‘Why my age is my concern, not yours: ageism, law and human rights’

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Address to ‘Rights, respect, recognition: a new deal for older Australians’, COTA Australia's National Policy Forum 2013

23 July 2013

It has quickly and appropriately become common practice to acknowledge the traditional owners of the land on which an event is being held. The acknowledgment is, however, often perfunctory, with little reflection on its meaning and import.

A further part of the acknowledgment is to pay respect to elders. We, who have scarcely arrived in this country, seem incapable of learning – or even acknowledging that we could learn – from the indigenous peoples who have been here for millennia. And paying respect to elders is only the beginning of the lessons we could learn.

Elders in indigenous Australian culture are those who have knowledge, understanding, insight and wisdom. They are the last to speak, and they are deferred to. The idea of an ‘elder’ is not necessarily tied to age. Although the knowledge and understanding accumulates with age, there is no chronological point at which one becomes an elder. It is a status that attaches to who one is and what one knows, not simply to age. We can learn from that.

So I acknowledge today the traditional owners of this land, and I pay respect to those who hold their knowledge and know their customs, their elders.

One of my pet bugbears – and I have many – one of the little windmills at which I joust from time to time, is the requirement on a form that I declare my country of birth. In very rare cases I can see the point of an agency’s knowing where I was born: for a passport application, or my eligibility to be selected for the Olympics. But almost invariably, I can see no point in an agency’s

knowing where I was born, and I am suspicious of the unwarranted inferences that will be drawn from the data. I usually leave the question unanswered, and have repeatedly challenged the data collector who chases me for the information, asking them to tell me what use will be made of it. The response is never better than 'for statistical purposes'.

But statistics are not passive – they become very active in the hands of social scientists, demographers and policy analysts, who draw inferences. What can be reasonably inferred about me from my country of birth? As it happens, very little that is unwarranted, as I was born in England. But a family member – as white and Anglo-Celtic and English-speaking as I am – is obliged to record she was born in Malaysia. That piece of data can give rise only to incorrect inferences, and potentially prejudicial ones.

The requirement on a form that I declare my date of birth is far more pervasive. Infuriatingly, it is a mandatory requirement for online form filling, so that if it is left blank when the form is submitted, the submission is rejected with a red notice on screen, demanding I complete the missing data before I can proceed with my transaction.

Clearly my age is relevant when I am establishing my eligibility for an age-related entitlement, but that is rare. More often, the intended 'statistical purpose' is quite apparent: people of a particular age tend to choose X, prefer to buy Y, usually need Z. Indeed, I have adopted this approach in my own research.

I went back and looked at a report I co-wrote in 2005 on community legal centres in NSW. We reported that 'nearly 50% of staff are aged over 40, a very substantial increase on the 14% who were over 40 in 1990'. That's all we said. What is a reader to make of that? What were we implying – intentionally or unintentionally – when we reported that 'age' statistic? Why was it necessary or even important for us to say it?

Of course social policy, and planning of service delivery, are dependent on demographic data. In that report on community legal centres we noted 'Latent

or hidden needs, rather than expressed needs, are most readily identified from inferences that can properly be drawn from socio-economic data'. We anticipated the types of legal needs that would arise in coastal NSW, where research showed movement into the region from Sydney and inland, coupled with noticeable increase in the median age of residents.

I can illustrate the same point differently. I chair the ACT Law Reform Advisory Council, and we recently inquired into the legal recognition of transgender and intersex people. In the course of the inquiry we asked ourselves when and why it mattered to know someone's sex or gender identity, in much the same way I have today reflected on when and why it matters to know someone's place of birth or age. An example we considered was purchase of land. Why should the purchaser of land record their sex? What earthly difference could the sex of the parties make to the conduct of the transaction? None, of course, but that is not the point. What does have some import is the aggregation of the specific instances, telling us how many women are buying and selling land. In the same way, it is not relevant to know that a person is aboriginal when they apply for a job, but we do want to know how many indigenous people are being employed.

So, at a macro level, aggregated demographic characteristics are relevant to social planning. And I am sure that private players in the market would say the same for their business growth plans. But even if there a sound reason of social policy for asking a person to volunteer their age, for example, there is a risk that that information will at the same time be used prejudicially in the specific instance. It is at the individual level, in people's personal experience, that assumptions associated with age are problematic. More than problematic, those assumptions can be unfair, exclusionary, discriminatory, disempowering and humiliating. The harm that is done by making characteristic-based assumptions is something that has been addressed, to a degree, by the law.

Students come to my law reform course with the idea that law makes a difference, that social change can be achieved through law. After some analysis and reflection it becomes clear to them that the dynamic between law and social change is more complex than that, but that if it has to be captured in a simple statement of causation, law tends to follow an established or emerging social direction, and add to its shape and momentum by bringing to bear the imprimatur of the state. Law has a part to play in social change, but the size and nature of that part, and its timing and effectiveness, is a source of endless study.

Anti-discrimination law has been in a symbiotic relationship with social change for decades. Australian anti-discrimination laws were born of a combination of factors. One was emerging practice, in the 1960s, in countries to which Australia looks, such as the *Civil Rights Act* in the US and the *Race Relations* and *Sex Discrimination Acts* in the UK. Another was Australia's engagement with the international human rights regime led by the Whitlam government in the early 1970s. And a third factor was that most elusive but persistent features of law reform, the individual champion, and Australia had its anti-discrimination law champions, among legislators such as Don Dunstan and Neville Wran, and advocates such as Roma Mitchell, and Peter Bailey. But it was some time before discrimination on the basis of 'age' attracted legislative protection.

Under Neville Wran in 1977, NSW's proposed new anti-discrimination act protected age discrimination, but employer groups successfully lobbied against it, and the protection was removed during parliamentary debates. An age discrimination amendment was not made until 1994, part of a wave of reforms across Australia which, between 1990 and 1999, saw every state and territory proscribe age discrimination across a wide range of public activity, and do away with compulsory retirement ages. The Commonwealth was part of the trend in a large but limited way, when in 1988 it enacted its obligations under the International Labour Organisation Convention 111 and limited age

discrimination in industrial awards. In 2004 the Commonwealth joined the states and territories in proscribing age discrimination across a wide range of public activity.

Some of you may be a little disappointed – but most will be relieved to know – that I am not about to embark on a detailed technical account of anti-discrimination laws, although there is a lot to say. For purposes of a larger discussion about age, discrimination and law, I will expand briefly the unhelpful way that anti-discrimination laws deal with the concept of age.

Our anti-discrimination laws are built on the concept of the binary. A person can be of one 'race' and not another, or of one sex and not the other, or have a disability or be without one. But everyone has an age.

The difference is important, because a common test for unlawful discrimination in Australia is to ask if a person with the attribute was or would have been treated differently from the way a person without the attribute was treated. If an aboriginal person was refused rental accommodation, was a non-aboriginal refused in the same circumstances, or would they have been? If a person with a disability was denied enrolment in school, was a person without a disability denied in the same circumstances? If a woman was sacked, was a man in the same circumstances also sacked?

There is no 'age' binary, no status of not having an age. There is the status of not having a particular age, but makes little sense to ask (as anti-discrimination law does) when a person of a particular age was refused a job, whether a person of a different age was not or would not have been refused. Is the difference in age one of days, weeks, months or years? More sense can be made of the binary if age is understood as 'age group', but how are ages to be grouped? In decades – 40s, 50s, 60s and so on? In descriptors – middle aged, retired, child bearing and so on?

Indications are that the courts and anti-discrimination agencies deal with the technical absurdity of characterising age in binary terms in a pragmatic manner. They don't get too concerned with precise age, and ask the question more broadly by reference to groups. In one of the very few cases under the Commonwealth *Age Discrimination Act* – and none has been successful – the complainant put her claim in terms of 'younger' and 'older', and the court was content to deal with it in those terms. She contended that she had been treated her less favourably than a younger employee would have been treated.[1]

At this point I should be clear that I am narrowing my discussion of age to the age grouping you are most concerned with, what I might call older people. Our age discrimination laws have been described as 'cradle to grave' in their coverage,[2] and they are as available to children as to the elderly. Age discrimination affects different age grouping differently: young people may be concerned about discriminatory pay and working conditions, people in their forties and fifties about discriminatory hiring and firing, and people no longer working about discriminatory service provision and healthcare.

In my examples and focus now, I will be talking about older rather than younger people, although I will not speculate on where the chronological line is drawn, or which side of the line I am on. On most days at work, a colleague no older than I am enthusiastically and engagingly greets me with 'Hello young Simon', and I will mark the time, and look closely in the mirror, the day he stops greeting me that way.

I was saying that anti-discrimination laws are designed to address prejudicial assumptions and attributions, and perhaps I don't need to tell you what they can be for older people: attitudinal and physical inflexibility, poor comprehension

1 Keech v State of Western Australia Metropolitan Health Service trading as King Edward Memorial Hospital [2010] FCA 1332.

2 K Lindsay, '"Cradle to Grave": Age Discirmination and Legislative Policy in Australia', (1996) 3(1) *Australian Journal of Human Rights* 97.

of modern technology, predisposition to illness and incapacity, conservative social values, poor communication with younger people, poor stamina and so on.

The nonsensical idea of an age binary would be avoided if anti-discrimination law didn't depend on it. But in an unthinking and lazy shortcut, the structure and operation of the Commonwealth *Age Discrimination Act* is a copy and paste of the *Sex* and *Disability Discrimination Acts*, and the correct technical question – avoided in the way I just described – is one which tries to differentiates between precise ages. An alternative approach does not engage in the comparative exercise at all. It doesn't ask if a person is treated more or less favourably than their binary opposite, but simply whether – and why – they have been treated unfavourably. This is the question asked in the ACT and Victoria, and the Victorian Act (s 8) give this example:

> An employer advises an employee that she will not be trained to work on new machinery because she is too old to learn new skills. The employer has discriminated against the employee by denying her training in her employment on the basis of her age.

No question arises in that illustration of how the employer treated or would have treated someone of a different age.

Rather than the artificial binary of age / different age, the real binary that captures the problem is age / not-age, rendering the question of age irrelevant. There are always exception in anti-discrimination law for when an attribute is, in circumstances, relevant – and I've acknowledged that at times it matters to know my age – but the onus is on the person who wants to know my age to explain why it is relevant, otherwise I am as likely to reveal that as I am to reveal my country of birth, and no-one should be volunteering their date of birth on their CV.

The Commonwealth was heading down this very sensible path of discarding the comparator test, for discrimination on the basis of <u>all</u> attributes, in its Human Rights and Anti-Discrimination Bill which, had it become an Act,

would have had the catchy acronym 'HRAADA'. For no sound policy reason, and for want of principle and courage, the Government earlier this year abandoned the contemporary, widely supported reforms that HRAADA offered, and left us with the inconsistent burdensome anti-discrimination regime of which the *Age Discrimination Act* is a part.

I should say that the tiny number of age discrimination cases in court is not a fair reflection of the use that is made of age discrimination laws, but even so, the statistics are unimpressive. Looking just at the most recent complaints statistics from the Australian Human Rights Commission,[3] the fewest complaints – only 8% – were made under the *Age Discrimination Act* while the most – 37% – were made under the *Disability Discrimination Act*. Some explanation of the difference in the rates of complaints lies in the profile that the *Disability Discrimination Act* has, and the related mobilisation of the disability sector. This is a story in itself, starting with the progressive aspects of that Act and the community-wide means of its implementation, both of which contrast starkly with the history of the *Age Discrimination Act*.

So far, I have been talking about discrimination because of age. But it is rare that chronological age is the reason for discriminatory conduct. More usually, age is a proxy for other concerns: a condition at a fairground that states 'You must be 10 to go on this ride' is actually identifying the need for requisite height or strength, just as a film classification of '15+' is shorthand to identify emotional maturity. The policy behind a mandatory retirement requirement is no more sophisticated than that it is an easy – and simplistic – way to deal with concerns about a person's diminishing capacity for attentiveness and reasoning.

So laws that address age discrimination are considerably broadened in scope when the prohibition extends to commonly attributed characteristics of age. In another of the few cases under the Commonwealth *Age Discrimination Act*, a

3 Australian Human Rights Commission Annual Report 2011-2012, Appendix 3.

woman in her late 30s complained that she had been treated less favourably 'because of a characteristic that is generally imputed to persons of her age or age group, that is, that persons in their late 30s are less attractive and less glamorous than persons in a younger age group'.[4] The 'characteristics' extension is a way of acknowledging both an assumed equation between chronological age and physiological age, and the pervasive and often unconscious existence of social constructions of age.

With this more complex understanding of age, an answer to the protestation 'it's not your age that's the problem' is 'No, it's what my age *means to you* that is the problem, it's the assumptions you make about, or the attributes you ascribe to, my age'..

In its vision, age discrimination legislation does understand the nature of the offending conduct that is being addressed, the way in which age is used as a proxy for another consideration. This understanding is, however, let down badly in its execution, and if law doesn't actually work well in its operation, it is unlikely to work well in its other capacity, as a tool for educating and promoting awareness.

In my teaching of law reform, we constantly return to a discussion about the role of law in society, seeing it as not only a device for actively regulating conduct, but as a symbolic statement by the state of the kind of conduct that is expected, in the hope that people will, effectively, self-regulate, in light of the lead given by parliament's democratically stated values.

While age discrimination laws promote an approach to treating people in the hope that that is in fact how people will behave, their efficacy is compromised by the conceptually confusing way they are drafted. Age discrimination laws require a different and properly adapted drafting model that addresses directly, and not obliquely, the evil that is being addressed: the irrelevant taking into account of age and its inferred characteristics.

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4 Thompson v Big Bert Pty Ltd t/as Charles Hotel [2007] FCA 1978.

One part of the story of the *Disability Discrimination Act* suggests a story that might still be told of the *Age Discrimination Act*: its operation in the context of an international human rights treaty.

Although the *Disability Discrimination Act* predates the international *Convention on the Rights of People with Disabilities*, that convention galvanised people with disabilities in a dramatic and exciting way. Human rights has become the language of disability advocacy in Australia, so that what was once asked for as a gesture is now claimed as a right, what was once charitable is now an obligation.

Could a *Convention on the Rights of Older People* do the same? As many of you know, this is not a new question. The then Human Rights Commissioner responsible for Age Discrimination, Elizabeth Broderick, gave a detailed account in 2010 of the arguments for and activities towards such a convention, and there continues to be momentum towards a treaty of some sort, at the United Nations and among advocacy organisations including COTA.

While it is true that older people have the same human rights as any person does, set out in the *International Covenants on Civil and Political, and Economic Social and Cultural Rights*, it is also true that the specific circumstances in which many of those rights arise for older people are not anticipated in those treaties. The same normative gap – between broadly stated rights and the lived experience of certain groups of people –led to the tailored terms of, for example, the *Convention on the Rights of People with Disabilities* and the *Convention on the Rights of the Child*.

Rights that have been proposed as warranting specific protection in the circumstances of older people include dignified medical treatment; physical,

mental and emotional integrity; special needs when in detention; respect for legal capacity, and the right to a dignified death. [5]

I suspect that a treaty for older people is a long way off. Apart from anything else, the UN's financial capacity to establish and monitor another treaty is limited, especially in light of the coverage that older people enjoy under existing human rights treaties. It may be that greater attention to the human rights of older people will come from the appointment by the UN Human Rights Council of a Special Rapporteur who can report generally, and for specify countries and issues, on older people's human rights.[6]

But to stay with what for many is the ultimate prize, many of the anticipated benefits of achieving recognition and status through an international human rights treaty are in the consequent effect on domestic law and practice: a treaty, for example, offers direction for a country's laws and policies, sets minimum standards, and provides a measure against which a country's conduct can be assessed.

Enthusiasm for an international human rights treaty must, however, be tempered by the *realpolitik* of international relations. Faith in international human rights law is characterised by what for some is optimism and for others is unreality, if not delusional thinking. Geoffrey Robertson, in his book *Crimes Against Humanity*, refers variously to the 'brick wall', the 'impregnable armour', the 'closed door', the 'no go area', and the 'familiar bogey' of state sovereignty, despairing of the barrier that state sovereignty poses to the universal application of human rights standards.

Different countries rely on state sovereignty to different degrees in different circumstances at different times, but always at some stage to resist meeting

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5 Sandra Huenchuan and Luis Rodriguez-Pinero, *Ageing and the protection of human rights: current situation and outlook*, Economic Commission for Latin America and the Caribbean, 2011, Ch 5.

6 Cf Oliver Lewis, speech to to the annual conference of the Solicitors for the Elderly <www.mdac.info/en/olivertalks/2013/06/21/older-peoples-decisional-segregation> .

international expectations. Australia is no different, and while we have been in the forefront of establishing both the League of Nations and the United Nations, have ratified international treaties at an almost unequalled rate, and have promoted human rights compliance to countries around the world and most particularly in our region, we are as resistant as any other similar country to accepting the judgment of international forums, and as reluctant in adapting our domestic laws and practices to comply with international expectations.

So I will jump ahead to the day that the United Nations adopts a *Convention on the Rights of Older People*. What difference might that make for Australia? A lot will depend on what Australia's involvement was in getting there. The Australian government was very engaged with the development of the *Convention on the Rights of People with Disabilities*, supporting delegations of non-government advocates to take part in the UN working parties, and nominating an Australian, Professor Ron McCallum, as a member of the UN Committee on the Rights of People with Disabilities, which he now chairs.

For a *Convention on the Rights of Older People* to make a difference in Australia, its development would need to be supported by the Australia government, in a way that the *Convention on the Rights of Migrant Workers and their Families*, and for a long time the *Declaration on the Rights of Indigenous Peoples*, were not supported.

But a government can support an international treaty – attracting both international and domestic kudos – and still resist acting on it locally. Australia's domestic conduct in relation to its international human rights law obligations does not encourage optimism.

Australia has still not enacted domestic legislation to give comprehensive effect to its obligations under, for example, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic Social and Cultural Rights*, and the *Convention on the Rights of the Child*. The NT Intervention illustrates it is willing to explicitly avoid its obligations under the *Convention*

for the Elimination of All Forms of Racial Discrimination, and the refugee policy illustrates the lengths it will go to avoid international treaty obligations.

Clearly the hoped-for nexus between international treaties and domestic action cannot be counted on in Australia. The current government has run hot and cold on its relationship with international standards. It relies on the International Court of Justice to control Japan's whaling, but rejects views of the Human Rights Committee that Australia has violated human rights.[7] It participates in the development of international human rights jurisprudence, but has not argued in the High Court – when it could have done[8] – that that jurisprudence is relevant to interpreting Australia law.

The current Opposition is potentially the next government, and indications of likely support for taking account of international human rights standards are not encouraging.

In a 2010 Senate Legal and Constitutional Affairs Legislation Committee hearing into proposed human rights scrutiny legislation, the Shadow Attorney-General Senator George Brandis said, speaking of the human rights treaties: 'I am very sceptical of the wholesale invocation of the international jurisdiction…'[9] and stated his preference for 'the accumulation of rights through both the common law and statutory protection going back literally centuries'.[10] He referred to the scrutiny of laws by reference to the international human rights treaties as a 'particular vice' and proposed an amendment to define human rights as:

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7 see *Nystrom et al v Australia* (1557/2007) CCPR/C/102/D/1557/2007, *Fardon v Australia* (1629/2007) CCPR/C/98/DR/1629/2007, *Tillman v Australia* (1635/2007) CCPR/C/98/D/1635/2007.

8 *Maloney v The Queen* [2012] HCATrans 342 (11 December 2012).

9 Senator the Hon George Brandis SC, *Hansard*, Senate Legal and Constitutional Affairs Legislation Committee, Reference: Human Rights (Parliamentary Scrutiny (Consequential Provisions) Bill 2010; Human Rights ((Parliamentary Scrutiny) Bill 20101, Thursday 4 November 2010, 14.

10 Senator the Hon George Brandis SC, *Hansard*, Senate Legal and Constitutional Affairs Legislation Committee, Reference: Human Rights (Parliamentary Scrutiny (Consequential Provisions) Bill 2010; Human Rights ((Parliamentary Scrutiny) Bill 20101, Thursday 4 November 2010, 15.

> the personal rights and liberties which exist under (a) the Australian Constitution, (b) acts of the parliaments of the Commonwealth, states and territories, (c) the common law, and (d) relevant international instruments to which Australia is a party and which have domestic application by Australian law".[11]

This conception of human rights – unique I think among nations of the world in the 21st century – makes me wonder what Australia will, or could sensibly, say to the United Nations in its periodic reports under the human rights treaties.

Unsurprisingly, none of the human rights that older people would want recognised in an international treaty is found in the Australian Constitution, in acts of the parliaments of the Commonwealth, States and Territories, or in the common law, and few of the international human rights treaties have even partial domestic application by Australian law.

Anti-discrimination laws are a small part of shifting in perception towards, and making a difference in, the human rights of older people. An international treaty would help, but a vigorous adoption of a rights mentality need not and ought not wait for that. What is needed, with or without a treaty, is the adoption of language, of policy, and a principled commitment to respect older people as holders of human rights. That is possible in policy and practice, without the driver of a treaty, or even of domestic human rights legislation.[12]

To make a rights claim in Australia is to challenge the grace-and-favour approach of both the social democratic welfare state and the liberal charitable ethos. It is challenging to re-characterise the needs of older people as

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11 Senator the Hon George Brandis SC, *Hansard*, Senate, Human Rights (Parliamentary Scrutiny (Consequential Provisions) Bill 2010; Human Rights ((Parliamentary Scrutiny) Bill 20101, Friday 25 November 2010, 9662.

12 See, eg Office of the Public Advocate in collaboration with University of SA Human Rights And Security Research & Innovation Cluster, *Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People: Report for the Office of Ageing and Disability Services*, October 2011, at <www.sa.gov.au/subject/Seniors/Corporate+and+business+information/Seniors+publications>.

entitlements, a shift from a desire to a right, to be treated equally and with respect, from a need to a right, to be supported and assisted. Fundamentally, rights language shifts older people from the margins to the mainstream of society, from dependency on charity and welfare to a having a dignified life.

It is in that spirit that today – intending no disrespect to our indigenous peoples – I pay respect to the older people of my culture, for their experience, perspective, understanding and wisdom, and I acknowledge their human right to be treated with dignity at all times.