

WHITENESS AND ANTI-DISCRIMINATION LAW—IT'S IN THE DESIGN

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Abstract

Although anti-discrimination laws have supported much social change, they have been subjected to sustained critique by legal scholars. A significant concern is that the formal 'same treatment' standard promoted by the design of anti-discrimination law is inherently problematic (Graycar & Morgan 2004) because it gives 'apparent legitimacy to outcomes which ... in effect embed inequality' (Kerruish & Purdy 1998: 150). In this article, I critique the laws' standard of formal equality, first to demonstrate the capacity of its 'neutral' response to reproduce and stabilise dominant privilege. Next, using the *Anti-Discrimination Act 1977* (NSW) as an example, I argue that the Act's 'race-neutral' and 'colour-blind' practice of formal equality holds capacity to stabilise and reproduce whiteness. I then argue that substantive equality—advocated by most legal critics as promoting 'better' forms of equality—also holds the capacity to reiterate whiteness as it can be defined through terms and conditions 'designed for and skewed' in favour of 'the white majority' (Davies 2008: 317). I conclude that this holds great implications for legal scholarship that remains selectively 'colour-blind' to the significance of racial 'difference', and call on mainstream legal scholars to open spaces to interrogate the implications of our *raced position* as *whites* (Moreton-Robinson 2007: 85).

Introduction

Australian common law recognises the fundamental right to equality before the law, but has never protected citizens from discrimination in their day-to-day affairs; instead, this protection is made available in Anglo-Australian law only through federal anti-discrimination Acts and those enacted in each state and territory jurisdiction (Rees et al 2008: 16-9). These Acts are based upon international covenants to which Australia has become signatory, providing a constitutional basis for the federal laws, and arguably at least, the inspiration for state and territory enactments. For instance, all of these laws prohibit race discrimination, which corresponds to the principle of racial non-discrimination established in Article 4 of the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD) (1969).

Despite their achievements, these laws have attracted sustained criticism (eg. Partlett 1977; Thornton 1990; Pace 2003) and are desperately in 'need of renewal' (Rees et al 2008: 3). However, much of this critical attention has been directed to rights associated with gender, sexuality and disability, so that—with notable exceptions (eg. Thornton 1995; de Plevitz 2000; Gaze 2005; Moreton-Robinson 2007)—discrimination and equality rights associated with race have attracted less sustained analysis. I make this point because, despite parallels, there are important differences between these points of analysis.

Moreton-Robinson (2007: 85) is, however, more particular in her concern about the (general) lack of attention by mainstream¹ Australian legal scholars to issues related to race: it is, she says, indicative of their 'agency' in the 'reproduction and maintenance of racial hierarchies'. This demands that white legal scholars, like me, pay more attention to race, but by doing more than simply 'dropping' race into our analyses. Instead, it demands that we interrogate the implications of our own *raced position as whites* who benefit from the racial hierarchies reproduced and maintained by our (white) law.

This same point became apparent in my doctoral research on discrimination law, in a statement made to me by an Aboriginal² man I consulted. When I asked him why he thought discrimination laws do not work, he replied:

The laws are designed for them [white people]. It's not for us ... It's not. It's just taking things away (Uncle N, in Nielsen 2007: 123).

While obviously 'white'³ refers to colour and biological identity, like any 'racial identity', whiteness is connected to the social meanings attributed to 'race' by virtue of processes of 'affiliation and external ascription' (Doane, 2003: 9). But as Frankenberg (1993: 236–7) has pointed out, this process of social construction operates to produce very different meanings for whites than for those constructed within non-white races, as whiteness 'signals the production and reproduction of dominance rather than subordination, normativity rather than marginality, and privilege rather than disadvantage'. This is not to say that all whites gain full access to the privileges of whiteness, but that all whites can more readily claim its privileges than can those constructed as 'other' and 'non-white'. Indeed, Uncle pointed out the

great significance of whiteness in that white people might expect to experience law differently to those constructed as 'non-white'. However, this runs counter to the pervasive Western liberal philosophy that Anglo-Australian law produces justice through its commitment to the formally equal treatment of all who come before it (Thornton 1990: 9); that is, in racial terms, law practices equality through being 'colour-blind' to racial difference (Davies 2008: 317). However, instead of this 'colour-blind' practice, Uncle's lived knowledge of white law is of a practice 'skewed towards the white majority' because it offers a '*protected and exclusive place of privilege*', to which non-whites gain entry only on white terms and conditions (Davies 2008: 315). And fundamentally, the whiteness of Anglo-Australian law relates to 'a colonial cultural condition' (Anderson, 1996: 35) that involves a claim of the right to 'settle' territory and to receive the privileges attendant upon occupation—including the expectation of laws' protection—a claim based upon the violence of invasion and the falsehood of white sovereignty (Watson 1997).

The purpose of this article is to follow Uncle's concern about the function of whiteness in anti-discrimination law as indicated in its response to race discrimination against Aboriginal peoples. 'Whiteness' is applied throughout as its prime point of analysis to signify it as a 'colonial cultural condition' that founds and reinforces the 'cumulative privilege' that has been 'quietly loaded up on whites' (Fine et al, 1997: 57). My central argument is that the 'neutrality' in the design of anti-discrimination law is actually a practice of racial differentiation achieved through a selective 'colour-blindness' that presents whiteness and white privilege as normative (Moreton-

Robinson 2007: 84). First, I explain the capacity of the prevailing formal standard of equality promoted by Australian anti-discrimination law to stabilise, endorse and reproduce dominant privilege. Next, using the *Anti-Discrimination Act 1977* (NSW) as an example, I argue that the specific effect of formal equality is to entrench—rather than challenge—the dominance of whiteness and white privilege. In the third part, I analyse substantive equality measures to suggest that they retain the potential to reiterate whiteness and white privilege. To conclude, I call on mainstream legal scholars to open spaces in which we interrogate the implications and benefits of our *raced position as whites*, because otherwise—as Moreton-Robinson warns us—we will only sustain the racial hierarchies reproduced and maintained by our law.

A 'Formal' Model of Equality

There are 13 separate pieces of anti-discrimination legislation in Australia, four enacted by federal parliament,⁴ and one in each state⁵ and territory⁶ jurisdiction. These Acts 'follow a similar pattern and operate, legally, in the same way', and share a lack of clarity in their policy goals (Rees et al 2008: 3-4). Though none of them specifically defines 'equality', each Act requires non-discrimination to be achieved through treatment that is 'comparable to', thereby instilling 'a struggle for equality' into anti-discrimination law mechanisms. However, the point of this struggle remains unclear until we ask: 'equal to what?' (Watson 1998: 38).

In international law, the answer to this question is founded in the theory of substantive equality. This involves 'relative'—rather than 'absolute'—equality that treats 'equally what are equal and unequally what are unequal': it holds that treating 'unequal matters

differently according to their inequality is not only permitted but *required*' (Judge Tanaka in *South West Africa Case*, cited in Pritchard 1997: 44). In relation to the right of racial non-discrimination, Recommendation XIV of the United Nation's CERD Committee stated that the Convention's reference to 'discrimination', relates 'to invidious acts of discrimination, not acts which are aimed at achieving an equal enjoyment of rights' (Jonas and Donaldson 2001: 16). Consequently, in international law, the principle of racial non-discrimination does not demand 'identical treatment without regard to concrete circumstances' because 'positive' forms of differentiation are integral to it, provided they are designed objectively and reasonably to achieve 'a legitimate aim' or they support the 'distinct' rights of Indigenous peoples (Pritchard 1997: 45-6). Indeed, Pritchard argues this principle is so fundamental to the achievement of human dignity that it is one of the 'least controversial examples' of an international legal peremptory norm, that is, an 'overriding' principle of international law notable for its 'indelibility and non-derogability' (1997: 42-3). Therefore, one might expect CERD signatories—like Australia—to promote the standard of racial equality that international jurists espouse.

However, a fundamental concern shared by critics of Australian anti-discrimination legislation is that it has been consistently interpreted by the courts as promoting formal equality as the primary standard (eg. *Gerhardy v Brown* (1985); *Purvis v New South Wales* (2003)). Unlike substantive equality, formal equality is concerned only with form—not *outcome*—so that all types of differentiation are completely impermissible (Thornton 1990: 9). For example, in *Gerhardy v Brown* (1985), the High Court examined the type of equality protected by the prohibition of

direct race discrimination in s 9(1) of the *Racial Discrimination Act 1975* (Cth) (RDA). It concluded that the *Pitjantjatjara Lands Rights Act 1981* (SA) contravened s 9(1) because it enabled non-Pitjantjatjara people to be treated differently because of their race (by having to apply for entry permits to Pitjantjatjara lands). But how else could the Pitjantjatjara peoples manage their country? Don't other landowners have a legal right to limit entry? As these questions suggest, the Court's conclusion indicates why formal equality's environment of 'sameness' is inherently problematic (Graycar & Morgan 2004) and defeats 'the underlying philosophy of non-discrimination' because it gives 'apparent legitimacy to outcomes which ... in effect embed inequality' (Kerruish & Purdy 1998: 150).

In *Gehardy*, the Court did, however, go on to conclude that the Land Rights Act was valid on the basis that it was a 'special measure' permitted by s 8(1) of the RDA. Section 8(1) endorses 'special measures' as defined by CERD:

[Measures taken] for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, ... [these measures do not] ... lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved (1969: Art 4(1)).

That is, the Land Rights Act's different treatment of rights on the basis of race was valid at law because this treatment was applied in order to redress 'historical

disadvantage'. But, as Sadurski (1986a: 136) argued at the time, the Act's legitimacy could have been founded in the principle of racial non-discrimination itself, in that the effect of the Act on non-Pitjantjatjara people:

did not amount to the impairment of their dignity by exhibiting racial prejudice against them, by stigmatising them as inferior, [or] by perpetuating the existing patterns of disadvantages.

Likewise, most Australian critics advocate substantive equality as the 'better' legal standard because it fosters an environment that responds to difference when justice requires—to prohibit 'invidious' discrimination—while simultaneously enabling a response to historical disadvantage and to the contexts in which inequality operates (Graycar & Morgan 2004). Therefore, making 'appropriate' differentiations is an implicit—not a separate—process within the substantive equality standard.

However, the Court refused to apply this standard of racial equality in *Gerhardy* because it viewed Pitjantjatjara land rights as valid *only* on account of 'historical disadvantage', rather than on account of the Pitjantjatjara peoples' distinct rights based upon their enduring connection and relationship to their law and country—rights that could not be claimed by any other group. As Sadurski (1986b: 6–8) lamented shortly afterwards, the Court wasted an opportunity to establish 'standards for future legitimate "positive discrimination"', and ignored its 'duty to examine the substantial issues of the limits of legitimate racial distinctions and the indicia of discrimination' because it was unwilling:

to engage in a morally serious discussion that potentially could have serious consequences and

carry a threat to the stability of dominant community values and dominant patterns of privileges.

Indeed, Sadurski exposes what the Court really ignored, namely the capacity of formal equality to stabilise, endorse and reproduce dominant privilege. In the next section, I investigate the implications of this capacity. Using the *Anti-Discrimination Act 1977* (NSW) as an example, I argue that the 'neutrality' claimed as the effect of the Act's formal equality design is instead a practice of selective racial differentiation that renders whiteness and its attendant privilege the Act's normative standard.

Formal Equality Entrenches Whiteness and White Privilege

The *Anti-Discrimination Act 1977* (NSW) (ADA) does not explicitly state its purpose (or objects), although its long title describes it as an Act to make various grounds⁷ of discrimination unlawful 'in certain circumstances' to promote 'equality of opportunity between all persons' (s 1). It defines two separate forms of racial discrimination⁸—direct race discrimination, the most commonly litigated form, which prohibits less favourable treatment of people because of their race (s 7(1)(a)), and indirect discrimination, which prohibits unreasonable conditions or requirements that have a disproportionately negative effect upon those of a particular racial group (s 7(1)(c)). Like the RDA, it also enables special measures to be taken in favour of certain groups, including Aboriginal peoples (ss 126 & 126A). It establishes the Anti-Discrimination Board (the Board) (s 71 & Part 8) as the statutory body with authority to handle discrimination complaints and perform a range of educative functions to promote the elimination of discrimination and develop human rights policy for the

state (s 119). Essentially, the ADA creates a jurisdiction that is 'about education', as it was founded in a 'general consensus that criminal sanctions are ineffective in carrying out' its purpose (Partlett 1977: 153).⁹ However, I argue that three main features of the Act's design demonstrate that it is not race-neutral but instead is structured to support whiteness and its attendant privilege.

First, the Act supports whiteness by placing the privileges it produces outside the scope of the definitions of what is race discrimination: the Act fails to prohibit class-based discrimination (Thornton 1990: 14), the definitions of direct and indirect race discrimination focus only upon 'disadvantage', and neither direct nor indirect race discrimination are unlawful *per se*¹⁰ as they are actionable only when they occur in specific areas of *public life*.¹¹ Not only does the Act's definition of race discrimination deflect attention from the 'ordinary' social 'advantages' enjoyed by whites (see McIntosh 1992; Davies 2008: 312–16), it also remains 'artificially and permanently' separated from the system of white privilege founded by and inherent within the prevailing capitalist system (Thornton 1990: 14–15).

The Act's definitional scope is further reduced because all forms of discrimination are defined as events that occur as a result of separable characteristics: race, gender, sexuality, and so on. Thornton (1990: 1) has long argued that the 'benchmark' for these characteristics is the 'white, Anglo-Celtic, heterosexual male who falls within acceptable parameters of physical and intellectual normalcy, who supports, at least nominally, mainstream Christian beliefs, and who fits within the middle-to-the-right of the political spectrum'. Although complaints can be

based on multiple grounds, each ground must be pleaded and proved separately, so that complainants are forced to 'pluck out' singular aspects of themselves by reference to the benchmark person and present it as 'the meaningful whole' that eclipses other parts of their being (Lorde, in Harris 1990: 586). Yet this 'meaningful whole' remains inherently limited in scope, because the definition of race discrimination is framed in 'race-neutral' language that conflates 'race' to a 'universal' experience. For instance, in the High Court's decision in *Purvis v New South Wales* (2003), Justices McHugh and Kirby commented that:

[d]isability discrimination is ... different from sex and race discrimination [because] ... its forms are various and personal to the individual while sex and race are attributes which do not vary' (at [86]; emphasis added).

This 'universal' approach indicates that the Act is designed to respond most effectively to what Duclos (1993: 42) describes as a 'paradigmatic victim' who 'conforms' to and is 'part of the "centre" except for his race'. For example, an Aboriginal woman complaining about sex discrimination would typically need to 'establish that she is just like' a white woman, even though 'it is very possible that the discrimination [she experienced] occurred precisely because she was not' a white woman (Duclos 1993: 43–4).¹² Thus, Duclos suggests that non-white experience will naturally be distorted by the Act's 'universally' defined racial scope and definitions, because it must be conveyed in accordance with the Act's white centre. Clearly, this 'universal' scope cannot acknowledge that disparities exist in the social, political and economic experience of different racial groups (Parashar 1994: 84–5), nor account for the variation in the social,

political and economic impact of race discrimination upon Aboriginal peoples as compared to those of other 'non-white' heritages (Gaze 2005: 174–5). And significantly, it gives no account to the different—and *privileged*—experience of race by whites. Rather, the Act founds whiteness as the invisible standard by which it measures the way raced 'others' 'should' be treated. The consequence is that complaints of racial discrimination by Aboriginal peoples may enable them to 'achieve' the 'same treatment' as white people, but *cannot involve any challenge* to the systemic privileges already enjoyed by whites (Nielsen 2007: 123–9).¹³

The second aspect of the Act's design that reinforces whiteness is its focus on the 'individual', which confines complaints to forms of race discrimination involving 'discrete' experiences. This is because complaints are limited to acts of discrimination that occur within the 12 months proceeding the date a complaint is lodged (s 89B(2)(b)), which confines the legislation's attention to racialised acts occurring in the 'present', not the 'past'. For example, an Aboriginal person may experience systemic race discrimination in the labour market, resulting in a résumé that implies a 'broken' and 'poor' work history. Any employer who refuses to employ them as a result remains immune from a complaint of race discrimination because the person's work history is placed outside of the employer's 'individual' responsibility—even though that employer's denial of employment perpetuates systemic racism (Nielsen 2007: 161–91).

Moreover, the Act fails to empower the Board to intervene, investigate, prosecute or punish acts of race discrimination or to investigate systemic racism (Partlett 1977: 156–8 & 171–3).

Although these are longstanding concerns, the Board remains empowered to act only when an *affected individual* lodges a complaint (ss 90–91A).¹⁴ This is significant, as the following example demonstrates, because the law struggles to respond even to 'individual' acts that compound to create a racist system overall. As part of the consultations for my doctoral thesis, the Board's complaints staff told me about the difficulty they faced when contacted about a recruitment agency that was 'discriminating against [Aboriginal] people constantly' because:

[all we can do is act on individual complaints, then in theory, every single person in this area who is discriminated against by [this agency] has to make a complaint, and we deal with each of them individually, without recognising that it might be coming from this one source. ... It would be much easier to just be able to address the source of the discrimination (in Nielsen 2007: 134).

The combined effect of the Act's temporal scope and the Board's inability to initiate action without a complaint is that systemic racism is structurally defined as an 'Aboriginal' problem—that is, one that does *not* implicate white people. Consequently, Aboriginal people not only bear full responsibility for challenging the effects of systemic racism, but may only challenge narrowly defined versions of problems that occur in the 'present'. This reiterates the normativity of the accumulated privileges of whiteness, as these privileges are immunised from challenge by being 'buried deep within the social psyche' where their 'longevity' accords them 'the status of a self-serving "truth"' (Thornton 1995: 84).

Finally, the Act's support of whiteness is firmly entrenched through the design of

the complaint system. Initially this is because the choice to pursue a complaint is a significant one: the law requires those who do so to be 'sufficiently informed, motivated ... empowered' and *resourced* to use its 'complex legal machinery' (Bertone & Leahy 2003: 113). Although this inevitably involves 'great personal cost' to Aboriginal people (Moreton-Robinson 2007: 93) as well as legal costs, the Act's formal equality makes them *equally* entitled to pursue their complaints as those people who enjoy the privileges of whiteness.

Whiteness is also supported as a result of the Act's emphasis on 'education' and 'persuasion', because conciliation—a process that rests primarily on *mutual* agreement—is the primary dispute resolution process used to resolve complaints.¹⁵ Even though the complexities of litigation might suggest that the focus on conciliation is a good thing,¹⁶ a successful conciliation does not 'prove' that the discrimination alleged occurred. Instead, it *might* result in an explanation, an apology, action to restore a person's rights, monetary or other forms of compensation or development and/or improvement of equal employment opportunity policies (NSW Anti-Discrimination Board 2008: 15). However, there are no guarantees because the Act is designed to use 'gentle persuasion' to convince respondents to change their practices or policies rather than penalties that would cause them 'pain' and thus deter them from repeating acts of race discrimination (Distaff 1994: 5, 9). Moreover, the Act does not define what action should—or at least could—constitute a 'successful' conciliation, and does not establish any criteria to vet the outcomes achieved at conciliation (Distaff Associates 1994: 41). Instead, all that is required is that the complainant accepts the respondent's proposals for

resolution (if any and whatever their form) and/or agrees to 'discontinue' the complaint.

Clearly, this ignores the likelihood of a 'structural inequality' between the complainant and respondent (Thornton 1995: 88), and that this inequality can be used to apply pressure on complainants to reduce their 'demands on the respondent wherever possible' (Distaff, 1994: 39). What this grants to white respondents, then, is a structurally superior position in conciliation because nothing can happen *without their consent*. For instance, some Aboriginal people have reported using the complaint system as a way of educating white people about racism (eg. Distaff Associates 1994: 74); but they can only achieve this if white people *want* to learn. According to the discrimination law practitioners I interviewed, this rarely happens. As one commented: 'I've never seen ... the lights go on and somebody go "oh yeah I'm a racist"', because more typically, respondents 'settle it on a "commercial" basis to get rid of it, on the basis of no admission of liability and confidentiality' (in Nielsen 2007: 136–38). Yet, again, the system's standard of formal equality positions Aboriginal complainants as formally equal to white respondents, all the while according those respondents a structural advantage that protects and reproduces their whiteness and their privilege. This suggests that the 'best' the Act can offer an Aboriginal person is the 'opportunity' to *persuade* white people to release their grip upon privilege through a process that actually *supports* white privilege because it imposes no demand that it *must* change.

Collectively, these features in the ADA's design reveal that, while formal equality dictates a 'neutral' response that ignores racial difference—that is, colour-blindness—the Act is only truly blind to

the racialised difference founded in the system of white privilege. Indeed, whiteness is the Act's (unstated) normative standard because ultimately, all that the Act requires is that Aboriginal people be treated *like white people* (Nielsen 2007: 192–210). However, I think it unlikely that Aboriginal peoples would recognise this as a form of equality. Instead, I think it more likely that, like Watson (2005), they would recognise this standard as a form of *more assimilation*.

Does Substantive Equality 'undo' Whiteness and Privilege?

The question unexplored so far is whether the formal standard inherent in anti-discrimination law is moderated by the inclusion of indirect discrimination and special measures provisions, because these types of provisions can promote substantive forms of equality.

As indicated above, indirect discrimination provisions prohibit conditions or policies that cause disproportionate disadvantage to members of a particular group. Thus, they may promote substantive equality because they enable scrutiny to be applied to the *effect* of facially neutral standards. However, the reach of the indirect discrimination provisions is inherently limited because a condition or requirement, despite causing disadvantage, is not unlawful if it is also *reasonable*.

In Anglo-Australian law, *reasonableness* is an 'objective' criterion, by which the courts 'weigh the nature and extent of the discriminatory effect' of the 'policy, requirement or condition against the reasons advanced' in its favour (*Secretary, Department of Foreign Affairs and Trade v Styles* (1989): 624). Not surprisingly, this criterion attracts significant criticism. For instance, Pace (2003: 3) argues it involves a

'questionable claim to universal objectivity':

The reasonable person standard applied by judicial decision-makers is assumed to provide a code of conduct that is commonly understood. The reasonable person is said to be neutral: devoid of gender, class, race, sexuality or other immutable characteristics. What this approach fails to recognise, however, is that there is in fact no self-evident, commonsense, consensus view about what is reasonable. The judgment as to what is reasonable is clearly going to depend upon the position and perspective from which the question is viewed.

Pace highlights where the fundamental difficulty in proving indirect discrimination complaints lies, in that what is reasonable tends to be viewed from the *respondent's* perspective. For example, Thornton (1993: 99) points out that the anti-discrimination tribunals' approach to judging whether or not employment decisions are 'reasonable' involves 'a presumption in favour' of an employers' 'prerogative' to manage and make decisions in their workplace. As I have argued elsewhere (Nielsen 2007: 252), mainstream workplace culture and practice is infused with white cultural values and assumptions, even though this white racial content is obscured by courts most often interpreting it as the 'ordinary', 'standard' way things are done—so much so that Aboriginal workers are simply expected to reconcile themselves to white workplace culture. Consequently, when employment conditions or decisions are scrutinised in an indirect race discrimination complaint, they are most likely to be blanded of their racial content through being read as 'ordinary' and/or 'commonsense', which judges consistently interpret as *reasonable*.

Therefore, I doubt that complaints of indirect race discrimination achieve the 'better' equality outcome asserted through substantive equality because the concept of 'reasonableness' represents a 'universalized order' (Watson 2007: 96) infused with white cultural values.

However, as noted above, 'special measures' work in another way in that they give legitimacy to *different* treatment where it is applied to (favour) a particular group so as to redress historical or other disadvantage. That is, they could promote substantive equality as they are said to be designed to achieve 'equal' outcomes. But even though this focus on outcome can promote substantive equality, the more important question is whether the outcomes it enables offer *enough*. Because the inherent difficulty in 'reasonableness' also lingers in special measures: *who* decides what form they take and what 'disadvantage' makes them necessary and legitimate? Monture (1986: 161–2) highlights this by explaining that describing Indigenous peoples as 'disadvantaged' is:

a nice, soft, comfortable word to describe dispossession, to describe a situation of force whereby our very existence, our histories, are erased continuously right before our eyes. Words like disadvantage conceal racism...

[Because Indigenous Peoples] are only disadvantaged if you are using a White middle class yardstick. I quite frequently find that White middle class yardstick is a yardstick of materialism. ... [For us it] is not what you are that counts, it is who you are. So when the world of the dominant culture hurts me and I cannot take it anymore, I have a place to go where things are different. I simply do not understand how that is disadvantaged.

Monture's point is exemplified by examining a feature of the Federal Government's 'emergency response' to violence and child abuse within certain Northern Territory Aboriginal communities—the 'Intervention' (see Martiniello 2007). The legislation underpinning the Intervention specifically reduces and/or negates Aboriginal rights, including by permitting the compulsory acquisition of and other reduction of certain land tenure rights.¹⁷ The irony in this approach is that the rights being taken are 'special measures': like Pitjantjatjara land rights, the rights affected are founded (in Anglo-Australian law) in Northern Territory land rights legislation.¹⁸

Nonetheless, the legislation would have us believe that the Intervention itself, functions as a 'special' measure¹⁹ because it redresses 'Aboriginal disadvantage'. Apparently, those who drafted this legislation were undeterred by its absurd logic: that is, the Intervention has the effect of *securing* for those within these Aboriginal communities 'equal enjoyment or exercise of [their] human rights and fundamental freedoms' (CERD 1969: art 1(4), emphasis added) by *reducing* Aboriginal property rights. And though it did not specifically interrogate the Intervention's status as a 'special measure', the High Court recently endorsed the logic that supports it, by deciding that there is nothing so 'distinct' or unique about these Aboriginal land tenure rights that precludes them from being compulsorily acquired by the Crown—*just like white property rights*.²⁰ Therefore, just as it reasoned in *Gerhardy*, the High Court refused to measure the property rights of these Aboriginal communities through their enduring connection and relationship to their law and country—the claim no other group can make—because it refused to understand

Aboriginal property rights as superior to or more 'special' than 'normal' property rights, that is, those rights defined by the white 'yardstick' of white sovereignty (Watson 1997). And the current government has also endorsed this logic by announcing its commitment to extending the Intervention;²¹ therefore, like its predecessor, this government is committed to measures defined through 'comfortable' words concealing normative white standards that perpetrate *assimilation* (Watson 2005). This is the exact problem Monture identifies.

What this discussion indicates is that, while both indirect discrimination and special measures can support a substantive model of equality, each retains the capacity to reiterate whiteness. This is because the outcomes produced by both are typically measured through a 'comfortable'—yet selectively colour-blind—standard that conceals the yardsticks of whiteness and racism. This suggests that the inclusion of substantive equality provisions does not automatically absent whiteness from laws' equality, but may instead further entrench it as laws' (unstated) normative standard.

The 'Agency' of Legal Scholarship

I have argued that the formal equality that underscores Australian anti-discrimination law functions as a form of 'race-blindness' that views all forms of racial differentiation as inherently discriminatory. But as indicated by my analysis of the ADA, the effect is neither colour-blind nor race-neutral, because the Act fixes 'equality' as something 'symbiotic with the prevailing [racial] order of social relations, and the interests of those who are dominant within it' (Bakan 1991: 454). As a result, the design of the Act is only truly blind to the racialised difference founded in the

systemic privileges accrued through whiteness. Accordingly, the 'colonial cultural condition' of whiteness is not only the ADA's invisible measure, but its protection appears to be the Act's central concern. Moreover, as suggested by my analysis of indirect discrimination and special measures, whiteness is not necessarily absented from or even moderated within laws' 'equality' simply by including provisions designed to promote substantive equality. Both of these provisions may reiterate whiteness because the terms and conditions that define what is 'substantive' can be 'designed for and skewed' in favour of 'the white majority' (Davies 2008: 317).

But rather than giving the 'answers', I think my analysis opens other questions: who *is* our law designed for and do our mainstream legal analyses of equality work to reveal that? Uncle was very clear to me about who the law is designed for, and Moreton-Robinson is very clear that typically our work does *not* reveal that (2007: 85). Indeed, each time we omit 'race' from our discourse, we retain our agency with laws' 'reproduction and maintenance of racial hierarchies' (Moreton-Robinson 2007: 85) by remaining selectively 'colour-blind' to the significance of racial 'difference' and skewed in our understanding of the context of inequality consequent upon 'historical disadvantage'. Therefore, we (whether unwittingly or not) continue to re-assert and stake white claims through upholding the 'invisibility' and supposed 'neutrality' of the whiteness of law. Consequently it is important how we 'know' *when* and *why* and *whose* racial difference matters; while I agree that substantive equality theory offers a more capable model to enable responses to equality, to apply it accurately, we need to 'know' when justice requires a response to racial

difference, and we need to 'know' the full context both of racial inequality and of 'historical disadvantage'. None of these things are just about 'others'.

And, given the commitment of legal scholars to issues of justice and equality, why are mainstream legal analyses failing to engage with the implications of our whiteness? In part, I think this is the result of the voices to which we are and are not willing to give attention. As Watson (2007: 107) says:

The exclusion of other narratives works to silence other possibilities, one being the role of the grandmothers. When the frame remains limited, so too does our search for solutions.

For instance, many Indigenous scholars articulate theories of *difference* rather than ones simply of 'equality'. As I understand it, they do so because Aboriginal peoples 'have never wanted to be the same' because it is 'difference, and the right to be different, that is central to the idea of an Indigenous struggle, the sameness is killing' (Watson 2001: 35). This struggle cannot be achieved through sameness with white people, whether in form or outcome, because instead, it is a struggle to hold onto the core of Aboriginal difference—the 'freedom to be myself, to honour the mother, to honour the traditions and culture that we have carried since time immemorial ... without fear of recriminations' (Watson 1996: 108)—Aboriginal sovereignty and self-determination.

Clearly this is *not* a dialogue about formal equality—but neither is it a dialogue based simply in a theory of substantive equality. Instead, it is a conversation based on the premise that 'equality is better measured against ourselves' as Aboriginal peoples (Watson 1998: 38). But more particularly here, this

conversation is not heard often within mainstream legal discourse even though, as Moreton-Robinson (2007) warns, by remaining closed to 'other' conversations, we continue an agency that contradicts our calls for 'justice'.

What this should suggest to those of us who are members of the mainstream legal academy, is the need for us to develop greater reflexivity in our practice, to open ourselves to spaces in which different epistemologies can meet and disrupt our own (Moreton-Robinson 2000: xxv). But our purpose in opening these spaces must not simply be to enable us to understand 'others'. Instead, our purpose should be to better understand and interrogate our own race consciousness—that is, *ourselves* and the implications of our *raced position as whites*:

not to strengthen the concept of the white race, but rather to call it into question—to demystify white power, and to remove the certainty of the comfortable place white people occupy in the world [and in our law] (Davies 2008: 318).

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Conventions and Cases

International Convention on the Elimination of All Forms of Racial Discrimination (CERD), opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

Baird v State of Queensland [2006] FCAFC 162.

Gerhardy v Brown (1985) 159 CLR 70.

Purvis v New South Wales (Department of Education and Training) [2003] HCA 62.

Secretary, Department of Foreign Affairs and Trade v Styles (1989) 88 ALR 621.

Western Australia v Commonwealth (1995) 183 CLR 373.

Wurridjal v The Commonwealth of Australia [2009] HCA 2.

Notes

¹ I use the term 'mainstream' to direct attention to the dominant group amongst the legal academy, that is, those of us who are white.

² Referring to the First Nations Peoples of Australia. 'Indigenous' is used to signify First Nations peoples, irrespective of geographic origin.

³ I use 'white' generally to refer to peoples with Anglo- and European-Australian racial identities.

⁴ *Racial Discrimination Act 1975, Sex Discrimination Act 1984, Human Rights and Equal Opportunity Act 1986, Disability Discrimination Act 1992, and Age Discrimination Act 2004.*

⁵ *Anti-Discrimination Act 1977 (NSW), Equal Opportunity Act 1984 (SA), Equal Opportunity Act 1984 (WA), Anti-Discrimination Act 1991 (Qld), Equal Opportunity Act 1995 (Vic), and Anti-Discrimination Act 1998 (Tas).*

⁶ *Discrimination Act 1991 (ACT) and Anti-Discrimination Act 1992 (NT).*

⁷ The grounds are: race, sex, marital status, pregnancy, family responsibilities, sexuality, transexuality, disability, age and sexual harassment.

⁸ It also prohibits racial vilification, that is, public acts that incite hatred, serious contempt, or severe ridicule towards those of a particular racial group (s 20C), while those that involve or incite threats of personal harm or harm to

property are made a criminal offence (s 20D).

⁹ The Act creates few offences: eg. serious racial vilification, publishing discriminatory advertisements (s 51), and (since 2005) a number related to involvement in conciliation proceedings.

¹⁰ Compare this with s 9(1) RDA, which creates a cause of action in relation to 'any act involving a distinction, exclusion, restriction or preference' (see *Baird v State of Queensland* 2006).

¹¹ Paid work relationships (ss 8–13), education (s 17), the provision of goods, services, and facilities (s 19), housing/accommodation (s 20), registered clubs (s 20A), and in the activities of certain public bodies and government (ss 119–121; though each is qualified by 'exceptions' which *permit* racial differentiation (ss 8(3), 14–16, 54 & 56).

¹² See also Moreton-Robinson 2007.

¹³ See further, de Plevitz 2000.

¹⁴ Section 7 requires *an individual* to be affected *before* any contravention of the Act can be alleged.

¹⁵ See Nielsen (2007b: 129–32).

¹⁶ Race discrimination is criticised as extremely difficult to prove (Thornton 1995; Gaze 2005), and about two thirds of litigated complaints will fail (Nielsen 2007b: 138).

¹⁷ Part 4, *Northern Territory Emergency Response Act 2007* (Cth).

¹⁸ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). See *Western Australia v Commonwealth* (1995).

¹⁹ *Northern Territory Emergency Response Act 2007* (Cth): s 132(1). The Act also immunises the Intervention from challenge under the RDA: s 132(2).

²⁰ *Wurridjal v The Commonwealth of Australia* [2009] HCA 2; but see Justice Kirby's discussion which gives an expanded notion of Aboriginal property rights, though he also contains them within the paradigm of white sovereignty ([307]–[308]).

²¹ Karvelas, P. 'Macklin extends intervention', *The Australian*, Friday 6 March 2007, 1.