Don Dunstan Oration 2015.

A Leader in the Struggle for Justice

The Hon. Catherine Branson QC

Everyone of about my age has Don Dunstan memories. He seemed to arise out of nowhere in the late 1960s and change the very nature of politics. If, like me, you came from a conservative rural family there were plenty to tell you that it was not a change for the better. But for those of us just entering adulthood and interested in social issues, it seemed a liberating change, a timely break with the old politics of Tom Playford and Frank Walsh.

Don Dunstan was Premier when I joined the SA Public Service in January 1977 as a Temporary Graduate Officer (Legal). Looking back it must have been the following year that I was given the astonishing privilege of travelling with him to Canberra to what in those days was called a Premiers' Conference. Don treated me with courtesy and respect throughout the conference and if

he was discomforted to find that his legal adviser was the Research Officer to the Solicitor-General rather than the Solicitor-General, as was the case for all other delegations, he disguised it well.

Former Premier John Bannon has said of Don Dunstan that he marks the beginning of what we might call modern politics[i]. Nowhere is this more apparent than in his approach to discrimination.

One of Don Dunstan's first initiatives on being appointed Attorney General in 1965 was to secure Cabinet approval to decriminalize homosexuality. This was 8 years after the publication of the Wolfenden Report in Britain, which recommended that homosexual behavior between consenting adults in private should no longer be a criminal offence, but it preceded any actual change to English or Australian criminal law[ii]. Don then obtained the approval of the ALP Caucus to introduce the Bill.

However, before the Bill was tabled several Caucus members got cold feet. Don accepted that there was insufficient public support at that time for the reform[iii].

Attitudes were to change dramatically after 10 May 1972. Late in the evening of that day, Dr. George Duncan, a lecturer at the Adelaide Law School, was on the banks of the Torrens at a place frequented by men seeking sexual contact with other men. Dr. Duncan and two other men were attacked and thrown into the Torrens. Dr. Duncan drowned. Three police officers were questioned about their presence in the area that evening while off-duty. They later resigned from the police force and refused to answer further questions.

This crime, which remains unsolved, shocked the South Australian community and highlighted the vulnerability of gay men to vicious physical attack. The Advertiser declared its support for decriminalising homosexuality in an editorial published less than 2 months later[iv].

Legislation soon followed – but the initiative was taken, unexpectedly, not the ALP government but by Murray Hill, an LCL member of the Legislative Council. He introduced into the Upper House a private member's bill that led to the enactment of a 'consenting adults in private' defence. That bill had been drafted by Murray Hill's son, Robert Hill, then a young lawyer in the Crown Solicitor's Office[v].

This Bill was substantially amended in the Parliament and emerged with what we would now regard as significant defects – but when passed on 25 October 1972[vi] it was an important first step in addressing discrimination on the ground of sexuality.

The critical second step, the one that we are particularly focusing on this afternoon, came on 17 September 1975 when Peter Duncan, a young ALP backbencher, secured the passage of a further private members bill[vii]. This legislation made South Australia the first jurisdiction in Australia to decriminalise male homosexual acts. It ensured equality of

treatment in the criminal law between homosexual conduct and heterosexual conduct including with respect to the age of consent, a bold step at the time.

Although significant credit for this initiative must be given to Peter Duncan, without the support of Don Dunstan the bill would not have become law. It appears that it was Don who persuaded the then Attorney General, the Catholic Len King, to join him in supporting Peter Duncan's efforts and Don's leadership that encouraged other parliamentarians to support the Bill[viii].

Don Dunstan's leadership in the struggle against unjust discrimination was not limited to decriminalising homosexuality.

Early in his time as Attorney General, Don Dunstan secured the passage of Australia's first ever anti-discrimination legislation, the *Prohibition of Discrimination Act* 1966. This Act made race discrimination in circumstances such as the provision of food, drink, services and accommodation and in the termination of

employment a criminal offence. It is remembered today as achieving little, possibly because of its criminal standard of proof. However, its passage was a milestone because it introduced discrimination as a legitimate area of public policy concern in Australia.

Don Dunstan's role in the passage of Australia's first Sex Discrimination Act was also an important one – although again the first Parliamentary initiative was taken not by the ALP but by Dr. Tonkin, the conservative member for Bragg. Dr. Tonkin had witnessed the difficulties faced by his widowed mother in trying to provide for her family. In 1973 Dr. Tonkin introduced into the Parliament a private members Bill for a Sex Discrimination Act.

However, the Bill that eventually passed was not Dr. Tonkin's Bill but rather Don Dunstan's. As Premier he introduced a Government Bill in June 1975 modeled in large part on the Bill introduced into the United Kingdom Parliament earlier that year.

We are now aware of the deficiencies of this Act and of early discrimination legislation generally. However, we can be proud that in 1975 our State once again led the way in legislating for the advancement of women.

As this brief review of the early history of our anti-discrimination legislation shows, Don Dunstan was a leader in this important struggle for justice.

I propose now to turn from Don Dunstan's legacy and address more contemporary issues concerning discrimination.

Our focus this afternoon on the 40th anniversary of the decriminalization of homosexuality suggests same-sex marriage as a relevant contemporary issue.

Despite the public controversy about same-sex marriage, I don't see it, of itself, as a challenging issue any longer. Rather, same-sex marriage seems to me to be an equality measure whose time has come. We know that the Commonwealth Parliament has the power

to authorize same sex marriage[ix]. It is likely to do so, probably following a plebiscite, after the next federal election.

The challenging issues, I believe, will arise from the sense of threat that organised religion will feel as a result of the passage of this legislation. Indeed, only last week the Catholic Archbishop of Sydney delivered a lecture entitled '*Democracy and the Right and Limits of Religion and Conscience in Contemporary Australia (Should a Baker be Forced to Bake Cakes for Same Sex Weddings)*'[x].

We are bound to see many more claims that people with religious objections should not be compelled to participate in acts that might be said to validate or celebrate same-sex marriage.

Disputes of this kind will be part of a broader struggle by organized religion against what it believes are unjustifiable intrusions by discrimination law into its spheres of operation. The kinds of arguments that are likely to be advanced can be identified from submissions

made to the Australian Law Reform Commission during its current ‘Freedom’ Inquiry.

These submissions advance two key arguments.

The first is that faith-based organisations should have the right to select staff who fit with the values and mission of the organisation. They argue that selection on the basis of ‘mission-fit’ (i.e. by reference to rules of inclusion rather than exclusion) is not discrimination.

I do not propose here to debate the extent to which faith-based organisations should be able to recruit by reference to ‘mission-fit’. To some extent it is plain that they must. My immediate concern is with the suggested distinction between ‘mission-fit’ and discrimination, with the suggested difference between rules of inclusion and rules of exclusion.

Let me illustrate the point that I wish to make with a short story. When I decided to leave the position of Crown Solicitor to begin private practice as a barrister I applied to join a set of barristers' chambers. All existing members of the chambers were male. I later earned that my application had caused considerable discomfort to a number of them. It was not that they disliked me. It was not that they objected to female barristers. It was just that they wanted to maintain the existing values and culture of the chambers. Those values and that culture, they believed, were inherently male in character. For this reason they wanted all of their colleagues to remain male. In short, they believed that I would not bring 'mission-fit' to the chambers.

I tell this story to illustrate that, except perhaps in a rare case, 'mission-fit' is not the antithesis of discrimination. Rather, the search for 'mission-fit' is discrimination. Rules of inclusion are not something different from rules of exclusion. Rather they are rules of exclusion looked at from a different angle.

The second key argument being advanced by faith-based organisations is that the definition of 'discrimination' in Commonwealth laws should be amended to exclude '*anything reasonably capable of being considered appropriate and adapted to the protection, advancement or exercise of another human right*'[xi]. The human right at the forefront of the mind of those advancing this submission is plainly freedom of religion.

This proposal is astonishingly broad. It overlooks the powerful reasons why the International Covenant on Civil and Political Rights acknowledges only five absolute rights. Rights inevitably come into conflict and, where they do, a balance between them must be found.

The contention, in effect, that freedom of religion should be allowed to trump all other rights cannot be accepted. While everyone is entitled to believe what he or she wishes, there is no absolute right to act out or manifest all that one believes. This is recognized by article 18 of the ICCPR. It is not hard to see

why this is so. After the American Civil War there were religious congregations for whom white supremacy was a fundamental tenet. Around the world today people are justifying by reference to religious beliefs practices that in the Australian context can only be seen as barbaric.

The truth is that every society has social and other values that it holds dear. Precisely what they are and how they are to be protected will change over time – but no modern society, and certainly not one within an ostensibly secular state, is likely to be willing to abdicate to religion the right completely to disregard those values within its own areas of operation.

What is required is a careful balancing of the various rights involved – a balancing that is respectful of religious freedom but respectful also of other human rights such as the right not to be discriminated against.

The second contemporary issue that I wish to address is gender equality. I have chosen this area not only because of its inherent

importance but because it is a good proxy for the consideration of discrimination issues more broadly.

While sex discrimination legislation has achieved a lot, the achievement of true equality between men and women continues to bedevil us.

The principal aim of the early sex discrimination legislation was to ensure that women were treated in the same way that men were treated. That was the injustice that women had experienced - being excluded from certain types of work simply because they were female[xii].

It is therefore unsurprising that the legislation did not ensure substantive equality for women. It principally assisted women who for one reason or another were not filling the traditionally female roles of bearing and nurturing children and caring for family members.

This illustrates what we know to be true – if you treat equally those who in a significant respect are not equal, you will not see equality of outcomes. Although efforts have been made more recently to address the difficulties that women face in accommodating work and family responsibilities it is plain that those efforts have not been sufficient to achieve an even playing field.

You do not need me to rehearse the sorry statistics. Their content is adequately conveyed by the recent observation of the former Sex Discrimination Commissioner that fewer big Australian companies are currently run by women than by men called Peter.

This is the outcome after we have removed formal barriers to women entering paid work, after we have enacted laws proscribing sex discrimination and laws providing for maternity leave and subsidized childcare and as we are starting to attend to the workplace consequences of domestic violence.

It is now recognized that working-women are a national productivity imperative. They should not face serious financial and other penalties for also undertaking the caring work that is vital to our society.

So what is to be done?

We tend to think of the fight against discrimination as a fight for equality. In one sense, of course, it is but more fundamentally it is a fight for justice.[xiii]

We accept in many areas that the national interest is advanced by laws that impact differently on those whose circumstances are not the same. Few object to the rich and the poor paying income tax calculated at different rates; few complain that veterans and their dependents enjoy favourable medical and social security benefits when compared with the general population; few argue against businesses being required to make reasonable adjustments to employ persons with disability. We see the justice of these measures even though they depart from strict equality.

We need to be alert to the need for other departures from strict equality in the interests of justice. Others will be better equipped than me to think of the full range of possible initiatives so far as working women are concerned.

We need also to remember that as society changes perceptions about what constitutes justice will also change.

One important change in our society is the increasing involvement of men in their children's upbringing. Some are becoming primary caregivers but more are truly sharing responsibility with their partners or former partners. Some, perhaps many, men would be happy to play a larger role.

Let me tell another personal story. I married, for the first time, at about the same time as one of my female friend. Neither of our households had much money. The four of us decided that a capital expenditure that we could ill afford could be avoided if, rather than

buying washing machines, we used the local Laundromat. It was agreed that for six months my friend and I would meet each Saturday morning at the Laundromat and that the men would do the same over the following six months. What happened? My friend and I did as agreed and precisely six months and one week later each household took possession of a washing machine? The point of this story is, of course, that priorities and outcomes change when problems once seen as women's problems become men's problems.

If we really want gender equality we must stop thinking of work-life balance as a women's issue. We must stop thinking of family responsibilities as women's responsibilities. We need to learn to value workplace leadership and caring equally; to think that managing a business or practice and managing a household full of other human beings are equally valid and valuable occupations[xiv].

If we want justice for women in the workplace what we need is significant numbers of men

making the case that justice for them requires that they be able to spend time caring for their families without significant cost to their careers and to their long-term financial security. Once work-life balance is seen as a men's issue then, and I suspect only then, will we see the sorts of changes that will ensure justice - for both men and for women.

I will close by drawing on a theme that I have already hinted at. Anti-discrimination legislation is one tool at our disposal in the fight for justice but, as our fight for gender equality has shown, there is a limit to what legislation can achieve.

At the heart of all discrimination legislation is a search for justice; a recognition that every individual has the right to be judged on his or her individual merits and not by reference to stereotypes. But none of us is immune from the influence of stereotypes. Stereotypes tend to reflect our perceptions, in many cases unconscious perceptions, of who constitutes the 'we' in a particular context, and who is 'them', the 'outsiders'. Over time some groups

will move from being ‘outsiders’ to being part of the mainstream – as has largely happened with women in senior employment.

It is imperative if we are to maintain a socially just Australia that we learn to enlarge the ‘we’ and embrace a more flexible view of what it is to be Australian. We must avoid what in Norway has been described as ‘generous betrayal’[xv]: anti-discrimination laws, social benefits and well-intentioned rhetoric serving as stand-ins for more meaningful acceptance.

In Australia to tend to think of ourselves as generous, fair-minded and democratic. No doubt this is in large measure true – but, despite some evidence of a growing openness to change, our national ethos, our national mythology, has focused on the heroic white male and been touched with more than a little misogyny, xenophobia and homophobia.

I was impressed by an article that I read recently written by Stan Grant following the change of leadership of the Liberal Party[xvi]. Let me read to you part of what he said. After referring to the serious and entrenched

disadvantage suffered by Indigenous Australians, Stan concluded:

> *"All of the words, the ideals, the leadership, still we fall short. I know it is complicated, that the web of our past entangles us still. Yet I also know, deep down I know, that if we wanted to cure it, we would cure it, just like we cured polio. The great Scottish poet Robbie Burns said: "if I could write all the songs, I would not care who wrote the laws". Politicians write the laws and the laws are inadequate. The song: that is ours and only we a people - beyond prime ministers - can complete it."*

The insight captured in the words of Robbie Burns quoted by Stan Grant is relevant to the struggle against all unjust discrimination. Stan is right. If we are to win that struggle, we need to change the nature of the songs that we sing in Australia. We need an Australian culture that celebrates diversity in all of its manifestations. While politicians must play their part, this is really up to us. The future lies in our hands.

[i] Memories of the Dunstan Decade, www.abc.net.au/7.39/content/2011/s3284837.htm

[ii] This had to await the passage of the Sexual Offences Act 1967 (UK).

[iii] Dino Hodge: *Don Dunstan, Intimacy & Liberty, a political biography*, at p.141. Wakefield Press 2014.

[iv] On 1 July 1972.

[v] Confirmed by Robert Hill in a private conversation with me in 2014.

[vi] Dino Hodge at p.150.

[vii] Criminal Law (Sexual Offences) Amendment Act 1975.

[viii] Dino Hodge at p.154.

[ix] Commonwealth of Australia v Australian Capital Territory [2013] HCA 55.

[x] The 2015 Acton Lecture delivered on Wednesday, 14 October 2015. See www.cis.org.au

[xi] Traditional Rights and Freedoms – Encroachment by Commonwealth Laws, ALRC Interim Report 127) at paragraph 4.61.

[xii] For more details see The Mitchell Oration 1995, '*Equal Opportunity: The Next Twenty Years*'. The Hon Justice Catherine Branson, 6 October, 1995.

[xiii] See Julius Stone, *Justice in the Slough of Equality* (1978) Vol 29 The Hastings Law Journal 995.

[xiv] See *Unfinished Business: Women Men Work Family*, Anne-Marie Slaughter, PenguinRandomHouse, September 2015.

[xv] Unni Wikan cited in *Norway: The Two Faces of Extremism*, Hugh Eakin, The New York Review of Books March 5-18, 2015. Volume LXII, Number 4 at page 57.

[xvi] The Guardian (15/9/2015)