, University of Western Australia Press, 1988) 71-73.
- 5 Henry Reynolds, *The Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia*, (UNSW Press, 2006) 92.
- 6 Charles Rowley, *The Destruction of Aboriginal Society*, (Penguin, 1972) 7.
- 7 *Record of the Investigation into the Death of Ms Dhu* (reference number: 47/15) 47.
- 8 *Ibid.*
- 9 *Ibid* 160-161.
- 10 *Racial Discrimination Act 1975* (Cth) s 18C.
- 11 *Ibid* 49-50.
- 12 *Ibid* 49-50.
- 13 *Ibid* 50.
- 14 Coronial Inquest into the Death of Ms Dhu Transcript 185.
- 15 *Record of the Investigation into the Death of Ms Dhu* (reference number: 47/15) 80.
- 16 Coronial Inquest into the Death of Ms Dhu Transcript 1592.
- 17 *Ibid* 47.
- 18 Australia, Parliamentary Debates, House of Representatives, 15 November 1994, 3342 (Lavarch).
- 19 Explanatory Memorandum, Racial Hatred Bill 1994, 1.
- 20 Australian Human Rights Commission, *At a glance: Racial vilification under sections 18C and 18D of the Racial Discrimination Act*, (2013).
- 21 Royal Commission into Aboriginal Deaths in Custody (1991) Vol 4 [28.3.7].
- 22 Australia, Parliamentary Debates, House of Representatives, 15 November 1994, 3366 (Brown).
- 23 *Ibid*, 3371 (Holding).
- 24 Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia*, (Oxford University Press, 1990) 84.
- 25 Australian Government, Attorney General's Department, 'National Strategic Framework for Legal Assistance 2015-20' (2014).
- 26 *Ibid*, 8.
- 27 National Strategic Framework for Legal Assistance 2015-20, 8.