

Anti-Discrimination Act Anniversary Speech

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Tasmania enacted the current Anti-Discrimination Act in 1998. It had had a difficult birth and a 20 plus year gestation. It was hard fought for and won and doggedly resisted.

The arguments made against its enactment were many and often rooted in bigotry and fear.

First and foremost, it was said that anti-discrimination legislation was neither needed nor wise. The reasons given were that:

1. There was no real discrimination in Tasmania;
2. But, even if there was discrimination in Tasmania, it was justified as resulting from incontrovertible rules of nature;
3. Existing laws, particularly the common law, already dealt adequately with problematic discrimination;
4. The implementation of anti-discrimination law would be expensive and severely damage the economy;
5. The law would end up having a discriminatory effect for the majority of the population;
6. Unmeritorious minority groups would be the only real beneficiaries of the Act;
7. Frivolous allegations would be made, that would clog the courts, tarnish the reputations of good people and prevent people from behaving normally;
8. The law would condone and encourage abnormal and undesirable behaviour;
9. It would cause social division, disruption and disputation;
10. Discrimination is a cultural and attitudinal problem that cannot and should not be dealt with by the law but rather through education.

Largely similar arguments have been made and continue to be made against the enactment of a Tasmanian Human Rights Act or Charter.

Of course, these assertions were and are spurious and discriminatory in themselves, both in relation to the Anti-Discrimination Act and a Human Rights Act.

Since the Anti-Discrimination Act became law most of us have come to understand, if we did not before, that attribute-based discrimination is a very real problem in Tasmania; that many of us have experienced discrimination that has blighted our lives, minimised our life choices or otherwise caused us serious distress. Many of us lived with discrimination and no possibility of remediation before the Anti-Discrimination Act was enacted.

Of course, the Anti-Discrimination Act has not caused the problems predicted for it. Neither has it prevented all discrimination.

Let me briefly recite a few examples.

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1. The Commonwealth Government's invitation to speak followed immediately by its refusal to hear what our First Nations' peoples said in the Uluru Statement, *From the Heart* about the establishment of a constitutionally enshrined First Nations' Voice into Parliament, stands as one of the most shameful ethical and moral failures of an Australian Government in our Constitutional history. I do not absolve State and Territory Governments from responsibility in this matter. They have resolutely failed to pick up the baton so ignominiously dropped by the Australian Government.
2. For people with disabilities, discrimination is a daily event. For example, people with cognitive or mental impairments remain over-represented in our criminal justice system at all levels, but particularly in prisons. Their access to equal treatment before the law is frustrated by the absence of communication assistance that would enable them to communicate their accounts of events adequately to police officers, lawyers and courts. While our Government has committed to the establishment of a pilot intermediary scheme, no flesh has been put on the bones of this promise and one wonders why a pilot and not a full blown scheme. A pilot is likely to perpetuate differential justice for people with communication needs.
3. Inequality in the workforce remains a reality for women. They are underpaid in comparison to men across a wide range of occupations. Their superannuation entitlements upon retirement remain a fraction of those paid to men. The services that might enable them to gain a more equal financial footing in the workplace are limited and often beyond their reach. Unequal treatment in sport both in terms of payment and media coverage is a prime example of sex/gender discrimination.
4. Intersex and transgender people are yet to obtain the equal treatment before the law that they seek. They and other LGBQ people are yet to be afforded full recognition as equal. They remain the targets of discriminatory campaigns and treatment.

Nevertheless, the Act has produced many desirable cultural and attitudinal changes. It has increased awareness and understanding of the *harms caused by attribute-based discrimination*; at the same time it has contributed *to a more tolerant and compassionate society, one where people more readily accept diversity and are sensitive to others' vulnerability*.

Rather than resulting in an angry and dispute ridden society it has provided a pathway to avoiding disputation and reconciling differences between people who otherwise might have had no avenue for dispute resolution or who might have resorted to violence of some kind or adversarial court proceedings. The Act, therefore, provides the means to diffuse and de-escalate conflict and to achieve some form of reconciliation and understanding between former adversaries. Viewed in this way, it is an instrument for peace rather than conflict.

The Tasmanian Anti-Discrimination Act was lauded at the time of its enactment as world's best practice. One reason that it received such an enthusiastic response is that it was a late addition to Australia's Anti-Discrimination laws which meant that we had the opportunity to learn from mistakes made in other Australian jurisdictions and from problems that had been identified with Anti-Discrimination Act laws elsewhere.

Moreover, the then Labor Government Attorney-General, Judy Jackson MHA, was concerned to make it as protective as possible of the right not to be discriminated against. This meant giving it a broad scope, in relation to the attributes it covers (race, gender, religion, sexual orientation, gender identity etc) and in relation to the designated areas of activity subject to the prohibition on discrimination (employment, provision of services, club membership, education and training etc) as well as a narrow scope to the exceptions allowed.

The result is that the Tasmanian Anti-Discrimination Act provides protection against discrimination in areas not available elsewhere.

In subsequent years, however, this encouraging beginning, has not led to universal acceptance of the Act or precluded attacks upon it or the depletion of its protections.

Our experience in this regard teaches us of the need to be vigilant in preventing the erosion of the rights protection it provides, both directly in narrowing its scope and increasing its exceptions and indirectly through procedural and practice requirements that limit the Commissioner's and/or Tribunal's ability to apply the Act properly and in accordance with its original legislative intent.

Current criticisms of the Act are not far removed from those made in an attempt to prevent its enactment. A common modern criticism is that it conflicts with and overrides other fundamental rights, for example, the right to freedom of speech and the right to religious freedom.

We saw the claim about the Act's conflict with the right to freedom of religion writ large before and during the marriage equality plebiscite, when it was argued trenchantly that the Act should be amended to enable churches and religious groups greater freedom in promulgating their views against marriage equality. It is not really clear what the justification for the sought amendment was, what the Act in its present form prevented churches and religious people from saying or what it was they wanted to be able to say that offended the Act. Ultimately, the government attempt to amend the Act in this way failed in the Legislative Council.

However, an earlier attempt to privilege religious freedom over freedom from discrimination was successful when the Act was amended to enable religious schools to discriminate on the grounds of religion when hiring and firing teachers and when admitting students.

Another version of the conflict of rights criticism is that it threatens hitherto inviolable and long-accepted freedoms in pursuit of so-called 'political correctness' and in contradiction of more important long cherished cultural, political and social norms. This view of Anti-Discrimination law is seen in the hostility of some journalists, media outlets and politicians to sections in the Commonwealth *Racial Discrimination Act* and their crusade to amend those provisions – namely, ss 18C and 18D of that Act. The same hostility could equally be levelled at s 17 of the Tasmanian Act. The sequelae to the *Andrew Bolt* case are prime exemplars of how this hostility manifests as a claim that Anti-Discrimination laws unjustifiably limit freedom of speech and more particularly, freedom of the press. I suspect that the vehemence of many of those offended by s 18C (Andrew Bolt, David Leyonhjelm and Cory Bernardi in

particular) springs from their personal affront when a hitherto *assumed entitlement* they have enjoyed is challenged.

We also saw the conflict of rights criticism of the Act expressed in relation to religious freedom during the national plebiscite on marriage equality, with reference to a complaint against the Catholic Archbishop lodged with Equal Opportunity Tasmania about a church booklet titled, “Don’t Mess With Marriage,” which was distributed in Catholic schools. This complaint, which was ultimately withdrawn, was claimed to justify erosion of anti-discrimination protection in favour of religious freedom, on the grounds that such a complaint should never even have been contemplated as permissible.

Essentially, the conflict of rights argument boils down to an assertion that there is no legitimate way to reconcile apparently conflicting rights or to prioritise freedom from discrimination over other rights. This view is fundamentally misconceived.

Specifically, and firstly, it ignores the fact that there are settled principles in human rights interpretation for ranking and prioritising rights; these interpretive principles give a very high ranking to the right not to be discriminated against on the grounds of personal attributes. This is seen in the fact that this right cannot be derogated from even in times of public emergency that threaten the life of the nation. This is set down in the *International Covenant on Civil and Political Rights*, Article 4.

While this principle does not preclude States from *internally qualifying* or *creating exceptions* to this right, they cannot do so in ways that abrogate it. This gives a justifiable primacy to this right. These principles are based in the notion that some rights must apply to everyone, everywhere, at all times by virtue of our humanity, a quality we have no choice about.

Other rights protect our choices and freedoms to choose how we live and what principles we live by. These rights may, in some circumstances, be derogated from but not abrogated in their entirety. They may also be qualified or limited by reference to other rights. Freedom of Speech is one such right. Freedom of Religion is another. This suggests that the religious freedom amendments to the Act that privilege freedom of religion over freedom from discrimination are illegitimate in human rights terms.

What I have attempted to show in this address is that, while our *Anti-Discrimination Act* is widely accepted and revered as part of the fabric of the Tasmanian justice system and society, we cannot be complacent about it. It is not immune to threats in various guises from those who oppose its application or seek to narrow its protections.

But I would like to conclude on a happier note by paraphrasing Rodney Croome who wrote about the Anti-Discrimination Act on its 10th anniversary: “As Tasmania celebrates the ... anniversary of its Anti-Discrimination Act, it’s time for all of us,

including the State Government, to rededicate ourselves to enhancing the principles of that landmark statute and to the vision it embodies of a more tolerant Tasmania.”²

² Rodney Croome (2008) “The Anti-Discrimination Act: Why It’s Important and How It’s Threatened”, *Tasmanian Times*, September 2nd, 2008.