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Thoughts on race, discrimination, law, and justice

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Introduction

For many years I was deciding the merits of racial discrimination claims, as a judicial member of what was then the New South Wales Administrative Decisions Tribunal (ADT), now the New South Wales Civil and Administrative Tribunal (NCAT).[1]

The ADT had – as NCAT now has – jurisdiction to decide applications made under the New South Wales *Anti-Discrimination Act*.[2] People complain to the Anti-Discrimination Board (ADB) about …

… and that's the point of this essay. Fundamentally, what people were complaining to the ADB about was not what I was deciding in the ADT. People complained about the way they were treated, while I decided how, if at all, the *Anti-Discrimination Act* responded to the way they were treated. The story the person wanted to tell was rarely the story I needed to hear.

In this essay I reflect on my experience of the gap between people's actual experience of racial discrimination, and the law that is supposed to protect them.[3] I look back on my experience as a decision-maker, when I giving effect to the law as a response to what people had experienced. This is not a technical critique

of anti-discrimination laws; there's no shortage of commentary on the problems with the way they work.[4] Rather, I'm looking at the laws and the decisions I made from a critical perspective that I became aware of only after I made these and other decisions.

Briefly, anti-discrimination laws prohibit prejudiced conduct, 'direct' discrimination: one person's treatment of another must not be on the basis of a protected attribute, such as race. This is an expression of formal equality: everyone should be treated the same, without regard to an attribute such as a person's race, sex, disability or age.[5]

The way our discrimination laws determine if direct discrimination has happened is to make a comparison: how was someone not of that race (or sex or disability or age) treated in the same circumstances? If they were or would have been treated in the same way: no discrimination; if they were or would have been treated less favourably: unlawful discrimination.

Mr Quach's case

In *Quach v J Robins (Chippendale) Pty Ltd*,[6] Mr Quach was a factory worker in Sydney, and in his duties he used a 'tack' knife to stick soles onto shoes. He had been born in Vietnam, and migrated to Australia when he was 19; for purposes of the *Anti-Discrimination Act*,[7] his 'race' was Vietnamese. In an argument with a fellow worker, Mr Quach pulled out his tack knife. He was dismissed from employment – ostensibly because he had produced the tack knife during the argument – and he complained that the dismissal was racial discrimination.

Mr Quach had to show that a reason for his dismissal was that he was Vietnamese, but he couldn't point to any conduct by his employer that explicitly referred to his race. Instead, he argued that his race put him in a position where he acted in a way that caused him to be dismissed. The *Anti-Discrimination Act* allows for 'race' to extend to 'characteristics that appertain generally' to that race, and Mr Quach argued that a characteristic of Vietnamese people is that they are short. He argued that he pulled a knife because he was frightened, he was frightened because he was short, and he was short because he was Vietnamese.

We decided that a short, *non*-Vietnamese man who pulled a knife in the same circumstances would have been dismissed, so it was Mr Quach's pulling the knife, not his race, that was the reason for his dismissal. He lost his case.

Ms Riley's case

In *Riley v Western College of Adult Education*,[8] Ms Riley was an Aboriginal woman employed by the Western College of Adult Education (WCAE) as the Aboriginal Programs Manager. She complained to the Anti-Discrimination Board that way she treated was racial discrimination in employment.[9]

This is only some of evidence, that was accepted, about the racially-charged nature of Ms Riley's employment; she was told that money was 'chucked' at her when seeking funds for Aboriginal courses; that her partner 'looks like he comes from a good Aboriginal family'; that it was 'trendy' to identify as Aboriginal; that 'there is no such thing as discrimination, racial or otherwise'; that Aboriginal people only do courses in order to be paid to do so, rather than to improve themselves; that Aboriginal programs for which she had responsibility were too problematic and are unmanageable; that historical context for the offensiveness of comments regarding

Aboriginal people was all history; that Aboriginal people should be treated the same as everybody else; that she was 'over-sensitive' or had misinterpreted race-related comments.[10]

We had a very specific task; the 'direct discrimination' question the *Anti-Discrimination Act* asks whether these things were said to Ms Riley because she was Aboriginal: 'were the same things said – or would they have been said – to a person who was not Aboriginal, in the same circumstances?'.[11] If the answer is 'yes', then there was no racial discrimination, because the comparison shows that race was not the reason for the conduct. And that's just what we decided:[12]

> We cannot be satisfied that a person who was not Aboriginal would have been treated differently in the same circumstances from the way Ms Riley was treated. [What was said] could in our view equally have been directed to a person who was not Aboriginal who was in the same circumstances.

Ms Riley lost her case.

A critical lens

As a judicial member of the ADT I understood the *Anti-Discrimination Act* very well, as a complex written test for when discrimination has occurred. In these two cases, I was a technician; I navigated the complexity of the Act, deciding facts, applying law to the facts, and making a decision: unlawful discrimination or not.

I look back at those decisions through a critical lens that I was unaware of the time, a lens that exposes embedded assumptions in the design of the *Anti-Discrimination Act*.

The comparator against which I assessed the treatment of Mr Quach and Ms Riley was not – could not have been – some neutral, disembodied idea; the comparator stood for something. As Margaret Thornton explains it, 'Anti-discrimination legislation accords a right of action to individuals who allege less favourable treatment by virtue of class membership [eg race, sex, age, disability etc] vis-à-vis a real or hypothetical *member of a benchmark class*'.[13] That 'benchmark' is 'a white, Anglo-Celtic, heterosexual male … of physical and intellectual normalcy ... mainstream Christian beliefs, and … within the middle-to-the-right of the political spectrum';[14] that is, after all, a fair description of the people who conceived and designed the comparative test for direct discrimination. Against a member of the benchmark class, anyone else is Other.[15]

To adapt Thornton's analysis of a sex discrimination complaint to a complaint of racial discrimination, a person with a racial identity needs to be imagined as a white person in order to prove unlawful discrimination.[17] When the comparative exercise makes us ask how would a person who was not of their

race have been treated in the same circumstances, we are asking how a white person would have been treated; only if a white person would have been treated in the same way can the person succeed in their complaint. Because the white comparator is the benchmark, the person with a racial identity is rendered absent, and their own story becomes 'ineffable within the legal system'.[18]

I now see that when we took Mr Quach's race out of the equation, we did not leave him without a race, we gave him ours. We imagined how someone like us would have been treated in the same circumstances. But by removing Mr Quach's being Vietnamese, we were fundamentally altering the circumstances in which the conduct occurred. His being Vietnamese was part of the circumstances in which the conduct occurred, but we effaced that reality when we substituted the non-Vietnamese comparator.

What Mr Quach wanted to be heard saying was not only, 'I was frightened because I was a short man and he was a big man', but that 'I was short *Vietnamese* man and he was a big *white* man'. Mr Quach's being Vietnamese mattered as much or more in the circumstances than his not being tall. If we'd asked, we might have learnt what being Vietnamese actually meant to Mr Quach. For the first 20 years of his life he survived the US-Vietnam War and its aftermath. We don't know what he saw, what he suffered, what he lost. We don't know how he came to Australia, or what he went through to establish himself here. We don't know how – in light of all that – he presented in the work place, how he was seen and understood. Being Vietnamese can manifest in dress, language, accent, stature, behaviours, attitudes, size and even, perhaps, responses to big white men.

There is much that might have explained why, in that moment of being confronted by a big white man, Mr Quach, *as a Vietnamese man*, reached for his knife. But there is no room in the *Anti-Discrimination Act* to explore that. It is hidden, lost, legally irrelevant, when race is treated as simply a fact that can be removed from the equation.

In Ms Riley's case, when we asked how a person who was not Aboriginal would have been treated 'in the same circumstances', there was – differently from Mr Quach's case – evidence of what Ms Riley's race contributed to the circumstances. We knew that Ms Riley was the Aboriginal

Programs Manager; she 'challenged the attitudes, assumptions and in some cases the established patterns of the workplace', and she 'was a strong advocate for Aboriginal people … articulate, passionate, and politically aware'. The circumstances of her treatment included that Ms Riley's approach to her work was confronting for her co-workers, and they reacted defensively to her manner and the heightened awareness of Aboriginal issues which she introduced to the workplace.[19]

Despite this, we decided that what was said to Ms Riley was as likely to have been said to a non-Aboriginal person in the s*ame circumstances.*[20] How could we so simply separate a person's Aboriginality from their passionate

advocacy for Aboriginal rights and respect? How could we so confidently assert that a white person would, even could, be in the same circumstances, as an articulate, forceful, provocative and discomforting Aboriginal Programs Manager or, that if they were, they would be treated in the same way as an Aboriginal person?

We did so because direct discrimination laws, reinforced by High Court authority,[21] do not protect a person against decisions based on *manifestations* of their race; the laws protect a person's race, but not their own experience of being of that race.[22] We quite simply did not incorporate into our reasoning any regard for a necessary connection between Ms Riley's race and the circumstances she was in. We separated her race from the circumstances.

In the decision is a sort of apologia, an acknowledgement of the unreality of that reasoning. The written decision recognises that in the absence of an unlikely explicit causal statement (such as 'I'm saying this because you're Aboriginal') a person will 'invoke their own perception, their own sense of what the ground was for that conduct'.[23] The written decision goes as far as to describe the reality, for the person, of the racial conduct:[24]

> When a complainant was present, and participated in the dynamics of a dealing or a relationship, they have an understanding of those dynamics which may, quite reasonably give them a sense of the ground for the conduct. This might come from tone of voice or inflection, body language, eye movement - indeed any combination of the senses with which humans read, assess and interpret their environment.

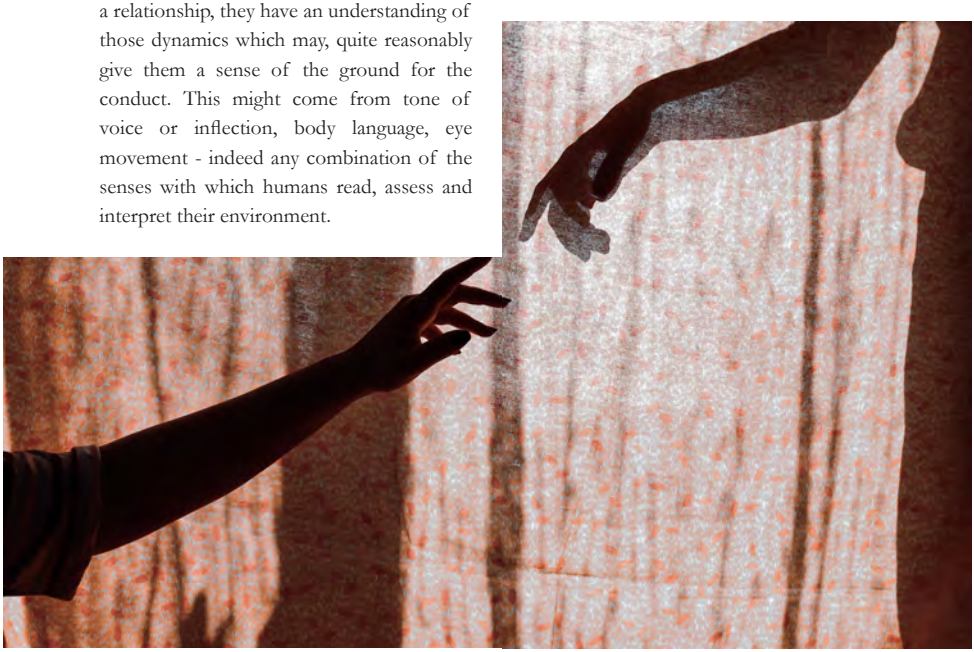
We had before us evidence of Ms Riley's 'strong sense that the conduct occurred because she is Aboriginal, and that a person who was not Aboriginal would not have been treated in the same way'; indeed, the written decision acknowledged that[25]

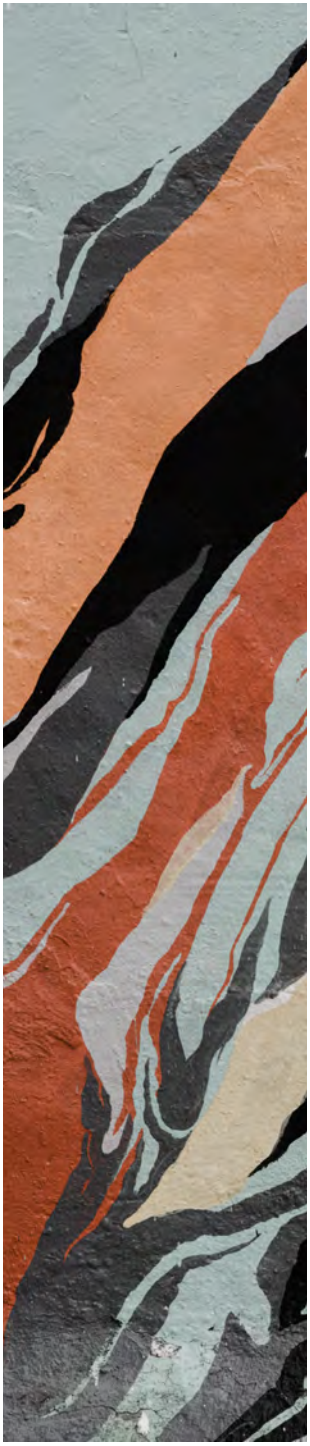
> [t]hat feeling, or sense, of why someone acts is a valid one and should not be disregarded. Often it is all that a person is able to rely on when claiming that conduct was on the ground of race.

But Ms Riley's reality came up against the rationality of the legal proceedings:[26]

> The issue for a complainant is whether their belief, based on such an experience, can be conveyed in the *formal setting of a Tribunal hearing*, in terms which satisfy rules of procedural fairness if not evidence, and *so as to satisfy the technical requirements of the legislation*.

We disregarded Ms Riley's feeling, her sense, of what happened, at the same time that we acknowledged it was 'valid and not to be disregarded'.





Legal form and personal reality

Both Mr Quach and Ms Riley came to the ADT convinced that they had been treated unfavourably because of their race, and they lost. Clearly there was a gap between what they knew to be true, and what they had to prove to get a remedy. Only weeks before the decision in Ms Riley's case I had written in another racial discrimination decision:

> …what is clear to a participant in events is not necessarily what can be established on the evidence, or even on inferences based on the evidence, and what is reasonable for a person affected by conduct to assume to be the ground for conduct is not necessarily what the evidence establishes.[27]

I invoked Margaret Thornton's observation that 'if the manifold requirements of legal form have not been satisfied, discrimination will be found not to have occurred'.[28] Giving effect to the design and terms of the *Anti-Discrimination Act*, the decisions in *Quach* and *Riley* accepted that legal form can preclude consideration of a person's actual experience.

I wonder now whether I could have approached these cases differently. Could I have had regard to the valid subjective perceptions of a non-white person? Could I have applied the *Anti-Discrimination Act* in a way that accommodated the full story of a person's race, of what it means to them, and of how it affected and perhaps even defined the situation they found themselves in?

In Ms Riley's case, it was a highly artificial exercise to compare the treatment of an articulate, forceful, provocative Aboriginal female manager with the likely treatment, in the same circumstances, of a hypothetical articulate, forceful, provocative *non*-Aboriginal female manager. Removing Ms Riley's Aboriginality should have been seen to change fundamentally the circumstances of the comparison. Ms Riley's story told us that her Aboriginality was not simply a physical attribute to be subtracted from the scenario; her Aboriginality carried with it a 'challenge to attitudes, assumptions and established patterns of the workplace, and articulate, passionate, and politically aware advocacy for Aboriginal people'. It should not have been possible to remove her 'Aboriginality' and pretend that the circumstances could be the same for a white person; her 'Aboriginality' was integral to the circumstances in which she was treated.

Similarly, in Mr Quach's case, it was a highly artificial exercise to compare the response of a small Vietnamese man to the aggression of a tall white man with the likely response, in the same circumstances, of a hypothetical small *non*-Vietnamese man. To remove Mr Quach's being Vietnamese may have fundamentally affected the circumstances of the comparison. Mr Quach might have told a story – he didn't have the opportunity – that being Vietnamese was not simply a physical attribute to be subtracted from the scenario. Had he been able to tell his story it may have been apparent that his

being Vietnamese was integral to the circumstances and that, absent his race, the circumstances simply could not have been the same.

Conclusion

Racial identity is coming out in Australia. Most strongly, recently, there has been a surge in Indigenous pride, and a growing confidence that the Other is staking a visible and legitimate claim against the benchmark. This seems to demand that we are open and honest about what Minow calls the 'unstated points of comparison necessary to the idea of difference'[29] that are embedded in the *Anti-Discrimination Act*. If we do, Minow says,[30]

> … we will then examine the relationships between people who have and people who lack the power to assign the label of difference. If we explore the environmental context that makes some trait stand out and some people seem not to fit in, we will have the opportunity to reconsider how and for what ends we construct and manage the environment. Then difference will no longer seem empirically discoverable, consisting of traits inherent in the 'different person'. Instead, perceptions of difference can become clues to broader problems of social policy and human responsibility.

But we deny our selves this opportunity for as long as the 'benchmark' points of comparison in the *Anti-Discrimination Act* remain unstated. The Act is based on the benchmark idea that 'race' is something that Other people have, and that it is rational to remove it from a scenario to see if things would have been different. In that design – in that world view – a person's race does not *add* to an understanding of what happened; its hypothetical *absence* is used to explain what happened; in other words, how would we have been treated? The story of people such as Mr Quach and Ms Riley become, as Thornton said, 'ineffable within the legal system'.