



# RESEARCH REPORT SNAPSHOT

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## The Limits of Australian Anti-Discrimination Law

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Anti-discrimination law affects how Australians run their businesses, educate their children, consume goods and services, and speak their minds. It has spurred consequential and far-reaching changes in each of these spheres.

Yet the first Commonwealth anti-discrimination statute was passed only in 1975, and some new Commonwealth anti-discrimination protections (ADPs) are only a decade old, e.g. the *Age Discrimination Act* 2004.

The growth of anti-discrimination law has been driven by the rise of identity politics (including the institutionalisation of an identity politics industry), rising expectations of what degree of protection anti-discrimination law should extend to covered classes, and the repeated pattern in which legislators frame ADP statutes in general language which is then interpreted broadly by judges and bureaucracies.

Furthermore, ADP has a poor track record in helping the populations it is designed to protect. The wage gap between men and women, for example, narrowed dramatically prior to the passage of the *Sex Discrimination Act* 1983 and plateaued after it. In the case of disability discrimination laws, they have been shown to actually *reduce* workforce participation among the disabled both in Australia and abroad.

The relatively novel rights created by ADP often come into conflict with older, more established legal rights, like the

right to property, freedom of association, and freedom of speech. In the case of the *Fair Work Act* 2009's ADPs, the traditional burden of proof is reversed and rests with the respondent.

Since the passage of the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act* 2013 (Cth), discrimination on the basis of sexual orientation, gender identity and intersex status has been banned under Commonwealth law.

This has coincided with increasing likelihood that Australia will follow the example of the United States, New Zealand, and more than a dozen other countries and extend the definition of marriage to same-sex couples.

Thus, the question has arisen of whether vendors with conscience objections to gay marriage will be allowed to decline to participate in such ceremonies, or whether that refusal of service constitutes illegal discrimination.

These developments, plus longstanding inconsistencies between various jurisdictions, raise the possibility of consolidation and harmonisation of state and Commonwealth ADP in the near future. Such reforms have already been proposed by a Commonwealth Attorney General twice in the past five years.

## Conclusions

Too often in their 50-year history, anti-discrimination laws have been expanded not for any logical reason, much less any evidence-based reason, but simply because a minority seemed to be 'next' or had 'come of age' as a pressure group.

Too rarely have people stopped to ask whether anti-discrimination law is really the best means for accomplishing some new political goal, especially given that, as this paper has shown, anti-discrimination laws may not even be accomplishing the goals for which they were expressly designed any more.

## Proposals

If changes to ADP are pursued, reformers should reflect on the failures of the past 40 years of anti-discrimination law and avoid similar failures in the future by framing ADP provisions as narrowly as possible.

ADP should be targeted at specific policy objectives rather than vague symbolic aspirations. Finally, we should leave as much space as possible for civil society to work out more lasting solutions to thorny social conflicts than would be possible through the clumsy and coercive means of legislation and litigation.

As Australia deliberates how anti-discrimination law should evolve in response to changes in the legal definition of marriage, or the increasingly confident transgender rights movement, or any of the new social challenges posed by diversity in the age of multiculturalism, we should keep in mind exactly what goals we want to accomplish.

No anti-discrimination laws should be added or expanded unless there is good reason to think the expansion will accomplish some specific goal—and unless there is reason to doubt that Australian citizens operating within civil society will find solutions on their own.

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