

## **'Basic instinct, and the heroic project of anti-discrimination law'**

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Good morning.

I acknowledge the dispossessed indigenous owners of this land. I express my sorrow at the loss and harm they have suffered, and I commit myself to achieving their status as truly equal participants in the rights and freedoms we enjoy.

That is not the usual acknowledgment of country. It is not the usual – and commonly perfunctory – recitation of words that has become the expected practice before we get on to whatever it is we really came here for.

But it illustrates an essential part of my theme today: that persistently conscious, specific and deliberate recognition of disadvantage and marginalisation is only the beginning of what we need to do, if we are truly committed to equality. A concurrent theme is that perhaps we are not, and never will be, truly committed to equality.

It is an honour to be invited to give this oration. I confess I did a little research to determine whether, in giving an oration, I should be giving something more or other than a speech. I now know that an 'oration' is a formal speech delivered in connection with a particular occasion; this, it seems to me, could encompass a wedding speech. There is, however, an archaic meaning of 'oration' that seems apt to my theme today: a prayer or petition to God. I do fear that pervasive social equality is beyond human powers, and may be achieved only with the intervention of your particular God. Which brings me to Dame Roma Mitchell.

Unlike many who have given this oration before me, I did not have the privilege of meeting Dame Roma, and cannot share with you any anecdotes that you cannot read for yourself. A slim connection I can make is that, 45 years and a thousand miles apart, we each went to a Catholic day school called St Aloysius. Sources suggest that Roma Mitchell may indeed have called on divine help in her quest for equality: her biographers say that a religious strand that ran through her life, and that she attended Mass almost daily.<sup>1</sup>

While I remain indebted to the Jesuits for the liberal education they gave me, I confess – if that is an apt word – that while I am pursuing many of the same goals as Dame Roma Mitchell did, I do so irreligiously.

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Australia's eleven federal, state and territory anti-discrimination laws go by three different names: Discrimination, Anti-Discrimination, and Equal Opportunity. Whatever they are called, their provisions are all much the same; by any other name they are as weak.

Each of these laws proscribes certain conduct, making a clear policy statement that at some times, in some circumstances, for some people, subject to some exceptions, it is wrong to discriminate. To put it another way, a lot of the time, in many circumstances, for a lot of people, it is permissible to discriminate.

To be fair, the anti-discrimination laws are ‘against’ quite a bit of conduct, in most areas of public life, and for personal attributes such as race, sex, disability, age and sexuality.

But my experience is that these laws, and the individual remedies they offer, are ends in themselves, rather than as a part of any larger project. The ‘end in itself’ of an anti-discrimination law is proof of an instance of prescribed discriminatory conduct, and the awarding to the aggrieved person of a remedy. But discriminatory conduct is only the manifestation of something much larger and deeper. In her landmark book on discrimination law, *The Liberal Promise*, my colleague Margaret Thornton – one of Australia’s great discrimination law thinkers – rightly decries the ‘atomism’ of discrimination laws, that ‘effectively separates the act of racial discrimination from racism and the act of sex discrimination from sexism’.<sup>2</sup> This is true too for the pervasive phenomena of ageism, homophobia, and other forms of stereotyping and prejudice. The separation of the manifestation from its cause undermines the larger project of social equality.

The nexus between anti-discrimination laws and the larger evil of prejudice is faith in the capacity of law to change not just behaviour, but attitudes. It is what Thornton describes as a belief in ‘the ripple effect’ throughout society, so that the favourable resolution of individual instances of discrimination will be ‘conducive to the diminution of prejudice overall’.<sup>3</sup> This idea is as hopeful, and as spurious, as trickledown economics, and that analogy is apt at least to this extent: in both cases the theory best suits those in power.

The effectiveness of law as a means of achieving social ends is notoriously uncertain. Faith is placed in both legislation and litigation to bring about change.

On legislation, laws are passed for a range of reasons, ostensible and actual. Criminal laws, for example, are a public statement of society’s moral code, and are intended to regulate behaviour by threat of punishment and opprobrium. And a wide range of civil and administrative laws are an expression of social values, offering rights, entitlements and remedies that reflect – through parliament – the way we’d like our daily lives to run. The laws are largely instrumental, intended to organise society in a particular way, and to affect people’s behaviour by inducing them to act in a particular way so as, for example, to avoid breaching a contract or misleading a consumer.

To a very large extent, criminal and civil laws achieve their behavioural modification aim. Most people don’t commit crimes, and most people avoid facing liability if they can help it, for say debt or negligence. But quite apart from the operation and enforcement of these laws, there are social and cultural imperatives that push in the same direction. As social animals, it is usually not in our interests to commit crime or cause loss and harm to others. The effectiveness of legislation is bolstered significantly by the very large extent to which the laws reflect and promote prevailing social values.

It is far from obvious that anti-discrimination laws have this going for them. Anti-discrimination laws more obviously fit into a category of symbolic legislation, enacted as an aspirational statement of where we – or those in power – would like society to go.

To the limited extent that the intended ripple effect actually has effect, it is to prevent overt expression of prejudice. Most of us know now that there are things that can't be said. So people don't say things. But they still engage in prejudicial treatment.

I have had clients in my office, refused a job, refused rental accommodation, refused a service, who say to me, 'no, they didn't say it was because I'm not white', 'they didn't say it was because I am a single mother', 'they didn't say it was because I have cerebral palsy'. 'But I was there. I know why they refused me. I saw it in their eyes, I heard it in their voice, I read it in their body'.

In cases such as that, all that anti-discrimination laws have done is encourage behaviour that hides persistent prejudice. The old discrimination was overt conduct. The new discrimination is just as old, but it is now revealed: the maintenance of cultural values that entrench inequality.

Faith placed in legislation to achieve social change is largely misplaced. So too is faith placed in litigation. Australian courts have persistently failed to give effect to the beneficial aims of anti-discrimination laws, further limiting what usefulness they have. Writing for a publication to mark the 25<sup>th</sup> anniversary of the *Sex Discrimination Act*, I said that:

The High Court's anti-discrimination jurisprudence is a sad example of the failure to have regard to the aims of the legislation, and other superior courts have been little better. They have been highly technical and out of touch with the spirit of the legislation, overturning decisions of trial courts and tribunals because of disagreement over the meaning and the application of the statutory provisions without regard to aims and purpose.<sup>4</sup>

In a comment that reflects my own experience as an anti-discrimination lawyer, Gaze observes that 'some very narrow and technical distinctions have been introduced, making success more difficult for complainants and discouraging the bringing of actions'.<sup>5</sup> Thornton is typically direct: 'Courts are unresponsive to personal needs or social interests since they have permitted formalistic masks to conceal the human and social realities of the cases before them'.<sup>6</sup>

I am not proposing we abandon anti-discrimination laws as a means of providing a remedy to those who suffer loss because of discriminatory conduct – they play a part in changing behaviour, although they could work with considerably greater coverage accessibility, efficiency, and effectiveness. I am proposing consciously and explicitly moving beyond the inadequacy of anti-discrimination laws as a means of achieving social equality.

The title of my talk – 'Basic Instinct' – signals where my thoughts have been going, and should more accurately have been followed by a question mark. The question I am asking is whether anti-discrimination laws are up against something as conforming and insurmountable as an innate human predisposition to act on prejudicial assumptions based on personal attributes. If so, then the ripple effect, the trickle down, of vindicated individual complaints is as likely to bring about change as a periodic burst of a garden hose is to wash away the deserts of Australia.

I turned to other disciplines to find an answer to the nature of prejudice: to social, cultural and educational anthropology, ethnography, sociology, cognitive and cultural psychology and even, warily, to the controversial territory of socio-biology.

My inquiry is, essentially, the nature/nurture debate. Research is increasingly pointing towards an unequal combination of *both* nature *and* nurture as the basis for our being willing to engage in prejudicial distinctions because of personal attributes. It is to a limited extent a product of how we are hard-wired as animals, and *principally* a product of how we then socialise as humans. From birth, to make sense of our world, we are inclined to categorise, what we do with those categories, what value we give them, depends on our environment.

The most fundamental aspect of the human environment is that we socialise. Group identity is a fact of human psychology,<sup>7</sup> and Claude Lévi-Strauss observed that ‘the one real calamity which can afflict a human group, and prevent it from achieving fulfilment, is to be alone’.<sup>8</sup>

We organise our groups and communities as ‘society’, within which we structure social behaviour.<sup>9</sup> Essential to society’s viability are the cultural practices of local homogenisation and standardisation.<sup>10</sup> A community has a self-image, and there is limited scope for deviation from that self-image without risking disharmony.<sup>11</sup> So our tolerance of diversity operates within narrow bounds of cultural expectations<sup>12</sup> and, faced by the novel or different, we seek ‘cognitive consistency’.<sup>13</sup>

Because of this tendency to cognitive consistency, ‘we tend to empathise narrowly, to rely on simple in-group identifications’,<sup>14</sup> and the terms ‘in-group’ and ‘out-group’ now characterise psychological and anthropological discussions on social categorisation.

The classic exploration of in-group and out-group relations is the ‘Robbers Cave’ social psychology experiment.<sup>15</sup> It was conducted in 1954, the same year that William Golding published ‘Lord of the Flies’, remarkable in that the ‘Robbers Cave’ experiment effectively acted out Golding’s ‘Lord of the Flies’ scenario. The Robbers Cave experiment illustrated what we know from experience to be so: that conflict generated by competition for scarce resources will cause one group to develop unfavourable stereotypes of another. Appreciation of this is at the heart of realist conflict theory which, with social identity theory, has informed much of the US commentary on race relations in that country.<sup>16</sup>

Contemporary research continues to investigate in- and out- groups. Earlier this year, a team of psychologists reported on an experiment that suggests that not only do ‘adults tend to like individuals who are similar to themselves’, but that ‘even infants and young children prefer individuals who share their attributes or personal tastes’.<sup>17</sup> Infants as young 9 months old ‘prefer individuals who treat similar others well and [who] treat dissimilar others poorly’. At much the same time, another team of psychologists reported that children’s undoubted conceptualization of social groups results from cultural input into a natural, essentialist bias.<sup>18</sup>

Neuro-imaging researchers conclude that although ‘differential perception of race’ is consistently associated with increased activity of the amygdala in the brain, ‘neural biases to race are not innate and ... race is a social construction, learned over time’.<sup>19</sup>

This is an important point. Whatever tendencies to grouping and discernment we naturally have, ‘it does not automatically follow that they will be expressed in discriminatory action or hostility in later life ... [P]revailing social and economic conditions must be involved in determining whether groups live at peace with each other or not’.<sup>20</sup> In Lévi-Strauss’s view, whatever pre-cultural traits resulted from

biological evolution in ‘the dawn of humanity’, they were ‘consolidated and propagated by cultural factors’.<sup>21</sup>

I note here that the most extensive research into the origins of our tendency to differentiate has been done in relation to ‘race’. The research question – which has very significant political implications throughout the world – has been not simply whether humans tend to discern difference, but whether we are hardwired to value that differentiation in a particular way, specifically, whether we are naturally inclined to ethnocentrism, to seeing one’s own group as virtuous and superior, and another group as contemptible and inferior.<sup>22</sup> Sigmund Freud’s thesis – not the product of any scientific research – was that ethnocentrism is a dormant characteristic of the human species, ‘easily appealed to, easily surfacing’.<sup>23</sup>

But the answer from psychological and anthropological research is different, and consistently so. As a commentator on the psychological research said, ‘we’re not naturally racist, we’re naturally groupist’.<sup>24</sup> We are naturally inclined to categorise and differentiate, so as to make sense of our world. But that is a neutral position. Nurture steps in, and what we go on to learn – what our social and cultural context teaches us – is what values to place on the different categories.

No-one can plausibly claim a human genetic predisposition to racism, sexism or homophobia. *We learn* these values. Prejudicial discrimination is a social phenomenon, the result of human beings’ shared social structure, not of our individual human natures.<sup>25</sup>

Knowing this, I turn back to our anti-discrimination laws, and observe that the isms and phobias, prejudices and biases, that pervade Australian society are almost completely out of their reach. This would be an unremarkable observation, if anti-discrimination laws had not carried from the outset the unrealistic burden of achieving social equality, and were seen for what they are: a remedial mechanism for individual grievance.

There were commentators who sounded a warning at the time. Writing in 1975, Brian Kelsey – under whom Margaret Thornton studied at the University of NSW in its early, heady days of critical legal scholarship – was dismissive of the approach taken in the new *Racial Discrimination Act*. He wrote that it ‘exhibits no evidence of the required reappraisal of basic postulates, cultural or legal, and in fact makes no *effective* [his emphasis] provision for implementation of the [Race] Convention in Australia’.<sup>26</sup>

I cannot put it better than Kelsey did:

... serious and effectual fulfilment of [the Convention] obligations requires both an intense analysis of the underlying causes of racial discrimination and a willingness to question the basic tenets of the social framework in which it is manifested.

It demands also a willingness to develop new legal tools for the resolution of racial conflicts, as existing laws, procedures and institutions are so often the means by which established inequalities and social patterns of discrimination are preserved.

Mere tinkering with the obvious and isolated manifestations of prejudice will achieve little. Rather, it may serve only to reinforce existing patterns of

discrimination and represent a trivialization of the principles of autonomy, diversity and freedom.<sup>27</sup>

Kelsey identified an essential weakness of the legislation that Thornton went on to detail in *The Liberal Promise*: its reliance on ‘a complaints-based procedure which by definition treats only the symptoms, not causes’.<sup>28</sup> Such a procedure, Kelsey pointed out, is ‘directed towards racial discrimination in its narrowest sense ... it needs to be understood that [a]cts of individual race discrimination are only a reflection of institutional racialism, which is not a series of acts, rather a total act of one group vis-à-vis another ... It is difficult’, he said, ‘to envisage the *Racial Discrimination Act* making any significant contribution to the elimination of ... racial attitudes’.<sup>29</sup>

Almost 40 years of experience, of the *Racial Discrimination Act* and the many other laws that have followed with the same approach, vindicate Kelsey’s criticism, and those of subsequent commentators.<sup>30</sup>

To some extent, the mistaken faith in laws – by the legislators and champions of anti-discrimination legislation alike – is understandable. In the enthusiasm to embrace a new and progressive approach to society, the law’s aspirations went, and to a degree remain, too far ahead of social consciousness – and judicial practice – cutting off any real prospect of even a ripple effect, let alone causing waves.

An analysis of the gap between anti-discrimination laws and unconscious racism in the US is apt for Australia:

The shift to perceiving racism as a moral deficiency or as evil was relatively quick, and there wasn’t much time or effort given to education and promotion of a new understanding. Deep-seated notions about race ... persisted and remain very much alive today— notions of inferiority and superiority, as well as racially attributed, stereotyped characteristics, like intelligence, perseverance, morality, tendencies to violence, and sexual promiscuity. None of this is surprising in the sense that a change of this magnitude cannot be expected to be absorbed quickly.<sup>31</sup>

That explains how an ambitious policy was perhaps pushed too far and too fast onto a society that had not sufficiently come to terms with a new sensibility, at least as far as race is concerned.

Perhaps anti-discrimination laws have been better at unseating deep-seated notions about, for example, sex, age, sexuality, and physical and intellectual ability, than they have been in addressing racial prejudice. In some ways, the comparative visibility of women – and the obvious comparison that can be made between opposites in the male/female binary – means that the blunt instrument of law has had some success in changing social expectations and perceptions. Some of you may recall the simple but telling changes wrought by the sex discrimination legislation when, literally overnight, job advertisements stopped being in two sections, one for men and boys and one for women and girls.

Increased social acceptance of difference – of, say, sexuality and gender identity – can fairly be attributed to an extent to the very fact of anti-discrimination law. Even so, the actual laws were a flawed execution of policy. They have focused our attention ‘almost exclusively on overt, explicit, and formal inequality’, thereby cutting off any larger learning process.<sup>32</sup> What was needed was an exercise in confronting and addressing entrenched values. Instead we play a game of complying with and

policing prescriptive rules, and of debating about who did what to whom and why – usually some years ago by the time the matter gets to court.

The research tells us that we need to look to our culture for the influences that promote prejudice. Glaring instances are dealt with by law, assuming the law works effectively even for that limited purpose. What the law does not deal with is the deep-seated, pervasive prejudice that lingers – perhaps even thrives – out of reach of individual complaints, court procedures and rules of evidence. What is to be done?

An academic commentator asking the same question in New Zealand suggested something close to social revolution, saying that what is required is ‘a realistic breaking of the attitudes which give rise to racial discrimination, a positive war against racism itself’.<sup>33</sup> In the spirit of the wars on poverty, drugs and terrorism, such an emphatic commitment to social change would be welcome. But what might be the strategies in the war, the battles to be fought?

We know that the sources of prejudice are not innate, and the values on which we differentiate are transmitted in our culture. So the battle ground is cultural. That is far too big a subject to embark on now, but here are some thoughts on strategy.

The first step is to come to terms with what is required to win the battle. An in-group, by definition, has the power; the out-group does not. It is not possible to have this discussion without proposing a fundamental challenge to the established relationships of power in society. Those who are outside will only be brought in if those on the inside give up some of their privilege. Not material loss, but a compromise of status, a recalibration of self-worth, a new way of perceiving one’s world, requiring an unprecedented humility.

Virginia Woolf in *A Room of One’s Own* describes the enormity of what men have to lose if they were to treat women as their equal. She muses that men gain their self-confidence from their feeling of superiority over women, and observes on:

[t]he need of a patriarch ‘to conquer ... to rule, [to feel] that ... half the human race .. are by nature inferior ... Women have served all these centuries as looking glasses possessing the magic and delicious power of reflecting the figure of man at twice its natural size ... That is why Napoleon and Mussolini both insist so emphatically upon the inferiority of women, for if they were not inferior, they would cease to enlarge.’<sup>34</sup>

The battle is indeed revolutionary. Only months before he died, Martin Luther King delivered a speech titled *Where Do We Go From Here?*.<sup>35</sup> The next step, he said, in achieving racial equality is ‘restructuring the whole of American society’. ‘[M]ore and more’, he said, ‘we’ve got to begin to ask questions about the whole society’. Similarly, in his critique of the *Racial Discrimination Act*, Kelsey called for ‘recognition of the need for wholesale transformations of society itself, flowing from fundamental changes in our conception of the values upon which it rests’.<sup>36</sup>

A step must be taken by those who have the power. Research in educational anthropology shows that ‘[s]ocial actions at the local level are the direct result of ideology that has been shaped at the macro-level’. Actions of the state, as well as material conditions and cultural context, affect local practices of social inclusion and exclusion.<sup>37</sup> So the cultural shift away from prejudicial discrimination can be led from above.

Leadership, role models, exemplars: show us how it is done. That such a plea must be made now is an indictment of Australia's leaders, many of whom, over many years, have not only failed to demonstrate inclusive or even tolerant values, but have allowed, if not encouraged, exclusive, intolerant and prejudicial values.

No amount of education or litigation towards a social goal can succeed when our leaders are not leading in the same direction.

Another step must take place among the people, because each of us wields power in relation to those close to us. Research in educational anthropology also shows that socioeconomic circumstances are relatively invisible when people in daily life assess equality and inequality around them. We rely in what we know.<sup>38</sup> Quite simply, when one group does not understand how another other group lives, it reverts to stereotypes. We know the power that personal experience has to establish understanding, the power of meeting someone, of being where they have been, of feeling what they have felt, of knowing who they are. This is a rich form of 'education', an idea which is otherwise too easily reduced to posters, workshops, and lessons slotted into the school curriculum.

Education for social change is necessarily political, because its aim is to shift power. Speaking of organised education, Paulo Freire wrote that:

[it] either functions as an instrument which is used to facilitate integration of the younger generation into the logic of the present system and bring about conformity, or it becomes the practice of freedom, the means by which men and women deal critically and creatively with reality and discover how to participate in the transformation of their world.<sup>39</sup>

It is conformity with the present system of prejudicial values that needs addressing, and the discovery of new values that needs to be achieved.

Education is not only formal, it happens more broadly, in life. Having had a Jesuit education I am perhaps a bit sensitive to the claim attributed to St. Ignatius of Loyola: 'Give me the child for seven years, and I will give you the man'. Rudolf Steiner built his educational philosophy on a similar conviction: that human beings are imitative. 'For young children' he said, 'it is extremely important that the people around them do only what they should imitate. It is important that you think and feel only what children should imitate when you are in their presence'.<sup>40</sup>

This seems to be right. The research shows us that childhood is 'a vital time for the acquisition of ... attitudes and prejudices'.<sup>41</sup>

So it is not only our leaders who must lead by example. The power to educate is in all of us, and in all we do. The most pervasive means of conveying social values are in our groups: family, work, church, dance clubs, and sporting teams, and in our communities, which these days are defined largely by the shows we watch, the advertising we take notice of, and the media we engage with. These are the contemporary sites for addressing and shaping values.

Redistribution of power; leadership with humility; pervasive education; normative content in popular culture – this sounds revolutionary, or at least idealistic. And for some people it will sound morally repugnant – social engineering; a transgression on personal freedoms. But I mean to illustrate the measure of the task if we are serious about achieving social equality.



None of what I have proposed is what one would call a legal remedy. Less confrontingly than social revolution, I can suggest using aspects of the legal system that we have, at least to make inroads into social practices, and to move more firmly towards social change than individual complaints are taking us.

One legal mechanism is the imposition of a positive duty, used in the UK and recently enacted in Victoria. This requires identified entities, such as corporations or government agencies, to take prophylactic steps to identify risk and to prevent discriminatory conduct, rather than waiting for a complaint to be made. Over time, this focus on systems and processes may have some success in influencing not only behaviour but attitudes and values. Certainly it has more promise than waiting for the ripples from a court decision to arrive. But the imposition of positive duties must be informed by our understanding of the size of the task, which is to address not only workplace culture, but broader cultural influences. The duty must be more than merely to report annually on steps taken – which can bring us back to posters and workshops – but to actively promote equality through, for example, something like affirmative action.

Active promotion of equality is affirmative action, in which we can include, broadly speaking benign (that is, ‘good’), positive, or reverse discrimination, and ‘special measures’. Special measures are explicitly allowed for in international human rights treaties, such as those for the elimination of racial discrimination and of discrimination against women. They are provided for in our anti-discrimination laws, but their scope has been heavily circumscribed by the technical approach of the courts, whose liberal preference for individual rather than social justice is especially enlivened by attempts at broader redress. Nor has affirmative action ever been embraced by the state, which is unwilling to be seen to engage in action with the pejorative overtones of reverse discrimination.

Affirmative action is an approach to achieving equality that goes beyond – potentially, radically beyond – conventional anti-discrimination laws. It is intended to do more than level things out; it is intended to actively redress past inequality, so that a newly established equality is sustainable. It means that where people have been excluded, include them, *and advance them to where they would have been*. Where people have been disadvantaged, recompense them, *and put them in the position they would have been in*. Where people have been humiliated, restore their dignity, *and advance them to where they would have been*.

In the US, where a rigid commitment to formal equal treatment prevents the pendulum swinging the other way at all, the controversy around affirmative action has neutralised it, and so it is unable to redress past wrongs. In Australia recently, a public debate about quotas for women in public office has seen some women disavowing a desire for special treatment as a slight on their ability, perhaps not fully appreciating the number of women, maybe in different socio-economic circumstances, whose ability will never be recognised, simply because they are women.

Acting affirmatively – and aggressively so – is what is necessary. Martin Luther King, answering the question ‘*Where Do We Go From Here,*’ wrote, ‘A society that has done something special *against* the Negro for hundreds of years must now do something *for* him, in order to equip him to compete on a just and equal basis’.<sup>42</sup> While King had a dream that one day society would be colour blind, he didn’t see that day being reached simply by ceasing to discriminate. Steps had to be taken to create

equality. Thornton described the rationale succinctly in an Australian context, commenting on ‘the inappropriateness of equal treatment in the light of accumulated harms emanating from historic disadvantage’.<sup>43</sup>

I have illustrated much of what I have said by reference racism. A similar but different account needs to be given for other forms of stereotyping and prejudice, such as sexism, ageism, and homophobia. On sexism, Virginia Woolf in *A Room of One’s Own* made a powerful, beautiful case for special measures for women:

Intellectual freedom depends on material things. Poetry depends upon intellectual freedom. And women have always been poor, not for two hundred years merely, but from the beginning of time. Women have had less intellectual freedom than the sons of Athenian slaves. Women then, have not a dog’s chance of writing poetry.<sup>44</sup>

There is no doubt that women have come a long way since then, at least in the circles Virginia Woolf moved in. But she moved in very limited circles, and for a great many women her case for special measures still resonates.

Even though we now know that prejudice is culturally based, not hard-wired, the real prospects of stopping it are fanciful. But an understanding of natural categorisation and socialised discrimination exposes the true nature and origins of prejudice. We can’t hope that any law will eliminate prejudice, any more than we hope that criminal law will eliminate what we call crime; anti-discrimination laws will always be necessary. But clearly they need to become more sophisticated and more powerful as discrimination becomes more subtle, and prejudice remains culturally validated. Perhaps we can aim no higher than to pursue Zeno’s paradox, forever halving the distance to our goal, destined never to achieve it.

I quoted Martin Luther King speaking in support of affirmative action for African Americans in the US. You may be surprised that Dame Roma Mitchell is in the same company, speaking for women in Australia. In giving the Phillip Hughes Oration at St Michael’s Collegiate in Hobart, Dame Roma said that she thought that she and her contemporaries – aware of the prejudice against them in their chosen professions because they were women – were right ‘for our time’ in taking a ‘softly softly’ approach. But, she said in 1993, ‘that time has passed ... There is a need for affirmative action’.<sup>45</sup>

Hilary Charlesworth quoted Dame Roma on the issue in this same oration a few years ago:

I always thought that if you quietly infiltrated the system then gradually women would just be there and discrimination would go away. It became clear to me that this quiet method ... was not going to be very effective. You can’t just let things go along. You’ve got to do it by affirmative action ...<sup>46</sup>

I am delighted to be able today to take up Dame Roma Mitchell’s call to move beyond the ‘softly softly’ approach to achieving social equality.

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  - 5 Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' (2002) 26 *Melbourne University Law Review* 325, 332–3
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  - 20 Reynolds et al, 271.
  - 21 Levi-Strauss, 30.
  - 22 Robert Axelrod and Ross A. Hammond, *The Evolution of Ethnocentric Behavior*, paper to the Midwest Political Science Convention, April 3-6, 2003, Chicago, IL, April 16, 2003
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  - 27 Kelsey, 58.
  - 28 Kelsey, 83.
  - 29 Kelsey, 84.
  - 30 eg Jennifer Nielsen, *Whiteness And Anti-Discrimination Law—It's In The Design* (2008) 4 (2) *ACRAWSA e-journal* and references there to Partlett, Thornton, Pace, de Plevitz, Gaze, Moreton-Robinson. See also Pheroze Jagose, 'Section 9A of the Race Relations Act 1971: The "Tigger" of New Zealand's Race Relations Legislation' (1987) 5(4) *Auckland University Law Review* 494.
  - 31 David Kairys, 'Unconscious Racism' (2011) 83 (4) *Temple Law Review* 857, 861.
  - 32 Kairys, 861.
  - 33 Jagose, 505.
  - 34 Penguin, 2004, 40-41.

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- 35 11th Annual Southern Christian Leadership Conference 16 August 1967, Atlanta, Georgia <[http://mlk-kpp01.stanford.edu/index.php/encyclopedia/documentsentry/where\\_do\\_we\\_go\\_from\\_here\\_delivered\\_at\\_the\\_11th\\_annual\\_sclc\\_convention](http://mlk-kpp01.stanford.edu/index.php/encyclopedia/documentsentry/where_do_we_go_from_here_delivered_at_the_11th_annual_sclc_convention)>
- 36 Kelsey, 62.
- 37 Hugh Mehan, 'Commentary: Constitutive Processes of Race and Exclusion', (1996) 27(2) *Anthropology and Education Quarterly*, 270, 271-272, commenting on articles in the same volume by Macias and Brook.
- 38 Mehan.
- 39 Paulo Freire, *Pedagogy of the Oppressed* Continuum, 2000, 34.
- 40 Rudolf Steiner, *Education as a force for social change*, trans Robert F. Lathe and Nancy Parsons Whittaker, Anthroposophic Press 1997, 10.
- 41 Reynolds et al, 270.
- 42 *Where Do We Go From Here: Chaos or Community*, (1967), 95 cited in Antrosio, Jason, 2013. *Biological Anthropology and Racism*. *Living Anthropologically*, <[www.livinganthropologically.com/anthropology/biological-anthropology-racism/](http://www.livinganthropologically.com/anthropology/biological-anthropology-racism/)>.
- 43 Thornton, *The Liberal Promise*, 226.
- 44 Penguin, 2004, 125.
- 45 <[http://www.slsa.sa.gov.au/women\\_and\\_politics/mr24.htm](http://www.slsa.sa.gov.au/women_and_politics/mr24.htm)>
- 46 Susan Mitchell, *Matriarchs* (1987) pp 36, cited in Professor Hilary Charlesworth, 'Are human rights the past or the future for Australia?', Mitchell Oration, 7 July, 2007.