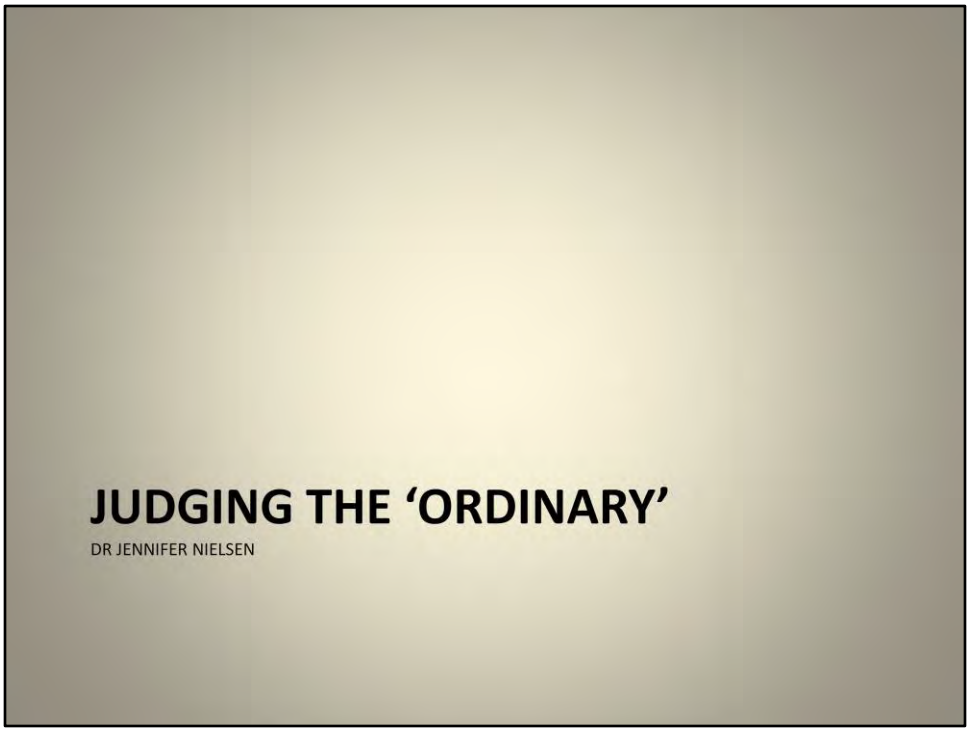

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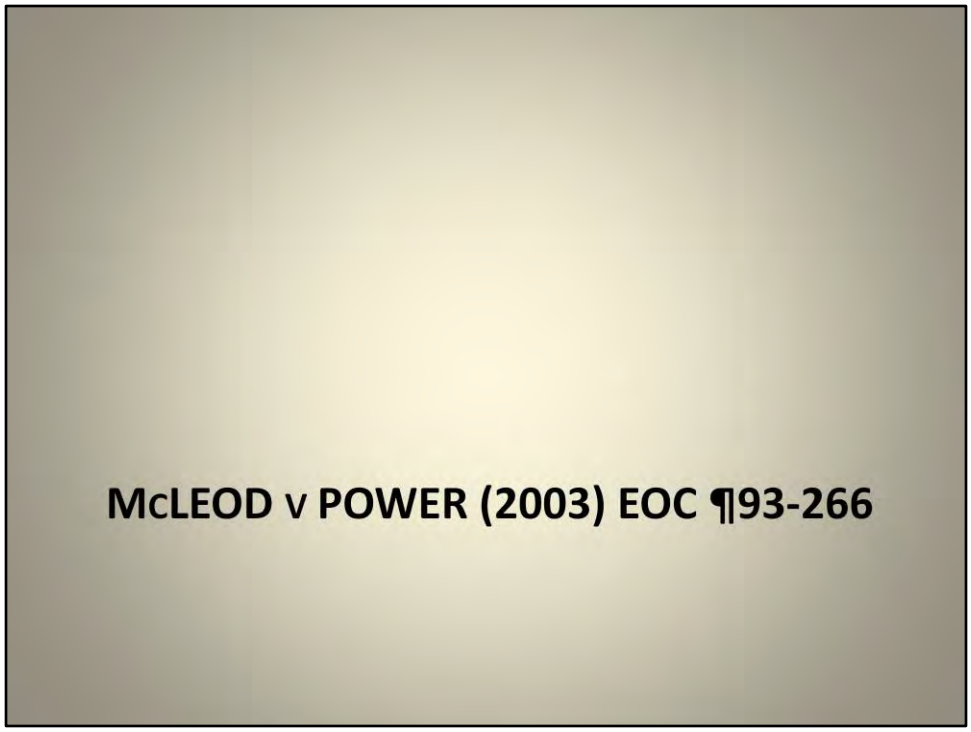
I would like to acknowledge the Turrbal and Jagera Peoples, owners and custodians of country where we meet today. I also wish to acknowledge and pay respect to their Elders – past, present and emerging – and their communities.

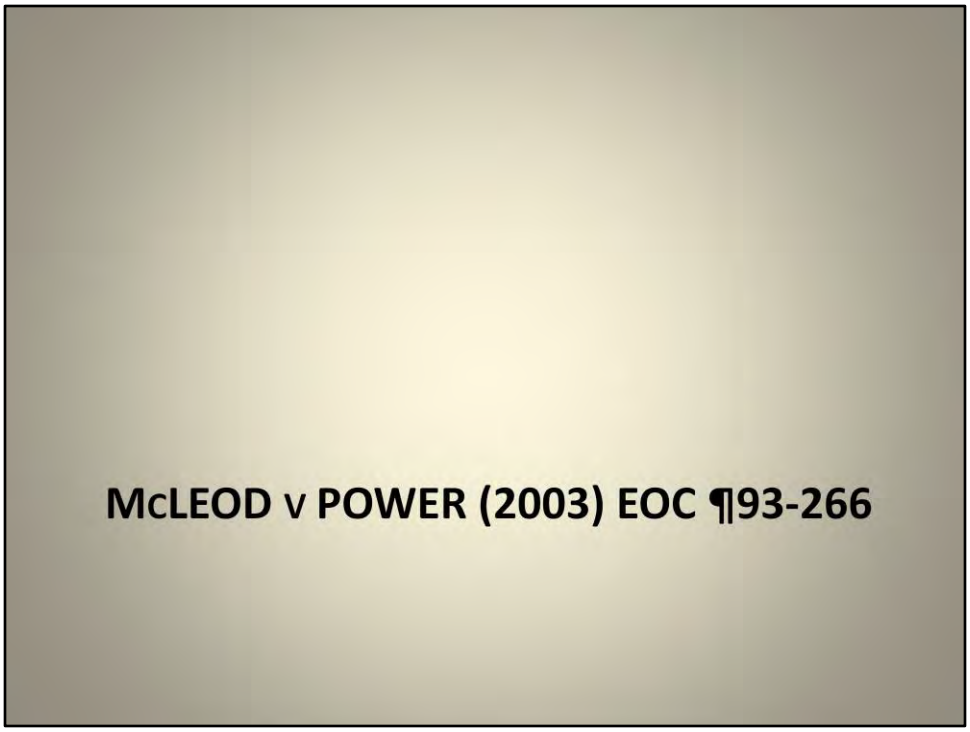
I also acknowledge Professor Irene Watson, who is here today, and who has been a patient and generous teacher to me over many years, and Professor Katharine Gelber who wrote the commentary to this judgement, and who offered valuable and very instructive feedback and guidance on my early drafts.

Finally, thank you to Professor Heather Douglas, Professor Rosemary Hunter, Dr Francesca Bartlett and Dr Trish Luker as the organisers of this event and for their work on this project.



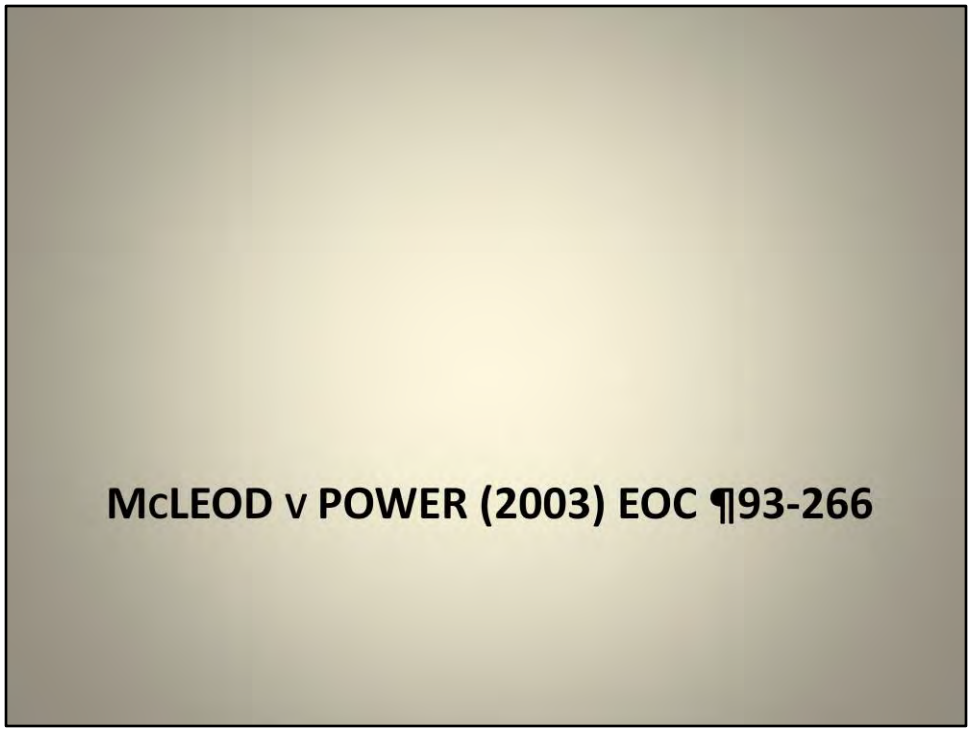
The case I rewrote deals with a racial vilification complaint heard in the Federal Magistrates Court in 2002. The facts are a little unusual in that the complaint was made by a white prison guard, Neale McLeod against an Aboriginal woman, Samantha Power.

The incident arose when Ms Power became angry and upset because she was refused entry to Yatala Labour Prison as she had not brought her usual identification paperwork. She was attempting to visit the prison to speak to her former partner, because he had made allegations about her parenting that had led to a care and protection order being sought in relation to one of their children. She had travelled for 2 hours by bus with 4 children under 5 yo to make this visit, and not surprisingly became extremely upset and angry that she was refused entry. Though angry she walked out and was leaving the prison grounds – and on the facts reported in the judgement, there was no suggestion that she was going to do anything other than have her say and leave. It is not explained why in the judgement, but Mr McLeod–the officer in charge – and one of his colleagues decided to follow her out. It was at this point that she was found to have said to Mr McLeod various words including: “you white piece of shit”, “you fucking white piece of shit” and “fuck you whites, you're all fucking shit”. Mr McLeod claimed that he had been racially vilified by these words.



The background to this case in my view is quite significant. It was the second complaint by a correctional officer from Yatala Labour Prison against an Aboriginal person – the first was *Gibbs v Wanganeen* [2001] FMCA 14 (6 March 2001). That case concerned a complaint by a white prison guard (Mr Gibbs) against an Aboriginal inmate who had called him variously, a "fucking white cunt", "a fucking dog" and "white trash". Mr Wanganeen [the inmate] appears to have done so as an expression of anger after he's been subjected to a strip search and a urine test and had been found to be 'clean' on both counts.

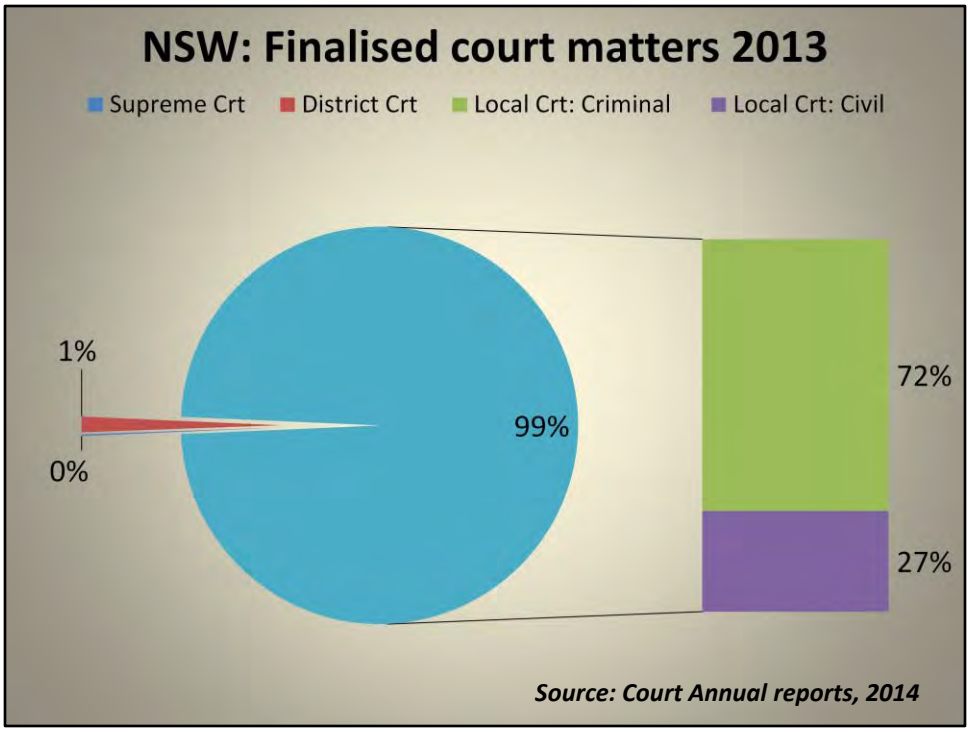
As explained in the original *McLeod* judgment: "Following the decision of Federal Magistrate Driver in the case of *Gibbs* v *Wanganeen* [2001] FMC 14, a pamphlet was released to members of the association which read in part as follows:



> The Legal Fund is pleased to announce that it has prosecuted a claim for racial vilification by a prisoner of an officer pursuant to the *Racial Hatred Act*. The matter was heard by the Federal Magistrates Court whose finding was that because the offensive remarks were made in a correctional facility, it could not be regarded as a public place within the meaning of the Act. Although that aspect of the decision was disappointing, it is clear that if an officer is racially vilified in a 'public area' of the prison (such as the visits area) then the matter would be actionable. ***The Legal [77233] Fund invites its members therefore to report any further racial vilification that may occur in `public' areas within correctional facilities, in consequence of which the Legal Fund will take further action for and on your behalf."*** (*McLeod v Power* (2003) 173 FLR 31, at [5]; emphasis added).

Thus Mr McLeod's claim was both backed and funded by his union.

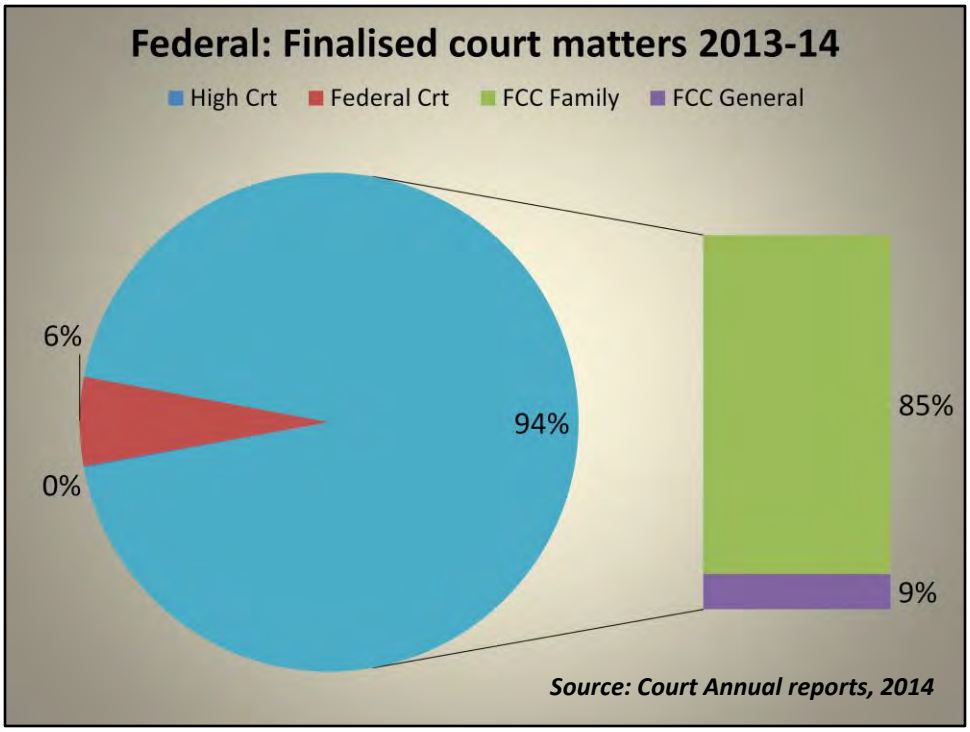
It is also clear that in both cases, Mr Wanganeen and Ms Power had already been subjected to disciplinary proceedings under prison regulations: Mr Wanganeen had been moved to a division with less privileges and Ms Power had been banned from visiting the prison for three months. So in both cases the racial harm being alleged could be boiled down to the inferences that might follow being called "white".



As noted in the Introduction to *The Australian Feminist Judgments Project: Writing and Re-writing Law* (2014: 14-5), the case I re-wrote is one of only a few of the re-written judgments that deals with a decision at first instance.

Though of course I acknowledge the importance of the works that engaged with higher court decisions and the appellate hierarchy, I mention this simply to remind us of the significant proportion of cases that are dealt with every day by single judges/ magistrates sitting in the "lesser" courts – what I might describe as the "ordinary" judging done on a daily basis by our courts.

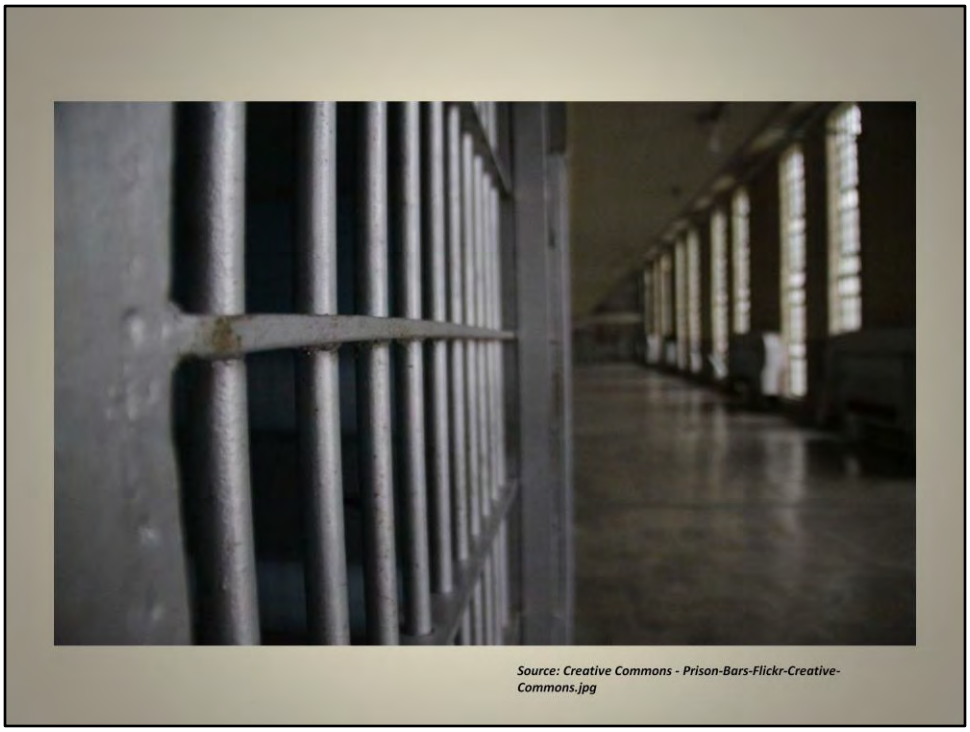
This and the following slide represent *a very rough* estimate of the proportion of cases that are dealt with by the various courts within both the NSW state and the federal court hierarchies. I concede these figures are illustrative only, but I have included them as I think they serve as a graphic reminder at how much "justice" – "ordinary" judging – is worked by our lower courts.



Despite being approximate figures, both graphs reveal the skew in our focus as teachers in law schools – and our scholarship – in that the ordinary decision making of the courts is rarely in the spotlight. There is, of course, a range of issues that has bearing on that – for instance, the sheer volume of decision-making in those courts, the lack of conventional reporting in the Local or Magistrates courts levels, and the emphasis in those courts on decision-making rather than legal interpretation.

Nonetheless, these graphs also reveal the degree of faith that we (almost must) place in the appellate system – in that we assume that the workings in the higher courts keep the lower courts in check. I am sure we concede that there are indeed flaws in that thinking because the appellate system is not universally accessible nor enforceable; put simply, not everyone can appeal when a decision is wrong. So a great deal of our "ordinary" decision-making – the everyday, garden variety – occurs without review and is really only mediated by the quality, capacity, and understanding of those who are appointed as magistrates and judges in all of the courts.

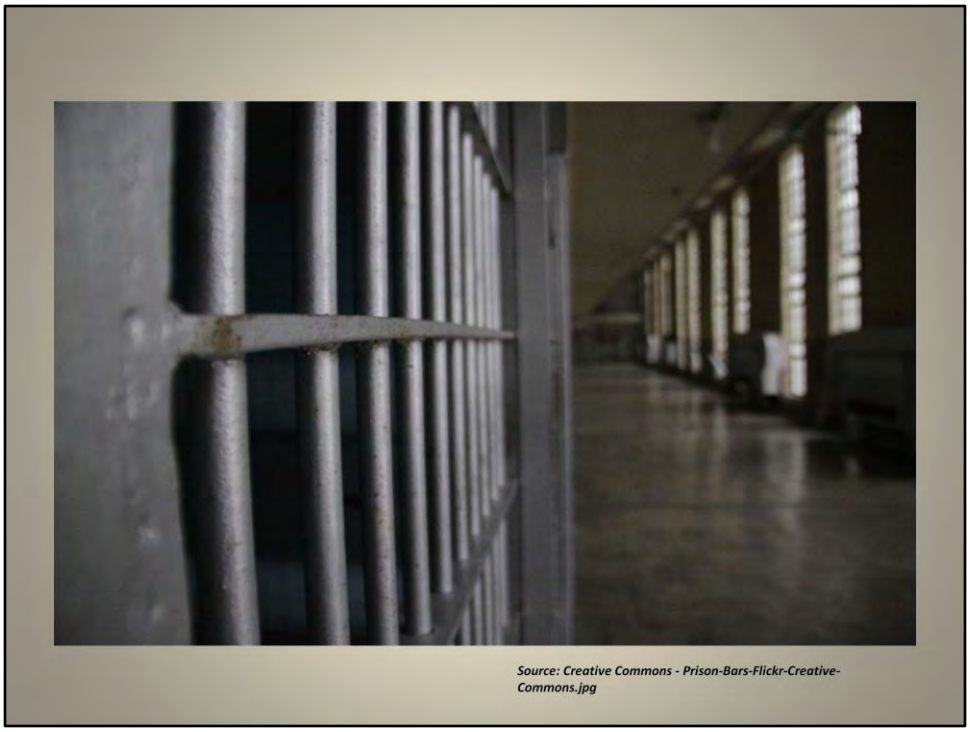
So it really matters if the ordinary problems that our judges and magistrates adjudicate on a daily basis do or do not come within the purview of their own life experience and knowledge.



Source: Creative Commons - Prison-Bars-Flickr-Creative-Commons.jpg

So, this brings me to discuss why I chose the case of *McLeod v Power* as a platform to contribute a discussion of whiteness and race to this collection – why not, for instance, one of the more high profile decisions, such as *Eatock v Bolt* [2011] FCA 1103 (28 September 2011; eg, see Gelber, K & McNamara, L 2013 ''The Bolt Case' and its Aftermath: Freedom of Speech and Racial Vilification in Public Discourse in Australia', *Australian Journal of Political Science* 48(4): 470), a significant decision in the area of race hate law and one I agree demands substantial analysis and critique.

Well in part, I chose it because I could relate in some way personally to the event in *McLeod v Power* – as a young articled clerk with the Victorian Aboriginal Legal Service, I attended HM Prison Pentridge on a weekly basis to interview clients on remand; I learnt a lot about the prison system through this experience – and in particular, I learned about its potential for arbitrariness and the fact that people within it are vulnerable to abuse under the guise of "exercises of discretion". And while in my experience discretion was not universally abused, abuse certainly did occur: though I was treated mostly with courtesy in my interactions with correctional officers (I suspect because I was legal professional), while standing in line in the gatehouse every week, I observed many, many, many women like Samantha Power who were ordinarily treated with discourtesy and a lack of respect – the power differential between them and the variety of correctional officers was palpable.



Source: Creative Commons - Prison-Bars-Flickr-Creative-Commons.jpg

So ultimately, the events in *McLeod v Power* caught my attention because they illustrate how profound in effect the "ordinary" and "everyday" can be. And given its setting, it is particularly significant to remind us that the imprisonment rate for Aboriginal and Torres Strait Islander people increased by 57% between 2000 and 2013, and that Aboriginal young people continue to be arrested and locked up between 24 and 28 times the rate of non-Indigenous youth (ANTAR, November 2014).

My particular concern in choosing this case was therefore to highlight and name these forms of ordinary and daily abuses of power by reframing the case to identify Mr McLeod's whiteness and thus reveal what I regard as his mis-use of the legal process to silence an Aboriginal woman who dared to question and to "call him" on his behaviour. The way I set about doing this was by making the argument that a reference to "white" *does* instill issues of race into a conversation – but not so as to enact racism but instead to call attention to and question it.

In the original judgement, the Magistrate held that that Ms Power's use of the word "white" did not bring the matter within the terms of the section because "being 'white' per se [was] not in [the Magistrate's] view descriptive of any particular ethnic, national or racial group" (at [59]). Thus, though the Magistrate could accept the reference to "white" did refer to "colour" (as is included in the wording of s.18C), he did not accept that "white" referred to a "race". Indeed, and despite the Magistrate himself describing Mr McLeod variously as "Caucasian by ethnic extraction" (at [2]), "a person of light coloured skin" (eg, at [62]; 5 references), and finally, "pale skinned" (eg, at [66]; 5 references), the Magistrate did not accept that when Ms Power referred to Mr McLeod as "white" she was talking about *his race*.

In my view, a problem with this reasoning is that it conflates "race" – which in contemporary terms is clearly understood to be socially constructed concept (eg, see Ian F Haney López, *White by Law: The Legal Construction of Race* (1996)) – with "national or ethnic origin" (also referred to in s.18C), concepts which the Magistrate described as capable of being discerned through definable and determinable characteristics (at [57]-[59]).

To explain a bit more simply – the upshot of the Magistrate's interpretation is that we can talk about the issues presented by this picture [above] as being related to "race" [because of its explicit reference to "European"] but we *cannot readily* talk about the issues in [the following picture] as also being related to race [because it simply makes reference to the nationless, non-ethnic category "white"].

Source: Migration Heritage Centre, '1920 White Australia Game', White Australian pineapples label c 1900, http://www.migrationheritage.nsw.gov.au/exhibition/objectsthroughtime/white-australia-game/

Well, I appreciate that many would be concerned that the legal recognition of "white" as a racial identity could be dangerous through permitting white people to bring complaints. Well, to put it bluntly – the horse has well and truly bolted, and in my view the cases in which this has occurred have produced legal reasoning which is dangerous because it is very inadequate.

Indeed, prior to *McLeod v Power*, a number of other Australian race discrimination cases had already involved complaints brought by "white" people against Aboriginal people. For instance, in *Gibbs v Wanganeen* (referred to above), the court implicitly accepted that the use of words similar to those in *McLeod* (which included the term "white") had the effect of imparting racial abuse ([2001] FMCA 14, at [20]), while in *Power v Hyllus Maris Aboriginal Community School Inc* ([1994] HREOCA 10), the term "gubba" (Koori English for "white person") also appears to have been accepted as making a reference to race. However, neither case explored the issue in detail as both were dismissed – *Gibbs v Wanganeen* because the words had occurred in private, and *Power v Hyllus* due to a lack of evidence.

But several other decisions have explicitly accepted that a reference to "white" can successfully found a complaint within the racial discrimination provisions, though the reasoning these cases apply does not accept "white" as referring to its *own* category of race.

Source: Migration Heritage Centre, '1920 White Australia Game', White Australian pineapples label c 1900, http://www.migrationheritage.nsw.gov.au/exhibition/objectsthroughtime/white-australia-game/

To explain, the case of *Wilson v Budsoar* concerned the complaint of the white editor of *Koori Mail* (a national Aboriginal owned and operated newspaper) that her contract of employment was terminated as a result of management's desire to appoint an Aboriginal editor. The tribunal concluded that Wilson's dismissal did not occur "because she was white and of European descent" [that is, it did not occur because of *her* race], but nonetheless decided she had suffered race discrimination in her dismissal because she was *not* "black and of Aboriginal descent" (77,088) [that is, it occurred because of the race she did not have]. This same reasoning was applied in both *Bell v ATSIC & Gray & Brandy* and *Carr v Boree Aboriginal Corp & Ors* [2003] FMCA 408, at [9]. In other words, these cases accepted that "white" only makes reference to "race" by pointing out that the complainant in each case was *not* Aboriginal:

> I am satisfied that the first respondent through its various servants and agents did discriminate against the applicant in her employment and did dismiss her for reasons which were to do with her race or ***non-Aboriginality*** (*Carr*, at [9], emphasis added).

The reasoning shared by these cases is that being referred to as "white" by itself imparts no racialised meaning. It follows, then, that the "problem" of race is not about white people, but is instead about "others"; that is, being "white" has *no* racial significance.

But why does it matter? Well it matters I think, because although Mr McLeod and all of the other "white complaints" mentioned, each squarely invites judicial analysis of the meaning of race, each case fails to engage in any meaningful analysis about what "race" is or to explore fully the meaning of racism or racial hatred. Instead, by concluding that the category of "race" is about "others" and not white people (cf Aileen Moreton-Robinson, 'Whiteness Matters: Australian Studies and Indigenous Studies', in David Carter, Kate Darian-Smith and Gus Worby (eds), *Thinking Australian Studies: Teaching Courses Across Cultures* (2004), 136; and Woody Doane, 'Rethinking Whiteness Studies', in Ashley 'Woody' Doane and Eduardo Bonilla-Silva (eds), *White Out: The Continuing Significance of Racism*, (2003), 3), these cases effectively limit conversations about race to matters about the visible or supposed indicators of race and thereby binds them to a logic that evades any analysis of the power relationships that the social conceptions about race promote.

Accordingly, the significance of race to social experience can never be fully explored in those conversations because there can never be any meaningful questioning about the effect of race upon white people (see Peggy McIntosh, 'White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies', in Margaret L Andersen and Patricia Hill Collins (eds), *Race, class and gender: an anthology* (1992), 70). Neither, then, can we question whether calling attention to whiteness should *ever* be understood as discrimination or vilification.

Instead, the reasoning applied in each of these cases ignores these kinds of questions and prevents us from engaging in any discussion of them because it speaks about problems of race only in very limited terms. Therefore the dynamics and the significance of race to social experience cannot be fully explored and our understanding of race discrimination remains locked into a dynamic of formal equality. As a result, in any race discrimination complaint involving a white person (which in Australia would be most), the power relationships at play cannot and will not be explored in any meaningful way because at least one party to the complaint will retain a "raceless" or at least "meaningless" raced character.

Yet in my view, the case of *McLeod v Power* involved an incident that was "essentially infused by considerations of race and colour" (at [69]): Samantha Power, an Aboriginal woman, was subjected to an unwelcome decision and one she clearly regarded as arbitrary and unreasonable. Her response was a vociferous protest, and she used the words "white" and "whites" quite deliberately to express her frustration at the power imbalance between herself and Mr McLeod. It also appears that she used "white" to signify that this power imbalance was connected to race – not just her own race, *but also to his*. She was talking about her "ordinary" and everyday experience of being enmeshed in a racialised system of power by which she regularly experienced marginalisation: that is, Mr McLeod, a white correctional services officer, exercised a complete authority over the decision of whether or not to admit her, an Aboriginal woman, as a visitor into the prison, and would do so not just on this day but on every other occasion when she (or other women like her) attempted to visit.

Samantha Power *was* talking about race and the Magistrate failed (or perhaps refused) to hear her.

However, from this view, her words no longer seem like a potential act of racial vilification, but instead look more like an act of free speech and even more like an act of self-determination; we can begin to understand the political dimensions of her words and see them, as Glen Coulthard might describe them, as "an expression of Indigenous outrage" (Law on the Edge, UBC, Vancouver Canada: July 2013) against the racialised power that endures in the ongoing colonialism of the so-called "settler nation", Australia. It finally enables "a telling of the same story, but [with] a different voice speaking" (Lawrence McNamara, 'Long Stories, Big Pictures: Racial Slurs, Legal Solutions and Playing the Game' (1998) 10 AFLJ 85, 107).

And that's why being able to name and speak about whiteness matters when we are talking about race because it enables us to hear that race is about privilege as well as marginalisation which may potentially unlock formal thinking through founding a challenge to the notion that same treatment produces an equal result.