A Creative Interpretation

A comparative study of statutory discrimination law

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Declaration

This thesis contains no material which has been accepted for the award of any other degree or diploma in any university. To the best of the author's knowledge, it contains no material previously published or written by another person, except where due reference is made in the text.

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Abstract

This thesis explores the judiciary's role in achieving substantive equality utilising statutory discrimination law. The normative literature almost uniformly suggests that a substantive approach should be adopted. But the extent to which courts have or are likely to interpret discrimination law consistent with a substantive purpose has been underexplored. I tackle this problem by exploring the idea that there needs to be a 'creative' interpretation of discrimination law to achieve substantive results. In this thesis, I fill this gap by asking: Is a 'creative' interpretation of statutory discrimination law consistent with the institutional role of the judiciary?

In my thesis, I adopt a comparative approach to the interpretation of non-discrimination rights by considering the interpretation of statutory discrimination law in Australia, Canada and the United Kingdom. These jurisdictions were chosen because each prohibits discrimination on the basis of a similar list of attributes, in a similar manner and in similar areas. However, in each case, the aims and purpose of statutory discrimination law has been understood differently. I explore and explain this difference by considering the approaches that have been taken with respect to three key controversies in discrimination law: who should be protected by discrimination law; what protection is provided (or what is unlawful discrimination); and how far can discrimination law 'transform' society. Through this thesis I establish that the different interpretations are not explained by different statutory schemes but by the different interpretive choices made by the judiciary in each jurisdiction.

I explain this difference by focusing on the different ways in which the appropriate role for the courts in rights review and norm elaboration is conceived in Australia, Canada and the United Kingdom. I ultimately argue that without an accepted role for the courts in rights review, statutory discrimination law will not be interpreted 'creatively' to achieve substantive results.

List of Abbreviations

AMC	Australian Medical Council
BMA	British Medical Association
BME	Black and Minority Ethnic
CBSA	Canadian Border Services Agency
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CSDPA	Chronically Sick and Disabled Persons Act
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EU	European Union
HRA	Human Rights Act 1998 (UK)
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
PCP	Provision, Criterion or Practice

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1 Introduction

When the first statutes prohibiting discrimination were introduced in the United Kingdom, the architects of that legislation, Lester and Bindman, emphasised that the response of the judiciary would be critical to the success of discrimination law.[1] They argued that, given the previous failures of the common law to tackle discrimination, the new *Race Relations Act* required courts to act as 'the creative interpreters of legislative intent.'[2] In the decades since, in many countries, including Australia, Canada and the United Kingdom, the reach of discrimination law has expanded. Discrimination law now covers a variety of attributes, in a wide variety of areas of public life, and prohibits a broad array of discriminatory behaviours, both intentional and unintentional. However, whether the courts are operating as 'creative interpreters of legislative intent' is still questionable.

It is because of the previous failures of the courts that a creative interpretation of discrimination law is needed. But there are still two problems left to address. First, determining what a 'creative' interpretation of legislative intent of discrimination law constitutes. And second, whether, in the context of human rights legislation, a 'creative' interpretation challenges the traditional institutional role of the judiciary. There is now a significant body of case law that can be used to consider the approach to discrimination law that has been adopted by courts in Australia, Canada and the United Kingdom. Have courts operated as the 'creative' interpreters of legislative intent? Or are the previous inadequacies of the common law's approach to discrimination still apparent in the decisions interpreting the meaning of the provisions in discrimination legislation? A brief assessment of the case law shows significant differences in approach, despite each jurisdiction having similar legislative frameworks in place. In Canada, the approaches taken to matters of discrimination and equality by the courts are cited as some of the better examples of a substantive and positive approach to questions of discrimination.[3] In contrast, the courts' approach in the United Kingdom and Australia has been criticised as being overly formal and narrow.[4] This means that the courts continue to fail to appropriately grapple with the underlying concepts and purpose of prohibitions on discrimination.

[1] Anthony Lester and Geoffrey Bindman, *Race and Law* (Longman, 1972) 71.
[2] Ibid.
[3] Belinda Smith, 'Rethinking the Sex Discrimination Act: Does Canada's Experience Suggest We Should Give Our Judges a Greater Role?' in Margaret Thornton (ed), *Sex Discrimination in Uncertain Times* (ANU Press, 2010) 235, 244–245.
[4] See for example: Margaret Thornton, 'Disabling Discrimination Legislation: The High Court and Judicial Activism' (2009) 15(1) *Australian Journal of Human Rights* 1, 6; Colm O'Cinneide, 'Fumbling Towards Coherence: The Slow Evolution of Equality and Anti-Discrimination Law in Britain' (2005) 54(1) *Northern Ireland Legal Quarterly* 57, 80–81.

In this thesis, I will consider the extent to which the support for the Canadian approach and the criticisms of the Australian and British jurisprudence are warranted. I also seek to interrogate the reasons for this divergence. Why has the Canadian judiciary been able to take a more substantive or creative approach to matters of discrimination while the Australian and British judiciaries have been more resistant and limited in exploring the substance underlying modern discrimination prohibitions?

1.1 Question

The overarching research question this thesis considers is the following: Is a creative interpretation of statutory discrimination law consistent with the institutional role of the judiciary in Australia, Canada or the United Kingdom? This thesis focuses specifically on the judiciary's approach to discrimination prohibited by statute.[5] To answer my research question, I focus on two interrelated sub-questions. First, what is a 'creative' interpretation of legislative intent with respect to discrimination law? Second, is the interpretation of discrimination law in Australia, Canada and the United Kingdom consistent with a 'creative' interpretation of legislative intent?

Answering these sub-questions is important to understanding the overarching research question. With respect to the first question, it is necessary to outline what interpretations, however creative, are defensible given the legislative language, context and normative literature. The second is necessary to identify and explain how the jurisprudence that has emerged differs. Finally, to understand *how* courts reach the conclusions that they do, one must consider the constitutional, institutional and historical context which allows for, or limits an expansive role in the development of newer forms of rights protection.

1.2 Context

Human rights scholarship has a tendency to fall into two opposing camps. On the one hand, much of the human rights discourse contends that constitutional bills of rights and strong rights enforcement are the best way to secure rights.[6] In this discourse, the legislature and the executive are seen as a key impediment to human rights. It is for the courts to correct abuses of legislative

[5] For example, discrimination prohibited by the *Racial Discrimination Act 1975*(Cth), the *Equality Act 2010* (UK) and the *Canadian Human Rights Act*, RSC 1985, c H-6. This excludes from primary consideration, discrimination prohibited by constitutions. The constitutional context may have a bearing on the interpretation of the statutory prohibitions and will be considered, but these are not the focus of this study.
[6] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) 90. See also: Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1985) 32, 70.

and executive power.[7] On the other hand, others, notably Waldron argue that the courts have neither the legitimacy nor the institutional competence to answer the moral questions that debates surrounding human rights necessarily raise.[8] Furthermore, there is a re-emergence of scholarship that focuses on the importance of the legislature and legislation in protecting human rights. On this side of the debate, as Webber et al have recently argued, legislatures are under an obligation to give the broad standards contained in international human rights instruments relatively precise legal forms.[9] They contend that this is something that the legislature does well, but this is under-recognised in the scholarship.[10]

At the outset, I accept the force of both sides of this debate. Legislation prohibiting discrimination is evidence that legislatures can and do protect human rights through legislation. Statutory discrimination law is important in the context of human rights protection because it recognises the social dimensions of discrimination. Discrimination is not just carried out by the state, but also by private parties in employment as well as in the provision of goods, services, and accommodation. In the Australian context, in particular, legislative rights are of utmost importance given the lack of constitutional non-discrimination rights.

But, notwithstanding this important legislative role, I will argue that courts still have a key institutional role to play in the protection of legislative rights. As Lester and Bindman acknowledged long ago, legislated non-discrimination rights will only be effective if interpreted 'creatively' by courts.[11] Unless courts interpret statutory non-discrimination rights 'creatively' and consistently with an underlying purpose, there is the capacity for the relatively precise legal form of non-discrimination rights to become awkward and ineffective pigeonholes which do not adequately capture the harm that discriminatory conduct causes throughout society.[12]

1.2.1 Unpacking the purpose of discrimination law

While discrimination legislation generally includes an objects clause or long title outlining the objects of the Act, these are often written with such abstraction that they serve little use in

[7] Wil J Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (Cambridge University Press, 2007) 265.
[8] Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115(6) *Yale Law Journal* 1346, 1349–1350; Jeremy Waldron, 'Judges as Moral Reasoners' (2009) 7(1) *International Journal of Constitutional Law* 2, 5.
[9] Gergoire Webber et al, *Legislated Rights: Securing Human Rights Through Legislation* (Cambridge University Press, 2018) 9–10.
[10] Ibid 11.
[11] Lester and Bindman, above n 1, 71.
[12] Denise Réaume, 'Of Pigeonholes and Principles: A Reconsideration of Discrimination Law' (2002) 40(2) *Osgoode Hall Law Journal* 113, 115.

developing the purpose of discrimination law.[13] For instance, the objects of the Australian *Sex Discrimination Act 1984* include eliminating 'as far as possible, discrimination against persons on the ground of sex…'.[14] Understanding what it means to 'eliminate, as far as possible, discrimination' cannot be explained by legislative wording alone. Developing an account of what it means to 'eliminate, as far as possible, discrimination' is what I suggest is the judiciary's role as the creative interpreters of the legislative text.

Even where a provision may appear prescriptive, its application is often subject to multiple different interpretations and involves the balancing of various societal interests.[15] Because of this, it is not possible to understand discrimination through only the legislative text. As Gaudron J, the first female justice of the High Court of Australia, concluded:

> It is only if the concept of 'equality' is given some comprehensible content that the objective embodied in the expression 'equal opportunity' can be fairly evaluated. It is only when the concept is given content that it is possible to determine whether, and to what extent the objective has been achieved. And, without some such content, it is impossible to make a critical appraisal of modern anti-discrimination legislation.[16]

It is for the courts, in their role as the 'creative' interpreters of legislative intent to give discrimination law and its underpinning concepts some depth of meaning. In exploring the courts' articulation and application of the purpose of discrimination law, I contend that in light of the vague and aspirational language adopted, Parliament has left it to the courts to develop the aims of discrimination law. This is a familiar technique that legislatures adopt in controversial areas of regulation. By minimising the detail in the legislation, the interpretive role is expanded for the courts to theoretically fill and expand with elaboration and meaning.[17] How courts have chosen to fill in the gaps and silences has differed.

Discrimination law is difficult to categorise and can be conceived as being contained within many different 'domains' of law.[18] Depending on the context, discrimination law is a private remedy for

[13] Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' (2002) 26 *Melbourne University Law Review* 325, 330-331.
[14] *Sex Discrimination Act 1984* (Cth) s 1.
[15] Sophia Moreau, 'Equality and Discrimination' in John Tasioulas (ed), *The Cambridge Companion to the Philosophy of Law* (Cambridge University Press, Forthcoming).
[16] Justice Mary Gaudron, 'In the Eye of the Law: The Jurisprudence of Equality' (speech delivered at The Mitchell Oration, Adelaide, 24 August 1990).
[17] Margaret Thornton, 'Sex Discrimination, Courts and Corporate Power' (2008) 36 *Federal Law Review* 31, 32.
[18] Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press, 2015) 24.

a civil wrong,[19] a subset of employment law,[20] protection of a fundamental human right,[21] an embedded constitutional concept,[22] or a subset of administrative law.[23] According to Baroness Hale, presently, discrimination law can involve three separate and distinct protections: a private law remedy against discriminatory practices by private suppliers of public goods; a requirement for public officials to administer laws equally; and a requirement that other laws do not discriminate between persons.[24] Adding to the categorical confusion, the underlying basis for prohibiting discriminatory conduct continues to be contested with the underlying rationale for prohibiting discriminatory conduct remaining illusive.[25] This is, in part, because while the prohibitions on discriminatory conduct were relatively static across these jurisdictions and for different attributes, at the time of their introduction they were 'under-theorised.'[26] Why discrimination is wrong and what discrimination law seeks to achieve has been subject to much academic commentary.[27] This commentary, whether philosophical, constitutional, conceptual or policy-based,[28] broadly focuses on the following concerns: who should be protected by discrimination law,[29] what kinds of behaviours and practices should be prohibited,[30] and the extent to which discrimination law can operate as a tool to 'transform' society.[31]

It is within this context that the approach adopted by the courts in Australia, Canada and the United Kingdom has diverged. An example of the differences in interpretation that I explore in this thesis is the approach to the causative element of direct discrimination: How do you prove discrimination or different treatment was 'because of' an attribute? Specifically, what is the legal

[19] Réaume, 'Of Pigeonholes and Principles : A Reconsideration of Discrimination Law', above n 12, 141.
[20] Dominque Allen, 'Adverse Effects: Can the *Fair Work Act* Address Workplace Discrimination for Employees with a Disability' (2018) 41(3) *UNSW Law Journal* 846, 848 and Belinda Smith, 'Fair and Equal in the World of Work: Two Significant Federal Developments in Australian Discrimination Law' (2010) 23 *Australian Journal of Labour Law* 199, 212.
[21] Sandra Fredman, *Discrimination and Human Rights* (Oxford University Press, 2001).
[22] Nicholas Bamforth, 'Conceptions of Anti-Discrimination Law' (2004) 24(4) *Oxford Journal of Legal Studies* 693, 694 - 695.
[23] Stella Tarrant, 'Reasonableness in the Sex Discrimination Act: No Package Deals' (2000) 19(1) *University of Tasmania Law Review* 39, 52.
[24] Baroness Hale, 'The Quest for Equal Treatment' [2005] *Public Law* 571, 572 - 573.
[25] Colm O'Cinneide, 'The Uncertain Foundations of Contemporary Anti-Discrimination Law' (2011) 11 *International Journal of Discrimination and the Law* 7, 10 - 11.
[26] Cass R Sunstein, 'Incompletely Theorized Agreement' (1995) 108(7) *Harvard Law Review* 1733, 1739–1340.
[27] Some of this commentary is discussed in detail in chapter three.
[28] Nicholas Bamforth, 'Approaching the Indirect-Direct Discrimination Distinction: Concepts, Justifications and Policies' in Hugh Collins and Tarunabh Khaitan (eds), *Foundations of Indirect Discrimination Law* (Hart Publishing, 2018) 57–59.
[29] Iyiola Solanke, *Discrimination as Stigma: A Theory of Anti-Discrimination Law* (Hart Publishing, 2017) 40.
[30] John Gardner, 'III - Discrimination: The Good, The Bad and The Wrongful' in *Proceedings of the Aristotelian Society* (2018) 55, 55.
[31] Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (McGill-Queen's University Press, 2010) 4.

test to prove the connection between the treatment meted out to an individual and an attribute that they may have? In Australia, a complainant is required to prove that the attribute was the 'true basis' or 'real reason' for the defendant's conduct.[32] In the United Kingdom, a complainant is required to prove that 'but for' the attribute, the treatment would have differed.[33] In Canada, a complainant is required to prove that the attribute was a 'factor' in a disadvantageous distinction.[34] Why are the approaches to the meaning of 'because of' so diverse? None of the operative legislative texts are explicit as to the method by which causation or the reason for the treatment or outcome should be proven. Instead, these distinctions are the result of different interpretations of the right to non-discrimination. The difference in approach is not merely semantic but is central to the effectiveness and understanding of a prohibition on directly discriminatory conduct in the statutory context. The Australian approach makes discrimination difficult to prove because a complainant is required to prove the 'true' reason for their treatment, requiring access to information sometimes only held by the defendant (and often not consciously acknowledged by them).[35] In the United Kingdom, the approach adopted makes discrimination easier to prove, but leads to discrimination law being both symmetrical and inflexible without acknowledgement that some distinctions are discriminatory but others are not.[36] The Canadian approach, only requiring an attribute to be a 'factor', could be relatively nuanced but the actual application by the courts can also show a degree of inflexibility and symmetry.[37] It is this difference in interpretation, as well as many other interpretive differences, which are the subject of this thesis.

1.2.2 Critiques of the jurisprudence

The judiciary's approach to discrimination has been critiqued in each jurisdiction. In the Australian context, the higher courts' approach to matters of discrimination has been described critically. For example, Allen and Gaze describe the approach adopted by higher courts as 'technical.'[38] Kirk,

[32] *Purvis v New South Wales* [2003] 217 CLR 92, 163 (Gummow, Hayne and Heydon JJ).
[33] *Birmingham City Council v Equal Opportunities Commission* [1989] 1 AC 1155*, James v Eastleigh Borough Council* [1990] 2 AC 751; R *(E) v Governing Body of JFS and Anor (United Synagogue and others intervening)* [2010] 2 AC 728.
[34] *Moore v British Columbia* [2012] 3 SCR 360.
[35] This is often coupled with a high evidentiary standard which is placed on a complainant: Loretta DE Plevitz, 'The Briginshaw 'Standard of Proof' in Anti-Discrimination Law: 'Pointing with a Wavering Finger"' (2003) 27 *Melbourne University Law Review* 308, 308.
[36] Sandra Fredman, 'Direct and Indirect Discrimination: Is There Still a Divide' in Hugh Collins and Tarunabh Khaitan (eds), *Foundations of Indirect Discrimination Law* (Hart Publishing, 2018) 31.
[37] This is particularly apparent in the relatively recent cases of *Quebec (Commission des Droits de La Personne Et Des Droits De La Jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)* [2015] 2 SCR 789 and *Stewart v Elk Valley Coal Company* [2017] 1 SCR 591 in which the Supreme Court appears to require a relatively high standard of proof of stereotyping for *prima facie* discrimination. This will be further discussed in 5.2.3 and 6.2.3.
[38] Dominique Allen, 'Barking and Biting: The Equal Opportunity Commission as an Enforcement Agency' (2016) 44(2) *Federal Law Review* 311, 317; Beth Gaze, 'Anti-Discrimination Laws in Australia' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Lawbook, 2013) 155, 168–170; Beth Gaze,

focusing on race discrimination, portrays the approach of the courts as one that is purely 'formal.'[39] Smith considers the High Court's approach as 'narrow.'[40] Thornton defines the higher courts' approach as 'restrictive.'[41] In the Australian academic scholarship, it is generally accepted that the approach adopted by the higher courts is not one that is substantive.

Reasons attributed to the judiciary's failure to develop a more substantive account of discrimination law have been: the prescriptive legislative text,[42] a joint failure of the legislature and the judiciary to develop a clear account of the aims and purposes of discrimination law,[43] a notion of a 'conservative judicial culture',[44] and the social status of the judiciary.[45] However, in this thesis, I contend that a more fulsome account of the courts' approach to discrimination law is needed. This is particularly with respect to the courts' understanding of discrimination law's purpose, how that purpose is constructed and the institutional and socio-political constraints that operate to influence the approach of the courts.

In the United Kingdom, the approach of the courts to discrimination law has also been criticised. For example, Fredman critiques the approach of the British courts as one that focuses on formal equality.[46] Hannett argues that the approach adopted by the British courts is one that seeks to 'minimise complexity in discrimination law.'[47] O'Cinneide and Liu describe the approach to the interpretation of the *Equality Act 2010* (UK) as one which is 'pragmatic' and one that lacks an underpinning coherence and consistency.[48] Focusing on the interpretation of the grounds or attributes which are protected, McColgan argues that the judiciary have failed to consider the grounds purposively or in a manner which understands the disadvantage that discrimination law

'Has the Racial Discrimination Act Contributed to Eliminating Racial Discrimination? Analysing the Litigation Track Record 2000–2004' (2005) 11(1) *Australian Journal of Human Rights* 6, 11.

[39] Linda J Kirk, 'Discrimination and Difference: Race and Inequality in Australian Law' (2000) 4(1) *International Journal of Discrimination and the Law* 323, 326.

[40] Belinda Smith, 'From Wardley to Purvis — How Far Has Australian Anti-Discrimination Law Come in 30 Years' (2008) 21 *Australian Journal of Labour Law* 3, 7.

[41] Thornton, 'Sex Discrimination, Courts and Corporate Power', above n 17, 37.

[42] Smith, 'Rethinking the Sex Discrimination Act', above n 3, 235–236; Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (The Federation Press, 3rd ed, 2018) 52–53, 88–89.

[43] Gaze, 'Context and Interpretation in Anti-Discrimination Law', above n 13, 321–322; Rees, Rice and Allen, above n 42, 7.

[44] Thornton, 'Disabling Discrimination Legislation', above n 4, 6; Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990) 212–213.

[45] Margaret Thornton, 'Feminism and the Changing State: The Case of Sex Discrimination' (2006) 21(50) *Australian Feminist Studies* 151, 153.

[46] Fredman, 'Equality: A New Generation?' (2001) 30(2) *Industrial Law Journal* 145, 158 and 163.

[47] Sarah Hannett, 'Equality at the Intersections : The Legislative and Judicial Failure to Tackle Multiple Discrimination' (2003) 23(1) *Oxford Journal of Legal Studies* 65, 76.

[48] Colm O'Cinneide and Kimberly Liu, 'Defining the Limits of Discrimination Law in the United Kingdom: Principle and Pragmatism in Tension' (2015) 15(1–2) *International Journal of Discrimination and the Law* 80, 81.

should be understood to address.[49] On the other hand, others consider that 'by and large' the courts have interpreted discrimination legislation in a purposive fashion, although often in a way that avoids controversy.[50] For instance, Barnard and Hepple more favourably comment on the United Kingdom courts' ability to understand the notion of indirect discrimination in an encouraging and flexible fashion.[51] McCrudden also concludes that at least some discrimination law jurisprudence has been consistent with principles of equality since the 1980s.[52] Where the approach of the British courts has been criticised, this has been attributed to the social backgrounds and personal values of the judiciary,[53] the restrictive legislative text,[54] and a lack of a clear overarching legal role in the United Kingdom's legal system to construct better protections against unfair and unequal treatment.[55]

While the Canadian judicial approach is often cited as a better example of a substantive approach to discrimination and equality,[56] it is not without criticism. Brodsky, Day and Peters argue that the case law on statutory discrimination law from the late 2000s and early 2010s shows a concerning narrowing of approach to matters relating to the accommodation of difference and the need for the identification of a stereotype or stigma behind disadvantageous treatment.[57] While ostensibly still articulating a 'purposive' approach to human rights legislation, the Canadian Supreme Court's application of this purposive interpretation to novel circumstances in recent years has been criticised.[58] Both Mummé and Réaume attribute this doctrinal confusion to ineffectual 'borrowing' from *Charter* jurisprudence, confusing what was otherwise a clear and straightforward test.[59]

[49] Aileen McColgan, 'Reconfiguring Discrimination Law' [2007] *Public Law* 74, 92.
[50] See for example: Brice Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford University Press, 2013) 313.
[51] Catherine Barnard and Bob Hepple, 'Substantive Equality' (2000) 59(3) *Cambridge Law Journal* 565, 583.
[52] Christopher McCrudden, 'Equality and Non-Discrimination' in David Feldman (ed), *English Public Law* (Oxford University Press, 2009) 604–605.
[53] Rachel J Cahill-O'Callaghan, 'The Influence of Personal Values on Legal Judgments' (2013) 40(4) *Journal of Law and Society* 596.
[54] Karon Monaghan, *Equality Law* (Oxford University Press, 1st ed, 2007) 83.
[55] O'Cinneide and Liu, 'Defining the Limits of Discrimination Law in the United Kingdom', above n 48, 80, 92.
[56] Smith, 'Rethinking the Sex Discrimination Act', above n 3, 235–236; Monaghan, *Equality Law*, above n 54, 66–67; McColgan, 'Reconfiguring Discrimination Law', above n 49, 87–88.
[57] Gwen Brodsky, Shelagh Day and Yvonne Peters, *Accommodation in the 21st Century* (Canadian Human Rights Commission, 2012) 17.
[58] See for example: Brian Langille and Pnina Alon-Shenker, 'Law Firm Partners and the Scope of Labour Laws' (2015) 4(2) *Canadian Journal of Human Rights* 211, 213.
[59] Claire Mummé, 'At the Crossroads in Discrimination Law: How the Human Rights Codes Overtook the Charter in Canadian Government Services Cases' (2012) 9 *Journal of Law & Equality* 103, 105; Denise Réaume, 'Defending the Human Rights Codes from the Charter' (2012) 9 *Journal of Law & Equality* 67, 68.

1.3 Gap and Contribution

There are two gaps in the literature that I fill in this thesis. First, while there are single jurisdiction studies, the comparative approach adopted adds to the literature by highlighting that some of the critiques made in the single jurisdiction studies are insufficient accounts of the jurisprudence when viewed in a comparative light. For instance, as highlighted above, the formalistic approach to discrimination law taken in Australia has been attributed to a multitude of factors such as the prescriptive legislative text,[60] a failure of the legislature to develop a clear account of the aims and purposes of discrimination law,[61] the social status of the judiciary,[62] as well as the 'David and Goliath' like power disparity between complainants and respondents.[63] But as this thesis will demonstrate these are all critiques that can be made, and in many cases, have been made in comparable jurisdictions. Nevertheless, the different approaches remain underexplored. More broadly, this consideration exposes the tension between the normative literature which considers the nature and purpose of discrimination law and the jurisprudence that has developed. It is this disconnection or tension that this thesis explores.

Second, while the judicial role in the context of constitutional or 'public' human rights is an area of substantial study,[64] the judicial role in developing and determining statutory human rights in a private sphere is relatively underexplored. The judicial role in interpreting statutory rights is important because without an understanding and assessment of the judicial role in this context, the likely success of legislative rights cannot be assessed.

Thus, I provide a contribution by examining the institutional role of the court in the interpretation of statutory rights, focusing specifically on statutory non-discrimination rights. I do so by providing an account and argument as to why courts approach statutory rights differently in different jurisdictions. In particular, I focus attention on the importance of the surrounding

[60] Belinda Smith, 'Rethinking the Sex Discrimination Act', above n 3, 235; Rees, Rice and Allen, above n 42, 52–53, 88–89.
[61] Gaze, 'Context and Interpretation in Anti-Discrimination Law', above n 13, 331–332; Rees, Rice and Allen, above n 42, 7.
[62] Thornton, 'Feminism and the Changing State', above n 45, 158.
[63] Thornton, 'Sex Discrimination, Courts and Corporate Power', above n 17, 35.
[64] TRS Allan, 'Deference, Defiance, and Doctrine: Defining the Limits of Judicial Review' (2010) 60(1) *University of Toronto Law Journal* 41; David Landau, 'A Dynamic Theory of Judicial Role' (2014) 55(4) *Boston College Law Review* 1501; Robert French, 'The Courts and the Parliament' (2013) 182 *Administrative Law Journal* 820; Philip Sales, 'Judges and Legislature: Values into Law' (2012) 71(2) *Cambridge Law Journal* 287; Aharon Barak, 'A Judge on Judging: The Role of a Supreme Court in a Democracy' (2002) 116(1) *Harvard Law Review* 19.

constitutional culture and institutional role for the court in the interpretation and protection of rights provided for in legislation.

I develop this contribution in three key ways. First, I interrogate the idea of a 'creative' interpretation of legislative intent in the context of discrimination law. While it is uniformly acknowledged that discrimination law should be interpreted 'purposively',[65] the minimisation of detail in the legislative texts, the multitude of different exceptions and the vague language explaining the objectives of the legislation in both the text and the accompanying explanatory materials, leaves considerable scope for courts to develop the purpose and meaning of discrimination law.[66] Whilst the structure of discrimination law has remained relatively static, the broader understanding of the kinds of disadvantage discrimination law could and should address has developed considerably. In some jurisdictions, courts have utilised this broader understanding of disadvantage to rethink discrimination protections, and in others, they have not. It is in this space that the courts have the opportunity for creativity.

Second, where a comparative approach has been adopted with respect to discrimination law previously, this has been used as a means to establish a centralising principle of discrimination law rather than to explore the differences.[67] Instead, my thesis provides an extensive account of the differences in the jurisprudence that have developed in three similar jurisdictions. It is in this exploration of differences that my thesis provides a contribution through demonstrating the different interpretative paths than can be taken with similar legislative texts. My focus on statutory rights, rather than statutory and constitutional rights,[68] is also distinctive and useful. It is useful because it allows for a clearer comparison of like cases and allows for the different constitutional contexts to operate as an independent variable in this study. In this way, I offer a different account and approach to that which has previously been adopted.

Third, precisely *how* courts have and should develop the purpose of discrimination law is left underexplored in the existing scholarship. Is such an approach consistent with the jurisdictionally understood judicial role? In assessing and articulating the broader constitutional conditions that

[65] And a purposive approach is required by legislation in Australia by the *Acts Interpretation Act 1901* (Cth) s 15AA with similar provisions existing in state and territory legislation. In the United Kingdom and Canada, it is accepted in case law that a purposive approach to statutory interpretation is also required: *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 and *Rizzo & Rizzo Shoes Ltd (Re)* [1998] 1 SCR 27 [21]. This is further discussed at 2.4.
[66] Thornton, 'Sex Discrimination, Courts and Corporate Power', above n 17, 32.
[67] Two recent examples are: Khaitan, *A Theory of Discrimination Law*, above n 18; Solanke, *Discrimination as Stigma*, above n 29.
[68] See for example the approaches adopted in Khaitan, *A Theory of Discrimination Law*, above n 18; Solanke, *Discrimination as Stigma*, above n 29; Sandra Fredman, *Discrimination Law* (Clarendon Press, 2nd ed, 2011).

make a 'creative' interpretation more likely, I make an original contribution to current debates in the literature. In doing so, I provide a broader contribution to understanding the effectiveness of statutory rights in achieving substantive and possibly 'transformational' results.

1.4 Method and scope

1.4.1 Methodological Approach

This thesis adopts a comparative approach by comparing the judicial interpretation of discrimination legislation in three common law jurisdictions: Australia, Canada (though noting the civil law tradition in Quebec) and the United Kingdom. This comparison is utilised to develop an account of the different approaches to interpretation to discrimination law and how these are reflected in the development of the legal tests associated with proving a claim of discrimination.

To develop an account of the different approaches, I consider three 'most similar' case studies to compare the case law that has emerged over the past 50 years. The case study jurisdictions were chosen because each has a common law system which did not recognise a right to non-discrimination prior to legislative intervention and each prohibits discrimination in a private law context using similar legislative structures. However, there are differences between each of the selected jurisdictions with respect to constitutional structures as well as the historical and political contexts of the courts which allow for a useful comparison of the distinctive differences in the case law.[69]

This study focuses on the case law on statutory discrimination law in Australia, Canada and the United Kingdom. Its focus is on the establishment and application of the appropriate legal tests for determining a finding of unlawful discrimination (both direct and indirect)[70] and the justifications for discriminatory conduct. It considers cases relating to all protected attributes. The study is limited through its focus on appellate court decisions which constitutes approximately 600 cases.[71] The focus on appellate court decisions keeps the size of the study manageable but is large enough to gain a significant account of the approach to discrimination in each jurisdiction. The

[69] Roger Cotterrell, 'Comparative Law and Legal Culture' in Mathias Reiman and Reinhard Zimmermann (eds), *The Oxford Hanbook of Comparative Law* (Oxford University Press, 2008) 709, 711; David Nelken, 'Legal Culture' in JM Smits (ed), *Elgar Encylopaedia of Comparative Law* (Edward Elgar, 2006) 372; David Nelken, 'Defining and Using the Concept of Legal Culture' in Esin Oruru and David Nelken (eds), *Comparative Law: A Handbook* (Hart Publishing, 2007) 109, 123.

[70] The definitions of direct and indirect discrimination as well as the justifications for discriminatory conduct are outlined and discussed in 2.3.

[71] The full list of cases considered as well as an articulation of the searches and databases used appears at Appendix A and considers cases up until 31 December 2018.

study extends to cases from the Court of Appeal of England and Wales and federal and provincial or state or territory Courts of Appeal from Australia and Canada because there are still new and emerging issues for discrimination law which are yet to be considered by a highest court but still are relevant for understanding if, when, and how judges are being 'creative' in interpreting discrimination law.[72] This extension to Courts of Appeal also allows for a greater scope to assess the Australian case law given the paucity of Australian High Court decisions on discrimination law.[73]

I focus my attention on appellate courts because these are the courts that ostensibly develop the tests that are then applied and reflected in the lower courts and tribunals. While comparatively few claims of discrimination reach the appellate courts,[74] this does not limit the importance of understanding the doctrinal developments of our understanding of prohibitions on discrimination. How human rights law is interpreted by appellate courts necessarily affects the understanding of the protections at a lower level for tribunal members in understanding the operation of provisions. The way in which prohibitions are given a broad or narrow interpretation will also affect the political opportunity structure which operates to determine whether it is worthwhile to bring test cases in discrimination law.[75] In addition, law informs a society's broader understandings of morality and appropriate behaviours.[76] In relation to discrimination, this means that how judges conceive discriminatory conduct and balance competing rights and interests can inform behaviour in society about what is and what is not discriminatory conduct.[77]

[72] An example of this emerging jurisprudence is the jurisprudence related to accommodating family responsibilities in Canadian discrimination law which will be discussed in 4.2.3.

[73] There are only 10 cases on the substance of discrimination law from the High Court of Australia: *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165; *Gerhardy v Brown* (1985) 159 CLR 70; *IW v City of Perth* (1997) 191 CLR 1; *Lyons v Queensland* (2016) 259 CLR 518; *Mabo v Queensland (No 1)* (1988) 166 CLR 186; *Maloney v The Queen* (2013) 252 CLR 168; *New South Wales v Amery* (2006) 230 CLR 174; *Purvis v New South Wales* [2003] 217 CLR 92; *Waters v Public Transport Corporation* (1991) 173 CLR 349; *X v Commonwealth* (1999) 200 CLR 177.

[74] For example, in the 2015–2016 period the Australian Human Rights Commission received 2013 complaints and the Commission finalised 1982 complainants: Australian Human Rights Commission, *Annual Report 2015–2016* (2016) 15. See also Thornton, 'Sex Discrimination, Courts and Corporate Power', above n 17, 35.

[75] Discussed with respect to the equality rights contained in the New Zealand Bill or Rights Act but are equally applicable in the context of discrimination legislation: David Erdos, 'Judicial Culture and the Politicolegal Opportunity Structure: Explaining Bill of Rights Legal Impact in New Zealand' (2009) 34(1) *Law and Social Inquiry* 95, 121.

[76] Ibid.

[77] Khaitan, *A Theory of Discrimination Law*, above n 18, 3–4.

These cases were identified by conducting a series of searches on a variety of different legal databases.[78] For each jurisdiction, searches were conducted relating to each discrimination Act. All search results were considered and duplicates, cases relating to vilification, harassment, procedural matters and remedies were excluded from initial consideration.

1.4.2 Limits and Scope

This thesis is concerned with the different interpretations of the foundational rules of discrimination law focusing on the attributes or grounds that are covered and direct and indirect discrimination, reasonable accommodation or reasonable adjustments and justifications. The purpose of this consideration is to determine how courts understand the 'purpose' or 'intent' of discrimination law and the courts role in developing or expanding upon that 'purpose'. While important, I am less concerned as to how this purpose is achieved or realised in reality. Consequently, I only incidentally consider cases which are concerned with procedure, evidence, remedies or appropriate standards of review. Significant consideration of harassment, vilification, victimisation, positive duties, and duties specifically related to equal pay are outside the scope of this study.

In contrast to single jurisdiction studies, such as Rees, Rice and Allen,[79] Monaghan,[80] or comparative work such as that provided by Schiek, Waddington and Bell, this thesis is not designed to be a casebook,[81] and I do not attempt to offer an encyclopaedic knowledge of discrimination law, outlining in technical detail all the specific components of discrimination law in many different jurisdictions. I also do not use comparison to understand the grounding or fundamental principles of discrimination by considering which features of discrimination law are consistent across jurisdictions.[82] Further, while my conclusions may have law reform implications, I am not focused on providing reflections or proposals for law reform.[83]

[78] For the Australian case law, LexisNexis AU and Westlaw Australia were used. For the case law from the United Kingdom: Westlaw UK, LexisLibrary and BAILII databases were used. For the case law from Canadian appellate courts, the Supreme Court of Canada database and CanLii were used.
[79] Rees, Rice and Allen, above n 42.
[80] Monaghan, above n 54.
[81] For an example in the discrimination law context: Dagmar Schiek, Lisa Waddington and Mark Bell, *Cases, Materials and Text on National, Supranational and Internation Non-Discrimination Law* (Hart Publishing, 2007).
[82] Two recent examples of this approach in discrimination law are Khaitan, *A Theory of Discrimination Law*, above n 18; Solanke, *Discrimination as Stigma*, above n 29. For a discussion of using comparison to find 'universality' see: Gerhard Danneman, 'Comparative Law: A Study of Similarities and Differences?' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Hanbook of Comparative Law* (Oxford University Press, 2008) 383, 385; Geoffrey Samuel, 'Comparative Law and its Methodology' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge, 2nd ed, 2017); Pierre Legrand, 'How to Compare Now' (1996) 16(2) *Legal Studies* 232.
[83] O Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37(1) *The Modern Law Review* 1, 1–2.

Instead I am primarily focused on the way in which relatively similar discrimination legislative regimes have been interpreted differently over time in three historically similar, but now constitutionally different, jurisdictions to examine the different roles courts play in the development of the purposes and aims of discrimination law. As such these cases are being discussed to consider *if* courts are the 'creative' interpreters of legislative intent in each jurisdiction and *if* such interpretation is consistent with their constitutional role. I focus my attention primarily on cases which either illustrate the current interpretation of the law, denote a change in approach to the interpretation of the law or reveal the judges' underpinning logic focusing on the values that discrimination law is based upon and the court's role in developing discrimination law based on those values. In essence, I concentrate on decisions that I argue do, or do not, denote a degree of 'creativity' in interpretation.

1.5 Argument and outline

This thesis is structured in three parts, focused on the three questions asked in 1.1 above. In Part I I will answer the first sub-question asked: What constitutes a 'creative' interpretation of statutory non-discrimination rights? In Chapter Two, I consider the legislative regimes in place in Australia, Canada and the United Kingdom. I will do so for two reasons. First, Chapter Two is designed to show that the legislation and the context in which it was introduced is similar enough to provide an appropriate basis for a comparison of the jurisprudence that has developed. Second, it will consider what a 'creative interpretation of legislative intent' is in light of the legislative text, and the explanatory materials. Chapter Three provides a review of the literature on the underlying theoretical basis for prohibiting discriminatory conduct and considers the nature of the relationship between discrimination and two intersecting broader ideals: liberty and equality.

In response to the first sub-question asked in 1.1 regarding what would constitute a 'creative' interpretation of legislative intent, in Part I, I will argue that understanding the purpose of discrimination necessarily requires creativity on behalf of the judiciary because there is no 'discoverable' intent of discrimination legislation. In Chapter Two, I will demonstrate that discrimination law has been prohibited in each jurisdiction in a relatively similar manner. But again, similarly in all studied jurisdictions, the purpose of discrimination law is articulated with a high degree of abstraction and aspiration and significantly less useful detail. In this context, it is left to the courts to develop the purpose of discrimination law through 'creative' adjudication and interpretation of non-discrimination rights. In Chapter Three, I will consider how to understand this interpretation in light of the normative literature and argue that a 'creative' approach to

interpretation is one that draws on a pluralist account of discrimination law's aims. In particular, I will argue in Chapter Three that the multidimensional approach to equality and discrimination propounded by Fredman is a useful approach to scaffold a creative interpretation of discrimination law.

In Part II of this thesis, I will answer the second sub-question asked in 1.1: Is the interpretation of discrimination law in Australia, Canada and the United Kingdom by appellate courts consistent with a 'creative interpretation of legislative intent'? To answer this question, Part II provides the substance of the three case studies and considers the approaches that have been taken with respect to discrimination law's purpose, its prohibitions and its exceptions in Australia, the United Kingdom and Canada. These chapters are presented thematically focusing on the central issues in constructing discrimination law's purpose. Chapter Four considers who should be protected from discriminatory conduct and whether the case law from each jurisdiction reflects an appreciation of the disadvantage excluded groups suffer from. Chapter Five focuses on the construction of the tests to prove discrimination as well as the defence of justification. Chapter Six outlines the extent to which courts have articulated the 'transformative' aspects of discrimination law's potential to reduce systemic barriers of access.

I will argue the Canadian approach to discrimination law is the approach that is the most consistent with a 'creative interpretation' of discrimination law's purpose, although there are still some limitations, particularly where courts are drawing on jurisprudence on s 15 of the *Canadian Charter of Rights and Freedoms* ('*Charter*'). In contrast, the case law from the United Kingdom and Australia both evince a less creative approach to discrimination. Until relatively recently, courts in the United Kingdom for the most part, avoided any real consideration of the purpose of discrimination law, whilst the Australian approach is focused on finding fault on the part of the duty-bearer.

In Part III, I will answer the overarching research question asked by this thesis: Is a creative interpretation of statutory discrimination law consistent with the accepted or traditional judicial role in Australia, Canada or the United Kingdom? In Chapter Seven, I will argue that implicit in the statutory schemes and the normative literature is the assumption that the judiciary takes a relatively active role in the elaboration of values and redistribution of social goods. In many ways, a creative interpretation of non-discrimination rights sits at the crux of the debate about judicial legitimacy and competence. What makes a creative interpretation more likely is an accepted role for the judiciary in rights review. I will argue that the differences in approach to the purpose of

statutory discrimination law are, in part, explained by the variation in the entrenchment of rights review in each jurisdiction.

In Chapter Seven, I will focus on questions of judicial legitimacy in interpreting discrimination law consistently with substantive equality. I will argue that in each jurisdiction statutory discrimination law is a form of quasi-constitutional law. I will argue that while the designation of discrimination law as 'quasi-constitutional' law in Canada has been utilised by the Supreme Court of Canada to justify an expansive and creative interpretation of statutory human rights, the same cannot be said in either Australia or the United Kingdom. In Chapter Seven, I will argue that this difference is explained by the different constitutional roles in rights review and norm elaboration that the courts in each jurisdiction play. In Chapter Eight, I will conclude and summarise the arguments and findings of this thesis and offer some reflections on the implications for future research that this thesis raises.

PART I

Part I: Interpreting discrimination law creatively?

This dissertation started by outlining the views of the architects of the *Race Relations Act* in the United Kingdom. In the introduction, I maintained that Lester and Bindman argued that the judiciary would be critical to the success of discrimination law.[84] They contended that without the judiciary operating as the 'creative interpreters of legislative intent' the legislation would struggle to be an effective mechanism to reduce inequality.[85] However, 'creative interpretation' is not a term well known to legal scholarship.[86] Thus, without further examination, this term provides no solid foundation to assess whether the judiciaries in Australia, Canada and the United Kingdom have fulfilled this role as the 'creative interpreters of legislative intent' over the past 50 years.

Herein lies the purpose and substance of Part I of this thesis. In Part I, I offer an answer to the first sub-question asked in 1.1: What is a 'creative interpretation' of legislative intent with respect to discrimination law? In answering this question, I seek to provide a guide to assess the discrimination law jurisprudence that has emerged in Australia, Canada and the United Kingdom. In answering this question, I do not attempt to offer any broader argument about the notion of 'creative interpretation' in statutory interpretation generally. Instead, I start from the proposition that 'creative' in this context is a more expansive version of purposive interpretation. As such, it is a useful linguistic device to develop the ultimate goals of the thesis to determine why different jurisdictions have adopted different interpretations of outwardly similar legislation. With that in mind, I aim to provide an articulation of this term in light of the history, legislative regime and normative discrimination law literature.

Part I consists of two chapters. In Chapter Two, I will explore the inadequacies of the common law and constitutional frameworks that led to the introduction of discrimination law in each of the studied jurisdictions. I will argue that one of the reasons that the judiciary needs to be 'creative' was because of their previous failings in providing protection from discriminatory conduct in both the common law and constitutional contexts. I next consider the legislative intent through considering the introduction and passage of the various statutes that prohibit discrimination in each of the studied jurisdictions and their operative provisions. My analysis in Chapter Two reveals three important conclusions. First, the context, legislative history and legislative regimes in place in each of the studied jurisdictions are similar enough to warrant the study of the jurisprudence in

[84] Lester and Bindman, above n 1, 71.
[85] Ibid.
[86] This terminology is used in Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 9. But it is unclear if the term is used in the same manner as Lester and Bindman.

Part II. Second, the context, legislative history and the legislation itself are similar enough that the difference in judicial approach is not simply explained by a difference in political will or legislative intent in each jurisdiction. Third, in none of the jurisdictions does the legislative history, explanatory materials or legislation provide a sufficiently clear articulation of legislative intent to provide guidance for the interpretation of discrimination law. It is in the construction of the purpose of the legislation that the judiciary must be 'creative.'

Due to this failure of the legislatures in each jurisdiction, in Chapter Three I provide a literature review of the normative scholarship on discrimination law. This literature is reviewed as a means to provide greater context to understand a 'creative' interpretation of discrimination law. This review of the normative literature is important because whilst the legislative regimes and the manner in which discrimination law functions has remained relatively static over time, the scholarship and normative approaches to discrimination law have changed and broadened. Thus, the interpretation of discrimination law today needs to be understood within the context of this changing normative landscape. In Chapter Three, I consider the various approaches to the purpose of discrimination law that have developed. I focus and outline three particular controversies. First, I consider whether the purpose of discrimination law can be interpreted and understood to provide more than simply formal equality and conclude that it can. Second, I outline and consider the substantive theories of discrimination law focusing on three different models based on liberty, dignity, and a pluralist approach which takes and adds to each of these two models. I conclude that for the purpose of assessing the 'creativity' of the judiciary, the pluralist model — principally based on Fredman's multidimensional approach — provides the best framework to assess the jurisprudence in Australia, Canada and the United Kingdom.

My review of the literature in Chapter Three also reveals a critical gap in the literature on discrimination law. While there is both a significant body of criticism of discrimination law jurisprudence in Australia, the United Kingdom and Canada and a significant body of scholarship which provides an account of what discrimination law *should* be capable of achieving, there is little work on interrogating the disconnection between the reality and the normative literature. It is this disconnection that this thesis will address in Parts II and III.

2 Comparing the Legislation

Discrimination legislation has been in place in Australia, the United Kingdom and Canada for many decades. These legislative regimes have changed incrementally to reflect the new and more substantive understandings of equality that have developed. The definitions of discrimination have been expanded to include direct and indirect discrimination and incorporate accommodation duties. Protection from discrimination has been expanded to new attributes or 'grounds.' This chapter will sketch this legislative history and describe the statutory discrimination regimes in each jurisdiction. In doing so, this chapter serves three purposes. The first is to provide the context for the study of the case law that is to follow in Part II. The second is to establish that the legislative regimes and the context in which they were implemented are similar enough to provide for a meaningful comparison of the jurisprudence. The third is to consider the notion of a 'creative' interpretation of legislative intent in light of the legislation and the explanatory materials. In doing so, it serves as a foundation on which to build the thesis's overall analysis and contribution.

In this chapter, I begin by considering the different factors that contributed to the introduction of legislation prohibiting discrimination. I will focus on the lack of sufficient common law or constitutional protection from discrimination and the need to comply with international and supra-national law. I will demonstrate that in each jurisdiction discrimination legislation emerged for similar reasons and in a similar manner. Understanding the history and passage of the legislation is important because it provides context for understanding the legislative regime and its judicial consideration.

I then consider the operation of the current legislative regimes. Specifically, I focus on the statements of purpose in the legislation, the attributes or grounds protected, the scope of operation, and the definitions of prohibited conduct. As this thesis is focused on understanding the development of discrimination law doctrine, though I acknowledge that there are significant differences in the enforcement regimes, these will not be considered.[87]

When describing the legal frameworks, it is acknowledged at the outset that this chapter only provides an overview of the legislative regimes. As such, it does not confront many of the complex and technical issues and differences within the different frameworks. The purpose of this thesis is

[87] For example, for a consideration of the enforcement mechanisms in Australia see: Dominique Allen, 'Strategic Enforcement of Anti-Discrimination Law: A New Role for Australia's Equality Commissions' (2010) 36(3) *Monash University Law Review* 103.

not to describe the technical detail of the legislative regimes. Instead, the purpose is to analyse the different ways in which courts have constructed the purpose of discrimination law. Nevertheless, technical details are explained where necessary and appropriate.

2.1 History and Context

In this section, I will map the introduction of legislation prohibiting discrimination in Australia, Canada, and the United Kingdom. I will demonstrate that the context is relatively similar across the jurisdictions and is not a reason for the distinctive approaches that have emerged when interpreting the legislation. In doing so, I will highlight two factors influencing the passage of discrimination legislation: the lack of common law and constitutional protections from discrimination, and the need for conformity with international and supra-national law.

2.1.1 Inadequacies and failure of the common and civil law

In each jurisdiction considered, one reason given for the introduction of legislation prohibiting discriminatory conduct was the failure of the common law to adequately provide a remedy for discriminatory conduct.[88] This was made explicit by Kep Enderby in introducing the *Racial Discrimination Act 1975* (Cth) in the Australian Commonwealth Parliament and was cited as a reason for introduction by both Hepple in the British context and by Tarnopolsky in the Canadian context in their commentaries on the introduction of discrimination law in their respective jurisdictions. The failure of the common law to remedy discriminatory conduct was a problem because Parliament had concluded that discrimination on particular grounds in certain places was wrong but there was no legal mechanism to prohibit it. There is no common law cause of action that could restrain a party from limiting another person's access to public goods because of an irrelevant characteristic. This lack of protection could be, in part, because throughout much of its history the English common law mostly concerned itself with the protection of property and the determination of contractual rights.[89] The protection of these rights often came at the expense of those who were vulnerable due to their difference.[90]

Nevertheless, despite the restrictive limits of the common law, there were a limited number of cases in which the denial of licences, employment or goods and services were overturned on the

[88] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 April 1975, 1416 (Kep Enderby, Attorney-General); Bob Hepple, *Race, Jobs and the Law in Britain* (Allen Lane, 2nd ed, 1970) 91; Walter Tarnopolsky, *Discrimination and the Law: Including Equality Rights under the Charter* (Thomson Carswell, 2004) vol 1.
[89] Justice John Toohey, 'A Matter of Justice: Human Rights in Australian Law' (1998) 27(2) *University of Western Australia Law Review* 129, 134.
[90] Ibid.

grounds of public policy.[91] Additionally, some foreign and colonial laws were either ignored or deemed invalid on the basis that they were 'contrary to natural justice.'[92] While courts did at times refuse to give effect to contracts on the grounds that they were against public policy, this was often done on the basis of illegality, or being harmful to good government rather than explicitly because discrimination on the grounds of race or sex was contrary to public policy.[93] The use of exceptions on the basis of public policy led to varying results because it was focused on the procedural aspects of the decision-making process rather than the decision itself.[94]

The English common law has one ancient rule of non-discrimination, first established in the 15th century, which applied to inn-keepers.[95] This very old rule requires that an inn-keeper, who held himself out as providing food and lodging to all travellers, cannot unreasonably refuse a potential customer who appeared in a fit state to be received and appeared able and willing to pay a reasonable sum for services and facilities provided.[96] However, the definition of an 'inn' and the application of the rule was limited. Up until the late twentieth century, an inn continued to be defined as 'an establishment held out as offering food, drink and sleeping accommodation.'[97] This was found to exclude other seemingly related enterprises including lodging houses, boarding houses, private residential hotels, houses of entertainment and restaurants.[98] This rule was also limited because it was rarely enforced and, even where it was enforced, nominal damages were often the only result.[99]

These limitations were also apparent in Canada in both the common and civil law traditions, where there was little attempt to broaden non-discrimination protections or the public policy exceptions

[91] For a more extensive summary of the common law position prior to the introduction of legislation in the United Kingdom see: Lester and Bindman, above n 1, 1; Hepple, *Race, Jobs and the Law in Britain*, above n 88, Chs 7 and 10. Gareth Evans accepted that these accounts were an adequate account of the Australian position as well: Gareth Evans, 'New Directions in Australian Race Relations Law' (1974) 48(10) *Australian Law Journal* 479, 480 fn 5. In respect of any public policy exception in Australian administrative law see: *Water Conservation and Irrigation Commission v Browning* (1947) 74 CLR 493.

[92] The early slavery cases are a good example of this, see for instance: *The Case of James Sommersett* (1772) 20 St. Tr. 1, 82.

[93] *Nagle v Feilden* [1966] 2 Q.B. 633 (C.A.).

[94] *Weinberger v Inglis* [1919] A.C. 606; *Scala Ballroom (Wolverhampton) Ltd v Ratcliff* [1958] 3 All ER 220; *Horne v Poland* [1922] 2 K.B. 364.

[95] Y.B. 39 H. VI 18, pl 24.

[96] For an account of the rule and its application in Canada and the United States see Henry L Molot, 'The Duty of Business to Serve the Public: Analogy to the Innkeeper's Obligation' (1968) 46(4) *Canadian Bar Review* 612; Paul Hartmann, 'Racial and Religious Discrimination by Innkeepers in U.S.A' (1949) 12(4) *Modern Law Review* 449.

[97] This definition was also incorporated into legislation, see for instance: *Innkeeepers Act 1968* (NSW) s 3.

[98] *Parker v Flint* (1699) 12 Mod. Rep. 254; *Dansey v Richardson* (1854) 3 E & B 144; *Duke of Devonshire v Simmons* (1894) 11 T.LR. 52; *Pidgeon v Legge* (1857) 21 JP 743; *Sealey v Tandy* [1902] 1 KB 296.

[99] See for example, *Constantine v Imperial Hotels Ltd* [1944] 1 KB 693 where Constantine succeeded in an action for breach of the inn-keepers' duty where he and his family were refused lodging on racial grounds but was only granted nominal damages.

originally developed in the English common law.[100] From the late 1890s until the mid-twentieth century plaintiffs brought actions against service providers (such as theatres and clubs) where the plaintiffs had been refused service because of race.[101] Few of these actions were successful.[102] In Australia, there are a dearth of cases on a common law right to non-discrimination,[103] but Evans assumed that the position would have been similar to the British position outlined above.[104]

2.1.2 Constitutional context

Another identified reason for the introduction of statutory discrimination law was the lack of clear constitutional protection from discrimination. Although, as highlighted above, a few contracts were set aside on the grounds of a 'public policy' exception, the public policy exception focused on the process or application of the law equally to all subjects rather than the substance of the laws themselves.[105]

The implementation of discrimination legislation in the United Kingdom, particularly the changes that have occurred in the past 20 years, need to be understood within the context of United Kingdom's relationship with Europe. In particular, discrimination law in the United Kingdom needs to be understood within the context of European Union ('EU') law as well as the United Kingdom's obligations under the European Convention on Human Rights ('ECHR') and in particular the right to equality contained in Art 14.

While the jurisprudence on Art 14 could, in theory, inform the interpretation of the *Equality Act 2010* (UK), in the main, this has not occurred.[106] The lack of engagement can be credited to three intersecting factors. First, the right to equality contained in the *Human Rights Act 1998* ('HRA') is limited to the protection of other Convention rights rather than as a standalone right.[107] This necessarily limits its applicability to a more general right to non-discrimination contained in the

[100] Molot, above n 96, 621.
[101] Some examples of common law actions for discrimination on the basis of race include *Sparrow v Johnson* (1899) 15 Que. C. S. 104; *Lowe's Montreal Theatres Ltd v Reynolds* (1919) 30 Que. C.B.R. 459; *Rogers v Clarence Hotel* [1940] 3 DLR 583; *Christie v York* [1940] S.C.R 139.
[102] An example of a successful action was *Sparrow v Johnson* (1899) 15 Que. C. S. 104 in which the plaintiffs were granted £50 in damages when they were refused theatre seats on racial grounds.
[103] In an article in the *Public Law Review* in 1993, Justice Toohey laments the underutilisation of a common law remedy for discrimination in Australia in a footnote, but this is left underexplored: Justice John Toohey, 'A Government of Laws, and Not of Men?' (1993) 4 *Public Law Review* 158, 160 fn10.
[104] Evans, above n 91, 480 fn5.
[105] Jeffrey Jowell, 'Is Equality A Constitutional Principle' (1994) 47(2) *Current Legal Problems* 1, 3.
[106] Hazel Oliver, 'Discrimination Law' in David Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (Cambridge University Press, 2011) 206, 206.
[107] Janneke Gerards, 'The Discrimination Grounds of Article 14 of the European Convention on Human Rights' (2013) 13(1) *Human Rights Law Review* 99, 100–101.

Equality Act or the historical legislation.[108] Second, the *Equality Act 2010* (UK) is considered comprehensive, giving the HRA and the ECHR little work to do in developing the construction of non-discrimination rights in that space. Third, and as will be developed further below, much of the substance that Art 14 could offer is already provided for through EU law in the form of the Directives and European Court of Justice ('ECJ') case law.[109] Whether the HRA will become a more useful device to pursue broader and more radical interpretations of the *Equality Act 2010* (UK) (through, for instance, the incorporation of new grounds) remains to be seen post-Brexit.[110]

Many of the more progressive changes to discrimination law have occurred to conform to the standards in place in EU law. The principle of non-discrimination has been described as foundational in EU Law. The Treaty of Rome, and subsequently the Treaty Establishing the European Community, contains a principle of equality and prohibits discrimination on the grounds of nationality.[111] In addition, Art 39 prohibited restrictions on freedom of movement and freedom to establish business or to offer services. Further, Art 141 provided for equal pay for male and female workers where equal work or work of equal value was undertaken.[112] However, there were limitations to this commitment because it only applied to nationality and gender. Nevertheless, the influence of EU law is reflected in the *Equal Pay Act 1970* and the *Sex Discrimination Act 1975* through the focus on discrimination in the employment context.

The principle of non-discrimination in EU law has been developed in a somewhat piecemeal fashion beginning in the 1970s with a focus on gender discrimination.[113] The legislative framework was significantly expanded and revised in the early 2000s.[114] This framework is focused on four directives: The Racial Equality Directive,[115] the Employment Equality Directive,[116] the Gender

[108] Ibid.
[109] Samantha Besson, 'Gender Discrimination under EU and ECHR Law: Never Shall the Twain Meet?' (2008) 8(4) *Human Rights Law Review* 647, 653. See also: Sandra Fredman, 'Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights' (2016) 16(2) *Human Rights Law Review* 273.
[110] Colm O'Cinneide, 'Values, Rights and Brexit — Lessons to Be Learnt from the Slow Evolution of United Kingdom Discrimination Law' (2017) 30(3) *Australian Journal of Labour Law* 236, 342.
[111] Takis Tridimas, *General Principles of EU Law* (Oxford University Press, 2nd ed, 2006) 61–62.
[112] Art 39 has direct effect: *Van Duyn v Human Office*, Case 41/74 [1974] ECR 1337. For its domestic impact in the field of discrimination law: see *Bossa v Nordstres Ltd* [1998] ICA 694; [1998] IRLR 284.
[113] Schiek, Waddington and Bell, above n 81, 11.
[114] Ibid.
[115] *Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin* [2000] OJ L 180/22 (Racial Equality Directive).
[116] *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation* [2000] OJ L 303/16 (Employment Equality Directive).

Employment Directive,[117] and the Gender Goods and Services Directive.[118] The Racial Equality Directive prohibits discrimination because of racial or ethnic origin in employment, vocational training, education, social protection, social advantages, access to goods and services including housing.[119] The Employment Equality Directive extended protections against discrimination in employment and vocational training to newer attributes including religion and belief, age, disability and sexual orientation.[120] The Gender Employment Directive extended the protections against gender discrimination first introduced in the 1970s to maintain consistency with the Racial Equality Directive and the Employment Equality Directive.[121] The Gender Employment Directive also codified the ECJ case law with respect to gender discrimination.[122] The Gender Goods and Services Directive extends the gender discrimination protections to the area of goods and services.[123]

Each of the Directives has been transposed into the domestic discrimination regime, now in force through the *Equality Act 2010* (UK).[124] Provisions that import the obligations and rights contained in the Directives must be interpreted purposively.[125] By interpreting the provisions purposively, courts are required to presume that the intention is not to infringe human rights, and it is to be effective in achieving the ends stated.[126] This requires a court, when constructing a purposive account, to potentially ignore the natural and ordinary meaning of words and to read-in additional words in order for the provision to achieve its purpose.[127] Further, to ensure consistency, it is important to interpret other provisions of discrimination law to be consistent with the EU provisions.[128] In addition, many of the provisions of the Directives have been found to have both horizontal and vertical direct effect.[129] The consequence of this is that there have been cases in which domestic discrimination law was disapplied because of directly effective EU law.[130] The consequences of the need for consistent interpretation and direct effect will be considered in

[117] *Council Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)* [2006] OJ L 204/23 (Recast Gender Employment Directive).
[118] *Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services* [2004] OJ L 373/37 (Gender Goods and Services Directive).
[119] *Racial Equality Directive* [2000] OJ L 180/22, 22.
[120] *Employment Equality Directive* [2000] OJ L 39/40, 16 – 17.
[121] *Recast Gender Employment Directive* [2006] OJ L 204/23, 23.
[122] Ibid.
[123] *Gender Goods and Services Directive* [2004] OJ L 373/37, 38.
[124] Explanatory Notes, *Equality Act 2010* [5].
[125] *Litster v Forth Dry Dock and Engineering Co Ltd* [1990] 1 AC 546.
[126] *Nold v Commission* (Case 4/73) [1974] I-ECR 491 [13].
[127] *Litster v Forth Dry Dock and Engineering Co Ltd* [1990] 1 AC 546.
[128] *Preddy v Bull* [2013] 1 WLR 3741, 3749.
[129] See for example: *Mangold v Helm* (C-144/04) [2005] ECR I-09981; [2006] IRLR 143.
[130] See for example: *Marshall v Southampton and South West Area Health Authority II* (Case C-271/91) [1993] ECR I-4367; *Bossa v Nordstress Ltd* [1998] ICR 694; *Alabaster v Barclays Bank Plc (formerly Woolwich plc) and Anor* [2005] ICR 1246.

succeeding chapters. Given that much of the strength and force of discrimination law in the United Kingdom stems from the relationship between the United Kingdom and the EU, there are concerns that Brexit will lead to a weakening of human rights protections more generally.[131] At the time of writing, the *European Union (Withdrawal) Act 2018* will, on commencement, transpose existing EU law into British law. As such, the Directives will continue to have effect after the United Kingdom withdraws from the European Union. Nevertheless, given the complexity of structures embedding equality in law in the United Kingdom, it remains to be seen what effect Brexit will have on human rights protection generally,[132] and discrimination law specifically.

In Australia, there are few rights explicitly protected in the Constitution.[133] Further, while there are now three statutory Human Rights Acts at state or territory level,[134] there is no statutory human rights Act at a federal level. There were some attempts to implement more broad-reaching human rights protection in the 1970s and 1980s, but this had limited parliamentary support.[135] It is from this context that the more limited protections offered by the *Racial Discrimination Act 1975* (Cth) and *Sex Discrimination Act 1984* (Cth) arise.

Two reasons explored by Charlesworth to explain this reluctance to recognise rights constitutionally include first, that the Australian constitutional tradition is built upon a Westminster constitutional tradition with a focus on parliamentary supremacy rather than individual rights.[136] Second, the primary focus of the constitutional drafters was on drafting a federal compact between the Australian states rather than securing individual rights.[137] When one framer, Andrew Inglis Clark, proposed the inclusion of a provision based on the American equal protection and due

[131] Robert Wintemute, 'Goodbye EU Anti-Discrimination Law? Hello Repeal of the Equality Act 2010?' (2016) 27(3) *King's Law Journal* 387, 388; Colm O'Cinneide, *Brexit and Human Rights* (Paper No 16, Centre for International Governance Innovation and British Institute of Comparative Law, 2018) 2–3.
[132] Tobias Lock, 'Human Rights Law in the UK after Brexit' [2017] (Brexit Special Extra Issue) *Public Law* 117, 133; Chris McCorkindale, 'Brexit and Human Rights' (2018) 22(1) *Edinburgh Law Review* 126, 130–131.
[133] The three provisions in the *Australian Constitution* which directly deal with matters which can be categorised as human rights are s 80, which provides that a citizen, when charged on an indictment for a federal offence, has the right to a jury trial; s 116 which denies federal legislative power with respect to religion and s 117 which protects residents of one state from discrimination based on state residency in another state. For a discussion of rights in the Australian constitution see for example: Rosalind Dixon, 'Functionalism and Australian Constitutional Values' in Rosalind Dixon (ed) *Australian Constitutional Values* (Hart Publishing, 2018) 3; Elisa Arcioni and Adrienne Stone, 'The Small Brown Bird: Values and Aspirations in the Australian Constitution' (2016) 14(1) *International Journal of Constitutional Law* 60.
[134] See the *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2019* (Qld).
[135] Hilary Charlesworth, 'The Australian Reluctance about Rights' (1993) 31(1) *Osgoode Hall Law Journal* 195, 205.
[136] Ibid 197–198. Sir Owen Dixon, 'Two Constitutions Compared' in Judge Woinarski (ed), *Jesting Pilate and Other Papers and Addresses* (William S Hein & Co, 2nd ed, 1997) 100, 101 and 102.
[137] Charlesworth, 'The Australian Reluctance about Rights', above n 135, 198. See also: W Harrison Moore, 'Commonwealth of Australia Bill' (1900) 16(1) *Law Quarterly Review* 35, 35.

process clause, the other framers rejected this. They rejected this clause because it would interfere with the existing colonial practice of enacting racially discriminatory laws.[138]

In addition to the failure to include many rights protecting provisions in the Constitution, the Australian approach to constitutional interpretation was, for much of the twentieth century, one of 'legalism.'[139] The doctrine of legalism was articulated by Australian High Court judge, Sir Owen Dixon as:

> … close adherence to legal reasoning is the only way to maintain the confidence of all parties in Federal conflicts. It may be that the court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than strict and complete legalism.[140]

Until at least the 1980s, the Australian judges were committed to a form of legalism.[141] This approach to legalism reflects an adherence to formal legal materials and constraints.[142] This legalist approach was reflected in the narrow angle adopted to the few express rights contained in the Australian Constitution that were 'discovered' to be merely procedural provisions.[143] The effect of this allegiance to 'legalism' in a constitutional context on statutory discrimination law is explored further in Part III of this thesis.

As a consequence of the Australian constitutional context, the introduction and application of domestic discrimination law in Australia in particular needs to be understood within the context of international conventions. Discrimination legislation in Australia was introduced, in part, to implement and conform to international and supra-national law.[144] Notions of equality and non-discrimination are firmly embedded in international law, both in general human rights treaties as well as specialised conventions on discrimination and disadvantage specific to certain attributes or grounds. The International Covenant on Civil and Political Rights ('ICCPR') and the International

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[138] For further discussion of Andrew Inglis Clarke's proposals see: William G Buss, 'Andrew Inglis Clark's Draft Constitution, Chapter III of the Australian Constitution and the Assist from Article III of the Constitution of the United States' (2009) 33(3) *Melbourne University Law Review* 718; John M Williams, '"With Eyes Open": Andrew Inglis Clark and Our Republican Tradition' (1995) 23(2) *Federal Law Review* 149; John M Williams, 'Race, Citizenship and the Formation of the Australian Constitution: Andrew Inglis Clark and the "14th Amendment"' (2008) 42(1) *Australian Journal of Politics & History* 10.

[139] Theunis Roux, *Politico-Legal Dynamics of Judicial Review: A Comparative Analysis* (Cambridge University Press, 2018) 92; Brian Galligan, *The Politics of the High Court* (University of Queensland Press, 1987) 252.

[140] Sir Owen Dixon, 'Concerning Judicial Method' (1956) 29 *Australian Law Journal* 468, 472.

[141] Roux, *Politico-Legal Dynamics of Judicial Review*, above n 139, 92–93.

[142] Charlesworth, 'The Australian Reluctance about Rights', above n 135, 198.

[143] To adopt the language of Chief Justice Barwick in *Spratt v Hermes* (1965) 114 CLR 226, 224. See also: Hilary Charlesworth, 'Individual Rights and the Australian High Court' (1986) 4 *Law in Context* 52.

[144] *Racial Discrimination Act 1975* (Cth) preamble, *Sex Discrimination Act 1984* (Cth) s 3, *Disability Discrimination Act 1992* (Cth) s 3; *Age Discrimination Act 2004* (Cth) s 3.

Covenant on Economic, Social and Cultural Rights ('ICESCR') both contain provisions confirming that the rights enunciated in the Conventions should be exercised without discrimination.[145] The International Convention on the Elimination of All Forms of Racial Discrimination ('ICERD'),[146] the Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW'),[147] the Convention on the Rights of the Child,[148] and the Convention on the Rights of Persons with Disabilities all prohibit discrimination on certain grounds and require states to take actions to further equality.[149]

There is explicit reliance on these international instructions in the Australian legislation. The explicit reliance on international conventions was required because the Australian Constitution gives no general power to the federal Parliament to introduce legislation which would protect individuals from discrimination. To implement such legislation, the federal Parliament was initially reliant on the external affairs power in the Australian Constitution which allows the federal Parliament to pass laws implementing international treaties. As the scope of this power was unknown, the *Racial Discrimination Act 1975* (Cth), in particular, closely matches the text of the ICERD.[150] The extent to which the other federal Acts implement an international treaty has been obliquely questioned by the High Court.[151] In addition, both Charlesworth and Charlesworth, and Thornton contend that the manner in which the *Sex Discrimination Act 1984* (Cth) implements CEDAW is insufficient because the *Sex Discrimination Act 1984* (Cth) applies to both men and women equally.[152] The nature of the relationship between the treaty instruments and the domestic legislation has been considered by the Australian courts in a number of cases and this will be discussed in succeeding chapters.

[145] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) Art 26.
[146] *International Convention on the Elimination of All Forms of Racial Discrimination,* opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).
[147] *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 2149 UNTS 13 (entered into force 3 September 1981).
[148] *Convention on the Rights of the Child*, opened for signature 20 November 1989 1577 UNTS 3 (entered into force 2 September 1990).
[149] *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).
[150] Rees, Rice and Allen, above n 42, 118.
[151] *Purvis v State of New South Wales* (2003) 217 CLR 92, 153 (Gummow, Hayne and Heydon JJ). See also *Re McBain Ex Parte Australian Catholic Bishops Conference and Anor* (2002) 209 CLR 372, 475 (Callinan J).
[152] Hilary Charlesworth and Sara Charlesworth, 'The *Sex Discrimination Act* and International Law' (2004) 27(3) *UNSW Law Journal* 858, 859–860; Margaret Thornton, 'Sex Discrimination, Courts and Corporate Power', above n 17, 36.

In Canada, prior to the introduction of the *Charter* there was limited constitutional recognition of a right to equality. The Constitution Act 1867 ('*BNA Act*')[153] provided some limited protections of individual rights. These limited protections were the right of Protestants and Catholics to organise their own schooling,[154] and the protection of the right to use both French and English in the courts and the Parliament of Canada and the legislature of Quebec.[155] But there was no general equality right. The Supreme Court of Canada when considering racially discriminatory legislation, confirmed that the Court was primarily concerned with the question of whether a discriminatory Act was made pursuant to the separation of legislative powers outlined in the *BNA Act* rather than the discriminatory nature of the legislation itself.[156] In the well-known Persons Case,[157] the Supreme Court accepted that women were not to be considered 'qualified persons' for the purposes of the *BNA Act*.[158] Even after the introduction of the statutory *Canadian Bill of Rights* in 1960 which contained an equality before the law provision at s 1(b), the Supreme Court of Canada only gave the provision substantive application once and limited its meaning to a restatement of equality before the law.[159]

However, since the introduction of the *Charter* a right to equality has been embedded in constitutional law. Section 15 of the *Charter* ensures that the citizens are treated with equal respect, consideration and concern, without stereotyping, prejudice or exacerbation of vulnerability.[160] Section 15 has been utilised to broaden statutory discrimination law to new analogous grounds for protection, even over the explicit rejection of these grounds by provincial legislatures.[161] In theory, the difference between the two protections is that s 15 of the *Charter* provides protection from discriminatory laws and conduct by public authorities and the statutory Codes provide protection from discriminatory conduct in private activities such as the provision of goods and services and

[153] Originally named the *British North America Act 1867* and for the purpose of this historical account it will be referred to as the BNA Act.
[154] *British North America Act* s 93.
[155] *British North America Act* s 113
[156] See *Quong-Wing v The King* (1914) 49 SCR 440.
[157] *Re Meaning of Word 'Persons' in Section 24 of the British North American Act* [1928] SCR 276. This was overruled by the Privy Council in *Edwards v Attorney-General of Canada* [1930] AC 124.
[158] *Edwards v Attorney-General of Canada* [1930] AC 124. Cf *Nairn & Ors v University of St Andrews* [1909] AC 147.
[159] *Regina v Drybones* [1970] SCR 282. Cf *Attorney-General of Canada v Lavell* [1974] SCR 1349.
[160] Lorraine E Weinrib, 'Canada' in Dennis Davis, Alan Richter and Cheryl Saunders (eds), *An Inquiry into the Existence of Global Values: Through the Lens of Comparative Constitutional Law* (Hart Publishing, 2015) 114–115.
[161] *Vriend v Alberta* [1998] 1 SCR 493.

employment. However, in practice, this division is far less clear, particularly in the context of the provision of government services.[162]

Since *Andrews v Law Society of British Columbia* ('*Andrews*'),[163] the doctrine of equality pursuant to s 15 and the statutory human rights codes have developed in tandem with *Andrews* drawing upon the jurisprudence that had been developed pursuant to the statutory human rights codes.[164] However, as will be demonstrated in succeeding chapters there are important differences in the doctrinal approaches taken to statutory discrimination law in Canada as compared to equality claims brought pursuant to the *Charter*.[165]

Further, while Canada is a signatory to all the international agreements outlined above, in the main, these are not specifically relied upon in the statutory texts.[166] While some provincial legislation refers to the Universal Declaration of Human Rights and other international obligations in the preamble, the *Canadian Human Rights Act* has no such statement.[167] A review of the federal legislation in 2000 recommended that the preamble to the *Canadian Human Rights Act* be amended to make explicit the link between the domestic human rights tradition and the international human rights.[168] However, this suggested amendment was not enacted.

In each jurisdiction both internal and external factors led to the introduction of discrimination legislation. In each jurisdiction, the existing legal avenues for redress both in the common law and constitutional frameworks were lacking. In all jurisdictions there were obligations stemming from international and supra-national instruments which led to the introduction of discrimination law. With respect to interpreting discrimination law, succeeding chapters will consider how these contextual factors are reflected in the jurisprudence that has developed.

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[162] *Tranchemontagne v Ontario (Director, Disability Support Program)* [2006] 1 SCR 513; *Canada (Canadian Human Rights Commission) v Canada (Attorney-General)* [2018] 2 SCR 230. For a discussion of the lack of clarity surrounding the distinction see: Mummé, 'At the Crossroads in Discrimination Law', above n 59.
[163] [1989] 1 SCR 143.
[164] Ibid 172–173 (McIntyre J)
[165] For a discussion of the divergence see for example: Mummé, 'At the Crossroads in Discrimination Law', above n 59; Réaume, 'Defending the Human Rights Codes from the Charter', above n 59; Benjamin Oliphant, 'Prima Facie Discrimination: Is Tranchemontagne Consistent with the Supreme Court of Canada's Human Rights Code Jurisprudence' (2012) 9 *Journal of Law & Equality* 33; Claire Mummé, 'The Ontario Human Rights Code's Distributive and Recognitional Functions in the Workplace' (2014) 18(1) *Canadian Labour & Employment Law Journal* 145.
[166] Gerard V La Forest et al *Report of the Canadian Human Rights Act Review Panel* (Canadian Human Rights Review Panel, 2000), 2.
[167] See for instance: Human Rights Code Human Rights Code CCSM c H175 Preamble.
[168] La Forest et al, above n 166, 2.

2.2 Passage and Compromise

In addition to the reasons for the introduction of discrimination legislation explored above, the passage of protections from discrimination was a result of a campaign by many different groups for recognition of the prolonged disadvantaged suffered and the need to redress the harms that have occurred because of discrimination based on race, gender, LGBTI+ status, disability and age.[169] In each jurisdiction, however, there was opposition to the introduction of the legislation from various interest groups. In the Australian case law in particular, the debate and the eventual compromises made to the legislation have been invoked by judges to justify a narrow interpretation.[170] But using the parliamentary speeches and the explanatory materials from each jurisdiction, this section will demonstrate that rather than demonstrating obvious or clear compromises, instead there is simply a lack of a clear articulation of the aims that the legislature sought to achieve by passing discrimination laws.[171] While there has been some movement towards a clearer articulation of the aims of discrimination law in some of the parliamentary debates from the 2000s onwards, there is still a lack of clarity surrounding the behaviours the Parliament intended to prohibit and why.

In each jurisdiction, the first attribute that was granted protection from discrimination was race. Race discrimination legislation was first passed in Canada in the 1940s at a provincial level in Ontario and Saskatchewan.[172] These early pieces of legislation conceived discrimination as a criminal offence and, according to Hunter, were rather crudely drawn.[173] The more modern Human Rights Codes began to be introduced in the 1960s and 1970s. These newer Codes conceptualised discrimination as a civil matter rather than a criminal offence. The Acts which were introduced were based on the Ontario *Human Rights Code* introduced in the 1960s. In addition, the federal *Canadian Human Rights Act* was first passed in 1978 and operates in a broadly similar fashion as the provincial legislation. There were limitations to these initial Acts. The first human rights

[169] See for example Catherine Kelogg, 'Lesbian and Gay Rights in Canada: Social Movements and Equality Seeking 1971–1995' (2001) 6(1) *Review of Constitutional Studies* 117.
[170] *IW v City of Perth* (1997) 191 CLR 1, 15 (Brennan CJ and McHugh J).
[171] Rees, Rice and Allen, above n 42, 8; Karon Monaghan, *Monaghan on Equality Law* (Oxford University Press, 2nd ed, 2013) 63.
[172] R Brian Howe and David Johnston, *Restraining Equality: The Human Rights Commissions in Canada* (University of Toronto Press, 2000) 7l; Dominique Clément, *Canada's Rights Revolution: Social Movements and Social Change 1937–1982* (UBC Press, 2008) 25.
[173] Ian A Hunter, 'Human Rights Legislation in Canada: Its Origin, Development and Interpretation' (1976) 15 *UW Ontario Law Review* 21. For further accounts of the introduction of Human Rights Legislation in Canada see: James W Walker, *"Race" Rights and the Law in the Supreme Court of Canada: Historical Case Studies* (The Osgoode Society for Canadian Legal History, 1997); Dominique Clément, 'Rights without the Sword Are but Mere Words: The Limits of Canada's Rights Revolution' in Janet Miron (ed), *A History of Human Rights in Canada: Essential Issues* (Canadian Scholars Press, 2009) 43; Howe and Johnston, above n 172, 7.

Acts only prohibited discrimination on the grounds of race and religion. When these early Acts were introduced, there was both active and passive resistance to the idea that discriminatory conduct should be prohibited by law. This resistance can even be seen from the very people introducing the legislation. For example, in Canada, premiers and other members of the provincial legislatures relied on either the British common law protections or religious teachings to downplay the need for discrimination legislation. Although he introduced the first *Racial Discrimination Act*, the Premier of Ontario George Drew maintained that 'the best way to avoid racial and religious strife is not by imposing a method of thinking, but by teaching our children that we are all members of a great human family.'[174] The Premier of Alberta, Ernest Manning, also strongly rejected the idea of additional protections from discriminatory conduct arguing that his government preferred 'to rely on those individual rights and privileges as established by the Common Law of England and the British Commonwealth.'[175] In Quebec, Premier Maurice Duplessis dismissed the need for discrimination legislation on the basis that Québécois only needed to read the Bible to understand the wrongness of discrimination.[176] In British Columbia, during the debates surrounding the introduction of Fair Practice legislation, one member insisted that discrimination was not a problem that needed legislative involvement arguing that: 'discrimination on any grounds contemplated by this Bill is virtually non-existent…Besides, you simply cannot legislate people into the Kingdom of Heaven.'[177]

In the United Kingdom, legislation prohibiting discrimination began to emerge in the 1960s.[178] The series of Acts prohibiting racial discrimination implemented in the 1960s and 1970s were passed at a time when the United Kingdom's approach to black and ethnic minorities was described by Monaghan as 'at best…ambivalent and at worst as plain racist.'[179] When the first race discrimination Acts were introduced in the 1960s, they arose out of a concerted campaign to better protect racial and ethnic minorities from discrimination. However, as there was considerable resistance to the passage of the legislation, the original Acts were narrow in scope in two ways. First, because the Acts adopted a narrow definition of discrimination and second, the Acts applied

[174] Will Silver, Dominique Clément and Daniel Trottier, *The Evolution of Human Rights in Canada* (Canadian Human Rights Commission, 2012) 11 citing James Walker, 'The 'Jewish Phase' in the Movement for Racial Equality in Canada' (2002) 34 *Canadian Ethnic Studies* 1 citing Globe and Mail, 2 September 1948.
[175] Ibid citing Maureen Riddell, *The Evolution of Human Rights Legislation in Alberta, 1945-1979* (Edmonton, Government of Alberta, 1978-1979).
[176] Ibid 12.
[177] Ibid 12.
[178] For a more extensive account of the history of the legislation in the United Kingdom see: Lester and Bindman, above n 1, 3; Lord Lester, 'Discrimination: What Can Lawyers Learn from History?' [1994] *Public Law* 224; Monaghan, *Equality Law*, above n 54, 2.
[179] Monaghan, *Monaghan on Equality Law*, above n 171, 36.

in only a limited number of areas of public life.[180] As in the Canadian debates surrounding the need for protection from discrimination, in the United Kingdom, prominent politicians and jurists questioned whether discrimination was a societal ill that required a legislative response. For example, Lord Radcliffe considered that 'the two key words…prejudice and discrimination, do not carry any association of moral ill-doing'[181] and that, in his view, law should only intervene 'in situations in which the moral issue is generally regarded as beyond debate.'[182]

As in Canada, legislation prohibiting discrimination first emerged in Australia at the state level with South Australia passing the first Act prohibiting discrimination on the basis of race.[183] Similar to the Canadian legislation, this was a criminal prohibition. As was the case in the Canadian context, there were few prosecutions based on the criminal prohibition. The Australian federal government passed the first federal prohibitions on discrimination in 1975 when it passed the *Racial Discrimination Act 1975*. In introducing the 1975 Bill, the Attorney-General Kep Enderby acknowledged that the purpose of the legislation was to implement Australia's obligations contained in the ICERD, remedy the inadequacies of the common law and educate the public about the 'undesirable and unsocial consequences of discrimination…and make them more obvious and conspicuous.'[184] The Australian debates surrounding the passage of legislative protections against discrimination display similar themes to those discussed above. The legislation had bipartisan support and the academic commentary made at the time does not indicate a significant level of controversy about the notion of protection from discrimination.[185] Nevertheless, the speeches made at the Act's second reading seem to indicate that the very notion that racism existed in Australia was contested. Even with this bipartisan support, there were still members who questioned the utility of an Act prohibiting discrimination either on the basis that discrimination and racism did not exist in Australia, or that it was not a significant problem when compared to the degree to which racism and discrimination occurred in the third world.[186] Even

[180] Hepple, above n 88, 164.
[181] Lord Radcliffe, 'Immigration and Settlement: Some General Considerations — Carr-Saunders Lecture' (1969) 11(1) *Race* 35, 45. For commentary see: Lord Lester, 'Equality and United Kingdom Law: Past, Present and Future' [2001] *Public Law* 77, 87.
[182] Radcliffe, above n 181, 45–46.
[183] *Prohibition of Discrimination Act 1966* (SA).
[184] Commonwealth of Australia, *Parliamentary Debates)*, House of Representatives, 13 February 1975, 285 (Kep Enderby, Attorney-General).
[185] See for instance: Gareth Evans, 'Benign Discrimination and the Right to Equality' (1974) 6(1) *Federal Law Review* 26; David Partlett, 'The Racial Discrimination Act 1975 and the Anti-Discrimination Act 1977: Aspects and Proposals for Change' (1977) 2(2) *UNSW Law Journal* 152; David Partlett, 'Benign Racial Discrimination: Equality and Aborigines' (1979) 10(3) *Federal Law Review* 238; Brian Kelsey, 'A Radical Approach to the Elimination of Racial Discrimination' (1975) 1(1) *UNSW Law Journal* 56.
[186] Commonwealth of Australia, *Parliamentary Debates*, Senate, 22 May 1975, 1544 (Ian Wood).

where discrimination was occurring, it was argued that this was 'unintentional' discrimination and therefore not a problem requiring legal sanction.[187] It was also claimed that if discrimination did exist, it offered a character-building opportunity for those who were discriminated against.[188] The other criticism made of the Act was that discrimination could not be rectified through legislative reform; these critics spoke of the potential for the Act's misuse.[189]

During the negotiation process some provisions of the Bill were amended. These amendments included the removal of criminal sanctions and as well as the removal of provisions prohibiting the incitement of racial hatred.[190] None of the amendments related to the legislative text with respect to the prohibited conduct provisions.

An illustration (albeit extreme) of this type of opposition is seen in the speech of Senator Glen Sheil:

> No country on earth has solved the problem of inter-racial relations, especially when those races are living side by side. The problem seems to me to be worse in those countries that have legislated.…Forced integration has been tried, for example, in the United States of America and it has proven a monumental failure. Forced segregation has been tried, for example, in South Africa and Rhodesia and it has led those countries into international ostracism, unjustifiably in my opinion because the multiracial and multinational problems in South Africa appear to be of much less magnitude than they are in other countries.[191]

The legislation's purpose was both to acknowledge the existence of racism and to attempt to combat it. As to the existence of racism, Senator Neville Bonner stated in response:

> I have had the opportunity to read some of the speeches on this Bill. Some have said that there is no discrimination. I say to all and sundry: Ask an Italian, a Sicilian or a Greek who has been called, to use some of the denigrating terms that have been used, a wog or a greaser or ask a Jew who has been called a hooknose or a moneybags whether he knows what discrimination is. Ask some of the Aboriginal people who have been called boongs Abos and such like whether there is discrimination. There is discrimination and we must do something about it.[192]

[187] Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 3 April 1975, 3249 (Michael MacKellar).
[188] Commonwealth of Australia, *Parliamentary Debates*, Senate, 22 May 1975, 1792 – 1793 (Ian Wood).
[189] Examples of this include Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 8 April 1975, 1303 (John Howard); Commonwealth of Australia, *Parliamentary Debates*, Senate, 27 May 1975, 1878 (Gordon Sinclair Davidson).
[190] Luke McNamara and Tamsin Solomon, 'The Commonwealth Racial Hatred Act 1995: Achievement or Disappointment?' (1996) 18(2) *Adelaide Law Review* 259, 260. Note that the prohibition on racial vilification was added to the *Racial Discrimination Act 1975* (Cth) in the *Racial Hatred Act 1994* (Cth).
[191] Commonwealth of Australia, *Parliamentary Debates*, Senate, 15 May 1975, 1536 (Glen Shiel).
[192] Commonwealth of Australia, *Parliamentary Debates*, Senate, 27 May 1975, 1884 (Neville Bonner).

Protection for other attributes has been introduced incrementally starting with prohibitions on sex discrimination. In the case of sex, a central controversy was whether such a prohibition was required given the distinct differences between men and women. For example, when debating the introduction of the *Sex Discrimination Act 1975* in the United Kingdom, parliamentarians questioned the necessity of legislation to deal with differences in sex:

> There is a mania today in legislation for attacking discrimination, oblivious that all life is about discrimination, because all life is about differences. This Bill is a particularly heinous example of the follies into which Governments and Parliaments are led when they give heed to this fashionable but foolish craze.[193]

The passage of the *Sex Discrimination Act 1984* in Australia in the 1980s exhibited similar characteristics to the debate surrounding the passage of the *Racial Discrimination Act 1975*. Introducing the legislation, Susan Ryan stated that the Act was designed to give effect to some of Australia's obligations in accordance with the CEDAW as well as to provide an avenue for redress for discrimination on the basis of sex which results in economic and social disadvantage.[194] In Australia, the introduction of sex discrimination legislation was controversial.[195] Again, the impact of discrimination was questioned:

> The UN Convention on the Elimination of All Forms of Discrimination Against Women makes perfectly good sense if it relates to the removal of social and legal repression of women as it exists in many Third World countries. Its application to Western democracies is more doubtful.[196]

There were passionate speeches in opposition to the Bill with some members arguing that the Bill represented a form of social engineering and a pursuit of affirmative action policies:

> I oppose the Sex Discrimination Bill. I do so because I believe that it is an ineffective attempt to impose upon society values, standards and principles which are not acceptable to the community at large.
>
> …
>
> What Government supporters are not doing is giving enough encouragement and support to the women who want to remain at home and who chooses to remain at home and look after her family and children. All sorts of things are being done to encourage a woman to leave home.
>
> …

[193] United Kingdom, *Parliamentary Debates*, House of Commons, 26 March 1975, vol 889, 544 (Enoch Powell).
[194] Commonwealth of Australia, *Parliamentary Debates*, Senate, 2 June 1983, 1187 – 1190 (Susan Ryan, Minister assisting the Prime Minister for the Status of Women).
[195] For more extensive accounts of the controversy see: Margaret Thornton and Trish Lucker, 'The *Sex Discrimination Act* and its Rocky Rite of Passage' in Margaret Thornton (ed), *Sex Discrimination in Uncertain Times* (ANU Press, 2010) 25.
[196] Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 1 March 1984, 344 (Peter Drummond).

> Arbitrary discrimination certainly does exist. I emphasise the word 'arbitrary.' We must encourage the community to eliminate that discrimination. We all have a sense of fairness. We must admit there is discrimination in the community. But do Government supporters think that the answer is to bring down this kind of draconian legislation?[197]

As a consequence of the controversy, changes were made to the Bill to ensure its passage. The most notable changes were the removal of the affirmative action provisions (now incorporated), and broader exemptions for religious organisations and schools as well as for insurance and superannuation.[198]

From the 1980s in Canada and the 1990s in Australia and the United Kingdom, there began to be clearer articulations for the rationale of prohibiting discrimination on new grounds and the reasons why unjust discrimination should be prohibited. In Australia, this clearer rationale for protection can be seen in the second reading speeches and Explanatory Memorandum to the *Disability Discrimination Act 1992* (Cth). When introducing the Act, the Minister for Health, Housing and Community Services stated that the legislation was a result of a:

> Vision [of] a fairer Australia, where people with disabilities are regarded as equals, with same rights as all other citizens, with recourse to systems that redress any infringements of their rights … where difference is accepted, and where public instrumentalities, communities and individuals act to ensure that society accommodates such difference.[199]

In a similar fashion to the passage of the *Racial Discrimination Act 1975*, whilst the conservative Liberal and National parties in opposition voted to pass the Act, many members voiced concerns and opposition to the Bill on the basis that protections from discrimination on the ground of disability were unnecessary, would place an intolerable burden upon business and would bureaucratise an issue that would be better left to the family unit.[200]

In 2004, the Australian Howard Government passed the *Age Discrimination Act 2004*. The rationale for the passage of the Act given by the then Attorney-General, Daryl Williams, was to fulfil Australia's international commitments by ensuring the full participation of older persons in public life. Consistent with the rationale for the introduction of the previous discrimination Acts, the

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[197] Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 1 March 1984, 367 (Raymond Groom).
[198] Susan Ryan, 'The "Ryan Juggernaut" Rolls On' (2004) 29(3) *UNSW Law Journal* 829, 830 – 831.
[199] Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 26 May 1992, 2755 (Brain Howe, Minister for Health, Housing and Community Services).
[200] See for example: Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 19 August 1992, 144 (Bruce Scott); Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 19 August 1992, 208–209 (John Bradford); Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 19 August 1992, 215–216 (Wilson Tuckey).

Attorney-General outlined that the aim of the legislation was to redress the negative consequences of stereotyping to the wellbeing of individuals.[201] However, the Age Discrimination Bill also was framed as an economic measure that would ensure that older workers were kept in the workforce for longer periods of time, improving economic productivity and reducing reliance on government social welfare.[202]

The United Kingdom first passed legislation prohibiting disability discrimination in 1995. This legislation was passed after two decades of activism from the disability community.[203] The path to passing the *Disability Discrimination Act* was slow with 14 attempts made to pass the legislation prior to 1995.[204] There was significant resistance to the passage of an Act prohibiting disability discrimination on the basis that there was no evidence of widespread discrimination against those with disabilities and that the protections in place through the *Chronically Sick and Disabled Persons Act* ('CSDPA') were adequate.[205] The CSDPA required that local authorities attempted to familiarise themselves with the number of persons with disabilities living in the area, to publicise the services that were offered to those with disabilities and 'so far as in the circumstances both practical and reasonable' have regard for the needs of those with disabilities in the design of public buildings.[206] Other arguments against broader protections against discrimination for those with disabilities were that the implementation would be too expensive and unworkable for business and that these issues were best dealt with in the private sphere.[207]

Most recently in the United Kingdom, prohibitions on discrimination were consolidated into one Act in 2010, the *Equality Act 2010* (UK).[208] The motivation behind the *Equality Act 2010* (UK) was two-fold: to harmonise the approach to discrimination protection and to further strengthen those protections in an attempt to further progress equality.[209] The *Equality Act 2010* (UK) was an attempt to strengthen protections for discrimination through the unification and simplification of those protections.[210] Nevertheless, it is notable in this context that the *Equality Act 2010* (UK) does

[201] Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 26 June 2003, 17621–17623 (Daryl Williams, Attorney-General).
[202] Ibid.
[203] Charlotte Pearson and Nick Watson, 'Tackling Disability Discrimination in the United Kingdom: The *British Disability Discrimination Act*' (2007) 23 *Washington University Journal of Law & Policy* 95, 101–102.
[204] Ibid 102.
[205] Ibid 103.
[206] Ibid 100.
[207] Ibid 101.
[208] *Equality Act 2010* (UK) ss 3, 13 and 19.
[209] Government Equalities Office, *Framework for a Fairer Future –The Equality Bill*, Cm 7431 (2008) 9.
[210] Equalities Review, *Equalities Review: Fairness and Freedom: The Final Report of the Equalities Review* (2007), 115, available at:

not apply in Northern Ireland.[211] Reviews into the effectiveness of discrimination law in the United Kingdom in 2007 and 2008 had found that there were long-term concerns about the inconsistencies in the discrimination law framework due to the many Acts, amendments to those Acts and the different ways that protections from discrimination had come about.[212] The *Equality Act 2010* (UK) was one of the last Acts passed by the Labour Government and received Royal Assent during Prorogation.[213] It was the first Act to leave explanatory notes within the text of the legislation in an attempt to aid the user in understanding, interpreting and applying the legislation.[214] Despite the Bill being carried over multiple parliamentary sessions, there were still criticisms that there was limited time for debate and parliamentary scrutiny of the legislation.[215] The Joint Committee on Human Rights considered that the Act would 'enhance the protection of human rights as well as simplifying and clarifying the law.'[216] In addition, the Minister for Women and Equality envisioned at the second reading of the Bill in the House of Commons that the legislation would cement the right to equality as a 'birth-right.'[217] Consistent with the rationale for the introduction of the *Age Discrimination Act 2004* in Australia, in the United Kingdom, the Minister also argued that non-discrimination laws were needed to ensure a meritocracy and to ensure a competitive economy with everyone's talents being utilised to their fullest potential.[218] Similar to the earlier Acts, however, the *Equality Act 2010* (UK) is a compromise between higher ideals of equality and pragmatic concerns.[219]

The passage of discrimination law in each jurisdiction demonstrates similar features. In each jurisdiction, particularly when the early legislation was passed, there was a degree of minimisation as to the existence and harmfulness of discriminatory practices. Since the 2000s the explanatory materials have become clearer as to the harm that discrimination law is designed to prevent. But

http://webarchive.nationalarchives.gov.uk/20100806180051/http://archive.cabinetoffice.gov.uk/equalitiesreview/upload/assets/www.theequalitiesreview.org.uk/equality_review.pdf, accessed: 11 April 2019.

[211] The Acts which prohibit discrimination in Northern Ireland include the *Equal Pay Act (Northern Ireland) 1970*; *Sex Discrimination (Northern Ireland) Order 1976*; *Disability Discrimination Act 1995* (UK); *Race Relations (Northern Ireland) Order 1997*; *Fair Employment and Treatment (Northern Ireland) Order 1998*; *Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003*; *Employment Equality (Age) Regulations (Northern Ireland) 2006*.

[212] Equalities Review, above n 209, 10.

[213] James Hand, Bernard Davis and Charles Barker, 'The *British Equality Act 2010* and the Foundations of Legal Knowledge' (2015) 41(1) *Commonwealth Law Bulletin* 3, 3.

[214] Ibid 3-4.

[215] James Hand, 'Unification, Simplification, Amplification? An Analysis of Aspects of the *British Equality Act*' (2012) 38(3) *Commonwealth Law Bulletin* 509, 512–513.

[216] Joint Committee on Human Rights, *Legislative Scrutiny: Equality Bill*, 26th Report of Session 2008–09, HL Paper 169, HC 736, 12 November 2009, 3.

[217] United Kingdom, *Parliamentary Debates*, House of Commons, 11 May 2009, 553 (Harriet Harman, Minister for Women and Equality).

[218] Ibid.

[219] O'Cinneide and Liu, above n 48, 85.

the language surrounding the nature of the harm and the aims of the Bill are still often presented using vague and aspirational language. In determining *how far* discrimination is meant to be ameliorated, or how to balance competing rights and interests, the reader is left none the wiser as to how the legal frameworks were envisaged to operate in practice.

2.3 Legal frameworks for prohibiting discrimination

This section outlines the operative provisions of discrimination law. It will highlight the similarities and differences between the legislative regimes. It will focus on the scope of protection provided (the grounds and places of operation), and the conduct that is prohibited. As highlighted in the introduction to the chapter, this section will not provide a detailed account of the technicalities of the legislation. Instead, it provides a basis to assess the way in which the legislation has been interpreted by the judiciary. In each subsection, the discussion will commence with the British legislation, before considering the legislation in Australia and Canada.

2.3.1 Protected attributes and scope of operation

In each jurisdiction, the legislation prohibits discrimination because of certain attributes and in specific areas of public life. These protected attributes and specified areas for protection are generally similar although the definitions differ in terms of language and specificity. Attributes were added incrementally as societal understandings of the disadvantages suffered by people because of certain characteristics became better understood.

Currently, discrimination due to race, sex, disability, age, sexual orientation, gender identity, marital status and pregnancy is protected at the national level in each jurisdiction.[220] In addition, in the United Kingdom and Canada, religious belief is also protected at the national level.[221] In Australia, protection on the basis of religious belief is currently only afforded through some of the legislative regimes at state level.[222] The *Canadian Human Rights Act* further prohibits discrimination on the basis of 'genetic characteristics' and 'conviction for an offence for which an allowance has been granted or in respect of which a suspension has been recorded.'[223] The Australian state legislation and the Canadian provincial legislation contain protection from discrimination on other grounds.

[220] *Equality Act 2010* (UK) s 4; *Human Rights Act 1985* (CA) s 3(1); *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth). The meaning of these terms and their interaction with other attributes will be discussed in Chapter Four.
[221] *Equality Act 2010* (UK) s 4; *Canadian Human Rights Act* RSC 1985, c H-6 s 3(1).
[222] *Anti-Discrimination Act 1991* (Qld) s 7(i); *Discrimination Act 1991* (ACT) s 7(u); *Equal Opportunity Act 2010* (Vic) s 6(n); *Equal Opportunity Act 1984* (WA) Pt IV; *Anti-Discrimination Act 1998* (Tas) ss 16(o) and (p).
[223] *Canadian Human Rights Act* RSC 1985, c H-6 s 3(1).

These include employment status,[224] accommodation status,[225] physical features,[226] participation in industrial activity,[227] political conviction,[228] profession, trade, occupation or calling,[229] being subject to domestic or family violence,[230] source of income,[231] and receipt of public assistance.[232] The normative reasons for the inclusion of certain attributes in the legislation are the subject of continued debate. The underlying basis for the inclusion of certain attributes and not others can relate to a number of factors. These include the existence of group or social disadvantage,[233] the existence of negative, stereotypical views of specific attributes,[234] or based on understandings of capabilities and vulnerability.[235] The approach to attributes contained in the legislation in each of the jurisdictions does not appear to be grounded in any specific theory of inclusion.

There are differences in the definitions of the grounds. This has affected the scope of the protection offered. This is particularly apparent with respect to the definition of disability. The definition of disability in the Australian legislation is broad and covers any loss of a person's bodily or mental functions including behaviour that is a symptom or manifestation of the disability, and that exists, previously existed or may exist in the future.[236] In contrast, the *Equality Act 2010* (UK) has a narrower definition of disability. It defines disability as a physical or mental impairment that

[224] *Discrimination Act 1991* (ACT) s7(f).
[225] *Discrimination Act 1991* (ACT) s 7(a).
[226] *Discrimination Act 1991* (ACT) s 7(n); *Equal Opportunity Act 2010* (Vic) s 6(j).
[227] *Discrimination Act 1991* (ACT) s 7(j); *Anti-Discrimination Act 1991* (Qld) s 7(k); *Anti-Discrimination Act* 1992 (NT) s 3(b); *Equal Opportunity Act 2010* (Vic) s 6(f); *Anti-Discrimination Act 1998* (Tas) s 16(l).
[228] *Discrimination Act 1991* (ACT) s 7(o); *Anti-Discrimination Act 1991* (Qld) s 7(k); *Anti-Discrimination Act 1992* (NT) s 3(b); *Equal Opportunity Act 2010* (Vic) s 6(k); *Equal Opportunity Act 1984* (WA) Pt IV; *Anti-Discrimination Act 1998* (Tas) ss 16(m) and (n); Alberta Human Rights Act RSA 2000 c A 25.5 s 4; Human Rights Code CCSM c H175 s 9(2)(k); *Human Rights Act* RSNB 2011, c 171 s 2.1(p); *Human Rights Act* RSPEI 1988, c H-12 *Preamble; Charter of Human Rights and Freedoms* RSQ, c C-12 s 10; *Human Rights Act 2010*, SNL 2010, C H-13.1 s 9(1).
[229] *Discrimination Act 1991* (ACT) s 7(q); *Equal Opportunity Act 2010* (Vic) s 6(c).
[230] *Discrimination Act 1991 (ACT)* s 7(x).
[231] *Alberta Human Rights Act* RSA 2000 c A 25.5 s 4; *Human Rights Code* CCSM c H175 s 9(2)(j); *Human Rights Act* RSPEI 1988, c H-12 Preamble; *Human Rights Act 2010*, SNL 2010, C H-13.1 s 9(1).
[232] *The Saskatchewan Human Rights Code 2018* S-24.2 s 2(1)
[233] Khaitan, above n 18, Ch 5.
[234] Colm O'Cinneide, 'Justifying Discrimination Law' (2016) 36(4) *Oxford Journal of Legal Studies* 909, 921.
[235] Martha Nussbaum, 'Women and Equality: The Capabilities Approach' (1999) 138(3) *International Labour Review* 227, 233; Martha Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 *Yale Journal of Law and Feminism* 1, 8–9.
[236] *Disability Discrimination Act 1992* (Cth) s 3. For further discussion, see also Lee Ann Basser and Melinda Jonest, '*The Disability Discrimination Act 1992* (Cth): A Three-Dimensional Approach to Operationalising Human Rights' (2002) 26(2) *Melbourne University Law Review* 254; Richard Sahlin, 'Legislating Discrimination Protection for Persons with Disabilities in Australia and Sweden: A Comparative Analysis' (2008) 13(2) *Australian Journal of Human Rights* 209.

has substantial and long-term adverse effects on the plaintiff's ability to carry out normal day-to-day activities.[237]

The Canadian legislation also allows for intersectional claims of discrimination, although in practice this has not occurred.[238] While s 14 of the *Equality Act 2010* (UK) provides protection from discrimination on the basis of dual characteristics, this provision has not come into force.[239] None of the Australian Commonwealth Acts explicitly allow for intersectional claims and it is difficult to do so utilising the Commonwealth legislation given that each ground is protected in a separate instrument.[240] A significant amount has been written on the importance of intersectionality in understanding discrimination and equality.[241] Intersectionality is important because, as Mansour acknowledges with respect to the Australian legislation, the focus on specific characteristics fails to understand the intersectional nature of discrimination and inequality.[242] This has both theoretical and practical implications, as it fails to recognise the layered way in which identity is understood and the way in which discrimination and inequality operate. Practically, potential claimants with multiple protected characteristics need to choose at the outset which of the characteristics was ultimately the reason the conduct complained of occurred. For example, an Aboriginal woman would need to decide whether conduct occurred because she was Aboriginal or because she was a woman to determine which Act to bring a claim pursuant to. This can also lessen any claim because it is often likely that the conduct occurred due to a range of reasons and

[237] *Equality Act 2010* (UK) s 6(1). For a critique of the definition of disability in the United Kingdom see Anna Lawson, *'Disability and Employment in the Equality Act 2010*: Opportunities Seized, Lost and Generated' (2011) 40(4) *Industrial Law Journal* 359; Pearson and Watson, above n 201; Stephen Bunbury, 'The Employer's Duty to Make Reasonable Adjustments — When Is a Reasonable Adjustment Not Reasonable' (2009) 10(3) *International Journal of Discrimination and the Law* 111.

[238] For a discussion of intersectionality generally see: Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] *University of Chicago Legal Forum* 139. For discussion of intersectionality in the context of the Canadian legislation see: Dianne Pothier, 'Connecting Grounds of Discrimination to Real People's Real Experiences' (2001) 13(1) *Canadian Journal of Women & Law* 37; Nitya Iyer, 'Categorical Denials: Equality Rights and the Shaping of Social Identity' (1993) 19(1) *Queen's Law Journal* 179; Nitya Duclos, 'Disappearing Women: Racial Minority Women in Human Rights Cases' (1993) 6(1) *Canadian Journal of Women & the Law* 25; Shelagh Day, *Reassessing Statutory Human Rights Legislation: Thirty Years Later: Affirmative Action and Equality Concepts* (Human Rights Research and Education Centre, 1995).

[239] *Equality Act 2010* (UK) s 14.

[240] Section 8 of the *Discrimination Act 1991* (ACT) allows for intersectional claims. There is one reported Tribunal decision which involves an intersectional claim: *Fares v Box Hill College of TAFE* (1992) EOC 92-391.

[241] Some examples are: Hannett, 'Equality at the Intersections', above n 47; McColgan, 'Reconfiguring Discrimination Law', above n 49; Fredman, 'Equality', above n 46; Joanne Conaghan, 'Intersectionality and UK Equality Initiatives' (2007) 23(2) *South African Journal on Human Rights* 317.

[242] Julia Mansour, 'Consolidation of Australian Anti-Discrimination Laws An Intersectional Perspective' (2012) 21(2) *Griffith Law Review* 533, 535

characteristics. The failure to consider intersectionality also means that the law fails to reflect the lived experience of disadvantage that the Acts could be understood to redress.

The Acts in place also specify the areas in which the protection applies. Again, the Acts operate in relatively similar spheres, prohibiting discrimination because of the specified attributes in respect of employment,[243] housing,[244] the provision of goods,[245] services and facilities,[246] the administration of government programs,[247] and education.[248] Again, whilst the areas that the Acts cover are relatively similar, the definition and the interpretation by the courts has led to some variation of approach with respect to when and how each Act will apply in a range of different scenarios. This will be discussed in Part II.

In the coverage of areas and attributes, there are similarities and differences. The Australian and Canadian coverage of attributes and areas appears at first glance to be more expansive than is the case under the British legislation. However, what is lacking in each jurisdiction is any real sense of why certain attributes are protected but others are not. It will be demonstrated in later chapters, particularly in Chapter Four, how this lack of clarity has been navigated differently in each jurisdiction.

2.3.2 Prohibited conduct

This section outlines the way in which the legislation in each jurisdiction prohibits discrimination by focusing on what kinds of conduct the Acts prohibit. In each jurisdiction, discrimination law prohibits both direct discrimination and indirect discrimination on the ground of a protected attribute.

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[243] *Racial Discrimination Act 1975* (Cth) s 15; *Sex Discrimination Act 1984* (Cth) s 14; *Disability Discrimination Act 1992* (Cth) s 15; *Age Discrimination Act 2004* (Cth) s 18; *Equality Act 2010* (UK) Pt 5; *Canadian Human Rights Act* RSC 1985, c H-6 ss 7 and 8.

[244] *Racial Discrimination Act 1975* (Cth) s 12; *Sex Discrimination Act 1984* (Cth) s 23; *Disability Discrimination Act 1992* (Cth) ss 25 and 26; *Age Discrimination Act 2004* (Cth) s 29; *Equality Act 2010* (UK) Pt 4*; Canadian Human Rights Act* RSC 1985, c H-6 s 6.

[245] *Racial Discrimination Act 1975* (Cth) s 13; *Sex Discrimination Act* 1984 (Cth) s 22; *Disability Discrimination Act 1992* (Cth) s 24; *Age Discrimination Act 2004* (Cth) s 28; *Equality Act 2010* (UK) Pt 3; *Canadian Human Rights Act* RSC 1985, c H-6 s 5.

[246] *Racial Discrimination Act 1975* (Cth) s 13; *Sex Discrimination Act 1984* (Cth) s 22; *Disability Discrimination Act* 1992 (Cth) s 24; *Age Discrimination Act 2004* (Cth) s 28; *Equality Act 2010* (UK) Pt 3; *Canadian Human Rights Act* RSC 1985, c H-6 s 5.

[247]*Racial Discrimination Act 1975* (Cth) s 10; *Sex Discrimination Act 1984* (Cth) s 26; *Disability Discrimination Act* 1992 (Cth) s 20; *Age Discrimination Act 2004* (Cth) s 31; *Equality Act 2010* (UK) Pt 3; *Canadian Human Rights Act* RSC 1985, c H-6 s 5.

[248] *Racial Discrimination Act 1975* (Cth) s 15; *Sex Discrimination Act 1984* (Cth) s 21; *Disability Discrimination Act 1992* (Cth) s 15; *Age Discrimination Act 2004* (Cth) s 18; *Equality Act 2010* (UK) Pt 6; *Canadian Human Rights Act* RSC 1985, c H-6 s 5.

In the United Kingdom, the structure of the earlier legislation was similar to the Australian legislation with each Act prohibiting direct and indirect discrimination because of the specified attributes protected by the Act. The *Equality Act 2010* (UK) continues to prohibit direct and indirect discrimination using a similar structure but has streamlined the tests with respect to direct and indirect discrimination. The *Equality Act 2010* (UK) defines direct discrimination as 'less favourable treatment than what another person would receive which occurs because of a protected characteristic.'[249] The definition of direct discrimination was amended from the previous Acts. The historical Acts referred to treatment 'on the grounds of' or 'on the ground of.' The *Equality Act 2010* (UK) refers to treatment 'because of.'[250] The Explanatory Notes explain that this change to the definition was made to ensure that the legislation was written as plainly and simply as possible. However, Monaghan raised concerns that this change could require a new judicial determination of the meaning and standard of proof required to prove that discrimination occurred 'because of', rather than 'on the grounds of' a protected characteristic.[251] As the Act stands, aside from age discrimination, direct discrimination cannot be justified.[252]

Indirect discrimination is also prohibited and defined by s 19 of the *Equality Act 2010* (UK). Indirect discrimination is defined as discrimination that occurs where a facially neutral provision, condition or procedure ('PCP') which is applied or could be applied has an effect which particularly disadvantages people with a protected characteristic.[253] Where a disadvantage of this kind occurs, a member of a group of persons with protected characteristics is discriminated against unless the person applying the PCP can justify it.[254] To justify the policy, the duty-bearer must show that the PCP is a proportional response to achieve a legitimate aim.[255] Additionally, discrimination arising from disability is prohibited where a duty-bearer cannot show that the treatment is a proportionate means of achieving a legitimate aim.[256]

The *Equality Act 2010* (UK) continues to require a comparison to be made between persons with a protected 'ground' or 'attribute' and those without the 'ground' or 'attribute' to show that

[249] *Equality Act 2010* (UK) s 13.
[250] The differing definitions were contained in *Race Relations Act 1976* (UK) ('Grounds of'), *Sex Discrimination Act 1975* (UK) ('Ground of').
[251] Monaghan, *Monaghan on Equality Law*, above n 171, 276, 277.
[252] *Equality Act 2010* (UK) s 13(2). For discussion of the lack of defence of justification of direct discrimination see: John Bowers and Elena Moran, 'Justification in Direct Sex Discrimination Law: Breaking the Taboo' (2003) 31(4) *Industrial Law Journal* 307; Tess Gill and Karon Monaghan, 'Justification in Direct Discrimination: Taboo Upheld' (2003) 32(2) *Industrial Law Journal* 115.
[253] *Equality Act* 2010 (UK) s 19(1)
[254] *Equality Act 2010* (UK) s 19(2).
[255] *Equality Act 2010* (UK) s 19(2)(d).
[256] *Equality Act* 2010 (UK) s 15.

discriminatory treatment has occurred.[257] Section 23 provides instruction as to how such a comparison should occur. It provides that like must be compared with like in cases of direct, dual or indirect discrimination.[258] The treatment of the complainant must be compared with either an actual or hypothetical person who does not share the protected characteristic or characteristics of the complainant but who is otherwise not in materially different circumstances. Those circumstances include respective abilities where the complainant is complaining of discrimination on the ground of disability.[259]

In Australia, the discrimination Acts at both a federal and state level are relatively similar in their overarching structure but contain some different exceptions and justifications for conduct and some differences in the wording of the specific prohibitions. Focusing on the Commonwealth Acts, each Act prohibits direct and indirect discrimination because of the specified protected attribute (race, age, sex and disability). However, the precise wording of the tests for direct and indirect discrimination differs. For example, the definition of direct discrimination in the *Disability Discrimination Act 1992* (Cth) is:

> a person discriminates against another person on the ground of disability of the aggrieved person, if because of the disability, the discriminator treats, or proposes to treat, the aggrieved person less favourably than the discriminator would treat a person without the disability in circumstances that are not materially different.[260]

The wording of the provision makes it clear that a comparison of treatment between a person with a disability and a person without a disability is required. Similar definitions of direct discrimination are found within the *Sex Discrimination Act 1984* (Cth) and the *Age Discrimination Act 2004* (Cth) as well as most of the state legislation.[261] In contrast, the definition of direct discrimination that appears in the *Racial Discrimination Act 1975* (Cth) does not appear to require a comparison as it defines unlawful discrimination as:

> [A]ny act involving a distinction, exclusion, restriction or preference based on race … which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal

[257] *Equality Act 2010* (UK) ss 13 and 19.
[258] *Equality Act* 2010 (UK) s 23(1).
[259] *Equality Act* 2010 (UK) s 23(2).
[260] *Disability Discrimination Act 1992* (Cth) s 5(1).
[261] See for example, the definition of sex discrimination contained in the *Sex Discrimination Act 1984* (Cth) s 5(1); *Age Discrimination Act 2004* (Cth) s 14.

> footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.[262]

This definition of discrimination also appears in the Northern Territory *Anti-Discrimination Act 1992*.[263] Additionally, the definition of direct discrimination in the Australian Capital Territory and Victoria was amended to place the focus on the unfavourable treatment received because of a protected attribute rather than a comparison of treatment.[264] There is no defence of justification to a claim of direct discrimination.[265]

Each of the Commonwealth Acts also contains a provision specifically prohibiting indirect discrimination. The provisions make it unlawful for a person to impose a requirement or condition on a person who, because of their protected attribute, cannot comply with or would be disadvantaged by that requirement or condition.[266] A key difference between the prohibitions on direct and indirect discrimination is that indirect discrimination can be justified or excused as a requirement or condition will not be considered unlawful discrimination if it is 'reasonable having regard to the circumstances.'[267]

The *Canadian Human Rights Act* defines and prohibits discrimination in different terms to the legislation in place in Australia and the United Kingdom. The *Canadian Human Rights Act* prohibits both direct and indirect discrimination but neither the federal nor provincial legislation defines what discrimination is in any meaningful way. For example, the federal Act prohibits discrimination in the provision of goods, services, facilities or accommodation:

> It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public:
>
> To deny, or deny access to, any such good service, facility or accommodation to any individual, or
>
> To differentiate adversely in relation to any individual,
>
> On a prohibited ground of discrimination.[268]

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[262] *Racial Discrimination Act 1975* (Cth) s 9(1). However, as will be seen in Chapter Four, the judicial consideration of the provision indicates that a comparison of treatment is still required with respect to direct discrimination complaints made pursuant to the *Racial Discrimination Act 1975* (Cth).
[263] *Anti-Discrimination Act 1992* (NT) s 20.
[264] *Discrimination Act 1991* (ACT) s 8(2); *Equal Opportunity Act 2010* (Vic) s 8(1).
[265] For criticisms of this lack of general defence of justification see: Robert Dubler, 'Direct Discrimination and a Defence of Reasonable Justification' (2003) 77(8) *Australian Law Journal* 514; Gus Bernardi, 'Direct Discrimination in the *Disability Discrimination Act*' (1999) 76(8) *Australian Law Journal* 512.
[266] *Racial Discrimination Act 1975* (Cth) s 9(1A); *Sex Discrimination Act 1984* (Cth) ss 5(1), 5A(1), 5B(1), 5C(1), 6(1), 7(1), 7A(1), 7AA(1), *Disability Discrimination Act 1992* (Cth) s 5; *Age Discrimination Act 2004* (Cth) s 14.
[267] *Racial Discrimination Act 1975* (Cth) s 9(1A); *Sex Discrimination Act 1984* (Cth) s 7B; *Disability Discrimination Act 1992* (Cth) s 6(3); *Age Discrimination Act 2004* (Cth) s 15(2).
[268] *Canadian Human Rights Act* RSC 1985, c H-6 s 5.

The lack of specificity in the definitions has left it to the courts to determine the meaning of discriminatory conduct and the tests that should be used to establish that the denial or differentiation occurred on a prohibited ground. The Canadian statutory schemes still contain defences or justifications for discriminatory conduct. In the federal Act, section 15 provides that a 'bona fide occupational requirement' is not a discriminatory practice. There is a similar justification or exception provided for the provision of goods and services.[269] These exceptions or justifications are also contained in the provincial legislation.[270]

In addition to prohibiting discrimination on the protected grounds, the Acts in place in each jurisdiction also prohibit other conduct such as vilification and harassment on the basis of the protected attribute. Significantly, the Acts in each jurisdiction also place a duty on duty-bearers to make reasonable adjustments or reasonable accommodation, particularly with respect to those with disabilities. For instance, the *Equality Act 2010* (UK) maintains the need to make reasonable adjustments for those with disabilities. Section 20 defines the duty to make reasonable adjustments for the purposes of the Act and specifies which Parts of the Act this duty applies to.[271] This duty creates three requirements where a disabled person is placed at a substantial disadvantage as compared to non-disabled people.[272] Where this substantial disadvantage occurs, the first requirement relates to making changes to the policies and practices which cause the disadvantage. The second relates to making changes to the physical environment that the disadvantage relates to and the third requires the provision of auxiliary aids and services.[273] Where the disadvantage relates to the way in which information is provided, a reasonable adjustment would be to provide the information in an accessible format.[274] Where a person fails to make a reasonable adjustment, this constitutes unlawful discrimination.[275]

Similarly, the Australian *Disability Discrimination Act 1992* (Cth) has some elements of distinction from the other Australian discrimination Acts in that it requires reasonable adjustments to be made for persons with disability. The *Disability Discrimination Act 1992* (Cth) requires reasonable

[269] *Canadian Human Rights Act* RSC 1985, c H-6 s 15(1)(g).
[270] Examples include *Alberta Human Rights Act* RSA 2000, c A 25.5 s7(2) *Human Rights Code* RSBC 1996, c 2010 s 15(4); *Human Rights Code* CCSM, c H175 s 13(1); *Human Rights Act* RSNB 2011, c 171 s 2.2; *Human Rights Act* RSPEI 1988, c H-12 s 6(f).
[271] *Equality Act 2010* (UK) s 20(1).
[272] *Equality Act 2010* (UK) s 20(2).
[273] *Equality Act 2010* (UK) s 20(3)–(5).
[274] *Equality Act 2010* (UK) s 20(6).
[275] *Equality Act 2010* (UK) ss 21(1)–(2).

adjustments to be made by a respondent unless making such reasonable adjustments would impose an unjustifiable hardship on the person.[276]

Similar to the Australia and British legislation the Canadian legislation contains a requirement for reasonable accommodation.[277] However, distinct to Australia or the United Kingdom, this duty is not confined to disability but extends to all protected characteristics because it is framed as a limitation on the exception contained in the human rights Acts that conduct or decisions based on a *bona fide* requirement are not prohibited discrimination pursuant to the Act.[278] The specific test for reasonable accommodation is also worded in a stricter fashion with the federal Act providing that 'the special needs of a person relating to a prohibited ground of discrimination must be accommodated unless the employer or service provider can prove that to do so would be an undue hardship.'[279]

Notably the *Equality Act 2010* (UK) contains a public-sector equality duty which requires public authorities and other public bodies to consider all individuals when carrying out their functions, not only in terms of performing public duties or as an employer but also with respect to overarching policy implementation.[280] The Act not only applies to government entities, but any organisation which is charged with carrying out a public function.[281]

An important difference between the *Equality Act 2010* (UK) and the Australian and Canadian statutes is that the latter regimes provide exemptions for special measures or affirmative action programs designed to provide benefits to groups with protected attributes. Neither the *Equality Act 2010* (UK) nor the historical legislation provided an exemption for these kinds of programs and when implemented they have been considered to be direct discrimination and in breach of the Act. In this way, the British regime evinces an approach more obviously based upon a notion of formal equality or treating 'like' alike.

What all three legislative frameworks have in common is first, that both direct and indirect discrimination is prohibited. Second, all provide a degree of accommodation and adjustments,

[276] *Disability Discrimination Act* 1992 (Cth) ss 4, 5(2)(b), 6(2)(b). The *Equal Opportunity Act 2010* (Vic) also allows for reasonable adjustments for both persons with disabilities and parents and carers: ss 3(d)(iii), 9(3)(e), 20, 33, 40 and 45
[277] *Canadian Human Rights Act* RSC 1985, c H-6 s 15(2).
[278] *Canadian Human Rights Act* RSC 1985, c H-6 s 15(1)(a).
[279] *Canadian Human Rights Act RSC* 1985, c H-6 s 15(2).
[280] *Equality Act 2010* (UK) s 149(1).
[281] *Equality Act 2010* (UK) s 149(2).

particularly for those with disabilities. Third, there are various exemptions that exist in each legislative regime. However, as will be seen from Chapter Five, the kind of protection that each regime provides has been significantly different due to the different ways in which these provisions have been interpreted and understood.

2.4 'Creative' interpretation and discrimination law

Thus far I have outlined the context for the introduction of discrimination law in each jurisdiction. I have charted the legislative history of statutory discrimination law and have compared the operative provisions. One of the purposes of this chapter was to define, in the context of discrimination law and for the purpose of this thesis, what a 'creative' approach to legislative intent is. In interpreting and applying discrimination legislation to new factual scenarios, courts are engaging in statutory interpretation to determine the meaning and application of the specific prohibitions on discriminatory conduct. The question remains, though, how courts should do so. In Australia, Canada and the United Kingdom, appellate courts have accepted that legislation prohibiting discrimination should be given a 'purposive' interpretation.[282] This section will argue that in light of the legislative history and the legislative text, to give discrimination law a 'purposive' interpretation, the courts need to take a more active role than traditional theories of statutory interpretation envisage in elaborating and determining the underlying values of discrimination law. It is this more active role in the elaboration and determination of underlying values that courts are charged to operate as the 'creative' interpreters of legislative intent. Developing the underlying meaning of discrimination law necessarily remains an exercise in statutory interpretation. Nevertheless, the kind of reasoning required to adopt a 'purposive' interpretation of discrimination law requires a style of reasoning more akin to common law style interpretation.

In the United Kingdom, it is generally acknowledged that the courts should give discrimination a 'purposive' interpretation. Bennion, one of the chief architects of the *Sex Discrimination Act 1975* (UK), describes a purposive approach as one which either applies the literal meaning of the text where it is in keeping with the legislative text; or applies a strained meaning (an interpretation other than the literal meaning) where the literal meaning is not in keeping with the purpose of the

[282] See for instance: *Waters v Public Transport Corporation* (1991) 173 CLR 349, 359 (Mason CJ and Gaudron J), 372 (Brennan J); *IW v City of Perth* (1997) 191 CLR 1, 12 (Brennan CJ and McHugh J), 27 (Toohey J), 39 (Gummow J); *Collier v Austin Health* (2011) 36 VR 1, 8; *Savjani v Inland Revenue Commissioners* [1981] QB 458, 466–467 (Templeman LJ). See also *Redcar & Cleveland Borough Council v Bainbridge and Ors (No 1)* [2007] EWCA Civ 929 and *Ontario Human Rights Commission v Simpson-Seers Ltd* [1985] 2 SCR 536, 546–547; *Canadian National Railway Co. v Canada (Canadian Human Rights Commission)* [1987] 1 SCR 1114, 11133–1136; *Robichaud v Canada (Treasury Board)* [1987] 2 SCR 84, 89–90; *British Columbia Human Rights Tribunal v Schrenk* [2017] 2 SCR 795.

legislative text.[283] With respect to discrimination law, since the early cases on racial discrimination in the United Kingdom, the judiciary has accepted discrimination law is designed to remedy 'a great evil' but have often failed to be explicit about what the 'great evil' that discrimination legislation is designed to ameliorate actually is.[284]

Purposive interpretation in Australia is an interpretation which reads discrimination legislation provisions with all the generality the words can provide in order to pursue a 'remedial' or 'beneficial' effect.[285] However, the Australian appellate courts leave unclear the answers to the central question as to who should benefit, how they should benefit, and the extent to which protected persons should benefit.

Similar to their Australian and British counterparts, Canadian judges repeatedly emphasise the need to give discrimination legislation a 'purposive interpretation' in keeping with its beneficial or remedial purposes. The modern Canadian approach to statutory interpretation was outlined in *Rizzo & Rizzo Shoes Ltd (Re).*[286] The modern approach is where the words of an Act are to be read in their grammatical and ordinary sense, in keeping with their context and harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament or provincial legislature. However, there are also particular rules that apply to the interpretation of human rights legislation. In particular, the Supreme Court of Canada has emphasised numerous times that the protections that human rights legislation offers are fundamental to society.[287] As such, the provisions must be given broad and liberal interpretations to better achieve their goals.[288] Nevertheless, this

[283] Francis Bennion and Oliver Jones, *Bennion on Statutory Interpretation: A Code* (LexisNexis, 6th ed, 2013) 304.
[284] *Savjani v Inland Revenue Commissioners* [1981] QB 458, 466–467 (Templeman LJ).
[285] *Waters v Public Transport Corporation* (1991) 173 CLR 349, 359 (Mason CJ and Gaudron J), 372 (Brennan J); *IW v City of Perth* (1997) 191 CLR 1, 12 (Brennan CJ and McHugh J), 27 (Toohey J), 39 (Gummow J).
[286] [1998] 1 SCR 27 [21] accepting the approach of Elmer A Dreidger, *The Construction of Statutes* (Butterworths, 2nd ed, 1983) 87.
[287] *Insurance Corporation of British Columbia v Heerspink* [1982] 2 SCR 145; *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 SCR 3; *Central Okanagan School District No 23 v Renaud* [1992] 2 SCR 970; *Canada (Attorney General) v Mossop* [1993] 1 SCR 554; *Quebec (Commission des droits de la personne et des droits de la jeunesses v Montreal (City)* [2000] 1 SCR 665; *Winnipeg School Division No 1 v Craton* [1985] 2 SCR 150; *Robichaud v Canada (Treasury Board)* [1987] 2 SCR 84; *Béliveau St-Jacques v. Fédération des employées et employésde services publics inc.* [1996] 2 SCR 345; *CN v Canada (Human Rights Commission)* [1987] 1 SCR 1114; *Brooks v Canada Safeway Ltd* [1989] 1 SCR 1219; *Tranchemontagne v Ontario (Director, Disability Support Program)* [2006] 1 SCR 513; *Zurich Insurance Co v Ontario (Human rights Commission)* [1992] 2 SCR 321; *Bhinder v CN* [1985] 2 SCR 561; *Battlefords and District Co-operative Ltd v Gibbs* [1996] 3 SCR 566; *Gould v Yukon Order of Pioneers* [1996] 1 SCR 517.
[288] *Ontario Human Rights Commission v Simpson-Seers Ltd* [1985] 2 SCR 536, 546–547; *Canadian National Railway Co. v Canada (Canadian Human Rights Commission)* [1987] 1 SCR 1114, 11133–1136; *Robichaud v Canada (Treasury Board)* [1987] 2 SCR 84, 89–90; British Columbia Human Rights Tribunal v Schrenk [2017] 2 SCR 795, 815–816.

interpretive approach does not give a court license to ignore the words of the Act 'in order to prevent discrimination wherever it is found.'[289]

While in each jurisdiction the need for 'purposive' interpretation has been accepted, there are still a number of ways in which statutory interpretation can be approached. Judges may focus on the literal meaning of the provision, or search for the 'true meaning' or the intention of the legislature when passing such legislation or search for the 'mischief' that the legislation is designed to prevent. As Lord Bingham concluded in *R (on the application of Quintaville) v Secretary of State for Health*:

> The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach …may… (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.[290]

As the quote makes clear, these are not mutually exclusive methods of interpretation and instead can be used together to understand the meaning of the statute. In the case of discrimination legislation, utilising these interpretative methods on their own can create problematic outcomes. For example, utilising a literal meaning approach in the context of discrimination law can be problematic because there is no singular meaning of the term 'discrimination'. As Gummow J highlighted in *IW v City of Perth*:

> It may be observed that 'discrimination', as a matter of ordinary English has quite distinct shades of meaning. Some of these lack the critical if not the pejorative connotation the term has in human rights legislation. Thus 'discrimination' may identify the ability to observe accurately and make fine distinctions with acuity, good judgment or taste, as well as the making of unjust or prejudicial distinctions.[291]

It is only through the background assumptions as to the nature and the 'purpose' of the legislation that one can understand the meaning of the term 'discrimination' in the context of discrimination legislation. While the 'golden rule' allows for a judge to depart from the literal meaning where the ordinary or 'literal' meaning would produce an absurd result this rule does not assist in the interpretation of discrimination law. This is because assumptions about what constitutes an 'absurd'

[289] *University of British Columbia v Berg* [1993] 2 SCR 353, 371.
[290] [2003] 2 AC 687 [8].
[291] (1997) 191 CLR 1, 36.

results rest on the background assumptions of the interpreter. Therefore decisions regarding absurdity are made with an eye to the expectations of the legal system and the constitutional context.

The problems of a singly literal approach to the interpretation of discrimination law statutes can be seen from considering the use of preambles or object clauses in understanding the purpose of discrimination law. One way to determine the aims and purpose of the legislation could be through the consideration of preambles,[292] or object clauses. As Lord Blackburn concluded:

> If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver. But, if any doubt arises from the terms employed by the Legislature, it has always been held a safe mean of collecting the intention, to call in the aid the ground and cause of making the statute, and to have recourse to the preamble, which … is 'a key to open the minds of the makers of the Act and the mischiefs which they intended to redress.'[293]

Discrimination legislation frequently employs the use of objects clauses or preambles. The utility of such clauses to identify the aims of the legislation in more precise terms has been criticised in the Australian context by Gaze and Smith,[294] and in the British context by Monaghan.[295] The statements of purpose contained in the legislation are often vague and aspirational. There is little precise articulation of the types of harms that discrimination law is designed to redress and what kinds of behaviours it is designed to prohibit. For example, the objects clauses of the *Sex Discrimination Act 1984* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth) explicitly acknowledge that their purpose is to eliminate, so far as is possible, discrimination against persons who have the specified attributes in the areas covered by the Acts and to promote the recognition and acceptance within the community of the principle of equality.[296] The problem with these vague 'motherhood' objects clauses is that such clauses give no indication of the *extent* to which discrimination should be eliminated, particularly given that

[292] Anne Winckel, 'The Contextual Role of a Preamble in Statutory Interpretation' (1999) 23(1) *Melbourne University Law Review* 184, 185–186.
[293] (1844) 11 C1 & Fin 85; 8 HR 19034, cited in Stephen Gageler, 'Legislative Intention' (2015) 41(1) *Monash University Law Review* 1, 2.
[294] Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2016).
[295] Monaghan, *Monaghan on Equality Law*, above n 169, 66 in which she cites both the *Canadian Human Rights Act*, RSC 1985, c H-6 and the *Sex Discrimination Act 1984* (Cth)'s objects clause as positive examples of clear objects clauses.
[296] *Sex Discrimination Act 1984* (Cth) s 3; *Discrimination Act 1992* (Cth) s 3; *Age Discrimination Act 2004* (Cth) s 3.

discrimination is only to be eliminated so far as is *possible*.[297] As highlighted in the introduction of this thesis, it is only if the terms 'equality' and 'discrimination' are given some comprehensive content that one can determine the aims and objectives of discrimination law.[298]

Instead of adopting a literal approach, Lester and Bindman seem to envisage a role for the courts as the 'creative' interpreters of legislative intent. However, 'legislative intent' is notoriously conceptually challenging. Legislative intent can refer to three different intentions: an objective, 'disembodied' intention of the legislature as a whole; an intention that a reasonably well-informed reader of the text would understand it to be; or the actual, subjective intention of an individual parliamentarian.[299] All three conceptions of legislative intent can be problematic. As both Gardner and Raz have shown, the idea of legislative intention is an artificial concept.[300] This artificial concept allows for an acceptance that the legislature intended to legislate but does not necessarily give the interpreter any further conclusions as to the underlying meaning of the statute. The idea of the 'purpose' of the legislation has similar conceptual challenges because individual legislatures may have many 'purposes' in mind when passing legislation, not all of which will be discernible from the text or extrinsic materials. Because of these conceptual challenges, it may be better to understand the legislative intention or the 'purpose' of Parliament as Feldman has described as 'the intention which it seems to us (as the interpreters) to be rational to attribute to the institutional legislature in the circumstances.'[301] Choices surrounding the intention rational to attribute to the Legislature are shaped by the interpretative assumptions of the legal community and the 'common learning of that community developed through the common law as well as the constitutional context.[302]

The problem in interpreting discrimination law 'purposively' is that it arises from a background without a 'common learning' because as described in 2.1 discrimination law arises without the background often provided through the common law or constitutional context. While statements were made in support of the passage of discrimination law in parliamentary proceedings, these on

[297] Gaze, 'Context and Interpretation in Anti-Discrimination Law', above n 13, 330–331.See also: Alysia Blackham, 'Defining "Discrimination" in UK and Australian Age Discrimination Law' (2017) 43(3) *Monash University Law Review* 760, 773.
[298] See discussion in 1.2 and in particular the quote from Justice Mary Gaudron, 'In the Eye of the Law: The Jurisprudence of Equality' (speech delivered at The Mitchell Oration, Adelaide, 24 August 1990).
[299] David Feldman, 'Statutory Interpretation and Constitutional Legislation' (2014) 130 *Law Quarterly Review* 473.
[300] Joseph Raz *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press, 2009) 188-189 and John Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford University Press, 2012) 44-45.
[301] Feldman, 'Statutory Interpretation and Constitutional Legislation', above n 299, 479.
[302] Ibid.

the whole contained no clear or precise statements of either individual or collective intentions of Parliament in passing discrimination legislation. It is in developing this 'common learning and language' that courts are tasked to operate of the 'creative' interpreters of legislative intent.

In each jurisdiction, the legislature has provided broad 'motherhood' statements which do little to illuminate the extent to which discrimination legislation should 'eliminate' discrimination and inequality. In each jurisdiction, the Parliament has provided little guidance in the explanatory materials as to what discrimination law is intended to prohibit. In each jurisdiction, while acknowledging that the legislation needs to be interpreted 'purposively,' the judiciary are tasked with an interpretative role without a common language of common law or constitutional rights to fall back on. It is in explaining and exploring what discrimination is and the extent to which it is 'possible' to eliminate it, that the judiciary are tasked with the need to be 'creative' in exploring the values underlying discrimination law. What goals, aims or purpose this 'creativity' could further will be explored in the following chapter.

3 Developing the Purpose of Discrimination Law

In Chapter Two, through exploring the introduction of discrimination law in Australia, Canada and the United Kingdom, I concluded that the legislature in each jurisdiction was not clear on the purpose of prohibiting discrimination. My examination identified that there are few articulations in the legislation, explanatory materials or parliamentary debates of key issues confronting discrimination law: the types of behaviours and practices that should be prohibited; the reasons why certain groups are singled out for protection or how far discrimination law requires society to change to accommodate difference. The failures of the legislature to articulate the goals or purpose of discrimination law are amplified when combined with the previous failures of the common law. Consequently, I argued that traditional theories of statutory interpretation were unhelpful in interpreting and applying the purpose of discrimination law. It is for this reason that the judiciary has to be 'creative' in interpreting the legislative intent of discrimination law.

Given the lack of clarity surrounding the aims and purposes of discrimination in law, in this chapter I provide a literature review of the normative scholarship on discrimination law. This literature is reviewed as a means to provide greater context to understand a 'creative' interpretation of discrimination law. This review of the normative literature is necessary because whilst the legislative regimes and the manner in which discrimination law functions have remained relatively static over time, the scholarship and normative approaches to discrimination law have changed and broadened. Thus, the interpretation of discrimination law today needs to be understood within the context of this changing normative landscape.

This chapter provides a review of the scholarship which articulates the theoretical and normative underpinnings of discrimination law. The literature develops an account of the reasons why discriminatory treatment is wrong, the harms discrimination law is designed to ameliorate and the behaviours it prohibits or requires of duty-bearers. In doing so, I will begin to answer the first of the sub-questions outlined in the introduction: what is a 'creative' interpretation of discrimination law? Specifically, it will consider the following question: what are discrimination law's aims and how can it be interpreted to achieve those aims? To answer this question, this chapter reviews the literature that considers the purpose of discrimination law.

In understanding and identifying the purpose of discrimination law, I focus on identifying the kinds of harms discrimination law is attempting to ameliorate, the kinds of behaviours the law is designed to prohibit, and the actions duty-bearers are required to take. Differently to some of the

recent work in this field, I do not set out to find a 'holy grail' of a singular, coherent normative account upon which all strands of discrimination law can rest.[303] There may be no single principle or theory to explain all the norms of discrimination law.[304] Instead I accept that a pluralist account of discrimination law may be the most accurate account and these different accounts are given effect in different legal concepts.[305]

There are three central debates in the literature outlined in this chapter. The first debate is the relationship between discrimination law and traditional or 'formal' notions of equality. Is discrimination law designed to protect individuals from only infringements of equality in a formal sense or does the law require an investigation into the more insidious and far reaching way inequality operates? The second debate is whether discrimination law is designed to protect individuals from violations of their liberty or whether it is designed to promote a right to substantive equality or equal treatment. The third debate surrounds the meaning of substantive equality. If the purpose of discrimination law is to promote substantive equality, what is the appropriate test or framework that can be adopted to promote this aim? Two frameworks that will be considered are substantive equality as human dignity and a multidimensional approach to substantive equality.

Having reviewed the literature, in this chapter, I will argue that a 'creative' interpretation requires the acceptance of the following three propositions. First, the purpose of discrimination law is to address inequality. Second, discrimination law should be interpreted to promote substantive rather than formal equality because if discrimination law is only associated with formal equality it can have only limited utility. And third, in interpreting discrimination law substantively, a multidimensional or pluralist approach is the best framework to utilise. This is because this approach acknowledges the multifaceted nature of inequality. This framework further provides a clear and pragmatic framework to understand the purpose of discrimination and measure whether judicial decisions are achieving this purpose.

One of my aims in this thesis is to consider whether these theoretical underpinnings are reflected in the jurisprudence in Australia, Canada and the United Kingdom. There is a substantial amount

*Parts of this chapter have been previously published: Alice Taylor, 'The Conflicting Purposes of Australian Anti-Discrimination Law' (2019) 42(1) *UNSW Law Journal* 188.

[303] Khaitan, *A Theory of Discrimination Law*, above n 18, 6.

[304] O'Cinneide, 'Justifying Discrimination Law', above n 234, 916.

[305] Sophia Moreau, 'Discrimination and Freedom' in Kasper Lippert-Rasmussen (ed), *Routledge Handbook of the Ethics of Discrimination* (Routledge, 2017) Ch 13.

of literature that considers discrimination law at an international and domestic level across the world. As I am centrally concerned with comparing the approaches taken in Australia, Canada and the United Kingdom, this chapter primarily focuses on the debates and literature from these jurisdictions. Some additional literature from other common law jurisdictions, notably from the United States, will be used where appropriate and useful to illustrate some of the differences in formation and interpretation.

One of my aims is to consider how these approaches manifest in the construction of a conceptually coherent account of the central legal concepts of discrimination. As such, the theoretical literature is being discussed to provide a basis for considering the development of the principles of discrimination law in the case law from each jurisdiction. This literature is not discussed in order to develop a new theory of discrimination law. Nevertheless, this chapter provides a contribution through the development and assessment of the current and significant debates in discrimination law literature. In particular, this chapter articulates and considers the current and significant debates surrounding the underpinning rationale, justification and goal of discrimination law. My review of the literature also reveals a critical gap in the literature on discrimination law. While there is a significant body of scholarship which provides an account of what discrimination law should be capable of achieving, there is little work interrogating the disconnection between the practice of discrimination law and the normative literature. This is particularly striking with respect to the judiciary's role in achieving discrimination law's normative aims.

3.1 Discrimination law and formal equality

This section considers the traditional understanding of the relationship between discrimination law and equality. Even if it is accepted that the purpose of discrimination law is to achieve equality or, at the very least, reduce inequality, this acceptance does not clarify what kind of equality discrimination law should seek to achieve: formal or substantive. This section will highlight the practical and theoretical problems of understanding discrimination law's purpose as one designed only to achieve a formal or symmetrical understanding of equality. Despite the terms discrimination and equality often being used in tandem, the relationship between them is neither clear nor explicit. As Holmes states:

> Those writing about discrimination law almost always assume some kind of relationship between anti-discrimination rights and equality. But the precise nature of this assumed relationship is often left ambiguous or at least inexplicit. Often this uncertainty arises out of confusion about the

> concept of equality and dissatisfaction with its characteristics and implications, particularly when it is assumed to relate to anti-discrimination rights.[306]

Holmes' critique of equating discrimination with equality is that the relationship between the two terms is unclear. Her critique is further that those who equate discrimination with equality struggle to identify what equality is or what kind of protections from discrimination would achieve equality. Identifying discrimination law's purpose as being to assist in the promotion of equality also does not clearly identify the limits to this approach. This is because it does not assist in developing and understanding the appropriate balance between competing interests and rights, particularly in a private law or statutory context. The struggle to identify what equality requires and how legal frameworks can be utilised to achieve equality is central to the debate surrounding formal and substantive equality.

At the outset, it is acknowledged that an approach to discrimination focused on formal equality has been supplanted by many newer theories. The problems of formal equality that are outlined below are now well known. A substantive approach, whether based on a notion of equality, liberty or human dignity is accepted in the literature, in some legislation,[307] and some case law.[308] However, as will be explained in the forthcoming chapters, in some jurisdictions such as Australia, this approach is still the prevailing approach in the case law. As such, this thesis will give a general explanation of the relationship between discrimination law and formal equality and explain some of its inherent limitations.

As was emphasised in 2.2, when discrimination legislation was introduced in each jurisdiction, the second reading speeches emphasised the importance of the legislation in providing for better protection of human rights. But the legislature was decidedly less clear about what kind of equal protection discrimination legislation would provide. The early scholarship generally assumed the 'kind' of equality that discrimination legislation was to provide was an equality of treatment or a form of Aristotelian egalitarianism.

Equality as a principle of Aristotelian egalitarianism appears relatively easy to understand. It involves the basic principle that the law should treat like individuals alike.[309] In this fundamental Aristotelian conception, equality operates as a confirmation that law should be applied equally and

[306] Elisa Holmes, 'Anti-Discrimination Rights Without Equality' (2005) 68(2) *The Modern Law Review* 175, 175.
[307] See for example: *Equal Opportunity Act 2010* (Vic).
[308] See for example: *Andrews v Law Society of British Columbia* [1989] 1 SCR 143.
[309] Aristotle, *Nicomachean Ethics* Vol 3, 1131a10-B15, cited in *Stanford Encyclopaedia of Philosophy*, 'Equality', available at: https://plato.stanford.edu/entries/equality/.

is, in essence, different terminology for the rule of law.[310] In this sense, formal equality is a fundamental norm of common law legal systems. As Lord Steyn described when discussing the shared history of the United Kingdom and United States legal systems:

> … embedded in our systems is the principle of equality. It is a fundament tenet of democracy that both law and government accord every individual equal concern and respect for their welfare and dignity. Everyone is entitled to equal protection of the law, which should be applied without fear or favour. Law's necessary distinctions must be justified but never be made on the grounds of race, colour, belief or gender or any other irrational ground. Individuals in both our countries are protected by law from discrimination on those grounds.[311]

As simple as this formulation is, there will always remain the problem of how to determine who is alike to whom when considering whether two persons should be treated similarly. Whilst Lord Steyn's articulation of the principle is eloquent, it fails to recognise that the common law was, and still is, ill-equipped to apply an equality principle in the vast majority of cases.

Discrimination law embeds this formal notion of equality through the explicit delineation of the characteristics that cannot be used when determining who is alike to whom. It confirms that certain characteristics such as race, gender, sexual orientation, disability and age do not equate to a difference between individuals that allows for a difference in treatment. Discrimination law further articulates formal notions of equality through prohibitions on directly discriminatory conduct.[312] The prohibition on directly discriminatory treatment requires consistency of treatment of persons who are similarly situated. The benefit of prohibiting direct discrimination should not be underestimated. This formal understanding of equality, embedded in prohibitions on directly discriminatory conduct, does go some way to eliminating overt discrimination, which was once common. Although these kinds of overt behaviours have been significantly reduced, it should not be forgotten that this behaviour still exists.[313] Nevertheless, the problem with formal equality is that it fails to recognise the multitude of ways in which discriminatory conduct affects many people's opportunities.

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[310] Peter Westen, *Speaking of Equality: An Analysis of the Rhetorical Force of 'Equality' in Moral and Legal Discourse* (Princeton University Press, 1990) 143.
[311] Lord Steyn, 'A Common Bond' in American Bar Association, *Common Law Common Values Common Rights: Essays on Our Common Heritage* by Distinguished British and American Authors (West Group, 2000) xii, xv.
[312] Fredman, *Discrimination Law*, above n 68, 166–167; Aileen McColgan, *Discrimination, Equality and the Law* (Hart Publishing, 2014) 20–21.
[313] For example, in 2018 a Queensland law firm was forced to apologise for an advertisement for a solicitor position which explicitly stated that only male candidates would be considered: Kay Dibben, 'Y Did I Send that E-male' *Courier Mail* (Brisbane) 24 February 2018, 9.

This conception of formal equality is also explained as requiring a consistency of treatment. There are four problems with conceiving equality as consistent treatment. The first is that there is no requirement for the consistent treatment to be beneficial. Prohibitions on discrimination will achieve their purpose so long as those without protected characteristics are treated as badly as those who have protected characteristics.[314] If a similarly situated person without the specified characteristic is also underpaid or undervalued, there is no breach of a formal non-discrimination principle.[315] A common and well-known example of this type of situation is addressed in the United States Supreme Court case of *Palmer v Thompson*.[316] In this case, the Court upheld a decision of a city council in Mississippi to close all the swimming pools in the district, rather than open a swimming pool for non-whites.

The second problem with equality as consistency is that it assumes a universal standard can operate for the purposes of comparison of treatment. This assumes a person's different experiences based on race, gender, religion, disability, and sexuality make no difference to their lived experience.[317] The basic premise that there can be a universal comparator is deceptive because the abstract is cloaked with the attributes of the dominant gender, culture, religion, ethnicity and sexuality. Consequently, equality as consistency assumes the purpose of equality is to conform to the majority norm rather than to accommodate difference. With respect to women, as Catharine MacKinnon argues:

> Concealed is the substantive way in which man has become the measure of all things. Under the sameness standard, women are measured according to our correspondence with man…Gender neutrality is thus simply the male standard.[318]

A third and interrelated problem with equality as consistent or equal treatment is that sometimes there is no appropriate comparison to be made in terms of what would be consistent treatment. Pregnancy and some forms of disability are some obvious examples because there is simply no equivalent state that the 'universal' comparator can be cloaked with to conduct an appropriate comparison of treatment.[319] Because of the universality of the comparator, equal treatment will ultimately require assimilation by someone with differing characteristics so that they can be

[314] Fredman, *Discrimination Law*, above n 68, 9–10.
[315] Ibid.
[316] *Palmer v Thompson* 403 US 217, 91 S Ct 1940 (1971).
[317] Fredman, *Discrimination Law*, above n 68, 10.
[318] Catharine A MacKinnon, *Feminism Unmodified* (Harvard University Press, 1987) 34.
[319] Sandra Fredman, 'A Difference with Distinction : Pregnancy and Parenthood Reassessed' [1994] *Law Quarterly Review* 106; Pearson and Watson, 'Tackling Disability Discrimination in the United Kingdom', above n 202.

considered appropriately 'alike' to receive equal treatment.[320] This approach to equality as consistent or equal treatment leads to the conclusion that equal treatment is only required where two people are in fact alike.[321] By focusing on the similarity between persons and their circumstances, this allows for the justification that their circumstances are sufficiently different to warrant different treatment.[322] For example, women in a particular profession could be paid less than similarly situated men in similar professions on the basis that their contractual obligations were sufficiently different to warrant lesser pay. MacKinnon critiques formal equality on the basis that treating likes alike, and unalike as unalike can cement inequality where two groups have become unalike due to structural inequality and unequal treatment. Focusing on sex discrimination, she states:

> The point is, because sex is conceived as a difference and equality is understood based on sameness in the Aristotelian approach of 'likes alike, unlikes unalike' the worse inequality gets, the more disparate its social reality becomes the less this legal approach can do about it, hence the more equal protection doctrine operates to institutionalize it.[323]

MacKinnon further argues that the overarching problem with the formal approach to equality is that it fails to grapple with the substance of the inequality that is already in existence.[324] Instead, the doctrine of equality law is predicated on the assumption that society is generally equal other than in an exceptional case. By focusing on the exceptional case rather than the substance of inequality, there is a search for morally wrong behaviour on the part of the discriminator. This conceives of discriminatory conduct as an exceptional and intentional human action, rather than the implications of a millennia of structural imbalances.

The final problem with equality as equal or consistent treatment is that it focuses primarily on one individual's treatment as compared to another, rather than viewing inequality as an issue that inherently affects groups of similarly situated individuals. Khaitan argues that this is the 'lay' conception of equality law.[325] The common or lay conception of discriminatory conduct focuses on the discriminator's actions and whether they should be found at 'fault' for discriminatory conduct.[326] There are two problems with this approach. First, the formal equality approach views discriminatory conduct as actions constituting a singular event rather than an accumulation of

[320] Bob Hepple, *Equality: The New Legal Framework* (Hart Publishing, 2011) 18.
[321] Catharine A MacKinnon, *Sex Equality* (Foundation Press, 3rd ed, 2016), 7.
[322] Ibid.
[323] Catharine A MacKinnon, 'Substantive Equality: A Perspective' (2011) 96(1) *Minnesota Law Review* 1, 6.
[324] Ibid 7.
[325] Khaitan, *A Theory of Discrimination Law*, above n 18, 1–2, 144.
[326] Ibid 160.

different and negative treatment. Second, it focuses on the individual fault of the discriminator as the legitimate basis for imposing a legal sanction.[327] This necessarily focuses much of the attention on the actions of the discriminator rather than the impact that discriminatory conduct has on the person who has been treated in a discriminatory manner.[328]

Due to the problems with a formal notion of equality outlined above, both legislatures and judiciaries in many jurisdictions have made efforts to ensure that the legal prohibitions on discriminatory conduct are interpreted to achieve more substantive outcomes.[329] Whether those substantive outcomes are meant to achieve liberty or equality will be discussed in the next section.

3.2 Discrimination law's substantive purpose: liberty or equality

Discrimination laws are often characterised as tools to achieve the overarching goal of equality and are often referred to as 'equality laws.'[330] However, discrimination laws are also described as centrally concerned with an individual's liberty.[331] This is one of the central debates surrounding the purpose of discrimination law: the relationship between discrimination law and two intersecting broader norms: equality and liberty.[332] A key difference between these approaches is the extent to which they require a comparison to be made between persons and their respective treatment.[333] This section considers the literature with respect to this debate, and concludes that although ultimately protection from discrimination builds the capacity for individual choice and freedom, it is better conceptualised as a tool to promote equality.

There are a variety of views on the ways in which discrimination laws operate to promote and protect liberty. These views share some common traits. By conceptualising discrimination as a violation of liberty, an individual action, policy or law is wrong where it infringes on a liberty or right a person is individually entitled to.[334] Consequently, discrimination as an assault on liberty is

[327] Ibid 161–162.
[328] Ibid.
[329] For a discussion of the role of courts in particular see Claire L'Heureux-Dube, 'Realizing Equality in the Twentieth Century: The Role of the Supreme Court of Canada in Comparative Perspective' (2003) 1(1) *International Journal of Constitutional Law* 35.
[330] Hugh Collins, 'Discrimination, Equality and Social Inclusion' (2003) 66(1) *The Modern Law Review* 16, 16.
[331] Kenji Yoshino, 'The New Equal Protection' (2011) 124(3) *Harvard Law Review* 747, 748.
[332] Hanoch Sheinman, 'The Two Faces of Discrimination' in Deborah Hellman and Sophia Moreau (eds), *Philosophical Foundations of Discrimination Law* (Oxford University Press, 2013) 28.
[333] Sophia Moreau, 'Equality Rights and the Relevance of Comparator Groups' (2006) 5(1) *Journal of Law & Equality* 81, 82; Colin Campbell and Dale Smith, 'Direct Discrimination Without a Comparator? Moving to a Test of Unfavourable Treatment' (2015) 43(1) *Federal Law Review* 91, 114.
[334] Deborah Hellman, 'Two Concepts of Discrimination' (2016) 102(4) *Virgina Law Review* 895, 899.

not inherently comparative or relational.[335] The issue is not that a person is being treated differently or worse than someone else. Instead, the problem is that they are being denied, or being given limited access to a right, freedom, liberty or deliberative choice they are fundamentally entitled to by virtue of their personhood.

It is this denial of rights that makes discriminatory conduct wrong and supplies the reason that it requires legal sanction. There are some benefits to this approach. As comparison is not necessary, the focus is on the exclusion or limitation of rights. It also limits the capacity for a 'levelling down' approach where different treatment is ameliorated by simply limiting rights or freedoms for everyone. Westen argues an understanding of law based upon equality could be counter-productive.[336] He maintains that while initially discrimination claims seem comparative and substantively concerned with 'equality,' any claim of discrimination 'must originate in a substantive idea of the kinds of wrongs from which a person has a right to be free.'[337] He claims the right to equal treatment on its own, without reference to other rights is meaningless; and when articulated with reference to those other rights it becomes merely a restatement of those rights rather than a separate and distinctive right of its own.[338] An example of this collapse of equality into a restatement of other rights is the right to vote. In Westen's view, a statement that all citizens have an equal right to vote is the same as stating that all citizens have a right to vote.[339]

Moreau also conceptualises discrimination as a limitation on liberty and individual choice.[340] She argues the purpose of discrimination law is to protect an individual's deliberative freedoms.[341] She argues that the focus on the individual is implicit in the structure of discrimination law to focus on individualistic harms. This individualistic approach is why discrimination law can be described as akin to a tort.[342] Moreau argues deliberative freedoms are defined as the freedom to choose how to live without limitations based on extraneous features such as race and gender. Discrimination law therefore operates to allow people who are from specific groups, who would otherwise be denied this right, to exercise this freedom.[343]

[335] Moreau, 'Equality Rights and the Relevance of Comparator Groups', above n 333, 82.
[336] Peter Westen, *Speaking of Equality*, above n 311, 287–288.
[337] Peter Westen, 'The Empty Idea of Equality' (1982) 95(3) *Harvard Law Review* 537, 567.
[338] Ibid 538.
[339] Ibid 563–564.
[340] Sophia Moreau, 'What Is Discrimination' (2010) 38(2) *Philosophy and Public Affairs* 143, 146–147.
[341] Ibid.
[342] Sophia Moreau, 'Discrimination as Negligence' (2010) Supp 36 *Canadian Journal of Philosophy* 123, 130.
[343] Ibid.

The conception of non-discrimination rights as a protection of liberty can also be seen in the work of Sen and Nussbaum. For both Sen and Nussbaum, non-discrimination is about the protection of choice as well as building the capability to make a variety of choices. Building this capability allows previously excluded individuals to exercise individual choices, rights and freedoms.[344] The understanding of discrimination as a limitation on liberty is most clearly seen in the literature and case law from the United States. In recent years, the United States Supreme Court has conceptualised actions invoking breaches to the Fourteenth Amendment as individual liberty claims focused on a breach of due process rather than comparative group-based equality claims.[345]

This account of discrimination as a violation of liberty is not without conceptual problems. First, it is often an individualistic account of the harm caused by discrimination.[346] This is because the liberty account focuses attention on singular, individual discriminatory acts rather than understanding the harm as relational and based on group disadvantage. This means that whilst the liberty account can seem conceptually coherent, it ignores many aspects of discrimination law such as accommodation duties.[347] Second, this approach almost unavoidably requires the infringement of other rights or freedoms, however so conceived, for a claim of a violation of equality rights to be made.[348] This leads to the conclusion that discrimination law also requires the demonstration of the existence and infringement of another right and *that* right's universality.[349] This search for a right focuses attention on whether there is a fundamental right that has been breached rather than a focus on the harm caused by the discriminating conduct per se.[350] Finally, discrimination as a violation of liberty can lead to a focus on the process by which a person has been denied individual choice rather than addressing the underlying systematic disadvantage the denial has caused.[351]

One liberty approach that attempts to avoid some of these conceptual difficulties is that presented by Khaitan. Similar to the other liberty accounts presented above, Khaitan conceptualises the purpose of discrimination law as a means to provide protection to an individual's four basic goods.

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[344] Amartya Sen, *Inequality Reexamined* (Oxford University Press, 1992); Nussbaum, above n 234.
[345] An often cited and critiqued example of this approach is *Lawrence v Texas* 539 U.S. 558 (2003) and this change of approach by the United States Supreme Court is considered in Rebecca L Brown, 'Liberty, the New Equality' (2002) 77(6) *New York University Law Review* 1491; Laurence H Tribe, 'Lawrence v Texas: The Fundamental Right that Dare Not Speak its Name' (2004) 117 *Harvard Law Review* 1893; Catharine A MacKinnon, 'The Road Not Taken: Sex Equality in Lawrence v. Texas' [2002] *Ohio State Law Journal* 1081.
[346] Sheinman, above n 332, 29.
[347] Colin Campbell and Dale Smith, 'Deliberative Freedoms and the Asymmetric Features of Anti-Discrimination Law' (2017) 67(3) *University of Toronto Law Journal* 247.
[348] Deborah Hellman, 'Equality and Unconstitutional Discrimination' in Deborah Hellman and Sophia Moreau (eds), *Philosophical Foundations of Discrimination Law* (Oxford University Press, 2013) 56.
[349] Ibid 57.
[350] Ibid.
[351] Ibid.

These basic goods are first, an ability to satisfy biological needs, second, freedom from unjustified interference in a person's projects, possessions, relationships or affairs, third, an adequate range of valuable opportunities for a person to choose from and fourth an appropriate level of self-respect.[352] However, despite the aim or outcome focusing on the individual, the overarching goal of discrimination law is still to 'reduce the persuasive, abiding and substantial relative disadvantage faced by members of protected groups.'[353] In taking this view, he attempts to ameliorate the problems of a more individualistic account of discrimination law. He accepts the necessary focus on the group rather than the individual in discrimination law is required in order to properly understand the reason why the limit to these basic goods is harmful. He also addresses relational aspects of discrimination law by acknowledging that only the relative disadvantage needs to be reduced rather than a disadvantage in its entirety.

The idea of discrimination law as a protection of liberty can be contrasted with the understanding of discrimination law as promoting equality (albeit in a substantive rather than formal way discussed above). This understanding is most common in the literature from the United Kingdom and Australia. On this view, the purpose of such laws is to promote social and economic equalisation and redress systemic disadvantage through the redistribution of economic and social goods. Fiss argues discrimination laws are designed to operate as a redistribution tool by combatting systematic subordination and stigmatisation.[354] By understanding discrimination as a violation of equality, the primary wrong discrimination law is meant to rectify is the treatment of individuals or groups as less worthy or important due to specific characteristics. This different and negative treatment can be reflected through the purpose of the action, through the process by which an action is taken or through the outward expression of an action which confirms to broader society that the poor treatment is legitimate.[355] By identifying discrimination law's purpose as being to promote equality, Hellman contends this understanding of discrimination is inherently comparative and this is the key difference between conceiving discrimination as a violation of liberty and conceiving discrimination as equality.[356]

In addition, an equality-based understanding of discrimination law is one focused on relational justice. Gardner comprehends discrimination law to be primarily concerned with notions of justice

[352] Khaitan, *A Theory of Discrimination Law*, above n 18, 118.
[353] Ibid 127–128.
[354] Owen Fiss, 'Groups and the Equal Protection Clause' (1976) 5(2) *Philosophy & Public Affairs* 107, 134.
[355] Cass Sunstein, 'The Anti-Caste Principle' (1994) 92(8) *Michigan Law Review* 2410, 2412.
[356] Hellman, above n 348, 60.

and 'the reasons for or against altering someone's relative position.'[357] Thus for Gardner, discrimination law is fundamentally focused on distributive rather than corrective justice.[358] Discrimination law is concerned with people's relative positions or how they should be treated, relative to how others are treated and ultimately Gardner concludes discrimination law requires an equalisation of results.[359]

Despite these reservations about the relationship between discrimination law and a broader notion of equality, this is a more useful way to understand discrimination law and its overarching goals than conceiving discrimination law's purpose as one focused on liberty. The equality approach better recognises that discrimination law is designed to prevent and combat group and individual disadvantage. This relationship recognises discrimination as a wrong without any necessary reference to other rights that may have been infringed. This relationship also allows for a focus on what discrimination law is designed to achieve: building the capacity to exercise free choices as well as the elimination of systemic disadvantage.

3.3 Discrimination law and substantive equality

A more substantive form of equality focuses on equality of opportunity or outcome rather than treatment.[360] However, as will be demonstrated below, there is no fixed meaning and significant debate as to the underlying tenets of substantive equality. Nevertheless, at the outset, I contend that a substantive equality interpretation of discrimination law does not focus on the formal distinctions that are made between persons but instead directs the focus on two separate issues. First, whether the distinction made was inappropriate, irrelevant or unjust. Second, the ramifications of such a distinction at both an individual and group level, for both dignity and socio-economic status. This section considers the different articulations of substantive equality in the scholarship. It will focus primarily on the conceptualisation of substantive equality as human dignity and the multidimensional approach to substantive equality.

This conception of equality as requiring something more than equal treatment has the potential to allow discrimination law to achieve a more substantive outcome. However, there are still

[357] John Gardner, 'Discrimination as Injustice' (1996) 16(3) *Oxford Journal of Legal Studies* 353. See also: John Gardner, 'Liberals and Unlawful Discrimination' (1989) 9(1) *Oxford Journal of Legal Studies* 1; Gardner, 'III — Discrimination', above n 30; John Gardner, 'On the Ground of Her Sex(uality)' (1998) 18(1) *Oxford Journal of Legal Studies* 167.
[358] Gardner, 'Discrimination as Injustice', above n 361, 355.
[359] Ibid.
[360] Colm O'Cinneide, 'The Right to Equality: A Substantive Legal Norm or Vacuous Rhetoric' (2008) 1 *UCL Human Rights Review* 80, 87.

difficulties in conceptualising what a substantive approach to equality might require in practice. As McLachlin CJ stated:

> Substantive equality is recognized worldwide as the governing legal paradigm. It is here to stay. We can count on it. But we must also recognize that it introduced a new difficulty that formal equality did not possess — the need to decide when a distinction is inappropriate or unjust. Substantive equality requires the court to determine whether a given situation is 'substantially the same' or 'substantially unlike' another. Here we find ourselves back in the uncertain sea of value judgements … Relevance, disadvantaged group, human dignity — these concepts and more attest to our search for a simple rule that will indicate whether a particular distinction treats persons in a way that is substantially the same or substantially different.
>
> Whatever words are used, drawing the line between appropriate and inappropriate, just and unjust distinctions, inevitably involves the courts in weighing and balancing conflicting values.[361]

Because of this desire to achieve a substantive form of equality, there have been attempts to construct legal norms to guide a substantive approach to discrimination and equality law. These legal norms are designed to guide judgments as to substantial similarity and difference. Three approaches to substantive equality will be addressed here. Substantive equality can be interpreted as a means to ensure human dignity, as a disruption to social hierarchies and a multifaceted approach which adopts many aspects of the first two approaches but considers further ways in which discrimination operates to disadvantage. Each of these is considered below.

3.3.1 Substantive equality as human dignity

A tool that has been used to develop a substantive account of equality is the concept of human dignity.[362] Concepts of human dignity and human worth are embedded in legal systems through international human rights conventions, constitutions, statutes and judicial decisions.[363] Human dignity can refer to three distinct concepts: dignity of the human species as a whole, dignity of different groups within the human species and the dignity of human individuals.[364]

Human dignity can be a useful concept in the international human rights law context because it is an organising principle which finds its roots in different cultures and strands of philosophical and

[361] Beverley McLachlin, 'Equality: The Most Difficult Right' (2001) 14(1) *Supreme Court Law Review* 17, 17.

[362] Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) *European Journal of International Law* 655, 690–691.

[363] See for instance: *Charter of the United Nations*, 26 June 1945, 59 Stat 1031, UNTS 993 3 Bevans 1153; *Universal Declaration of Human Rights*, GA Res 217A (III), UN Doc A/810 at 71 (1948), *International Covenant on Economic, Social and Cultural Rights* (ICESCR), GA Res 2200A (XXI), 21 UN GAOR Supp (No 16), at 49 UN Doc A/6316 (1966), 993 UNTS 3; *International Convention on Civil and Political Rights* (ICCPR), GA Res 2200A (XXI), 21 UN GAOR Supp (No. 16) 52, UN Doc A/6316 (1966), 999 UNTS 171; *Constitution of the Republic of South Africa Act 1996* (South Africa, s 10.

[364] David Feldman, 'Human Dignity as a Legal Value: Part 1' [1999] *Public Law* 682, 684–685.

political thought.[365] However, its utility as a legal norm for developing discrimination and equality law is less clear.

For a time, the Supreme Court of Canada and the South African Constitutional Court firmly situated their constitutional equality jurisprudence within the context of human dignity.[366] In *Law v Canada*, the Supreme Court of Canada clearly identified dignity as the central concern of the equality guarantee:

> Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity.[367]

When conceived as a constitutional value, the former President of the Supreme Court of Israel, Aharon Barak, also confirms the importance of human dignity as a legal norm:

> Human dignity as a constitutional value is the humanity of each person as a human being; it is the freedom of choice of human beings and the autonomy of their will. It is their human identity. It is the freedom of each individual to write the story of his or her own life. It is the freedom from humiliation and degradation. It is preventing anyone from turning into a means for the satisfaction of another's will. Human dignity functions within the bounds of society. It represents a holistic approach to the internal and emotional world of human beings, their social identity, and their relationships with others. This, in my opinion, is the modern version of the idea that every man has the status and rank of a king.[368]

The concept of dignity can be a useful tool when considering statutory prohibitions on discriminatory conduct. Invoking dignity confirms that there is an inherent, inviolate principle of human worth.[369] This intrinsic value in each person necessarily leads to the conclusion that everyone is entitled to equal respect. The concept of dignity assists the creation of a more substantive conception of equality by confirming that equally poor treatment will not support human dignity.[370] Necessarily, human dignity requires an enhancement of status rather than a levelling down of human experience. This is because a levelling down approach would not pay due regard to intrinsic human dignity and worth.

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[365] McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights', above n 362, 656.
[366] For detailed accounts of this jurisprudence see Denise Réaume, 'Discrimination and Dignity' (2003) 63(3) *Louisianna Law Review* 645; Judy Fudge, 'Substantive Equality, the Supreme Court of Canada, and the Limits to Redistribution' (2007) 23(2) *South African Journal on Human Rights* 235.
[367] [1999] 1 SCR 497 [51].
[368] Aharon Barak, 'Human Dignity: The Constitutional Value and the Constitutional Right' in Christopher McCrudden (ed), *Understanding Human Dignity* (British Academy, 2013) 361, 363, 365.
[369] Paolo G Carozza, 'Human Dignity and Judicial Interpretation of Human Rights: A Reply' (2008) 19(5) *European Journal of International Law* 931, 938.
[370] Michele Finck, 'The Role of Human Dignity in Gay Rights Adjudication and Legislation: A Comparative Perspective' (2016) 14(1) *International Journal of Constitutional Law* 26.

The foundation of equality being the dignity of groups within the human species also allows for a more flexible approach to the characteristics protected by prohibitions on discrimination.[371] Rather than a focus on whether a person belongs to a protected group, the question becomes whether an action, policy, or law has diminished a person's self-worth and dignity by creating a distinction based on an irrelevant characteristic.[372] The question becomes one of effect rather than pre-determined categorical distinction.[373]

Finally, a substantive approach based on human dignity does not require a comparison of treatment to be made.[374] This is because of its focus on the effect on a person's dignity. The focus on dignity is in contrast to a question of whether someone without those characteristics would have been treated in a substantially similar fashion. As was outlined when discussing formal equality above in section 3.1, the comparator is particularly problematic when considering issues that have no real comparison.

Whilst human dignity is an important concept when undertaking a substantive approach to equality, it does have limitations. One of the limitations is that human dignity is open to different interpretations and can, ultimately, be a question of values.[375] The question of whether a person's dignity has been assaulted in the sense that one individual feels humiliated and under-valued is an individual one and can be challenging to assess objectively.[376] When there have been attempts to turn human dignity into a legal test, these attempts have often created more, rather than fewer, barriers for potential claimants by making the test for proving discriminatory conduct stricter rather than more flexible.[377] Instead of conceiving of discriminatory conduct and irrelevant distinctions as a wrong in and of themselves, the central question becomes whether a person's human dignity is violated.[378] Requiring a complainant to prove that discriminatory conduct had a

[371] Fredman, *Discrimination Law*, above n 68, 21.
[372] Sandra Fredman, 'Combatting Racism with Human Rights: The Right to Equality' in Sandra Fredman and Philip Alston (eds), *Discrimination and Human Rights: The Case of Racism* (Oxford University Press, 2011) 18, 18.
[373] Ibid.
[374] David Feldman, 'Human Dignity as a Legal Value : Part 2' [2000] *Public Law* 61; Tarunabh Khaitan, 'Dignity as an Expressive Norm: Neither Vacuous nor a Panacea' (2012) 32(1) *Oxford Journal of Legal Studies* 1.
[375] Sandra Fredman, 'Facing the Future : Substantive Equality under the Spotlight' (Paper No 5, Legal Research Paper Series, University of Oxford, August 2010) 2.
[376] McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights', above n 362, 747–748.
[377] Thomas MJ Bateman, 'Human Dignity's False Start in the Supreme Court of Canada: Equality Rights and the Canadian Charter of Rights and Freedoms' (2012) 16(4) *The International Journal of Human Rights* 577, 587– 588.
[378] Ibid 588.

detrimental effect on their dignity makes the test to prove discriminatory treatment significantly more difficult.[379] As the Supreme Court of Canada acknowledged in *R v Kapp*:

> Several difficulties have arisen from the attempt … to employ human dignity as a *legal* test. There can be no doubt that human dignity is an essential value underlying the s 15 equality guarantee. In fact, the protection of all of the rights guaranteed by the Charter has as its lodestar the promotion of human dignity … But as critics have pointed out, human dignity is an abstract and subjective notion that … has … proven to be an *additional* burden on equality claimants rather than the philosophical enhancement it was intended to be.[380]

MacKinnon is also critical of the conception of substantive equality as a right to human dignity. She considers human dignity as problematic because it can be used as a veil to cloud what she considers the core of inequality: social hierarchy.[381] She argues a focus on human dignity alone is problematic in the case of gender because it is susceptible to culturally gender-based differences that cannot be decoded without a grasp of substantive inequality.[382]

Finally, as Hepple acknowledges, there are difficulties in developing an account of how the concept of human dignity operates with other fundamental values embedded in a legal system such as liberty and autonomy.[383] This can be a problem given that human dignity can also be equally be associated with the broad notions of liberty and autonomy as it is with equality.[384] If human dignity operates as an umbrella principle which requires not only equality but also liberty and autonomy it is not a singular norm. Its identification as the underpinning rationale for discrimination law is then difficult to justify where equality conflicts with other fundamental principles of a liberal democratic system.

3.3.2 A pluralist approach to substantive equality

Instead of a singular approach to substantive equality, pluralists argue that there is no singular value or principle to explain substantive equality. Fredman advocates for conceptualising equality as a four-dimensional concept.[385] She argues that equality cannot be captured by a single principle because one principle cannot encapsulate the many ways in which discrimination operates to a person's detriment. For Fredman, substantive equality has four intersecting aims. First, a multidimensional approach to equality aims to break the cycle of disadvantage that is associated

[379] Ibid.
[380] *R v Kapp* [2008] 2 SCR 483 [21]-[22].
[381] MacKinnon, *Sex Equality*, above n 321, 51–53.
[382] Ibid.
[383] Bob Hepple, 'The Aims of Equality Law' in *Equality: The Legal Framework* (Hart Publishing, 2nd ed, 2014) 1, 22–23.
[384] Ibid.
[385] Sandra Fredman, 'Substantive Equality Revisited' (2016) 14(3) *International Journal of Constitutional Law* 712.

with 'out' groups.[386] Second, substantive equality should be utilised to promote respect for dignity and worth for all individuals and consequently, to reduce stigma, stereotyping, humiliation and violence based on specific identifying factors.[387] Third, a substantive approach to equality must accommodate difference and create structural change.[388] This approach recognises that equality cannot require assimilation to be the price for equal treatment. Fourth, substantive equality requires the facilitation of full participation in society.[389]

In many ways, this multidimensional approach seeks to acknowledge the benefits of many of the approaches that came before it and which are outlined above. It acknowledges the ways in which inequality is a wrong in and of itself, the harm it causes to human dignity as well as the ways in which discrimination inhibits individual liberty and the choices that people can make. It recognises the structural and hierarchical nature of inequality and the ways in which this hierarchy embeds stigma and social violence. It also acknowledges that each of these approaches or theories of discrimination law have gaps, silences or inconsistencies if any one approach is taken to be a 'single principle' to define equality.

Each of these four dimensions can operate singularly but they can also operate together. The purpose of these different dimensions is to acknowledge the layered and structural way inequality operates. A multidimensional approach acknowledges that inequality operates in a multitude of different directions rather than just as a vertical power imbalance and that it manifests itself across different dimensions.[390] Each of Fredman's four dimensions is discussed in more detail below.

The first dimension, redressing disadvantage, acknowledges that an approach to equality can be asymmetric. This dimension is focused on ensuring equality for groups that have suffered disadvantage: women rather than men, people with disabilities rather than those who are able-bodied, black people rather than white. This asymmetric approach clearly distinguishes a substantive approach from a formal approach to equality which would prohibit different treatment regardless of the circumstances. Fredman highlights that with respect to this dimension, it is not the characteristics of the group that are important, but the detrimental consequences that are attached to those characteristics.[391] Due to prolonged exclusion from the workforce and public

[386] Ibid 727.
[387] Ibid.
[388] Ibid.
[389] Ibid.
[390] Ibid 728.
[391] Fredman, *Discrimination Law*, above n 68, 26–27.

spaces more generally, women, those from minority backgrounds and those with disabilities are likely to be amongst the lowest earners and are more likely to experience poverty and social exclusion. Discrimination law should be understood as being aimed to rectify this asymmetry of experience. Fredman argues that this dimension effectively bridges the gap between the traditional sphere of discrimination law and distributive equality allowing the law to effectively address an area which has historically been associated with public policy rather than law.[392] By focusing on addressing disadvantage rather than aiming for neutrality, Fredman argues that this dimension removes the possibility of 'levelling down.'[393] It further allows for the inclusion of affirmative action measures on the basis that these redress disadvantage rather than pursuing a focus on equal treatment at all costs. Fredman acknowledges that redressing disadvantage needs to be considered in a broad perspective and not only be concerned with socio-economic disadvantage. Instead, drawing on the work of Young,[394] Sen,[395] and Nussbaum,[396] she argues that there needs to be a focus on the structures which exclude people from having the capacity to exercise individual choice and action.[397]

The second dimension, reducing stigma, stereotyping, humiliation, and violence on the grounds of specific characteristics is similar to, and incorporates many aspects of the conceptualisation of equality as human dignity discussed above in section 3.3.1. Fredman argues that this dimension avoids some of the problems associated with human dignity because it does not rely on vague and manipulable definitions. Instead, it focuses on the recognition of the harms caused by stigma, stereotyping, humiliation, and violence.[398] Developing the purpose of discrimination law in this way allows for an acceptance of the relational rather than individualistic experiences of inequality.[399] Fredman argues that unlike the individualist account of human dignity, this dimension acknowledges and can therefore address the fact that gender and race are social constructs. She argues:

> Instead of regarding sex as a biological given, the right to equality aims to address its social consequences through its focus on the ways in which people relate to each other. Thus, the right to equality can address sexual harassment and stereotyping in ways in which a pure equal treatment paradigm could not. A similar approach can be taken to disability: using recognition dimension of

[392] Ibid
[393] Ibid
[394] Iris Young, *Justice and the Politics of Difference* (Princeton University Press, 1990).
[395] Amartya Sen, *Development as Freedom* (Knopf, 1st ed, 1999).
[396] Nussbaum, above n 234.
[397] Fredman, 'Substantive Equality Revisited', above n 385, 729.
[398] Ibid 730.
[399] Ibid.

> substantive equality, it is possible to address the social implications of disability rather than focusing on the impairment.[400]

The third dimension focuses on social inclusion and political voice, building the capacity for participation in society in a variety of ways. A focus on political voice and participation is required because past discrimination and other societal pressures have blocked the capacity for political participation for many minority groups. Consequently, the law should operate to both compensate for the absence of political voice and generate the capacity for greater participation.[401] This is important due to the continuing and far-reaching implications that the long-term exclusion from the political process will continue to have on the way in which persons are listened to and accommodated in the political process. The second aspect of social inclusion is to acknowledge the importance of community for individuals. Fredman explains that rather than considering the individual in the abstract as formal equality requires, this element or dimension of substantive equality recognises the intrinsic need humans have for community and social participation.[402] For this dimension, she draws on the work of Fraser and Honneth,[403] Young,[404] and Collins.[405] In particular, she draws on Collins' work on discrimination, equality, and social inclusion. Collins argues that the goal of discrimination law is to provide for social inclusion.[406] Social inclusion has the potential to provide a more compelling and coherent account of discrimination law because it provides access to public spaces and public conversations.[407] This, in turn, generates a sense of community and social cohesion. As Collins outlines:

> Although … social inclusion shares with equality a concern with the distributive allocations to groups and individuals in a society, its more fundamental objective is the outcome of social cohesion. Social inclusion is a theory of how society can be integrated and harmonious. At its simplest, the theory is that if everyone participates fully in society, they are less likely to become alienated from the community and will conform to its social rules and laws.[408]

The final dimension is to accommodate difference and allow for structural change. This dimension acknowledges that gender, race, disability, and other status markers are not irrelevant and it is impossible to eliminate these differences from a person's identity. Through this dimension, Fredman acknowledges that difference is inescapable and cannot and should not be regarded as

[400] Ibid 731.
[401] Ibid.
[402] Ibid 732.
[403] Nancy Fraser and Alex Honneth, *Redistribution or Recognition: A Political Philosophical Exchange* (Verso Books, 2003).
[404] Young, above n 394.
[405] Collins, above n 330.
[406] Fredman, 'Substantive Equality Revisited', above n 385, 729.
[407] Ibid.
[408] Collins, above n 330, 24.

an irrelevant consideration, as is the approach of formal equality.[409] This accommodation of difference recognises that protected characteristics are not a detriment that should be minimised and the purpose of equality is not assimilation.[410] Instead, substantive equality requires an acceptance of differences, and a recognition that structural change is sometimes necessary to accommodate difference. The challenge with this fourth dimension is recognising and developing an account of how structural change is to occur. The question is whether structural change occurs as an exception by, for instance, creating accommodations for those with disabilities, or whether it requires a broader and more general change of social structures to accommodate difference.[411]

Day and Brodksy question whether an exceptionalist approach to accommodation, where concessions are made on an ad hoc basis, furthers the goals of equality.[412] They argue that instead of challenging imbalances of power, this approach embeds inequality by continuing to allow distinctions between those who are 'normal' and those who require 'accommodation.'[413] Fredman acknowledges that there are tensions between a more general goal of structural change and cases of ad hoc accommodation. But, she argues that the structural change that is required will need to be assessed on a case-by-case basis.[414] Another consideration that needs to be made with respect to structural change is who should bear the cost of that structural change.[415] There are two issues with respect to the cost of social change. The first is whether inequality is viewed as a single and individual problem. If it is, a cost-burden on the perpetrator is appropriate. If discrimination is conceptualised as a broader societal issue, then it may be appropriate for society as a whole to bear the cost. The second issue is how to assess the need for accommodation or structural change against competing claims on resources.

A multidimensional approach to addressing inequality is useful because it is not an attempt to provide an overarching definition of what equality is or a complete account of how inequality manifests. It instead is an analytic framework which can be used to assess policies, laws, and court judgments and assist in the creation of laws, policies, and judgments that better support substantive equality. There are benefits to a multifactor approach to equality. Such an approach allows for a consideration of the interaction between different facets of inequality. It allows for an equality

409 Fredman, *Discrimination Law*, above n 68, 30–31.
410 Ibid.
411 Ibid.
412 Shelagh Day and Gwen Brodsky, 'The Duty to Accommodate: Who Will Benefit' (1996) 75(3) *Canadian Bar Review* 433.
413 Ibid 468–469.
414 Fredman, *Discrimination Law*, above n 68, 30–31.
415 Ibid.

guarantee to be both about redressing distributive inequality as well as countering stigma, stereotyping, and prejudice. It does so without making an overall judgement about whether one is more important than the other. It acknowledges that disadvantage is both individual and systemic and the ways in which it manifests are different. The dimensions outlined by Fredman are designed to be complementary and any conflicts between the different dimensions need to be resolved for this approach to be useful. Fredman's approach to discrimination and inequality has been used by international organisations, governments, and academics to assess the effectiveness of international conventions and domestic discrimination and equality laws.[416]

Other pluralist accounts of discrimination law's purpose have also been provided in the work of Moreau. In Moreau's more recent work, deliberative freedom is still central to her articulation of discrimination law's aims. But, she now concludes that a pluralist account of discrimination may be required to capture all the diverse reasons why discrimination is wrongful.[417] Moreau accepts that discrimination is wrong for a number of reasons, not just related to a person's freedom but their dignity, opportunities, and protection from physical and emotional harms.[418]

The pluralist approach is not without critics. MacKinnon has been critical of the multidimensional approach articulated by Fredman. The crux of her critique is that contrary to Fredman's analysis, there indeed is a 'single principle' upon which to base a conceptualisation of substantive equality and that is social hierarchy.[419] Social hierarchy is on this account the key identifying principle upon which equality is based. MacKinnon argues that substantive equality can only be understood in terms of hierarchy.[420] By focusing on the hierarchical structures that are in place, it becomes evident that the effects of inequality are almost always material as well as dignitary. She argues that

[416] Recent examples include Ebenezer Durojaye and Yinka Owoeye, 'Equally Unequal or Unequally Equal: Adopting a Substantive Equality Approach to Gender Discrimination in Nigeria' (2017) 17(2) *International Journal of Discrimination and the Law* 70; Andrea Broderick, 'A Reflection on Substantive Equality Jurisprudence: The Standard of Scrutiny at the ECtHR for Differential Treatment of Roma and Persons with Disabilities' (2015) 15(1–2) *International Journal of Discrimination and the Law* 101; Catherine Albertyn, 'Equality before Dignity: Multidimensional Equality and Justice Langa's Judgments' (2015) 1(1) *Acta Juridica* 430; Bobbi Murphy, '*Balancing Religious Freedom and Anti-Discrimination: Christian Youth Camps Ltd v Cobaw Community Health Services Ltd*' (2016) 40(2) *Melbourne University Law Review* 594; Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston, on extreme inequality and human rights, A/HRC/29/31 29th Session HRC, 2015; I*nternational Labour Organization: Social Protection Floors Recommendation No. 2020* (2012); UN Women Flagship Report, *Progress of the World's Women 2015–2016: Transforming Economics: Realising Rights* (2015) Ch. 1, available at: http://progress.unwomen.org/en/2015/chapter1/. Fredman's model also forms the basis of the UN Committee on the Rights of Persons with Disabilities *General Comment No. 6* articulation of the principle of inclusive equality: Committee on the Rights of Persons with Disabilities, *General comment No. 6 (2018) on equality and non-discrimination*, UN Doc CRPD/C/GC/6 (26 April 2018) 3 [11].

[417] Sophia Moreau, above n 15.

[418] Ibid.

[419] Catharine A MacKinnon, 'A Reply to Sandra Fredman' (2016) 14(3) *International Journal of Constitutional Law* 739.

[420] MacKinnon, 'Substantive Equality', above n 323, 6.

by focusing on the nature of the hierarchical structure, both the material and dignitary dimensions will be evident, and it is significantly more difficult to ignore the substance of inequality.[421] For MacKinnon, a substantive approach to equality requires two steps. First, it requires asking what the substance of a particular inequality is and second, whether the facts are an instance of that inequality.[422] Her core insight is that inequality is a social relation of rank ordering typically based on characteristics.[423] Inequality is therefore always relational, comparative, and vertical.[424] She acknowledges that where inequality is actualised in specific domains, the way in which it operates is often in an intersecting and overlapping manner. MacKinnon's conception of substantive equality is based on the proposition that discrimination is harmful because it is predicated on unfair and factually false rankings based on characteristics:

> The resulting materials and dignitary deprivations and violations are substantive indications and consequences of this hierarchy, but it is the hierarchy itself that defines the core inequality problem.[425]

Without a grounding in social hierarchy, MacKinnon argues that the dimensions will operate in the abstract which could lead to their meaning being filled to assist those who are already advantaged rather than those who are disadvantaged.

The other critique of the pluralistic approaches to substantive equality is that it is merely an attempt to paper over the inherent problems of equality being the underlying goal of discrimination law. Discrimination law is not designed to create equality. Instead, discrimination law is a mechanism designed to give people opportunities that they would otherwise be denied.[426] The pluralistic account of discrimination law's purpose does not resolve this central tension. The answers to fundamental questions regarding treatment and resource allocation will ultimately depend on which dimension or aspect of inequality one places emphasis on.

The critiques made of the pluralist model highlight the ongoing struggle to utilise a singular theory to encapsulate the issues that discrimination law grapples with. While the ultimate goal of discrimination law can be understood as providing people with greater capacity to achieve the life they wish to lead, the liberty theories provide neither a clear articulation of what is preventing a person from doing so, nor provide a real avenue to redress the limitations that people face in doing

[421] Ibid 12.
[422] Ibid 13.
[423] Ibid.
[424] Ibid.
[425] Ibid 12.
[426] Moreau, 'Discrimination and Freedom', above n 305.

so. These theories also often fail to identify the recognitional harms caused through inequality. Similarly, a focus on social hierarchy provides one account of *how* certain groups are disadvantaged but does not articulate the overarching goal of discrimination law or explain how discrimination law should operate to remove social hierarchies.

Although the pluralist or multidimensional model does not resolve all of these problems, it does reconcile many of them. It does so in three ways. First, the pluralist account of discrimination law's purpose recognises both the recognitional and redistributive harms caused through historical marginalisation and mistreatment. Second, pluralist accounts recognise the ways in which people are excluded and marginalised through lack of participation, economic disadvantage and systemic inaccessibility. Third, these models contextualise the purpose and capacity of discrimination law to redress inequality while still utilising current structures and frameworks in place, rather than entirely reimagining new systems to achieve equality. . The multidimensional or pluralistic model can be a useful tool to consider and assess the effectiveness of legislation and new regulatory mechanisms to redress discrimination and enhance equality. However, its effectiveness to determine the 'hard cases' could be limited. In complex cases it could be difficult to assess which dimension should be placed in focus. This is particularly problematic because the outcome could be different depending on which dimension is the focus of the inquiry or when multiple rights and interests are in the balance. The utility of the pluralist approach in the interpretation of discrimination legislation will be the focus of the remainder of this chapter.

3.4 A 'creative' interpretation of discrimination law

In Part I, I set out to provide the foundation to compare the different interpretive approaches to discrimination law adopted in Australia, Canada and the United Kingdom. In Chapter Two I charted the introduction of discrimination legislation in each of these jurisdictions. I outlined and interrogated the context for the introduction of discrimination law, the rationale for the introduction given by the legislature and the structure of the legislation. I determined that first, the legislation and the context for introduction were similar enough to provide a foundation for a meaningful comparison of the developed doctrine in each jurisdiction. In Chapter Two, I established that while in each jurisdiction the judiciary accepted the need to interpret discrimination law 'purposively,' the legislative text, and explanatory materials are written with such a degree of abstraction that they provide little assistance in determining the purpose of prohibiting discrimination. In particular, the legislative materials fail to give clear guidance on three questions:

Who should be protected from discrimination? What protection should be provided? And how far can discrimination be eliminated in society?

To provide a structure to consider these questions in Part II, in Chapter Three I reviewed the normative scholarship that interrogates the purpose of discrimination law. I did so in order to structure my analysis of the case law in Part II. In particular, I focused on three debates: the relationship between discrimination law and formal equality, whether the substance of discrimination law should be understood as furthering equality or liberty and the different approaches to a 'substantive' approach to equality.

As I highlighted in the introduction of this chapter, the purpose of this chapter was not to find or confirm a 'holy-grail' of a singular normative principle of discrimination, nor was it to contribute or add to the normative debates in any significant way. Instead, I sought to utilise these debates to frame and understand the interpretation of discrimination law. Thus, after considering the scholarship I adopt the following conclusions. First, a 'creative' interpretation of discrimination law is grounded in an understanding that discrimination law is designed to address inequality and ultimately create a more equal society. In addressing inequality, discrimination law should be interpreted to provide for a substantive rather than a simply formal outcome. This is because of the underlying problems of formal equality and because at its essence, formal equality is simply a restatement of the rule of law. Thus, a substantive equality rather than formal equality approach is consistent with the rationale for the introduction of discrimination law as attempt to ameliorate the effects of the previous common law and constitutional approach to discrimination law.

Ultimately, in this chapter I have advocated for the use of a pluralist or multidimensional approach to substantive equality. This approach, as compared to theories based upon liberty, dignity and social hierarchy, does a better job of encompassing all the various ways in which disadvantage manifests and the different methods to address such inequality and disadvantage. In terms of the interpretation of law, it provides the opportunities for creativity through understanding and contextualising the disadvantages that discrimination law could address and challenging systemic barriers that exist throughout society.

However, I also acknowledge that this pluralistic and 'creative' account brings with it challenges in the interpretation of law. It is in providing an interrogation of the extent of this challenge that this thesis fills a gap in the literature. In particular, each of the substantive theories, including the pluralist equality theory of discrimination law, bring with them two significant challenges in

practice. Each substantive theory of discrimination law requires the contextualisation of the disadvantage suffered by complainants. Each substantive theory requires judges to be proactive in addressing the systemic socio-economic structures which continue and perpetuate disadvantage. For example, in understanding and addressing historical disadvantage and stereotyping and stigma, the court is required to contextualise the nature of the disadvantage, drawing both on the individual stories and the broader social systems and structures which embed disadvantage. The kinds of evidence and context that courts draw upon will necessarily affect the extent to which disadvantage is understood and addressed. Once disadvantage is recognised and contextualised, utilising discrimination law to ameliorate this disadvantage can challenge the institutional role of the courts through requiring a reasonable active role in challenging executive action and socio-economic policy because both dimensions can involve challenges to government practice and policy.[427]

Analysing the different approaches to these two challenges in each jurisdiction will be the subject of Part II of this thesis. Although the normative theories provide an account of what discrimination law could and should achieve, less studied is the role of the judiciary in achieving these outcomes and the institutional limits in achieving substantive outcomes. As Sheppard has argued, 'developing a vision of inclusive equality that is attentive to both the substantive and procedural harms of discrimination raises complex questions regarding the type of evidence and knowledge required to prove a violation of equality rights.'[428] Drawing on the jurisprudence of Wilson J, she argues that a 'contextual' approach to equality rights requires a layered and considered interpretation of the evidence.[429] Sheppard argues that in practice this requires a contextual approach to equality rights which considers inequality at the micro, meso and macro-context levels.[430] At the micro level, she advocates for an approach to discrimination law which recognises and values the narrative lived experience of those suffering disadvantage.[431] At the meso level, Sheppard argues that the institutional practices and their interaction with legal norms should be examined.[432] Finally, the macro level examines inequality within a broader socio-economic realm.[433] As she argues, traditional legal theory often treats the larger socio-economic realm as neutral when instead it embeds and perpetuates inequality.[434] It is in identifying these broader socio-economic

[427] Colleen Sheppard, 'Inclusive Equality and New Forms of Social Governance' (2004) 24 *Supreme Court Law Review* (2d) 103, 104; Fudge, above n 366, 235-236.
[428] Colleen Sheppard, 'Inclusive Equality', above n 31, 65.
[429] Ibid 65–66.
[430] Ibid 66.
[431] Ibid 67.
[432] Ibid 70.
[433] Ibid 74.
[434] Ibid.

factors that courts are required to be 'creative' in interpretation through eschewing traditional forms of legal reasoning.

In addition to adopting a contextual approach to the interpretation of discrimination law, a 'creative' interpretation of discrimination law based on substantive equality further requires judges to challenge and ameliorate systemic barriers of access. This can require a degree of redistribution of socio-economic resources.[435] As former Chief Justice McLachlin highlights, this can present challenges to the traditional judicial role:

> Equality debates usually turn on the proponent's view of society and what it should be. This raises the question of whether the courts can capture the complexity of social life in a way that permits them to make the best decisions. At a more abstract level, who should be making fundamental decisions about the kind of society we have – the legislatures or the courts? Again, should the law preserve the social status quo, or should it seek to change it? And underlying the question of how far to go in changing things is the fact that [equality guarantees] have been superimposed on a system that espouses a market economy and the importance of open competition.[436]

As McLachlin highlights, decisions about discrimination and equality are often complex and ask larger questions about the kind of society that should be in place. These questions are also being answered within the confines of a market economy which assumes and is predicated upon a degree of inequality.[437] Within this context, the role of judiciary in the development of a substantive account of discrimination law is underexplored in the normative literature on discrimination and equality law. While the pluralist approach to substantive equality offers the most internally consistent and practical account of how discrimination law can operate substantively, it does not address the questions posed by Chief Justice McLachlin above. None of these theories consider the nature of the court's role in making fundamental decisions about equality in liberal democracies.

More broadly, equality laws can be understood are a form of 'transformational law' which is focused on changing social norms and institutions. As Hamilton Kreiger has argued in the context of discrimination law in the United States, such 'transformational law' can be subject to both backlash and capture.[438] This is either through the explicit rejection of the fundamental tenents of the 'transformative law's' potential (backlash) or through the more subtle interpretation of law to limit the more 'transformational' aspects of the law through entrenched and existing legal practices

[435] Judy Fudge, above n 366, 237. See also Claire Mummé, 'The Ontario Human Rights Code's Distributive and Recognitional Functions in the Workplace' (2014) 18 *Canadian Labor & Employment Law Journal* 145.
[436] McLachlin, above n 358, 21.
[437] Thornton, above n 44, 12-13.
[438] Linda Hamilton Krieger, 'Afterword: Socio-Legal Backlash' (2002) 21(1) *Berkeley Journal of Employment and Labor Law* 476.

(capture).[439] In Part II, I will consider the extent to which discrimination laws have been interpreted to allow for discrimination law to have this more 'transformational potential.'[440]

Understanding how different jurisdictions, with different constitutional contexts have navigated the institutional challenges presented by discrimination law offers a gap in the scholarship, and it is fundamental to understanding if and how discrimination law can achieve its normative potential. The judiciary plays a key role in determining the overall effectiveness of discrimination law. The legal meaning of discrimination and its application to different individuals and groups is left to judges.[441] This is clearly the case with respect to open-textured constitutional and legislative texts where there is additional flexibility to the definitions of who should be protected and what kinds of behaviour they should be protected from.[442] However, there is also a role for judicial determination where the law is structured in a more prescriptive fashion. As will be demonstrated in Part II, ultimately, it will be for judges to determine the boundaries of protected characteristics and determine, for instance, whether an individual is part of a group with protected characteristics or whether certain groups fall within the scope of protected characteristics. Even under a more prescriptive framework, it is for judges to determine if a decision was made for a discriminatory reason or whether a policy or rule is having a discriminatory effect.[443] The judiciary determines the flexibility of the legal and evidentiary tests that are employed in determining these issues and the evidentiary standards that are applied.[444] To that end, judges have a critical role in determining the way discrimination law is developed. As such, it is important to understand and articulate how that role is being performed, if such an approach reflects a substantive approach to discrimination law's purposes and if this is consistent with a traditionally understood judicial role. In this thesis, I begin to fill this gap in Part II of this thesis by exploring how discrimination law has been interpreted differently in each jurisdiction.

[439] Ibid 492–493.
[440] On this point see also Linda Hamilton Krieger, 'Foreword – Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies' (2000) 21(1) *Berkeley Journal of Employment and Labor Law* 1; Michael Waterstone, 'Backlash, Courts and Disability Rights' (2015) 95 *Boston University Law Review* 833.
[441] Gaze, 'Context and Interpretation in Anti-Discrimination Law', above n 13, 327.
[442] Smith, 'Rethinking the *Sex Discrimination Act*' above n 3.
[443] Examples of these kinds of decisions include *Lyons v Queensland* (2016) 259 CLR 518; *New South Wales v Amery* (2006) 230 CLR 174.
[444]Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' (2009) 31 *Sydney Law Review* 579, 584.

PART II

Part II: A 'creative' approach in practice

One of my aims in this thesis is to assess the approach adopted by the courts to developing discrimination law in Australia, Canada and the United Kingdom. Have courts operated as the 'creative' interpreters of legislative intent as envisaged by Lester and Bindman? Or are the previous inadequacies of the common law still apparent in the decisions on key questions and controversies in discrimination law in each jurisdiction?

Part I of this thesis provided the framework to interrogate the discrimination law jurisprudence that has developed in Australia, Canada and the United Kingdom and in doing so defined the markers of a 'creative' interpretation of legislative intent for the purpose of this thesis. These markers were defined in light of the legislative text, the legislative history and the current normative debates. In Part I, I argued that a pluralist model derived from Fredman's multidimensional theory of substantive equality was the best guide to a 'creative' interpretation of legislative intent. In other words, a 'creative' interpretation of discrimination law is one which eschews a simple conceptualisation of discrimination, instead embracing a multifaceted approach which contextualises the disadvantages that discrimination law is able to address and challenges the systemic practices which embed inequality. But I argued that the multidimensional approach raised two challenges for the interpretation of discrimination law. These were that first to achieve substantive outcomes, discrimination law must be interpreted contextually with an eye to the individual and institutional nature of disadvantage that discrimination law could ameliorate and second, the extent to which the court could tackle the socio-economic structures of disadvantage within the context of a liberal market economy and with a degree of deference to the legislature and executive with respect to socio-economic policy.

In Part II, I will utilise the framework of 'creative' interpretation defined in Part I to answer the second sub-question asked in 1.1: Is the interpretation of discrimination law in Australia, Canada and the United Kingdom consistent with a 'creative' interpretation of legislative intent? To answer this question, I will assess each judiciary's approach to three central questions in discrimination law, namely, who is protected from discriminatory harms; what kinds of behaviours and practices are prohibited; and, to what extent can discrimination be 'eliminated'?

Part II consists of three chapters. In Chapter Four, I will consider the question of who is protected from discrimination in each jurisdiction. In the legislation in each jurisdiction, discrimination is prohibited where it is based upon specified 'grounds.' However, these 'grounds' are left relatively

undefined by the legislative text. How prohibited grounds of discrimination are interpreted and understood by the courts in each of the studied jurisdictions illuminates each judiciary's different understanding of the harms that discrimination law can eliminate.

In Chapter Five, I will focus on the fundamental architecture of statutory discrimination law in each jurisdiction. In each jurisdiction both direct and indirect discrimination are prohibited and some forms of discrimination can be justified. These prohibitions and justifications form the central pillars of statutory discrimination law in each jurisdiction. Again, as in Chapter Four, the different approaches adopted with respect to these fundamental prohibitions illuminate the degree of opportunity given to the judiciary to shape how each jurisdiction conceives the purpose and effect of discrimination law.

In Chapter Six, I will consider the extent to which discrimination law can be interpreted 'creatively' in each jurisdiction to transform society through the elimination of systemic barriers of access. I will utilise Fredman's multidimensional approach to assess the extent to which any of the studied jurisdictions' jurisprudence can be understood as 'transformational.'

The aim of Part II is to provide the forensic and analytical foundations of this project. While Part I contextualised the problem that is the focus of this thesis, Part II provides the evidence on which I will base my answer to my overall research question in Part III. By utilising a cross-cutting approach, I am able to interrogate the jurisprudence in order to consider the different interpretations of discrimination law's purpose and demonstrate that each jurisdiction has interpreted the aims and purpose of discrimination law differently. Part II does so by considering how appellate courts understand the problem that discrimination law is designed to address and how far parliaments intended to go in eliminating that problem. In Part II, I will focus on appellate court decisions, with an emphasis on highest court decisions. As explained in 1.4, the focus on appellate courts is appropriate because these are the courts that ostensibly develop the tests that are then applied and reflected in the lower courts and tribunals.

As explained in 1.4, I am interested in if and how the interpretations of discrimination law have changed over time. Have courts become more 'creative' in their interpretation of discrimination law to reflect new understandings of the ways in which inequality and discrimination exist in society? Or has the case law continued to reflect a narrow definition of discrimination and inequality? Thus, I begin my analysis with early decisions on the meaning and purpose of discrimination law before considering how these have, or have not, changed over time, concluding with the most recent

decisions by the courts in each jurisdiction on any given issue. In particular, I am focused on *if* courts are the 'creative' interpreters of legislative intent in each jurisdiction and *if* such interpretation is consistent with their constitutional role. I focus my attention primarily on cases which either illustrate the current interpretation of the law, denote a change in approach to the interpretation of the law or reveal the judges' underpinning logic focusing on the values that discrimination law is based upon and the court's role in developing discrimination law based on those values. In essence, I concentrate on decisions that I argue do, or do not, denote a degree of 'creativity' in interpretation.

Part II contributes to the existing scholarship in three key ways. First, while there are significant single jurisdiction studies, the comparative approach adopted in Part II brings into focus the multitude of interpretive avenues that are available notwithstanding the similar legislative language. Second, this consideration exposes the limitations of the normative literature discussed in Chapter Three. Part II will demonstrate that while *some* decisions in each jurisdiction reflect a 'creative' interpretation of legislative intent, drawing on the elements or dimensions of a pluralist account of equality, there are limitations in each jurisdiction. The comparative aspect of this project also demonstrates that these limitations are often jurisdictionally distinctive. Third, distinctive to comparative studies of equality and discrimination law,[445] I have narrowed the study to statutory discrimination claims only rather than considering both constitutional and statutory claims. This approach allows a clearer and more faithful comparison of the case law. It has the capacity to demonstrate some useful distinctions between the interpretations of statutory discrimination law and constitutional equality provisions. Further, while this project only focuses on statutory discrimination law decisions, this still represents a consideration of more than 500 cases over the past 50 years providing an extensive study of discrimination law in each jurisdiction. Finally, this approach leaves the different constitutional frameworks as a variable to study in Part III.

[445] See for example the approaches adopted in Khaitan, *A Theory of Discrimination Law*, above n 18; Solanke, *Discrimination as Stigma*, above n 29; Fredman, *Discrimination Law*, above n 68.

4 Group Disadvantage

As Chapter Two highlighted, some form of legislation prohibiting discrimination has been in place for over 50 years in Australia, Canada and the United Kingdom. While the broad structure of the legislation has remained relatively consistent, the theoretical underpinnings have developed considerably. This chapter will outline how appellate courts in Australia, Canada and the United Kingdom have understood the identifying features of the groups or attributes designated for protection. In this chapter I will consider whether and to what extent courts have identified the lived experiences of disadvantage that discrimination is designed to protect people from. I will argue that a 'creative' approach by the courts can be identified by the extent to which judges ground their analysis in an understanding of the lived experience of the disadvantage that discrimination law could be utilised to ameliorate.

A central question with respect to discrimination law is how to determine who is entitled to protection. In some of the different normative work on discrimination law's purpose outlined in Chapter Three, it is important to identify why certain attributes are granted protection and others are not.[446]

Identifying the distinguishing features of a 'ground' or 'attribute' for the purposes of a discrimination claim is important because doing so can allow for a better articulation of the contextual and historical factors which situate the disadvantage suffered.[447] Attributes can be protected where the attribute is related to historical and persistent group disadvantage.[448] Disadvantage can be economic, political, or dignitary.[449] Protected attributes are generally immutable or relate to choices intrinsically connected to a person's sense of self (such as religious belief).[450] One of the key distinctions between the formal and substantive approaches to equality law outlined in Chapter Three with respect to attributes is whether this disadvantage *only* relates to the disadvantages caused by assumptions, stereotypes and stigmas or whether the protected attributes should be understood with respect to other kinds of disadvantage, such as (although not limited to) economic and educational disadvantages, language difficulties and differing expectations related to care-giving associated with gender and cultural differences.[451] Another

[446] See for example: Khaitan, *A Theory of Discrimination Law*, above n 18, 3.1 in which he explores the defining features of attributes granted protection from discrimination through discrimination law.
[447] Pothier, 'Connecting Grounds of Discrimination to Real People's Real Experiences', above n 237, 40.
[448] McColgan, *Discrimination, Equality and the Law*, above n 316, 38–39.
[449] Khaitan, *A Theory of Discrimination Law*, above n 18, 120.
[450] Ibid 50.
[451] Solanke, *Discrimination as Stigma*, above n 29, 60–61.

important distinction in the normative literature outlined in Chapter Three was whether the understanding of the protected attributes is one that allows for an asymmetry of treatment.[452] Explaining and understanding the disadvantage that is suffered because of group identity is important to understanding the boundaries of the categories for protection.

Each jurisdiction has chosen a closed list of attributes which are entitled to protection from discrimination.[453] Thus, it is for Parliament to determine which groups are protected from discrimination and which are not. However, in each jurisdiction, questions and choices remain about the definitional boundaries of the protected attributes, and it is for the courts to determine those definitional limits. I will consider and compare the approaches taken in each jurisdiction to understand who is entitled to protection from discriminatory conduct. In this chapter, I will address three controversies that exemplify the difficulties in understanding the protected attributes: first, how to define 'race' and its associated disadvantages. Second, the relationship between pregnancy, family responsibility and sex discrimination, and third, the application of age discrimination in an employment context. With respect to each of these issues, this chapter will consider the British, Australian and Canadian approaches in turn.

These controversies were selected because each involves a consideration of cases that fall at the boundaries of definitions and involve attempts to either expand non-discrimination protections to other disadvantaged groups through a wide and 'creative' interpretation of existing attributes or recognise and ameliorate the disadvantages which are not only caused by stereotypes. This is important because while redressing stereotypes is an important part of discrimination law, as Chapter Three identified it is not the only part of discrimination law. Understanding a court's approach in these cases is important because this will later allow for an exploration of the court's understanding of the underlying purpose of discrimination law and the role of the courts in developing a substantive account of non-discrimination rights.

In developing an account of these three controversies, in this chapter I make two important contributions to the thesis' overall argument. First, I expose the ongoing difficulties in each jurisdiction (though to varying extents) in identifying and addressing the disadvantages that discrimination law could be interpreted to remedy in the case law. The failure to identify the kinds of disadvantage that discrimination law is designed to tackle is particularly apparent with respect

[452] Fredman, *Discrimination Law*, above n 68, 175 and 215. See also: Brian Doyle, 'Enabling Legislation or Dissembling Law? *The Disability Discrimination Act 1995*' (1997) 60(1) *Modern Law Review* 64.
[453] For the discussion of the attributes protected in each jurisdiction see 2.3.1.

to age discrimination. In contrast, while courts do more clearly identify disadvantages that are caused by pregnancy and family responsibilities, it remains unclear *how far* law can and should be utilised to redress those disadvantages. Second, in this chapter I start to demonstrate the tensions between the role of Parliament and the courts that 'creative' interpretation can cause in each jurisdiction. As will be argued below, the capacity to extend the reach of discrimination law to disadvantages which are broader than simply addressing stereotyping and stigma reveals tensions as to the appropriate role of the legislature and the judiciary.

4.1 Race, ethnic origins, national origins and nationality

As Chapter Two explained, race was the first attribute granted protection.[454] However, as has been acknowledged many times previously, 'race' is difficult to define because it is not a state of biology but a cultural construct.[455] Consequently, in the discrimination law context at least, the legislative text provides an attempt to give meaning to the definition through other terms such as 'colour', 'ethnic origin' and 'national origin' or 'nationality.'[456] But, it is then for the courts to determine the meaning of these sub-terms. The way that the courts in the United Kingdom, Australia and Canada have done so has varied.

4.1.1 United Kingdom

With respect to race, the courts in the United Kingdom initially adopted an inflexible approach to interpreting phrases such as 'national origin.' In *Ealing London Borough Council v Race Relations Board* ('*Ealing*'),[457] the House of Lords considered the meaning of 'national origins'. The complainant was a Polish citizen residing in the United Kingdom who was denied public housing on the basis that he was not a British citizen. He argued that this denial constituted race discrimination on the

[454] Previously discussed in 2.2.

[455] See for example: Ashley Montagu, *The Concept of Race* (Free Press, 1964) 24; Lester and Bindman, above n 1, 154–155; Fredman, *Discrimination Law*, above n 68, 50–51; Stuart Hall, 'New Ethnicities' in James Donald and Ali Rattansi (eds), *Race, Culture and Difference* (Open University, 1992) 254. Also discussed — though in the context of s 51(xxvi) of the *Australian Constitution* (the 'race power') — in Robert J Sadler, 'The Federal Parliament's Power to Make Laws with Respect to ... the People of Any Race...' (1985) 10(3) *Sydney Law Review* 591, 606–609; John McCorquodale, 'The Legal Classification of Race in Australia' (1986) 10(1) *Aboriginal History* 7, 9; Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, Final Report, 2012, 139–141.

[456] *Equality Act 2010* (UK) ss 9(1)(b) and (c); *Racial Discrimination Act 1975* (Cth) ss 9(1); 10(1); 18B(1); *Canadian Human Rights Act* RSC 1985, c H-6 ss 2(1) and 3(1). Additionally, s 5 of the *Racial Discrimination Act 1975* (Cth) adds 'being an immigrant' as a protected characteristic with respect to certain protections contained in the *Racial Discrimination Act 1975* (Cth) though not with respect of the broad protections provided by ss 9 or 9(1)(A) of the *Racial Discrimination Act 1975* (Cth). Section 7(1)(i) of the *Discrimination Act 1991* (ACT) also includes 'immigration status' as a separate protected characteristic.

[457] [1972] AC 342.

grounds of 'national origins.'[458] The House of Lords concluded that 'national origins' was a separate and distinct category from 'nationality.' National origin denoted a status that was immutable based on place of birth. In contrast, 'nationality' was a status that was generally (although sometimes with difficulty) changeable.[459] Consequently, the House of Lords concluded that as the *Race Relations Act 1967* (UK) did not preclude discrimination on the basis of nationality, a requirement to be a British citizen to access public housing was not unlawful discrimination.[460] While this distinction is understandable where the complaint relates to a public policy criterion,[461] it can be a far more confusing distinction in the interactions between private persons. As highlighted by Hucker, 'much of the language in *Ealing* leaves one with the impression of a court unwilling to view the question before it in a realistic context.'[462] As the White Paper proceeding the introduction of the *Race Relations Act 1976* (UK) made clear, the distinction made by the House of Lords between nationality and national origins 'creates an obvious pretext for discriminating on racial grounds' because one could simply argue that the decision was made on the grounds of 'nationality' rather than 'national origins.'[463] The approach by the judiciary more broadly caused such anomalous results that Parliament introduced new legislation in the form of the *Race Relations Act 1976* (UK) in order to resolve some of these anomalies.[464] Since that time, the British appellate courts have adopted, at times, a more contextual approach to interpretation of terms such as 'race' and 'ethnic origins.' This more contextual approach draws an understanding that the purpose of the Act is to ameliorate historic group disadvantage.

This is particularly evident in the appellate courts' approach to the meaning of 'ethnic origins.' The House of Lords first considered the meaning of 'ethnic origins' in *Mandla (Sewa Singh) v Dowell Lee* ('*Mandla*').[465] In *Mandla* the Court accepted that the purpose of the Act, in a general sense, was to make provision with respect to relations between people of different racial groups.[466] The complainant was a Sikh who argued that a school dress-code was racially discriminatory where it required male students to cut their hair and cease wearing a turban in order to comply.[467] The

[458] [1972] AC 342, 352.
[459] [1972] AC 342, 360 (Lord Dilhorne), 362–363 (Lord Simon).
[460] [1972] AC 342, 364 (Lord Simon). For a more modern application see also: *R (Al Rawi) v Secretary of State for Foreign and Commonwealth Affairs (United Kingdom)* [2006] EWCA Civ 1279.
[461] And the *Race Relations Act 1967* (UK) provided exceptions on this basis,
[462] John Hucker, 'The House of Lords and the Race Relations Act: A Comment on *Ealing v Race Relations Board*' (1975) 24(2) *International and Comparative Law Quarterly* 284, 300; '*London Borough of Ealing v Race Relations Board*' (1972) 6(2) *Law Teacher* 97; '*Ealing London Borough v Race Relations Board*' (1972) 1 *Industrial Law Journal* 42.
[463] *Racial Discrimination* (1975) Cmnd 6234 [56] cited in Monaghan, *Monaghan on Equality Law*, above n 169, 207.
[464] Monaghan, *Monaghan on Equality Law*, above n 169, 207–208.
[465] [1983] 2 AC 548.
[466] [1983] 2 AC 548, 559.
[467] [1983] 2 AC 548, 559.

question for the court was whether Sikhs were a group who were provided protection under the *Race Relations Act 1976* (UK).[468] When considering whether Sikhs were entitled to protection, Lord Templeman highlighted the limitations of the Act:

> By section 3 of the Act the racial groups against which discrimination may not be practised are groups 'defined by reference to colour, race, nationality or ethnic or national origins …' Presumably Parliament considered that the protection of these groups against discrimination was the most necessary. The Act does not outlaw discrimination against a group of persons defined by reference to religion. Presumably Parliament considered that the amount of discrimination on religious grounds does not constitute a severe burden on members of religious groups.[469]

The purpose of the Act as understood by the House of Lords in *Mandla* was to provide protection from discrimination only to those who have attributes Parliament has deemed most in need of protection and this is instead of providing protection from discrimination generally.[470] In *Mandla*, Lord Fraser defined a list of identifiable features that could be used to characterise a distinct ethnic group.[471] These included a shared history, a distinctive cultural tradition, common geographical origin or descent from a small number of ancestors, a common language and literature, a common and distinctive religious tradition, and, importantly, being a minority or oppressed people.[472] Using this framework for analysis it was accepted that Sikhs were a distinct ethnic group and were entitled to protection pursuant to the *Race Relations Act 1976* (UK).[473] In subsequent cases, other groups such as Roma gypsies,[474] and Jewish persons[475] have been found to be distinct ethnic groups. Conversely, Rastafarians have not been found to be a distinct ethnic group.[476] Importantly, the decisions in these cases emphasised the significance of long shared history and minority status (and associated disadvantage) as justification for accepting those claimant groups as groups entitled to protection.[477] Conversely, in the case of Rastafarians, the lack of long shared history or acknowledged separate identity from others of Afro-Caribbean descent was a justification for

[468] [1983] 2 AC 548, 559–560.
[469] [1983] 2 AC 548, 568 (Templeman J).
[470] Ibid.
[471] [1983] 2 AC 548, 562 (Lord Fraser).
[472] Ibid.
[473] Ibid.
[474] *R (European Roma Rights Centre and others) v Immigration Officer at Prague Airport and Anor (United Nations High Commission for Refugees intervening)* [2005] 2 AC 1. See also *Commission for Racial Equality v Dutton* [1989] 1 QB 783, it should also be noted that the Irish traveller community are a protected group in the Northern Irish legislation: *Race Relations (Northern Ireland) Order 1997* (UK) s 5(3)(a).
[475] *R(E) v Governing Body of JFS and Anor (United Synagogue and others intervening)* [2010] 2 AC 728.
[476] *Dawkins v Department of Environment, sub nom Crown Supplies (Property Services Agencies)* [1993] ICR 571, 528.
[477] *Commission for Racial Equality v Dutton* [1989] 1 QB 783, 801; *R(E) v Governing Body of JFS and Anor (United Synagogue and others intervening)* [2010] 2 AC 728, 761 (Baroness Hale).

rejecting the application of the *Race Relations Act 1976* (UK) to discrimination against Rastafarians.[478]

However, the aim of ameliorating group disadvantage is limited where have courts have failed to understand that group disadvantage based on race can stem from implications directly or implicitly associated with a person's national or ethnic origins or nationality. For example, in *Onu v Akwiku & Anor* ('*Onu*'),[479] the Supreme Court of the United Kingdom considered whether the mistreatment of migrant domestic workers could constitute unlawful discrimination on the grounds of race. The plaintiffs were Nigerian women who had entered the United Kingdom lawfully on migrant domestic worker visas obtained for them by their employers.[480] After arriving, their passports were confiscated and they were subject to 'systematic and callous exploitation' by the respondents.[481] The question for the Court was whether this treatment was because of race (with the understanding that the definition of race included 'nationality').[482] Baroness Hale (with whom the other members of the Court agreed) concluded that the treatment was not 'because of race.'[483] Instead, the plaintiffs were treated the way they were because of their vulnerable immigration status.[484] While immigration status is a 'function' of nationality, the wide variety of different terms and conditions that can be attached to immigration status necessarily means that it is different from race.[485] While there may have been other employment remedies available to migrants subjected to these working conditions, it is notable that, despite the Supreme Court's ruling in *Onu*, similar arguments regarding race discrimination are still being made in appellate courts in the context of the mistreatment of migrants working in domestic settings such as in *Mruke v Khan* in 2018.[486] What this decision fails to explore is that as a 'function' of nationality, immigration status, can be precarious and can be the cause of disadvantage on the basis that a person is not a British national.

[478] *Dawkins v Department of Environment, sub nom Crown Supplies (Property Services Agencies*) [1993] ICR 571, 528. For criticism of this decision and in-depth discussion see Sebastian M Poulter, *Ethnicity, Law and Human Rights: The English Experience* (Oxford University Press, 1998) 351–354.
[479] *Onu v Akwiku & Anor; Taiwo v Olaigbe & Anor*; [2016] 1 WLR 2653. See also: *Mruke v Khan* [2018] ICR 1146; *Hounga v Allen* [2014] 1 WLR 2889, both of which consider race discrimination claims in the context of the mistreatment of domestic workers.
[480] [2016] 1 WLR 2653, 2653 (Baroness Hale).
[481] Ibid.
[482] [2016] 1 WLR 2653, 2661 (Baroness Hale).
[483] Ibid.
[484] Ibid.
[485] Ibid.
[486] [2018] ICR 1146.

Baroness Hale considered that this finding was consistent with the closed nature of the enumerated grounds listed and the court's role in protecting persons from discrimination. She emphasised the differences between the *Equality Act 2010* (UK) and its predecessors and the more open-ended nature of Art 14 of the ECHR which allows for a more contextual approach to attributes:

> Parliament could have chosen to include immigration status in the list of protected characteristics, but it did not do so. There may or may not be good reasons for this — certainly, Parliament would have had to provide specific defences to such claims … So the only question is whether immigration status is so closely associated with nationality that they are indissociable for this purpose.[487]

What is emphasised in the judgments on the inclusion or exclusion of particular attributes is the respective roles of the Parliament and the courts.[488] While the courts are required to give a faithful interpretation of discrimination law, it is for the Parliament, not the courts, to extend that protection.[489]

4.1.2 Australia

There are two notable features of the Australian jurisprudence on race discrimination. First, the case law simply adopts some of the earlier British case law without any consideration of the correctness or otherwise of those decisions. Second, similar to the British courts, the Australian courts often fail to appreciate the lived reality of disadvantage that is caused by race discrimination.

More generally, in the Australian case law there has been decidedly less consideration of the scope and meaning of race in the context of discrimination.[490] Where the Australian courts have considered the boundaries of race discrimination this has, as in the early case law from the United Kingdom, been focused on the meaning of 'ethnic origins' and the distinction between 'national origins' and 'nationality.' The distinction between 'national origins' and 'nationality' is important in the context of *Racial Discrimination Act 1975* (Cth) because only 'national origins' is included in the definition of race.[491] In *Azriel v New South Wales Land & Housing Corporation*, the New South Wales Court of Appeal accepted that Jewish persons were a 'race' for the purposes of the New South Wales *Anti-Discrimination Act 1977*.[492] This was based upon the reasoning of the New

[487] [2016] 1 WLR 2653, 2661 (Baroness Hale).
[488] Ibid.
[489] Ibid.
[490] However, the definition of a 'race' has been discussed in other contexts: *Commonwealth v Tasmania (the Tasmanian Dam Case)* (1983) 158 CLR 1, 276 (Deane J) (in the context of the race power); *Miller v Wertheim* [2002] FCAFC 156 (in the context of the vilification provisions in the *Racial Discrimination Act 1975* (Cth)).
[491] *Racial Discrimination Act 1975* s 9(1).
[492] [2006] NSWCA 372 [47].

Zealand Court of Appeal in *King-Ansell v Police*,[493] and the House of Lords in *Mandla*[494] but there was no analysis or discussion with respect to *why Mandla* and *King-Ansell* where the correct approaches to be followed in the circumstances or useful in understanding the identifiable features of an ethnic group.

The meaning of 'national origins' was very briefly explored in *Australian Medical Council v Wilson* ('*Wilson*')[495] In *Wilson*, the complainant was a non-Australian medical practitioner who had obtained his medical degree in India. As he had not completed his medical training in Australia or New Zealand, to register for unrestricted practice he was required to sit an exam set by the Australian Medical Council ('AMC') and be placed in the first 200 applicants.[496] The purpose of the scheme was to reduce the intake of overseas trained doctors across Australia.[497] The Full Court of the Federal Court determined that the policy of AMC did not amount to racial discrimination because the policy equally affected Australian and New Zealand citizens, had they graduated from overseas institutions. Consequently, it was not discrimination on the basis of race or national origins.[498] There are two problems with this decision. First, in his judgment, Sackville J considered whether the scheme was discrimination based on 'national origins.'[499] In doing so he briefly considered the meaning of 'national origins' and concluded that the House of Lords decision in *Ealing* discussed above provided guidance.[500] The guidance that *Ealing* provided was 'powerful independent support' for the understanding of national origin as something separate to nationality or citizenship.[501] This approval of *Ealing* neither engaged with the criticisms of that decision provided through both academic commentary or the British parliamentary materials nor explored in any more depth the scope of 'national origins.'[502] This decision, and the guidance provided by *Ealing* has been followed in subsequent cases emphasising the distinction between nationality and national origins such as in *Macabenta v Minister for Immigration & Multicultural Affairs*.[503] Second, this decisions fails to appreciate the lived reality of such a protectionist policy given that it is far more likely that medical

[493] Ibid.
[494] [2006] NSWCA 372 [54]–[55].
[495] (1996) 68 FCR 46.
[496] (1996) 68 FCR 46, 48.
[497] (1996) 68 FCR 46, 50–51.
[498] Ibid.
[499] (1996) 68 FCR 46, 74.
[500] (1996) 68 FCR 46, 75. In addition, *Ealing* has been cited as an authority for the meaning on 'national origins' and its distinctiveness from 'nationality' in *Yildiz v Minister for Immigration and Ethnic Affairs* (1982) 70 FLR 105 [4]; and *Macabenta v Minister for Immigration & Multicultural Affairs* (1998) 90 FCR 202.
[501] (1996) 68 FCR 46, 67.
[502] Ibid.
[503] (1998) 90 FCR 202.

practitioners graduating from overseas institutions are also less likely to be Australian or New Zealand citizens.

The kinds of distinctions and disadvantages that can constitute racial discrimination have been understood without reference to the lived experience of disadvantage caused through discrimination. A particular example of this disconnection is the acceptance that disadvantages caused by limited English language abilities are not considered instances of racial discrimination. In *Munkara v Bencsevich*,[504] the complainant argued that the extremely constrained timeframes to challenge alcohol protection orders constituted race discrimination because the English language requirements and the complexity of the procedural formalities had a disproportionate effect on the Aboriginal population of the Northern Territory.[505] It had a disproportionate effect because of the limited capacity or inability of a large number of Aboriginal persons to use or understand both spoken and written English.[506] While the Court accepted this evidence of the English language difficulties of indigenous Northern Territorians, following the Federal Court decision in *Sahak v Minister for Immigration and Multicultural Affairs*[507] it found that the provisions did not breach the *Racial Discrimination Act 1975* (Cth) because the language difficulties faced by the complainant were caused by his 'personal characteristics and not due to a circumstance which is dictated by [his] race, colour or national or ethnic origin.'[508] By separating 'personal characteristics' from a person's 'race, colour or national or ethnic origin' the courts limit discrimination law's capacity to combat any disadvantage which is not singly based on obvious and overt stereotypes because any possibly linked disadvantages are simply categorised as 'personal characteristics.'

The distinction between a person's 'personal characteristics' and 'race, colour or ethnic origins' is one that is not found in either the British or Canadian case law. The dividing line between a characteristic that is 'personal' and one that is based on a person's 'race, colour or national or ethnic origin' is not immediately clear, particularly when considered in the context of the list of factors indicating a racial or ethnic group in *Mandla* which included shared language. In contrast to the position in Canada and the United Kingdom, the approach adopted in *Munkara* appears to only allow for a role for race discrimination law where there is total assimilation by a racial group

[504] [2018] NTCA 4.
[505] [2018] NTCA 4, [105]–[110].
[506] [2018] NTCA 4 [111].
[507] (2002) 123 FCR 541, 523. Similar conclusions were also reached in *Nguyen v Refugee Review Tribunal* (1997) 74 FCR 311.
[508] [2018] NTCA 4 [117].

with no accommodation of different treatment based on cultural and racial differences as accepted in *Mandla*.[509]

The Australian approach to the understanding of 'race' and its related terms highlights a lack of engagement with the principles underpinning the basis on which groups are entitled to protection from discrimination. It does not evince any consideration of the multitude of ways in which disadvantage based on race manifests.

4.1.3 Canada

Interestingly, the definition of a 'race' is considered in significantly less detail in the Canadian appellate case law on non-discrimination principles sourced from legislation.[510] However, it should be noted that a study by Sangha and Tang reveals that race discrimination claims have much lower rates of success than other claims.[511] A reason that the definition of race has not been interrogated at a higher court level may be because, unlike in Australia and the United Kingdom, religion has been protected since human rights legislation came into force.[512] Consequently, the distinction between a religious group and a racial group has never been an issue. As noted above a number of the cases in both Australia and the United Kingdom on the definition of 'race' related to groups that sit at the intersection of ethnicity and religion such as Sikhs and Jewish persons.[513] This has meant that it was accepted at the outset in cases such as *Bhinder v Canadian National Railway,*[514] heard two years after *Mandla*, that the complainant, who was a Sikh, had a protected attribute regardless of whether Sikhs were considered an ethnic group or a religious group.[515]

Possibly to avoid some of the conceptual challenges related to race discussed above with respect to the British and Australian case law, in Canada, claims have also been brought on the basis of

[509] [1983] 2 AC 548.
[510] There are two very early Human Rights Board Decisions which accepted a broad definition of race. For further analysis see Walter Tarnopolsky, *Discrimination and the Law* (Richard De Boo, 1982) Ch 5. See *Rajput v Watkins and Algoma University College* (1976) and *Snyker v Fort Frances-Rainy River Board of Education* (1979). *Canada (Attorney General) v Mohawks of the Bay of Quinte First Nation* 2012 FC 105 and *Squamish Indian Band v Canada* 2001 FCT 480 accept the indices of an ethnic group set out in *Mandla* and *King-Ansell*. Although it is notable that a 1995 decision of the Ontario Human Rights Commission concluded that race was a biological condition, see *Espinoza v Coldmatic Refrigeration of Canada Ltd* 1995 25 CHRRD/35.
[511] Dave Sangha and Kwong-Leung Tang, 'Race Discrimination and the Human Rights Process' (Paper delivered at the Canadian Critical Race Conference 2003, University of British Columbia Canada, 2 May 2003) cited in Joshua Sealy-Harrington and Jonnette Watson Hamilton, 'Colour as a Discrete Ground of Discrimination' (2018) 7(1) *Canadian Journal of Human Rights* 1.
[512] See the discussion in 2.2 and 2.3.
[513] In the United Kingdom, see for example the cases discussed above in 4.1.1 such as *Mandla v Dowell Lee* [1983] 2 AC 548 and *R(E) v Governing Body of JFS and Anor (United Synagogue and others intervening)* [2010] 2 AC 728 and in Australia see: *Azriel v New South Wales Land & Housing Corporation* [2006] NSWCA 372.
[514] [1985] 2 SCR 561.
[515] [1985] 2 SCR 561 [3].

colour specifically. Sealy-Harrington and Hamilton contend that in some cases colour discrimination could be more easily proven due to the fact that the discrimination is more visible than discrimination on other related grounds.[516]

4.2 Pregnancy, family responsibility and sex discrimination

One reason that sex discrimination legislation was introduced was to establish 'norms of social conduct.'[517] In the early appellate court decisions in each jurisdiction there was a general acceptance that prohibitions on discrimination would prohibit disadvantages and detriment caused by gendered and stereotypical assumptions. This was the case in *Skyrail Oceanic Ltd v Coleman*[518] where the Court of Appeal rejected the assumption that a woman would give up her career upon getting married.[519] Both Australian and British courts accepted that lesser schooling opportunities for girls based upon historical discrimination (in the case of *Birmingham City Council v Equal Opportunities Commission*) and social stereotypes in the case of *Haines v Leves* were prohibited by the sex discrimination legislation. [520] Both the Australian and Canadian courts have interpreted discrimination laws to provide new opportunities to women in traditional blue collar environments as the Australian High Court concluded in *Australia Iron & Steel v Banovic* and the Canadian Supreme Court concluded in *Canadian National Railway Co v Canada (Canadian Human Rights Commission)* (*'Action Travail'*).[521] Commonly, in each jurisdiction, efforts to extend the concept of actionable of sex discrimination to discrimination based on related grounds, such as sexual orientation and gender identity and age have been controversial (and mostly unsuccessful).[522]

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[516] Sealy-Harrington and Watson Hamilton, above n 512, 28.
[517] Utilising the language of the Full Court of South Australia in *Pulteney Grammar School v Equal Opportunity Tribunal* (2007) 250 LSJS 309 [14].
[518] [1981] ICR 864.
[519] [1981] ICR 864, 871 (Lawton LJ).
[520] *Birmingham City Council v Equal Opportunities Commission* [1989] 1 AC 1155 and *Haines v Leves* [1987] 8 NSWLR 442.
[521] *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165 and [1987] 1 SCR 1114, 1117 (Dickson CJ with the Court agreeing). See also cases such as *Walsh v Mobi Oil Canada* 2008 ABCA 268 at [63] in which the Alberta Court of Appeal accepted that a woman's failure to be promoted despite consistently good performance evaluations demonstrated the 'paternalistic attitudes' of her superiors and was sex discrimination.
[522] See for example: *Croft v Royal Mail Group Plc* [2003] EWCA Civ 1045 [54] which involved a consideration of gender reassignment in the context of the *Sex Discrimination Act 1975* (UK); *Pearce v Governing Body of Mayfield Secondary School* [2003] ICR 937, 941 in which the Court of Appeal concluded that discrimination on the ground of sexual orientation was not sex discrimination; for a critique of that decision see Robert Wintemute, 'Sex Discrimination in MacDonald and Pearce: Why the Law Lords Chose the Wrong Comparator' (2003) 14 *Kings College Law Journal* 267. In *Chief Constable of West Yorkshire Police v A (No 2)* [2005] 1 AC 51 the House of Lords accepted that discrimination on the grounds of gender identity was sex discrimination. In Canada, in *Nixon v Vancouver Rape Relief Society* 2005 BCCA 601 the British Columbia Court of Appeal concluded that the definition of sex included gender identity. In *Mossop v Attorney-General* [1993] 1 SCR 554, the Canadian Supreme Court concluded that the protected grounds of 'marital status' did not include protection for sexual orientation. In Australia, the meaning, interaction and definition of discrimination on the basis of sex and 'marital status' has been discussed in a number of cases incldluing *AB v Registrar of Birth, Deaths and Marriages* (2007) 162 FCR 528 and *Rohner v Scanlan* (1998) 86 FCR 454 which considers

Where appellate courts in Australia, Canada and the United Kingdom have diverged is the extent to which appellate courts have interpreted the legislation to apply to the disadvantages that attach to women because of childbirth and parental responsibilities. It is this divergence in approach which will be the focus of the section and a small number of cases have been selected to discuss this divergence in some depth. Social and economic disadvantages due to entrenched social norms related to care-giving, still disproportionately fall on women.[523] This section will consider three issues: the need for a male equivalent of pregnancy, the immutability of family responsibilities and the capacity of discrimination law to require inclusive accommodation through requiring flexible working conditions for parents.

4.2.1 United Kingdom

The British courts initially struggled to apply sex discrimination legislation where the disadvantage complained of related to pregnancy because there was no appropriate comparator for the pregnant woman's treatment to be compared to.[524] In *Webb v EMO Air Cargo (UK) Ltd*, the Court of Appeal concluded that it was not pregnancy that should be compared but the 'general effect' of pregnancy on an employee's performance at work, specifically focused on the time off required.[525] Glidewell LJ concluded that:

> To postulate a pregnant man is an absurdity but I see no difficulty in comparing a pregnant woman with a man who has a medical condition which will require him to be absent for the same period of time and at the same time as does the woman's pregnancy.[526]

While Glidewell LJ's conclusion that discrimination on the grounds of pregnancy could be sex discrimination was an important development, it also repeated a formal understanding of equality. As was previously discussed in 3.1, particularly in cases such as pregnancy there is no equivalent comparator. As Fredman has argued, the problem with comparing a pregnant woman to an ill man is that to do so fails to appreciate the societal benefits that child-bearing has and stigmatises the very nature of pregnancy as being akin to an 'illness'.[527] It also has the capacity to allow for 'levelling down' as so long as the ill man is also treated to the same disadvantage, there will be no

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the interaction between marital status and sex in the *Sex Discrimination Act 1984* (Cth); *Owen v Menzies* [2013] 2 Qd R 327 which considered whether bisexuality was covered by the term 'sexuality' in the context of a vilification claim. See also *JM v QFG* [2000] 1 Qd R 373 which discussed the definition of lawful sexual activity and concluded that it did not include discrimination on the basis of no sexual activity.

[523]Khaitan, *A Theory of Discrimination Law*, above n 18, 53–54; Shephard, 'Inclusive equality', above n 31, 75.

[524] See for example, the Employment Appeal Tribunal decisions in *Hayes v Malleable Working Men's Club and Institute* [1985] ICR 703 and *Turley v Alders Department Stores Ltd* [1980] ICR 66.

[525] *Webb v EMO Air Cargo (UK) Ltd* [1992] ICR 445.

[526] [1992] ICR 445, 455.

[527] Fredman, 'A Difference with Distinction : Pregnancy and Parenthood Reassessed' above n 319, 113–114.

discrimination.[528] This was what occurred in *Webb* and as a comparable ill man would have been treated in a similar manner if they had also required a similar amount of time off from work, there was no sex discrimination. But ultimately, the ECJ resolved the pregnancy comparator question in *Dekker* where it concluded that as there was no appropriate male equivalent for pregnancy, there was no requirement for a hypothetical comparator.[529] While this was an important development, women continued to have difficulty succeeding in claims where their pregnancy appears to cause a significant burden for a duty-bearer.[530]

While the British courts struggled to apply sex discrimination legislation in the context of pregnancy, its response to disadvantage caused by family responsibilities has shown more creativity. In *London Underground Ltd v Edwards (No. 2)* ('*Edwards*'),[531] an introduction of a new roster system which compelled single parents to resign was found to be indirectly discriminatory because of sex. While all of the male train drivers could comply with the roster system, one of the women (a significantly lower proportion of the employee pool) could not.[532] A reason for this discrepancy was established: the roster system had a disproportionate impact upon single parents.[533] The Court concluded that the new roster system was indirect sex discrimination. This was despite the fact that the complainant could not show a statistical disadvantage on the basis of sex due to the vast disparity between male and female employees.[534] Although the wording of the *Sex Discrimination Act 1975* (UK) and the previous case law appeared to require a complainant to show a statistical disadvantage, the Court of Appeal accepted that it was 'common knowledge that females are more likely to be single parents and caring for a child than males.'[535] Consequently, it concluded that a restrictive roster system would necessarily have a disproportionate impact upon women. The approach shows a degree of flexibility as to the evidentiary burden placed on claimants and understanding of the context in which sex discrimination operates. The decision in *Edwards* is

[528] Ibid 113. See also: Nicholas Bamforth, 'The Changing Concept of Sex Discrimination' (1993) 56(6) *The Modern Law Review* 872.
[529] *Dekker v Stiching* (C-177/88, [1990] ECR I-34941) 329.
[530] For example, in the re-hearing of *Webb v EMO Air Cargo (UK) Ltd (No 2)* [1995] WLR 1454, 1460 to determine how to read EU law and the SDA consistently, the House of Lords distinguished in the application of the principle between permanent employment contracts and fixed time contracts and concluded that dismissals on the grounds of pregnancy may still be lawful in the case of fixed time contracts. For further consideration of pregnancy discrimination and maternity leave see *Halfpenny v IGE Medical Systems Ltd* [2001] ICR 73l; for a consideration of maternity leave and part time work arrangements see *Hardy & Hansons plc v Lax* [2005] ICR 1565.
[531] [1999] ICR 494.
[532] [1999] ICR 494, 497.
[533] [1999] ICR 494, 498.
[534] [1999] ICR 494, 500–501.
[535] [1999] ICR 494, 501.

notable because it avoids the statistical 'tangles' or 'difficulties' that Barnard and Hepple,[536] Fredman,[537] and Blackham[538] have all argued had troubled the interpretation of the historical legislation in the United Kingdom. The decision did so by accepting 'social facts' and the lived reality of family, care responsibilities and sex discrimination.

The British approach to the interrelated disadvantages caused by discrimination because of sex, pregnancy and family responsibility suggests an acknowledgment that the purpose of sex discrimination law is to redress the kinds of disadvantages caused by pregnancy and family responsibilities. But it also demonstrates an inability to interpret, particularly in the case of pregnancy, the legislation to actually redress this disadvantage. Similar to the analysis of the case law on the meaning of race at section 4.1, the case law emphasises adherence to the legislative text and the appropriate roles for Parliament and the courts when interpreting discrimination law.[539] The understanding of discrimination law is not furthered through 'creative' interpretation by the British courts, but through the more 'creative' interpretations and guidance from the ECJ.

4.2.2 Australia

In Australia, sex discrimination legislation has been successfully used to address explicit discrimination on the basis of sex and to compensate disadvantage based on historical exclusion or stereotypes.[540] But, the courts have struggled to apply sex discrimination where the disadvantage relates to family responsibilities. This is because the Australian approach still requires a strict application of the comparator principle even in cases of pregnancy.[541] It should be noted that there are only single judge decisions that consider pregnancy discrimination and thus are outside the

[536] Barnard and Hepple, above n 33, 573 in which the authors compare the approach adopted in *Edwards* favourably as compared to *Barry v Midland Bank Plc* [1999] 1 WLR 1465 in which the House of Lords concluded that in claims of indirect discrimination, complainants must show a difference in treatment between two groups of employees.
[537] Fredman, 'Equality: A New Generation?', above n 46, 163, although she argues that to rely upon courts to approach these issues in 'a common sense' manner might be too optimistic.
[538] Alysia Blackham, 'Legitimacy and empirical evidence in the UK courts' (2016) 25(3) *Griffith Law Review* 414, 428–429.
[539] This is the case in *Webb v EMO Air Cargo (UK) Ltd* [1992] ICR 445, 460-461 in which Glidewell LJ justifies his conclusions about the appropriate comparator on the basis that this was the only open interpretation of the legislation based on the intentions of Parliament.
[540] See for example: *Ansett Transport Industries (Operations) Pty v Wardley* (1980) 142 CLR 237; *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165; *Waterhouse v Bell* (1991) 25 NSWLR 99; *Haines v Leves* (1987) 8 NSWLR 442; *Umina Beach Bowling Club Ltd v Ryan* (1984) 2 NSWLR 61. Cf: *Tullamore Bowling & Citizens Club Ltd v Lander* (1984) 2 NSWLR 32.
[541] *Thomson v Orica Australia Pty Ltd* (2002) EOC 93-227 [157]. In *Thomson*, the complainant complained of sex discrimination where she was essentially demoted after taking maternity leave. Allsop J concluded that the appropriate comparator was a man who had also taken medical leave with a right to return. In those circumstances, the complainant was successful. A similar approach was adopted in the single judge decision of *Cocks Macnish v Binndo* [2004] WASCA 194, a claim of pregnancy and sex discrimination made pursuant to the Western Australian *Equal Opportunity Act 1984*.

scope of this study. This section will focus on the indirect discrimination decision of the Victorian Court of Appeal decision in *Victoria v Shou (No 2)* ('*Shou*').[542] While criticised in the academic commentary, notably by Gaze,[543] and Chapman,[544] this decision remains relevant. The decision has been cited with approval by a number of appellate court decisions on indirect disability discrimination as the correct approach to determining the reasonableness of a requirement or condition.[545] These include *Catholic Education Office v Clark*e ('*Clarke*'),[546] *Devers v Kindilan Society*,[547] and most recently in 2017 in *Sklavos v Australasian College of Dermatologists* ('*Sklavos*').[548] In this section, I will argue that in contrast to the British approach adopted in *Edwards* or in the more recent Canadian decisions regarding family status discussed in 4.2.3, this decision illustrates a failure to recognise the capacity to utilise discrimination law to accommodate care responsibilities in the workplace.

In *Shou v Victoria (No 2)*, the complainant was a Hansard reporter and sub-editor.[549] As a Hansard reporter she was required to be at Parliament House for very long hours in sitting weeks.[550] She was also the parent of a child with significant medical issues.[551] The complainant requested that she be supplied with equipment so that she could do some of her work at home.[552] This was never supplied and the complainant resigned.[553] The complainant argued that the failure to supply her with equipment so that she could work from home was indirect discrimination on the basis of 'family responsibilities', a protected attribute in the Victorian *Equal Opportunity Act 1995*.[554] The Victorian Court of Appeal accepted that this constituted a condition or requirement and accepted that the proportion of persons with family responsibilities who were able to comply with the condition or requirement was less than those without family responsibilities.[555] However, Phillips JA concluded that it was 'almost inconceivable' that to require attendance was not a reasonable requirement.[556] In finding that it was a reasonable requirement, the Court of Appeal highlighted

[542] (2004) 8 VR 120.
[543] Gaze, 'Context and Interpretation in Anti-Discrimination Law' above n 13. Though note that this article discusses the original decision in the Supreme Court of Victoria which was approved on appeal.
[544] Anna Chapman, 'Reasonable Accommodation, Adverse Action and the Case of Deborah Shou' (2012) 33(2) *Adelaide Law Review* 29.
[545] *Victoria v Shou* (2001) 3 VR 655.
[546] (2004) 138 FCR 121 [115].
[547] (2010) 116 ALD 239 [75], citing the statements in *Catholic Education Office v Clarke* (2004) 138 FCR 121 [115].
[548] (2017) 256 FCR 247 [80].
[549] (2004) 8 VR 120, 125 (Phillips JA).
[550] Ibid 127 (Phillips JA).
[551] Ibid.
[552] Ibid.
[553] Ibid.
[554] Ibid 123 (Phillips JA).
[555] Ibid 128 (Phillips JA).
[556] Ibid 128–129 (Phillips JA).

that there was a rational basis for the requirement's existence (that of a high pressure, fast-paced and specialised work environment) and it was a requirement that the complainant had agreed to in her employment contract. While it would have been reasonable for the complainant to work from home, the existence of a reasonable alternative solution did not, in and of itself, show that the original requirement was not reasonable.[557]

The Australian approach demonstrated through the Victorian decision in *Shou* to the accommodation of family responsibilities is an approach that emphasises a strict application of formal equality. As articulated in 3.1, a problem with formal equality as articulated by MacKinnon is that it assumes the existence of a universal comparator or standard. In this case that comparator is cloaked in the attributes of the traditional male breadwinner. The approach in *Shou* does not identify that difficulties managing children and work, exacerbated by employer practices, are of a kind the legislation could redress. It highlights that in the Australian understanding of discrimination law, even in cases of indirect discrimination, in contrast to the approach adopted in the United Kingdom in *Edwards*, there is no real requirement to accommodate difference and difficulty.

4.2.3 Canada

Since the 1980s, the Canadian Supreme Court has recognised the economic and social detriments that are caused through discrimination on the grounds of pregnancy. More recently, appellate courts have started to incorporate the disadvantages caused by a failure to accommodate childcare responsibilities in the workplace into family status discrimination. These have both required a degree of creativity on behalf of judges. In the case of pregnancy, that creativity is through the explicit rejection of past precedent. In the case of childcare responsibilities, it is through expanding the definition of 'family status' to include non-immutable characteristics. But, as will be seen below, there are limitations as to how far this 'creativity' extends.

In an early decision regarding the application of the *Canadian Bill of Rights* to pregnancy discrimination, the Supreme Court of Canada concluded that for the purposes of legislation, discrimination on the grounds of pregnancy was not sex discrimination.[558] In the decision of *Bliss,* the Court concluded that as pregnancy was a biological condition that would only ever be connected to women, it was 'discrimination by nature, rather than law.'[559] However, in *Brooks v*

[557] Ibid 129–130 (Phillips JA).
[558] *Bliss v Attorney-General of Canada* [1979] 1 SCR 183.
[559] [1979] 1 SCR 183, 198 (Richie J).

Canadian Safeway Ltd the Court reversed this finding and concluded that pregnancy discrimination was indeed sex discrimination in the context of the operation of human rights legislation.[560] Importantly, writing for the majority, Dickson CJ centred the analysis not on the biological fact of pregnancy but rather on the social and economic disadvantages that women suffered *as a result* of pregnancy:

> Furthermore, to not view pregnancy in this way goes against one of the purposes of anti-discrimination legislation. This purpose, which was noted earlier in the quotation from *Andrews*, is the removal of unfair disadvantages which have been imposed on individuals or groups in society. Such an unfair disadvantage may result when the costs of an activity from which all of society benefits are placed upon a single group of persons. This is the effect of the Safeway plan. It cannot be disputed that everyone in society benefits from procreation. The Safeway plan, however, places one of the major costs of procreation entirely upon one group in society: pregnant women … In the second part of this judgment I state that this disadvantage can be viewed as a disadvantage suffered by women generally. That argument further emphasizes how a refusal to find the Safeway plan discriminatory would undermine one of the purposes of anti-discrimination legislation. It would do so by sanctioning one of the most significant ways in which women have been disadvantaged in our society. It would sanction imposing a disproportionate amount of the costs of pregnancy upon women. Removal of such unfair impositions upon women and other groups in society is a key purpose of anti-discrimination legislation.[561]

The determination that pregnancy discrimination is necessarily part of sex discrimination is important because it recognises that the purpose of discrimination law is not to ensure 'equal' treatment at any cost but to ameliorate existing and unfair disadvantages. Dickson CJ's decision does engage with a degree of creativity through rejecting the Court's previous rulings on pregnancy and discrimination. It articulates that a purpose of discrimination law is to identify unfair disadvantages such as where the costs of an activity (such as procreation) are placed on one group. This identifies the nature of the disadvantage that pregnancy discrimination creates without unnecessary stigmatisation of pregnancy as a form of 'illness'. This approach to pregnancy is distinctive to the approach initially taken in the United Kingdom and still taken in Australia because it focuses not on the need for symmetry of treatment, and a strict comparison of circumstances, but on the broader societal aims of sex discrimination legislation: to prevent the disproportionate and disadvantageous costs of pregnancy from falling exclusively on women.[562] Despite this reasonably strong and coherent statement about the rationale for prohibiting sex discrimination, it is notable that in later cases (though generally cases focused on breaches of the *Charter* equality guarantee), appellate courts have focused on the physical costs of pregnancy rather than the

[560] [1989] 1 SCR 1219, 1237.
[561] [1989] 1 SCR 1219, 1238.
[562] Notably, the approach to pregnancy also applies where the complainant is employed in short-term contracts: *United Nurses of Alberta, Local 115 v Calgary Health Authority* 2004 ABCA 7.

economic and social disadvantages which are identified in *Brooks* to justify decisions not to extend benefits given to birth mothers to fathers and adoptive parents.[563]

The disadvantages caused by children and care responsibilities have also been considered in respect of how to define and understand discrimination on the basis of family status.[564] The question for courts to consider here was whether the attribute was only defined as being 'in' a family, or to care for other family members, specifically children.[565] In the first appellate court decision addressing discrimination on the basis of whether family status discrimination extended to parent-child care-giving, the Court of Appeal of British Columbia accepted that to constitute *prima facie* discrimination, a complainant was required to show that a term or condition of employment imposed by an employer resulted in a 'serious interference with a substantial parental or other family duty or obligation.'[566] This is a higher threshold to prove *prima facie* discrimination than usually applies.

However, this approach was not followed in *Canada (Attorney General) v Johnstone* ('*Johnstone*').[567] The complainant brought a claim of family status discrimination against the Canadian Border Services Agency for failing to accommodate her parent-child care-giving obligations in its shift allocation.[568] The Court considered the meaning and scope of the term 'family status.' The CBSA (Canadian Border Services Agency) argued that prohibited grounds of discrimination all related to immutable characteristics. This interpretation would mean that prohibiting discrimination on the basis of family status would protect someone from discrimination on the basis that they were a member of a family unit, or a particular family unit. But, this interpretation would have meant that discrimination on the basis of family status did not extend to parent-child care-giving obligations on the basis that this was not the intention of Parliament.[569] The Federal Court of Appeal rejected this interpretation.[570] In doing so the Court emphasised that the purpose of the *Canadian Human*

[563] This most clear in cases considering different benefits provided to adoptive parents: *Schafer v Canada (Attorney-General)* 1997 35 OR(3d) 1; *Tomasson v Canada (Attorney-General)* [2008] FCR 176; *British Columbia Government and Services Employees Union v British Columbia (Public Service Employee Relations Commission)* 2002 BCCA 476.
[564] *H.S.A.B.C v Campbell River & North Island Transition Society* (2004) BCJ No 922. See also: *International Association of Firefight, Local 268s v Adekayode* 2016 NSCA 6; *Partridge v Botony Dental Corporation* 2015 ONCA 836; *Canada (Attorney General) v Bodnar* 2017 FCA 171 (although heard under a different Act, but acknowledging that the issues were the same as Code cases); *Canadian National Railway v Seeley* 2014 FCA 111.
[565] On other issues relating to family status including discrimination based on the identity of family members see: *Brossard (Town) v Quebec (Commission des droits de la personnne)* [1988] 2 SCR 279; *B v Ontario (Human Rights Commission)* [2002] 3 SCR 403; *Alberta (Minister of Human Resources and Employment) v Weller* 2006 ABCA 235.
[566] *H.S.A.B.C v Campbell River & North Island Transition Society* (2004) B.C.J. No 922
[567] [2015] 2 FCR 595.
[568] Ibid [13] (Mainville JA).
[569] Ibid [53]–[55] (Mainville JA).
[570] Ibid [66] (Mainville JA).

Rights Act was to ensure that persons 'have their needs accommodated … without being hindered in or prevented from doing so by discriminatory practices based on … family status.'[571] However, the Court was also cautious in the extension of protection to childcare responsibilities:

> That being said, the precise types of childcare activities that are contemplated by the prohibited ground of family status need to be carefully considered. Prohibited grounds of discrimination generally address immutable or constructively immutable personal characteristics and the types of childcare needs which are contemplated under family status must therefore be those which have an immutable or constructively immutable characteristic.
>
> …
>
> The childcare obligations that are contemplated under family status should be those that have immutable or constructively immutable characteristics, such as those that form an integral component of the legal relationship between a parent and child.[572]

Accepting that childcare obligations are incorporated into the protected ground of family status is important because it recognises the employment difficulties and challenges that parent-child care-giving obligations can cause and interprets the term 'family status' broadly and 'creatively' so that discrimination law can tackle this societal problem.[573] But restricting protection to the kinds of care that have an 'immutable characteristic' has led to some difficulties in application. It is understandable that the Federal Court of Appeal wanted to create a framework to limit the kinds of personal choices that the Codes would apply to.[574] However, this approach does fail to identify the societal benefits that appropriate childcare offers — above that which would avoid conduct being classed as child abuse or neglect.[575]

The limitations of this approach and the difficult dividing line between a 'responsibility' and a 'personal choice' was evident in *Flatt v Canada (Attorney General)* ('*Flatt*').[576] In *Flatt,* the Federal Court of Appeal concluded that it was not discriminatory for an employer to refuse flexible working conditions to a woman in order for her to continue to breastfeed her child without further evidence of medical necessity.[577] Without medical necessity, breastfeeding was a 'personal choice' rather than a responsibility that a mother may have.[578]

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[571] Ibid [98] (Mainville JA).
[572] Ibid [68]–[70] (Mainville JA).
[573] Elizabeth Shilton, 'Family Status Discrimination: 'Disruption and Great Mischief' or Bridge over the Work-Family Divide?' (2018) 14 *Journal of Law & Equality* 33, 36.
[574] Lyle Kanee and Adam Cembrowski, 'Family Status Discrimination and the Obligation to Self-Accommodate' (2018) 14(1) *Journal of Law & Equality* 61, 68.
[575] Sheila Osborne-Brown, 'Discrimination and Family Status: The Test, the Continuing Debate and the Accommodation Conversation' (2018) 14(1) *Journal of Law & Equality* 87, 99.
[576] 2015 FCA 250.
[577] Ibid [32] (Trudell JA).
[578] Ibid [33] (Trudell JA).

The dividing line between responsibility and choice in the Canadian case law continues to be unclear. However, comparing the approach to that taken in Australia and the United Kingdom, the courts appear at least cognisant to the kinds of practices and disadvantages that women face, particularly in the workplace — that the discrimination law is designed to remedy.

4.3 Age and the employment context

The prohibitions against age discrimination have been in place for multiple decades.[579] Despite this, their necessity is also less understood than the prohibitions on race and sex discrimination.[580] Age discrimination is often considered less socially problematic and more readily justifiable in a range of situations.[581] Age is still used as a valid criteria for social ordering can be justified in a larger range of circumstances than other attributes.[582] Baroness Hale has concluded that this difference in treatment of age compared to other attributes can be attributed to the fact that age is a continuum and not a binary state of being.[583] Thus, people may experience different advantages and disadvantages over time. As Goosey has recently argued, this has also meant that the 'moral seriousness' of age discrimination is less well articulated.[584] Consequently, age is subject to different and broader exemptions than other attributes protected by discrimination law.[585]

In this section, I will compare highest court decisions focusing on the justification of mandatory retirement policies. The comparison of these cases will show that each fails to articulate the purpose of prohibiting age discrimination and to varying extents accepts and continues to perpetuate stereotypical thinking about older workers. This is possibly because some of the key cases relating to age discrimination in the highest courts involve complainants with a degree of economic privilege as many of the claims have involved law firm partners, university professors and senior airline pilots. This has potentially meant that courts have struggled to contextualise and

[579] Therese MacDermott, 'Challenging Age Discrimination in Australian Workplaces: From Anti-Discrimination Legislation to Industrial Regulation' (2011) 34(1) *UNSW Law Journal* 182, 182. See also: Therese MacDermott, 'Older Workers and Requests for Flexibility: A Weak Right in the Face of Entrenched Age Discrimination' (2016) 44(3) *Federal Law Review* 451.
[580] Stuart Goosey, 'Is Age Discrimination a Less Serious Form of Discrimination?' (2019) 44 *Legal Studies* 1, 1–2.
[581] Alysia Blackham, 'A Compromised Balance? A Comparative Examination of Exceptions to Age Discrimination Law in Australia and the UK' (2017) 41(3) *Melbourne University Law Review* 1085, 1085.
[582] Pnina Alon-Shenker, 'The Unequal Right to Age Equality: Towards a Dignified Lives Approach to Age Discrimination' (2012) 25 *Canadian Journal of Law and Jurisprudence* 234, 235. See also the discussion in *Hashish v Minister for Education of Queensland* [1998] 2 Qd R 18, which discusses the justification for limiting the provision of educational services on the basis of age.
[583] *Seldon v Clarkson Wright and Jakes* [2012] ICR 716 [4].
[584] Goosey, above n 581, 4.
[585] Alysia Blackham, 'A Compromised Balance?' above n 582, 1100.

articulate the disadvantage and harm that age discrimination could and should be utilised to prevent.

4.3.1 United Kingdom

In the United Kingdom direct discrimination on the basis of age can be justified, unlike direct discrimination on the basis of other attributes.[586] The justification defence involves a balancing exercise between the requirement for equality and other 'legitimate aims.' How this balance is struck by the courts and the articulation of the 'legitimate aims' that such discriminatory measures have may illuminate an understanding of the kind of disadvantages that age discrimination is meant to ameliorate and the 'moral seriousness' of discrimination.[587] In *Seldon v Clarkson Wright and Jakes*,[588] the Supreme Court of the United Kingdom identified, drawing on EU jurisprudence, two kinds of legitimate aims which justify age discrimination.[589] In *Seldon*, the complainant was a partner in a law firm.[590] The partnership agreement contained a mandatory retirement age for partners. The complainant argued that this was discriminatory because of age.[591] The Supreme Court accepted that the mandatory retirement age was *prima facie* direct discrimination because of age but considered whether it was nevertheless justified.[592]

In its consideration of the complainant's case, the Supreme Court of the United Kingdom provided guidance as to the legitimate aims that could justify age discrimination, drawing on the European jurisprudence. The Court accepted that when justifying age discrimination, an employer was required to demonstrate that their reasons for discrimination were reasons with a 'legitimate aim,' relating to broad social policy aims rather than merely 'business need.'[593] The two legitimate aims that the Supreme Court focused on were intergenerational fairness and ensuring the dignity of older workers.[594] Baroness Hale (with the Court agreeing) found that these were 'broad social and economic policy objectives of the state.'[595] Intergenerational fairness was described as 'uncontroversial' and related to facilitating the sharing of limited employment opportunities

[586] Ibid and *Equality Act 2010* (UK).
[587] Blackham, 'A Compromised Balance?' above n 582, 1085.
[588] [2012] ICR 716.
[589] Ibid. For a discussion of the ECJ jurisprudence see: Colm O'Cinneide, 'Age Discrimination and the European Court of Justice: EU Equality Law Comes of Age' (2009) 2 *Revue des affaires europeennes* 253.
[590] Ibid 720 (Baroness Hale with whom the Court agreed).
[591] Ibid.
[592] Ibid 737.
[593] Ibid 733.
[594] Ibid 737.
[595] Ibid.

amongst the generations to promote diversity and a sense of fairness of opportunities.[596] However, while the Court describes this legitimate aim as uncontroversial, Goosey maintains that the idea of intergenerational fairness can, at times, rely upon a 'lump of labour' fallacy which assumes that removing some workers will create more opportunities for others.[597] The dignity justification focuses on the benefits of avoiding the need to dismiss older workers on the ground of their incapacity and thus avoiding humiliation to the older worker.[598]

This construction of legitimate aims has some utility in furthering the goals of substantive equality because it does require employers to justify their practices on the basis of broad social goals, thereby associating discrimination law with broader public policy issues rather than an individual dispute at hand. As will be seen below, this is a more considered approach than that adopted in Australia, which instead allows employers to justify discriminatory practices on the basis of business convenience.

However, as Blackham has argued, what is unfortunate about the aim of dignity as a 'legitimate aim' in particular is that it perpetuates the stereotypical thinking about older workers' capabilities that prohibitions on age discrimination could theoretically address.[599] The dignity aim implies that older workers are incapable and it is justifiable to exclude them from useful enterprises in society simply because of age. Underpinning the aim of dignity can be the stereotypical assumption that older workers will be less capable without individually assessing a person's capability to continue to do their job. Despite having some difficulty with the dignity aim, the Supreme Court nevertheless accepted that 'dignity' was a legitimate aim that could justify age discrimination. Instead of tackling these stereotypes, the European and British jurisprudence utilises these assumptions to underpin justifications for discriminatory conduct. In doing so, the Supreme Court of the United Kingdom neglects to clarify what kinds of disadvantages and distinctions age discrimination is ultimately intended to ameliorate and embeds stereotypical thinking into discrimination law.

[596] Ibid 734–735. The idea of 'fairness' can also be applied to policies that disproportionately affect younger workers: *Lockwood v Department of Work & Pensions* [2014] ICR 1257 [50], the Court of Appeal determined that a policy of lower severance pay for younger workers was 'fair' given that younger workers have less financial obligations and were more likely to be able to find new employment opportunities.
[597] Goosey, above n 581, 26.
[598] [2012] ICR 716.
[599] Alysia Blackham, 'Interrogating the 'Dignity' Argument for Mandatory Retirement: An Undignified Development?' (2018) *Industrial Law Journal*, 21 (Advance online publication https://doi.org/10.1093/indlaw/dwy013).

4.3.2 Australia

In Australia, there are few cases concerning age discrimination at an intermediate appellate court level.[600] The High Court of Australia has considered the issue of mandatory retirement ages in *Qantas Airways Ltd v Christie* ('*Christie*').[601] In *Christie* the High Court concluded that a mandatory retirement policy for pilots was justified on the basis that pilots over 60 were unable to fly all international routes and thus would be unable to utilise the company's roster system equally with their peers.[602] The complainant argued that he was unlawfully termination based on age pursuant to the s 170DF(1) of the *Industrial Relations Act 1988* (Cth).[603] The respondent argued that the termination was lawful because it was an inherent requirement of the position of a pilot in the company to comply with the roster system.[604]

The majority found that this requirement to participate equally in the roster system was an inherent requirement of the role or position of an international Qantas pilot.[605] While there were multiple judgments, the key reason for this finding were the distinction between the inherent requirements of a person's *job* and the inherent requirements of a person's *position*. The majority found that the inherent requirements of a job were characteristics of the specific and definable tasks or work that was required to be performed.[606] Alternatively, a person's position was primarily concerned with the level or rank from which a person performs those tasks.[607] Thus the majority concluded that whilst being able to comply with the roster system was not an inherent requirement of the respondent's *job*, it was an inherent requirement of his position as a senior-level pilot working for Qantas.[608] As an inherent requirement of the position of a Qantas pilot was to be able to comply with the roster system, the mandatory retirement policy was justified and not unlawful discrimination.

Christie highlights a distinctive approach adopted in the Australian case law to matters of justifying age discrimination in employment situations. In contrast to the approach adopted in the British case law outlined above (and, as will be shown below, the Canadian approach), there is no need to justify discrimination within the context of broader societal goals such as intergenerational justice

[600] Four examples are *Commonwealth v Bradley* (1999) FCR 218; *Malaxetxebarria v Queensland* [2007] QCA 132, *McIntyre v Tully* [2001] 2 Qd R 338; and *Lightning Bolt Co P/L v Skinner & Anor* [2002] QCA 518.
[601] (1998) 193 CLR 280.
[602] Ibid 288–290 (Gaudron J).
[603] Ibid.
[604] Ibid 303 (McHugh J).
[605] Ibid 284-286 (Brennan CJ), 296 (Gaudron J), 303 (McHugh J), 320(Gummow J).
[606] Ibid 304 (McHugh J).
[607] Ibid.
[608] Ibid 305–307 (McHugh J).

or concerns for health and safety. Termination on the basis of age can instead be justified purely on the basis of the organisational structure and systems of the organisation. In many ways this can simply be described as justification based on the convenience of the organisation. As Thornton,[609] and Blackham [610] argue, it raises 'administrative convenience to the status of an inherent requirement.' The majority's generous interpretation of 'inherent requirements' could be a function of the fact that this is *not* a case brought pursuant to a discrimination statute. As Justice McHugh acknowledges, the Act in question was 'not a general anti-discrimination statute' and needs to be understood 'in the context of a free enterprise system of industrial relations where employers and employees have considerable scope for defining their contractual rights.'[611]

Even within this 'free-enterprise system of industrial relations' there is no consideration of *why* the legislature has prohibited termination on the basis of age and what kinds of mischief it sought to eliminate by doing so. A judgment which more clearly identifies the rationale for prohibiting age discrimination is the Full Court of the Federal Court decision in *Commonwealth v Bradley & Anor* ('*Bradley*').[612] *Bradley* involved a challenge to an age limit to become a specialist army pilot.[613] Chief Justice Black concluded that for a direct rule based on age, there must be an clear link between a person's age and capacity to do job. If there was not, he concluded that:

> Respect for human rights and the ideal of equality — including equality of opportunity in employment — requires that every person be treated according to his or her individual merit and not be reference to stereotypes ascribed by virtue of membership of a particular group … These considerations must be reflected in any construction of the definition of 'discrimination' presently under consideration because, if they are not, and a construction is adopted that enables the ascription of negative stereotypes or the avoidance of individual assessment, the essential object of the Act to promote equality of opportunity in employment will be frustrated.[614]

Chief Justice Black's statement in *Bradley* is a rare example of a clear articulation of the underlying rationale for discrimination law in the Australian case law. But it is notable that it has been rarely cited in other discrimination cases,[615] while the reasoning and conclusions in *Christie* were applied by the High Court in the disability discrimination decision of *X v Commonwealth* and is still cited in

[609] Thornton, 'Disabling Discrimination Legislation', above n 4, 14–15. See also Patricia Easteal, Channy Hiu Tung Cheung and Susan Priest, 'Too Many Candles on the Birthday Cake: Age Discrimination, Work and the Law' (2007) 7(1) *Queensland University of Technology Law and Justice Journal* 93 for a discussion of the nature of inherent requirements and age discrimination more generally.
[610] Blackham, 'A Compromised Balance?' above n 581, 1100.
[611] (1998) 193 CLR 280, 307–308.
[612] *Commonwealth v Bradley and Anor* (1999) 95 FCR 218.
[613] (1999) 95 FCR 218.
[614] (1999) 95 FCR 218, 235 (Black CJ).
[615] Though it was cited in *Commonwealth v Human Rights & Equal Opportunity Commission* (2000) 108 FCR 378.

cases brought pursuant to discrimination legislation.[616] Again, similar to the case of race and sex discrimination discussed above, the manner in which age discrimination cases are determined leaves little scope for Australian law to address disadvantages related to age discrimination.

4.3.3 Canada

In Canada, as in the United Kingdom and Australia, mandatory retirement policies have been challenged as discriminatory on the basis of age. Two distinct issues are raised in the Canadian case law. First, the extent to which mandatory retirement ages can be justified as a bona fide occupational requirement[617] and second, whether the particular employment relationships which establish the mandatory retirement age have the indicia of disadvantage that discrimination law is designed to ameliorate.[618] I will argue that both of these issues demonstrate the courts' understanding of the underlying rationale for a prohibition on age discrimination.

Mandatory retirement ages were first considered in *Ontario Human Rights Commission v. Borough of Etobicoke* ('*Etobicoke*').[619] In *Etobicoke*, the complainants were firemen who were forced to retire at 60 pursuant to a clause in a collective agreement. The complainants argued that the mandatory retirement age constituted age discrimination. The Supreme Court of Canada accepted at the outset that this constituted *prima facie* discrimination but was required to consider whether age was a 'bona fide occupational qualification and requirement.' Justice McIntyre, writing for the majority, considered that a 'bona fide qualification or requirement' must:

> Be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition it may be related in an objective sense to the performance of the employment concerned in that it is reasonably necessary to assure the efficient

[616] (1999) 200 CLR 177. Most recently *Christie* has been cited in the Federal Court decision of *State of New South Wales (Dept of Justice – Corrective Services) v Huntley* [2017] FCA 581 [170]–[171], [181]. See also: *Chivers v Queensland* [2014] 2 Qd R 561, *New South Wales v Amery* (2006) 2230 CLR 174 both of which cite *Christie* as authority in claims brought pursuant to discrimination legislation.

[617] There are a number of cases which consider mandatory retirement ages and if they are *prima facie* discrimination. This include: *Ontario Human Rights Commission v. Borough of Etobicoke* [1982] 1 SCR 203; *Air Canada v Carson* [1985] 1 FC 209; *Saskatchewan (Human Rights Commission) v Saskatoon (City*) [1989] 2 SCR 1297; *Saskatchewan (Human Rights Commission) v Moose Jaw (City)* [1989] 2 SCR 1317; *McKinney v University of Guelph* [1990] 3 SCR 229; *Dickason v University of Alberta* [1992] 2 SCR 1103;; *Large v Stratford (City)* [1995] 3 SCR 733; *New Brunswick (Human Rights Commission) v Potash Corporation of Saskatchewan Inc* [2008] 2 SCR 604; *Air Canada Pilots Association v Kelly* [2012] FCA 209; *Tri-County Regional School Board v Nova Scotia (Human Rights Board of Inquiry)* 2015 NSCA 2;*; Foster v Nova Scotia (Human Rights Commission)* 2015 NSCA 66; *Adamson v Canada (Human Rights Commission)* [2016] 2 FCR 75.

[618] *McCormick v Fasken Martineau DuMoulin* [2014] 2 SCR 108.

[619] [1982] 1 SCR 203.

> and economical performance of the job without endangering the employee, his fellow employees and the general public.[620]

In terms of age specifically, he considered that:

> In cases where concern for the employee's capacity is largely economic, that is where the employer's concern is one of productivity, and the circumstances of employment require no special skills that may diminish significantly with aging or the public that may be compounded by aging, it may be difficult, if not impossible to demonstrate that a mandatory retirement at a fixed age, without regard to individual capacity may be validly imposed under the Code.[621]

In this case, the respondent could not provide any evidence that physical capacity diminished to such an extent after 60 years of age that a mandatory retirement age was a 'bona fide' requirement.[622] The approach adopted here can be contrasted with the Australian approach to inherent requirements above. For the Canadian Supreme Court, a 'requirement' of a job must involve something more than concerns about economic productivity and administrative compliance and instead has to be related to a broader public concern.

The Supreme Court of Canada again considered the lawfulness of mandatory retirement policies in *McKinney v University of Guelph*.[623] *McKinney* was a case brought pursuant to the *Charter* but explores many of the underlying reasons for the prohibitions on age discrimination and its justifications which can be extrapolated to a private employment context.[624] In *McKinney*, the complainants were university staff members who were reaching the mandatory retirement age of 65.[625] The Ontario *Human Rights Code* did not apply, because whilst it did list age as a protected attribute, the definition only related to age discrimination where the complainant was 18–65 years old.[626] The complainants first argued that the University policy was a breach of s 15 of the *Charter*. In the alternative, they argued that the definition contained in the Code was a breach of s 15 of the *Charter*.[627] The Supreme Court rejected both arguments. In doing so, the majority elaborated upon the rationale for discriminatory retirement policies. As in the later jurisprudence from the United Kingdom and the

[620] [1982] 1 SCR 203, 208 (McIntyre J).
[621] [1982] 1 SCR 203, 209 (McIntyre J).
[622] [1982] 1 SCR 203. See also *Winnipeg School Division No 1 v Craton* [1985] 2 SCR 150 and *Saskatchewan (Human Rights Commission) v Saskatoon (City)* [1989] 2 SCR 1297.
[623] [1990] 3 SCR 229.
[624] Ibid 256–257 (La Forest J).
[625] Ibid 255 (La Forest J).
[626] Ibid 254–255 (La Forest J).
[627] Ibid 257–258 (La Forest J).

ECJ, the emphasis was placed on the idea of 'intergenerational fairness' and preserving the 'dignity' of older workers to justify the legality of mandatory retirement policies.[628]

These same justifications for mandatory retirement ages were again accepted in *Dickason v University of Alberta*,[629] a case involving a complaint of age discrimination brought under Alberta *Individual Rights Protection Act*.[630] Again, the majority concluded that a mandatory retirement age was justified based on the legitimate aim of 'intergenerational fairness' and to protect the dignity of older workers.[631] The majority accepted that the mandatory retirement age was a proportional approach to achieve those aims in light of the need to appropriately manage resource allocation across the university and to allow for opportunities for younger workers.[632] In that context, the discriminatory retirement policy was not 'unfair' discrimination and was justified.[633]

More recently, the Supreme Court has considered the issue of mandatory retirement ages in the context of partnership arrangements. The issue of defining an employment relationship arose in *McCormick v Fasken Martineau DuMoulin*.[634] Similar to the case of *Seldon* from the United Kingdom, in *McCormick* the complainant was a partner in the respondent law firm. Again, similar to in *Seldon*, incorporated into the partnership agreement (and originally agreed to) by the appellant was a mandatory retirement age of 65 for partners.[635] The appellant brought an action pursuant to the British Columbia *Human Rights Code* arguing that the clause constituted employment discrimination on the basis of age.[636] As the provision was *prima facie* discriminatory, the question for the Supreme Court of Canada was whether a partnership agreement constituted an employment relationship for the purposes of the Act.[637] The Court concluded that a partnership agreement was not covered by the Act. Abella J (writing for the Court) concluded that key characteristics of an employment relationship pursuant to the Code was the degree of control and dependency within the employment relationship.[638] In her judgment, Justice Abella focused attention on the purposes of

628 Ibid 282–283 and 284 (La Forest J).
629 [1992] 2 SCR 1103.
630 RSA 1980, c.I-2.
631 Ibid 1137 (Cory J).
632 Ibid 1134–1135 (Cory J).
633 [1992] 2 SCR 1103, 1137 (Cory J). Mandatory retirement policies were again before the Supreme Court in *New Brunswick (Human Rights Commission) v Potash Corporation of Saskatchewan Inc* [2008] 2 SCR 604 but the Court chose not to reopen the issue of the legality of mandatory retirement policies overall and instead focused on the bona fide exemption in the legislation.
634 [2014] 2 SCR 108.
635 [2014] 2 SCR 108, 114 (Abella J).
636 Ibid.
637 [2014] 2 SCR 108, 114–115 (Abella J).
638 [2014] 2 SCR 108, 118–119 (Abella J).

discrimination legislation and specifically, what kinds of relationships it was meant to be provide protection for:

> The *Code* is quasi-constitutional legislation that attracts a generous interpretation to permit the achievement of its broad public purposes … Those purposes include the prevention of arbitrary disadvantage or exclusion based on enumerated grounds so that individuals deemed to be vulnerable by virtue of a group characteristic can be protected from discrimination.
>
> The *Code* achieves those purposes by prohibiting discrimination in specific contexts. One of those contexts is 'employment.' The definition of employment must be approached consistently with the generous, aspirational purposes set out in s 3 of the *Code* and understood in light of the protective nature of human rights legislation which is 'often the final refuge of the disadvantaged and the disenfranchised' and of 'the most vulnerable members of society.' This is the philosophical framework for ascertaining whether a particular workplace relationship represents the kind of vulnerability the *Code* intended to bring under its protective scope.[639]

The focus of the analysis was therefore on the control and dependency within the relationship and in particular whether the complainant is in a vulnerable or disadvantaged position in the relationship.[640] In the case of the appellant's employment relationship, the Court concluded that the factors of control and dependency were not apparent in the relationship. Thus, the appellant's partnership agreement was not an 'employment relationship' for the purposes of the *Human Rights Code* and he had no cause of action.[641] In making this finding, Abella J did not find that partnership agreements could never constitute employment relationships for the purposes of the Act but that the specific and contextual factors relating to that relationship needed to be analysed in light of the purpose of the Code.[642]

Broadly and consistently with the approaches adopted in the compared jurisdictions, the Canadian case law also accepts that age discrimination is a more easily justifiable and legitimate form of discrimination. However, differently to the approach adopted in Australia or the United Kingdom the Canadian Supreme Court's analysis in the most recent case of age discrimination at least gives some indication of reasoning as to why this is consistent with the broader purposes of discrimination law. Justice Abella frames discrimination law's purpose as one to protect the most vulnerable and disadvantaged members of society. Precluded from her conception of 'the vulnerable and disadvantaged' are older partners of law firms. The problem with the exclusion, as Langille and Pina-Shenker articulate, is that it justifies the complainant's treatment on the basis that he does not have another factor of vulnerability outside of his age:

[639] [2014] 2 SCR 108, 119–120 (Abella J).
[640] [2014] 2 SCR 108, 125 (Abella J).
[641] [2014] 2 SCR 108, 128 (Abella J).
[642] [2014] 2 SCR 108, 132 (Abella J).

> The Court elided the idea of the rationale for extending human rights protection to those groups identified by the prohibited grounds (which, as we have just seen and as the Court itself noted, is the idea of their vulnerability in virtue of the group characteristic) with the idea of the various contexts in which the Code seeks to protect those so identified as vulnerable, e.g. housing, service provision and employment. Here the Court slid into not only a moralized (vulnerability) account of why we have human rights protections for certain groups (a sound move), but also to a moralized (vulnerability) account of the contexts in which these protections are to be operable (a very unsound move)…That is what the Court constructed here - a double vulnerability.[643]

Whether this understanding of social power is correct is questionable,[644] but at the very least it still better identifies and justifies the approach adopted in light of a clear purpose of discrimination law.

4.4 Comparing the approaches

In this chapter, I have interrogated the judiciary's understanding of protected attributes in each jurisdiction. I sought to establish whether courts have been able to articulate the reasons why particular attributes have been designated for protection and the nature and lived experience of the disadvantage suffered by these group. I chose to focus on three distinct controversies: the definition and nature of race discrimination; the relationship between sex, pregnancy and family responsibility and the legitimacy of mandatory retirement policies. The discussion of these three controversies exposes three conclusions. First, in each jurisdiction there are limits to how far the judiciary are willing to interpret the legislation 'creatively' in order to utilise discrimination law to tackle group disadvantage, particularly where to ameliorate that disadvantage, a person requires different treatment. Second, where the disadvantage is articulated in the case law, the courts have come to different conclusions as to the extent and way in which the disadvantage should be addressed. Third, each jurisdiction has understood the appropriate role for the court in the re-interpretation and expansion of the definition of attributes differently.

At the outset, this chapter argued that it was important to understand and articulate the reason *why* certain attributes have been designated for protection from discriminatory treatment and the kinds of disadvantages that certain groups face. While this is discussed in the normative literature, this same level of analysis is not as clearly identifiable in the case law. An articulation of the reasons why certain attributes have been designated for protection is important because this allows for a consideration of the various kinds of behaviours that discrimination law is designed to prohibit. It allows for a consideration of whether the interpretation adopted could be considered a 'creative'

[643] Langille and Alon-Shenker, above n 58, 223.
[644] Ibid 218.

interpretation embedding a pluralist equality account of discrimination law's purpose as outlined in Chapter Three in that it is asymmetrical, cognisant of the disadvantage suffered and does not require a complainant to conform to a dominant norm. In each jurisdiction there are limits to the extent to which this 'creative' approach is taken, particularly in the context of family responsibilities and age discrimination.

It is in the extent to which courts engage with these issues that their approaches diverge. The Australian approach adopted with respect to understanding group disadvantage shows no real indication of being amenable to a 'creative' approach. The approach to attributes in respect of race, sex and age all require a symmetry and conformity to a dominant norm. The socio-economic and dignitary harms caused by discrimination are minimised and the needs for 'business efficacy' is emphasised. What is notable about the Australian appellate court case law is that there is almost no analysis of *why* persons with certain attributes suffer from disadvantage and any articulation of the forms of disadvantage that are suffered. Without an articulation of the disadvantage suffered, it is difficult to construct a clear doctrinal narrative surrounding the Australian approach to discrimination law.

The Australian approach to discrimination stands in contrast to that adopted in both the United Kingdom and Canada in this respect. In both the United Kingdom and Canada, particularly with respect of age and sex discrimination, there are clearer articulations of what kinds of disadvantages the Parliament may have been intending to ameliorate with discrimination law.

In the case of age discrimination, appellate courts in both jurisdictions have identified the kinds of stereotypical thinking about the capacity of older workers to continue to be efficient and productive members of the workforce that discrimination law may be intended to ameliorate. However, the extent to which the Parliament intended to balance the interests of older workers against other legitimate interests relating to issues such as intergenerational fairness has failed to elicit clarity in either jurisdiction.

In the case of sex discrimination, appellate courts in both jurisdictions have been required to grapple with the way in which childbearing and childcare responsibilities impact the capacity of workers to work strict and unchangeable schedules. In both jurisdictions this has been identified as a discriminatory disadvantage generally placed upon women because of socially engrained gender roles.

Where the approach of the courts in the United Kingdom and Canada part company, however, is the extent to which appellate court judges are able and willing to re-interpret and extend legal principles to utilise discrimination law to address those disadvantages. In the case law from the United Kingdom as outlined above, the legitimate roles of the legislature and the courts are emphasised. In the case of race discrimination, for instance, Baroness Hale emphasised that it was not for the Court to broaden the definition of attributes, such as race, to accommodate the disadvantages caused by related attributes such as immigration status. In doing so she identified what was jurisdictionally considered to be the appropriate roles of the court and the Parliament in the development of discrimination law. Similar tendencies can be seen in the controversies surrounding pregnancy discrimination where the Court of Appeal could identify the discriminatory disadvantages caused by pregnancy but were unable to re-interpret the understanding of the comparator principle to ameliorate those disadvantages in a coherent or compelling manner until required to do so by the ECJ.

In contrast, the Canadian courts can and do re-interpret principles to accommodate new understandings of the disadvantages caused by discriminatory conduct in a manner that has been generally conceptually coherent. This is clear from the early reversal on the discriminatory nature of treating women differently because of pregnancy in *Brooks*, the new ways to understand the nature of family responsibility in the recent case law and the continued re-evaluation of the nature of disadvantage that is suffered due to age discrimination in the workplace and the manner in which discrimination law can be re-interpreted and utilised to address these disadvantages. The Canadian courts may be assisted by the differences in the legislative schema and text compared to those in the United Kingdom and Australia, but nevertheless the courts have identified a role for themselves in the re-interpretation of discrimination law to address new understandings of disadvantages suffered because of discrimination.

The differences I have articulated in this chapter bring into focus the different interpretation of discrimination law's aims and reach in ameliorating disadvantages of protected groups. These differences are not explained by the legislative definitions of the attributes. Instead, I have argued that these differences are explained by two factors: first, how courts have understood the underlying purpose of discrimination law and their role in shaping and progressing the law to change or 'transform' society.

5 Protection

This chapter considers what types of conduct and behaviours persons with protected attributes are protected from through discrimination law in the United Kingdom, Australia and Canada. In essence, it asks: what is discrimination prohibited by law? The purpose of this chapter, similar to the purpose of Part II as a whole, is to provide the evidence and basis for the arguments that will ultimately be made in Part III. It does so by outlining the different interpretative approaches adopted to key questions of discrimination law. I focus on three key elements of a discrimination claim: comparison, causation or connection, and justification. Understanding the different ways in which these three elements can be interpreted is important to determine what a 'creative' interpretation of legislative intent requires from judges. More 'creative' approaches to comparison and causation can allow for courts to adopt a more contextual approach to the disadvantage that is suffered by complainants by recognising both the individualistic harm and elements of the broader and systemic issues surrounding the complaint. More rigorous interpretations of justificatory provisions can challenge the traditional conceptions of the judicial role by requiring the interrogation of broader systemic problems and social policy responses. It is in assessing how different jurisdictions have tackled these challenges that this chapter contributes to my overall project. These elements also allow for an interrogation and a clear comparison of the case law from the three studied jurisdictions. While in each jurisdiction there is case law on other issues in discrimination law such as special measures in the Australian context, affirmative action policies in Canada and the public sector equality duty in the United Kingdom, as there is no equivalent in the other studied jurisdictions these are not appropriate for consideration in this thesis. In assessing the case law from the three studied jurisdictions, I will make the following arguments. First, much of the lack of consistency and clarity, particularly from the case law in the United Kingdom and Canada stems from a failure to articulate or understand the underpinning purpose or rationale for discrimination law. This is a persistent problem in the British case law, though there are some exceptions. As will be demonstrated below, the problems in the Canadian case law are most acute when the court is either 'borrowing'[645] from the jurisprudence developed pursuant to s 15 of the *Charter* or in identifying the elements of the *prima facie* case. In contrast, the Australian case law does demonstrate an understanding of the purpose of discrimination law. But that understanding

[645] To adopt the term used in Denise Réaume, 'Defending the Human Rights Codes from the *Charter*', above n 59, 68.

is not one that conceives discrimination law as a protective instrument, but rather one designed to 'punish' duty-bearers for their conduct.[646]

Chapter Five is important as it provides the foundation to assess the articulations of purpose which will be discussed in Chapter Six and the judiciary's role in advancing that purpose in Chapter Seven. In identifying some broad jurisdictionally distinctive trends, I further develop my thesis' overall contribution and argument. First, in this chapter, I reveal the ongoing conceptual difficulties with three of the key elements of a discrimination claim: comparison, reason and cause, and justification. Second, how courts in each jurisdiction have tackled these elements has been jurisdictionally distinctive because each has understood the purpose of discrimination law and their role in developing and articulating the doctrinal discrimination tests differently. This distinctiveness is best demonstrated in the use of terminology or tests from other areas or domains of law to develop these doctrinal tests.

This chapter starts with a consideration of each jurisdiction's approach to comparison. In particular, I will outline how the courts in each jurisdiction comprehend the necessity of comparison for a discrimination claim and construct the appropriate individual and group comparators in matters of discrimination. In 5.2, I then consider the relevance of intention, motive and reason to prove the discrimination or the *prima facie* case. Finally, I will interrogate the way courts have interpreted the justificatory provisions in 5.3, focusing on the scope for justification and the extent of examination of a defendant's practices.

5.1 Comparison

One of the aims of discrimination law is to prevent a person from suffering from a harm (whether described as an adverse distinction, a disadvantage, unfavourable treatment or less favourable treatment)[647] because they have a protected attribute. Thus a complainant must show that the attribute is the connecting factor between treatment (direct) or the effect (indirect) that constitutes the 'adverse distinction.'[648] A way to demonstrate this connect in both direct and indirect

[646] This is expressly articulated in *Commissioner of Police v Estate of Russell* (2002) 55 NSWLR 232, 247 (Spigelman CJ) According to Spigelman CJ 'I do not believe that loss distribution is a purpose of the *Anti-Discrimination Act*. Denunciation, punishment and deterrence appear to be the primary considerations.'

[647] This is the phrasing utilised in some of the provisions in the *Canadian Human Rights Act* RSC 1985, c H-6. The Australian and British Acts utilise the phrase 'less favourable treatment' and 'unfavourable treatment.' As will be seen below, these differences in wording have not resulted in significant difference in reasoning once cases reach appellate courts.

[648] With respect to the British and Australian Acts, the analysis of direct and indirect discrimination has been separated as the prohibitions are considered mutually exclusive. The Australian authority for this proposition include *Australian Iron & Steel Ltd v Banovic* (1989) 168 CLR 165, 171 (Brennan J) and 184 (Dawson J); *Waters v Public*

discrimination is to compare the treatment or effect on the complainant against the treatment or the effect on persons who do not share the complainant's attribute.

The use of a comparator can be used as merely one kind of evidentiary device to prove the reason for the treatment or disadvantage.[649] Some discrimination legislation has been amended to avoid the comparator question. The amendments involve changing the definition of direct discrimination to 'treating the claimant *un*favourably' rather than 'treating the claimant *less* favourably.'[650] Whether or not this has, in fact, resolved issues of comparison is questionable. In *Aitken & Ors v Victoria – Department of Education and Early Childhood Development*, the Victorian Court of Appeal considered that the requirement for a 'comparator' under the new legislative construction in the Victorian *Equal Opportunity Act 2010* was still an 'open question that they declined to answer in that case.[651] There is yet to be any clear answer to this question at an appellate-court level. In the United Kingdom, the *Equality Act 2010* (UK) prohibits 'unfavourable' treatment because of disability. This can be contrasted to the prohibition on direct discrimination which utilises the terminology of *less* favourable treatment. In contrast to the position in Australia, in *Trustees of Swansea University Pension and Assurance Scheme v Williams*, the Supreme Court of the United Kingdom accepted that in assessing discrimination on the basis of a disability, a complainant did not need to compare their treatment to another.[652]

This section will consider the approach of the British, Australian and Canadian courts to matters of comparison. The approach adopted with respect to the conceptualisation of comparison will be categorised utilising a typology suggested by Atrey: a 'strict' approach, a 'flexible' approach and a 'contextual' approach.[653] This typology is being utilised because it allows for a clear articulation

Transport Corporation (1991) 173 CLR 349, 392–393 (Dawson and Toohey JJ) and 400 (McHugh J); *Victoria v Walker* (2011) 279 ALR 284 [28]; *Sklavos v Australasian College of Dermatologists* (2017) 256 FCR 247, 253 (Bromberg J). The authorities for this proposition in the United Kingdom include: *Secretary of State for Trade and Industry v Rutherford (No 2)* [2006] ICR 785, [71] (Baroness Hale); *Elias v Secretary of State* [2006] 1 WLR 3213 [119] (Mummery LJ); *(Coll) v Secretary for State for Justice (Howard League for Penal Reform intervening)* [2017] 1 WLR 2093 [43] (Baroness Hale with the Court agreeing). In the case of Canada, direct and indirect discrimination was unified in *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 SCR 3 and is presented accordingly.

649 Sophia Moreau, 'The Wrongs of Unequal Treatment' (2004) 54(3) *The University of Toronto Law Journal* 291, 318.

650 *Equal Opportunity Act 2010* (Vic) s 8(1) and *Discrimination Act 1991* (ACT) s 8(2) and in the United Kingdom on the grounds of pregnancy: *Equality Act 2010* (UK) ss 17 and 18.

651 (2013) 46 VR 676, 687. However, in *Re Prezzi and Discrimination Commissioner and Quest Group Pty Ltd* (1996) 39 ALD 729, the ACT Administrative Appeals Tribunal found that a similar provision in the ACT legislation did not require a comparison to be made. The approach adopted in *Prezzi* appears to be the approach adopted in lower court decisions in Victoria despite the approach in *Aitken*. For further discussion see: Rees, Rice and Allen, above n 42, 132; Campbell and Smith, 'Direct Discrimination Without a Comparator?' above n 330, 96.

652 [2019] 1 WLR 93 [12]. See also: *Williams v Trustees of Swansea University Pension & Assurance Scheme* [2017] EWCA Civ 1008 and *Dunn v Secretary of State for Justice* [2018] EWCA Civ 1998.

653 Shreya Atrey, 'Comparison in Intersectional Discrimination' (2018) 38(3) *Legal Studies* 379.

of the different approaches adopted in the case law and an analysis of these differences. The strict approach to comparison is where the appropriate comparator is one with whom the claimant shares the characteristics material to the circumstances but excluding the attribute or ground that is the basis for the claim.[654] The strict approach requires finding a single mirror comparator person or group to compare treatment in every case.[655] In contrast, a flexible approach to comparison accepts that comparison can be useful in establishing a claim, but it is not essential and can be a hindrance in some cases.[656] A contextual approach uses a range of comparisons with different groups and individuals to establish patterns of disadvantage and unfair discrimination.[657]

A 'strict' comparator approach can be problematic for several reasons, some of which have been previously discussed in 3.1. The use of a comparator can allow for a 'levelling down' approach to be adopted where the discriminatory nature of the treatment can be ameliorated simply by treating more powerful groups to the same disadvantage.[658] In addition, the hypothetical comparator is often cloaked in the attributes of the more powerful groups which emphasises the need for conformity with the dominant paradigm rather than allowing for an acceptance and inclusion of difference.[659] As Atrey explains, the use of this strict comparison is particularly inappropriate for claims of intersectional disadvantage because it fails to understand or ameliorate the manner in which disadvantage is experienced in practice.[660] The flexible approach, while initially attractive because it does not require mirror comparators in all cases, can also be problematic because it is unclear when comparison can and should be utilised and when it cannot. Where it is utilised, it generally conforms to the 'strict' model outlined above. The contextual approach is the most 'creative' approach to matters of comparison because it allows for the articulation and interrogation of the disadvantage that discrimination law should ameliorate. But given its necessary reliance on understanding and exploring different social and cultural factors, it is questionable whether it is appropriate for the court to utilise it in a statutory context focused on the actions of private individuals.

654 Ibid 382–383.
655 Ibid 383.
656 Ibid 387.
657 Ibid 390.
658 Fredman, *Discrimination Law*, above n 68, 162.
659 MacKinnon, *Sex Equality*, above n 321, 7. See also: Margaret Thornton, 'Neo-Liberalism, Discrimination and the Politics of Ressentiment' (2000) 7(2) *Law in Context* 8, 8; Denise Réaume, 'Comparing Theories of Sex Discrimination: The Role of Comparison' (2005) 25(3) *Oxford Journal of Legal Studies* 547, 547–548.
660 Atrey, above n 653, 382–383. See also: Conaghan, above n 241; Hannett, above n 47; Iyiola Solanke, 'Putting Race and Gender Together: A New Approach to Intersectionality' (2009) 72 *Modern Law Review* 723.

5.1.1 United Kingdom

The British judiciary is conscious of some of the difficulties associated with the comparator exercise. As Baroness Hale highlights (although in the context of Art. 14 of the *Human Rights Act*):

> There are … dangers in regarding differences between two people, which are inherent in a prohibited ground and cannot or should not be changed, as meaning that the situations are not analogous. For example, it would be no answer to a claim of sex discrimination to say that a man and a woman are not in an analogous situation because one can get pregnant and the other cannot. This is something that neither can be expected to change. If it is wrong to discriminate between them as individuals, it is wrong to focus on the personal characteristics which are inherent in their protected status to argue that their situation is not analogous.[661]

This section will consider the British courts' approach to comparison with respect to direct and indirect discrimination. It will assess whether the approach adopted is strict, flexible or contextual. It will argue that an assessment of the case law evinces an attachment to the strict formulation. This strict approach to comparison is consistent with the British approach to the overarching purpose of discrimination law which tends to avoid an articulation of the social and contextual factors surrounding the disadvantage that discrimination law could address.

5.1.1.1 Direct discrimination and comparison

In direct discrimination claims, the purpose of comparison is to determine if the complainant suffered less favourable treatment.[662] The use of a comparator has been described as an evidentiary tool to help a court determine why a complainant was treated the way in which they were.[663] As an evidentiary tool, hypothetical comparators are frequently utilised, particularly where the basis of the treatment could be a multitude of factors or mental processes.[664] The key to comparison is in 'correctly identifying the relevant circumstances.'[665] Overall, the approach to the appropriate comparator has been heavily reliant on the strict 'mirror' approach. The problem with this

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[661] *AL (Serbia) v Secretary of State for the Home Department* [2008] 1 WLR 1434 [27].

[662] *Ministry of Defence v Jeremiah* [1980] QB 87, 99 (Lord Denning).

[663] *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, 341 (Lord Nicholls), 373–374 (Lord Scott).

[664] *Bahl v The Law Society* [2004] EWCA Civ 1070; *Madarassy v Nomura International Plc* [2007] EWCA Civ 33 (this case was heard with *Appiah & Anor v Governing Body of Bishop Douglas Roman Catholic School* [2007] EWCA Civ 10 and *Brown v London Borough of Croyden* [2007] EWCA Civ 32 but on a question of burden of proof rather than the use of a hypothetical comparator); *Carter v Ashan* [2008] AC 696 [37]; *Ayodele v Citylink Ltd* [2017] EWCA Civ 1913. Cf the approach in *Chief Constable of the Royal Ulster Constabulary v Sergeant A* [2000] NI 261 in which real comparators were used.

[665] *Aziz v Trinity Street Taxis Ltd* [1988] 3 WLR 79, 89; See also: *R v Immigration Appeal Tribunal Ex parte Kassam* [1980] 1 WLR 1037; *West Yorkshire Police v Khan* [2001] ICR 1065, 1071 (though note that this was a claim of victimisation); *London Borough of Islington v Ladele* [2010] 1 WLR 955 [39] (Lord Neuberger); *Aylott v Stockton and Tees City Council* [2010] EWCA Civ 910. Note however that the material circumstances exclude the discriminatory circumstances: *Showboat Entertainment Centre v Owens* [1984] ICR 65 [20] and *Smyth v Croft Inns Limited* [1996] IRLR 84; cf *Dhatt v McDonalds Hamburgers Ltd* [1991] 1 WLR 527 and *Redfearn v Serco Ltd (Trading as West Yorkshire Transport Service)* [2006] EWCA Civ 659 [39].

approach is that it fails to consider the contextual factors and implicit biases that may be operating on decision makers and the situation more broadly.

An example of this is *Shamoon*,[666] in which the complainant complained of sex discrimination when she was relieved from some of her duties while two of her male colleagues had not received the same treatment.[667] The complainant's superintendent argued that she had not been relieved because she was a woman but because she had been the subject of complaints by junior officers.[668] The House of Lords concluded that the complainant's two male colleagues were not appropriate comparators because they had not been subject to the same complaints.[669] As such, that comparison would not be comparing 'like' with 'like.'[670] When compared to a hypothetical male chief inspector who had also been the subject of complaints, there could be no finding of less favourable treatment.[671] While this approach is superficially attractive, as Baroness Hale has pointed out, it fails to consider the context of the claim in that the very complaints could have been based upon underlying sexism in the first place.[672]

The lack of consideration of context is reflected in other cases of sex and race discrimination, where complainants have argued for a more contextual approach to comparators.[673] For example, in *Chamberlain Solicitors v Emokpae*,[674] the complainant was dismissed on the basis of rumours that she was in a relationship with her employer.[675] She argued that this was sex discrimination because such rumours would not have occurred had she been a male employee.[676] The Court of Appeal concluded that the appropriate comparator would have been a male rumoured to be a same-sex relationship with his employer.[677] But such an approach fails to appreciate the 'lived reality' of the sexualisation of women in the workplace.[678]

[666] [2003] ICR 337. For a discussion of the facts in this case see: Julie McCandless, '*Shamoon v Chief Constable of the RUC* — What It Says about the Contemporary Legal Position of Unlawful Sex Discrimination' (2003) 54(3) *Northern Ireland Legal Quarterly* 327.
[667] Ibid 344–345 (Lord Hope).
[668] Ibid.
[669] Ibid 341–342 (Lord Nicholls), 359 (Lord Hope), 367 (Lord Hutton); 375 (Lord Scott); 379 (Lord Rodger).
[670] Ibid.
[671] Ibid.
[672] Baroness Hale, Oxford Equality Lecture 2018 (Law Faculty at the University of Oxford, 29 October 2018) 7.
[673] *Igen Ltd v Wong; Chamberlain Solicitors v Emokpae; Webster v Brunel University* [2005] EWCA Civ 142.
[674] Heard together in the Court of Appeal with *Igen Ltd v Wong* and *Webster v Brunel University* [2005] EWCA Civ 142.
[675] Ibid [54].
[676] Ibid [64].
[677] Ibid.
[678] Linda Clarke, 'Sexual relationships and sexual conduct in the workplace' (2006) 26(3) *Legal Studies* 347, 361.

However, in the Supreme Court decisions there is possibly a trend towards a more nuanced and contextual approach to the question of comparison which has been identified by Baroness Hale. For example, in *Hewage v Grampian Health Board* ('*Hewage*')[679] an Asian, female doctor made complaints about her treatment by certain members of staff.[680] She complained that she was bullied and harassed by her managers who gave more favourable treatment to white male consultants who had also made similar complaints about the same staff members. Drawing on the reasoning in *Shamoon*, the respondent argued that the circumstances between the complainant and her colleagues was too different to compare.[681] However, in *Hewage* the Supreme Court concluded that in a matter of race and sex discrimination the appropriate comparators were the complainant's white, male colleagues who had been treated more favourably than her.[682] The differences between the two decisions may not be the factual circumstances but, that a decade on, the Supreme Court was more willing to consider the broader context in which the dispute was taking place.[683]

The approach to comparison in direct discrimination often evinces an understanding of discrimination law as symmetrical and non-contextual. In utilising this evidentiary' tool, appellate courts appear to be more interested in finding a neat and simple evidentiary tool rather than examining the circumstances of the case.

5.1.1.2 Indirect discrimination and comparison

The failure to challenge more insidious forms of bias through direct discrimination claims could be because this is understood as the intended focus of indirect discrimination. To prove indirect discrimination, the claimant is required to show that a PCP has a disproportionate impact on a group of people that share a protected attribute. The focus of an indirect discrimination claim is on the *effect* of a PCP on a *group* of complainants. This can be contrasted with a direct claim which is focused on the *reason* for the treatment of an *individual*. Through this difference, one can argue that indirect discrimination could be utilised to redress more insidious forms of disadvantage through targeting practices which perpetuate structure and historical disadvantage.[684] These

[679] [2012] ICR 1054.
[680] [2012] ICR 1054, 1057–1059 (Lord Hope with whom Baroness Hale, Lord Mance, Lord Kerr and Lord Reed agreed).
[681] Ibid 1062 (Lord Hope with whom Baroness Hale, Lord Mance, Lord Kerr and Lord Reed agreed).
[682] [2012] ICR 1054, 1062–1063 (Lord Hope with whom Baroness Hale, Lord Mance, Lord Kerr and Lord Reed agreed).
[683] Baroness Hale, 'Oxford Equality Lecture 2018' above n 672, 7.
[684] Fredman, *Discrimination Law*, above n 68, 181.

practices can be identified through identifying an under or over representation of groups through forms of comparison.[685]

But this potential effect of indirect discrimination is not necessarily apparent in the British case law on indirect discrimination which has often been confused and contradictory in determining almost all aspects of an indirect claim, including how to understand the nature of a PCP or a requirement or condition (pursuant to the historical legislation)[686] and how to understand a 'detriment' or 'disadvantage.'[687] However, this section will consider this doctrinal confusion specifically in addressing the operative test for comparison in indirect discrimination. In this section, I will argue that in many appellate court cases, the courts have struggled to apply a comparison in a manner which can illuminate the disadvantage that is suffered by a claim group by failing to consider the discrimination or disadvantage in 'a wider sense.'

To find indirect discrimination, the courts often compare the effect of the PCP on the protected group as compared to another 'pool' of people who do not share that attribute.[688] As Sedley LJ concluded in *Grundy v British Airways Ltd*:

> One of the striking things about both the race and sex discrimination legislation is that, contrary to early expectations, three decades of litigation have failed to produce any universal formula for locating the correct pool, driving tribunals and courts alike to the conclusion that there is none.[689]

The guiding principle for determining the 'pools' for comparison is that the pools should not be drawn to incorporate the disputed disadvantage.[690] To avoid this prospect, the approach of the Court of Appeal originally seemed to be (in the case of employment disputes) to construct one pool of employees *with* the protected attribute and compare that group to another pool of all

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[685] Ibid.

[686] See for example the narrow interpretations given to the definition of a 'requirement and condition' in *Perera v Civil Service Commission (No 2)* [1983] ICR 428 in which it was determined that a 'requirement or condition' short of an absolute bar would not meet the threshold provided for in the legislation. See also: *Meer v London Borough of Tower Hamelets* [1983] ICR 428 and *Jones v University of Manchester* [1993] ICR 474 in which the Court of Appeal concluded that a mere 'preferences' were not requirements or conditions for the purposes of discrimination law.

[687] In some early cases, the Court of Appeal determined that if a complainant could 'cope' or 'adapt' to a requirement or condition, it was not indirectly discriminatory. For example, these were the conclusions in *Mandla (Sewa Singh) and Anor v Dowell Lee* [1983] QB 1 (reversed by the House of Lords in *Mandla (Sewa Singh) and Anor v Dowell Lee* [1983] 2 AC 548).

[688] *Grundy v British Airways plc* [2007] EWCA Civ [27]; *Eweida v British Airways Plc* [2010] ICR 890 [13] – [14]; *McCloud v Lord Chancellor and Secretary of State for Justice* [2018] EWCA Civ 2844 [196].

[689] [2007] EWCA Civ 1020 [27].

[690] *Rutherford and Anor v Secretary of State for Trade and Industry (No 2)* [2006] ICR 785, [77] and [82] (Baroness Hale). See also: *London Underground v Edwards (No 2)* [1999] ICR 494; R v *Secretary of State for Employment; Ex p Seymour-Smith (No 2)* [2000] 1 WLR 435; *Allonby v Accrington and Rossendale College* [2001] ICR 1189. *Grundy v British Airways plc* [2007] EWCA Civ 1020; *Gibson v Sheffield City Council* [2010] EWCA Civ 63; and *Eweida v British Airways Plc* [2010] EWCA Civ 80 for similar statements. For a discussion see: Simon Forshaw and Marcus Pilgerstorfer, 'Direct and Indirect Discrimination: Is There Something in Between?' (2008) 37(4) *Industrial Law Journal* 347.

employees to identify any disadvantage.[691] That approach was thrown into doubt by the House of Lords in *Rutherford v Secretary of State for Trade and Industry (No 2)* ('*Rutherford*').[692] In *Rutherford*, the complainant argued that a rule that prevented older workers from claiming for unfair dismissal was indirectly discriminatory on the basis of sex because there were more older, male workers than older female workers.[693] The majority concluded that the appropriate comparison was between both men and women over the age of 65 in the workforce and concluded that there was no difference in treatment.[694] Baroness Hale justified this approach to comparison on the basis that younger workers had no interest in the 'advantage or disadvantage in question.'[695]

Reliance on *Rutherford* led for a time to the drawing of groups for comparison on a narrow basis and including the purported disadvantage into the comparative exercise. For instance in *British Medical Association v Chaudhary*,[696] the plaintiff claimed that a rule of the British Medical Association ('BMA') that it would not support race discrimination claims made by doctors against medical boards was indirectly discriminatory on the grounds of race.[697] In considering the claim, the Court of Appeal determined that the pool needed to be defined by 'reference to the nature of the rule.'[698] The Court of Appeal determined that the base pool to compare the impact against was all BMA members who wanted advice from and support of the BMA when making race discrimination claims against medical bodies.[699] Given that all members were equally affected by this rule, regardless of race, there was no disparate impact.[700] In contrast, if the comparison was between those wanting to make race discrimination claims and those making all kinds of legal claims, the disadvantage on the basis of race would have been significantly clearer. Similarly, in *Bailey v London Borough of Brent*,[701] a race discrimination case which challenged the closure of libraries in a borough, the Court of Appeal accepted as a comparison the disadvantage suffered by all library users as

[691] See for example in *Jones v University of Manchester* [1993] ICR 474; *McCausland v Dungannon District Council* [1993] 1 WLUK 212; *Allonby v Accrington and Rossendale College* [2001] ICR 1189 and the Court of Appeal decision in *Rutherford v Secretary of State for Trade and Industry (No 2)* [2005] ICR 119. In each of these cases the Court of Appeal concluded that the appropriate pools for comparison were a group with the complainants' attribute against all others in their particular workforce.
[692] [2006] ICR 785.
[693] Ibid [1].
[694] Ibid [73].
[695] Ibid [73]–[74].
[696] [2007] EWCA Civ 788.
[697] Ibid [3].
[698] Ibid [201]–[202].
[699] Ibid.
[700] Ibid. There was obiter suggesting that those not interested in the advantage or disadvantage should not be part of the 'pool' for consideration: *Pike v Somerset County Council* [2010] ICR 46 and *R (Bailey) v London Borough of Brent and All Souls College* [2011] EWCA Civ 1586.
[701] [2011] EWCA Civ 1586.

compared to the disadvantage suffered by Asian library users in particular.[702] Utilising that comparison, the Court of Appeal found no different treatment. But, as Connolly has argued, this case fails to measure the impact on Asian residents of the Borough who used and relied on library services more than non-Asian residents of the Borough.[703]

The Supreme Court may have resolved the problems of comparison in *Homer v Chief Constable of West Yorkshire Police* ('*Homer*').[704] In *Homer*, the Supreme Court was required to consider if the introduction of a career progression structure which required university qualifications was indirect age discrimination.[705] The complainant argued that it was indirectly discriminatory because of age because older candidates would be unable to obtain the relevant qualification prior to being forced into retirement.[706] The Court of Appeal came to its conclusion by comparing the effect of the policy on those nearing retirement age, to those who were leaving the workforce for other reasons (because of family responsibilities for instance) and concluded that the policy did not discriminate on the basis of age.[707] This approach was rejected by the Supreme Court because it failed to recognise the particular disadvantage that the complainant's group would suffer.[708] The complainant's group would suffer a particular disadvantage because unlike other employees who would later return to the workforce and could complete the qualifications, it was impossible for those nearing retirement to do so.[709] By appreciating this difference, the Supreme Court contextualised and considered the actual manifestation of the disadvantage. In particular, Baroness Hale focused on the purpose of the new language in s 19 of the *Equality Act 2010* (UK).

> The new formulation was not intended to make it more difficult to establish indirect discrimination…quite the reverse...It was intended to do away with the need for statistical comparisons where no statistics might exist. It was intended to do away with the complexities involved in identifying those who could comply and those who could not and how great the disparity had to be. Now all that is needed is a particular disadvantage when compared with other people who do not share the characteristic in question. It was not intended to lead us to ignore the fact that certain protected characteristics are more likely to be associated with particular disadvantages.[710]

In her judgment, Baroness Hale identifies the broader implications of the policy to conclude that it is discriminatory. Thus, she can utilise a comparative exercise to show a difference in effect

[702] Ibid [53] and [82].
[703] Michael Connolly, *Easy Cases Making Bad Law: The English Judiciary, Discrimination and Statutory Interpretation* (PhD, UCL, 2018) 147
[704] [2012] ICR 704.
[705] Ibid 707 (Baroness Hale with whom Lord Brown and Lord Kerr agreed).
[706] Ibid.
[707] Ibid.
[708] Ibid.
[709] Ibid.
[710] Ibid 709–710.

between older and younger workers who were affected by the policy. The problem in the case law and the various approaches adopted to the group comparison exercise is that there is no account for the kinds of disadvantages that indirect discrimination is designed to ameliorate. Without an identification of Parliament's aim in prohibiting indirect discrimination, the purpose of the comparison exercise is unclear and its application inconsistent.

5.1.2 Australia

This section will outline the construction of the appropriate comparator in the Australian case law. It will demonstrate that while the pattern is generally towards a strict approach to comparison, there are some notable exceptions. These notable exceptions, however, are overall consistent with the Australian courts' understanding of the underlying purpose of discrimination law: to punish and remediate what the courts consider is 'unfair' discrimination. This is distinctive to the approach adopted in the United Kingdom and in Canada. This section will begin by considering the appropriate comparator with respect to direct discrimination, before considering the approach to matters of indirect discrimination.

5.1.2.1 Direct discrimination and comparison

The High Court considered the appropriate approach to comparison in detail in *Purvis v New South Wales*.[711] In *Purvis*, the complainant was the foster father of a child, Daniel, who had been excluded from a public high school due to behavioural problems.[712] Those behavioural problems were a manifestation of a disability which existed because of brain damage.[713] To determine the claim, the High Court was required to determine whether Daniel had been treated less favourably than someone without Daniel's disabilities but in similar circumstances.[714] This required the consideration of the characteristics of the appropriate comparator.[715] The Court needed to consider whether Daniel's treatment was to be compared to another student without Daniel's disability and its associated behavioural problems, or alternatively whether the appropriate

[711] (2003) 217 CLR 92. This case has been extensively critiqued previously: Colin Campbell, 'A Hard Case Making Bad Law: *Purvis v New South Wales* and the Role of the Comparator Under the *Disability Discrimination Act 1992* (Cth)' (2007) 35(1) *Federal Law Review* 111; Kate Rattigan, 'Case Note: *Purvis v New South Wales (Department of Education and Training)* A Case For Amending the *Disability Discrimination Act 1992* (Cth)' (2004) 28(2) *Melbourne University Law Review* 532; Smith, 'From Wardley to Purvis', above n 40; Samantha Edwards, 'Purvis in the High Court Behaviour, Disability and the Meaning of Direct Discrimination' (2004) 26(4) *Sydney Law Review* 639; Jacob Campbell, 'Using Anti-Discrimination Law as a Tool of Exclusion: A Critical Analysis of the *Disability Discrimination Act 1992* and *Purvis v NSW*' (2005) 5(ii) *Macquarie Law Journal* 201; Thornton, 'Disabling Discrimination Legislation', above n 4.
[712] (2003) 217 CLR 92, 104 (McHugh and Kirby JJ).
[713] Ibid.
[714] (2003) 217 CLR 92, 100 (Gleeson CJ).
[715] Ibid.

comparator was a person who did not have Daniel's disability but did nevertheless exhibit the same behavioural problems.[716] The majority determined that it was the latter:

> The circumstances referred to in s 5(1) are all of the objective features which surround the actual or intended treatment of the disabled person by the person referred to in the provision as the 'discriminator.' It would be artificial to exclude (and there is no basis in the text of the provision for excluding) from consideration some of the circumstances because they are identified as being connected with that person's disability … In the present case, the circumstances in which Daniel was treated as he was, included, but were not limited to, the fact that he had acted as he had. His violent actions towards teachers and others formed part of the circumstances in which it was said that he was treated less favourably than other pupils.[717]

By conceiving the appropriate comparator as a person without Daniel's disability but who exhibited the same behaviour, the factual question the Court answered was whether a student without the disability who behaved in the same way would have been expelled as Daniel had been.[718] The plurality concluded that such a hypothetical student would have been expelled and consequently, there had been no direct discrimination on the grounds of disability.[719] The fact that Daniel's behavioural problems were directly associated with his disability and that consequently he had limited capacity to alter his behaviour was immaterial.[720] Importantly, in this case, the majority judgments emphasised the need for like treatment in all circumstances. The fact that Daniel, unlike other violent students without his disability, may not have been able to control his behaviour, was immaterial to the outcome.

The approach of the plurality in *Purvis* led, for a time, to an understanding of the appropriate comparator as a hypothetical person without the attribute but still with the manifestations or characteristics of the attribute. One could argue that the importance of *Purvis* in Australian discrimination law is overstated and this is simply a case considering how the characteristics of an attribute are to be included within the comparator exercise. To that effect, the *Disability Discrimination Act 1992* (Cth) has since been amended to clarify that the approach adopted by the High Court was not the intention of the Parliament with respect to comparing circumstances of persons with disabilities to those without disabilities.[721] However, to make this argument would be to misunderstand the reliance of *Purvis* throughout the Australian case law on direct discrimination.

[716] (2003) 217 CLR 92, 101 (Gleeson CJ), 161 (Gummow, Hayne and Heydon JJ).
[717] (2003) 217 CLR 92, 161 (Gummow, Hayne and Heydon JJ).
[718] (2003) 217 CLR 92, 162 (Gummow, Hayne and Heydon JJ).
[719] (2003) 217 CLR 92, 162 (Gummow, Hayne and Heydon JJ).
[720] For the contra view see (2003) 217 CLR 92, 134 (McHugh and Kirby JJ).
[721] Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 3 March 2008, 12292 (Robert McClelland, Attorney General).

In *Collier v Austin Health*,[722] the Victorian Court of Appeal set out the approach to comparators adopted in *Purvis*, not only with respect to this narrow point, but instead as a more general statement of the comparator exercise in discrimination law.[723]

I further suggest that there is a larger and more structural problem in the analysis in *Purvis* which *is* reflected in many of the other cases on the relevant or appropriate comparator. That problem is that the comparator is simply not used as an evidentiary device at all. Instead, like in *Purvis*, the comparator is used to confirm and justify the defendant's conduct by including their rationale for their treatment within the material circumstances for comparison.

For example, in *Purvis*, the material circumstances include the fact that Daniel was violent, notwithstanding the fact that, as the tribunal decision concluded, the extent of his violence may have been overstated.[724] In cases involving disabilities such as *Zhang v University of Tasmania*, the material circumstances included manifestations of the complainant's disability.[725] In *Forbes v Australian Federal Police*, the relevant comparator was a person without the complainant's disability but about whom the respondent had the same beliefs about the existence of the disability.[726] In *Lyons v Queensland*, the Queensland Court of Appeal accepted that the appropriate comparator in a case where a woman needed an 'Auslan' (Australian sign language) interpreter provided in order to be juror, was a person who wanted to bring another person into a jury room with them.[727] In *Queensland (Queensland Health) v Forest*, the appropriate comparator in the cases of disability discrimination on the basis of the use of an assistance animal was a person without a disability but with a misbehaving dog.[728] This was on the basis that Queensland Health argued that the animal had not been excluded because it was an assistance animal but because the dog had behaved badly.[729] As Harpur noted, the adopted 'relevant' comparator allowed the court to side-step any challenge to the evidence that the dog was, in fact, misbehaving.[730] In *Chi v Technical and Further Education Commission*,[731] where the complainant complained of race discrimination where a teacher

[722] (2011) 36 VR 1.
[723] Ibid [54]–[61]. Most recently and noting the legislative changes, in *Reurich v Club Jervis Bay Ltd* (2018) 360 ALR 296, despite noting the change in the legislation, Markovic J still applied *Purvis* as the proper approach to the comparator test at [251].
[724] *Purvis v New South Wales Department of Education (No 2)* [2000] HREOCA 47.
[725] (2009) 174 FCR 366 [63]–[66] (Jessup and Gordon JJ).
[726] [2004] FCAFC 95 [76] (Black CJ, Tamberlin and Sackville JJ).
[727] [2016] 2 Qd R 41[39] (Holmes JA).
[728] *Queensland (Queensland Health) v Forest* (2008) 168 FCR 532 [108] (Spender and Emmett JJ).
[729] Ibid.
[730] Paul Harpur, 'Rights of Persons with Disabilities and Australian Anti-Discrimination Laws: What Happened to the Legal Protections for People Using Guide or Assistance Dogs?' (2010) 29(1) *Tasmanian Law Review* 49, 69.
[731] [2012] NSWCA 421.

had repeatedly told him in front of a class that he 'could not read English',[732] the appropriate comparator was another student the teacher concluded was illiterate but whose illiteracy was not based on their national origins.[733] By including the purported illiteracy or belief of illiteracy into the material circumstances there is no real challenge to the evidentiary basis upon which the decision is brought. Rather than illuminating the evidence to reveal any different treatment, this approach to comparison and the material circumstances simply allows defendants to justify their conduct.

There are cases which do not apply the comparator test in the manner adopted in *Purvis*. For example, in *Mulligan v Virgin Airlines Ltd*,[734] the Full Federal Court rejected the defendant's argument that the comparator should be a person without the disability but who nevertheless wanted to travel with an animal in the cabin.[735] Similarly, in *Woodforth v Queensland*,[736] a case where the deaf complainant argued that the Queensland Police's failure to record her evidence utilising an interpreter in a timely manner constituted disability discrimination, the Court concluded that the relevant comparator was simply another victim of crime who wanted to have their evidence recorded.[737] In *Employment Services Australia Pty Ltd v Poniatowska* ('*Poniatowska*'),[738] the Full Court accepted the trial judge's finding that the complainant had been subjected to sex discrimination where she had been dismissed after she had made complaints about sexual harassment.[739] In doing so, his Honour compared her treatment to the men who sexually harassed her.[740] The employer argued that the appropriate comparison was between the complainant and a hypothetical man who had made a complaint about sexual harassment.[741] Stone and Bennett JJ concluded that the trial judge's choice of comparator was the correct approach.[742] As the concurring judgment of Dowsett J makes clear, the reason why a woman complaining of sexual harassment should be compared to men who are accused of sexual harassment is not necessarily clear.[743] The difference between these three decisions and the decisions that are outlined above is that in these three decisions, the defendants were not successful in justifying their conduct. The defendants could not point to

[732] Ibid [29].
[733] Ibid [34].
[734] (2015) 234 FCR 207.
[735] Ibid [149].
[736] [2018] 1 Qd R 289.
[737] Ibid [53] and [57].
[738] [2010] FCAFC 92.
[739] Ibid [111]–[112] (Stone and Bennett JJ).
[740] Ibid.
[741] Ibid.
[742] Ibid.
[743] Ibid [2]–[3].

alternative reasons for acting aside from the attribute in question or alternatively, the court remained unconvinced of the evidence. Rather than illuminating the circumstances and evidence of the case, appellate courts simply apply the comparator test to justify their conclusions.

5.1.2.2 Indirect discrimination and group comparison

As in the British approach to indirect discrimination outlined above, the Australian approach also requires a comparison of groups to determine whether there is a disadvantage to persons who hold a particular attribute. In many cases, constructing the appropriate comparator groups to demonstrate a disadvantage has been dispensed with in a relatively perfunctory fashion, with the Court accepting a disproportionate disadvantageous effect without significant interrogation.[744] There are a few reasons that this could be the case. First, and as will be discussed in 5.3.2, much of the focus has been on whether the policy is 'reasonable.' Second, a complainant might have been unable to show that they were subject to a condition or requirement.[745] Third, this could be attributable to a difference in the wording of the Australian legislation.[746] But, when the nature of the group comparison exercise is considered in the case law, judges appear to be occasionally adopting an approach to comparison as an attempt to unveil an underlying discriminatory intention.

The first illustration of this is in *Australian Iron & Steel v Banovic* ('*Banovic*').[747] In *Banovic*, the complainants were women who had been retrenched by the appellant.[748] The complainants argued that the method of retrenchment adopted a 'last on, first off' policy was indirect sex discrimination because the appellant had only recently ended a discriminatory practice of refusing to hire women.[749] In considering the respondent's argument, the High Court was required to consider the appropriate way to assess whether the policy had a disproportionate impact on female employees.[750] The appellant advocated for a method in which the Court compared the proportion of men affected out of the total male employee 'pool' against the proportion of women affected out of the total female employee 'pool.'[751] Utilising this comparison, there was no difference in effect. The respondent advocated for an approach in which the Court compared the effect of the

[744] See for example: *Hurst v Queensland* (2006) 151 FCR 562; *Catholic Education Office v Clarke* (2004) 138 FCR 121; *Sklavos v Australasian College of Dermatologists* (2017) 256 FCR 247; *Walker v Victoria* [2012] FCAFC 38; *Nojin v Commonwealth* [2012] FCAFC 192.
[745] This was the case in *New South Wales v Amery* (2006) 230 CLR 174.
[746] Rees, Rice and Allen, above n 42, 154–155; Gaze and Smith, *Equality and Discrimination Law in Australia*, above n 291, 120–121; Rosemary Hunter, *Indirect Discrimination in the Workplace* (Federation Press, 1992) Ch 13.
[747] (1989) 168 CLR 165. See: Thornton, 'Sex Discrimination, Courts and Corporate Power', above n 17, 43–45; Margaret Thornton, 'The Indirection of Sex Discrimination' (1993) 12(1) *University of Tasmania Law Review* 88, 95.
[748] Ibid 172–173 (Deane and Gaudron JJ).
[749] Ibid 173 (Deane and Gaudron JJ).
[750] Ibid 179–180 (Deane and Gaudron JJ).
[751] Ibid.

policy on a group of men and women who applied for employment with the appellant on a certain date. Because of the appellant's discriminatory policies, the women did not receive employment until many years after first making an application and thus a disproportionate impact could be demonstrated.[752] The majority (Deane and Gaudron JJ, and Dawson J concurring) concluded that the respondents' approach was the correct approach to adopt in the circumstances.[753]

When considering the way in which to construct the appropriate pools, Dawson J rejected the approach of the appellant.[754] However, he also considered that a 'bold comparison …. between the raw figures for the number of men who complied and the raw figures for the number of women who complied'[755] would also be an inappropriate comparison with which to determine indirect discrimination. This was because:

> The problem with that form of comparison is that the result may merely be a reflection of the fact that the workforce was sexually imbalanced. Indeed, where the sexes are not evenly balanced in a workforce, the application of the 'last on, first off' principle will almost always result in the retrenchment of a higher proportion of one sex. Where, as in this case, the men employed outnumbered the women by a ratio of fifteen to one, it was only to be expected that the number of men who complied with any condition, however, genuinely neutral and non-discriminatory, would greatly outnumber the number of women who could comply.
>
> …
>
> Such an approach could only be justified by treating s 24(3) as being aimed generally at discouraging workforces in which the sexes are unequally represented and there is, in my view, no basis for interpreting the sub-section in that far-reaching manner. Obviously, the reach of the sub-section was intended to be far less ambitious and to extend to only discriminatory requirements or conditions imposed on a workforce.[756] (emphasis added)

The problem with the approach adopted by Dawson J, in this case, is that while he accepts that this is a case of indirect discrimination, he appears to understand the purpose of the comparative exercise as one which can reveal the discriminatory *intent* behind a facially neutral practice or policy rather than a comparative exercise designed to clarify the discriminatory *effect* of the policy. This approach appears to be a misunderstanding of the distinction between direct and indirect discrimination, and the reasons for including a prohibition on indirect discrimination. It also unnecessarily limits the capacity for indirect discrimination to be utilised to address disadvantages not caused by a discriminatory motive but by history and social structures. Thornton has previously critiqued the decision in *Banovic* as an attempt by the courts to limit the investigation of

[752] Ibid.
[753] Ibid 181 (Deane and Gaudron JJ) and 191 (Dawson J).
[754] Ibid 188 (Dawson J).
[755] Ibid 185 (Dawson J).
[756] Ibid 186 (Dawson J).

discrimination to the individual case and avoid addressing the social structures that facilitate the discriminatory conduct in the first place.[757]

Similarly, in the *Commonwealth Bank of Australia v Human Rights & Equal Opportunity Commission* ('*Financial Sector Union Case*'),[758] Sackville J critiqued the approach taken in the original decision for failing to make precise findings as to the proportion of women on extended leave who were affected by a voluntary retrenchment policy.[759] In doing so, Sackville J appears to be searching for an underlying rationale for the retrenchment policy and requiring the women who were disadvantaged to demonstrate that they were targeted or singled out by the introduction of the policy in some way. Requiring a level of precision as to *who* could not comply with the policy appears again to be searching for a degree of motivated unfairness rather than simply considering the discriminatory effect of the policy itself.

The Australian courts understand the purpose of comparison as not only to identify difference, but also to identify an underlying problematic rationale for its treatment — in both direct and indirect discrimination cases. In this context, the courts are searching in cases of both direct and indirect discrimination for more than just 'different' treatment, they appear to be searching for wrongful treatment.

5.1.3 Canada

In contrast to the Australian and British approaches to discrimination, the Canadian test to prove *prima facie* discrimination does not require the identification of a real or hypothetical comparator. Instead, the test for *prima facie* discrimination under all Human Rights Codes,[760] established in *Ontario Human Rights Commission & O'Malley v Simpson-Sears* ('*O'Malley*'),[761] and further elaborated upon in more recent cases such as *Moore v British Columbia (Education)* ('*Moore*'),[762] involves three elements: (1) the complainant has a characteristic or attribute protected by the Code; (2) the complainant 'experienced an adverse impact' and (3) the protected characteristic was a factor in the adverse impact.[763] None of these steps involve the need for a comparison between the

[757] Thornton, 'Sex Discrimination, Courts and Corporate Power', above n 17, 45.
[758] (1997) 80 FCR 78.
[759] (1997) 80 FCR 78, 121–122 (Sackville J).
[760] As Rowe and Cote JJ articulate in *Canadian Human Rights Commission v Attorney General of Canada* 2018 SCC 31 [84] "Human rights protections must be interpreted consistently across jurisdictions unless legislative intent clearly indicates otherwise."
[761] [1985] 2 SCR 536.
[762] [2012] 3 SCR 360, 377.
[763] The test under the *Quebec Charter* is slightly different. The *Quebec Charter* requires the complainant to prove that (1) a distinction, exclusion or preference has occurred; (2) this distinction, exclusion or preference relates to one of the enumerated grounds and (3) this has the effect of nullifying the exercise of a human right or freedom.

treatment or outcomes for the complainant and someone who does not share their attribute. Instead, while comparative evidence can be utilised as an evidentiary tool, different to the approaches in Australia and the United Kingdom it is not considered a particularly powerful one.[764]

While for a time the Supreme Court of Canada utilised a group comparator approach in s 15 equality jurisprudence (the terms of which were outlined in 2.1.2),[765] the Court shifted away from this approach in *Withler v Canada (Attorney General)*, accepting that:

> Finding a mirror [comparator] group may be impossible as the essence of an individual's or group's equality claim may be that, in light of their distinct needs and circumstances, no one is like them for the purpose of comparison.[766]

Instead, the consideration in discrimination cases is focused on whether the treatment is adverse or *un*favourable rather than *less* favourable. Consequently, the approach adopted can reflect the actual disadvantage that the person complains of and avoids many of the problems with comparison discussed above in Chapter Three and 5.1 with respect to 'levelling down' and requiring conformity with dominant norms. In doing so, the approach conforms most closely with the 'contextual' approach outlined above.

The reasons for rejecting a strict comparator approach in a statutory discrimination law setting have also been articulated by the Supreme Court. In *Moore*, Justice Abella, writing for a unanimous Supreme Court, argued that to adopt a strict comparator approach to *prima facie* discrimination would undermine the purpose of the legislation which was to provide *genuine* access to services.[767]

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[764] See discussion in *Canada (Human Rights Commission) v Canada (Attorney General)* 2005 FCA 154. Contra conclusions were made in *King v Govt. P.E.I et al* 2018 PECA 3 at [10] but this case seems to be inconsistent with the current authority from the Supreme Court of Canada and other appellate courts.

[765] A discussion of the importance of comparator groups can be found in *Lovelace v Ontario* [2000] 1 SCR 950; *Hodge v Canada (Minister of Human Resources Development)* [2004] SCR 357 and *Auton (Guardian ad litem of) v British Columbia (Attorney General)* [2004] 3 SCR 657. Consequently, the comparator group approach was also adopted in some statutory discrimination cases as well: *Ontario Nurses' Association v Orillia Soliders Memorial Hospital et al* (1999) 42 O.R. (3d) 692 (CA); *United Food and Commercial Workers, Local 401 v Alberta Human Rights and Citizenship Commission* 2003 ABCA 246; *Howe v Canada* 2007 BCCA 314; *BC Government Service Employees' Union v British Columbia (Public Service Employee Relations Commission)* 2005 BCCA 129; *British Columbia (Ministry of Education) v Moore* 2010 BCCA 478. For a discussion of the use of a comparator test in respect of statutory human rights see Andrea Wright, 'Formulaic Comparisons: Stopping the Charter at the Statutory Human Rights Gate' in Fay Faraday, Margaret Denike and M Kate Stephenson (eds), *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Irwin Law, 2006) 409.

[766] [2011] 1 SCR 396 [59]. See also: 2, 3 45-48, 55, 80-81. For a discussion of the Supreme Court of Canada's approach to comparators in Charter cases see: Moreau, 'Equality Rights and the Relevance of Comparator Groups', above n 330; Jennifer Koshan and JW Hamilton, 'Meaningless Mantra: Substance Equality after Withler' (2011) 16(1) *Review of Constitutional Studies* 31; Bateman, above n 377; Denise Réaume, 'Dignity, Equality, and Comparison' in Deborah Hellman and Sophia Moreau (eds), *Philosophical Foundations of Discrimination Law* (Oxford University Press, 2013) 7; Beverley Baines, 'Comparing Women in Canada' (2012) 20(2) *Feminist Legal Studies* 89.

[767] *Moore v British Columbia* [2012] 3 SCR 360, 367.

She accepted that requiring a strict comparison had the capacity to lead judges to a formal 'like for like' comparative approach.[768]

Moore involved a claim that a child, Jeffrey, with severe learning disabilities was denied equal access to education in British Columbia where there had been significant cuts to the services available to students with learning disabilities.[769] Because of those cuts, Jeffrey was essentially forced to attend a private school.[770] His father argued that this was *prima facie* discrimination under the Code by limiting access to a service 'ordinarily provided to the public.'[771] The question for the courts was how to define the relevant service: was the service 'education' generally or was the service 'special education.' The Divisional Court and the British Columbia Court of Appeal both defined the service as 'special education.'[772] The majority of the British Columbia Court of Appeal then compared the treatment Jeffrey received to that received by other students who were also receiving special education.[773] It concluded that as the cuts all affected them in the same way, there was no *prima facie* discrimination.[774]

A unanimous Supreme Court of Canada rejected this approach. Writing for the Court, Abella J concluded that in keeping with the purposes of discrimination law, 'services' required a broad definition which could acknowledge the necessity of providing education to all:

> The preamble to the *School Act*, the operative legislation when Jeffrey was in school, stated that 'the purpose of the British Columbia school system is to enable all learners to develop their individual potential and to acquire the knowledge, skills and attitudes needed to contribute to a healthy, democratic and pluralistic society and a prosperous and sustainable economy.' This declaration of purpose is an acknowledgment by the government that the reason all children are entitled to an education is because a healthy democracy and economy require their educated contribution. Adequate special education, therefore, is not a dispensable luxury. For those with severe learning disabilities, it is the ramp that provides access to the statutory commitment to education made to *all* children in British Columbia.[775]
>
> …
>
> I agree with Rowles JA [in dissent in the BC Court of Appeal] that for students with learning disabilities like Jeffrey's, special education is not the service, it is the *means* by which those students get meaningful access to the general education services available to all of British Columbia's students.[776]

[768] [2012] 3 SCR 360, 367 (Abella J).
[769] [2012] 3 SCR 360, 367–371 (Abella J).
[770] Ibid.
[771] Ibid.
[772] [2012] 3 SCR 360, 374 (Abella J).
[773] Ibid.
[774] Ibid.
[775] [2012] 3 SCR 360, 367 (Abella J).
[776] [2012] 3 SCR 360, 375 (Abella J).

Additionally, while advocating for a broad and meaningful definition, Abella J also cautioned against a strict use of a comparator in all cases of discrimination:

> To define 'special education' as the service at issue also risks descending into the kind of 'separate but equal' approach which was majestically discarded in *Brown v Board of Education of Topeka*. Comparing Jeffrey only with other special needs students would mean that the district could cut *all* special needs programs and yet be immune from a claim of discrimination. It is not a question of who else is or is not experiencing similar barriers. This formalism was one of the potential dangers of comparator groups identified in *Withler v Canada (Attorney General)*.
>
> If Jeffrey is compared only to other special needs students, full consideration cannot be given to whether he had *genuine* access to the education that all students in British Columbia are entitled to receive. This, as Rowles JA noted, 'risks perpetuating the very disadvantage and exclusion from mainstream society the *Code* is intended to remedy.'[777]

The decision in *Moore* was hailed by commentators as a positive turn in statutory discrimination law jurisprudence.[778] This was because it was unanimous, eloquent and succinct with a clear identification of the broader purpose of discrimination law.[779] However, the decision in *Moore* can nevertheless still be critiqued on two bases. First, and as will be discussed in 6.1.3, while Abella J emphasises the importance of education for all students with learning difficulties, the claim of systemic discrimination was rejected. Second, in part, Abella J appears to place significant emphasis on the fact that the provincial government had promised, in the long title of the *Education Act,* to ensure all learners had access to education. If the provincial government had not instilled this promise into legislation it is unclear whether discrimination law would have otherwise required the government to provide this equal access to education.

While *Moore* has been cited with approval in a number of appellate cases, this is often for the restatement of the test for *prima facie* discrimination.[780] The only case to focus on the easing of the requirement for comparator groups in the context of a Code claim is the Federal Court of Appeal decision of *Attorney General of Canada v Canadian Human Rights Commission* ('*First Nations Child Caring Case*').[781] The complainants, the First Nations Child and Family Caring Society and the Assembly

[777] [2012] 3 SCR 360, 376 (Abella J).
[778] See for example: Gwen Brodsky, 'Moore v British Columbia: Supreme Court of Canada Keeps the Duty to Accommodate Strong' (2013) 10 *Journal of Law & Equality* 85; Mona Pare, 'Refining the Test for Discrimination in the Context of Special Education: Moore v British Columbia' (2013) 10 *Journal of Law and Equality* 71; Cf Joanna Birenbaum and Kelly Gallagher-Mackay, 'From Equal Access to Individual Exit: The Invisibility of Systemic Discrimination in Moore' (2013) 10 *Journal of Law and Equality* 93.
[779] Bruce Ryder, 'The Strange Double Life of Canadian Equality Rights' (2013) 63 *Supreme Court Law Review* 261, 282.
[780] A search of Canlii (www.canlii.org) reveals that *Moore* has been cited in appellate courts in 31 decisions. Of these, the vast majority are for the restatement of the test for *prima facie* discrimination. The only other case to consider in detail the necessity of comparator groups is *Canada (Attorney General) v Canadian Human Rights Commission* 2013 FCA 75.
[781] 2013 FCA 75. For a discussion of the issues in the case (and the other long-running issues associated with this litigation) see: Cindy Blackstock, 'The Canadian Human Rights Tribunal on First Nations Child Welfare: Why if

of First Nations, argued that the Canadian Government had engaged in prohibited discrimination by under-funding child welfare services for on-reserve First Nations children.[782] This denied them services available to other Canadian children (which was provided for by provincial governments).[783] The Tribunal originally found that there was no discrimination on the basis that there was no appropriate comparator group available because the Federal Government did not provide welfare services to children who were not on-reserve.[784] As there could be no comparison, there was no *prima facie* discrimination. The Federal Court and the Federal Court of Appeal rejected this decision.[785] It found that the Tribunal's approach had incorrectly turned the comparator analysis into part of the definition of discrimination.[786] Instead, the Court of Appeal accepted that the comparator was no more than an evidentiary tool which may be useful to determine the existence of discrimination; in other words its use was not mandatory.[787]

Ultimately, the Canadian approach to comparison does reflect an understanding of discrimination law's purpose as one which furthers substantive equality. It does so by adopting a more contextual approach to the requirement of comparison which accepts that while it can be a useful evidentiary tool, it is not fundamental to an equality claim.

5.2 Reason and cause

In each jurisdiction, discrimination is prohibited where it occurs 'because of' the protected attribute. As Atrey explains, this means the complainant is required to prove that the cause, whether an act (in the case of direct discrimination) or a condition, criterion, practice or requirement (in the case of indirect discrimination) is connected to the harm suffered by the complainant through the complainant's attribute.[788] While comparison (as explored above in 5.1) is often an evidentiary tool used to prove this connection, it is not the only tool used. In this section I will interrogate how this connection is proven in each jurisdiction.

The manner in which the court is able to determine whether the treatment or effect is 'because of' the protected attribute is not designated by the legislative text, but instead is determined through

Canada Wins, Equality and Justice Lose' (2011) 33(1) *Children and Youth Services Review* 187; Cindy Blackstock, 'The Complainant: The Canadian Human Rights Case on First Nations Child Welfare' (2016) 62(2) *McGill Law Journal* 285.

[782] 2013 FCA 75.
[783] Ibid [2].
[784] Ibid.
[785] Ibid [7].
[786] Ibid.
[787] Ibid [18]–[22].
[788] Atrey, above n 650, 379.

the application of different judicially constructed tests. I will argue that in each jurisdiction the test to prove that the treatment or effect was *because of* the complainant's attribute has been constructed differently and each demonstrates a failure to articulate what harms discrimination law is designed to protect people from.[789]

Focusing specifically on the use of the 'but for' test in the United Kingdom to prove direct discrimination, I will argue that the Supreme Court's preference for this evidentiary test has turned all questions of discrimination into an effects test—blurring the distinction between direct and indirect discrimination. This has made it difficult to understand the underlying rationale for prohibiting discrimination and the kinds of conduct that discrimination law is designed to target.

In contrast, the approach adopted in Australia is focused on finding fault and 'moral blameworthiness' on behalf of the defendant. The focus on finding the motivations of the defendant are consistent with the previous findings of Gaze,[790] and my assessment and analysis of the case law finds little change in the approach adopted since she made these conclusions some 17 years ago.

Finally, in Canada since *British Columbia (Public Service Employee Relations Commission) v BCGSEU* ('*Meiorin*')[791] the tests for direct and indirect discrimination have been unified and ostensibly the focus of the inquiry should be on the *effect* of the conduct. However, more stringent standards for evidence, the rationale for the conduct and the focus on the arbitrariness of the conduct have focused attention back on the *reason* for acting rather than the effect.

5.2.1 United Kingdom

The British courts' approach to questions regarding evidence that the attribute was the *reason* for the treatment or disproportionate outcome has generated significant criticism.[792] As highlighted above, the crux of this criticism is that the British courts' construction of the causative tests for both direct and indirect discrimination fail to demonstrate an understanding of the purpose of the

[789] Hugh Collins and Tarunabh Khaitan, 'Indirect Discrimination Law: Controversies and Critical Questions' in Hugh Collins and Tarunabh Khaitan (eds), *Foundations of Indirect Discrimination Law* (Hart Publishing, 2018) 1, 4–5.
[790] Gaze, 'Context and Interpretation in Anti-Discrimination Law', above n 13. In making this argument Gaze relies upon statements which discuss finding the defendant 'guilty' of discrimination in *Department of Health v Arumugam* [1988] VR 319, 325 (Fullagar J) and the single judge decision *Shou v Victoria* [2001] 3 VR 655, 661 (Harper J).
[791] [1999] 3 SCR 3.
[792] Collins, above n 330.

separate prohibitions and often amalgamate the two different types of discrimination.[793] Though this is a problem, I will make a slightly different (though still related) claim. I will argue that particularly in the context of direct discrimination, the Supreme Court of the United Kingdom's preference for distinguishing between the 'moral wrongness' of discrimination and its legal prohibition gives little basis for understanding the purpose of the prohibition and the kind of conduct that discrimination law should be preventing.

To avoid the need to consider the motivations of the duty-bearer, British courts have avoided causative tests which require consideration of a duty-bearer's motivations and instead utilise a 'but for' construction. The 'but for' test was first utilised in *Birmingham City Council v Equal Opportunities Commission* and has been affirmed by the House of Lords and the Supreme Court in numerous cases.[794] Since the late 2000s, the Supreme Court, and Baroness Hale in particular, has established that the 'but for' test is the preferable test to establish the reason for the complainant's treatment.[795] Nevertheless, there is still reliance on the older tests for proving reason and cause which were utilised in *Shamoon* and *Nagarajan v London Regional Transport* both of which articulated the test as finding the 'reason why' the defendant acted the way in which they did.[796]

The 'but for' test was utilised to emphasise that it was unnecessary to find a discriminatory motive or intent behind the 'less favourable' treatment suffered by the complainant. The rationale for this was explained by Lord Goff in *Birmingham City Council* in the following terms.

> The intention or motive of the defendant to discrimination … is not a necessary condition of liability … [Otherwise] it would be a good defence for an employer to show that he discriminated against

[793] Fredman, 'Direct and Indirect Discrimination', above n 36, 40–43; See also: Sandra Fredman, 'The Reason Why: Unravelling Indirect Discrimination' (2016) 45(2) *Industrial Law Journal* 231, 232; Forshaw and Pilgerstorfer, above n 690.

[794] *Birmingham City Council v Equal Opportunities Commission* [1989] 1 AC 1155, 1194 (Lord Goff). In his judgment, Lord Goff relied on a line of previous authority including: *Jenkins v Kingsgate (Clothing Productions) Ltd* [1981] 1 WLR 1485, 1494 (Browne-Wilkinson J); *R v Secretary of State for Education and Science, Ex parte Keating* (1985) 84 LGR 469 and *Ministry of Defence v Jeremiah* [1980] QB 87, 98 (Lord Denning). Since then, the following House of Lords or Supreme Court of the United Kingdom judgments have applied 'But for": *James v Eastleigh Borough Council* [1990] 2 AC 751; *R (on the application of E) v Governing Body of JFS and the Admission Appeal Panel of JFS and Others* [2010] 2 AC 728; *Preddy v Bull* [2013] UKSC 73; *(Coll) v Secretary for State for Justice (Howard League for Penal Reform intervening)* [2017] 1 WLR 2093; *Lee v Ashers Baking Co Ltd* [2018] 3 WLR 1294.

[795] *R (on the application of E) v Governing Body of JFS and the Admission Appeal Panel of JFS and Others* [2010] 2 AC 728; *Preddy v Bull* Regina [2013] UKSC 73; *(Coll) v Secretary for State for Justice (Howard League for Penal Reform intervening)* [2017] 1 WLR 2093; *Lee v Ashers Baking Co Ltd* [2018] 3 WLR 1294. This is also the approach adopted in the appellate court decision of *English v Thomas Sanderson Blinds Ltd* [2009] ICR 543 and *Chief Inspector of Education, Children's Services and Skills v Interim Executive Board of Al Hijrah School* [2017] EWCA Civ 1426;

[796] *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, 340 – 343 (Lord Nicholls) repeating and adopting his previous articulation of the proper test in *Nagarajan v London Regional Transport* [1999] ICR 877, 884 – 885 (Lord Nicholls) though *Nagarajan* involved a victimization claim. These cases have been subsequently adopted in a number of Court of Appeal decisions including: *Hussian v King's College Hospital NHS Trust* [2002] EWCA Civ 1269; *Stockton on Tees Borough Council v Aylott* [2010] EWCA Civ 910; *Taiwo v Olaigbe* [2014] EWCA Civ 279;

> women, not because he intended to do so but (for example) because of customer preference, or to save money, or even to avoid controversy.[797]

In the terms stated by Lord Goff, the rationale for adopting a 'but for' test for direct discrimination is understandable given the ways in which defendants may seek to justify or rationalise their actions.

But, as has been commented on extensively in the scholarship of the law of obligations, notably by Wright,[798] Stapleton[799] and Bant and Paterson[800] amongst others, the 'but for' test can be over and under inclusive and cannot sufficiently weigh the importance of various factors which may be said to *cause* an particular outcome. Further, as Bant and Paterson have argued, the 'but for' test is particularly inappropriate when the inquiry should be focused on the *reason* a person had for acting.[801] This is because the 'but for' test—a test stemming from the doctrine of unintentional torts—is not designed to illuminate a reason for acting but only to consider the effect.

In the context of a discrimination claim, the 'but for' test fails to interrogate the nature of different treatment or to contextualise the disadvantage that is at the heart of the complaint. It is for this reason that the 'but for' test cannot differentiate between simply *different* treatment and *discriminatory* treatment. Two cases which illustrate the failure of the 'but for' test to apply weight to competing factors for treatment are *James v Eastleigh Borough Council* ('*James*') and *R (on the application of E) v Governing Body of JFS and the Admission Appeal Panel of JFS and Others* ('*JFS*').[802]

In *James*, a council swimming pool waived the entrance fee for pensioners.[803] The complainant argued that this policy constituted sex discrimination because the age at which persons could access the pension differed on the basis of sex.[804] The House of Lords agreed and considered that the difference in the fee was direct sex discrimination and thus could not be justified.[805] In doing so, they accepted that pensionable status was a 'proxy' for sex and 'but for' the complainant's sex he would have been granted free entry. In *JFS,* the complainant argued that the admission policy of

[797] *Birmingham City Council v Equal Opportunities Commission* [1989] 1 AC 1155, 1194 (Lord Goff). See also *Smyth v Croft Inns Ltd* [1996] IRLR 84 (which although determined under the equivalent Northern Irish Act, rejected that customer preference and possibly a concern for an employee's physical safety precluded a finding of discrimination).
[798] Richard W Wright, 'The New Old Efficiency Theories of Causation and Liability' (2014) 7(2) *Journal of Tort Law* 65, 70.
[799] Jane Stapleton, 'An 'Extended But-For' Test for the Causal Relation in the Law of Obligations' (2015) 35(4) *Oxford Journal of Legal Studies* 697.
[800] Elise Bant and Jeannie Marie Paterson, 'Statutory causation in cases of misleading conduct: Lessons from and for the common law' (2017) 24 *Torts Law Journal* 1, 14.
[801] Ibid 18–19.
[802] [1990] 2 AC 751 and [2010] 2 AC 728.
[803] Ibid 760 (Lord Bridge).
[804] Ibid 767 (Lord Bridge), 769 (Lord Ackner), 770 (Lord Goff).
[805] Ibid.

the respondent school, JFS, was racially discriminatory because it prioritised for admission children who were recognised by the Office of the Chief Rabbi as Jewish through matrilineal descent by birth, or mother's conversion.[806] The majority concluded that although the admissions policy was not motivated by prejudice,[807] 'but for' the child's lack of matrilineal descent by birth or conversion he would not have suffered the detriment of not being given priority for admission.[808]

The problem with the application of the 'but for' test in both *James* and *JFS* is that there are multiple sufficient causes for the detriment, some of which are justifiable, reasonable distinctions to make between people. In *James*, while the House of Lords determined that pensionable status is a proxy for sex, it could equally be a 'proxy' for economic disadvantage as pensioners also often have fewer financial resources than those still earning an income. Economic disadvantage *is* a reasonable and justifiable distinction to make in determining the costs of public facilities. In the case of *JFS*, the status of matrilineal descent in the Orthodox Jewish religious tradition can be classed as *both* a racial ground *and* a religious requirement. In the context in which religious schools are allowed to operate, religious requirements for entry are a legitimate distinction to draw between potential applicants.

There are two fundamental problems with the 'but for' test for determining direct discrimination. First, it is unclear from the test what kinds of harms the Parliament intended to ameliorate and thus unclear *why* discrimination should be prohibited by law. By utilising the 'but for' test, the courts accept that equality legislation covers 'benign' discrimination. As Baroness Hale concluded in *JFS*, 'No one is accusing JFS…of discrimination on the grounds of race as such. Any suggestion or implication that they are 'racist' in the popular sense of that term can be dismissed.'[809] However, the acceptance that direct discrimination prohibits both 'benign' and 'less benign' discrimination fails to identify the purpose of direct discrimination and *why* discrimination is wrongful in the first place. It further fails to distinguish between the different purposes (if any) of direct discrimination and indirect discrimination. This is because both now seem to target unintended or unintentional discrimination.

Second, while the 'but for' test's application is relatively clear where a case involves stated rules and preferences, its applicability is less clear where the defendant's reason for acting is unknown.

[806] [2010] 2 AC 728, 749.
[807] Ibid 756 (Baroness Hale).
[808]Ibid 754 (Lord Phillips), 760–761 (Baroness Hale), 773 (Lord Mance), 783 (Lord Kerr), 784 (Lord Clarke).
[809] Ibid 756 (Baroness Hale).

The 'but for' test could be utilised in cases such as in *Preddy v Bull* where the complainants who were in a same-sex partnership were refused a hotel room on the basis that they were not married as the complainants were given an explicit reason for their refusal which could then be evaluated.[810] But in cases where there are no such statements or rules in place, its application because decidedly less clear.

Third, as Lord Griffiths articulates in *James*, the results can lead to further disenfranchisement of an already excluded group:

> either free facilities must be withdrawn from those who can ill afford to pay for them or, alternatively, given free to those who can well afford to pay for them. I consider both alternatives regrettable. I cannot believe that Parliament intended such a result and I do not believe that the words 'on the grounds of sex' compel such a result.[811]

The solution for these 'regrettable' results proposed by Baroness Hale is simply for Parliament to amend the legislation to incorporate a justification defence for direct discrimination.[812] However, as will be seen from the discussion below, the solution could simply be to utilise a different test to prove reason and cause.

5.2.2 Australia

In contrast to the British 'but for' test, the Australian approach focuses on the 'real reason' or 'true basis' for the conduct.[813] The 'real reason' test does not focus on the effect of the conduct on a complainant. Instead, there is a focus on the reasons why the duty-bearer acted in the way they did and whether that reason was discriminatory. In this section, I will argue that courts use the 'real reason' test to find, target and 'prosecute' 'unfair' and motivated discriminatory practices. These findings and this argument are consistent with the articulation of discrimination law's purpose by Chief Justice Spigelman in *Commissioner of Police v Estate of Russell* in which he states that the primary

[810] [2013] 1 WLR 3741, 3747–3748 (Baroness Hale) 3759 (Lord Toulson).
[811] [1990] 2 AC 751, 768.
[812] Baroness Hale, 'Oxford Equality Lecture 2018' above n 665, 7.
[813] Prior to the High Court's decision in *Purvis v New South Wales* (2003) 217 CLR 92, there was some consideration of the 'but for' test utilised by the House of Lords: see the discussion in *Human Rights and Equal Opportunity Commission v Mt Isa Mines Ltd* (1993) 46 FCR 301, 323 (Lockhart J); *IW v City of Perth* (1997) 191 CLR 1, 32 (Toohey J) and 64 (Kirby J) and *Purvis v New South Wales* (2003) 217 CLR 92, 13 –144 (McHugh and Kirby JJ). In *Australian Iron & Steel v Banovic* (1989) 168 CLR 165, 176, Deane and Gaudron JJ conclude it is necessary in a discrimination claim to determine the 'true basis' for the conduct. Dawson J came to a similar conclusion at 184. In respect of the terminology of 'true basis' or 'real reason' see: Rees, Rice and Allen, above n 42, 116–118; Gaze and Smith, above n 294, 116.

purposes of the New South Wales *Anti-Discrimination Act 1977* are 'denunciation, punishment and deterrence'[814] and with the previous findings by Gaze.[815]

As in the United Kingdom and Canada, since the early case law, it has been accepted that the motive or an intention to discriminate by the respondent was not a deciding factor to determine direct discrimination.[816] But, in contrast to the approaches adopted elsewhere, the Australian courts still consider it necessary to determine the 'true reason' for the conduct.[817]

For instance, in *University of Ballarat v Bridges* it was still necessary to determine whether the attribute was the 'true reason' for the treatment:

> A difference in connotation between the expression 'on the ground of' and 'by reason of' is not obvious. Both appear to me to connote the true justification, reason or basis for the implemented decision or determination which is relied on to constitute a proscribed act of discrimination.[818]

In *Kapoor v Monash University & Anor*, the Victorian Court of Appeal expanded on the steps required to determine whether the attribute was the 'true basis' for the conduct. In particular, the Victorian Court of Appeal found that to constitute direct discrimination, the duty-bearer must be shown to be aware of the connection *between* the attribute and the manifestations or characteristics of the attribute.[819]

In *Purvis*, three of the four judgments considered the appropriate test for establishing causation in discrimination claims. In their joint judgment, although they concluded that there had been no differential treatment, Gummow, Hayne and Heydon JJ still considered what the phrase 'because of' required. They stated:

> For present purposes, it is enough to say that we doubt that distinctions between motive, purpose or effect will greatly assist the resolution of any problem about whether treatment occurred or was

[814] (2002) 55 NSWLR 232.
[815] Gaze, 'Context and Interpretation in Anti-Discrimination Law' above n 13.
[816] *Waters v Public Transport Corporation* (1991) 173 CLR 349, 359 (Mason CJ and Gaudron J, Deane J agreeing), *Waterhouse v Bell* (1991) 25 NSWLR 99, 108 (Clarke JA). However, cf *Waters v Public Transport Corporation* (1991) 173 CLR 349, 401 (McHugh J). As outlined in 2.3.2, the definition of discrimination in *Racial Discrimination Act 1975* (Cth) is different and has been interpreted slightly differently to refer to the 'sufficient connection.' Similarly, with respect to other discrimination claims in Australia, there is no need to prove an improper motivation of intention to discriminate. See *Victoria v Macedonian Teachers Association Victoria Inc* (1999) 91 FCR 47; *Bropho v Western Australia* (2008) 169 FCR 59 and *Australian Medical Council v Wilson* (1996) 68 FCR 46, 74 (Sackville J).
[817] It should be noted that almost uniformly, the Australian legislation provides that the discriminatory reason need only be one of a duty-bearer's reasons for acting and not the *only* reason for acting: see *Disability Discrimination Act 1992* (Cth) s 10; *Sex Discrimination Act 1984* (Cth) s 8; *Age Discrimination Act 2004* (Cth) s 16; *Racial Discrimination Act 1975* (Cth) s 18.
[818] *University of Ballarat v Bridges* [1995] 2 VR 418, 424 (Tadgell JA). On the terminology of 'true basis' see also: *Aboriginal Legal Rights Movement v South Australia* (1995) 64 SASR 551, 553 (Doyle CJ).
[819] *Kapoor v Monash University* (2001) 4 VR 483, 494–495 (Chernov JA).

> proposed 'because of' disability. Rather, the central question will always be — *why* was the aggrieved person treated as he or she was? If the aggrieved person was treated less favourably was it 'because of' or 'by reason of' that person's disability? Motive, purpose, effect may all bear on that question. But it would be a mistake to treat those words as substitutes for the statutory expression 'because of.'[820]

This approach to causation also appears to find support in the majority judgment of Gleeson CJ and the minority judgment of McHugh and Kirby JJ.[821] However, those judgments came to different conclusions as to what the true basis for excluding Daniel was. For Gleeson CJ, the underlying reason for the principal's decision to exclude Daniel was concern for the health and safety of other staff and students of the school. The Chief Justice stated:

> There is no reason for rejecting the principal's statement of the basis of his decision as being the violent conduct of the pupil, and his concern for the safety of other pupils and staff members. It is not incompatible with the legislative scheme to identify the basis of the principal's decision as that which he expressed. On the contrary, to identify the pupil's disability as the basis of the decision would be unfair to the principal and to the first respondent.[822]

Justice Callinan also accepted that the real reason for the principal's conduct was the safety of staff and other students rather than Daniel's disability.[823] In contrast, when considering whether Daniel's disability was the reason he was expelled, McHugh and Kirby JJ concluded that the disability was the 'real reason' the principal made the decision to expel Daniel.[824]

As explained in the various judgments in *Purvis*, the 'real reason' approach seems to require a finding as to the duty-bearer's underlying reasons for acting as he or she did. This could be different from the facially apparent factors which influenced the decision in question. The 'real reason' test could be a test which could operate to interrogate the underlying reasons for the conduct in question. In contrast to the British 'but for' approach outlined above, by allowing for an interrogation of the reasons for the treatment, this could allow for differentiating between different treatment and discriminatory treatment.

However, in application, the 'real reason' test has several difficulties. First, as can be seen from the different judgments in *Purvis*, it is difficult to conclude in many cases what the 'true basis' or 'real reason' for conduct is. This is because as a person's reasoning process can occur on many levels of conscious and unconscious thought. Second, this approach seems to introduce a judicially

[820] *Purvis v New South Wales* (2003) 217 CLR 92, 163 (Gummow, Hayne and Heydon JJ).
[821] Ibid 159 (Gummow, Hayne and Heydon JJ), 127 (McHugh and Kirby JJ).
[822] Ibid 102–103 (Gleeson CJ).
[823] Ibid 174 (Callinan J).
[824] Ibid 144–145 (McHugh and Kirby JJ).

created defence of a 'pure motive' which allows for discriminatory conduct where it is done for a good and necessary reason. Again, this can be seen from Gleeson CJ and Callinan J's focus on the concerns for the welfare of staff and other students as a justification for expelling Daniel.[825] This defence of 'pure motive' or other justification is also apparent in *Malaxetxebarria v Queensland* ('*Malaxetxebarria*'). In *Malaxetxebarria* the Queensland Court of Appeal found that it was not discriminatory to prevent a gifted nine-year old from entering high school. This was because the education department had not prevented her from doing so *because of* her age, but because of a concern for her welfare and social development.[826] The focus on the 'true basis' for the decision allows for justification on the basis of pure motivation and does not conceive of the role of discrimination law as being to remedy discrimination based on unconsciously held biases. This emphasis continues to reflect a 'lay'[827] understanding of discrimination which conceptualises discrimination as a singular action in which a degree of fault needs to be established for discrimination to be unlawful.

Third, by focusing on what is in the mind of the duty-bearer rather than an objective assessment of the impact of the treatment it becomes very difficult for a complainant to prove that the conduct occurred because of the attribute without an explicit statement by the duty-bearer.[828] Ultimately, as Thornton and Hunyor acknowledge, it is the duty-bearer who has all the information which is essential in order for the complainant to prove their case.[829]

In many of the more recent cases where direct discrimination has been proven, there has been some kind of explicit slur or statement that the attribute was the reason why the conduct occurred. For example, racial discrimination was found in *Qantas Airways Ltd v Gama*,[830] where the

[825] Ibid 102–103 (Gleeson CJ) and 174 (Callinan J).
[826] [2007] QCA 132 [32]. Another example of this kind of defence of 'pure motive' is seen in *Bropho v Western Australia* (2008) 169 FCR 59, 80 where the complainant's removal from an indigenous community was not an act done 'by reference to' her race but because of she had been a member of a dysfunctional community.
[827] Khaitan, *A Theory of Discrimination Law*, above n 18, 1–3. See also: Denise Réaume, 'Harm and Fault in Discrimination Law: The Transition from Intentional to Adverse Effect Discrimination' (2001) 2(1) *Theoretical Inquiries in Law* 349.
[828] The difficulties in proofing race discrimination in particular have been the subject of academic commentary including in Jonathon Hunyor, 'Skin-Deep: Proof and Inferences of Racial Discrimination in Employment' (2003) 25(4) *Sydney Law Review* 535, 538-539; Allen, 'Reducing the Burden of Proving Discrimination in Australia', above n 436, 583; de Plevitz, above n 35. On the higher standards of evidence required in race discrimination claims see also *Sharma v Legal Aid (Qld)* [2002] FCAFC 196 [40], though see the statements in *Victoria v Macedonian Teachers Association of Victoria* (1999) 91 FCR 47 [21] and *Qantas Airways Ltd v Gama* (2008) 167 FCR 537 [134] which suggest that the standard of evidence required is dependent on the circumstances of the case.
[829] Margaret Thornton, *The Liberal Promise*, above n 44, 180; Jonathon Hunyor, above n 816, 552.
[830] (2008) 167 FCR 537.

complainant was subject to explicit racial slurs in the workplace.[831] Similar findings were also made in *Vata-Meyer v Commonwealth*. In cases of discrimination on the grounds of sexual orientation, in *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd*[832] and *OV and OW v Members of the Board of Wesley Mission Council*[833] direct discrimination was found where the complainants had been explicitly denied services on the basis of their sexual orientation.[834] Alternatively, discrimination has been found where the conduct complained of was a long-standing and overtly discriminatory government policy such was the case in *Baird v Queensland*.[835] While in theory and as acknowledged recently in *Ferris v Victoria*, direct discrimination could be proven through inferences based on the surrounding circumstances, there are few appellate court decisions in which this has occurred.[836]

The understanding of causation as requiring the court to establish the 'real reason' for the duty-bearer's conduct is in keeping with its approach to discrimination law which requires motivated fault. In the Australian conception of discrimination law, its purpose is *only* to provide for protection from overt and explicitly unfavourable treatment on the basis of an attribute. This is distinctive to the approach adopted by the British courts to direct discrimination because it directly engages with the reason for the treatment in every case.

In contrast to the British approach to direct discrimination, this approach does not accept that discrimination law and, in particular direct discrimination, has any role to play in prohibiting conduct caused by implicit bias or thoughtlessness. This is despite the fact, as Gaze and Smith, articulate that the text gives very little guidance as to how 'based on' or 'because of' should be proven.[837] This approach reflects the limited purpose of Australian discrimination law as a

[831] (2008) 167 FCR 537, 564 (French and Jacobson JJ). See also *Vata-Meyer v Commonwealth* [2015] FCAFC 139 [85] in which the complainant was also subject to racial slurs in the workplace. In this case, whether the comments amounted to a contravention of the *Racial Discrimination Act 1975* was remitted to the Federal Circuit Court for rehearing. For further discussion of the decision in *Vata-Meyer* see: Beth Gaze and Joanna Howe, 'It Is (Not) Ok to Offer "Black Babies" to Indigenous Employees in the Commonwealth Public Service' (2016) 23(3) *Australian Journal of Administrative Law* 119. Cf: *Hagan v Trustees of the Toowoomba Sports Ground Trust* (2001) 105 FCR 56 in which the naming of a sportsground stand using a racial epithet did not constitute race discrimination.
[832] (2014) 50 VR 256.
[833] (2010) 79 NSWLR 606
[834] (2014) 50 VR 256, 278 (Maxwell P) and 367 (Neave JA). In the case of *OV* however this was justified on the basis of a specific exemption with respect to acts done in accordance with religious belief: Ibid 625 (Basten JA and Handley JA). For a discussion of these cases and religious exemptions in Australian discrimination law see: Murphy, above n 420; Liam Elphick, 'Sexual Orientation and Gay Wedding Cake Cases under Australian Anti-Discrimination Legislation: A Fuller Approach to Religious Exemptions' (2017) 38(1) *Adelaide Law Review* 149.
[835] For example, a claim that the underpayment of wages for over 10 years constituted race discrimination was successful: *Baird v Queensland* (2006) 156 FCR 451, 472 (Allsop J, with Spender and Edmonds JJ agreeing).
[836] [2018] VSCA 240 [23]. One example is *Lighting Bolt Co Pty Ltd v Skinner* [2002] QCA 518 in which two older workers were dismissed and two younger workers were hired the next week to perform the same job. The QCA accepted the inference that the men were dismissed due to their age.
[837] Gaze and Smith, above n 294, 116–118.

mechanism to punish duty-bearers, particularly though the invocation of the 'pure motive' defence, rather than create broader social change.

5.2.3 Canada

In the Canadian context, to prove *prima facie* discrimination, the complainant is required to prove that their attribute was a 'factor' in the adverse treatment that is complained of. In *Stewart v Elk Valley Coal Corp* ('*Stewart*') the Supreme Court accepted that this factor does not need to be a 'significant factor' but only a 'factor' in the adverse treatment.[838] The Court has further cautioned lower courts not to equate this term with other terms of causality.[839] As Oliphant has outlined, the Supreme Court's Code jurisprudence over a number of decades revealed a relatively light burden being placed on claimants to prove *prima facie* discrimination.[840] Complainants simply had to identify a differential effect of a rule to establish a causal link between their treatment and their attribute.[841] This is a factual rather than normative burden as the complainant simply needs to show *difference* while it is for the respondent to explain and justify the difference as not discriminatory.[842] This places the normative or substantive burden on defendants rather than claimants. Réaume argues that this is a distinctive feature of the Code jurisprudence as compared to the *Charter* jurisprudence because in *Charter* claims, the complainant is required to show substantive discrimination at the outset (with various accounts given of that 'substance': whether based upon dignity, stereotyping or another kind of disadvantage).[843]

The benefit of the approach under the Code with a relatively light burden on claimants is that it allows for a wider conception of the concept of discrimination. This is because the focus is on the effect of the treatment rather than the reason of the duty-bearer. In contrast to the approach adopted by the British courts, it lacks the rigidity of the 'but for' test as it can accommodate an understanding that the different treatment is not necessarily discrimination. It is also more flexible than the Australian 'real reason' test in that it requires the attribute to only be a 'factor' rather than the 'true' or 'real' reason for the conduct. However, some of the more recent case law seems to be moving away from this division of burden and has shifted to requiring a plaintiff to prove substantive discrimination at the *prima facie* stage.

[838] *Stewart v Elk Valley Coal Company* [2017] SCR 591, 616.
[839] [2017] SCR 591, 615–616.
[840] Benjamin Oliphant, '*Prima Facie* Discrimination: Is *Tranchemontagne* Consistent with the Supreme Court of Canada's Human Rights Code Jurisprudence', above n 165, 47.
[841] Ibid 36.
[842] Ibid.
[843] Réaume, 'Defending the Human Rights Codes from the *Charter*' above n 59, 80.

The relatively light burden placed upon claimants in proving *prima facie* discrimination is demonstrated in numerous Supreme Court decisions. Thus, in a number of mandatory retirement age claims referenced in 4.3.3 including *Ontario Human Rights Commission v Etobicoke, Large v Stratford (City)*,[844] *Saskatchewan (Human Rights Commission) v Saskatoon (City)*[845] and more recently in *New Brunswick (Human Rights Commission) v Potash Corporation of Saskatchewan Inc*[846] the Supreme Court simply accepts that a *prima facie* claim exists on the basis of the existence of the mandatory retirement age. Instead, the discussion centres on whether the retirement policy can be justified. Similar findings have been made regarding policy exclusions on the basis of gender and disability including in *Zurich Insurance Co v Ontario (Human Rights Commission)*,[847] *Battleford and District Co-Operative Ltd v Gibbs*,[848] and *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* ('*Grismer*').[849] In cases where a rule has caused a different effect on the basis of religion such as in *Central Okanagan School District No 23 v Renaud*;[850] *Central Alberta Dairy Pool v Alberta (Human Rights Commission),*[851] *Bhinder*;[852] and *Commission scolaire régionale de Chambly v Bergevin*[853] the Supreme Court accepted the *prima facie* case and the focus shifted to the defendant to justify the rule's existence.

The reason for this relatively low burden is to avoid some of the problems articulated in the consideration of the Australian jurisprudence on reason and cause. In the Canadian context, as Sheppard and Chabot have recently argued, in many of these cases the defendants hold all of the evidence about the rationale and reasons underlying their conduct or the rule that they have put in place.[854] The older Canadian jurisprudence recognises this and thus places a higher burden on the defendant to justify their conduct. This was articulated in the Ontario Court of Appeal judgment of *Peel Law Association v Pieters*:

> The question whether a prohibited ground is a factor in the adverse treatment is one for the applicant. Respondents are uniquely positioned to know why they refused an application for a job or asked a person for identification. In race cases especially, the outcome depends on the

844 [1982] 1 SCR 203.
845 [1989] 2 SCR 1297.
846 [2008] 2 SCR 604.
847 [1992] 2 SCR 321.
848 [1996] 3 SCR 566.
849 [1999] 3 SCR 868.
850 [1992] 2 SCR 970.
851 [1990] 2 SCR 489.
852 [1985] 2 SCR 561.
853 [1994] 2 SCR 525.
854 Colleen Sheppard and Mary Louise Chabot, 'Obstacles to Crossing the Discrimination Threshold: Conntecting Individual Exclusion to Group-Based Inequalities' (2018) 96(1) *Canadian Bar Review* 1.

> respondents' state of mind, which cannot be directly observed and must almost always be inferred from circumstantial evidence.[855]

Despite this rationale for the relatively light burden, in a number of appellate cases since the late 2000s, a higher evidential and substantive burden has been placed upon complainants in order to prove their claims. The case most clearly evidencing this higher evidential burden is *Quebec (Commission des droits de la personne et des droits de la jeuness) v Bombardier Inc (Bombardier Aerospace Training Center)* ('*Latif*') [856] a case which concerned the existence of racial profiling. In *Latif*, the complainant (a Canadian citizen of Pakistani descent and a practising Muslim) [857] argued that a denial of flight training services by the respondent constituted race discrimination. The respondent argued that it denied training services based upon a decision of the United States government to refuse security approval. The complainant provided expert evidence of wide spread racial profiling of Arabs and Muslims by the United States government since 9/11.[858] In considering the claim, Justices Wagner and Côte writing for the unanimous court found that there was insufficient evidence to support a finding that Latif's national or ethnic origin was a 'factor' in the refusal of security clearance.[859] In doing so, the Court rejected the expert evidence on the prevalence of racial profiling on the basis that the evidence provided was not specifically related to the industry context in which the complaint took place. [860] As highlighted by both Sheppard and Chabot, and Vizkelety, the resistance to inferential evidence to prove the *prima facie* case makes it more difficult for a

[855] *Peel Law Association v Pieters* [2013] ONCA 396. A similar approach was also adopted in *Shaw v Phipps* [2012] ONCA 155 and *Bertrand v Commission des droits de la personne et des droits de la jeunesse* 2014 QCCA 2199. Cf: *Vancouver Area Network of Drug Users v Downtown Vancouver Business Improvement* [2018] BCCA 132; *Canadian Elevator Industry Welfare Trust Fund v Skinner* 2018 NSCA 31; *Nova Scotia Liquor Corporation v Nova Scotia (Board of Inquiry)* 2016 NSCA 28.

[856] *Quebec (Commission des droits de la personne et des droits de la jeuness) v Bombardier Inc (Bombardier Aerospace Training Center)* [2015] 2 SCR 789. For a discussion of this case and the application of Human Rights Codes to racial profiling and unconscious bias see: Sheppard and Chabot, above n 854; Ranjan K Agarwal, Faiz M Lalani and Misha Boutilier, 'Lessons from Latif: Guidance on the Use of Social Science Expert Evidence in Discrimination Cases' (2018) 96(1) *Canadian Bar Review* 37; Reem Bahdi, 'Narrating Dignity: Islamophobia, Racial Profiling and National Security Before the Supreme Court of Canada' (2018) 55(2) *Osgoode Hall Law Journal* 557; Reem Bahdi, 'Arabs, Muslims, Huamn Rights, Access to Justice and Institutional Trustworthiness: Insights from Thirteen Legal Narratives' (2018) 96(1) *Canadian Bar Review* 72. The approach to *prima facie* discrimination has since been applied in the following cases: *Stewart v Elk Valley Coal Corp* [2017] 1 SCR 591; *University of British Columbia v Kelly* 2016 BCCA 217; *Vancouver Area Network of Drug Users v Downton Vancouver Business Improvement Association* 2018 BCCA 132; *Webber Academy Foundation v Alberta (Human Rights Commission)* 2018 ABCA 207*; SGEU v Saskatchewan (Environment)* 2018 SKCA 48.

[857] [2015] 2 SCR 789, 797 (Wagner and Côte JJ, with the Court agreeing).

[858] [2015] 2 SCR 789, 818–819.

[859] Ibid.

[860] Ibid 820.

complainant to prove their case, particularly in cases relating to unconscious bias and in turn fails to allow for a critical analysis of the circumstances of the case and the conduct of the defendant.[861]

This higher evidentiary standard has been further coupled with normative or substantive burdens being placed upon complainants. Rather than simply requiring the complainant to show that their attribute was the link between the cause and effect, complainants are being required to show that the decision, rule or policy is arbitrary or based upon a stereotype. In *Ontario (Director, Disability Support Program) v Tranchemontagne*,[862] the Ontario Court of Appeal concluded that the test for *prima facie* discrimination required proof of disadvantage on the basis that the policy in question perpetuated prejudice and stereotyping.[863] While not in such explicit terms, Oliphant argues that the decision in *Armstrong v British Columbia (Ministry of Health)*[864] also reflects this renewed focus on prejudice and stereotype though the decision does not utilise those terms.[865] Instead, the British Columbia Court of Appeal accepts the necessity of finding the 'true' reason for the treatment and the 'true role played by' the prohibited ground.[866] Both of these decisions were based upon Abella J's minority judgment in *McGill University Health Centre (Montreal General Hospital) v Syndicat Des Employes De L'Hopital General de Montreal*[867] which will be discussed further in Chapter Six. In 2017, in *Stewart v Elk Valley Coal*,[868] the Supreme Court considered the question whether proving arbitrariness or stereotyping was a separate step of the *prima facie* test. The majority judgment concluded that whilst it was not a separate step, the prevention of treatment which perpetuated stereotypes was accommodated through the need to prove that the attribute was a 'factor' in the disadvantage.[869]

The confusion over both the evidentiary and normative burdens placed upon claimants could be attributed to, as in the British and Australian case law discussed above, a failure to articulate the purpose of discrimination law. The lack of clarity over both the evidence that a complainant is to provide, and the kind of disadvantage or difference that they must show gives little account of the kinds of harms that discrimination law is designed to prevent. While Canadian courts are given

[861] Sheppard and Chabot, above n 854, 15 and Béatrice Vizkelety, 'Revisiting the *Prima Facie* Case and Recognising Stereotypes Based on Unconscious Bias in Racial and Ethnic Discrimination' (2013) 20 *Charter & Human Rights Litigation* 45, 49 and 51.
[862] 2010 ONCA 593.
[863] Ibid [72].
[864] 2010 BCCA 56.
[865] Oliphant, '*Prima Facie* Discrimination: Is *Tranchemontagne* Consistent with the Supreme Court of Canada's Human Rights Code Jurisprudence', above n 165, 40.
[866] 2010 BCCA 56 [25]–[28].
[867] [2007] 1 SCR 161.
[868] [2017] 1 SCR 591.
[869] Ibid [45].

significantly more scope to elaborate and construct the tests to prove discrimination than in Australia or in the United Kingdom, without an underpinning rationale, the test still fails to be effective in clearly identifying discriminatory conduct.

5.3 Justification

In this final section, I will consider the different ways in which discriminatory conduct can be justified. The ways in which discriminatory conduct can be justified are different in each jurisdiction, as explained in 2.3.2. Understanding and comparing the different interpretations given to justificatory provisions provides a useful illustration of the different ways in which the courts understand the 'balance' or 'compromise' that discrimination law represents.[870] As Blackham has commented, though only in the context age discrimination, exceptions reflect the normative limits the state has placed upon non-discrimination rights.[871] I apply this idea to examine and interrogate the different approach to justifications which are reflected in the appellate-level case law from each jurisdiction. As Thornton, drawing on the work of Julius Stone, has argued, justification represents a 'lee-way of choice' for the court in determining the kinds of behaviours, practices and rules can be justified.[872] I will develop an account of how this 'lee-way of choice' has developed in each jurisdiction.

I will argue that the approach to justification can illustrate each jurisdiction's understanding of the extent to which Parliament intended to eliminate discrimination. As previously explained in Chapter Two, the justification defence which applies to indirect discrimination in Australia and the United Kingdom and to *prima facie* discrimination in Canada is also understood differently, in part due to the different wording of the legislation.[873] In the United Kingdom indirect discrimination is justified where it is a proportional response to a legitimate aim.[874] In Australia, indirect discrimination is justified where it is reasonable.[875] In Canada, *prima facie* discrimination is

[870] Blackham, 'A Compromised Balance?', above n 582, 1092.
[871] Ibid.
[872] Thornton, 'Sex Discrimination, Courts and Corporate Power', above n 17, 44 citing Julius Stone, *Legal System and Lawyers' Reasoning* (1968) 325 – 330 *et passim*. See also: Julius Stone, *Human Law and Human Justice* (Oxford University Press, 1965) 328. See also Julius Stone, 'Reasons and Reasoning in Judicial and Juristic Argument' (1964) 18 *Rutgers Law Review* 757; Julius Stone, 'On the Liberation of Appellate Judges: How Not to Do It' (1972) 35(5) *Modern Law Review* 243.
[873] See 2.3.2.
[874] *Equality Act 2010* (UK) s 19(2)(d).
[875] See for example the definitions in the Commonwealth Acts: *Racial Discrimination Act 1975* (Cth) s 9(1A); *Sex Discrimination Act 1984* (Cth) ss 5(1), 5A(1), 5B(1), 5C(1), 6(1), 7(1), 7A(1), 7AA(1), *Disability Discrimination Act 1992* (Cth) s 5; *Age Discrimination Act 2004* (Cth) s 14.

justified where it is a *bona fide* requirement.[876] How courts have understood and applied the justification defence has differed in each jurisdiction, as will be discussed below.

5.3.1 United Kingdom

As in many other areas of discrimination law in the United Kingdom, the approach to justification has changed significantly over time, in part, based on EU Directives and ECJ jurisprudence. Under the historical Acts, a defendant was required to show that the provision was justifiable despite the fact that it had a disproportionate impact on protected groups. Hepple argued that this standard was interpreted in a manner which reinforced social norms by requiring defendants to simply show 'adequate grounds…which would be acceptable to right thinking people'.[877] Hepple utilised *Ojituku v Manpower Services Commission* ('*Ojituku*') to illustrate this argument.[878] In *Ojituku*, the Court justified a requirement for managerial experience to receive bursaries for a business course even though it caused a disproportionate effect on West African applicants who lacked management experience due to historical discrimination.[879] The correct approach to justification under the historical Acts was clarified in *Hampson v Department of Education and Science* ('*Hampson*')[880] and approved by the House of Lords in *Webb v EMO Cargo (UK) Ltd*.[881] In *Hampson*, the Court of Appeal advocated for a proportionality test which balanced the discriminatory effect of a policy or rule against the reasonable needs of a business or governmental agency.[882]

The justificatory standard applied to indirect discrimination in the *Equality Act 2010* (UK) is one found in the Directives and the ECJ jurisprudence.[883] To justify discrimination, a respondent is required to show that the condition is a proportionate means to achieve a legitimate aim. This legitimate aim need not be based on broad social objectives but can be based upon a consideration of a variety of factors including those specifically related to the business or policy in question.[884] This can be contrasted to the approach to justifying age discrimination discussed in 4.3.1. The key British case on understanding the elements of justification is *R (Elias) v Secretary of State for Defence*

[876] See for example: *Canadian Human Rights Act* RSC 1985, c H-6 s 15(1).
[877] Bob Hepple, 'Can discrimination ever be fair?' in Kitty Malherbe and Julia Sloth Nielson, *Labour law into the future: essays in honour of D'Arcy du Toit* (Claremont, 2012) 11.
[878] Ibid.
[879] [1982] ICR 661, 667–668.
[880] [1989] ICR 179, 191 (Balcombe LJ).
[881] [1993] 1 WLR 49, 56 (Lord Keith).
[882] [1989] ICR 179, 191 (Balcombe LJ).
[883] *Seldon v Clarkson Wright & Jakes and Secretary of State for Business, Innovation and Skills* [2012] UKSC 16 [18] (Baroness Hale); *Aster Communities Ltd (Formerly Flourish Homes Ltd) v Akerman-Livingstone* [2015] AC 1399, 1416–1417 (Baroness Hale); see also Monaghan, *Monaghan on Equality Law*, above n 171, 347.
[884] See 4.3.1 for a discussion of justification of age discrimination. Although note obiter in *R (E) v Governing Body of JFS and the Admissions Appeal Panel of JFS* [2010] 2 AC 728, 776 (Lord Mance citing *Huang v Secretary of State for the Home Department* [2007] UKHL 11).

('*Elias*').[885] *Elias* concerned a compensation scheme for British citizens who were interned by occupying Japanese forces in Hong Kong during the Second World War.[886] The complainant was interned because she was a British subject. Nonetheless, she was excluded from the compensation scheme on the basis that at the time of her internment she was not a British citizen.[887] She claimed that the exclusion of her and persons like her (interned as British subjects but not British citizens) was racially discriminatory.[888] The defendant conceded, and the court accepted, that this scheme constituted indirect discrimination and had a disproportionate impact because of race or national origin.[889] But the defendant argued that it could be justified as a proportionate means to achieve a legitimate aim.[890] The legitimate aim of the policy was to limit the eligibility for the payment by requiring close links with the United Kingdom.[891] The Court of Appeal concluded that the policy adopted by the Secretary of State for Defence could not be justified.[892]

The Court of Appeal in *Elias* developed the approach to justifying indirect discrimination, particularly where the discrimination is perpetrated by a government entity. Mummery LJ advocated for a three-step approach, drawing on the Privy Council case of *de Freitas v Permanent Secretary of the Ministry of Agriculture, Fishers, Lands and Housing*,[893] and the Canadian Supreme Court decision in *R v Oakes*:[894]

> First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective.[895]

This approach has received support from the Supreme Court.[896] First, Mummery LJ emphasised that, when at the stage of considering a legitimate aim, cost and administrative convenience were not factors to be taken into account.[897] Second, the standard of justification in race discrimination was the exacting European standard of proportionality.[898] This high standard of scrutiny requires that the policy or rule in question must be appropriate with a view to achieving the objective and

[885] *Secretary of State for Defence v Elias* [2006] 1 WLR 3213.
[886] Ibid 3221 (Mummery LJ).
[887] Ibid 3221–3222 (Mummery LJ).
[888] Ibid.
[889] Ibid 3228–3229 (Mummery LJ).
[890] Ibid 3252 (Mummery LJ).
[891] Ibid 3228 (Mummery LJ).
[892] Ibid 3252 (Mummery LJ).
[893] [1999] 1 AC 69, 80.
[894] [1986] 1 SCR 103.
[895] Ibid 3251.
[896] *Seldon v Clarkson Wright & Jakes and Secretary of State for Business, Innovation and Skills* [2012] ICR 716, 735.
[897] [2006] 1 WLR 3213, 3248.
[898] [2006] 1 WLR 3213, 3249–3250 relying on *Bilka Kaufhaus GmbH v Weber von Harz* [1986] ECR 1607.

be necessary to that end.[899] Mummery LJ rejected the proposition that it was enough for the respondent to 'reasonably consider the means chosen as suitable for attaining the aim.'[900] He further emphasised that a stringent standard of scrutiny would apply when seeking to justify indirect discrimination, where it was based on 'racial grounds.'[901] Further, Mummery LJ rejected the approach advocated by the respondent which relied significantly on the concepts of margin of appreciation and discretionary judgments developed in the context of Art 14 of the ECHR.[902] He concluded that this standard did not apply to domestic discrimination law, which required a higher standard of justification, even in respect of social and economic policy an area where there is a traditional deference given to the executive.[903]

The articulation of the proportionality test in *Elias* has received support from the Supreme Court in a number of subsequent cases including *JFS,*[904] *Seldon*[905] and *Akerman-Livingstone v Aster Communities Ltd (formerly Flourish Homes Ltd)*.[906] While the test as outlined in *Elias* appears to place a relatively high burden on defendants to justify their conduct, there are two problems. First, as is demonstrated in the decision of *JFS*, results can differ depending on a judge's own values and sense of what is 'proportional'.[907] In *JFS*, Lord Mance took a broad view of the discriminatory impact of the school's policy and considered policy's impact on society more generally.[908] Lord Mance (with Baroness Hale, Lord Kerr, Lord Hope and Lord Clark, agreeing on this point) concluded that if the policy was indirectly discriminatory, it could not be justified.[909] In contrast, Lord Roger and Lord Brown narrowed their focus to consider in significantly more detail the needs of the school.[910] On their analysis they concluded that the policy was justified. Without a clearer identification of how the proportionality test should be applied, results will seemingly depend on the judge's own sense of justice.[911]

899 See also: *British Airways plc v Starmer* [2005] IRLR 862.
900 [2006] 1 WLR 3213, 3248–3249.
901 Ibid 3249, relying on the judgment of Lord Fraser in *Orphanos v Queen Mary College* [1985] AC 761.
902 Ibid 3252.
903 Ibid.
904 [2010] 2 AC 728.
905 [2012] ICR 716, 735.
906 [2015] AC 1399.
907 [2010] 2 AC 728.
908 Ibid [97]–[100].
909 Ibid.
910 Ibid [233] (Lord Rodger) and [255] (Lord Brown)
911 This case was used as a test case to determine the way in which a judge's own values can influence a decision: Cahill-O'Callaghan, above n 53. The manner in which differed values and rights can be understood and balanced differently can also be seen in *Mba v Merton London Borough Council* [2014] 1 WLR 1501 [34]–[35].

Second, as identified recently by Lane and Ingleby,[912] courts and in particular the Employment Appeals Tribunal are simply not applying the findings in *Elias* and are instead reverting to the old test outlined originally in *Hampson* and re-articulated in *Barry v Midland Bank*[913] and *Hardy & Hanson plc v Lax*.[914] Lane and Ingleby suggest that the failure to apply the proportionality test as articulated in *Elias* may be linked to the failure to consider the discriminatory nature of the PCP in a broad sense as outlined in 5.1.1.2.[915] More generally, this again appears to be a failure to understand the justificatory provisions with an eye to an overarching purpose or aim of discrimination law.

5.3.2 Australia

In contrast to the British proportionality approach, the Australian standard for justifying indirect discrimination hinges on whether the requirement or condition is 'reasonable.' As Stone noted long ago, the concept of reasonableness is one which is 'slippery and even treacherous."[916] The understanding and application of the justifications for discriminatory conduct will be examined in this section. I will argue that while reasonableness *could* require a reasonably high standard of justification, over time the Australian approach to justification has come to involve a standard so low that respondents may only need to show that the requirement has an 'understandable logical basis."[917] In many ways, the Australian approach shows little development from the old common law position discussed in 2.1 where a rule can be justified so long as it has a rational basis. This is consistent with an Australian approach to discrimination, which is grounded in the finding of fault and punishment. As was emphasised in the *Financial Services Case*, the fact that discrimination legislation is beneficial is no justification for interpreting the exceptions narrowly.[918] Relying on the reasoning in *IW v City of Perth*, the Full Federal Court in the *Financial Services Case* concluded that the interpretation of the justification provisions could not be informed by a broader understanding of discrimination.[919]

In *Secretary, Department of Foreign Affairs and Trade v Styles*, 'reasonable' was described in the case law as a standard which is 'less demanding than one of necessity but more demanding than a test of

[912] Jackie A. Lane and Rachel Ingleby, 'Indirect Discrimination, Justification and Proportionality: Are UK Claimants at a Disadvantage?' (2018) 47(4) *Industrial Law Journal* 531, 535.
[913] [1999] 1 WLR 1465.
[914] [2005] ICR 1565.
[915] Lane and Ingleby, above n 912, 525.
[916] Stone, *Human Law and Human Justice*, above n 869, 328.
[917] *Sklavos v Australasian College of Dermatologists* (2017) 256 FCR 247, 264 (Bromberg J).
[918] *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission and Anor* (1997) 80 FCR 78, 88 (Davies J). For a discussion of this case see Tarrant, above n 23.
[919] (1997) 80 FCR 78, 116 (Sackville J).

convenience.'[920] In *Waters v Victoria Public Transport Corporation,* the High Court determined that a court is required to weigh all the relevant factors in the assessment of the reasonableness of the standard and balance the interests of the complainant and the respondent.[921] In *Clarke*, the Full Court of the Federal Court described the test as one which is 'objective' with the complainant bearing the burden of proof in demonstrating a lack of reasonableness.[922] Notwithstanding this, in *Sklavos*, Bromberg J emphasised that it is not enough to show there are less discriminatory ways of achieving the same outcome. Instead, a complainant must demonstrate that there is something inherently unreasonable about the specific requirement or condition which is being challenged.[923] Employment conditions have been found to be reasonable where they are 'fair' and 'based on merit'[924] regardless of their disproportionate impact or examination of the biases underlying these terms. Further, conditions have been found to be reasonable where they are considered in the context of the whole employment 'package' for all employees.[925] In the most recent appellate court decision, *Sklavos*,[926] it was accepted that an examination scheme was reasonable because it would have been 'expensive and time-consuming' to develop a new examination scheme.[927] This determination was made without the respondent being required to provide any evidence at all as to cost or time involved with developing different assessment for persons with disabilities.[928]

The cases on other exemptions in the legislation reflect a similar approach. As was outlined in Chapter Four with respect to age discrimination in the employment context, the Australian courts have interpreted 'inherent requirements' to include requirements which really can only be considered 'administrative conveniences.'[929]

A similar approach has been adopted with respect to the understanding of unjustifiable hardship in the context of the requirement to make adjustments for persons with disabilities. In *King v Jetstar Airways Pty Ltd*, for instance, the complainant argued that a policy that only allowed for two

[920] (1989) 23 FCR 251, 263 (Bowen CJ and Gummow J).
[921] (1991) 173 CLR 349, 383 (Deane J) and 395–396 (Dawson and Toohey JJ).
[922] (2004) 138 FCR 121 [115] *Australian Medical Council v Wilson* (1996) 68 FCR 46, 61–62 (Healy J) and *Commonwealth Bank v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78, 112–113 (Sackville J). The position with respect to the burden of proof was reversed through the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) s 17.
[923] (2017) 256 FCR 247, 269–270 (Bromberg J).
[924] *Secretary, Department of Foreign Affairs and Trade v Styles* (1989) 23 FCR 251, 264 (Bowen CJ and Gummow J).
[925] *Commonwealth Bank of Australia v Human Rights and Equality Commission and Anor* (1997) 80 FCR 78 (A similar decision was reached in *Commonwealth v Human Rights and Equal Opportunity Commission* (1995) 63 FCR 74).
[926] (2017) 256 FCR 247.
[927] Ibid 262 (Bromberg J).
[928] Ibid.
[929] See discussion in 4.3.2. In respect of similar conclusions in respect of disabilities see: *Chivers v Queensland* [2014] 2 Qd R 561 and *Teachers Registration Board of South Australia v Edwards* (2013) 117 SASR 246.

wheelchair users per flight by the defendant airline constituted disability discrimination.[930] The Full Federal Court accepted that this constituted disability discrimination but concluded that it was not unlawful because of the unjustifiable hardship that would have been caused to the airline.[931] The Full Court concluded that there was unjustifiable hardship because Jetstar was a budget airline that operated on tight margins and short turn-around times for flights.[932] The Court inferred that more wheelchairs would cause considerable delays and cancellations causing inconvenience to other passengers and loss of profits.[933] With respect to unjustifiable hardship, the focus is not on the broader challenge to facilitate accommodation of difference but instead on the continuation of existing practices on the basis of 'cost and convenience.' It is notable that when similar arguments have been raised in both the United Kingdom and Canada regarding wheelchairs and the provision of transportation, particularly by 'low-cost' airlines,[934] these have been rejected. Instead, providers of transportation have been required to adapt their services in order to accommodate persons with disabilities.[935]

The approach to justification is consistent with that adopted in respect of proving discrimination: one which is focused on fault and punishment. Accordingly, policies and practices that are part of broader operational plans or have some kind of rational or logical basis are not captured by discrimination law.

5.3.3 Canada

The Canadian approach to justification is distinctive to that taken in the United Kingdom and Australia discussed above. In Canada, a practice will not be unlawful discrimination where it is a bona fide requirement. In determining whether a practice is 'bona fide,' a court is required to consider whether it would cause 'unjustifiable hardship' for a respondent to avoid the discriminatory outcome. The attitude adopted to this justificatory standard is distinctive due to the greater burden than in Australia or the United Kingdom that is placed on the respondent to justify the necessity of the standard in place. This approach requires defendants to provide evidence of the need for the particular standard and to provide evidence that no less discriminatory means could be utilised.

930 (2012) 293 ALR 613.
931 (2012) 293 ALR 613 [24].
932 (2012) 293 ALR 613 [39].
933 Ibid.
934 See for example: *Ross v Ryanair Ltd* [2004] 1 WLR 2447.
935 *Ross v Ryanair Ltd* [2004] 1 WLR 2447; *Paulley v First Group Plc* [2017] 1 WLR 423; *Council of Canadians with Disabilities v VIA Rail Canada Inc* [2007] 1 SCR 650.

What is notable is that, in general, the Canadian legislation does *not* place the burden of proof for establishing a bona fide requirement on a respondent. This is, instead, a judicial construct. When establishing the test for *prima facie* discrimination, the Supreme Court of Canada in *O'Malley* established that it was for the respondent to justify discriminatory conduct.[936] From the 1980s it was established that the test for justification was relatively strict. In contrast to the Australian approach outlined above at 5.3.2 which concluded that the existence of reasonable alternatives does not prove that the respondent's preferred standard is not reasonable, this is precisely the approach adopted in Canada. As Wilson J commented in *Central Alberta Dairy Pool*: 'if a reasonable alternative exists to burdening members of a group with a given rule, that rule will not be a [bona fide requirement].'[937]

The test for justification was re-established and explained in significant detail in *Meiorin*.[938] In *Meiorin*, McLachlin J proposed a three-step test for determining whether a discriminatory standard is a bona fide requirement. This three-step test involves the respondent proving on the balance of probabilities that: (1) the standard was adopted for a legitimate purpose; (2) it was adopted in an honest and good faith belief that it was necessary to fulfil a legitimate purpose and (3) the standard is reasonably necessary to accomplish the legitimate purpose.[939] The test adopted and outlined in some depth by McLachlin J is substantially based on an approach advocated for in the academic literature, notably by Day and Brodksy.[940]

In her judgment, McLachlin J provides some detail as to what each step of the inquiry requires. The first step requires the identification of the legitimate purpose that the standard is meant to further.[941] In an employment context, the task is to determine whether this standard is rationally connected to the performance of a job. In the context of services cases it needs to be shown to be rationally connected to another legitimate purpose. Justice McLachlin considered that this first step is focused on the validity of *purpose* rather than the standard itself.[942] If the purpose of the standard is not legitimate, the discriminatory standard cannot be justified.[943] Pothier has critiqued

[936] *Ontario Human Rights Commission and O'Malley v Simpson-Sears Ltd* [1985] 2 SCR 536 [24] (McIntyre J). See also: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)* [2000] 1 SCR 665 with respect to the Quebec *Charter of Human Rights and Freedoms*.

[937] *Central Alberta Dairy Pool v Alberta (Human Rights Commission)* [1990] 2 SCR 489, 518.

[938] *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 SCR 3.

[939] Ibid 32.

[940] Day and Brodsky, above n 412.

[941] [1999] 3 SCR 3, 33–34.

[942] Ibid.

[943] Ibid.

the separation of purpose and the standard in the three-step justification test, arguing that it fails to reflect the intertwined nature of the way in which discriminatory rules operate in practice, particularly in the context of disability.[944]

Examples of a legitimate general purpose in an employment context are those centred on ensuring public or employee safety.[945] In addition, in *Brossard (Town) v Quebec (Commission des droits de la personne)*, the Supreme Court accepted that the general and legitimate purpose of an anti-nepotism policy in government hiring was to avoid actual and apparent conflicts of interest amongst public service employees.[946] In *Caldwell v Stewart*, the Supreme Court accepted that the general and legitimate purpose of a requirement to be a Catholic in order to be a teacher at a Catholic school was to ensure the religious integrity of the school's teaching environment was maintained.[947]

If the legitimacy of the general purpose of the standard is established, McLachlin J explained that the focus must then shift to the standard itself and the subjective reasons for its introduction.[948] If the respondent did not introduce the standard honestly and in good faith, it cannot be justified regardless of whether the standard is rationally connected to the general purpose.[949]

Finally, the respondent is required to show that it is reasonably necessary to achieve the legitimate purpose.[950] To show that the standard is reasonably necessary, the respondent must demonstrate that it is impossible to accommodate individual employees who share the attribute of the complainant without imposing undue hardship.[951] The relevant factors for consideration include the financial costs of accommodation, the capacity to change the workforce and its facilities and the need to protect the rights of others.[952] As accepted by Cory J in *Chambly*, these considerations should be applied with 'common-sense and flexibility in the context of the factual situation

[944] See the discussion in Dianne Pothier, 'Tackling Disability Discrimination at Work: Towards a Systemic Approach' (2010) 4(1) *McGill Journal of Law and Health* 17.
[945] *Bhinder v Canadian National Railway Co* [1985] 2 SCR 561, 590 (McIntyre J with Estey and Lamer JJ agreeing). Other examples include: *Keith v Correctional Service of Canada* 2012 FCA 117.
[946] *Brossard (Town) v Quebec (Commission des droits de la personne)* [1988] 2 SCR 279 [152] (Beetz J with McIntyre, Lamer and La Forest JJ agreeing).
[947] *Caldwell v Stuart* [1984] 2 SCR 603, 628 (McIntyre J with whom the Court agreed). Cf *Mouvement laïque québécois v. Saguenay (City)* [2015] 2 SCR 3.
[948] *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 SCR 3, 34–35.
[949] Ibid.
[950] Ibid 35–36.
[951] *Central Okanagan School District No. 23 v Renau*d [1992] 2 SCR 970, 984 (Sopinka J).
[952] *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 SCR 3, 35–36. For application of this step see also: *Canada (Attorney General) v Girouard* [2002] 4 FC 538; *Regina (City) v Kivela* 2006 SKCA 38; *Canadian Human Rights Commission v Canada (Attorney General)* [2015] 3 FCR 103 ('*Cruden*'); *Hoang v Attorney General of Canada* 2017 FCA 63; *SGEU v Saskatchewan (Environment)* 2018 SKCA 48.

presented.'[953] When considering this 'common-sense' approach, McLachlin J further elaborates that:

> Courts and tribunals should be sensitive to the various ways in which individual capabilities may be accommodated. Apart from individual testing to determine whether the person has the aptitude or qualification that is necessary to perform the work, the possibility that there may be different ways to perform the job while still accomplishing the employer's legitimate work-related purpose should be considered in appropriate cases. The skills, capabilities and potential contributions of the individual claimant and others like him or her must be respected as much as possible. Employers, courts and tribunals should be innovative yet practical when considering how this may be done in the circumstances.[954]

Further, the Canadian case law emphasises that there can be some 'hardship' placed on a respondent. As Sopinka J observed in *Central Okanagan School District No. 23 v Renaud*, 'the use of the term "undue" assumes that some hardship is acceptable; it is only "undue" hardship that satisfies this test.'[955]

Importantly, the test for justification adopted by McLachlin J in *Meiorin* is explicitly grounded in her Honour's understanding of the purpose of discrimination as requiring the accommodation of difference. Difference is to be accommodated, not on an individualistic basis but by challenging the existence of the standard or barriers:

> Employers designing workplace standards owe an obligation to be aware of both the differences between individuals and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards. By enacting human rights statutes and providing that they are applicable to the workplace, the legislatures have determined that the standards governing the performance of work should be designed to reflect all members of society, in so far as this is reasonably possible. Courts and tribunals must bear this in mind when confronted with a claim of employment related discrimination. To the extent that a standard unnecessarily fails to reflect differences among individuals, it runs afoul of the prohibitions contained in the various human rights statutes and must be replaced. The standard itself is required to provide for individual accommodation, if reasonable possible.[956] (Emphasis added)

This approach to justification emphasises and identifies accommodation of difference as a central aim of discrimination law. This approach (as well as the facts of *Meiorin*) will be more extensively discussed in Chapter Six.

The Canadian approach thus requires significantly more from respondents to justify their conduct. A useful illustration to contrast the Australian and Canadian approaches is the decision in *Council*

[953] *Commission scolaire regionale de Chambly v Bergevin* [1994] 2 SCR 525, 546 (Cory J). See also *United Nurses of Alberta, Local 115 v Calgary Health Authority* 2004 ABCA 7.
[954] *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 SCR 3, 36.
[955] *Central Okanagan School District No. 23 v Renaud* [1992] 2 SCR 970, 984.
[956] *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 SCR 3, 38.

of Canadians with Disabilities v VIA Rail Canada Inc ('*VIA Rail*').[957] In *VIA Rail*, the respondent had purchased 139 new rail cars for C$30 million.[958] None of these new cars were accessible for persons with disabilities using personal wheelchairs.[959] This meant that not all trains and all routes would be accessible for persons in personal wheelchairs.[960] Making arguments similar to those made in the Australian case of *King v Jetstar*,[961] the respondent argued that the costs involved in doing so would not be practicable and it would cause financial disincentives to other passengers.[962] However, in contrast to the Australian approach, the Canadian Supreme Court rejected the respondent's contentions. Instead, the Supreme Court emphasised that the point of undue hardship is reached only where 'reasonable means of accommodation are exhausted and only unreasonable or impracticable options for accommodation remain.' [963] In that context, although cost and efficiencies are factors to consider, they are not granted significant weight given the overarching importance of ensuring reasonably equal access to services.[964]

5.4 Comparing the approaches

In this chapter, I sought to interrogate and establish the types of conduct and behaviours that discrimination law protects people from in each jurisdiction. To do so, I focused on different interpretations and approaches adopted to three key issues: comparison, reason and cause, and justification. I sought to identify broad trends in each jurisdiction in order to provide a clearer account of the kinds of behaviours that appellate courts have understood to be discriminatory by considering the jurisprudence that has developed over decades. This has been a substantial enough study to be able to identify some broader trends.

These broader trends are that though each jurisdiction's jurisprudence has been contradictory and confusing at times, each has approached the underlying purpose of discrimination law, and the behaviour that the law prohibits differently. The sources, or other domains of law that appellate judges have drawn on in order to interpret and understand discrimination law has also been different.

[957] [2007] 1 SCR 650. Note that this was a claim brought under the *Canada Transportation Act* which requires that transport providers provide services for persons with disabilities in accordance with the principles in the *Canadian Human Rights Act* RSC 1985, c H-6*, Canada Transportation Act* SC 1996, c.10 s 5.
[958] Ibid 665 (Abella J, with McLachlin CJ, Bastarache, LeBel and Charron JJ agreeing).
[959] Ibid 666 (Abella J, with McLachlin CJ, Bastarache, LeBel and Charron JJ agreeing).
[960] Ibid 717 (Abella J, with McLachlin CJ, Bastarache, LeBel and Charron JJ agreeing).
[961] [2014] FCAFC 115 and see 5.3.2.
[962][2007] 1 SCR 650, 733–734 (Abella J, with McLachlin CJ, Bastarache, LeBel and Charron JJ agreeing).
[963] Ibid 702 (Abella J, with McLachlin CJ, Bastarache, LeBel and Charron JJ agreeing).
[964] Ibid 734–735 (Abella J, with McLachlin CJ, Bastarache, LeBel and Charron JJ agreeing).

In the United Kingdom, the jurisprudence demonstrates that often judges are unclear on the kinds of behaviours and practices that could be addressed through discrimination law. In respect of both comparison and causation, judges have attempted to avoid more complex questions. This is through simplifying the comparator question to avoid contextualising the disadvantages suffered by complainants and through simplifying the causative test in order to avoid more challenging questions as to intent and the nature of discrimination. In this context, it is notable the Supreme Court has drawn on doctrines and tests developed in tort law for unintentional torts such as the 'but for' test despite its origins for quite different purposes and addressing quite different questions. Not all of the jurisprudence avoids the more difficult questions presented by discrimination law. There are decisions such as *Hewage, Homer* and *Elias* all of which present a clearer articulation of discrimination law's aim, contextualise the disadvantage suffered and require respondents to justify their conduct to a higher standard than in most other cases.

In contrast, the Australian jurisprudence is clearer on the kinds of conduct and behaviours that discrimination law is designed to prohibit. The Australian jurisprudence is focused on finding the fault or 'guilt' of the defendant. This is demonstrated in respect each of the elements that I considered in this chapter. The approach to comparison in direct discrimination claims allows for the defendant to import the justification for their conduct into the material circumstances of the case. In the few cases addressing indirect discrimination, in at least some of the judgments, judges appear to be utilising group comparison to search for an underlying discriminatory intention. With respect to cause and reason, the Australian test of 'real reason' or 'true basis' for the conduct places significant burdens on the claimant to prove their claim and again allows for a defendant to proclaim a 'pure motive' defence. With respect to justifying indirect discrimination, over time the test has been watered down considerably so that the requirement or condition only needs to have some underlying logical basis to be considered 'reasonable', notwithstanding the discriminatory impact.

Finally, the Canadian jurisprudence can also be confusing and contradictory, particularly surrounding the *prima facie* case and the evidentiary and normative burdens which are placed upon claimants. Particularly when drawing on s 15 *Charter* jurisprudence, the tests for proving discrimination have become more rather than less complicated. However, particularly in its judgments on comparison and justification, the Supreme Court of Canada has been able to identify a clearer purpose for prohibiting discrimination. In particular, it has provided clearer articulations on the importance of prohibiting policies, behaviours and practices which unjustifiably limit a

person's opportunities because of attributes they hold. This clearer purpose has allowed for a more flexible, if not contextual approach to comparison to emerge and for a significantly more rigorous examination of defendants to justify their actions.

In Chapter Six, I will continue from this analysis of the kinds of harms that discrimination law is designed to protect people from, to assess explicit and implicit indices of purpose against a pluralist model of substantive equality to consider if any of these jurisdictions have understood and interpreted discrimination law 'creatively' in identifying and achieving these aims

6 Transformation

In this chapter, I focus on discrimination law's transformative potential. Specifically, this chapter addresses two questions. First, what have judges understood as the kinds of disadvantage that the legislature intended to address through discrimination law? Second, if and how has discrimination law been interpreted to redress these kinds of disadvantages? In answering these questions, this chapter places into focus the normative literature discussed in Chapter Three to determine whether the case law from any of the jurisdictions reflects the approaches advocated for in the normative scholarship. In each jurisdiction, courts acknowledge that discrimination law should be interpreted 'purposively' and with an acknowledgement of its 'remedial' or 'beneficial' objectives.[965] However, each jurisdiction has articulated those remedial or beneficial objectives quite differently. In this chapter, I will consider the articulations of purpose given by the judiciary. I will assess these articulations of purpose by utilising the discussion of the normative literature outlined in Chapter Three. This chapter is framed around Fredman's four dimensions of substantive equality: redistribution, reducing stigma and stereotypes, facilitating participation and accommodating difference.

In Chapter Six, I continue and build upon the analysis of the case law in Chapters Four and Five. I do so by considering how the doctrinal distinctions discussed in Chapters Four and Five are reflected in the courts' understanding of the overarching purpose of discrimination law and the extent to which discrimination law can be used to transform society through pursuing equality and eliminating discrimination. In this chapter I primarily utilise statements of purpose from the Supreme Court of the United Kingdom, Supreme Court of Canada and the High Court of Australia because these are the courts which articulate the normative foundations of discrimination law specifically and law more generally. However, I utilise appellate court decisions to both provide a clearer account of the Australian case law, given the paucity of High Court decisions, and to elaborate on how some of the cases have been utilised and interpreted by appellate courts.

*Parts of an earlier draft of 6.4 have been accepted for publication: Alice Taylor, 'Disability Discrimination, the Duty to Make Adjustments and the Problem of Persistent Misreading' (2019) 45(2) *Monash University Law Review* (forthcoming).

[965] See for example *Waters v Public Transport Corporation* (1991) 173 CLR 349, 359 (Mason CJ and Gaudron J); *Insurance Corporation of British Columbia v Heerspink* [1982] 2 SCR 145, 158 (Lamer J); *Farah v Commissioner of Police of the Metropolis* (1998) QB 65, 79 (Lord Hutchison), 83–84 (Lord Otton); in the United Kingdom see also: *Savjani v Inland Revenue Commissioners* [1981] QB 458, 466–467 (Lord Templeman LJ) and *R v Entry Clearance Officer, Bombay, Ex parte Amin* [1983] 2 AC 818, 834–835 (Lord Fraser) which rejected the conclusions in *R v Immigration Appeal Tribunal Ex parte Kassam* [1980] 1 WLR 1037.

This chapter develops my thesis' overall contribution to the existing scholarship in the following ways: first, this chapter builds on the analysis in Part II to answer the second sub-question asked in the introduction: are the different interpretations adopted in the United Kingdom, Australia and Canada a 'creative' interpretation of discrimination law? In answering this question, I establish that the purpose of discrimination law is not determined by the text or the explanatory materials but rather is based upon judicial interpretation and understanding. Second, this chapter reveals that there are distinct approaches to discrimination law's purpose, even where the jurisdictions appear outwardly similar. Finally, this chapter will demonstrate the limitations of the normative scholarship in practice as while *some* judgments reflect a pluralist or 'creative' account of discrimination law's purpose there are limitations apparent in each jurisdiction. Following the structure of the previous chapters, it first considers the British case law before continuing to consider the Australian case law and then the Canadian case law.

This chapter will conclude that in none of these jurisdictions do courts evince an approach that is entirely consistent with a 'creative' interpretation of discrimination law's purpose. The Australian approach fails to interpret discrimination law to achieve any dimensions of substantive equality. The courts in the United Kingdom understand discrimination law as a means to redress stigma and stereotype and, in cases of disability, to offer some individual accommodation. But the courts in the United Kingdom fail to utilise discrimination law to achieve a measure of redistribution or to facilitate participation. The Canadian case law reveals some degree of a transformational understanding of accommodation and it has accepted the redistributive purposes of statutory discrimination law. However, the case law also demonstrates a failure to understand the need to facilitate participation of under-represented groups. Further, the recent case law highlights that a singular focus on stereotype and stigma can continue to perpetuate rather than remove disadvantage.

6.1 Redistribution

The first of Fredman's four dimensions of substantive equality, redressing disadvantage, acknowledges that an approach to equality can be asymmetric. It focuses attention on the groups that have suffered disadvantage: women rather men, people with disabilities rather than those who are abled bodied, and people of minority backgrounds rather than those who are part of the majority.[966] This asymmetric approach distinguishes a substantive equality approach from a formal

[966] Réaume, 'Harm and Fault in Discrimination Law', above n 828, 351-352.

equality approach which would prohibit different treatment regardless of the circumstances.[967] Instead, a redistributive approach focuses attention on ameliorating disadvantages caused by historical exclusion and disenfranchisement.[968] This dimension bridges the gap between the traditional sphere of discrimination law and distributive equality. This allows the law to address an area that has historically been associated with public policy rather than law.[969] In particular, this dimension is focused on addressing systemic inequality.

Systemic inequality is embedded in the processes, practices, norms and relationships that reproduce and accentuate inequality.[970] Systemic discrimination can manifest as both direct and indirect discrimination. In the Canadian context, systemic inequality is described as:

> Discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief both within and outside the group, that the exclusion is a result of 'natural' forces, for example, that women 'just can't do the job' … To combat systemic discrimination, it is essential to create a climate in which both negative practices and negative attitudes can be challenged.[971]

This section identifies two contexts in which courts can be seen to be drawing on discrimination law's redistributive potential. First, this section will look for articulations that redistribution is an aim or purpose of discrimination law. Second, it will look for an approach to remedies which are adapted to addressing systemic and historical disadvantage.

6.1.1 United Kingdom

In the United Kingdom, discrimination law could be utilised to address systemic and historical underrepresentation and inequality in two ways. First through the imposition of remedies in a direct discrimination claim and through an interpretation of indirect discrimination which targets the underlying systemic causes of disadvantage. Each of these will be addressed in turn below.

Direct discrimination is not generally associated with redistributional aspects of equality due to direct discrimination's symmetrical nature.[972] It is designed to ensure equal treatment without

[967] Fredman, 'Substantive Equality Revisited', above n 385, 728–729.
[968] Ibid.
[969] Ibid.
[970] Colleen Sheppard, 'Institutional Inequality and the Dynamics of Courage' (2013) 31(1) *Windsor Yearbook of Access to Justice* 103, 103.
[971] *Canadian National Railway Co v Canada* [1987] 1 SCR 1114, 1139.
[972] Fredman, *Discrimination Law*, above n 68, 176–177.

recognising the different starting positions for people who hold certain attributes.[973] However, it can have a somewhat redistributive effect where its outcome is, at the very least, to lift the distribution of certain 'social goods' to the level of others. For example, one could argue that this was outcome in *Birmingham City Council* where the House of Lords accepted the proportionately smaller number of places in selective schools available to girls as compared to boys amounted to direct discrimination because of sex.[974] When discussing remedies, Lord Goff, in particular, concluded that the *Sex Discrimination Act 1975* (UK) placed a positive duty on public sector authorities to ensure that 'facilities for education provided by it, any ancillary benefits or services, are provided without sex discrimination.'[975] As such, he ends his judgment with the following proposed course of action for the Council:

> The time has come for the Birmingham City Council to accept that it is in breach of section 23 of the Act of 1975, and that something has got to be done about it. Its proper course must surely be to respond to the proposal of the commission that it should begin the necessary process of consultation, with a view to finding the most practical solution available which accords with the obligations imposed upon it by Parliament.[976]

In other claims of direct discrimination such as *R (Coll) v Secretary of State for Justice (Howard League for Penal Reform Intervening)* ('*Coll*') and *JFS*,[977] respondents are tasked with finding solutions to disparate treatment and those solutions could theoretically involve a degree of redistribution of social benefits. This means that a discrimination case could have a more far-reaching effect than one that simply focused on remedying an individual complaint. This is because a discrimination claim can lead to the rule being amended or changed to ensure equal treatment. But conversely, it could also allow for a for 'levelling down' approach discussed in Chapter Three in which the majority group is simply treated to the same disadvantage as the minority group – a prospect raised in the dissenting judgment of Lord Griffiths in *James* which was discussed in Chapter Five.

A distinguishing feature of indirect discrimination as compared to direct discrimination is its capacity to generate redistribution.[978] But to do so, as Khaitan and Steel have recently argued, the individual claim approach to indirect discrimination needs to be clearly linked to the systemic goal

[973] Ibid.
[974] [1989] 1 AC 1155, 1190–1191 (Lord Goff).
[975] Ibid 1196 (Lord Goff).
[976] Ibid 1196.
[977] [2017] 1 WLR 2093, 2104 and [2010] 2 AC 728.
[978] Fredman, *Discrimination Law*, above n 68, 181.

of reducing relative group disadvantage.[979] Without this link, indirect discrimination is simply searching for an individual rather group harm and is almost simply 'direct discrimination in disguise.'

In one of the most recent judgments on indirect discrimination in *Essop v Home Office*, the Supreme Court has started to recognise ameliorating disadvantage and providing equality of results as the underlying purpose of prohibiting indirect discrimination.[980] In *Essop,* the plaintiffs were black and minority ('BME') civil servants over the age of 35 who were seeking promotion in the Civil Service.[981] To achieve a promotion in the civil service, an employee was required to pass a core skills test.[982] Older and BME candidates were less likely than younger, non-BME candidates to pass the test.[983] As not all older or BME candidates failed the test, the Court of Appeal determined that the plaintiffs were required to not only show that they were at a greater risk of failing the test but also that their attributes were the *reason why* they failed the test.[984]

On appeal, the Supreme Court was required to consider whether it was necessary for a plaintiff to show why a rule had a disproportionate impact on the basis of an attribute. The Supreme Court concluded that indirect discrimination claims did not require a finding on the reasons *why* a PCP caused a disproportionate impact.[985] Contrasting direct and indirect discrimination, Baroness Hale (with whom the Court agreed) concluded that the aim of indirect discrimination is to achieve an equality of results. She accepted that indirect discrimination is targeting 'hidden barriers which are not easy to anticipate or spot.'[986] As such, the reasons *why* a group may be less able to comply with a PCP may not be able to be identified. She drew on the language of counsel to conclude that the difficulties in compliance could be related to 'context factors' which relate to genetics, social and traditional employment practices, a combination of these factors and other PCPs or something entirely different.[987] What is put in focus is that there are underlying causes of disadvantage which indirect discrimination is designed to remedy.[988] In *Essop*, at least, the Supreme Court has

[979] Tarunabh Khaitan and Sandy Steel, 'Wrongs, Group Disadvantage and the Legitimacy of Indirect Discrimination Law' in Hugh Collins and Tarunabh Khaitan (eds) *Foundations of Indirect Discrimination Law* (Hart Publishing, 2018) 197, 198–199.
[980] [2017] 1 WLR 1343.
[981] Ibid 1348–349 (Baroness Hale with whom the Court agreed).
[982] Ibid1349.
[983] Ibid.
[984] Ibid.
[985] Ibid 1353-1355.
[986] Ibid 1353.
[987] Ibid 1353–1354.
[988] Ibid.

recognised the redistributional opportunities of discrimination law through understanding that it is designed to target underlying, implicit and systemic issues of inequality.

Thus, in the United Kingdom both through the potential remedies offered for direct discrimination and through an identification of the aims of indirect discrimination, discrimination law can be utilised to target historical and systemic disadvantage.

6.1.2 Australia

In Australia, the case law highlights a degree of resistance to a redistributive approach to discrimination law and does not address systemic discrimination. This is evident in a rejection of systemic claims and an individualistic approach to remedies. In the early case law, both the High Court and the New South Wales Court of Appeal in particular, emphasise that discrimination law is designed to combat discriminatory 'detriment' and not to operate as an 'affirmative action' mechanism.[989] In many ways, the case law continues to reflect a traditional understanding of discrimination law's purpose which is focused on intention and fault rather than unintentional or effects based discrimination.[990]

That Australian discrimination law is not designed to operate as an 'affirmative action' regime was emphasised in *Banovic* (the facts of which were discussed in 5.1.2).[991] In the dissenting judgments in particular, Brennan J and McHugh J emphasised that discrimination law should not be understood as a tool of 'affirmative action'[992] or to reverse the effects of previous discrimination.[993] Justice Brennan was concerned that if it was determined that the respondent's retrenchment policy was discriminatory, it was other male employees who would bear the cost of that determination as they could be retrenched.[994] He cautioned that this approach, rather than being non-discriminatory, would instead be 'reverse discrimination' and this 'reverse discrimination' was not the purpose of the Act:

[989] See for example the discussion of the aims of the legislation in T*ullamore Bowling and Citizens Club Ltd v Lander* (1984) EOC 92, 109; *Boehringer Ingelheim Pty Ltd v Reddrop* [1984] 2 NSWLR 13; *Director-General of Education & Anor v Breen & Ors (*1984) EOC 92 - 015; *Public Service Board of New South Wales v Naiper & Ors* (1984) EOC 92–116. In each of these cases, the New South Wales Court of Appeal emphasised that the Tribunal's understanding of the aims of the legislation were 'over-broad' and its purpose was to be limited to prohibiting 'discriminatory detriments.' In the rejection of any affirmative action aims see also: *Australian Iron and Steel v Banovic* (1989) 168 CLR 165, 172 (Brennan J) and *Waters v Victorian Public Transport Corporation* (1991) 173 CLR 349, 372 (Brennan J).
[990] Adopting the terminology in Réaume, 'Harm and Fault in Discrimination Law', above n 828, 351-352.
[991] (1989) 168 CLR 165, 172 (Brennan J)
[992] Ibid.
[993] Ibid 206–207 (McHugh J).
[994] Ibid 171–172.

> Dismissals for the purpose of advancing the members of one sex at the expense of members of the other sex amounts to unlawful discrimination by virtue of ss 24(1)(a) and 25(2)(c). Putting the proposition in another way, the Act does not provide for 'reverse discrimination' or 'affirmative action' by an employer in dismissing employees from the employer's workforce in order to undo the effect of prior unlawful discrimination in its constitution.
>
> …
>
> Acts of unlawful discrimination are not excused because they are designed to remedy the consequences of earlier unlawful discrimination. The opposite to 'discrimination on the ground of sex' is not discrimination against the opposite sex; it is non-discrimination. In the enthusiasm for equality, whether of numbers or proportions, between the sexes in a workforce it is as well to remember that the object of any dismissal is an individual who has no personal obligation to underwrite the perfect fulfilment of the statutory policy.[995]

While this statement was made in a dissenting judgment, this same unease is also apparent in the one of majority judgments in *Banovic*. While Dawson J ultimately agrees that the complainants had been subject to indirect discrimination, his judgment (previously discussed in 5.1.2) emphasised that what discrimination law prohibits is 'unfair' discrimination.[996] Redressing gender imbalances in a wide-range of professions was not, in Dawson J's view, the purpose of discrimination law.[997]

The rejection of the redistributive aims of discrimination law is also apparent where complainants have a degree of choice surrounding their actions. In *Director-General of Education & Anor v Breen*, the complainant argued that more limited promotional opportunities for 'infant' teachers (who taught kindergarten to year two) as compared to primary school teachers (who taught years four to six) constituted sex discrimination.[998] This was because the overwhelming majority of infant teachers were women and the sex ratio of primary teachers was decidedly more balanced.[999] Whilst the tribunal originally concluded that this difference constituted sex discrimination, the New South Wales Court of Appeal overturned this decision.[1000] In doing so, Street CJ emphasised the degree of choice that the complainants had had: they had *chosen* to be infant teachers rather than primary teachers and as such, were required to live with the consequences of that decision.[1001] Yet, this does not take into account the discriminatory narratives that are embedded in the processes, practices, norms and relationships which place women in roles that are considered less worthy and that reproduce and accentuate inequality.[1002]

[995] Ibid.
[996] Ibid 185–186 (Dawson J).
[997] Ibid.
[998] [1982] 2 IR 93, 94 (Street CJ).
[999] Ibid.
[1000] [1982] 2 IR 93, 95 (Street CJ).
[1001] [1982] 2 IR 93, 96 and 102.
[1002] For discussion of these issues in a broader sense see: Claire L'Heureux-Dube, 'Beyond the Myths: Equality, Impartiality, and Justice' (2001) 10(1) *Journal of Social Distress and the Homeless* 87.

More than 20 years later, the High Court came to a similar conclusion in *New South Wales v Amery*.[1003] In *Amery,* the Court was required to consider if the disparate pay and promotional opportunities for casual supply teachers compared to those in permanent positions was indirect discrimination because of sex.[1004] The complainants in *Amery* were female supply teachers.[1005] They were unable to obtain permanent teaching positions because they were limited geographically as to where they could teach due to their family responsibilities.[1006] Instead, they were employed as supply casuals but argued that for all intents and purposes they did the same job as their permanent colleagues.[1007] Nevertheless, they were unable to achieve the same rates of pay as their permanent (and proportionately more male) colleagues.[1008] They argued that the requirement to be a permanent teacher to achieve higher rates of pay constituted indirect sex discrimination.[1009] The High Court rejected the complainants' argument. In doing so, the majority concluded that despite the fact that both groups were teachers, the legislated employment benefits of 'supply' teacher and 'permanent' teacher were too different to be appropriately compared.[1010] Due to this difference, there was no capacity to compare the two groups and there was no discrimination.[1011] In coming to this finding, the majority judgment implicitly appears to accept that discrimination law is not to ameliorate disadvantage or redress systemic inequality, particularly where the disadvantage is caused by some degree of personal choice by failing to consider the way in which choices are limited by socially constructed barriers.

Additionally, the approach adopted with respect to class action claims and remedies has failed to remove discriminatory practices.[1012] The Australian approach to remedies, in contrast to that adopted elsewhere, does not remediate discrimination even when it is found. Whereas, in other jurisdictions, the offending rules can be removed once discrimination is proven,[1013] in Australia this does not necessarily occur. Instead, individual complainants are able to access damages, but

[1003] (2006) 230 CLR 174.
[1004] (2006) 230 CLR 174, 178 (Gleeson CJ)
[1005] (2006) 230 CLR 174, 188 (Gummow, Hayne and Crennan JJ)
[1006] (2006) 230 CLR 174, 188–189 (Gummow, Hayne and Crennan JJ)
[1007] (2006) 230 CLR 174, 188 (Gummow, Hayne and Crennan JJ)
[1008] (2006) 230 CLR 174, 189–190 (Gummow, Hayne and Crennan JJ).
[1009] (2006) 230 CLR 174, 191 (Gummow, Hayne and Crennan JJ).
[1010] (2006) 230 CLR 174, 198–199 (Gummow, Hayne and Crennan JJ).
[1011] (2006) 230 CLR 174, 185 (Gleeson CJ).
[1012] Therese MacDermott, 'The Collective Dimension of Federal Anti-Discrimination Proceedings in Australia: Shifting the Burden from Individual Litigants' (2018) 18(1) *International Journal of Discrimination and the Law* 22. See also: Dominique Allen, 'Remedying Discrimination: The Limits of the Law and the Need for a Systemic Approach' (2010) 29(2) *University of Tasmania Law Review* 83; Dominique Allen, 'Strategic Enforcement of Anti-Discrimination Law: A New Role for Australia's Equality Commissions' (2010) 36(3) *Monash University Law Review* 103.
[1013] See for example the outcomes in *R (on the application of E) v Governing Body of JFS and the Admission Appeal Panel of JFS and Others* [2010] 2 AC 728; *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 SCR 3.

the discriminatory rule or practice could remain in place for some time. This was the approach adopted in both *Hurst v Queensland* ('*Hurst*'),[1014] and *Noijin v Commonwealth* ('*Noijin*').[1015] These were both cases which could have had broader implications for other persons with disabilities but instead were treated as singular and individual instances of discrimination. In *Hurst*, the Full Federal Court accepted that a failure to provide Auslan interpretation for a deaf child so that she could participate in school was indirectly discriminatory.[1016] However, the Full Court emphasised that this conclusion did not have any broader implications for the provision of education to other deaf children:

> In order to avoid any misunderstanding, it should be stressed that Tiahna's case is not a test case. The judgment of this court does not establish that educational authorities must make provision for Auslan teaching or interpreting for any deaf child who desires it. It does not establish that Auslan is better than signed English as a method of teaching deaf children. It does not determine that an educational authority necessarily acts unreasonably if it declines to provide Auslan assistance.[1017]

In this case, instead of considering any broader societal implications, the Full Court emphasised that discrimination cases are cases which are focused on single individuals and are generally matters of narrow statutory construction. This greatly limits the capacity for discrimination law to have broader societal effects. Even in Tiahna's case, though there was a finding of discrimination, the Full Court later determined that she had suffered no damage and was entitled to no remedies.[1018]

In *Noijin*, the Full Court accepted that a test to assess the competency of disabled workers in order to determine how much less than the minimum wage they should be paid was indirectly discriminatory for persons with intellectual disabilities.[1019] Nevertheless, this case demonstrates a failure to acknowledge systemic discrimination in two key ways. First, by accepting the legitimacy of a wage assessment tool, the court and the parties accept that people with disabilities are not entitled to the same minimum wage as non-disabled people. This embeds and perpetuates economic disadvantages for persons with disabilities. Second, even though the complainants were successful, the respondent initially succeeded in arguing that the decision only applied to the two workers involved rather all intellectually disabled workers who had been assessed.[1020] In addition,

[1014] (2006) 151 FCR 562.
[1015] (2012) 208 FCR 1.
[1016] (2006) 151 FCR 562.
[1017] (2006) 151 FCR 562 [131]–[132].
[1018] *Hurst v Queensland (No 2)* [2006] FCAFC 151.
[1019] (2012) 208 FCR 1.
[1020] Other workers brought a class-action for compensation for the underpayment. Ultimately this was settled: *Duval-Comrie v Commonwealth* [2016] FCA 1523.

the test is still currently in use, seven years after the Full Court accepted that it was indirectly discriminatory.[1021]

In the Australian case law, discrimination is still considered as an individual claim focused on the specifics of the case. This approach is consistent with that outlined in Chapter Five, where it was seen that Australian courts are still looking for a degree of motivated fault. This limits the capacity of discrimination law to remove discriminatory barriers and operate as a tool of redistribution.

6.1.3 Canada

In Canada, the Supreme Court has held that the purpose of discrimination law is to remediate discrimination rather than to punish duty-bearers. This remedial approach to discrimination law was critical to the finding that statutory discrimination law prohibited systemic discrimination in *Canadian National Railway Co v Canada (Canadian Human Rights Commission)* ('*Action Travail*').[1022] In *Action Travail*, the complainant claimed that the Canadian Railway Company exercised discriminatory hiring and promotion practices by denying employment opportunities to women in particular blue-collar positions.[1023] The original tribunal accepted that the respondent's recruitment, hiring and promotion policies constituted discrimination.[1024] As a remedy, the tribunal imposed upon the respondent an employment program. The employment program required the respondent to increase the proportion of women in non-traditional roles to the national average and hire one woman for every four traditionally male-dominated jobs filled in the future.[1025]

The respondent argued before the federal Court of Appeal that in making this order, the tribunal exceeded its jurisdiction as the legislation did not allow for it to implement remedies designed to ameliorate the consequences of past discrimination.[1026] The federal Court of Appeal set aside those remedies on the basis that the legislation did not allow 'restitution of past wrongs.'[1027] The Supreme

[1021] The Commonwealth sought an exemption from the *Disability Discrimination Act 1992* (Cth) in 2013 to continue to allow the payment of intellectually workers assessed on the BSWAT system. They were granted a temporary exemption which has since been extended periodically every year. For a discussion see: Beth Gaze, 'Discrimination, Temporary Exemptions and Compliance with the Law' (2015) 23(3) *Australian Journal of Administrative Law* 10.
[1022] [1987] 1 SCR 1114, 1117 (Dickson CJ with the Court agreeing). For a discussion of this case and systemic discrimination in Canada more generally see: Sheppard, 'Institutional Inequality and the Dynamics of Courage', above n 970 and Sheppard, *Inclusive Equality*, above n 31, 23. Susan Sturm has called the attempts to redress systemic discrimination in law 'second-generation' discrimination laws: Susan Sturm, 'Second Generation Employment Discrimnination: A Structural Approach' (2001) 101(3) *Columbia Law Review* 458.
[1023] [1987] 1 SCR 1114, 1119–1124.
[1024] Ibid 1125.
[1025] Ibid 1125–1127.
[1026] Ibid.
[1027] Ibid 1128–1129.

Court rejected this approach.[1028] Writing for the Court, Dickson CJ considered that the literal approach to the remedies provision adopted by the Court of Appeal failed to give meaning to the Act as a whole and was not the proper interpretive attitude required for interpreting human rights legislation:

> Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact.[1029]

In articulating the purpose of the legislation, Dickson CJ emphasised that the explicit purpose of the Act was to promote the goal of equal opportunity so that individuals can achieve 'the life that he or she is able and wishes to have.'[1030] To achieve this goal, human rights legislation seeks to 'prevent all discriminatory practices.'[1031]

From this articulated goal, Dickson CJ emphasised that the purpose of the Act was not to punish wrongdoing, but to prevent future discrimination and ameliorate its past effects.[1032] A remedy which required an employment equity program to be in place was consistent with the purpose of the legislation and consistent with the Tribunal's role. As highlighted by Dickson CJ:

> To render future discrimination pointless, to destroy discriminatory stereotyping and to create the required 'critical mass' of target group participation in the workforce, it is essential to combat the effects of past systemic discrimination. In so doing, possibilities are created for the continuing amelioration of employment opportunities for the previously excluded group.[1033]

The decision in *Action Travail* has allowed for Canadian human rights tribunals to implement remedies which could have an impact in ameliorating systemic disadvantage into the future rather than merely compensating for past discriminatory wrongs.[1034] Remedies addressing systemic

[1028] Ibid 1132.
[1029] [1987] 1 SCR 1114, 1134.
[1030] Ibid.
[1031] Ibid.
[1032] Ibid.
[1033] [1987] 1 SCR 1114, 1145.
[1034] Ibid.

discrimination have been utilised in an employment context.[1035] Addressing systemic disadvantage has also been articulated as one of the purposes of the Human Rights Codes more generally.[1036]

But, while the Supreme Court has accepted that the Human Rights Codes are designed to combat systemic discrimination, the application, particularly in the context of systemic remedies, has been less effective. The limitations of systemic remedies have become apparent in both an employment and institutional setting, as was identified by Pothier.[1037] Systemic remedies have been particularly challenging to fashion when the discrimination complained of is due to racial biases in an amorphous workplace culture.[1038] Further, where discrimination claims involve a challenge to government policy and funding, there are difficulties regarding institutional capacity to embed systemic remedies. An example of this is in *Moore* (discussed in 5.1.3).[1039] While Abella J clearly articulates an underlying rationale and test for *prima facie* discrimination,[1040] she also rejects the implementation of systemic remedies against the provincial executive of British Columbia.[1041] As in the Australian approach adopted above, the claim in *Moore* was considered a case about a single claimant rather than a challenge to the funding of education for students with disabilities as a whole.[1042] This finding is hard to maintain in light of the necessary implications of the case in finding that there were not sufficient educational provisions for students with learning difficulties. A single child could not have been the only person to be affected by such a provincial government policy.

While the Canadian case law articulates the rationale for systemic remedies, the application has been less than successful, particularly in the more recent case law to more complex public funding

[1035] See for example: *McKinney v University of Guelph* [1990] 3 SCR 229; *Gaz metropolitain inc v Commission des droits de law personne et des droits de la jeunesse* [2011] RJQ 1253; *Public Service Alliance of Canada v Canada (Department of National Defence)* [1996] 3 FC 789; *Canada (Human Rights Commission) v Canadian Airlines International Ltd* [2006] 1 SCR 3; *Public Service Alliance of Canada v Canada Post Corporation* [2011] 2 FCR 221.
[1036] *Canada (Human Rights Commission) v Taylor* [1990] 3 SCR 892; *Saskatchewan (Human Rights Commission) v Whatcott* [2013] 1 SCR 467; Cf *Moore v British Columbia* [2012] 3 SCR 360.
[1037] Dianne Pothier, 'Adjudicating Systemic Equality Issues: The Unfulfilled Promise of Action Des Femmes' (2014) 18(1) *Canadian Labour & Employment Law Journal* 177. And even in *Acton Travail,* there were difficulties in enforcing the systemic remedies granted, see: Rachel Cox, 'The Human Rights Tribunal Order in *Action travail des femmes v Canadian National:* A Path Littered with Obstacles' in Research Report prepared for the Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision*. Report, Department of Justice, Ottawa, 2000.
[1038] Pothier, 'Adjudicating Systemic Equality Issues', above n 1037, 184–187.
[1039] *Moore v British Columbia* [2012] 3 SCR 360.
[1040] See discussion at 5.1.3.
[1041] [2012] 3 SCR 360, 389.
[1042] Ibid.

arrangements. It may be that, as Pothier argues, the viability of systemic remedies is limited by complexity and institutional capacity which are insurmountable in the Canadian context.[1043]

6.1.4 Interpreting discrimination law to achieve redistribution

It is possible to interpret discrimination law to achieve a measure of redistribution. But to do so requires courts to recognise the structural, asymmetrical and historical nature of discrimination and requires the implementation of remedies to address embedded discriminatory practices. As this section has demonstrated, the extent to which courts have interpreted discrimination law as a tool of redistribution has differed.

The Australian approach rejects the capacity for discrimination law to operate as a tool for more far-reaching change. This is emphasised through the individualistic focus of the case law, even when considering indirect discrimination. The approach to remedies again emphasises a limited role for the courts in actually ameliorating disadvantage even when it is found. The Australian approach is consistent with the analysis in Chapter Five in that discrimination law is designed only to remedy 'unjust' or 'unfair' discrimination with a significant focus on individual fault. It is distinguishable from the Canadian and British case law in this respect. In both the United Kingdom and Canada, where discrimination is found, respondents are tasked with changing their rules and practices to prevent discrimination continuing. In Canada in particular, courts and tribunals have implemented remedies that can require significant changes to practices which can come at a considerable cost to employers and service providers. This approach is taken in order to achieve the purpose of discrimination law: to combat the effects of past systemic discrimination and to render future discrimination pointless.

Where the British and Canadian approaches differ is that while both allow for remediation where discrimination is apparent, the Canadian approach recognises an asymmetry not found in the British case law. The Canadian approach to purpose emphasises the expansive and remedial nature of discrimination law. This approach to purpose is utilised to justify the incorporation of kinds of discrimination (such as systemic discrimination) that the legislature may not have considered when passing the original legislation. It also makes available to human rights tribunals and courts an expansive interpretation of remedial powers.

[1043] Pothier, 'Adjudicating Systemic Equality Issues', above n 1037.

6.2 Reducing stereotype and stigma

This section will consider whether courts have understood discrimination law as a means to reduce harm caused by stereotyping and stigma.[1044] In this section, I will argue that in Canada and the United Kingdom, the link between discrimination law and the reduction of stereotypes is identified in the case law. I will demonstrate that the connection is less obvious in the Australian case law. However, I will also argue, focusing specifically on the Canadian case law, that too much emphasis on this particular dimension has the capacity to diminish the achievement of discrimination law's other aims, particularly regarding redistribution and transformation.

6.2.1 United Kingdom

Over a series of cases, the British appellate courts have emphasised that the purpose of discrimination law is to prevent harms caused by stereotyping and stigma. The harms caused by stereotyping are identified to include damage to an individual's dignity and self-worth.

One of the clearest illustrations of this is the Supreme Court of the United Kingdom's decision in the *R (on the application of European Roma Rights Centre) v Immigration Officer at Prague Airports* ('*Roma Rights Case*').[1045] The *Roma Rights Case* involved a United Kingdom pre-clearance extraterritorial immigration scheme which operated at Prague airport.[1046] It was aimed at stemming the flow of Roma asylum seekers from the Czech Republic.[1047] Consequently, immigration officers treated Roma applicants with more suspicion and questioned Roma applications in a more intrusive and intense fashion than those of other applicants.[1048] A group of Roma complainants argued that this practice constituted direct discrimination on the grounds of ethnic origin and was unlawful pursuant to the *Race Relations Act 1976* (UK).[1049] The Supreme Court accepted that the practice of interrogating Roma applicants more thoroughly than other applicants was direct discrimination on the basis of ethnic origin.[1050] In this finding, Baroness Hale outlined the underlying rationale for prohibiting discrimination:

> The underlying concept in both race and sex discrimination laws is that individuals of each sex and all races are entitled to be treated equally ...
>
> The whole point of the law is to require suppliers to treat each person as an individual, not as a member of a group. The individual should not be assumed to hold the characteristics which the supplier

[1044] For previous discussion of this see 3.3.2.
[1045] [2005] 2 AC 1.
[1046] [2005] 2 AC 1, 21–22 (Lord Bingham).
[1047] [2005] 2 AC 1, 59 (Baroness Hale).
[1048] Ibid.
[1049] [2005] 2 AC 1, 59 (Baroness Hale).
[1050] [2005] 2 AC 1, 65 (Baroness Hale, with whom the court agreed with on this issue).

> associates with the group, whether or not most members of the group do indeed have such characteristics, a process which is sometimes referred to as stereotyping. Even if, for example, most women are less strong than most men, it should not be assumed that the individual woman who has applied for the job does not have the strength to do it. Nor, for that matter, should it be assumed that an individual man does have the strength. If strength is a qualification, all applicants should be required to demonstrate that they qualify.[1051] (emphasis added)

In this paragraph, Baroness Hale articulates that one of the key purposes of discrimination law is to ensure that the treatment meted out to individuals is based on their personal characteristics and circumstances rather than their group identity or association. It is emphasised that the purpose of discrimination law is to ensure that individuals are treated as individuals and individual identity is respected.

These same underlying concepts that were articulated with respect to race discrimination in *Roma Rights* have also been applied to cases involving discrimination based on other attributes. For example, when considering the nature of age discrimination in *Seldon v Clarkson Wright and Jakes*, the plaintiff urged the Supreme Court to:

> Consider these issues having it firmly in mind that the purpose of all anti-discrimination legislation is to 'address the mismatch between reality and past assumptions or stereotypes … ' These assumptions no longer hold good (if they ever did) … So, we should put such stereotypical assumptions out of our minds.[1052]

This quote again highlights that the Court's understanding of the purpose of discrimination is to redress the harms caused by stereotypical assumptions.

The Supreme Court has also explained the kind of harm caused by decisions based on stereotyping and stigma that it seeks to address. That harm can be financial, physical and dignitary.[1053] This is consistent with an approach to detriment which concludes that detriment exists where a reasonable person would take the view that the treatment was to their detriment.[1054]

The dignitary nature of the harm is emphasised in some of the case law on discrimination on the basis of sexual orientation.[1055] For instance, in *Preddy v Bull*, the Court considered whether the refusal to provide a hotel room to an unmarried same-sex couple constituted discrimination on

[1051] [2005] 2 AC 1, 22 and 55–56.
[1052] [2012] ICR 716, 722. The facts of this case were discussed in 4.3.1.
[1053] *Preddy v Bull* [2013] 1 WLR 3741,
[1054] *Ministry of Defence v Jeremiah* [1980] ICR 13, 31, approved in *West Yorkshire Police v Khan* [2001] 1 WLR 1947.
[1055] *Preddy v Bull* [2013] 1 WLR 3741 and *Islington London Borough Council v Ladele* [2010] 1 WLR 955 [29] (Lord Neuberger); *English v Thomas Sanderson Blinds Ltd* [2009] ICR 542 [38] (Sedley J); *Lee v Ashers Baking Company* [2018] UKSC 49 [35] (Baroness Hale).

the grounds of sexual orientation.[1056] The defendants, a couple who were devout Christians, argued that the application of discrimination law within this context was an unjustified infringement on their right to exercise their religious belief.[1057] In considering this argument, the Court emphasised the reasons for the restriction on discriminatory conduct on the basis of sexual orientation:

> Sexual orientation is a core component of a person's identity which requires fulfilment through relationships with others of the same orientation …
>
> Heterosexuals have known this about themselves and been able to fulfil themselves in this way throughout history. Homosexuals have also known this about themselves but were long denied the possibility of fulfilling themselves through relationships with others. This was an affront to their dignity as human beings which our law has now (some would say belatedly) recognised. Homosexuals can enjoy the same freedom and same relationships as any others. But we should not underestimate the continuing legacy of those centuries of discrimination, persecution even, which is still going on in many parts of the world.[1058]

In this respect, British courts do acknowledge that one of the central aims of discrimination law is to acknowledge and enhance the acceptance of the inherent dignity and worth of individuals.

Further, the harms of stereotyping and stigma are identified in two recent cases on gender segregation.[1059] In *Coll*, when discussing the nature of segregated services, Baroness Hale identified that:

> The history of the United States of America and of the Republic of South Africa, to take the two most obvious examples, has taught us to treat with great suspicion the claim that, if the races are segregated, 'separate but equal' facilities can be provided for both, quite apart from the affront to dignity in the assumption that the races have to be kept separate.[1060]

This statement was considered in *R (Interim Executive Board of Al-Hijrah School) v HM Chief Inspector of Education, Children's Services and Skills*,[1061] a case considering the legality of gender segregation in schools.[1062] In its decision, the Court of Appeal accepted that the segregating of school children on the basis of gender in a mixed-gender school constituted direct discrimination. The Court accepted the particular harm suffered by female students because:

> The female sex is the group with the minority of power in society, so restrictions upon female children learning, socialising and feeling comfortable with male children and upon male children

[1056] *Preddy v Bull* [2013] 1 WLR 3741, 3746 (Baroness Hale).
[1057] Ibid 3745.
[1058] Ibid 3756 (Baroness Hale).
[1059] R*(Coll) v Secretary of State for Justice (Howard League for Penal Reform Intervening)* [2017] 1 *WLR 2093 and* R *(Interim Executive Board of Al-Hijrah School) v HM Chief Inspector of Education, Children's Services and Skills* [2017] EWCA Civ 1426.
[1060] [2017] 1 WLR 2093, 2106.
[1061] [2017] EWCA Civ 1426.
[1062] Ibid [65]–[68].

> learning to work and interact socially with female children have adverse social implications for women which outweigh the adverse social implication for men.
>
> …
>
> The very fact of segregation constitutes less favourable treatment of girls as it amounts to an expressive harm caused by the necessary implication that girls are inferior or otherwise relevantly different to boys in day to day social and working contexts.[1063]

In this case, the Court of Appeal recognised that the harm caused by segregation is through the perpetuation of gendered stereotypes and stigma. This approach is in keeping with the Supreme Court's articulations of the purpose of discrimination law outlined above.

6.2.2 Australia

In contrast to the British approach discussed above, and the Canadian approach to be discussed below, there are few Australian cases or judgments which identify reducing stereotyping and stigma as a purpose of discrimination law. The problems of stereotyping are referred to in Chief Justice Black's judgment in *Bradley*, but there are few other examples to be found. [1064] There are even fewer discussions of stigma. In an assessment of the references to stigma in Australian High Court decisions, Solanke found only 26 cases which used the word 'stigma' and none related to discrimination claims.[1065] Instead, some of the case law adopts some of the stereotypes that the law could be used to removed. This kind of interpretation has been previously identified in the literature addressing LGBTI and age discrimination, respectively.[1066]

In some cases, the interpretation of discrimination law has increased rather than decreased stigmatisation, particularly in the context of disability.[1067] In his dissents in both *IW v City of Perth* and *X v Commonwealth*, Kirby J obliquely raises the possibility that the majority judgments are clouded by stereotypical views about the nature of HIV status and persons with HIV (the disability shared by the complainants). [1068] In his dissent in *IW*, he warns that the risk of a narrow interpretation of discrimination law is greatest where those 'who invoke the legislation comprise of individuals … least likely to strike a sympathetic chord.'[1069] In both cases (and in a number of

[1063] Ibid.
[1064] See for example, Chief Justice Black's judgment in *Commonwealth v Bradley* (1999) 95 FCR 218 previously discussed in 4.3.2.
[1065] Pothier, 'Adjudicating Systemic Equality Issues', above n 1037.
[1066] Solanke, *Discrimination as Stigma*, above n 29, 65–66.
[1067] Isabel Karpin and Karen O'Connell, 'Stigmatising the "Normal": The Legal Regulation of Behaviour as a Disability' (2015) 38(4) *UNSW Law Journal* 1461, 1475. See also: Karen O'Connell, 'The Clean and Proper Body: Genetics, Stigma and Disability Discrimination Laws' (2009) 14(2) *Australian Journal of Human Rights* 139; Karen O'Connell, 'Unequal Brains: Disability Discrimination Laws and Children with Challenging Behaviour' (2016) 24(1) *Medical Law Review* 76.
[1068] (1999) 200 CLR 177, 211 and (1997) 191 CLR 1, 52 (Kirby J).
[1069] (1997) 191 CLR 1, 52.

others)[1070] he concludes that a purpose of discrimination legislation is to address stereotypes.[1071] In his dissent in *X*, Kirby J emphasised the stigma and stereotypes which were inherent in the challenged policy:

> The Act contemplates that the conduct of employers will adapt to its requirements. Particular judgements will replace universal ones. The latter, when analysed, will all too often be founded on stereotyped assumptions about a particular disability ... it would be as well, in my respectful opinion, if the courts were to avoid the preconceptions that lie hidden, and not so hidden in the tales of Tuscan soldiers wallowing in blood.[1072]

While the *Disability Discrimination Act 1992* (Cth) utilises a social model of disability, with a broad definition of disability based on the way in which a person is able to interact with the world around them, the courts have instead embedded a medical model of disability.[1073] A medical model of disability situates the source of the 'problem' within the person, rather than their lived environment. A number of cases have considered the appropriate role of discrimination law where students display 'problematic' behaviour in schools. In *Purvis* (discussed previously in 5.1.2 and 5.2.2) and in *Walker v Victoria*,[1074] the students claimed disability discrimination where they were excluded from school due to problematic behaviour. It was accepted that this behaviour stemmed from their disability, but their exclusion was found not to be 'because of their disability' but because they were disruptive or 'problematic' within the school environment. O'Connell argues that in these cases instead of considering the social context and environmental factors that relate to and mould the child's behaviour, the courts treat children with psycho-social disabilities as having a physical, enduring condition which justifies removal and exclusion.[1075] This approach adopted by the courts to psycho-social disabilities perpetuates and re-embeds stereotype and stigma to justify exclusion.

In summary, in contrast to the case law from the United Kingdom or Canada, in Australia there are few references to removing stereotypes and stigma as an aim of discrimination law. This, again, could be due to a conceptualisation of discrimination law as simply designed to prevent 'unfair' or 'unjust' discrimination rather than to change perceptions of people's abilities based on their immutable characteristics.

[1070] (1999) 200 CLR 177, 222.
[1071] (1997) 191 CLR 1, 52; (1999) 200 CLR 177, 222. See also: *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, 334, 341, 344; *New South Wales v Amery* (2005) 230 CLR 174, 229; *Haines v Leves* (1987) 8 NSWLR 442, 473.
[1072] (1999) 200 CLR 177, 230.
[1073] Karpin and O'Connell, above n 1067.
[1074] [2012] FCAFC 38
[1075] O'Connell, 'Unequal Brains', above n 1067, 90.

6.2.3 Canada

As in British jurisprudence, the Canadian case law also clearly identifies that one of the aims of discrimination law is to reduce stigma by challenging decisions based on stereotyping.[1076] A renewed focus on stereotyping and stigma in Code cases is derived from the Canadian *Charter* jurisprudence from the late 2000s and early 2010s. In *Charter* cases, the Supreme Court has shifted away from the dignitary-centred test established in *Law v Canada* as well as the comparator group test discussed in 5.1.3. Instead, a claimant arguing a violation of s 15 was required to show that they have suffered a disadvantage which was based on or perpetuated stereotyping.[1077] There are three problems with this emphasis on stereotyping. First, it focuses attention on one kind of harm that a person can suffer through discriminatory treatment to the exclusion of other kinds of harms relating to socio-economic status and social cohesion. Second, while previous jurisprudence suggested that the focus of a statutory discrimination claim was on the effect of the decision, finding arbitrariness or stereotyping can blur the distinction between the reason for the decision and the effect of the decision. This is because it requires an articulation of the rationale behind the rule or policy to establish that the distinction was based on stereotypical grounds.[1078] Third, it makes it challenging for complainants who are viewed unsympathetically by society to prove their claims because judges can unconsciously hold negative views about these complainants.

The emphasis on stereotyping is less apparent in the Code jurisprudence than in the *Charter* jurisprudence. Nevertheless, in a number of intermediate court decisions and in some notable Supreme Court concurrences, there is the identification of a stereotype as a necessary element of a statutory discrimination claim. In *Stewart v Elk Valley Coal*,[1079] the majority emphasised that the test for *prima facie* discrimination did not incorporate a separate requirement of a finding of stereotypical or arbitrary decision making.[1080] But the majority did nevertheless conclude that:

> The goal of protecting people from arbitrary or stereotypical treatment or treatment that creates a disadvantage by perpetuating prejudice is accomplished by ensuring that there is a link or connection between the protected ground and adverse treatment.[1081]

[1076] *McGill University Health Centre (Montreal General Hospital) v Syndicat Des Employes De L'Hopital General de Montreal* [2007] 1 SCR 161.
[1077] See for example: *Withler v Canada (Attorney General)* [2011] 1 SCR 396 [34]. Cf *Quebec (Attorney General) v A* [2013] 1 SCR 61 [327].
[1078] Brodsky, Day and Peters, above n 57, 23.
[1079] [2017] 1 SCR 591.
[1080] Ibid 616.
[1081] Ibid.

While proving that a decision was arbitrary or based upon a stereotype was not a separate step of the test, it was still integral to the finding that there was a link between the protected ground and adverse treatment. While accepting that stereotyping was not a separate stage of the inquiry, the emphasis on stereotyping is nevertheless problematic where it can be difficult to articulate what the stereotype is, particularly in cases of disability accommodation.[1082] A useful illustration of this difficulty is the minority judgment of Abella J (with McLachlin CJ and Bastrarache J concurring) in *McGill University Health Centre (Montreal General Hospital) v Syndicat Des Employes De L'Hopital General de Montreal*.[1083] In *McGill*, the complainant had been unable to work for two years due to mental health issues. As she was getting ready to return to work, she was injured in a car accident and asked for further time before returning to work.[1084] As her original rehabilitation period had ended, her employer terminated her employment.[1085] The complainant argued that the failure to extend the rehabilitation period due to the new injury constituted disability discrimination.[1086] The minority rejected the conclusion that the complainant had proven *prima facie* discrimination. This was on the basis that she had failed to show that the decision to terminate her employment was on the basis of an arbitrary stereotype or distinction:

> What flows from this is that there is a difference between discrimination and a distinction. Not every distinction is discriminatory. It is not enough to impugn an employer's conduct on the basis that what was done had a negative impact on an individual in a protected group. Such membership alone does not without more, guarantee access to a human rights remedy. It is the link between that group membership and the arbitrariness of the disadvantaging criterion or conduct, either on its face or in its impact, that triggers the possibility of a remedy. And it is a claimant who bears this threshold burden.[1087]

In her judgment, Abella J focused not on whether the employer could have reasonably accommodated the complainant, but whether the complainant had been disadvantaged on the basis of a stereotypical or arbitrary assumption.[1088]

The difficulty of establishing a discrimination claim based upon a stereotypical and arbitrary assumption is readily identifiable in the cases about discrimination on the basis of addiction. In numerous cases which involve addiction disorders, courts have accepted that termination of employees based on implications of their addictive disorders was not *because of* their addictions but

[1082] Brodsky, Day and Peters, above n 57 [45].
[1083] *McGill University Health Centre (Montreal General Hospital) v Syndicat des employes de l'Hopital general de Montreal* [2007] 1 SCR 161, 165–166.
[1084] Ibid.
[1085] Ibid.
[1086] Ibid.
[1087] Ibid 180–181.
[1088] Ibid.

because they breached an employer's policy or procedures.[1089] As the British Columbia Court of Appeal concluded in *British Columbia (Public Service Agency) v British Columbia Government and Service Union* ('*Gooding*'):

> I can find no suggestion in the evidence that Mr Gooding's termination was arbitrary and based on preconceived ideas concerning his alcohol dependency. It was based on misconduct … That his misconduct may have been influenced by his alcohol dependency is irrelevant if that admitted dependency played no part in the employer's decision to terminate his employment and he suffered no impact for his misconduct greater than another employee would have suffered for the same misconduct.[1090]

By focusing on the existence of stereotype and stigma, courts fail to challenge systemic barriers of access and the implicit stereotypical assumptions embedded in decisions.

6.2.4 Interpreting discrimination law to reduce stigma and stereotype

Understanding discrimination law as one mechanism to reduce harmful conduct based on stereotypes and stigma allows for the identification and acknowledgement of the unfair and arbitrary nature of discrimination. It recognises that an aim of discrimination law is to ensure that people are treated as individuals rather than as merely part of a group. But where discrimination law is *only* focused on the existence of arbitrary stereotype, this places attention on the reason for the treatment rather than the effect of the treatment. The Canadian case law in particular indicates that a focus on the need for stereotype or prejudicial motivations can be a limitation in discrimination law's capacity to address discrimination caused by underlying systemic problems or implicit bias. This is because the courts are searching for a particular motivation or stereotype underlying the action (whether overt or covert). In cases which involve psycho-social or addiction-based classifications, this can also be problematic where the judiciary appear to hold the same prejudicial or stereotypical views of the complainant. This argument is rather poignantly put by Gascon J in his dissent in *Stewart v Elk Valley Coal* in which he opens his judgment by arguing that:

> Drug dependence is a protected ground of discrimination in human rights law. Its status as such is settled, and none of the parties dispute this. Still, stigmas surrounding drug dependence — like the belief that individuals suffering from it are the authors of their own misfortune or that their concerns are less credible than those of people suffering from other forms of disability — sometimes impair the

[1089] *British Columbia (Public Service Agency) v BCGSEU* 2008 BCCA 357. See also *Stewart v Elk Valley Coal Corporation* [2017] 1 SCR 591; *Wright v College and Association of Registered Nurses of Alberta* 2012 ABCA 267; *Heal Employers Association of British Columbia (Kootenay Boundary Regional Hospital v B.C. Nurses' Union* 2006 BCCA 57*; Kemess Mines Ltd v International Union of Operating Engineers, Local 115* 2006 BCCA 58; *Alberta (Human Rights and Citizenship Commission) v Kellogg Brown & Root (Canada) Company* 2007 ABCA 426; *Ontario (Disability Support) v Tranchemontagne* 2010 ONCA 593; *Saskatchewan (Department of Finance) v Saskatchewan (Human Rights Commission)* 2004 SKCA 134; *Commission des droits de la personne et des droits de la jeunesse c. Centre hospitalier universitaire de Sherbrooke* 2012 QCCA 306.
[1090] 2008 BCCA 357 [11]–[15].

> ability of courts and society to objectively assess the merits of their discrimination claims. These stigmas contribute to the "uneasy fit of drug addiction and drug testing policies in the human rights arena" noted by the Alberta Human Rights Commission ("Tribunal") below [citation omitted].
>
> Yet, as drug-dependent persons represent one of the marginalized communities that could easily be caught in a majoritarian blind spot in the discrimination discourse, they of course require equal protection from the harmful effects of discrimination. In my view, improper considerations relied on by the Tribunal here — such as drug-dependent persons having some control over their choices and being treated "equally" to non-drug-dependent persons under drug policies, and drug policies not necessarily being arbitrary or stereotypical — effectively excluded Mr. Stewart, a drug-dependent person, from the scope of human rights protections.[1091]

While reducing stigma and stereotype is a necessary dimension of discrimination law's purpose, this should not be at the expense of tackling other kinds of disadvantage.

When the three jurisdictions are compared, what is notable about the Australian approach is that it does not identify preventing harmful conduct based on arbitrary stereotypes as a goal or aim of discrimination law, differently from the approaches adopted in the United Kingdom and Canada. This leaves open the question of what the goals of Australian discrimination actually are given that it seems to address neither the redistributive aspects of discrimination outlined in section 6.1 nor the recognitional aspects of discrimination outlined in section 6.2.

6.3 Facilitation of participation

Another dimension of substantive equality is the facilitation of participation. This dimension is focused on ensuring social inclusion and political voice. Collins argues that the goal of discrimination law is to provide for social inclusion.[1092] Social inclusion is a principle of justice. While social inclusion may achieve some distributive justice, this is not its ultimate aim.[1093] Instead, an interpretation of discrimination law predicated on social inclusion aims to provide marginalised individuals with access to opportunities that would otherwise be inaccessible or impossible.[1094] It focuses on the benefit to wellbeing that comes from inclusion more generally. There is cross-over between this dimension and the other dimensions of social equality. Pursuing social inclusion involves degrees of redistribution; it requires an understanding of stigma and stereotyping and the removal of systemic barriers.

[1091] *Stewart v Elk Coal Valley* [2017] 1 SCR 591, 620–621 (Gascon J).
[1092] Fredman, 'Substantive Equality Revisited', above n 385, 732.
[1093] Collins, above n 330.
[1094] Ibid 22.

A social inclusion lens has the potential to provide a more compelling and coherent account of discrimination law because it is not only focused on redistributive or recognition-based harms. But it also focuses on the provision of access to spaces and conversations. Its focus is not only on the economic aspects of disadvantage but on the various ways in which discrimination limits disadvantaged groups' capacity to speak and participate in society.[1095] Through this dimension, an aim of discrimination law is to compensate for the absence of political and public voice and generate the capacity for greater participation.[1096] Social inclusion has the potential to provide a more compelling and coherent account of discrimination law because it encompasses many different aspects of life, recognising the importance of work and social participation outside its economic advantages.[1097]

Understood in this manner, participation is focused on voice and capacity building. This section I will outline the case law that touches on aspects of facilitating access and participation throughout society. Although social inclusion is a broad idea encompassing many different aspects of life, this section focuses on two key issues. First, a consideration of whether discrimination law requires access to communities and organisations from which women and minority communities have historically been excluded. My focus will be on how the divide between 'public' and 'private' activities has been understood. This is important because public activities are covered by discrimination law and private activities are not. How the courts have understood this divide is important because, as the Canadian Supreme Court articulated in *University of British Columbia v Berg*, [1098] the terms 'public' and 'private' have no 'self-evident' meaning and thus require interpretation by the courts.[1099] Second, this section will consider the interpretation and utilisation of discrimination law to require the recognition of voice and participation in the regulation of minority communities and persons with disabilities.

6.3.1 United Kingdom

In this section, I will consider the ways in which appellate courts have, or have not facilitated participation in society by considering two issues: first, the inclusion of political parties as an area covered by discrimination law, either as an association or by conceptualising a person's involvement with a political party as employment and second whether discrimination law covers volunteering and other 'like' employment opportunities. Both issues are important to facilitate

[1095] Ibid 24.
[1096] Ibid.
[1097] Ibid.
[1098] [1993] 2 SCR 353.
[1099] Ibid 363 (Lamer CJ).

engagement in public life by ensuring that people have the capacity to engage in the political process or more broadly in the community through volunteer positions. This section will demonstrate that historically, the approach taken to cases involving access to associations, services, and employment in the United Kingdom shows little understanding of discrimination law's potential to facilitate better participation in society.

In the very early cases involving exclusion from membership of clubs and society membership because of race, the House of Lords determined that the initial *Race Relations Acts* of 1965 and 1968 did not extend protection to discriminatory conduct by unincorporated clubs and associations.[1100] In *Race Relations Board v Charter*, an Indian man attempted to join his local Conservative Club. Membership would have allowed him access to the clubs' facilities and amenities.[1101] His membership was refused on the basis of his 'colour.' He argued that this refusal constituted race discrimination.[1102] While the House of Lords accepted that the conduct was discriminatory, it found that the *Race Relations Act 1968* (UK) did not apply to clubs such as the Conservative Club.[1103] In doing so, the House of Lords emphasised the distinction made in the Act between public and private conduct.[1104] While discrimination legislation was amended to ensure that political parties were captured by discrimination law, attempts to conceptualise the relationship between a political party and a potential candidate as one of employment or as a body offering 'qualifications' have also failed, despite accepting that the political party's conduct was discriminatory.[1105]

When considering the definition of an employment relationship, the courts' approach has not necessarily facilitated social inclusion and access either. In *X v Mid Sussex Citizen Advice Bureau*,[1106] the claimant worked unpaid at the respondent advice bureau providing legal advice. She worked pursuant to a volunteer agreement that was not legally binding. When the respondent asked her to cease her position, she brought an action of discrimination on the ground of disability pursuant to the *Disability Discrimination Act 1995* (UK). The question for the Supreme Court was whether the claimant's volunteer position could be considered 'employment' for the purposes of the Act. In answering this question, the Supreme Court considered both the language of s 4 of the *Disability Discrimination Act 1995* (UK) and the Employment Equality Directive. The Supreme Court

[1100] *Race Relations Board v Charter* [1973] AC 868.
[1101] [1973] AC 868, 889 (Lord Morris).
[1102] Ibid.
[1103] [1973] AC 868, 887 (Lord Reid), 894 (Lord Morris), 901 (Lord Simon).
[1104] Ibid. Similar conclusions were made in *Dockers Labour Club v Race Relations Board* [1976] AC 285; *Applin v Race Relations Board* [1975] AC 259
[1105] This was the conclusion reached in both *Ali v McDonagh* [2002] EWCA Civ 93 and *Carter v Ashan* [2008] AC 696.
[1106] *X v Mid Sussex Citizen Advice Bureau* [2013] ICR 249.

concluded that volunteer positions fell outside the scope of protection offered by the *Disability Discrimination Act 1995* (UK).[1107] By finding that volunteers are not covered by the discrimination law, this reveals the way in which non-employees are less valued and not included in important aspects of social life.

This limited understanding of the application of discrimination law to different kinds of public and employment relationships undermines the capacity of discrimination law to redress social exclusion and give historically excluded groups access to participate in society.

6.3.2 Australia

The approach adopted in the Australian case law shows little understanding or regard for an interpretation of discrimination law that aims to facilitate participation or to promote social inclusion. This section will focus specifically on the High Court's decisions in *Lyons v Queensland* and *Maloney v The Queen* to illustrate this argument.[1108]

In *Lyons*,[1109] the complainant argued that she had been unlawfully discriminated against when she was refused consideration for jury selection because she was profoundly deaf and required the services of an Auslan interpreter. The deputy registrar excluded the complainant from jury selection on the basis that there was no oath in the *Oaths Act 1867* (Qld) to swear in an interpreter for a jury member. Allowing the use of an interpreter would require also an additional person to be in the jury room when the jury was sequestered.[1110] The complainant argued that this constituted discrimination under the Queensland *Anti-Discrimination Act 1991*. The plurality of the High Court found that the Deputy Registrar's actions did not constitute discrimination because without a specific statutory provision allowing for an interpreter in the jury room, discrimination law cannot provide that the state must allow one.[1111] In making this finding, the plurality confirmed that 'the common law has long required that the jury be kept separate.' The sanctity of the jury sequester required an explicit legislative allowance to be made for a profoundly deaf person to have access to an Auslan interpreter to be a juror and to have the assistance of an Auslan interpreter in the jury room.[1112] In doing so, the High Court limited the capacity for persons with disabilities to perform their civic duties.

[1107] [2013] ICR 249, 252–253.
[1108] (2016) 259 CLR 518; (2013) 252 CLR 168.
[1109] (2016) 259 CLR 518, 522–524 (French CJ, Bell, Keane and Nettle JJ).
[1110] Ibid 523–524 (French CJ, Bell, Keane and Nettle JJ).
[1111] Ibid 529–530 (French CJ, Bell, Keane and Nettle JJ).
[1112] Ibid 530–532 (French CJ, Bell, Keane and Nettle JJ).

The Australian High Court jurisprudence on race discrimination also does not interpret discrimination law to require political inclusion and participation for historically excluded groups.[1113] An illustration of this is found in *Maloney v The Queen*.[1114] In *Maloney*, the complainant challenged the legality of alcohol bans on Palm Island, Queensland.[1115] She argued that the relevant provisions in the *Liquor Act 1992* (Qld) and its associated regulations were inconsistent with s 10 of the *Racial Discrimination Act 1975* (Cth) which required equality before the law.[1116] She argued that the alcohol ban restricted her right to own property, the right to equality and the right to services and this restriction (while facially neutral) had a disproportionate impact on the overwhelmingly indigenous population of Palm Island.[1117] The respondent argued that in the event that the alcohol restrictions did restrict the rights and freedoms of indigenous persons, this was nevertheless justified. It was justified on the basis that it was a special measure adopted with the sole purpose of securing adequate advancement of certain racial or ethnic groups.[1118] The appellant argued that s 8 of the *Racial Discrimination Act 1975* (Cth) needed to be understood in line with contemporary international jurisprudence and opinion. Relying on General Recommendation No. 32 to the ICERD, the appellant argued that valid special measures required prior consultation with affected communities.[1119] This consultation had not occurred with respect to the restrictions contained in the *Liquor Act 1992* (Qld) and its associated regulations.[1120] Consequently, the appellant argued that the Act and the regulations could not constitute special measures.[1121]

In separate judgments, all judges, aside from Kiefel J,[1122] found that the restrictions in the *Liquor Act* had infringed the appellant's rights (although there was disagreement as to which right was infringed) on the basis of race. But all judges concluded that the restrictions were valid on the basis that they were special measures.[1123] The High Court found that the wording of s 8 did not require any consultation.[1124] In respect of the extent to which contemporary jurisprudence on the ICERD

[1113] *Maloney v The Queen* (2013) 252 CLR 168. See also: *Bropho v Western Australia* (2008) 169 FCR 59; *Aurukun Shire Council v CEO Liquor Gaming and Racing in the Department of Treasury* [2012] 1 Qd R 1.
[1114] (2013) 252 CLR 168.
[1115] Ibid 176–177 (French CJ).
[1116] Ibid.
[1117] Ibid 262 (Gageler J).
[1118] Ibid 225 (Kiefel J).
[1119] Ibid 185 (French CJ).
[1120] Ibid.
[1121] Ibid.
[1122] Ibid 231.
[1123] Ibid 186 (French CJ), 212 (Hayne J), 222 (Crennan J), 258 (Bell J), 306 (Gageler J).
[1124] Ibid 185–186 (French CJ), 211–212 (Hayne J), 222 (Crennan J), 258 (Bell J), 305–306 (Gageler J).

could be utilised in the interpretation of the *Racial Discrimination Act 1975* (Cth), the Court found, to greater and lesser extents, that it generally could not be used as an aid to interpretation.

What, again, is interesting about the approach adopted in *Maloney* is that it limits the broader, available interpretations of discrimination law's capacity and reach.[1125] It assumes that there is a static and unchangeable understanding of discrimination and equality by limiting the opportunity for reliance on updated international materials on the meaning of the ICERD. Instead, the High Court advocates an approach that is reliant on the interpretation and understanding of equality and discrimination in the 1970s. The approach adopted by the majority with respect to the inapplicability of international jurisprudence is notably absent in cases relating to other international obligations and conventions.[1126] The Australian cases do not evince an approach to discrimination that facilitates participation in civic spaces. Instead, discrimination law appears to be understood as a defensive shield rather than a positive tool designed to facilitate civic engagement.

6.3.3 Canada

The Canadian case law reflects a varied approach to facilitating participation. On the one hand, the approach adopted in disability cases including *Moore,*[1127] *VIA Rail*[1128] and *Grismer*[1129] reflects an approach which requires services to be provided to persons with disabilities so that they can better participate in society. This could be through requiring the provision of appropriate transportation to ensure that persons can travel more easily,[1130] or through the provision of appropriate education to ensure that persons with learning disabilities have the ability to find meaningful work and contribute to the economy.[1131] However, in other ways the case law reflects a more narrow approach to facilitating participation, particularly when considering the nature of services.

[1125] For a discussion of this case from an international law perspective see: Patrick Wall, 'The High Court of Australia's Approach to the Interpretation of International Law and its Use of International Legal Materials in *Maloney v The Queen*' (2013)15(1) *Melbourne Journal of International Law* 228.
[1126] Patrick Wall, 'Case Note: A Marked Improvement, Australia's Approach to Treaty Interpretation in *Macoun v Commissioner of Taxation* [2015] HCA 44' (2016) 17(1) *Melbourne Journal of International Law* 170, 171.
[1127] *Moore v British Columbia (Education)* [2012] 3 SCR 360.
[1128] *Council of Canadians with Disabilities v VIA Rail Canada Inc* [2007] 1 SCR 650.
[1129] *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* [1999] 3 SCR 868.
[1130] *Council of Canadians with Disabilities v VIA Rail Canada Inc* [2007] 1 SCR 650 and *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* [1999] 3 SCR 868.
[1131] *Moore v British Columbia (Education)* [2012] 3 SCR 360.

This section will focus on the changing definition of a service within the Canadian case law. The definition of services is important in reflecting the reach of discrimination law to allow persons to access facilities and spaces that have been historically inaccessible.

Originally, provincial Human Rights Codes were interpreted to apply to only a limited range of services and facilities. In *Gay Alliance v Vancouver Sun*, the Supreme Court held that there was no violation of the British Columbia *Human Rights Code* in a refusal to print an advertisement on behalf of a gay rights activist group because the Code did not apply to the newspapers' activities. Martland J, drawing on the American jurisprudence, outlined a list of services and facilities covered by the legislation:

> In my opinion the general purpose of s 3 was to prevent discrimination against individuals or groups of individuals in respect of the provision of certain things available generally to the public. The items dealt with are similar to those covered by legislation in the United States, both federal, and state. 'Accommodation' refers to such matters as accommodation in hotels, inns, and motels. 'Service' refers to such matters as restaurants, bars, taverns, service stations, public transportation, and public utilities. 'Facilities' refers to such matters such as 'customarily available to the public.' It is matters such as these which have been dealt with in American case law on the subject of civil rights.[1132]

In *University of British Columbia v Berg*,[1133] the Supreme Court determined that the narrow list was not in keeping with the broader aspirational purposes of the British Columbia *Human Rights Act* and so the Court greatly expanded the possible application of discrimination law. First, the Court accepted that 'services customarily available to the public' could be interpreted to apply to small groups of people.[1134] In the case of *Berg,* this meant to people generally admitted into a program of study. [1135] Second, the kinds of actions which could be classed as the provision of a 'accommodation, service, or facility' were interpreted with a degree of creativity so that the Codes had a broader reach than might have originally been envisioned.[1136]

This definition expanded the scope of actions which could constitute the provision of a service. However, its application since has been inconsistent, particularly in the context of facilitating participation and access, thereby showing similar limitations to the jurisprudence from the United Kingdom outlined in section 6.3.1 above. For example, in *Gould v Yukon Order of Pioneers*

[1132] *Gay Alliance v Vancouver Sun* [1979] 2 SCR 435, 455–456.
[1133] [1993] 2 SCR 353.
[1134] Ibid 382–383 (Chief Justice).
[1135] Ibid 387–388 (Chief Justice).
[1136] Chief Justice did so, relying on statements made in the Federal Court of Appeal in *Canada (Attorney General) v Rosin* [1991] 1 F.C. 391, 398 that "The essential aim of the wording is to forbid discrimination by enterprises that purport to serve the public."

('*Gould*'),[1137] the complainant applied for membership in the Yukon Order of Pioneers.[1138] The Yukon Order was a fraternal order whose primary objective was to preserve local custom and culture and to collect historical materials which were then made available to the public.[1139] The complainant's application was rejected because she was a woman.[1140] The complainant argued that this constituted sex discrimination.[1141] The majority of the Supreme Court rejected her claim. The majority concluded that while the Human Rights Codes should be interpreted in light of their beneficial purpose, neither the prohibition against discrimination in the provision of services nor in the provision of membership could be interpreted to provide a right to membership of a private club.[1142] In contrast, the dissenting judgment of McLachlin J highlighted that the Yukon Order of Pioneers occupied an important place in the community.[1143] Further, by excluding women from the organisation, the Order also presented a particular narrative and image of the 'pioneer' who was singularly male.[1144] This meant that the important roles women played were not recognised. In this context, McLachlin J concluded that the Pioneers were a public organisation and so were subject to statutory discrimination law.[1145] This distinction is important because the minority recognised that access to particular groups reflects a community understanding of identity and importance, and facilitates inclusion of previously excluded groups from community narratives.[1146]

While both *Berg* and *Gould* has been cited by numerous appellate courts since they were heard, this has generally been with respect to the statements by the majority as to the quasi-constitutional nature of the legislation and the appropriate interpretative approach (which will be discussed in more detail in Chapter Seven).[1147] The analysis and discussion in both *Berg* and *Gould* with respect to the interpretation of 'services customarily available to the public' has been considered in far fewer cases and only one is relevant for my purposes here.[1148] In *Marine Golf Club v Buntain et al and BC Human Rights Tribunal* the British Columbia Court of Appeal accepted based on the reasoning

[1137] [1996] 1 SCR 571.
[1138] Ibid 591 (La Forest J).
[1139] Ibid 591–592 (La Forest J).
[1140] Ibid 591 (La Forest J).
[1141] Ibid 590 (La Forest J).
[1142] Ibid 601–602 (La Forest J).
[1143] Ibid 612–613 (La Forest J).
[1144] Ibid.
[1145] Ibid 656–659 (McLachlin J), Justice L'Heureux-Dubé makes similar statements in her dissenting judgment at 626–627.
[1146] Ibid 656–659 (McLachlin J).
[1147] In particular at 7.2.2.
[1148] The phrase 'customarily available to the public' was raised in the tribunal decision of *Vancouver Rape Society v Nixon* but was not considered on appeal: 2005 BCCA 601 and has been applied with respect to government services in cases such as *Watkin v Canada (Attorney General)* 2008 FCA 170 but not in a manner which would illuminate the arguments made above.

in *Gould* and the House of Lords decision in *Dockers Labour Club v Race Relations Board* that the Codes did not apply to membership and service at a private golf club which refused membership to women.[1149] Again, the decision fails to recognise the important role that private clubs can play in the community and allows for the maintenance of structures which continue and perpetuate exclusion for previously disenfranchised groups.

6.3.4 Discrimination law and facilitation of participation

In each jurisdiction, courts have struggled to consistently understand discrimination law as a means to facilitate participation in providing access to spaces from which historically disadvantaged groups were previously excluded. In the United Kingdom and in Canada this is reflected in the failure to recognise the public aspects of 'private' organisations, such as political parties and community groups. By failing to provide protection from discrimination for women and racial minorities in these areas, the courts have failed to recognise the important role that community organisations play in society and in privileging certain voices and experiences. In the Australian context, the failure to facilitate participation is most clearly reflected in the failure to accommodate disability in the carrying out of public functions and the failure to include community consultation as a necessary condition of affirmative action or special measures. By failing to facilitate access to spaces, the courts fail to utilise discrimination to achieve a measure of social inclusion.

6.4 Inclusive accommodation

This section will outline the courts' approach in each jurisdiction to accommodating difference. It will consider whether accommodation is understood in an individualistic sense or instead, focuses on promoting greater structural changes to society. It is primarily focused on accommodating disability.

The ultimate aim of structural change is to 'transform' society through the removal of barriers that exist throughout it. Accommodation acknowledges that gender, race, disability and other status markers are not irrelevant. Difference is inescapable and needs to be accommodated if there is to be substantive equality in society.[1150] Accommodation of difference recognises that protected characteristics are not a detriment that should be minimised and that the purpose of equality is not assimilation.[1151]

[1149] 2007 BCCA 17 [54].
[1150] Fredman, *Discrimination Law*, above n 68, 30–31.
[1151] Ibid.

This section utilises an understanding of accommodation first articulated by Day and Brodsky. This understands accommodation as requiring the removal of physical, social and economic barriers of access for everyone.[1152] This is in contrast to an approach which focuses on a singular, individual remedy or accommodation for a single person or group rather than challenging the validity of the existing barrier.[1153] As they persuasively argue:

> The difficulty with this [accommodation] paradigm is that it does not challenge the imbalances of power or the discourses of dominance … which result in a society being designed for some and not for others. It allows those who consider themselves 'normal' to continue to construct institutions and relations in their image as long as others, when they challenge this construction are 'accommodated' … Accommodation does not go to the heart of the equality question, to the goal of transformation, to an examination of the way institutions and relations must be changed in order to make them available, accessible, meaningful and rewarding for the many diverse groups of which our society is composed. Accommodation seems to mean that we do not change procedures or services, we simply, 'accommodate' those who do not quite fit. We make some concessions to those who are 'different,' rather than abandoning the idea of 'normal' and working for genuine inclusiveness … In short, accommodation is assimilationist. Its goal is to try to make 'different' people fit into existing systems.[1154]

Understanding the duty to accommodate in the manner proposed by Day and Brodsky requires an adjudicator to question and challenge the existing standards or practices in place. The duty to accommodate requires an adjudicator to consider if the standard, practice or rule can be adjusted to ensure that it accommodates as many differences as possible rather than making individual exceptions to the standard.[1155] Understanding the duty to make adjustments or accommodation in this way, it focuses attention on what is wrong with the standard rather than the person. Such an approach is not focused on accommodating the individual but rather on ensuring fairer access and opportunity for everyone.

6.4.1 United Kingdom

In respect of disability discrimination, the appellate courts in the United Kingdom acknowledge that, at least with respect to disability, there needs to be some accommodation of difference. However, where the approach in the United Kingdom is lacking is that it is still generally individualistically focused (although the outcomes may have broader implications). Instead of challenging the existence of barriers, the approach to reasonable adjustments is still focused on individual accommodation of the individual claimant. This often has the effect of keeping the rule or barrier in place but creates an exception for persons with disabilities.

[1152] Ibid.
[1153] Day and Brodsky, above n 412, 462.
[1154] Ibid.
[1155] Ibid.

Disability discrimination is distinguished from other forms of discrimination because the legislation explicitly requires a degree of accommodation through the requirement to make reasonable adjustments. The purpose of making a reasonable adjustment is not to act as an 'end in itself.'[1156] Instead, the purpose is to ensure that 'a disabled person is no longer at a substantial disadvantage, in comparison with persons who are not disabled.'[1157] As was emphasised by Sedley LJ, the duty to make adjustments is not a 'minimalist' policy but is designed to achieve a substantive outcome for those with disabilities:

> The policy of [the 1995 Act] is not a minimalist policy of simply ensuring that some access is available to the disabled: it is, so far as reasonably practicable, to approximate the access enjoyed by disabled persons to that enjoyed by the rest of the public.[1158]

The courts in the United Kingdom have generally understood the duty to adjust as a requirement to treat disabled persons differently and potentially more favourably to ensure that similar outcomes are achieved. The requirement for different and possibly more favourable treatment was emphasised in the first disability discrimination case heard by the House of Lords, *Archibald v Fife Council* ('*Archibald*').[1159] In *Archibald*, the complainant had been a road sweeper for the Fife Council. After a medical procedure, she was unable to walk and therefore unable to do her job. She requested redeployment to an office role. The redeployment policy allowed redeployment without a competitive interview for posts of the same or a lower pay grade. However, all office roles were at a higher pay grade than the complainant's current manual position, and consequently, the redeployment policy was not applied.[1160] She argued that the redeployment policy breached the *Disability Discrimination Act 1995* (UK) in that it failed to provide for the making of reasonable adjustments.[1161]

In the House of Lords, the complainant was successful in her claim. In determining the claim, the House of Lords elaborated on the meaning and requirements of the duty to make adjustments.[1162] In their consideration of the duty and its potential for justification they concluded that the duty to

[1156] *Archibald v Fife Council* [2004] ICR 954. See *also Smith v Churchill Stairlifts Plc* [2005] EWCA Civ 1220; *O'Hanlon v Revenue and Customs Comrs* [2007] ICR 1359; *Griffiths v Secretary of State for Work and Pensions* [2015] EWCA Civ 1265.
[1157] *Archibald v Fife Council* [2004] ICR 954.
[1158] *Roads v Central Trains Ltd* [2004] EWCA Civ 1541 [30] (Sedley LJ) cited with approval in *Ross v Ryanair Ltd* [2004] EWCA Civ 1751 [32] (Brooke LJ).
[1159] [2004] ICR 954. The positive and anticipatory nature of reasonable adjustments has been re-iterated in *Finnigan v Chief Constable of Northumbria Police* [2013] 1 WLR 445; *Allen v Royal Bank of Scotland Group Plc* [2009] EWCA Civ 1213.
[1160] [2004] ICR 954, 957–959.
[1161] Ibid.
[1162] Ibid.

adjust can involve more favourable treatment for a disabled complainant than another person and a failure to implement reasonable adjustments had a high threshold for justification.[1163]

In doing so, the House of Lords emphasised the differences between the prohibitions on disability discrimination and discrimination on other grounds. As Baroness Hale emphasised:

> This legislation is different from the Sex Discrimination Act 1975 and the Race Relations Act 1976. In the latter two, men and women or black and white, as the case may be, are opposite sides of the same coin. Each is to be treated in the same way. Treating men more favourably than women discriminates against women. Treating women more favourably than men discriminates against men. Pregnancy apart, the differences between genders are generally regarded as irrelevant. The 1995 Act, however, does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. It expects reasonable adjustments to be made to cater for the special needs of disabled people. It necessarily entails an element of more favourable treatment.[1164]

In her judgment, it is clear that Baroness Hale understood that to achieve equality for persons with a disability, there may need to be more favourable treatment. While the legislative regime has undergone a number of significant changes since the decision in *Archibald*, the Supreme Court of the United Kingdom has maintained that the correct approach to the duty to make adjustments requires asymmetry and potentially more favourable treatment of persons with disabilities.[1165] This is despite some clear discomfort in the more recent case law about the broader implications of this approach.

This discomfort can be seen in the 2017 decision of *Paulley v FirstGroup*.[1166] In *Paulley*, the complainant was in a wheelchair and wished to catch a bus. While all buses were equipped with a space for wheelchairs, on the bus that he attempted to catch, this space was filled with another passenger with a pram. The complainant was refused entry onto the bus because the bus driver felt unable to engage in any further actions to move the passenger with the pram to another seat when the passenger had refused an initial request.[1167] The complainant argued that this failure to have a policy in place to deal with unaccommodating passengers constituted a failure to make reasonable adjustments in the provision of services, as required by s 29 of the *Equality Act 2010* (UK).[1168] The Supreme Court of United Kingdom agreed that the bus company was required to

[1163] Ibid.
[1164] Ibid 966.
[1165] See for example: *Smith v Churchill Stairlifts Plc* [2005] EWCA Civ 1220; *O'Hanlon v Revenue and Customs Comrs* [2007] EWCA Civ 283; *Allen v Royal Bank of Scotland Group Plc* [2009] EWCA Civ 1213; *Finnigan v Chief Constable of Northumbria Police* [2013] 1 WLR 445; *R (VC) v Secretary of State for the Home Department* [2018] EWCA Civ 57.
[1166] [2017] 1 WLR 423.
[1167] [2017] 1 WLR 423, 426.
[1168] Ibid.

do more to attempt to move other passengers from the wheelchair seating area. But, there was a lack of clarity as to what 'more' would involve and the amount of pressure that a bus driver could place on another passenger to get them to vacate the space.[1169] Some of the judgments, particularly those of Lord Neuberger and Lord Sumption show a clear discomfort with the idea of discrimination law sanctioning merely inconsiderate behaviour, with Lord Neuberger considering:

> As to Lord Sumption JSC's judgment, I agree with him that, at least as a general rule, the law should not normally seek to sanction or otherwise deal with lawful but inconsiderate behaviour, and, similarly, it should not normally enforce standards of decency and courtesy. However, we are here concerned with a statute whose purpose is to ensure, within limits, that behaviour is curbed when it results in discrimination under s 29 of the Equality Act 2010. Accordingly, while it is essential that any judicial decision in this area seeks to take into account the realities of life and the interests of others, judges have to do their best to give effect to the purpose, even if it may involve a degree of departure from the general rule.[1170]

Again, similar to the decision in *Archibald*, discussed above, the Supreme Court accepts that persons with disabilities may need to be treated differently to others in order to achieve the purposes of the *Equality Act 2010* (UK). What is distinctive about the approach in the United Kingdom case law is that although the case law still exhibits some discomfort with the idea of reasonable adjustments, in the United Kingdom there is an acceptance that the purpose of the legislation is to provide asymmetric and potentially more favourable treatment of persons with disabilities in the attempt to achieve a more equal outcome. This may require creativity on the part of judges and duty-bearers to ensure compliance with the duty to make reasonable adjustments, but nevertheless recognises that reasonable adjustments are required to be made.

6.4.2 Australia

This section will consider the Australian appellate courts' approach to the duty to make adjustments in both its former and current iterations in the *Disability Discrimination Act 1992* (Cth). It will argue that despite the indications from the accompanying legislative materials that the duty to make reasonable adjustments was designed to operate as a positive and substantive duty, the courts have consistently approached it utilising a framework of formal equality or treating 'like' alike which has limited the effectiveness of the duty.

The High Court of Australia first considered the duty to accommodate in *Purvis v New South Wales*, the facts of which have been previously discussed in 5.1.2. In their joint judgment, Gummow, Hayne and Heydon JJ emphasise that the purpose of the *Disability Discrimination Act 1992* (Cth) is

[1169] [2017] 1 WLR 423, 442.
[1170] [2017] 1 WLR 423, 443 (Lord Neuberger) and 447 (Lord Sumption).

to provide for equality of *treatment* rather than equality of outcome.[1171] As such, the *Disability Discrimination Act 1992* (Cth) was not to be understood as requiring or even attempting to achieve substantive equality.[1172] In this way, the *Disability Discrimination Act 1992* (Cth) was said to be distinctive from the legislation in place in other jurisdictions such as the *Disability Discrimination Act 1995* (UK) in the United Kingdom and the *Charter* in Canada:[1173]

> Section 5(2) [of the *Disability Discrimination Act 1992*] provides some amplification of the operation of that expression. It identifies one circumstance which does *not* amount to a material difference: 'the fact that different accommodation or services might be required by the person with a disability.' But s 5(2) does not explicitly oblige the provision of that different accommodation or those different services. Rather s 5(2) says only that the disabled person's *need* for different accommodation or services does not constitute a material difference in judging whether the discriminator has treated the disabled person less favourably than a person without the disability.[1174] (underline emphasis added)

In their judgment, the plurality rejected that the *Disability Discrimination Act 1992* (Cth) in any sense requires or obliges a duty-bearer to accommodate a disabled person's differences. Instead, the requirement for accommodation is merely a 'circumstance' to be considered when determining if discrimination had occurred.[1175] In their dissenting judgment whilst McHugh and Kirby JJ reject the plurality's application of s 5(2), they also accepted that the provision did not impose a positive obligation on duty-bearers to make adjustments for persons with disabilities.[1176] It was these statements, in part, that led to the Labor Government's amendments to the *Disability Discrimination Act 1992* (Cth) in 2009 to clarify that the duty to make adjustments *did* require positive action and *was* intended to produce substantive outcomes.[1177]

But, the recent Full Federal Court decision in *Sklavos* limits the extent of the positive obligation placed on duty-holders. In *Sklavos,* the Full Federal Court considered the operation of s 5(2) of the *Disability Discrimination Act 1992* (Cth).[1178] The appellant complainant was training to become a dermatologist. To become a dermatologist, he was required to undertake the respondent's training

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[1171] (2003) 217 CLR 92, 155 (Gummow, Hayne and Heydon JJ).
[1172] Ibid.
[1173] Ibid.
[1174] (2003) 217 CLR 92, 159 (Gummow, Hayne and Heydon JJ)
[1175] Ibid.
[1176] (2003) 217 CLR 92, 127 (McHugh and Kirby JJ).
[1177] Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 3 March 2008, 12292 (Robert McClelland, Attorney General). Section 5(2) reads:
'For the purposes of this Act, a person (the *discriminator*) also discriminates against another person (the *aggrieved person*) on the ground of a disability of the aggrieved person if: (a) the discriminator does not make, or proposes not to make, reasonable adjustments for the person; and (b) the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of the disability, treated less favourably than a person without the disability would be treated in the circumstances that are not materially different.'
[1178] *Sklavos v Australasian College of Dermatologists* (2017) 256 FCR 247.

program and pass the respondent's examinations in order to become a Fellow of the College. During this training, the appellant began to suffer from a specific phobia of the College's assessment. At trial, it was accepted that he had such a psychiatric condition and that this phobia fell within the meaning of disability as defined by s 4 of the *Disability Discrimination Act 1992* (Cth). Due to this specific phobia, the appellant requested that he be admitted as a Fellow of the College without having to sit the examinations set by the College. The respondent refused his request. In response, the appellant brought an action for discrimination arguing that the respondent's decision constituted disability discrimination arguing direct and indirect discrimination on the basis of a failure to make reasonable adjustments.

Before considering the detail of the provisions, Bromberg J (with Griffiths and Bromwich JJ agreeing) highlighted the purpose of the *Disability Discrimination Act 1992* (Cth) was to address:

> Disadvantage, or less favourable treatment, brought *about or caused by* a person's disability. That fundamental concern applied irrespective of whether the discrimination is direct or indirect.[1179] (Emphasis added).

In determining whether the appellant had been discriminated against through the failure to provide reasonable adjustments, Justice Bromberg focused on the operation of the causative test required to prove that the complainant was treated the way he was 'because of' his disability.[1180] The appellant had argued that s 5(2) required a different approach to causation to that required by s 5(1), which contained the general definition of direct discrimination.[1181] He argued that this distinction related to the fact that s 5(1) of the *Disability Discrimination Act 1992* (Cth) is focused on the reason for the treatment, while s 5(2) is focused on the effect of the failure to make reasonable adjustments on the person with a disability.[1182] Due to this difference, the appellant argued that the correct approach to s 5(2) was to consider the effect or consequences of the failure to provide reasonable adjustments on the person with a disability rather than the reason why the duty-bearer refused to make the reasonable adjustment.[1183]

Justice Bromberg rejected this construction of the causative test. He considered that as the phrase, 'because of disability' appeared in the provision, it required the court to conduct a causative inquiry.[1184] Justice Bromberg found that the central question for both ss 5(1) and 5(2) was for the

[1179] Ibid 254–255.
[1180] Ibid.
[1181] Ibid 258.
[1182] Ibid 259.
[1183] Ibid.
[1184] Ibid.

court to determine why the complainant was treated the way they were.[1185] It was for a complainant to prove with respect to both ss 5(1) and 5(2) that the substantial reason that they were treated the way they were was because of their disability.[1186] In addition, Bromberg J considered that this approach to s 5(2) was the only way to achieve harmony between the two definitions of discrimination contained in the Act:

> [The] construction is in harmony with the structure adopted by the [*Disability Discrimination Act 1992* (Cth)] for separating direct disability discrimination from indirect disability discrimination, as well as providing internal harmony for s 5 itself. To construe the causation question as addressing the effect of the discriminator's conduct rather than the reason for that conduct would severely undermine that intended harmony. It would also have the result that two provisions (s 5(2) and s 6(2)) would be essentially addressing the same subject matter of discrimination brought about merely where disability explains disadvantage. It would also serve to significantly deny what seems to be the obvious intent of the [*Disability Discrimination Act 1992* (Cth)] as demonstrated by s 6(3), that conduct which is not driven (in part or in whole) by the disability (indirect discrimination) is more amenable to being justified and excused if it is reasonable than conduct that is based (in part of in whole) upon the disability (direct discrimination).[1187]

For the appellant, it meant that his treatment was to be compared to another person without a psychiatric disability who also wanted to become a fellow of the Society who had not passed the examinations.[1188] In those circumstances, the appellant was treated in the same way had that person also asked for the adjustments that the appellant requested.[1189] As he was treated the same as any other applicant to the College, there could be no direct discrimination and no utilisation of s 5(2) of the Act.

This approach turns what was described in the second reading speech and the explanatory memorandum as a positive obligation — to make changes to existing structures and practices to accommodate difference — into a negative obligation. It becomes a negative obligation because a duty-bearer is *only* required by the Act to make a reasonable adjustment where the reason for the refusal is the disability itself.

This approach to s 5(2) of the *Disability Discrimination Act 1992* (Cth) is one which adopts an understanding of discrimination law's purpose as one of only formal equality; that persons in similar circumstances should be treated the same even if to have the possibility of equal outcomes, they, in fact, require different treatment. Justice Bromberg's approach to the duty to make reasonable adjustments appears to give such a duty limited applicability because there are few cases

[1185] Ibid.
[1186] Ibid.
[1187] Ibid.
[1188] Ibid 261.
[1189] Ibid.

where a failure to make adjustments will be substantially because of a person's disability. Rather, in most cases, it is the cost and convenience which prevents duty-bearers from implementing adjustments. Particularly when considering the duty to make adjustments, this is both counter-intuitive and ineffective. As Brodsky has highlighted in the Canadian context:

> The complaint in most disability accommodation cases is not that the complainant was treated differently from members of another group, but rather that there has been a failure to take disability into account *and* effectively remove a barrier to inclusion. The fact that may have been the same treatment is irrelevant. It is illogical and counter-productive to require a person seeking accommodation because of a disability to demonstrate that they have been treated differently from anyone else. The goal of accommodating persons with disabilities is not to address different treatment. Rather, it seems to render services … accessible to persons with disabilities, taking account of disability-related difference and making such adjustments to norms and practices as are reasonably possible.[1190]

The approach adopted by the Full Court in *Sklavos* did not appreciate this difference between accommodation or adjustment claims and other kinds of discrimination claims.[1191] It does not appreciate that in order to make appropriate adjustments, organisations may need to undertake considerable work up until the point of unjustifiable hardship to ensure that persons with disabilities have appropriate access to services and opportunities. Particularly in its assessment of the indirect discrimination claim, the Court failed to appreciate that the *Disability Discrimination Act 1992* (Cth) could be interpreted in a way that challenges accepted practices or places an onus on respondents to justify the standards and practices that they have put in place in any real way.

Again, one can interpret the Australian approach to transformation as internally consistent, even though it is not an approach which furthers substantive equality. The Australian approach to discrimination has generally conceived of discrimination law as only embedding a basic level of formal equality and prohibiting 'unfair' or motivated discrimination whether overt or covert rather than as one envisaging any real transformation of opportunities in society.

6.4.3 Canada

In contrast to the Australian interpretation of reasonable adjustments, in Canada, the duty to accommodate is a fundamental tenet of Canadian Human Rights Law. The fundamentality of the duty to accommodate disabilities was recently reasserted by the Supreme Court of Canada in *Quebec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v Caron* ('*Caron*').[1192] In *Caron*, the duty to reasonably accommodate was described as a 'core and transcendent human rights

[1190] Brodsky, above n 779, 89.
[1191] Rees, Rice and Allen, above n 42, 364; Gaze and Smith, above n 294, 126.
[1192] [2018] 1 SCR 35.

principle.'[1193] This section will outline how the duty to reasonably accommodate has come to occupy such an important role in Canadian human rights jurisprudence.

In Canada, the duty to accommodate difference initially emerged in the context of discrimination on the basis of religion.[1194] It was originally conceived as the adjustment of a rule, practice or condition to take into account the specific needs of an individual or group and is understood as a fundamental aspect of discrimination law. However, its operation has, at times, been doctrinally confused.

A trilogy of cases in the Supreme Court of Canada first embedded the duty to accommodate into Canadian human rights law, but the manner in which it was embedded was confusing and contradictory.[1195] It was unclear whether the duty to accommodate was a concept only related to indirect discrimination or whether it applied to both direct and indirect discrimination.[1196] The implications for the appropriate remedies were also confused with inconsistent doctrine on whether the duty to accommodate required individual accommodation to the impugned practice or procedure or whether remedies could require changes to the practices or policies more broadly.[1197]

This doctrinal confusion was removed in *Meiorin*.[1198] In this case, the Supreme Court revised its approach to discrimination generally and in doing so, also revised the approach to the duty to accommodate.[1199] The adopted approach was heavily based upon the approach advocated for by Day and Brodsky in their 1994 article discussed above.[1200] In her judgment McLachlin J accepted that interpreting human rights legislation with a goal of achieving formal equality undermines the promise of substantive equality.[1201] She considered that this lens of formal equality undermined and prevented appropriate judicial scrutiny of standards and practices which in turn perpetuated systemic discrimination.[1202] In doing so, McLachlin J emphasised that:

> Although the Government may have a duty to accommodate an individual claimant, the practical results of the conventional analysis is that the complex web of seemingly neutral systemic barriers

[1193] Ibid [20] (Abella J).
[1194] *Ontario Human Rights Commission v Simpson-Sears* [1985] 2 SCR 536.
[1195] *Ontario Human Rights Commission v Simpson-Sears* [1985] 2 SCR 536; *Bhinder v CN* [1985] 2 SCR 561; *Alberta (HRC) v Central Alberta Dairy Pool* [1990] 2 SCR 489.
[1196] Day and Brodsky, above n 412, 367.
[1197] Ibid.
[1198] *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 SCR 3.
[1199] [1999] 3 SCR 3, 19.
[1200] Ibid 25–26.
[1201] Ibid 27.
[1202] Ibid 28.

> to traditionally male-dominated occupations remains beyond the direct reach of the law. The right to be free from discrimination is reduced to a question of whether the 'mainstream' can afford to confer proper treatment on those adversely affected, within the confines of its existing formal standard. If it cannot, the edifice of systemic discrimination receives the law's approval. This cannot be right.[1203]

This approach to accommodation is also apparent in Supreme Court jurisprudence on disability discrimination including in the recent decision of *Caron* as well as in *Grismer*.[1204] In *Grismer* the Canadian Supreme Court emphasised that the approach adopted in *Meiorin* was to be adopted generally in cases of discrimination regardless of the ground or attribute in question.[1205] The complainant in *Grismer* suffered from homonymous hemianopia, a condition which eliminated most of his left-side peripheral vision in both eyes.[1206] As a result of this condition, his drivers' licence was cancelled as his vision no longer met the minimum standard.[1207] The complainant argued that with some modifications to the vehicle and a certain kind of eyewear, persons with his condition could drive safely.[1208] A failure to individually assess his capacity to drive with these modifications, he argued, constituted discrimination on the ground of disability.[1209] The Supreme Court accepted this argument. It found that the discrimination that existed in the case was not in the refusal to issue a license, but a failure to give the claimant the opportunity to prove through individual assessment that he could drive without jeopardising the goal of reasonable road safety.[1210] It concluded that this failure of opportunity could not be justified on cost or public safety grounds.[1211]

The approach adopted in *Grismer* can be neatly contrasted with that taken by the Australian Full Federal Court in *Sklavos*. In *Grismer*, the Canadian Supreme Court is centrally focused on whether standards and tests can be administered flexibly to ensure accommodation whilst simultaneously maintaining high safety standards. In contrast, in *Sklavos,* there is little challenge to the College's assertion that changing the method of assessment would be 'difficult, costly and time-consuming' with the respondent seemingly not required to provide evidence of what those costs might be as it was 'self-evident.' The importance of this difference is that in Canada, the onus to justify a barrier

[1203] Ibid 29.
[1204] [1999] 3 SCR 868. This approach to accommodation has also been applied in a numerous Court of Appeal decisions including: *McCreath v Victoria Taxi (1987) Ltd* 2017 BCCA 342; *University of British Columbia v Kelly* 2016 BCCA 271; *Hamilton-Wentworth District School Board v Fair* 2016 ONCA 421; *Tolko Industries Limited v Industrial, Wood and Allied Workers of Canada, (Local 1-207)* 2014 ABCA 236; *R (City) v Kivela* 2006 SKCA 38.
[1205] [1999] 3 SCR 868.
[1206] Ibid 873 (McLachlin J).
[1207] Ibid 875 (McLachlin J).
[1208] Ibid.
[1209] Ibid 882 (McLachlin J).
[1210] Ibid 884 (McLachlin J).
[1211] Ibid.

to access is more clearly and strictly placed on a respondent to show that there is no capacity for the inclusion of a complainant without jeopardising broader societal aims, such as public safety.

6.4.4 Discrimination law and inclusive accommodation

This section has argued that the approaches adopted with respect to whether discrimination law can be transformative are, again, different in each jurisdiction. Each jurisdiction (whether through the legislation or by means of judicial construct) accepts that, particularly in cases of disability, there is a need for adjustments and accommodation of difference. In each jurisdiction, the legislature has accepted that, at least in some cases, the same treatment will lead to inequality. But there have been important differences in how the courts have responded to this need for accommodation.

While in the United Kingdom it is accepted that this is the purpose of discrimination law, how far this transformation is to go and the courts' capacity to direct governments and companies to generate this transformation is unclear. This is particularly evident in the decision of *Paulley*, where the Supreme Court of the United Kingdom accepts that the service provider must 'do more' to accommodate wheelchair users and adjust their practices, but there is little agreement as to the scope for the court to dictate what 'more' ultimately involves.

In Australia, despite accommodation provisions existing in Australian disability discrimination law, these provisions are still seen through a lens of formal equality with 'like' treatment being offered in most circumstances. This again appears to be keeping with the Australian approach to discrimination law developed in the previous chapters as one designed to punish duty-bearers for 'unfair' discriminatory practices rather than challenging the underlying conditions of disadvantage.

Finally, the Canadian approach to discrimination is one which does challenge underlying biases, behaviours and practices which cause disproportionate outcomes for certain groups. It is the most substantive and transformational of the three approaches because it accepts that reasonable accommodation is a fundamental part of discrimination law for all attributes and grounds and requires consideration of the capacity for accommodation in every case. It is important to recognise that this approach was not a fait accompli but represents a choice made by the judiciary in its understanding of the purpose of discrimination law and its capacity to 'transform' society.

6.5 Assessing a 'creative' approach in practice

In Part II, I utilised the framework of 'creative interpretation' defined in Part I to answer the second sub-question asked in 1.1: Is the approach adopted to the interpretation of discrimination law in Australia, Canada and the United Kingdom consistent with a 'creative' interpretation of legislative intent? In Part I, I argued that a 'creative' interpretation of discrimination law was one built upon a pluralist account of substantive equality. Part II has achieved two objectives. First, I have developed an outline and identified indicators of a court judgment that reflect a 'creative' interpretation of discrimination law's purpose. I did so through interrogating the different interpretations of the three central questions in discrimination law, namely, who is protected from discriminatory harms; what kinds of behaviours and practices are prohibited; and, to what extent can discrimination be 'eliminated'? Second, through this outline, I can establish an answer to the second sub-question asked in the introduction.

A 'creative' interpretation of discrimination law incorporates a contextual understanding of the historical and continuing disadvantage suffered on the basis of group membership. This requires an assessment of why certain grounds have been selected for protection and interpreting discrimination law accordingly. It requires an acceptance that the harm caused by discrimination can be both socio-economic and dignitary and that this harm can be 'because of' multiple and intersecting factors, some of which might not be obviously or initially identifiable. Finally, it requires an accepted role for the courts in remediating this disadvantage through challenging structures and practices, requiring positive action and providing remedies which redress the systemic reasons that disadvantage exists.

In these chapters, I developed an account of how each of these jurisdictions have understood the purpose of discrimination law and the courts' role in developing that purpose differently. In each jurisdiction, while the legislation is to be interpreted 'purposively,' how that purpose is constructed and whether it is consistent with a theory of substantive equality has differed. By considering the jurisprudence from each of these jurisdictions, I have demonstrated the degree of choice that courts have had in interpreting legislation that is, at face value, relatively similar. I have explored what a 'creative' interpretation of discrimination is in practice and demonstrated that each jurisdiction understands discrimination law differently.

When viewed as a whole, the approach to discrimination adopted in the United Kingdom involves a relatively faithful interpretation of the legislative text and the limitations are often justified on

the basis of limits in that text. It recognises that Parliament intended to prohibit discrimination, whether that discrimination was intentional or not. Some (although not all) of the case law recognises the different kinds of disadvantages that discrimination is designed to remedy. This allows courts to capture a wider variety of decisions and actions than is present in the Australian case law, but there is less consideration of the underlying and systemic reasons for disparity than is evident in the Canadian case law. Specifically, with respect to the capacity of discrimination law to create transformative change, appellate judges have acknowledged that discrimination law should have the capacity to address three out of four of the substantive equality dimensions.

Discrimination law can operate as a tool to redistribute advantages, redress stereotyping and stigma, and accommodate differences. The case law does not evince an approach that facilitates participation in different aspects of life: whether this is to participate in politics through political parties or through work. Further, the extent to which the appellate courts in the United Kingdom *actually* implement these purposes is limited. The courts justify these limits on the basis of the limitations of the legislation and the limitations of their role in constructing and facilitating social change. What is notable, though, is the gradual change that has taken place in the case law. The more recent case law from both the Supreme Court and the Court of Appeal, particularly since the mid-2000s, has begun to incorporate clearer articulations of the purpose of discrimination law.

In comparison, the Australian case law does not demonstrate a substantive approach to discrimination law's purpose. The Australian case law fails to give any real articulation of what the purpose of discrimination law is outside general statements that it is 'remedial' and 'beneficial.' Even where it is acknowledged that 'substantive equality' is the focus or purpose of discrimination law, there is no articulation of what this term means or requires. Broadly, the Australian case law demonstrates an understanding of discrimination law as a mechanism to punish duty-bearers for decisions that are unfair and based upon prohibited grounds. It is rarely interpreted to address underlying systemic inequality or merely 'negligent' discrimination.

The Canadian approach to the purpose of discrimination does, to a greater extent than the case law from the United Kingdom or Australian case law, focus on systemic issues that cause discrimination. It can challenge existing standards and practices of organisations and governments and require them to justify to a greater degree the imposition of policies and practices that cause disproportionate and discriminatory outcomes. Further, the remedies granted by courts give courts a more active role in both challenging and redressing discrimination.

However, in the more recent case law, there has been a high degree of focus on and concern as to the need for a stereotype to be the basis of a Canadian discrimination law claim. This focus and need for prejudice or stereotype has the capacity to limit the reach of discrimination law. This is because the court becomes focused on the intent and thought processes of the duty-bearer rather than the effects on a complainant or the underlying reasons for disadvantage. In addition, this approach appears to have limitations, particularly where the complainant is part of a group that is not viewed particularly sympathetically.

In answer to the second question asked in the introduction, the Canadian approach is the most consistent with a 'creative' interpretation of discrimination law founded on an understanding of substantive equality, although there are still evident limitations. In coming to this conclusion, Part II has contributed to the existing scholarship in three key ways.

First, through the comparative approach adopted, I have brought into focus the multitude of interpretative avenues that are available notwithstanding the similar legislative language. Second, I have illustrated the limitations of the normative literature discussed in Chapter Three. Part II has demonstrated that while there are some decisions in each jurisdiction which reflect a 'creative' interpretation of legislative intent, all interpretations still have significant limitations in redressing disadvantage, particularly where that disadvantage requires a degree of socio-economic redistribution.

Third, by narrowing the study to statutory discrimination claims only rather than a consideration of both constitutional and statutory claims, I have been able to establish that the relationship between 'constitutional' equality protections and statutory protections does not necessarily lead to a 'creative' or substantive interpretation of discrimination law. Particularly in the Canadian context, reliance on the s 15 jurisprudence has often led to *narrower* rather than more expansive interpretations of discrimination law. How these 'constitutional' protections have been utilised in each jurisdiction in the development of statutory discrimination law has been different. By excluding these cases from consideration in Part II, I have left the different constitutional frameworks as a critical variable to explore in Part III.

PART III

Part III What does a 'creative' interpretation of legislative intent require from judges?

Thus far, I have proposed answers to two of the three sub-questions asked in the introduction in 1.1. In Part I, I focused on the first sub-question: What is a 'creative' approach to discrimination law's purpose? I argued that statutory discrimination laws were passed to pursue an undefined goal of 'equality' in Australia, Canada and the United Kingdom. This undefined goal or purpose is reflected in the statutory texts, the explanatory materials and the historical and background assumptions behind the passage of the Acts in each jurisdiction. In Chapter Three, I argued that in light of the current normative debates, while this undefined goal could be understood in many different ways, a pluralist account of discrimination law's aims was the most useful framework for the purposes of my project

In Part II, I then assessed whether the judiciary in Australia, the United Kingdom and Canada have interpreted discrimination law 'creatively' as defined in Part I. I considered the interpretation of discrimination law with respect to three critical questions: why have certain groups been singled out for protection; what these specified groups are protected from (or what is unlawful discrimination); and how far can discrimination law change or 'transform' society. I argued that the Canadian approach to discrimination law is an approach that is the most consistent with a 'creative' interpretation of discrimination law's purpose, although there are still some limitations, particularly where courts are drawing on *Charter* jurisprudence. In contrast, the case law from the United Kingdom and Australia evinces a less substantive approach to discrimination. The United Kingdom's case law demonstrates an approach that conceives discrimination as incorporating negligent as well as intentional behaviours, while the Australian approach is focused on finding fault of the duty-bearer.

In the final part of this thesis, Part III, I will answer the thesis' overall research question: Is a 'creative' interpretation of statutory discrimination law consistent with the accepted or traditional judicial role in Australia, Canada or the United Kingdom? I will argue that implicit in the statutory schemes and the normative literature is the assumption that the judiciary takes a relatively active role in the elaboration of values and redistribution of social goods. In many ways, a 'creative' interpretation of non-discrimination rights sits at the crux of the debate about judicial legitimacy and competence. An expansive or 'creative' interpretation of statutory discrimination law can lead to challenges to the legitimacy of the judiciary to interpret non-discrimination rights in a manner that may not have been anticipated by parliaments when they passed discrimination legislation, in

some cases, decades ago. Additionally, it draws into question the competency of courts to remediate discriminatory practices, particularly where the discrimination involves questions of government policy.

What makes a 'creative' interpretation more likely is an accepted role for the judiciary in rights review. I will argue that the differences in approach to the purpose of statutory discrimination law are, in part, explained by the variations in the entrenchment of rights review in each jurisdiction.

In Chapter Seven, I will focus on questions of judicial legitimacy in interpreting discrimination law consistently with substantive equality. I will argue that in each jurisdiction statutory discrimination law is a form of quasi-constitutional law. I will argue that while the designation of discrimination law as 'quasi-constitutional' law in Canada has been utilised by Canadian judges to justify an expansive and 'creative' interpretation of statutory human rights, the same cannot be said in either Australia or the United Kingdom. In the second part of Chapter Seven, I will argue that this difference is explained by the different constitutional roles in rights review and norm elaboration that the courts play in each jurisdiction.

In Chapter Eight, I will conclude and summarise the arguments and findings of this thesis and give some reflections on the implications for future research that this thesis raises. The findings and conclusions of this research have important ramifications for the utility of legislative rights more broadly, particularly in jurisdictions without an entrenched role for the courts in rights review.

7 Values and Legitimacy

In this chapter, I will interrogate the values and principles that underlie discrimination law, drawing together the analysis and arguments from Chapters Two to Six. Discrimination law acts as a legislative articulation of particular societal values. The most central of these values is equality. But, as I emphasised in Part I, the detail and substance of what 'equality' entails and requires has been left to the courts to articulate. It is for the courts, rather than the legislature, to elaborate and apply discrimination law to the myriad of ways in which inequality manifests. As was demonstrated in Part II, how courts have responded to this role in the articulation and application of societal values has been different in Australia, Canada and the United Kingdom. This chapter builds on this analysis to make the overall argument of this thesis. In doing so, it answers the overarching research question asked in the introduction: Is a 'creative' interpretation of statutory discrimination law consistent with the accepted or traditional judicial role in Australia, Canada and the United Kingdom? I will argue that a 'creative' interpretation of statutory discrimination law challenges the legitimate role of the court in developing and articulating rights and values and applying those values where cases raise questions of public policy.

This chapter explores questions of legitimacy through a series of three contentions. The first contention is that addressing the recognitional and redistributive harms caused by discrimination requires a clear articulation of why discrimination is wrong and an analysis of the underpinning value of discrimination law. This articulation is best provided by judicial actors because it allows for discrimination law to reflect and apply to the ways in which inequality actually manifests in society. I will argue that the differences in interpretation demonstrated in Part II are explained by the extent to which judges draw upon values to give meaning and effect to discrimination law.

The second contention is that because of both the content and the function of statutory discrimination law in each jurisdiction, such statutes are a form of 'quasi-constitutional' law. In Canada, judges have utilised this designation in order to justify an expansive and 'creative' interpretation of statutory non-discrimination rights. However, in Australia and the United Kingdom, while statutory discrimination law can also be understood or categorised as 'quasi-constitutional,' this has not had the same effect on the interpretation of statutory non-discrimination rights. It is this difference that this chapter will explore.

The third contention is that what makes the approach adopted in Canada distinctive, as compared to Australia and the United Kingdom, is that the Canadian courts have a recognised, legitimate

and constitutionally embedded role in rights review more generally. This entrenched rights review role exists to a lesser extent in the United Kingdom and to a very limited extent in Australia. The consequences of an entrenched rights review role are that assigning 'quasi-constitutional' status to discrimination law provides the courts with greater scope to articulate the fundamental values underpinning discrimination law. This in turn is what gives courts the scope to interpret non-discrimination rights substantively.

7.1 Values underpinning statutory discrimination law

In Part I, I argued that discrimination law draws upon higher values, principally equality, liberty and dignity. This is demonstrated in the legislative text, particularly in the objects clauses, long titles and preambles in the Australian, Canadian and British legislation.[1212] Much of the normative scholarship draws on these higher values in articulating and advocating for a particular approach to discrimination law. In their work, both Moreau and Khatain draw upon ideas of liberty in developing the central theory and underlying basis for prohibiting discrimination.[1213] Others, such as Fredman and Sheppard draw upon different notions of equality to develop and expand on the meaning of discrimination whether based on dignity, hierarchy or a combination of recognition and redistribution.[1214] Part II demonstrated how these different values manifest and are articulated in the case law. In Part II, I demonstrated that these values have manifested differently in each jurisdiction. Building on these conclusions, I will argue that due to the nature of discrimination legislation, it is for courts to interpret and interrogate the relationship between the precise rules of conduct contained in discrimination legislation and higher values such as equality, liberty and dignity.

In earlier chapters, I argued that discrimination law is aspirational, drawing on broader values. Discrimination law principally draws on the value of equality. But a multidimensional approach to substantive equality recognises that there is an interwoven relationship between equality, liberty and dignity.[1215] Law operates as the link that articulates the precise rules of conduct to give meaning to these more abstract values and principles.[1216] It is this interlinked role that leads to discrimination

[1212] See 2.3.1.
[1213] See 3.2.
[1214] See 3.3.
[1215] See 3.3.2.
[1216] Sophia Moreau, 'What Is Discrimination?', above n 340, 147, 153–154.

law having *both* a highly technical design,[1217] as well as broadly stated aspirations.[1218] In most cases, tensions between these broad aspirations and its technicalities are limited. However, in hard cases, these tensions become starker.[1219] A judge can justify a broad and expansive interpretation of a discrimination statute on the basis that the statute articulates the fundamental values of the community.[1220] Or instead, a judge can focus on the technicalities of the legislative scheme, rejecting the statute as an articulation of fundamental values in the community.[1221] As Rutherglen has argued, over time these choices send the interpretation of discrimination law in a certain direction, pulling upwards towards aspiration or downwards towards questions of compliance:

> Discrimination serves to direct the debate up or down on the scale of abstraction: to basic controversies over political ideals or to pointed inquiries over how to frame political acceptable prohibition. The influence of the latter perspective, downward to legal doctrine, has diminished the force of appeals in the former direction, upward in the order of conceptual ascent. It has given calls to end discrimination a distinctly conservative cast … The weight and force of such prohibitions depend more upon practical commitments to compliance and enforceability than to placement at the apex of a hierarchy of justification.[1222]

For Rutherglen, the moral force and practical utility of discrimination law is lessened because of the natural tendency of legal reasoning to descend into technicality rather than focus on the broader and more abstract values that discrimination law is predicated upon.

Réaume proposes a contrasting critique of the failure to develop a 'grand theory' of the values of discrimination underlying discrimination law.[1223] Considering the history of the Canadian Human Rights Codes,[1224] Réaume argues the while statutory discrimination law is comprehensive, the piecemeal manner in which it has developed means that it lacks a foundational grand theory.[1225] Without a foundational 'grand theory' it becomes difficult to understand why certain attributes are granted protection from discrimination and others are not and what kinds of behaviours and practices should be prohibited.[1226] She argues that the problem is a 'top-down' or legislative approach to discrimination law.[1227] A 'top-down' approach can be challenging because without the

[1217] Anne Hewitt, 'Can a Theoretical Consideration of Australia's Anti-Discrimination Laws Inform Law Reform' (2013) 41(1) *Federal Law Review* 35, 43.
[1218] George Rutherglen, 'Concrete or Abstract Conceptions of Discrimination' in Deborah Hellman and Sophia Moreau (eds), *Philosophical Foundations of Discrimination Law* (Oxford University Press, 2013) 115, 115–116.
[1219] Ibid.
[1220] *Insurance Corporation of British Columbia v Heerspink* [1982] 2 SCR 145, 158 (Lamer J).
[1221] *IW v City of Perth* (1996) CLR 1, 15 (Brennan CJ and McHugh J).
[1222] Rutherglen, above n 1218, 117.
[1223] Réaume, 'Of Pigeonholes and Principles', above n 12.
[1224] Which is partially traced in section 2.1 of this thesis and is similarly reflected in Australia and the United Kingdom.
[1225] Réaume, 'Of Pigeonholes and Principles', above n 12, 124.
[1226] Ibid 126.
[1227] Ibid 128.

precise identification of the content of the values contained in discrimination legislation, the provisions become narrowed into pigeonholes.[1228]

One of the key differences in the interpretation of discrimination law is the extent to which these 'higher' values have been referred to in the identification of the purpose of discrimination law. In Chapter Six, I identified different articulations of the purpose of discrimination law in each jurisdiction and considered whether these articulations were consistent with a substantive understanding of equality. There are examples in both the Canadian and the more recent case law from the United Kingdom which draw on these higher values in explaining the purpose of discrimination. However, in Australia, judges have been more likely to draw downwards towards the technicalities of the legislation and the administration.

In the Australian case law, instead of interrogating the values underpinning discrimination law, the High Court has emphasised that discrimination statutes are not 'general' discrimination statutes. This was emphasised in the majority judgments in *IW*. For example, Brennan CJ and McHugh J acknowledged the need to give the legislation a broad interpretation pursuant to both general rules of statutory interpretation and the requirements of the Western Australia *Acts Interpretation Act* but cautioned that:

> Given the artificial definitions of discrimination in the Act and the restricted scope of their application, the court or tribunal should not approach the task of construction with a presumption that conduct which is discriminatory in its ordinary meaning is prohibited by the Act. The Act is not a comprehensive anti-discrimination or equal opportunity statute. The legislature of Western Australia, like other legislatures in Australia and the United Kingdom has avoided use of general definitions of discrimination.[1229]

In addition, Brennan CJ and McHugh J focused on the legislative compromises that were made to ensure the Act's passage. Due to these legislative compromises, they concluded that a broad interpretation could not be given to the Act in order for it to achieve the aims that supporters of non-discrimination wish it was able to achieve:

> Those legislatures have also deliberately confined the application of anti-discriminatory legislation to particular fields and particular activities within those fields.
>
> No doubt most anti-discrimination statutes are legislative compromises, resulting from attempts to accommodate the interests of various groups such as traders, employers, religious denominations and others to the needs of the victims of discrimination. As the evils of discrimination in our society have become better understood, legislatures have extended the scope

[1228] Ibid 143–144.
[1229] (1997) 191 CLR 1, 15 (Brennan CJ and McHugh J).

> of the original anti-discrimination statutes. Many persons think that anti-discrimination law still has a long way to go. In the meantime, courts and tribunals must faithfully give effect to the text and structure of these statutes without any preconceptions as to their scope. But when ambiguities arise, they should not hesitate to give the legislation a construction and application that promotes its objects. Because of the restricted terms of a particular statute, however, even a purposive and beneficial construction of its provisions will not always be capable of applying to acts that most people would regard as discriminatory.[1230]

In considering that the discrimination legislation is not a general prohibition on discrimination, Brennan CJ and McHugh J focused on two issues. First, that discrimination is not given a general definition in the Acts but instead is separated into two categories: direct and indirect. Each of these are given specific definitions. Second, Brennan CJ and McHugh J, as well as other members of the majority, emphasised that the application of the Acts is narrowed to specific areas such as employment, the provision of goods and services and education. This specificity leads to the conclusion that the Act was not envisaged to require broad scope and application.

The focus on the 'artificiality' of discrimination law is important for the manner in which courts have engaged in the development of its meaning. Understanding discrimination legislation as prohibiting only a very narrow range of behaviours and practices rather than as a more 'general' prohibition on discrimination allows the courts to abdicate any responsibility to interpret discrimination law consistently with higher values. The understanding of discrimination law as 'narrow' rather than 'general' and 'artificial' rather than 'organic' has two significant implications. First, it categorises discrimination law as only a matter of statutory interpretation. Second, it expressly limits the utility of other areas of law to develop an account of discrimination law's principles. This Australian focus on 'artificiality' can be contrasted with the clearer articulation of the values of discrimination law in both the case law from the United Kingdom and Canada.

The interpretation of discrimination law in the United Kingdom has undergone a degree of transformation since the legislation's first introduction in the 1960s and 1970s. As is evident from Part II, the initial interpretation often showed signs of the same restrictive interpretation of discrimination law. Discrimination law represented merely a limited exception to the general rules of the common law.[1231] Courts interpreted the grounds,[1232] the areas that discrimination law applied to, [1233] and in particular the scope and reach of indirect discrimination narrowly for many

[1230] Ibid. For similar statements see (1997) 191 CLR 1 35–37 (Gummow J) as well as *Australian Iron & Steel Pty Ltd v Banovic & Ors* (1989) 168 CLR 165, 206–207 (McHugh J)
[1231] O'Cinneide, 'Values, Rights and Brexit', above n 110.
[1232] See 4.1.1 and 4.1.1 for a discussion of the narrow way in which the definitions of race and sex were interpreted.
[1233] See section 6.3.1 for discussion as well as *Amin v Entry Clearance Officer Bombay* [1983] 2 AC 818 in which the House of Lords determined that did not apply to immigration decisions and *Australian Iron & Steel Pty Ltd v Banovic & Ors* (1989) 168 CLR 165, 206–207 (McHugh J).

decades.[1234] However, over time and particularly in the more recent case law over the past 10 to 15 years, the interpretation of discrimination law has shown a degree of change. In the more recent case law from the Supreme Court of the United Kingdom in particular, there is both an acceptance that discrimination law is a legislative articulation of rights rather than an exception to the general rule and an articulation of the higher values that underpin the legislative regime.

The Canadian jurisprudence can be contrasted with both the United Kingdom's slow progression towards a more 'creative' interpretation of discrimination law and the Australian focus on artificiality and technicality. The Canadian judiciary since the 1980s have accepted and better articulated the more aspirational aims of discrimination law. Rather than focusing on technical details and differences in the provincial Codes, courts have instead been more prepared to focus on the broader purposes and values behind discrimination law. This was demonstrated through the clearer articulation of the purpose of discrimination law and the broader interpretations given to grounds, protection and areas of operation as demonstrated in Part II. Further, in contrast to Australia, there is an emphasis on consistent interpretation of other legislative instruments with the principles in human rights statutes. This requirement for consistency in interpretation is, in part, based upon an understanding that discrimination law is the legislative articulation of fundamental values and a form of 'higher law.'

7.2 Quasi-constitutionalism and discrimination law

One of the most notable differences between the Canadian case law and the case law from the United Kingdom and Australia is the acceptance in the case law that the Canadian Human Rights Codes are 'quasi-constitutional' legislation. From the Supreme Court decision in *Insurance Corporation of British Columbia v Heerspink* ('*Heerspink*') onwards, this status has been used as a justification for a broader and more 'creative' interpretation of the provisions of the legislation. In this section, I will argue that that the Canadian quasi-constitutional approach to statutory discrimination law has been more likely to promote a substantive approach to construction and interpretation. This is because when doing so, judges focus on the broad social and aspirational aims of the legislation rather than its technical details which in turn allows the principles of legality to apply to non-discrimination rights.

This section begins with an assessment of what makes a statute quasi-constitutional and the effects of quasi-constitutional status on the approach to statutory interpretation. In particular, in this

[1234] See 5.1.2, 5.3, and 6.1.2 discussion.

section I will argue that while there are many attempts at a general definition of quasi-constitutional legislation, the designation is highly dependent on jurisdictional constitutionalism. The second part of this section will then argue that within each jurisdiction, discrimination legislation can and has been identified as 'quasi-constitutional' legislation within that jurisdictional context. However, this designation has not had consistent consequences in terms of statutory interpretation. The reasons for this difference will be developed in the third section of this chapter.

7.2.1 Quasi-constitutional statutes

To assess whether statutory discrimination law is quasi-constitutional, it is first necessary to articulate what makes a statute quasi-constitutional and why this is important. While there is a growing body of scholarship on the subject,[1235] the concept still lacks some clarity.[1236] At the outset, I contend that the terms 'quasi-constitutional' and 'constitutional' are ostensibly referring to the same kinds of legislation. Constitutional or quasi-constitutional legislation is legislation that whether through the legislative text or judicial pronouncement sits at a level between a 'capital-C style' Constitution and an ordinary statute.[1237] Statutes can be designated by judges as 'quasi-constitutional' either based upon the subject matter or because the statute functions as a limitation on the principle of parliamentary supremacy.

A number of statutes, particularly in the United Kingdom and Canada, have been designated by judges as 'constitutional' or 'quasi-constitutional.'[1238] However, judges have often failed to provide a definition or outline of what features give a statute this particular designation. In *Thoburn v Sunderland City Council*,[1239] Laws LJ outlined two forms of legislation that qualified as 'constitutional' legislation. These are first, legislation which outlines the conditions of the legal relationship between the citizen and the state in a general, overarching manner and second, legislation which either enlarges or diminishes the scope of what are 'fundamental constitutional rights.'[1240] Laws LJ's approach has been cited with approval by the Supreme Court of the United Kingdom.[1241] But,

[1235] Two recent examples include: Richard Albert and Joel Colon-Rios, *Quasi-Constitutionality and Constitutional Statutes: Forms, Functions and Application* (Routledge, 2019); John Helis, *Quasi-Constitutional Law in Canada* (Irwin Law, 2018).
[1236] Farrah Ahmed and Adam Perry, 'Constitutional Statutes' (2017) 37(2) *Oxford Journal of Legal Studies* 461, 467.
[1237] The UK case law and scholarship lean towards the term 'constitutional' statutes, while the Canadian case law and scholarship tend towards 'quasi-constitutional' and the Australian scholarship utilises both terms.
[1238] See Ahmed and Perry, above n 1236, 464 and Vanessa MacDonnell, 'A Theory of Quasi-Constitutional Legislation' (2016) 53(2) *Osgoode Hall Law Journal* 508 for a list of statutes that have designated this status in the United Kingdom and Canada.
[1239] [2002] QB 151.
[1240] [2002] QB 151, [62]–[64].
[1241] *H v Lord Advocate* [2013] 1 AC 413 [30] (Baroness Hale and Lord Kerr agreeing); *R (HSW Action Alliance Ltd) v Secretary of State for Transport* [2014] 1 WLR 324 [208] (Lord Neuberger with Baroness Hale, Lords Kerr, Sumption, Reed and Carnwath Agreeing).

a number of constitutional commentators from the United Kingdom including Feldman dispute this categorical distinction. He criticises Laws LJ's categorisation because the categories do not have clear and distinct boundaries. Feldman argues that many kinds of legislation change the legal relationship between the citizen and state, and further, will change over time because fundamental constitutional values are not fixed.[1242]

In the scholarship, there are numerous 'working definitions' of quasi-constitutional legislation. A distinction lies between an approach that focuses on the subject matter of the legislative instrument and the form and function of the legislative instrument. While much of the scholarship attempts to provide a uniform and general definition, rather than offering an attempt to do so, I argue that any definition of 'quasi-constitutionalism' is dependent on the constitutional context in which it is embedded. This means that no single definition can encapsulate a definition of quasi-constitutionalism in all jurisdictions.

Where a statute is designated as 'quasi-constitutional' because of its subject matter, this is generally because it relates to fundamental values. This focus on fundamental values reflects an understanding of a constitution as sitting at the top of a 'normative pyramid' which establishes and articulates the social values of a society.[1243] Quasi-constitutional statutes can also be akin to what Eskridge and Ferejohn describe as a 'super-statute.' A 'super-statute' is a statute that establishes a new normative or institutional framework for state practice. Such a statute 'sticks' in public culture in a way that the values embedded in the statute have a broad effect on the development of law.[1244] A statute's status as a super-statute is not embedded at the time of passage but instead is developed over time through a series of contestations surrounding its importance and meaning.[1245] In this conceptualisation, constitutionalism can be considered as the culmination of a contest about fundamental values and rights. In this context, a constitution or 'super-statute' is the outcome from such a struggle.[1246] Again, while this may have particular relevance in some jurisdictions, it does not apply to all constitutional contexts indiscriminately.

Alternatively, and possibly more prosaically, a statute can be 'quasi-constitutional' based on its form and function. Statutes can be designated as constitutional where the statute operates as a

[1242] David Feldman, 'The Nature and Significance of "Constitutional" Legislation' (2013) 129 *The Law Quarterly Review* 343, 346. See also: Ahmed and Perry, above n 1236, 464.
[1243] Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press, 2011) 190.
[1244] Ibid.
[1245] William N Eskridge and John Ferejohn, 'Super-Statutes' (2001) 50(5) *Duke Law Journal* 1215, 1216. This idea is drawn from Bruce Ackerman, *We the People (Vol 2) Transformation* (Harvard University Press, 2000).
[1246] Ackerman, above n 1245, 5 and 170.

mechanism which provides for how laws are to be made rather than merely a declaration of what the law is.[1247] Constitutional statutes regulate a fundamental feature of the law-making process in terms of the enactment, administration and interpretation of the law.[1248]

The implications of assigning legislation constitutional or quasi-constitutional status are significant. In Canada, Lamer CJ described quasi-constitutional legislation as:

> a half-way house between a purely common law regime and a constitutional one; it may aptly be described as a quasi-constitutional instrument. It does not embody any sanctions for the enforcement of its terms, but it must be the function of the Courts to provide them in the light of the judicial view of the impact of that enactment.[1249]

Generally, quasi-constitutional legislation has three effects. First, constitutional statutes are generally not subject to implied repeal.[1250] Second, where there is a conflict between a general provision of a 'constitutional' statute and a specific provision of an ordinary statute, the general maxim of *generalia specialibus non derogant* does not apply.[1251] Consequently, the more specific provision of the ordinary statute needs to read consistently with the constitutional statute.[1252] Third, where constitutional or quasi-constitutional statutes relate to fundamental human rights, this can import the principle of legality onto statutory rights, requiring clear legislative language before courts will accept that the legislature intended to infringe fundamental rights.[1253] This can also mean that statutory rights are treated with the same level of significance as traditional common law rights.

Constitutional or quasi-constitutional legislation emphasises the importance of the values and aspirations underpinning it and justifies a broad and expansive interpretation. Because of these effects, giving statutory discrimination law the designation of 'quasi-constitutional' legislation could allow for a more 'creative' interpretation, particularly in the context of competing legislation, legislative priorities and balancing different rights and interests.

[1247] David Feldman, 'Statutory Interpretation and Constitutional Legislation' above n 299, 473.
[1248] David Feldman, 'The Nature and Significance of "Constitutional" Legislation', above n 1242, 351-352.
[1249] *Hogan v The Queen* [1975] 2 SCR 574, 597–598.
[1250] *Thoburn v Sunderland City Council* [2002] QB 151.
[1251] See for example *R (Governors of Brynmawr Foundational School v The Welsh Ministers (Brynmawr)* [2013] EWHC 519; *Insurance Corporation of British Columbia v Heerspink* [1982] 2 SCR 145.
[1252] See for example *R (Governors of Brynmawr Foundational School) v The Welsh Ministers (Brynmawr*) [2013] EWHC 519; *Insurance Corporation of British Columbia v Heerspink* [1982] 2 SCR 145.
[1253] *Quebec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v. Caron* [2018] 1 SCR 35 [81].

7.2.2 Is statutory discrimination law quasi-constitutional?

This section will apply the definition of quasi-constitutional or constitutional statutes to statutory discrimination law in place in Australia, Canada and the United Kingdom. That discrimination law has quasi-constitutional dimensions is recognised in each jurisdiction; this section will explore the reasons why. Is it only due to the emphasis on human rights or do the functional aspects of constitutional legislation identified in the above section also apply to discrimination law? This section will demonstrate that this designation has had a different effect in each jurisdiction and that while in Canada it is through identifying statutory discrimination law as 'quasi-constitutional' that the courts have an expanded their scope to interpret discrimination law purposively, it has different effects in Australia and the United Kingdom.

In the United Kingdom, discrimination law can and has been identified as 'quasi-constitutional.' However, this is not because it is reflective of fundamental values but because the nature of the relationship with the EU has functional effects on parliamentary supremacy. McCrudden has identified discrimination legislation as 'quasi-constitutional' due to both its subject matter and its relationship with EU law.[1254] The *Equality Act 2010* (UK) and the historical legislation have not been given the designation of 'constitutional' legislation by the courts. The *Equality Act 2010* (UK) is not quasi-constitutional because of its subject matter.[1255] Rather, the relationship with EU law presently gives the *Equality Act 2010* (UK) a quasi-constitutional force. The close and necessary relationship between EU law and the discrimination statutes in the United Kingdom has required the application of EU law and ECJ judgments in the interpretation of discrimination statutes. Broadly, the application of EU law has been favourable in the pursuit of a more 'creative' interpretation of discrimination law in the United Kingdom (although there are some exceptions).[1256] In particular, it has strengthened the approach to the justification of indirect discrimination.[1257] The adoption of EU law has led to broader reading of some protected attributes such as disability to include associates of those with a disability.[1258] It has further allowed for clear applicability of discrimination law with respect to pregnancy discrimination without the need for comparison.[1259]

[1254] McCrudden, 'Equality and Non-Discrimination', above n 52, 499; McCrudden, 'Multiculturalism, Freedom of Religion, Equality, and the British Constitution', (2011) 9(1) *International Journal of Constitutional Law* 200, 229; Karon Monaghan, 'Constitutional Equality: New Horizons' [2008] (1) *European Human Rights Law Review* 20.
[1255] Ahmed and Perry, above n 1236, fn 30.
[1256] See discussion of justification of age discrimination at 4.3.1 for example.
[1257] [2013] 1 WLR 3741, 3748.
[1258] *Coleman v Attridge Law and Anor* (Case C-303/06) [2008] ICR 1128.
[1259] See 4.2.

Importantly, the Supreme Court has drawn on ECJ jurisprudence even where it was not required to do so. For instance, in *Preddy* the prohibitions on discrimination contained in the *Equality Act (Sexual Orientation) Regulations 2007* (UK) went further than was required by the Equality Directive,[1260] by extending the application of discrimination on the grounds of sexual orientation to areas other than employment. *Preddy* involved the provision of goods and services. Given that the provision was not based on the Directive, there was no requirement for the interpretation to be consistent with EU law. Nevertheless, Baroness Hale, with whom the Court agreed, concluded that:

> We do not have to construe these Regulations in accordance with the jurisprudence of the Court of Justice because they are not implementing a right which is (as yet) recognised in EU law. But as the same concepts and principles are applied in the Equality Act 2010 both to rights which are and rights which are not recognised in EU law, it is highly desirable that they should receive interpretations which are both internally consistent and consistent with EU Law.[1261]

The relationship with EU law gives British statutory discrimination law a form of quasi-constitutional force. This has led to a method of interpretation that ensures consistency with EU law, even where the statutory right is not yet recognised in the EU jurisprudence, as was the case in *Preddy*. However, contrasting with Canada, as will be demonstrated below, this has not led to any special methods of interpretation based on the fundamental nature of the subject matter.

In Australia, discrimination law, particularly federal discrimination law, has been described as 'quasi-constitutional law.' This description is often justified on the basis of the subject matter and that discrimination legislation is reflective of fundamental values.[1262] The *Racial Discrimination Act 1975*, in particular, also has the kind of 'super-statute' status described by Eskridge and Ferejohn. This is evidenced by the repeated failure to remove or limit the protections that it provides minority racial groups, particularly in the context of racial vilification protections.[1263]

[1260] *European Council Directive* 2000/78/EC 27 November 2000.
[1261] [2013] 1 WLR 3741, 3748.
[1262] Cheryl Saunders and Megan Donaldson, 'Values in Australian Constitutionalism' in Dennis Davis, Alan Richter and Cheryl Saunders (eds), *An Inquiry into the Existence of Global Values: Through the Lens of Comparative Constitutional Law* (Hart Publishing, 2015) 15, 36.
[1263] There has been ongoing debate and attempts to remove or limit the operation of the protections from racial vilification in the *Racial Discrimination Act 1975* s 18C. For a discussion of this debate see: Adrienne Stone, 'The Ironic Aftermath of Eatock v Bolt' (2015) 38(3) *Melbourne University Law Review* 926, 936–945; Katharine Gelber and Luke McNamara, 'Freedom of Speech and Racial Vilification in Australia: "The Bolt Case" in Public Discourse' (2013) 48(4) *Australian Journal of Political Science* 470; Amanda Porter, 'Words Can Never Hurt Me? Sticks, Stones and Section 18C' (2015) 40(2) *Alternative Law Journal* 86.

Williams and Reynolds identify that the 'constitutional value' of discrimination legislation is through the supremacy of federal legislation over state legislation.[1264] This supremacy enables Commonwealth discrimination legislation to set standards of conduct at both a federal and state level.[1265] The Commonwealth discrimination Acts have been utilised to curtail discriminatory state and territory legislation. In the context of the *Racial Discrimination Act 1975* (Cth), in 30 appellate-level cases, parties have sought to override a provision of a state or territory Act because of inconsistency with a federal Act.[1266] Most of these involve challenges related to native title.[1267] It is notable, however, that only seven of these cases were successful,[1268] and two of these involved limiting the operation of a state discrimination Act.[1269] While the 'constitutional value' of discrimination law is often discussed in the context of s 10 of the *Racial Discrimination Act 1975* (Cth), this is not the only Commonwealth discrimination Act which has been described as quasi-constitutional in nature or as a form of legislation which demonstrates constitutional values.[1270] Nor is the *Racial Discrimination Act 1975* (Cth) the only federal discrimination Act which has been utilised in an attempt to limit state law on the basis of inconsistency. There have been some

[1264] George Williams and Daniel Reynolds, 'The Racial Discrimination Act and Inconsistency under the Australian Constitution' (2015) 36(1) *Adelaide Law Review* 241, 246.
[1265] Ibid.
[1266] These cases are *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Viskauskas v Niland* (1983) 153 CLR 280; *University of Wollongong v Metwally* (1984) 158 CLR 447; *Gerhardy v Brown* (1985) 159 CLR 70; *Mabo v Queensland (No 1)* (1988) 166 CLR 186; *Mabo v Queensland (No 2)* (1992) 175 CLR 1; *Wik Peoples v Queensland* (1996) 187 CLR 1; *Western Australia v Commonwealth ('Second Native Title Act Case')* (1995) 183 CLR 373; *Western Australia v Ward* (2002) 213 CLR 1; *Jango v Northern Territory of Australia* (2007) 159 FCR 531; *James v Western Australia* (2010) 184 FCR 582; *Munkara v Bencsevich* [2018] NTCA 4; *Maloney v The Queen* (2013) 252 CLR 168; *R v Maloney* [2013] 1 Qd R 32*; Queensland Construction Materials Pty Ltd v Redland City Council* [2010] QCA 182; *Morton v Queensland Police Service* (2010) 271 ALR 112; *Aurukun Shire Council v Chief Executive, Office of Liquor, Gaming and Racing in the Department of Treasury* [2012] 1 Qd R 1 237; *Durham Holdings Pty Ltd v New South Wales* (1999) 47 NSWLR 340; *Mason v Tritton* (1994) 34 NSWLR 572; *R v Grose* (2014) 119 SASR 92; *Central Northern Adelaide Health Service v Atkinson* (2008) 103 SASR 89; *Aboriginal Legal Rights Movement Inc v South Australia [No 2]* (1995) 64 SASR 558; *Doyle v Queensland* (2016) 249 FLR 519; *James and Ors v Western Australia & Ors* (2010) FCR 582; *Bropho v Western Australia & Ors* [2008] FCAFC 100; *Western Australia v Sebastian* (2008) 173 FCR 1; *Queensland v Central Queensland Land Council Aboriginal Corporation and Anor* (2002) 125 FCR 89; *Pareroultja & Ors v Tickner & Ors* (1993) 42 FCR 32; *Northern Territory Planning Authority v Murray Meats (NT) Pty Ltd & Ors* (1983) 51 LGRA 158.
[1267] *Mabo v Queensland (No 1)* (1988) 166 CLR 186; *Mabo v Queensland (No 2)* (1992) 175 CLR 1; *Wik Peoples v Queensland* (1996) 187 CLR 1; *Western Australia v Commonwealth ('Second Native Title Act Case')* (1995) 183 CLR 373; *Western Australia v Ward* (2002) 213 CLR 1; *Jango v Northern Territory of Australia* (2006) 152 FCR 150*; James v Western Australia* (2010) 184 FCR 582; *Queensland v Central Queensland Land Council Aboriginal Corporation and Anor* (2002) 125 FCR 89.
[1268] *Viskauskas v Niland* (1983) 153 CLR 280; *University of Wollongong v Metwally* (1984) 158 CLR 447; *Mabo v Queensland (No 1)* (1988) 166 CLR 186; *Mabo v Queensland (No 2)* (1992) 175 CLR 1; *Western Australia v Commonwealth ('Second Native Title Act Case')* (1995) 183 CLR 373; *Western Australia v Ward* (2002) 213 CLR 1; *Jango v Northern Territory of Australia* (2006) 152 FCR 150; *James v Western Australia* (2010) 184 FCR 582.
[1269] *Viskauskas v Niland* (1983) 153 CLR 280; *University of Wollongong v Metwally* (1984) 158 CLR 447; Cf *Central Northern Adelaide Health Service v Atkinson* (2008) 103 SASR 89.
[1270] Scott Stephenson 'The Rise and Recognition of Constitutional Statutes' in Richard Albert and Joel Colon-Rios (eds), *Quasi-Constitutionality and Constitutional Statutes: Forms, Functions and Applications* (Routledge, 2018) 27, 35 fn 33; Saunders and Donaldson, above n 1263, 36.

attempts to utilise the provisions of the *Sex Discrimination Act 1984* (Cth) to limit the operational force of state legislation pertaining to gender transition and access to in vitro fertilisation services.[1271]

Theoretically, the federal and state discrimination Acts could compel or constrain the statutory construction of another state or federal Act to ensure harmonious operation.[1272] This could involve interpreting other legislation consistently with the principles contained in discrimination law. While there is one case from an appellate court in which this occurs,[1273] generally it is discrimination legislation that is curtailed to ensure the harmonious operation of two potentially inconsistent Acts.[1274]

Ultimately, any 'quasi-constitutional' force of discrimination law in Australia comes from the combination of both the constraining influence of Commonwealth law and the subject matter of the statutes as neither of these identifying features on their own provide significant 'quasi-constitutional force.' Instead, it is the amalgamation of these factors which justify the inclusion of discrimination legislation as 'quasi-constitutional.' This is reflected in the way in which High Court judges refer to the force of federal discrimination law extra-curially. In 1982, Sir Harry Gibbs concluded that the *Racial Discrimination Act 1975* implemented 'A bill of rights, limited it is true in scope, which is effective[ly] entrenched against the States.'[1275] Other Justices of the High Court have made similar statements about the nature of the *Racial Discrimination Act*, sometimes focusing specifically on its aspirational nature.[1276] In this way, the Commonwealth Acts do have a kind of quasi-constitutional status, not only because the Acts articulate fundamental values but also because of their functional effect on state legislatures. However, again like in the United Kingdom, this quasi-constitutionalism has not led to any special interpretive techniques being adopted to fulfil a substantive purpose.

[1271] See for example: *AB v Registrar of Births, Deaths and Marriages* (2007) 162 FCR 528; *EHT18 v Melbourne IVF* (2018) 263 FCR 376.
[1272] Perry Hertzfeld, Thomas Prince and Stephen Tully, *Interpretation and Use of Legal Soures: The Laws of Australia* (Thomson Reuters, 2013) 224.
[1273] *Queensland v Attrill* [2012] QCA 299.
[1274] See for example: *Lyons v Queensland* (2016) 259 CLR 518 where the High Court read down the provisions of the *Anti-Discrimination Act 1991* (Qld) to ensure consistency with the *Jury Act 1995* (Qld).
[1275] Sir Harry Gibbs, 'The Constitutional Protection of Human Rights' (1982) 9(1) *Monash University Law Review* 1, 13.
[1276] See for example: Robert French, 'Protecting Human Rights Without a Bill of Rights' (Speech delivered at the John Marshall Law School, Chicago Bar Association, 26 January 2010); Justice Virginia Bell, 'Equality, Proportionality and Dignity: The Guiding Principles for a Just Legal System' (2017) 42(1) *Alternative Law Journal* 4; Justice John Toohey, above n 88.

The Canadian Supreme Court has designated a limited number of statutes as 'quasi-constitutional.'[1277] The provincial and the federal human rights Acts have all been designated as quasi-constitutional, as have the statutory bills of rights including the *Canadian Bill of Rights* and the Quebec *Charter of Human Rights and Freedoms*.[1278] The other statutes granted 'quasi-constitutional' status are statutes protecting privacy, access to information legislation and official languages legislation. [1279] Different to Australia, this designation has a demonstrable effect on the interpretation of discrimination statutes. The implication of this 'quasi-constitutional' status is that they are given a 'broad and generous' interpretation and trump other ordinary laws unless those laws otherwise provide.[1280]

The concept of 'quasi-constitutional' statutes emerged in Canada in the 1970s in the context of the application of the *Canadian Bill of Rights*.[1281] This same understanding of the 'special' character of statutes implementing human rights is seen clearly in the Canadian Supreme Court jurisprudence on discrimination legislation from the early 1980s. The first case in which the Court clearly did so was *Insurance Corporation of British Columbia v Heerspink*.[1282] In *Heerspink*, the appellant had terminated the insurance coverage on the respondent's buildings after the respondent was put on trial on drug trafficking charges.[1283] The respondent argued that the cancellation of insurance was a breach of the British Columbia Human Rights Code by denying him a service which was customarily available to the public on the basis of a protected attribute.[1284] The appellant argued that it was within its statutory rights as defined in the *Insurance Act* to terminate coverage without giving justification.[1285] The question for the Court was whether the statutes could be read together or if the Human Rights Code had impliedly repealed the older *Insurance Act*.[1286] While ultimately the majority concluded that there was no conflict between the two statutes, Lamer J articulated that had there been a conflict, the Human Rights Code would prevail:

> When the subject matter of a law is said to be the comprehensive statement of the 'human rights' of the people living in that jurisdiction then there is no doubt in my mind that the people of that jurisdiction have through their legislature clearly indicated that they consider that law, and the values it endeavours to buttress and protect, are save their constitutional laws, more important

[1277] See *Éditions Écosociété Inc v Banro Corp* [2012] 1 SCR 636 and *R v Mercure* [1988] 1 SCR 234
[1278] Helis, above n 1235, 4–6.
[1279] Ibid 6 – 10.
[1280] See Ruth Sullivan, *Sullivan on the Construction of Statutes* (LexisNexis Canada, 2014) 497–508; and *Thibodeau v Air Canada* [2014] 3 SCR 340.
[1281] Helis, above n 1235, 2.
[1282] [1982] 2 SCR 145.
[1283] [1982] 2 SCR 145, 148–151 (Richie J with Laksin CJ and Dickson J agreeing).
[1284] [1982] 2 SCR 145, 148 (Richie J with Laksin CJ and Dickson J agreeing).
[1285] [1982] 2 SCR 145, 147 (Richie J with Laksin CJ and Dickson J agreeing).
[1286] Ibid.

> than all others. Therefore, short of that legislature speaking to the contrary in express and unequivocal language in the Code or in some other enactment, it is intended that the Code supersede all other laws when conflict arises.
>
> As a result, the legal proposition, *generalia specialibus non derogant* cannot be applied to such a code. Indeed, the *Human Rights Code*, when in conflict with 'particular and specific legislation,' is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law.
>
> Furthermore, as it is a public and fundamental law, no one, unless clearly authorized by law to do so, may contractually agree to suspend its operation and thereby put oneself beyond the reach of its protection.[1287]

These sentiments about the fundamentality of discrimination legislation were repeated in a number of subsequent cases. It is this fundamentality which requires discrimination law to be given a broad and beneficial interpretation. An example of this is in *O'Malley*, where the Supreme Court of Canada accepted that the Ontario Human Rights Code prohibited not only direct discrimination but also indirect discrimination.[1288] It did so through a broad interpretation of the prohibition on discriminatory conduct. Justice McIntyre justified this approach based on the special nature of Human Rights Codes:

> The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment (see Lamer J in *Insurance Corporation of British Columbia v Heerspink* [citation omitted]) and to give it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than ordinary — and it is for the courts to seek out its purpose and give it effect.[1289]

Much the same conclusions about the special nature of human rights legislation have been accepted in numerous cases since then.[1290] The status of human rights legislation as 'quasi-constitutional' in Canadian law is now well-established.

[1287] [1982] 2 SCR 145, 157–158 (Lamer J).
[1288] [1985] 2 SCR 536, 546–547 (McIntyre J).
[1289] [1985] 2 SCR 536, 547 (McIntyre J).
[1290] Lamer J's comments have been cited with approval in the following Supreme Court decisions: *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 SCR 3; *Central Okanagan School District No 23 v Renaud* [1992] 2 SCR 970; *Canada (Attorney General) v Mossop* [1993] 1 SCR 554; *Quebec (Commission des droits de la personne et des droits de la jeunesses v Montreal (City)* [2000] 1 SCR 665; *Winnipeg School Division No 1 v Craton* [1985] 2 SCR 150; *Robichaud v Canada (Treasury Board)* [1987] 2 SCR 84; *Béliveau St-Jacques v. Fédération des employées et employésde services publics inc.* [1996] 2 SCR 345; *CN v Canada (Human Rights Commission)* [1987] 1 SCR 1114; *Brooks v Canada Safeway Ltd* [1989] 1 SCR 1219; *Tranchemontagne v Ontario (Director, Disability Support Program)* [2006] 1 SCR 513; *Zurich Insurance Co v Ontario (Human rights Commission)* [1992] 2 SCR 321; *Bhinder v CN* [1985] 2 SCR 561; *Battlefords and District Co-operative Ltd v Gibbs* [1996] 3 SCR 566; *Gould v Yukon Order of Pioneers* [1996] 1 SCR 517.

There are three aspects to this designation of Human Rights Codes as 'quasi-constitutional' in Canada which are important for the development of a 'creative' interpretation of non-discrimination rights. First, the principle of legality applies to discrimination law in a manner which it does not in either the United Kingdom or in Australia. In *Winnipeg School Division No 1 v Craton*,[1291] the Supreme Court of Canada concluded that:

> Human rights legislation is of a special nature and declares public policy regarding matters of general concern. [It] is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the legislature. It is, however, of such a nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement.[1292]

This has made discrimination law in Canada difficult to repeal without express legislative pronouncement.

Second, and as has been noted in 5.3.3, the 'quasi-constitutional' status has meant that other statutes and the common law are interpreted in a manner consistent with the human rights principles transposed in discrimination law. Additionally, despite differences in wording, the federal and provincial Human Rights Codes must be interpreted consistently.[1293] This has given the principles and values underlying the prohibitions on discrimination wide effect.[1294]

Third, the judiciary has used this status as 'quasi-constitutional' law to justify an interpretation of discrimination law which is in keeping with its articulation of the community's overarching and changing community standards and values. This can involve stretching the language of the statute to be consistent with the broad and aspirational purpose of the legislation. It is through the status as 'quasi-constitutional' that the courts have justified the conclusion that the statute prohibits indirect as well as direct discrimination and requires reasonable accommodation for all grounds or attributes.[1295] The legislation's quasi-constitutional status has been invoked to justify a broad and generous interpretation of attributes such as family status.[1296] Most recently in *British Columbia v Schrenk*,[1297] the Supreme Court invoked discrimination law's quasi-constitutional status to justify

[1291] [1985] 2 SCR 150.
[1292] [1985] 2 SCR 150, 156 (McIntyre J, with whom the Court agreeing).
[1293] *University of British Columbia v Berg* [1993] 2 SCR 353 [32] (Lamer CJ). See also: *Saskatchewan (Human Rights Commission) v Prince Albert Elks Club Inc* 2002 SKCA 106 [20].
[1294] *Honda Canada Inc v Keays* [2008] 2 SCR 362 [118]–[119] (LeBel J with Fish J concurring).
[1295] *Ontario Human Rights Commission and O'Malley v Simpson-Sears Ltd* [1985] 2 SCR 536; *Bhinder v Canadian National Railway* [1985] 2 SCR 561.
[1296] See 4.2.3; *B v Ontario (Human Rights Commission)* [2002] SCC 66; *Canada (Attorney General) v Johnstone* [2015] 2 FCR 595 and *Saskatchewan (Human Rights Commission) v Prince Albert Elks Club Inc* 2002 SKCA 106 [20].
[1297] [2017] 2 SCR 795.

an interpretation of the term 'employment' to extend discrimination protection to all discrimination with a sufficient connection to their employment context.[1298] This includes discrimination by co-workers, even where those co-workers have a different employer and most likely includes discrimination by customers.[1299] These interpretive choices about what prohibited discrimination is, who is entitled to protection and what areas of public life are covered have expanded discrimination law far past its original boundaries when it was first passed many decades ago.

While in each jurisdiction, statutory discrimination law can be readily identified as 'quasi-constitutional' law, only in Canada has this designation had any demonstrable impact on the approach adopted to interpretation. In Canada, it is this 'quasi-constitutional' status which requires a broad and 'creative' interpretation of non-discrimination rights. Despite a feasible designation as 'quasi-constitutional' in both the United Kingdom and Australia, the same interpretive role has not developed. In the next section, I will contend that this difference stems from the different institutionally accepted role for the court in rights review.

7.3 Judicial legitimacy and statutory non-discrimination rights

Why has the quasi-constitutional status of statutory discrimination law had different effects in different jurisdictions? This section will argue that a 'creative' interpretation of statutory non-discrimination rights requires the judiciary to have an accepted role in the articulation of fundamental values and the protection of rights, whether these rights are constitutional or statutory.

Most of the debate about the legitimate role of the judiciary in rights review is focused on the legitimacy of strong forms of rights review where legislation is invalidated on the basis of violation of individual rights.[1300] Either judicial review of rights is justified as a precondition to a well-functioning democracy[1301] or judicial review is opposed on the basis that it is the democratically elected legislature who best can determine whether they want to permit a range of policies and

[1298] [2017] 2 SCR 795, 820–821 (Rowe J).
[1299] [2017] 2 SCR 795, 817 (Rowe J). See also: *Canadian Pacific Ltd v Canada (Human Rights Commission)* [1991] 1 FC 571 (CA).
[1300] Waldron, 'The Core of the Case Against Judicial Review', above n 8, 1353.
[1301] Ronald Dworkin, *Freedom's Law: The Moral Reading of the Constitution* (Harvard University Press, 1996) 3-4.

actions which relate to morality and rights.[1302] As Waldron highlights, where there is no strong-form judicial review:

> The people can decide finally, by ordinary legislative procedures whether they want to permit abortion, affirmative action, social vouchers or gay marriage … If they disagree about any of these matters, they can elect representatives to deliberate and settle the issue by voting for legislation.[1303]

Waldron and other rights review critiques contend that not only is rights review undemocratic, but also that legal method and legal reasoning are inconsistent with the kinds of moral debates that are necessary to resolve questions regarding rights. Waldron has been critiqued on philosophical, conceptual and methodological grounds, but the implications for statutory rights interpretation have not been considered.[1304]

The problem with much of this debate in the context of statutory rights is its dualist nature.[1305] Rights are either best protected by the legislature due to the democratic and open nature of the institution[1306] or courts are the institutions best able to protect human rights because they are better able to resist the pressures of partisan politics and better protect minority interests in a majoritarian sphere.[1307]

Statutory discrimination law creates an interesting dilemma in this context. In passing discrimination law, legislatures operate exactly in the manner in which democratic legitimacy objectors to rights review argue that legislatures should act. Legislation prohibiting discrimination demonstrates that parliamentarians can be committed to minority and individual rights.[1308] Discrimination legislation demonstrates that the legislative process *can* be harnessed to discuss and

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[1302] Waldron, 'The Core of the Case Against Judicial Review', above n 8, 1349. See also: Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999); Tom Campbell, *Prescriptive Legal Positivism: Law, Rights and Democracy* (UCL Press, 2004) 171.

[1303] Waldron, 'The Core of the Case Against Judicial Review', above n 8, 1349. See also: Waldron, 'Judges as Moral Reasoners', above n 8.

[1304] Adrienne Stone, 'Judicial Review without Rights: Some Problems for the Democratic Legitimacy of Structural Judicial Review' (2008) 28(1) *Oxford Journal of Legal Studies* 1; Theunis Robert Roux, 'In Defence of Empirical Entanglement: The Methodological Flaw in Waldron's Case Against Judicial Review' in Ron Levy et al (eds) *Cambridge Handbook of Deliberative Constitutionalism* (Cambridge, 2018) 203; Wojciech Sadurski, 'Rights and Moral Reasoning: An Unstated Assumption — A Comment on Jeremy Waldron's "Judges as Moral Reasoners"' (2009) 7(1) *International Journal of Constitutional Law* 25; Aileen Kavanagh, 'Participation and Judicial Review: A Reply to Jeremy Waldron' (2003) 22(5) *Law and Philosophy* 451.

[1305] Beverley McLachlin, 'Legislated Rights: Comment by Beverley McLachlin,' Blog Post on Judicial Power Project (14 February 2019), available at: http://judicialpowerproject.org.uk/legislated-rights-comment-by-beverley-mclachlin/.

[1306] Francisco J Urbina, 'How Legislation Aids Human Rights Adjudication' in Grégoire Webber, Paul Yowell and Richard Ekins (eds), *Legislated Rights: Securing Human Rights Through Legislation* (Cambridge University Press, 2018) 153, 177.

[1307] Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, 2009) 345.

[1308] Waldron, 'The Core of the Case Against Judicial Review', above n 8, 1360.

determine difficult issues.[1309] As demonstrated in Chapter Two, the protection of non-discrimination rights has remained remarkably consistent with relatively little backsliding over a reasonably substantial period of time.[1310] While courts have a clear role in the protection of rights in this context, this is generally not performed in 'opposition' to nor in a kind of dialogue with the legislature.[1311]

Once the democratically elected representatives have passed rights protecting legislation, what is the legitimate role of the judiciary in its interpretation? The courts will be the ultimate arbiters of the meaning of statutory rights, developed through interpreting provisions through a series of cases. An adherence to parliamentary sovereignty only goes so far to determining an intention of Parliament where the legislation and the explanatory materials are sparse on details of intention and filled with statements of aspiration. Adherents to parliamentary supremacy such as Goldsworthy and Ekins argue that the courts' role in interpreting legislation is to construe the meaning or purpose of the provision in the context of the statute as a whole, consistent with the background assumptions of all actors involved.[1312] This conceives the process of interpretation of one of two-sides of a conversation in which context and unstated assumptions gives the interpreter the necessary information to construe the appropriate meaning.[1313]

But, as I have shown, there is no 'discoverable' meaning or intent behind discrimination law. As demonstrated from the analysis of the legislation in Part I and the interrogation of the case law in Part II, neither the legislation's particular wording, nor the background cultural understandings which could illuminate the intended meaning of a provision, are helpful when confronted with actual cases and circumstances. Even where it is acceptable to use parliamentary materials in an attempt to answer these questions, as was outlined in Chapter Two,[1314] the rationale for prohibiting discrimination has never been clearly articulated by the legislature. Instead, the legislative materials emphasise that discrimination is a societal ill that the common law has failed to ameliorate. But

[1309] See discussion in 2.2.
[1310] See Chapter 2; although acknowledging that in the United Kingdom, the Conservative Government h either failed to bring into force or amend parts of the *Equality Act* since its introduction in 2010 and that in Canada, in some provinces, there have been some recent changes to some of the provincial legislation. See Dominique Clément, 'Renewing Human Rights Law in Canada' (2017) 54 *Osgoode Hall Law Journal* 1311.
[1311] Peter Hogg and Allison Bushell, 'The Charter Dialogue between Courts and Legislatures (or Perhaps the Charter of Rights Isn't a Such a Bad Thing after All)' (1997) 35 *Osgood Hall Law Journal* 75. Cf: Aileen Kavanagh, 'The Lure and the Limits of Dialogue' (2016) 66(1) *University of Toronto Law Journal* 83.
[1312] Ekins and Goldsworthy, above n 290. See also: Goldsworthy, *Parliamentary Sovereignty*, above n 85, Ch 9; Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2012) Ch 9.
[1313] Ibid. See also Dennis C Pearce and Robert S Geddes, *Statutory Interpretation in Australia* (Lexis Nexis, 8th ed, 2014) 146.
[1314] See section 2.2 and 2.4

there is little articulation of the reasons why certain groups warrant protection but others do not. Similarly, there is little articulation of what conduct is discriminatory or the extent to which discrimination law was intended to change society in the explanatory materials or the parliamentary debates. Whether this is an abdication of responsibility,[1315] or merely the nature of human rights legislation,[1316] it leaves courts as the arbiters of the moral underpinnings of discrimination law. However, the courts are left as the arbiters of meaning within a context where the background assumptions and community expectations of what discrimination is and what law can and should be aimed at achieving have changed over time.[1317]

Further complicating the appropriate role for the court in interpreting discrimination is the fact that many of the appellate court decisions involve challenging government action and policy. As has been outlined in earlier chapters, discrimination laws have been utilised in each jurisdiction in an attempt to achieve some form of socio-economic equality. In each jurisdiction, complainants have challenged policies related to schooling,[1318] the provision of healthcare,[1319] transportation,[1320] planning and housing,[1321] and other government policies and subsidies.[1322] Each of these challenges involves difficult questions of public expenditure and executive and legislative decision making. The justificatory standards, as discussed in 5.3, can necessarily require a degree of interrogation of government policy choices, particularly concerning the scarcity of public resources in determining appropriate standards of services in education, transportation and social assistance.

The appropriate role for the court in interpreting legislation could also stem from the legislative text itself. Where the text is more open-ended there is potentially more scope for creativity.[1323] Considering discrimination law in particular, the different interpretations given to discrimination legislation could simply stem from the different legislative text and the political willingness of the legislature to prohibit discrimination. But this hypothesis is not sustainable in light of the research

[1315] Thornton, *The Liberal Promise,* above n 44, 34. See also: Thornton, 'Sex Discrimination, Courts and Corporate Power', above n 17, 48.
[1316] O'Cinneide, 'The Right to Equality', above n 360.
[1317] Ibid.
[1318] See for example: *Mandla (Sewa Singh) v Dowell Lee* [1983] 2 AC 548; *R v Birmingham City Council Ex parte Equal Opportunities Commission* [1989] AC 1155; *R (E) v JFS Governing Body* [2010] 2 AC 728; *Purvis v New South Wales* (2003) 217 CLR 92; *Moore v British Columbia (Education)* [2012] 3 SCR 260.
[1319] *Armstrong v British Columbia* 2010 BCCA 56.
[1320] *Paulley v FirstGroup Plc* [2017] 1 WLR 423; *Waters v Public Transport Corporation* (1991) 173 CLR 350; *Council of Canadians with Disability v VIA Rail Canada Inc* [2007] 1 SCR 650.
[1321] *IW v City of Perth* (1996) 191 CLR 1; R *(on the application of Wilson) v Wychavon DC* [2007] EWCA Civ 55*; Vancouver Area Network of Drug Users v Downtown Vancouver Business Improvement Association* 2018 BCCA 132.
[1322] R *(on the application of Domb) v Hammersmith and Fulham* [2009] EWCA Civ 941; *Hamnett v Essex County Council* [2017] EWCA Civ 6.
[1323] Smith, 'Rethinking the *Sex Discrimination Act*', above n 3.

and arguments put forward in this thesis. As was identified in Chapter Two, there is a lack of clarity in each jurisdiction surrounding the legislation's purpose, and in terms of the operation of the legislative provisions. It is notable that the legislatures have attempted to provide significantly more detail to guide the operation of the legislation than in most other cases of legislative drafting. In the United Kingdom, the explanatory notes have been left in the *Equality Act 2010* (UK) in an attempt to further elaborate upon the meaning of the key provisions.[1324] In the Australian legislation (particularly in the state legislation),[1325] examples and explanations to indicate the desired intent of the provisions have been included in the legislative text for guidance. This demonstrates political engagement and willingness but has had seemingly little bearing on the judicial interpretation of the legislation.

In each jurisdiction, the legislature attempted (in the Canadian context explicitly) to avoid the pitfalls and problems of the 'common law' approach to discrimination outlined in 2.1 through the creation of separate, specialist tribunals.[1326] The purpose of the tribunal system was to avoid the cost and rigidity of the court system.[1327] But it was also to allow discrimination law jurisprudence and practice to develop through the use of expert tribunal members rather than judges.[1328] This was arguably effective in the Canadian context.[1329] However, the same cannot be said in the

[1324] See Hand, Davis and Barker, above n 212, for discussion.

[1325] See for example the Queensland *Anti-Discrimination Act 1991*, in which there are examples of the kinds of behaviours which are prohibited given in the legislative text in plain English. For example, the Act provides examples of indirect discrimination as defined by s 11:

> *Example 1—*
>
> An employer decides to employ people who are over 190cm tall, although height is not pertinent to effective performance of the work. This disadvantages women and people of Asian origin, as there are more men of non-Asian origin who can comply. The discrimination is unlawful because the height requirement is unreasonable, there being no genuine occupational reason to justify it.
>
> *Example 2—*
>
> An employer requires employees to wear a uniform, including a cap, for appearance reasons, not for hygiene or safety reasons. The requirement is not directly discriminatory, but it has a discriminatory effect against people who are required by religious or cultural beliefs to wear particular headdress.

[1326] John Hucker, 'Antidiscrimination Laws in Canada: Human Rights Commissions and the Search for Equality' (1997) 19(3) *Human Rights Quarterly* 547, 553.

[1327] Thornton, *The Liberal Promise,* above n 44, 173; Dominique Clément, 'Human Rights in Canadian Domestic and Foreign Politics: From "Niggardly Acceptance" to Enthusiastic Embrace' (2012) 34(3) *Human Rights Quarterly* 751, 762.

[1328] Clément, 'Renewing Human Rights Law in Canada', above n 1311, 1317–1318, 1328.

[1329] Clément, 'Human Rights in Canadian Domestic and Foreign Politics: From "Niggardly Acceptance" to Enthusiastic Embrace', above n 1328, 762–763.

Australian context.[1330] At least at the federal level, the tribunal system was found to be unconstitutional.[1331]

Most critically, the central role of courts to the success of discrimination law's success is best demonstrated when comparing the approach of the courts to legislative changes in each jurisdiction. Where courts have given narrow interpretations of the legislative text, particularly in Australia and the United Kingdom, the legislatures have attempted to remedy these interpretations through legislative amendments.[1332] What is different is the manner in which courts have responded to these legislative changes. In the United Kingdom, appellate courts have generally accepted these legislative interventions and alterations.[1333] In contrast, the Australian courts have instead *resisted* legislative intervention. This is demonstrated through the Victorian courts' approach to the removal of the element of a comparator and the Federal Courts' approach to disability discrimination. As noted in 5.1, the definition of direct discrimination has been amended in some jurisdictions to avoid the need for a comparator.[1334] Victoria attempted to do so in 2010.[1335] The Explanatory Memorandum states that the purpose of this change was to 'overcome the unnecessary technicalities associated with identifying an appropriate comparator when assessing direct discrimination.'[1336] While single judge decisions have since adopted an approach which does not use a comparator,[1337] in *Aitken v State of Victoria (Department of Early Childhood Development)*, the Victorian Court of Appeal stated that 'the question whether a comparator group is required under the 2010 Act remains an unresolved question of law.'[1338] Similarly, when amending the *Disability Discrimination Act 1992* (Cth) in 2008, in the second reading speech the Commonwealth Attorney-General, Robert McClelland, specifically cites the decisions in *Purvis* and *Forest*,[1339] as the reason

[1330] Peter Bailey and Annemarie Devereux, 'The Operation of Anti-Discrimination Laws in Australia' in David Kinley (ed) *Human Rights in Australian Law: Principles, Practice and Potential* (Federation Press, 1998) 292.
[1331] *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.
[1332] See the discussions at 4.1,5.3, 6.4. Another example is the amendments made to amend the approach taken with respect to discrimination on the basis of disability in *Lewisham London Borough Council v Malcolm (Equality and Human Rights Commission intervening* [2008] AC 1399. In *Aster Communities Ltd (formerly Flourish Homes Ltd) v Akerman-Livingstone (Equality and Human Rights Commission Intervening)* [2015] AC 1399, 1414 (Baroness Hale) and 1423 (Lord Neuberger) both acknowledging that the determinations in *Malcolm* had been reversed through legislation and the incorporate of s 15 of the *Equality Act 2010*. This was again clarified in *Trustees of Swansea University Pension and Assurance Scheme v Williams* [2019] 1 WLR 93 [12] (Lord Carnwath) Further appellate courts have accepted that *Malcolm* is no longer a useful authority: *Burnip v Birmingham City Council* [2012] EWCA Civ 629; *Griffiths v Secretary of State for Work and Pensions* [2015] EWCA Civ 1265; *York City Council v Grosset* [2018] EWCA 1105.
[1333] See the discussion of the change of approach to comparison in disability discrimination discussed in 5.1.2.
[1334] See also: Campbell and Smith, 'Direct Discrimination Without a Comparator?' above n 330.
[1335] *Equal Opportunity Act 2010* (Vic) s 8(1).
[1336] Explanatory Memorandum Equal Opportunity Bill 2010 (Vic) 12–13.
[1337] *Kuyken v Commissioner of Police* (2015) 249 IR 327; *Obudho v Patty Malones Bar Pty Ltd t/as Inflation Nightclub* [2017] VSC 28.
[1338] [2013] VSCA 28 [46].
[1339] (2003) 217 CLR 92 and (2008) ALR 145.

that the *Disability Discrimination Act 1992* (Cth) required amendment. This was to clarify in particular the legislature had *always intended* that positive actions and accommodations were to be made for persons with disabilities.[1340] Nevertheless, as was emphasised in sections 5.1.2, 5.2.2, 6.4.2, there is still significant reliance on the decisions in *Purvis* throughout Australian discrimination jurisprudence.[1341]

The Australian experience, in particular, demonstrates that the effectiveness of discrimination law is *not* simply determined by the existence of legislative will. The differences in interpretation in each jurisdiction are not simply explained through differences in legislative intent. This difference is the result of the different institutional contexts in which judicial decision making takes place.

To develop a substantive account of non-discrimination rights, content needs to be given to the underpinning values of statutory discrimination law. As emphasised in the introduction, it is *only* if equality is given some kind of content that the success of discrimination law can be measured.[1342] It is the judiciary's role in this context to assess how far it is 'possible' to eliminate discrimination in society. The opaque and often aspirational language of the legislation requires courts to expand and elaborate on what discrimination and equality actually require. This is particularly so when confronted with the unanticipated and insidious ways in which discrimination and inequality exist. When interpreting discrimination legislation, it is important for judges to articulate the background assumptions and moral values and goals that discrimination law is pursuing.

The judicial role in value and norm elaboration in the context of discrimination legislation can challenge the understood role of the judiciary. The approach to discrimination legislation in each jurisdiction emphasises a different politico-culturally appropriate role for the court in the development of the meaning and scope of rights. For courts to have continued legitimacy, their approach to decision making and interpretation needs to conform to legal cultural norms within the jurisdictions.[1343] These can relate to the way to decide particular cases, the degree of deference that should be accorded to the Parliament and the executive and the capacity for the court to depart from previous decisions.[1344] In the case of discrimination law, these norms influence the

[1340] Commonwealth, *Parliamentary Debates*, House of Representatives, 3 December 2008, 12292 (Robert McClelland, Attorney-General).
[1341] See the analysis at section 6.4.2 and in particular see *Sklavos v Australasian College of Dermatologists* (2017) 256 FCR 247. For further discussion see Alice Taylor, 'Disability Discrimination, the Duty to Make Adjustments and the Problem of Persistent Misreading' (2019) 43(2) *Monash University Law Review* (Forthcoming).
[1342] Justice Gaudron, 'In the Eye of the Law', above n 16.
[1343] Robert Woods, 'Rights Review in the High Court and the Cultural Limits of Judicial Power' (2013) 41 *Federal Law Review* 585, 588.
[1344] Aileen Kavanagh, 'The Idea of a Living Constitution' (2003) 16 *Canadian Journal of Law and Jurisprudence* 55, 70.

extent to which courts are able to engage in the moral reasoning required to achieve substantive equality.

7.3.1 United Kingdom

In the United Kingdom, when discrimination legislation was first introduced, as was outlined in Chapter Two, there was minimal recognition of any limitation on discrimination in private contractual relations. Similarly, the constitutional context provided little evidence of any common law right to equality. Jowell and O'Cinneide argue that the British Constitution contains three core values: liberty, representative government and the rule of law.[1345] They further identify a number of 'secondary' values including a commitment to equality.[1346] They acknowledge that these 'secondary' values, while influencing the design and function of the United Kingdom's constitutional system, do not serve as the 'bedrock' of normative foundations in the manner that the core values do.[1347] The existence of a value of equality is identified through the mechanisms of the welfare state, the *Equality Act 2010* (UK) and its historical predecessors and human rights law through Art 14 of the HRA.[1348] In the 1990s, Jowell identified the beginnings of a substantive right to equality in English constitutional law.[1349] This identified common law right to equality is still 'fleeting and ambiguous' and there remains a degree of scepticism about its existence.[1350]

It was against this background that discrimination law was first interpreted. Against these background circumstances, discrimination legislation was interpreted as the exception to the general rule rather than a statement of general or fundamental values. As was highlighted in section 7.1, this led to a close and relatively restrictive close textual reading of the legislative text.

However, the introduction of the HRA fundamentally changed the nature of the relationship between the Parliament and the judiciary.[1351] As Kavanagh argues, the interpretive provisions of

[1345] Jeffrey Jowell and Colm O'Cinneide, 'Values in the UK Constitution' in Dennis Davis, Alan Richter and Cheryl Saunders (eds), *An Inquiry into the Existence of Global Values: Through the Lens of Comparative Constitutional Law* (Hart Publishing, 2015) 357, 259–260.
[1346] Ibid 360.
[1347] Ibid.
[1348] Ibid 384–385.
[1349] Jowell, above n 105; TRS Allan, 'The Rule of Law as the Rule of Reason: Consent and Constitutionalism' (1999) 115 *Law Quarterly Review* 221, 244; O'Cinneide, 'Fumbling Towards Coherence: The Slow Evolution of Equality and Anti-Discrimination Law in Britain', above n 4, 80–82.
[1350] For judicial scepticism see: *Association of British Civilian Internees (Far Eastern Region) v Secretary of State for Defence* [2003] QB 1397; [85]–[86] and *Rhys-Harper v Relaxation Group Plc* [2003] UKHL 33 [78]. See also: John Stanton-ife, 'Should Equality Be a Constitutional Principle' (2000) 11(2) *The King's College Law Journal* 133; Aileen McColgan, 'Discrimination Law and the Human Rights Act 1998' in Tom Campbell, Keith Ewing and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford University Press, 2001) 215, 218–224; McColgan, above n 313.
[1351] There is extensive commentary on this point. For some examples, both sceptical and supportive see: Tom Campbell, KD Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essay* (Oxford

the HRA create a strong presumption in favour of statutory interpretation consistent with the rights protected under the ECHR.[1352] This style of statutory interpretation is consistent with a relatively strong rights review role for the court. Instead of conceiving statutory interpretation as being concerned with 'discovering' the linguistic meaning, an interpretation consistent with the HRA requires a broader evaluation of the legislation and consideration of whether it can be justified in terms of the values and rights underlying the ECHR.[1353] This changes the role of the court in the articulation of the political morality and values that underpin Convention rights.

But while Kavanagh argues that the HRA has the effect of an almost entrenched bill of rights, it has had a limited effect on the interpretation of the *Equality Act 2010* (UK) or its historical predecessors. This is, in part, because the *Equality Act 2010* (UK) is considered a comprehensive discrimination statute. Further, the right to equality contained in the HRA is limited to the protection of other Convention rights rather than as a standalone right.[1354] Much of the substance that Art 14 could offer is already provided for through EU law in the form of the Directives and ECJ case law.[1355] Until relatively recently, the ECJ's interpretation of non-discrimination rights was more developed and substantive than that of the European Court of Human Rights' approach to Art 14.[1356] It is possible that as the interpretation of Art 14 becomes more dynamic, it will have more utility in the interpretation of the *Equality Act 2010* (UK) in providing broader interpretations, particularly in the context of analogous grounds.[1357] The capacity for 'creative' interpretation[1358] based on the HRA has yet to be utilised in this case of discrimination legislation.

In the case of statutory discrimination law, as was argued above in section 7.2, 'fundamental' or 'constitutional' status of discrimination law does not stem from the reshaping of the constitutional relationship between the Parliament and the judiciary through the HRA but from the relationship with the EU. This means that the 'creative' interpretation of discrimination law is often achieved through the importation of EU law rather than the courts themselves engaging with the underlying values of equality and non-discrimination law. Thus, when interpreting statutory discrimination

University Press, 2011); Mary Dame Arden, 'The Changing Judicial Role: Human Rights, Community Law and the Intention of Parliament' (2008) 67(3) *Cambridge Law Journal* 487; TRS Allan, 'Human Rights and Judicial Review: A Critique of "Due Deference"' (2006) 65(3) *Cambridge Law Journal* 671; Rabinder Singh, 'The Moral Force of the United Kingdom's Human Rights Act' (2013) 11 *New Zealand Journal of Public and International Law* 39.

[1352] Kavanagh, *Constitutional Review under the UK Human Rights Act*, above n 1307, 297–303.

[1353] Ibid 30.

[1354] Gerards, above n 107.

[1355] Besson, above n 109.

[1356] Fredman, 'Emerging from the Shadows', above n 109.

[1357] McColgan, 'Reconfiguring Discrimination Law', above n 49.

[1358] Kavanagh, *Constitutional Review under the UK Human Rights Act*, above n 1307, 404.

law, the appropriate roles for the court and the Parliament and an adherence to parliamentary sovereignty are still emphasised and utilised to justify limiting the reach of discrimination law. While in the preceding chapters the case law does demonstrate an approach that is 'purposive,' the focus of the judiciary is on finding the 'intent' of Parliament rather than grappling with discrimination law's underpinning morality.[1359]

There is an attempt to articulate the intentions of Parliament in prohibiting discrimination by emphasising the reasons why discriminatory conduct is harmful.[1360] More expansive articulations of the rationale for prohibitions on direct and indirect discrimination have been given. As was demonstrated in Chapter Six, the underlying rationale is often traced to the harms of stereotyping and segregation and the importance of treating each person as an individual.[1361] Occasionally, the literal meaning of provisions (notably often in the context of disability discrimination) is eschewed on the basis that it would stymie legislative intent.[1362] But, where there is the opportunity to extend the reach of discrimination law through a broad interpretation of protected attributes, or re-interpret and apply it in a manner which would allow for a more substantive approach to the meaning of discrimination, the courts have resisted an expansive approach. Instead, courts have re-iterated the importance of the distinction between the appropriate roles of the court and the Parliament. It is for the Parliament to determine who is entitled to protection and what kind of protection a person can receive.

The clear difference between the roles of the court and the Parliament are identified in *JFS* in respect of any capacity for asymmetrical operation of direct discrimination prohibitions:

> If Parliament had adopted a different model of protection, we would not be here today. Parliament might have adopted a model of substantive equality, allowing distinctions which brought historically disadvantaged groups up to the level of historically advantaged groups. But it did not do so.
>
> …
>
> This means that it is just as unlawful to treat one person more favourably on the ground of his ethnic origin as it is to treat another person less favourably.
>
> …
>
> Some may feel that discrimination law should modify its rigid adherence to formal symmetry and recognise a greater range of justified departures than it does at present … But if such allowance is

[1359] Dickson, above n 50, 312.
[1360] See the discussion in section 2.2.
[1361] *R (on the application of European Roma Rights Centre) v Immigration Officer at Prague Airports (Roma Rights Case)* [2005] 2 AC 1; *R (Interim Executive Board of Al-Hijrah School) v HM Chief Inspector of Education, Children's Services and Skills* [2017] EWCA Civ 1426.
[1362] See for example: *Roads v Central Trains Ltd* [2004] EWCA Civ 1541 [30] (Sedley LJ); *Ross v Ryanair Ltd* [2004] EWCA Civ 1751 [32] (Brooke LJ).

> to be made, it should be made by Parliament and not be the courts' departing from the long-established principles of anti-discrimination legislation.[1363]

This defect is not one that can or should be rectified by the courts, but instead is a clear call to the Parliament to amend the legislation to allow for a degree of justification for discriminatory conduct.[1364]

Similarly, and as was considered in Chapter Four, this same approach to discrimination law's reach is also evident in the courts' consideration of the definition and nature of the attributes or grounds which are identified for protection. As Baroness Hale emphasised in *Onu* it is for the Parliament to designate the grounds for protection and the courts should not interpret attributes to accommodate other related reasons for disadvantage within discrimination law's reach.[1365]

This approach adopted in the United Kingdom, with emphasis on the appropriate roles of Parliament and the courts in prohibiting non-discrimination, fails to identify any role for the judiciary in assessing how far to eliminate discrimination. Instead, when confronted with difficult questions which are not already answered through ECJ jurisprudence, often the approach of the judiciary is still to retreat into the traditional roles for the courts and the Parliament in the United Kingdom.

However, this traditional retreat may be undergoing some revision. The more recent judgments from the Supreme Court, particularly in *Essop* (amongst others) have shown significantly more engagement with the values and principles underlying discrimination law.[1366] This redirection could be attributed to the repositioning of the *Equality Act 2010* (UK) as a form of public law with the entrenchment of the public sector equality duty which requires that public authorities pay 'due-regard' to facilitating equality.[1367] This duty shifts the focus away from non-discrimination and concentrates on equality. It further requires judicial engagement with the actions of another branch of government, the executive, rather than the traditional understanding of statutory discrimination law as a form of statutory tort. O'Cinneide attributes the small markers of a new, more purposive direction in the case law from the United Kingdom to both the normalisation of rights discourse through the ECHR and the fundamentality of non-discrimination rights in EU law.[1368] Through

[1363] *R(E) v Government Body of JFS* [2010] 2 AC 728, 762 (Baroness Hale).
[1364] See section 5.2 for discussion.
[1365] [2016] 1 WLR 2653, 2661.
[1366] [2017] 1 WLR 1343.
[1367] Justice Sales, 'The Public Sector Equality Duty' (2011) 16(1) *Judicial Review* 1, 2.
[1368] O'Cinneide, 'Values, Rights and Brexit', above n 110, 241.

these instruments a new rights culture is being forged with non-discrimination and equality values being more firmly embedded within the constitutional and legal context in the United Kingdom.[1369]

This shift and progress towards a clearer articulation of the underlying purpose of discrimination law, particularly apparent in the judgments from 2017, can be attributed both to the close relationship with EU law and the changing nature of the constitutional role of the judiciary due to the HRA. Whether this progress continues in light of Brexit remains to be seen. While the rights contained in the *Equality Act 2010* (UK) will remain unless and until they are repealed, time will have to tell if, without the guidance provided by the ECJ, the courts will shift back towards a literal rather than purposive and 'creative' interpretation of non-discrimination rights. In some respects, Brexit will represent an opportunity to test the strength of reappraisal of the roles of Parliament and the judiciary brought about by the HRA.

7.3.2 Australia

In the Australian context, while again the federal legislation has been described as 'quasi-constitutional' legislation, this had little effect on the interpretation of non-discrimination rights. As was seen from Part II, there are few examples of any attempt to articulate the values underpinning statutory discrimination law.[1370] I argue that, in part, the failure to develop statutory discrimination in a substantive fashion is attributable to the limited constitutional role in rights review that the Australian courts play.

As was highlighted in 2.1.2, in Australia, both because of the text and structure of the Constitution as well as socio-political constraints, the High Court has adopted a narrow approach to rights protection in a constitutional context.[1371] This distinctiveness has been attributed to the lack of a constitutional and statutory bill of rights as well as allegiance to legalism, both as an ideological position and a method of constitutional interpretation.[1372] As previously outlined in Chapter Two, the doctrine of legalism was expressed by Sir Owen Dixon as follows:

> … close adherence to legal reasoning is the only way to maintain the confidence of all parties in Federal conflicts. It may be that the court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than strict and complete legalism.[1373]

[1369] Ibid.
[1370] See *Commonwealth v Bradley* (1999) FCR 218; *Waters v Public Transport Corporation* (1991) 173 CLR 349.
[1371] MacDonnell, above n 1239, 510.
[1372] Roux, *Politico-Legal Dynamics of Judicial Review*, above n 139, 107; Galligan, above n 139.
[1373] Sir Owen Dixon, 'Concerning Judicial Method', above n 140, 472.

For much of Australian history, the Australian judges were committed to a form of legalism.[1374] This approach to legalism reflects an adherence to formal legal materials and constraints.[1375] It emphasises the undesirability of the High Court having a political role in Australian democracy, clearly demarking the boundaries of law from politics.[1376] This approach to constitutional interpretation resists forms of reasoning which require a more open-ended form of policy or political judgment.[1377] It reflects both a strategic choice, embedding the role of the High Court within the polity and a reflection of the culturally accepted role for the court, particularly with respect to a limited role in respect of rights review.[1378]

There was some retreat from this legalist approach during the period of the chief justiceship of Sir Anthony Mason. Chief Justice Mason advocated an approach to law and constitutional interpretation which did expose the underlying values upon which judges made their decisions. As he concluded in a speech in 1986:

> It is impossible to interpret any instrument, let alone a constitution, divorced from values. To the extent they are taken into account, they should be acknowledged and should be accepted community values rather than mere personal values. The ever present danger is that 'strict and complete legalism' will be a cloak for undisclosed and unidentified policy values.
>
> …
>
> When judges fail to discuss the underlying values influencing a judgment, it is difficult to debate the appropriateness of those values … As judges who are unaware of the original underlying values, subsequently apply that precedent in accordance with the doctrine of *stare decisis*, those hidden values are reproduced in the new judgment — even though community values may have changed.[1379]

The Mason Court's adapted approach to legalism generated a significant amount of controversy and led to the articulation of some implied rights and freedoms.[1380] However, it did not leave a significant mark in terms of the introduction of greater candour in the legal reasoning process. As Roux has argued:

> [t]o the extent that those reforms were aimed at introducing greater candor about the role of extralegal values in the judicial reasoning process, they failed. In times of trouble, High Court justices' instinct is still to fall back on a conception of law as a technically exacting discipline capable of generating political

[1374] Roux, *Politico-Legal Dynamics of Judicial Review*, above n 139, 133.
[1375] Charlesworth, 'The Australian Reluctance about Rights', above n 135, 198.
[1376] Roux, *Politico-Legal Dynamics of Judicial Review*, above n 139, 100.
[1377] Ibid.
[1378] Theunis Roux, 'Reinterpreting "The Mason Court Revolution": An Historical Institutionalist Account of Judge-Driven Constitutional Transformation in Australia' (2015) 43(1) *Federal Law Review* 1, 24.
[1379] Anthony Sir Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16(1) *Federal Law Review* 1, 5.
[1380] For discussion see: Haig Patapan, *Judging Democracy: The New Politics of the High Court* (Cambridge University Press, 2000); Jason Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (Carolina Academic Press, 2006).

> neutral answers to controversial questions. To that extent, a version of democratic legalism premised on the denial of law's politicality still holds sway.[1381]

Regardless of the lasting success of Mason CJ's approach to interpretation, it important to note that Chief Justice Mason did not advocate for judicial creativity. He did not advocate for the elaboration of values underlying decisions, nor did he advocate for the courts to import 'new' values into judicial decision making. Rather than elaborating upon values, the Mason Court utilised 'values' as simply a skeleton to guide judicial decision making. This can be distinguished from giving values some underlying meaning and content.

Utilising values as a 'skeleton' has meant that while the High Court of Australia has drawn upon overarching values such as 'equality' and 'non-discrimination' to justify conclusions,[1382] this has not led to significant discussion of what such values entail. For example, the value of non-discrimination was utilised in *Mabo (No. 2)* in which the High Court accepted that native title had not been extinguished through colonisation. Brennan J, in particular, concluded that it was imperative to ensure that the common law was 'not frozen in an age of racial discrimination.'[1383] He argued that the courts were giving effect to 'the enduring community value of non-discrimination, that is, the equality of all people before the law.'[1384] This value of non-discrimination was described as 'the skeleton of principle which give the body of our law its shape and internal consistency.'[1385]

In *Street v Queensland Bar Association*, Gaudron J attempted to construct a more substantive legal right to non-discrimination on the basis of state residency.[1386] To do so, she utilised a range of international and comparative law to explain and develop the concept of non-discrimination.[1387] Another attempt to give an equality value a clearer content and application was made in the dissenting judgments in *Leeth*.[1388] In dissent, Deane and Toohey JJ held that Commonwealth constitutional law included an implied constitutional guarantee of legal equality.[1389] In *Leeth*, the

[1381] Roux, *Politico-Legal Dynamics of Judicial Review*, above n 139, 133.
[1382] For some examples see: *Tjungarrayi v Western Australia* [2019] HCA 12; *AB v Western Australia* (2011) 244 CLR 390.
[1383] *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, 42.
[1384] Ibid.
[1385] Ibid.
[1386] (1989) 168 CLR 461.
[1387] Ibid 566 (Gaudron J). For use of foreign law see also: 488 (Mason CJ, citing *Race Relations 1976* (UK) jurisprudence) and 508–509 (Brennan J, citing Canadian Human Rights jurisprudence).
[1388] *Leeth v Commonwealth* (1992) 174 CLR 455.
[1389] Ibid 486–487 (Deane and Toohey JJ). For commentary see Leslie Zines, 'Form and Substance: "Discrimination" in Modern Constitutional Law' (1993) 21(1) *Federal Law Review* 136; Jeremy Kirk, 'Constitutional Implications (II): Doctrines of Equality and Democracy' (2001) 25(1) *Melbourne University Law Review* 24.

High Court considered whether a provision subjecting persons convicted of federal crimes to disparate state parole laws was constitutional.[1390] In dissent, Deane and Toohey JJ held that the provision breached a general constitutional guarantee of legal equality implied in the history and structure of the Australian Constitution.[1391] The issue of an implied right to equality was vaguely alluded to but not definitively determined by Gaudron J and Brennan J.[1392] The existence of a general guarantee of legal equality arose again in *Kruger v Commonwealth*, which challenged the forced removal of Aboriginal children and the incarceration of Aboriginal adults during the twentieth century.[1393] Five judges rejected any general equality guarantee,[1394] although with varying levels of force.[1395] While equality is still a value underlying Australian constitutionalism, it remains a skeleton principle without the content necessary for a substantive interpretation of statutory discrimination law.

While the values of equality and non-discrimination are utilised to justify a particular conclusion, the role of the courts in elaborating, articulating or expanding the scope of these values is generally rejected. Brennan J utilised these values to justify the conclusion in *Mabo (No. 2)*. But, in *Dietrich v The Queen*, determined less than five months later, he warned of the use of 'contemporary values' in justifying judicial development:

> The contemporary values which justify judicial development of the law are not the transient notions which emerge in reaction to a particular event or which are inspired by a publicity campaign conducted by an interest group. They are the relatively permanent values of the Australian community. Even if the perception of contemporary values is coloured by the opinions of individual judges, judicial experience in the practical application of legal principles and the coincidence of judicial opinions in appellate courts provide some assurance that those values are correctly perceived. The responsibility for keeping the common law consonant with contemporary values does not mean that the courts have a general power to mould society and its institutions according to judicial perceptions of what is conducive to the attainment of those values.[1396]

This resistance to 'moulding society and institutions to judicial perceptions of what is conductive of those values' has come at the expense of articulating the substance of those values. In particular, there is no articulation of what these values require of other branches of government and private

[1390] (1992) 174 CLR 455, 460–463 (Mason CJ, Dawson and McHugh JJ).
[1391] Ibid 484.
[1392] Ibid 475 (Brennan J) and 501–3 (Gaudron J). Mason CJ, Dawson and McHugh J rejected any implied guarantee of equality: (1992) 174 CLR 455, 467.
[1393] (1997) 190 CLR 1.
[1394] (1997) 190 CLR 1, 44–45 (Brennan CJ); 63–8 (Dawson J, with McHugh J agreeing at 142), 112–113 (Gaudron J) and 153–155 (Gummow J).
[1395] Sarah Joseph, 'Case Commentary Kruger v Commonwealth : Constitutional Rights and the Stolen Generations' (1998) 24(2) *Monash University Law Review* 486, 491–492.
[1396](1992) 177 CLR 292, 319 (Brennan J).

parties. Instead, the 'values' of equality and non-discrimination are referenced in the abstract to justify certain conclusions without any engagement with their content.

Even at its most 'radical,'[1397] the Australian High Court's approach to constitutional values is simply to acknowledge their existence and the role they play in legal reasoning. But the Court still fails to give these values any depth or meaning. Particularly with respect to the twin values of non-discrimination and equality, even in its most 'radical' judgments, the jurisprudence from the period of the Mason Chief Justiceship, when viewed with hindsight, simply concludes the possible existence of legal equality in Australian constitutional law.[1398] The Australian approach to overarching values as a kind of skeleton structure means that the articulation of what equality is fails to answer any of the key questions that discrimination law still grapples with. Instead, equality is simply associated with a notion of 'fairness.'[1399] The Australian notion of 'equality' gives no framework to understand who discrimination law is designed protect and why certain groups have been granted protection but not others. It fails to articulate what non-discrimination requires in respect of comparison, causation or justification and it fails to provide a basis to articulate any kind of underlying purpose of discrimination law in line with any model articulated in Chapter Three of this thesis.

This resistance to the articulation of the values underlying Australian law is reflected in the approach adopted to interpreting statutory discrimination law. The Australian case law emphasises a beneficial or remedial purpose without articulation of what the benefit or remedy actually is. Without a consideration of the values underpinning discrimination law, the interpretation of the statute descends into the technicalities of the legislation.

The separation of the community values and social reality of discrimination and statutory non-discrimination rights was also expressly articulated in *Hurst:*

> It is unfortunate that Tiahna's case, as with others of a similar nature, appears to have engendered a great deal of passion. It is, in the end, a case about a single litigant, which turns upon a narrow question of construction. The resolution of this case is not assisted by the involvement of various interest groups, each with its own agenda, which seek to politicise what is, at bottom, a legal issue.[1400]

[1397] Jeremy Kirk, above n 1390, 24.
[1398] (1992) 174 CLR 455, 486–487 (Deane and Toohey JJ).
[1399] Chief Justice Allsop, 'Values in Public Law' (Speech delivered at the James Spigelman Oration, Sydney, 27 October 2015), available at: https://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20151027, last accessed 1 July 2019.
[1400] (2006) 151 FCR 562 [133].

But without this articulation and elaboration of the norms and community standards underpinning discrimination law, the 'legal issues' at stake continue to develop without reference to an underlying purpose or rationale.

7.3.3 Canada

The Canadian courts do provide a clearer articulation of the values and norms underlying Canadian discrimination law and these values and norms have evolved over time. This is in keeping with the constitutional role of the Supreme Court of Canada. In understanding the values inherent in Canadian law Weinrib argues:

> The values of the Canadian Constitution are not circumscribed by the unwritten Constitution or the written constitutional instruments. The judgments of the Supreme Court of Canada are most relevant, in that the courts are required to apply, interpret and develop these constitutional values in the adjudication of particular cases as well as in abstract review of questions referred by the provincial or federal executive. An important element of the Court's responsibility is to construct coherence and comprehensiveness out of the fragmented elements of Canadian constitutional law. The Court increasingly operates as both an appellate and constitutional court, ie, as guardian of the normative principles and values of the constitutional order at large.[1401]

This section will argue that the more 'creative' interpretation of discrimination law stems from an accepted role in rights review and an allegiance to a 'living-tree constitutionalism.' It is these two factors which lead from a statutory interpretation of discrimination law to something more akin to constitutional interpretation. It means that the underlying values that discrimination law is giving effect to do not act merely as a 'skeleton,' but are given some substantive content.

Since at least the introduction of the *Charter* in 1982, the Canadian courts have had a role in rights review.[1402] Further, the metaphor of a 'living Constitution' has been utilised to explain and justify the approach to constitutional interpretation adopted by the Supreme Court of Canada.[1403] This approach famously draws upon Lord Sankey's judgment in *Edwards v Canada (Attorney General)* or the 'Persons Case.'[1404] In respect of the *Charter,* Justice Dickson argued that 'the *Charter* must be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.'[1405] The reference to the 'living' nature of the Constitution and law more generally has two important implications: first, that growth and change in the law is

[1401] Weinrib, above n 160, 98.
[1402] Ibid 103.
[1403] Peter W Hogg, *Constitutional Law of Canada* (Carswell, 5th ed, 2013) 36–25.
[1404] [1930] AC 124.
[1405] *Hunter v Southam* (1984) 11 DLR (4th) 641, 649; Robert Sharpe, 'The Impact of a Bill of Rights on the Role of Judiciary: A Canadian Perspective' in Philip Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford University Press, 1999) 437.

possible, preferable and required. Second, that the courts, through interpretation, are the body that is responsible for facilitating this change.[1406] The conception of 'living-tree' constitutional interpretation is not without controversy. It is critiqued on the basis that it misrepresents the actual finding of the Persons Case,[1407] fails to adequately explain the actual interpretive practices of the Supreme Court,[1408] and represents merely judicial self-empowerment.[1409] Nevertheless, it remains the 'official' interpretive policy of the Supreme Court of Canada.[1410]

The implications of this is that the courts do articulate the values upon which Canadian law is predicated and these values are given some substantive content. In a line of cases, the Supreme Court of Canada identified a number of values or norms to which the court must have reference to developing an approach to constitutional and statutory interpretation and the development of the common law. However, in contrast to the articulated approach of the Australian courts, these principles do not remain a 'skeleton.' Instead, they gain further expansion so that it is possible to understand their effect as a limitation of executive and legislative power and on the rights and obligations of private parties. It is particularly notable in this context that two fundamental values of the Canadian Constitution are the respect for diversity and minority rights.[1411]

This means that discrimination law is interpreted within a context in which the protection of minority rights is considered a fundamental constitutional principle. Further discrimination law is interpreted within a context where the courts are duty-bound to articulate and promote an approach to interpretation which allows for interpretations to change to be in keeping with evolving social standards. Its connection to the fundamental principles in Canadian constitutional law justifies its designation as 'quasi-constitutional.' The need for the judiciary to articulate with a degree of precision the values that underlie Canadian law generally allows for significantly clearer articulation of the underlying purpose of discrimination law. This has been done with a focus on protection of vulnerable minority rights rather than simply pursuing formal equality.

[1406] Kavanagh, 'The Idea of a Living Constitution', above n 1344, 56.
[1407] Bradley Miller, 'Origin Myth: The Persons Case, the Living Tree and the New Originalism' in Grant Huscroft and Bradley Miller (eds), *The Challenge of Originalism* (Cambridge University Press, 2011); Bradley Miller, 'Beguiled by Metaphors: The "Living Tree" and Originalist Constitutional Interpretation in Canada', (2009) 22 *Canadian Law and Jurisprudence* 331.
[1408] Leonid Sirota and Oliphant Benjamin J, 'Originalist Reasoning in Canadian Constitutional Interpretation' (2017) 50 *Columbia Law Review* 505.
[1409] Grant Huscroft, 'The Trouble with Living Tree Interpretation' (2006) 25 *University of Queensland Law Journal* 3, 17; Dwight Newman, 'Judicial Power, Living Tree-Ism, and Alterations of Private Rights By Unconstrained Public Law Reasoning' (2017) 36(2) *University of Queensland Law Journal* 247.
[1410] Hogg, above n 1404, 36–25.
[1411] Reference re Secession of Quebec [1998] 2 SCR 217.

This more active and 'creative' role for the Court has been apparent in discrimination jurisprudence since the 1980s. As Vizkelety articulated in the early 1990s regarding the expanded scope of statutory discrimination law:

> Interestingly, the breakthrough has come as a result of judicial, not legislative, intervention ... As for the courts, there has been an ever-growing tendency especially at the higher levels, to recognize the special nature of human rights legislation. Fortified, perhaps by their heightened responsibilities under the Canadian Charter of Rights and Freedoms, courts have shown that they are now prepared to look beyond the narrow and literal constructions of anti-discrimination laws and to give effect to their purpose. It is on the basis of a liberal approach such as this that courts have recognized the effects of the concept of discrimination … There is, therefore, reason for optimism regarding the future of anti-discrimination legislation in this country.[1412]

Since then, further 'breakthroughs' in statutory discrimination law, from the unification of direct and indirect discrimination to the recent the expansion of vicarious liability for discriminatory acts, have all come through judicial intervention.[1413] Each time, the courts draw upon aspirations and community standards and values to justify an interpretation which expands upon the legislative language.

It is this difference, in the more accepted legitimate role of the Court in articulating and re-interpreting community values and norms, with a degree of precision which differentiates the approach by Canadian courts to matters of statutory discrimination law. It is because of this difference that the underlying values of discrimination law are often better articulated in the judgments. The changing nature of the Court's role due to the need for rights review encompassed by the *Charter* has provided this more accepted and legitimate role in the articulation of values. This change in constitutional structure provides a further possible explanation for the different interpretive styles adopted with respect to the previous *Bill of Rights* and statutory discrimination law after *Heerspink* and *O'Malley*.[1414]

However, a 'creative' interpretation of discrimination law not only requires judges to have a legitimate role in the elaboration of social norms and values but also to take a crucial role in the redistribution of resources both in private and public sectors. 'Creative' discrimination law decisions also allow for redistribution of resources. Historically, policies targeting the redistributional dimensions of inequality have focused on large-scale political and legislative

[1412] Beatrice Vizkelety, *Proving Discrimination in Canada* (Carswell, 1987) 237–238.
[1413] *British Columbia v Schrenk* [2017] 2 SCR 795, 820–821 (Rowe J).
[1414] [1982] 2 SCR 145; [1985] 2 SCR 536. See also: Helis, above n 1235, 25–26.

changes to methods of capital accumulation.[1415] But as Fraser argues, these two kinds of disadvantage need to be understood and tackled in tandem:

> Rooted at once in the economic structure and the status order of society, [two-dimensional divisions] involve injustices that are traceable to both. Two-dimensionally subordinated groups suffer both maldistribution and misrecognition in forms where neither of these injustices are an indirect effect of the other, but where both are primary and co-original.[1416]

Since the 1980s, discrimination laws have been increasingly used to tackle maldistribution in the market. Equality laws have been utilised to challenge both private and public actors to change policies and practices to provide more appropriate services to a range of groups. Discrimination laws have been utilised to open up more lucrative career paths for women,[1417] and to provide appropriate services for persons with disabilities.[1418] All of these have included a degree of redistributional policies and can involve government funding.

The challenge of the extent to which equality rights should be read to incorporate the redistribution of socio-economic benefits were identified by Chief Justice McLachlin. She emphasised:

> A market-based representative democracy necessarily tolerates a certain degree of disparity, economic and otherwise.
>
> …
>
> The Charter positively accords Canadians equal benefit of the law and equal protection from the law's burden. This can be argued to extend the guarantee of equality beyond the scope of traditional anti-discrimination law, to equal provision of state benefits.[1419]

But a substantive approach to discrimination law necessarily requires courts to take a relatively active role in redistribution. This is through challenging maldistribution and requiring amelioration of the disadvantage suffered both for an individual complainant and other members of the disenfranchised group.

Protection of social rights can pose significant challenges to the institutional capacity and competence of courts. The protection of social rights can require a degree of consideration of budgetary policy, traditionally understood as decisions to be made by the legislature. Moreau has argued that this distinction is a reason that the philosophical debates on the distributive nature of

[1415] Fraser and Honneth, above n 403, 10.
[1416] Ibid. See also Nancy Fraser, 'Rethinking Recognition' (2000) 3 *New Left Review* 107, 110–112.
[1417] *CN v Canada (Canadian Human rights Commission)* [1987] 1 SCR 1114.
[1418] *Council of Canadians with Disabilities v VIA Rail Canada Inc* [2007] 1 SCR 650.
[1419] McLachlin, above n 361, 17.

equality are not necessarily reflected in the legal debates on equality and discrimination.[1420] While general principles for the distribution of resources can help guide legislatures in the design of policies:

> a court cannot unproblematically assume that it is either institutionally competent to make judgements about the most appropriate general distributive principles or possessed of the institutional mandate to do so.[1421]

Given that these choices can be 'complex,' 'political' and 'extremely difficult,' judges can demur from more adopting more far-reaching conclusions which have broader consequences for public policy. It is in these situations that the Canadian courts may not adopt a 'creative' approach.

While there is a clear articulation of the principles and values underpinning statutory discrimination law, the effectiveness at target systemic discrimination, particularly where it involves government decision making surrounding resource allocation is less obvious. As was seen in Chapters Five and Six, while in some cases the Supreme and appellate courts have required changes to government policy and practice, in others such as *Moore*, the Court limits discrimination findings to individual claimants to avoid the broader policy questions that a case can raise.

7.4 Conclusion

In this chapter, I have argued that the differences in the interpretation of discrimination law in Australia, Canada and the United Kingdom are best explained through the differing roles for the judiciary in rights review. A 'creative' interpretation of discrimination law requires courts to develop and expand upon the values that underlie discrimination law, most principally equality. I argued that by passing discrimination legislation, the parliaments in each jurisdiction have compelled the courts to develop and articulate fundamental norms. In this way, the relationship between the courts and the Parliament in the development of discrimination is not performed in opposition to one another, nor as a dialogue, but is better conceived of as a partnership. However, as I have demonstrated, the development of these underlying values can challenge the traditionally understood role of the court by requiring the articulation and progression of fundamental moral values of society.

Assessing the Canadian jurisprudence, I argued that where the Canadian courts have interpreted discrimination law substantively and expansively, this was justified on the basis that discrimination

[1420] Moreau, 'The Wrongs of Unequal Treatment', above n 650, 191.
[1421] Ibid.

law was 'quasi-constitutional.' This quasi-constitutional status has made discrimination law a kind of 'fundamental law' and as a consequence, requires a broad and 'creative' interpretation. I outlined the nature of quasi-constitutional law and argued that while discrimination law could be understood as 'quasi-constitutional' law in each jurisdiction, this did not lead to the same interpretive effect in either the United Kingdom or Australia.

I argued that this difference was best explained by the different constitutional roles that each jurisdiction's courts play in the development of rights. I argued that in Australia, High Court judges, in particular, have rejected a role in rights review on the basis of adherence to the ideology if not the legal technique of legalism. In Canada, the role for the court in the development of rights and the Constitution more broadly through an adherence to the interpretive theory of 'living-tree constitutionalism' is far more accepted and is the 'official ideology of the court.' Finally, in the United Kingdom, the new role for the court and the emergence of rights discourse brought about through the introduction of the HRA has had a noticeable influence on the way in which discrimination law has been interpreted. Nevertheless, where new and challenging questions emerge, the Supreme Court still retreats into traditional understandings of the roles of the courts and the Parliament, failing to adopt an expansive or 'creative' interpretation of non-discrimination rights.

Thus, in answer to the overall research question posed in the introduction, a 'creative' interpretation of statutory discrimination law requires an accepted general institutional role for the courts in rights review. It is this role in rights review that allows courts to elaborate and expand upon the aspirations and values underlying discrimination law. While this role exists in Canada and is beginning to emerge in the United Kingdom, it does not exist in Australia. Without a role for the courts in rights review, statutory discrimination law will struggle to achieve effective outcomes.

8 Conclusion

This dissertation opened by reflecting on the commentary by Lester and Bindman on the introduction of discrimination legislation in the United Kingdom.[1422] Lester and Bindman argued that in the case of discrimination law, courts would operate best as the 'creative' interpreters of legislative intent.[1423] However, I argued that what a 'creative' interpretation of legislative intent is in light of the legislative text and history was left inexplicit. It is in interrogating the notion of a 'creative' interpretation of legislative intent in the context of discrimination law that this thesis has provided a contribution.

8.1 Contribution

The contribution was developed in three parts. In Part I, I focused on the first sub-question: What is a 'creative' approach to discrimination law's purpose? In developing an answer to this question, I identified a gap in the scholarship and established a framework to interrogate the case law in each jurisdiction. In Chapter Two, I compared and contrasted the legislative regimes, the history and context for introduction and their legislative passage. I established that the different approaches adopted in the jurisprudence could not be explained by reference to the legislative text or the political and historical context because of their relative similarity.

I further argued that statutory discrimination law was passed to pursue an undefined goal of 'equality' in Australia, Canada and the United Kingdom. This undefined goal or purpose is reflected in the statutory texts, the explanatory materials and the historical and background assumptions behind the passage of the Acts in each jurisdiction but must be given meaning through the courts' engagement in the practice of 'creative' interpretation.

In order to give structure and meaning to the term 'creative' interpretation of legislative intent in the context of discrimination law, in Chapter Three I provided a literature review of the normative scholarship surrounding discrimination law. I argued that in light of the current normative debates, the undefined goals of statutory discrimination law in each jurisdiction are best understood as the pursuit of a pluralist form of substantive equality. I came to this conclusion after considering the relationship between formal equality and discrimination law where I found that formal equality was an insufficient concept to achieve equality. Further, given that the concept at its essence is already a common law principle, statutory discrimination law needed to be understood to do more

[1422] Lester and Bindman, above n 1, 71.
[1423] Ibid.

than merely reflect a common law principle in legislative form. In the second part of Chapter Three, I assessed the two remaining options: discrimination law as a pursuit of equality and discrimination law as a pursuit of liberty and found both to be a partial explanation at best. Hence, a pluralist account of substantive equality best articulated the purpose of discrimination law. However, I argued that the discrimination law scholarship has thus far failed to account for the disconnection between the normative accounts and aspirations of discrimination and the interpretation of discrimination law by the courts.

In Part II I began to fill this gap in the scholarship. In Part II, I assessed whether the judiciary in Australia, the United Kingdom and Canada have interpreted discrimination law 'creatively' and consistently with the purpose of substantive equality. I considered the interpretation of discrimination law with respect to three critical questions: why have certain groups been singled out for protection; what these specified groups are protected from (or what is unlawful discrimination); and how far can discrimination law change or 'transform' society. I argued that the Canadian approach to discrimination law is the approach that is the most consistent with a 'creative' interpretation of discrimination law's purpose, although there are still some limitations, particularly where courts are drawing on *Charter* jurisprudence.

In contrast, the case law from the United Kingdom and Australia evinces a less creative interpretation of discrimination law. The United Kingdom's case law demonstrates an approach that conceptualises discrimination as akin to a kind of negligence, and the Australian approach is focused on finding fault of the duty-bearer. Part II develops the contribution made by this thesis through the comparative approach adopted. Through utilising a comparative approach which considers hundreds of cases over the past 50 years, I have been able to identify distinctive trends in each jurisdiction which are not explained through differences in the legislative text alone. This brought into focus the multitude of interpretative avenues that are available notwithstanding the similar legislative language.

In Part II I also illustrated the limitations of the normative literature discussed in Chapter Three. While there is both a significant body of criticism of discrimination law jurisprudence in Australia, the United Kingdom and Canada and there is a significant body of scholarship which provides an account of what discrimination law *should* be capable of achieving, Part II has demonstrated the disconnection between the interpretations given by courts and the normative literature. Part II has indicated that while there are some decisions in each jurisdiction which reflect a 'creative' interpretation of legislative intent, all interpretations still have significant limitations in redressing

disadvantage, particularly where that disadvantage requires a degree of socio-economic redistribution.

In Chapter Four, I argued that a creative approach to the attributes or grounds that are protected requires a contextual understanding of the reasons why certain people are disadvantaged in light of the attributes that they have. I demonstrated that each jurisdiction had exhibited different accounts of why certain immutable characteristics or attributes had been singled out for protection. While the British and Canadian jurisprudence did identify some reasons to explain the fact that sex and age can cause disadvantage, the Australian case law generally did not. In contrast, the Australian case law did not exhibit the same understanding of the disadvantage suffered.

In Chapter Five, I argued that in each jurisdiction, the operation of discrimination law has been interpreted differently. I examined three contentious issues in determining the existence of unlawful discrimination: comparison, causation and justification. I demonstrated that each jurisdiction had adopted a distinctive approach to each of these issues. I argued that they broadly were representative of an overall approach to interpreting non-discrimination rights and what they were designed to do.

In the United Kingdom, while the interpretation was generally faithful to the legislative text, the courts often avoided opportunities for a more creative and expansive interpretation. In Australia, the interpretation and understanding of the protection that discrimination law provides is limited to motivated 'unfair' discrimination.

This is reflected in the way in which the courts approach comparison by requiring relatively strict formal equality; through a need to identify the 'true' basis for a defendant's conduct and the flexible and generous approach to justifications for discriminatory conduct. In Canada, the approach adopted is one that is more focused on changing the underlying conditions which create systemic discrimination. While there are still limitations, the Canadian approach to comparison, causation and justification does demonstrate that the objective underlying the analysis of statutory discrimination law is to address systemic barriers of access and inequality.

In Chapter Six, I utilised the analysis from chapters Four and Five to consider whether these approaches could be reflective of an understanding of substantive equality or discrimination law's capacity to transform society utilising a pluralist account of discrimination law's aims. I argued that in the British context, while discrimination as 'negligent or unintentional' would sometimes lead

to an outcome consistent with substantive equality, it would not consistently do so. I concluded that the Australian approach did not demonstrate any real degree of a creative interpretation of discrimination law to achieve the law's transformative potential. I argued that while the Canadian approach did demonstrate some indices of creativity to achieve substantive equality, the emphasis on stereotyping and stigma had the potential to overwhelm the capacity for discrimination to redress issues of maldistribution.

In Part III, I sought to account for these differences and considered some potential reasons for the different approaches that were apparent from the analysis in Part II. This served two purposes. The first was to establish reasons for the different approaches that have been taken to similar legislative texts. The second was to provide an account of the role of the court when interpreting legislative rights and to demonstrate the importance of a general role for the court in rights review for a 'creative' interpretation of non-discrimination law to emerge.

Chapter Seven started by arguing that discrimination law gives higher values such as equality, liberty and dignity a precise content. I argued that it was because of discrimination law's relationship with these broader ideals that in the Canadian jurisprudence, discrimination law is considered 'quasi-constitutional.' I interrogated the effect and importance of this quasi-constitutional status in the Canadian context. I argued that although the designation of discrimination law as 'quasi-constitutional' law in Canada has been utilised by the judges to justify an expansive and 'creative' interpretation of statutory human rights, the same cannot be said about either Australia or the United Kingdom. In the final part of Chapter Seven, I explained that this difference can, in part, be attributed to the different constitutional roles in rights review and norm elaboration that the courts in each jurisdiction play.

8.2 Possibilities

In addition to the contributions made in this dissertation, this project has raised a number of possibilities and implications for future research. It touched upon a number of issues that could be developed further. Four of these are outlined below. The first is to consider whether these findings can be replicated across further jurisdictions. The jurisdictions were chosen because they each shared similar legislative frameworks and a shared common law history but with now quite distinctive constitutional structures and roles for the court in rights review. It would be useful to consider how, and if, these differences are reflected in other jurisdictions.

The second is to consider whether these findings are consistent with the interpretation of other legislated rights, particularly those not previously found in the common law. While this thesis concluded that the appropriate role for the court in rights review had important implications for how the courts approach their role in statutory discrimination disputes, the question is whether this finding holds true in other areas of rights or whether non-discrimination rights are distinctive in this way. The right to privacy could be a useful area to consider as it shares some commonalities with non-discrimination without a firm common law basis of protection and an embedded 'quasi-constitutional' status in some jurisdictions.

The third is to focus on the implications of discrimination law as a particular area or 'domain.' While this thesis touched on this idea, it would be valuable to explore in more detail the implications of an understanding of where statutory discrimination law fits within a division between public law and private law. In particular it would be useful to consider the implications that flow from this divide and whether this division is reflected in the particular tests and approaches that are adopted by courts and the remedies that are granted

The fourth is to consider, particularly in light of the approaches adopted in Canada and the United Kingdom, whether legislative rights can, in fact, provide better protection from non-discrimination than constitutional rights. In both the United Kingdom and in Canada, there are times in which statutory non-discrimination rights have been given stronger and more substantive application and interpretation than public or constitutional rights. The possible reasons for this and the implications both in the Australian consideration of constitutional rights and the approach to constitutional horizontality in both the United Kingdom and Canada could be explored in more depth.

8.3 Significance

The findings of this research are significant. In particular, this research demonstrates two important findings. First, judicial interpretation is critical to the success of any legislated human rights regime. Whether discrimination law will achieve substantive and transformative outcomes is based less upon choices made by the legislature, than it is on the interpretive choices made by the judiciary. While this thesis has never denied the importance of the legislature in the protection of human rights, this research demonstrates that courts will always play a key role in the effectiveness of legislated human rights and that this role should be understood when considering the nature and purpose of discrimination law.

This has important implications for understanding how the 'purpose' of law is developed. It is not simply focused on legislative choices but judicial choices as well. This research has demonstrated that similar legislative frameworks have very different results depending on the manner in which they are interpreted. Thus, this research ends with an emphasis on the role of partnership (as opposed to dialogue or monologue) that both parliaments and courts play in the protection of human rights such as non-discrimination.

The second significant finding of this research is that the extent to which the judiciary adopt a 'creative' interpretive role with respect to non-discrimination rights is very much dependent on the embedded role for the court in determining questions of rights more generally. I have argued that in each jurisdiction, discrimination law can and has been understood as a form of quasi-constitutional law. But this quasi-constitutional status has different effects depending on the constitutionally embedded role of the court.

While in Canada it is this status as quasi-constitutional law that justifies the courts' expansive approach to discrimination law, this is less evident in the United Kingdom and non-existent in the Australian jurisprudence. For Australians, this finding has particular implications because it is indicative that without more far-reaching constitutional transformation, legislative rights will continue to be relatively ineffective in securing substantive change.

Fundamentally, the judiciary will have a role in the effectiveness of any statutory human rights regime. A role in constitutional rights review has the potential to provide courts with the language and institutional legitimacy to bring to life a 'creative' interpretation of legislative intent that such human rights regimes require to achieve substantive outcomes.

Appendix A: Cases considered

In this thesis, I have focused on statutory discrimination law in Australia, Canada and the United Kingdom. I considered cases related to all statutory regimes and all attributes. I focused on prohibitions on unlawful direct and indirect discrimination, and reasonable accommodation or adjustments as well as and justifications and exceptions. To find the relevant cases I utilised a variety of databases. For the Australian cases, I conducted searches of each of the federal and territory legislative schemes on Lexis Advance and Westlaw Australia. For the cases from the United Kingdom, I searched for cases relating to the *Equality Act 2010* and each of the historical cases on Westlaw UK, ICLR, Bailii. For the Canadian cases, I searched for cases related to federal and provincial human rights Acts on the Canadian Supreme Court website, Canlii and Westlaw Canada. Excluding cases which primarily considered harassment, vilification, positive duties placed on public sector authorities, procedure and appeals dismissed with no prospect of success, I have considered the 593 remaining cases. Decisions from the Court of Appeal of Quebec were included where an unauthorised English translation could be obtained. The complete list of cases considered in this study are listed below in alphabetical order and per jurisdiction.

Australia

AB v Registrar of Birth, Deaths and Marriages (2007) 162 FCR 528
Aboriginal Legal Rights Movement Inc v South Australia (1995) 64 SASR 551
Aboriginal Legal Rights Movement Inc v South Australia [No 2] (1995) 64 SASR 558
Airflite Pty Ltd v Goyal [2003] WASCA 45
Amery v New South Wales [2004] NSWCA 404
Ansett Transport Industries (Operations) Pty v Wardley (1980) 142 CLR 237
Aurukun Shire Council v CEO Liquor Gaming and Racing in the Department of Treasury [2012] 1 Qd R 1
Australian Iron & Steel Pty Ltd v Banovic (1989) 168 CLR 165
Australian Medical Council v Wilson (1996) 68 FCR 46
Australian Postal Commission v Dao (1985) 3 NSWLR 565
Azriel v New South Wales Land & Housing Corporation [2006] NSWCA 372
Baird v Queensland (2006) 156 FCR 451
Boehringer Ingelheim Pty Ltd v Reddrop [1984] 2 NSWLR 13
Bropho v Western Australia (2008) 169 FCR 59
Cameron v Human Rights and Equal Opportunity Commission (1993) 46 FCR 509
Catholic Education Office v Clarke (2004) 138 FCR 121
Central Northern Adelaide Health Service v Atkinson (2008) 103 SASR 89
Chi v Technical and Further Education Commission [2012] NSWCA 421
Chivers v Queensland [2014] 2 Qd R 561
Christian Youth Camps Ltd v Cobaw Community Health Services Ltd (2014) 50 VR 256
Collier v Austin Health (2011) 36 VR 1

Colyer v State of Victoria [1998] 3 VR 759
Commissioner of Equal Opportunity v ADI Limited [2007] WASCA 261
Commissioner of Police v Estate of Russell (2002) 55 NSWLR 232
Commissioner of Police v Mohamed (2009) 262 ALR 519
Commonwealth Bank of Australia v Human Rights & Equal Opportunity Commission (1997) 80 FCR 78
Commonwealth of Australia v Human Rights and Equal Opportunity Commission & X (1998) 76 FCR 513
Commonwealth of Australia v Human Rights and Equal Opportunity Commission (1991) 32 FCR 468
Commonwealth of Australia v Human Rights and Equal Opportunity Commission (1993) 46 FCR 191
Commonwealth of Australia v Human Rights and Equal Opportunity Commission (1995) 63 FCR 74
Commonwealth of Australia v Human Rights and Equal Opportunity Commission (1999) 95 FCR 218
Commonwealth of Australia v Williams (2002) 125 FCR 229
Commonwealth v Bradley and Anor (1999) 95 FCR 218
Cosma v Qantas Airways Ltd (2002) 124 FCR 504
De Silva v Minister for Immigration and Multicultural Affairs (1998) 89 FCR 502
Devers v Kindilan Society (2010) 116 ALD 339
Director General of Education v Atkins (1989) EOC 92-263
Director-General of Education & Anor v Breen & Ors (1984) EOC 92-015
Dovedeen v GK [2013] QCA 116
Doyle v Queensland (2016) 249 FCR 519
Employment Services Australia Pty Ltd v Poniatowska [2010] FCAFC 92
Ferris v Victoria [2018] VSCA 240
Forbes v Australian Federal Police [2004] FCAFC 95
French v Sydney Turf Club (1999) EOC 93-018
Gerhardy v Brown (1985) 159 CLR 70
Hagan v Trustees of the Toowoomba Sports Ground Trust (2001) 105 FCR 56
Haines v Leves (1987) 8 NSWLR 442
Hashish v Minister for Education of Queensland [1998] 2 Qd R 18
Hautlieu Pty Ltd t/as Russell Pathology v McIntosh (2000) EOC 93-096
Hills v State of South Australia (2002) 82 SASR 102
Hinton v Alpha Westmead Private Hospital (2016) 242 FCR 1
HJ Heinz Company Ltd v Turner [1998] 4 VR 872
Hollier for the Holliers of the Bass Strait Islands v Registrar of the National. Native Title Tribunal (1998) 82 FCR 186
Human Rights and Equal Opportunity Commission v Mt Isa Mines Ltd (1993) 46 FCR 301
Hurst v Queensland (2006) 151 FCR 562
Hurst v State of Queensland (No 2) [2006] FCAFC 151
Iliafi v The Church of Jesus Christ of Latter-Day Saints Australia [2014] FCAFC 26
IW v City of Perth (1997) 191 CLR 1
Jamal v Department of Health (1988) 14 NSWLR 252
James v Western Australia (2010) 184 FCR 582
Jango v Northern Territory of Australia (2006) 152 FCR 150
JM v QFG [2000] 1 Qd R 373
Jones v Public Trusteee & Ano [2004] QCA 268
Kapoor v Monash University (2001) 4 VR 483

Richardson v ACT Health and Community Care Service (2000) 1000 FCR 1
Robinson v Commissioner of Police (NSW Police Force) [2013] FCAFC 64
Rohner v Scanlan (1998) 86 FCR 454
Sahak v Minister for Immigration and Multicultural Affairs (2002) 123 FCR 541
Secretary, Department of Foreign Affairs and Trade v Styles (1989) 23 FCR 251
Sharma v Legal Aid (Qld) [2002] FCAFC 196
Sklavos v Australasian College of Dermatology (2017) 256 FCR 247
Sluggett v Flinders University of South Australia [2003] FCAFC 27
Sydney Local Health Network v QY and QZ [2011] NSWCA 412
Teachers Registration Board of South Australia v Edwards (2013) 117 SASR 246
Thomson v Orica Australia Pty Ltd (2002) EOC 93-227
Toodayan v Anti-Discrimination Commissioner Queensland [2018] QCA 349
Tullamore Bowling & Citizens Club Ltd v Lander (1984) 2 NSWLR 32
Umina Beach Bowling Club Ltd v Ryan (1984) 2 NSWLR 61
University of Ballarat v Bridges [1995] 2 VR 418
Vanstone v Clark (2005) 147 FCR 299
Vata-Meyer v Commonwealth [2015] FCAFC 139
Victoria (Office of Public Prosecutions) v Grant (2014) 246 IR 441
Victoria v Bacon [1998] 4 VR 269
Victoria v Macedonian Teachers Association Victoria Inc (1999) 91 FCR 47
Victoria v Shou (No 2) (2004) 8 VR 120
Victoria v Sinnapan (No. 2) (1995) EOC 92 - 663
Walker v Victoria [2012] FCAFC 38
Waterhouse v Bell (1991) 25 NSWLR 99
Waters v Public Transport Corporation (1991) 173 CLR 349
Western Australia v Commonwealth ('Second Native Title Act Case') (1995) 183 CLR 373
Western Australia v Sebastian (2008) 173 FCR 1
Western Australia v Ward (2002) 213 CLR 1
Wik Peoples v Queensland (1996) 187 CLR 1
Woodforth v Queensland [2018] 1 Qd R 289

Canada

Adamson v Canada (Human Rights Commission) [2016] 2 FCR 75
Air Canada Pilots Association v Kelly [2012] FCA 209
Air Canada v Carson [1985] 1 FC 209
Alberta (Human Rights and Citizenship Commission) v Elizabeth Metis Settlement 2005 ABCA 173
Alberta (Human Rights and Citizenship Commission) v Kellogg Brown & Root (Canada) Company 2007 ABCA 426
Alberta (Minister of Human Resources and Employment) v Weller 2006 ABCA 235
Armstrong v British Columbia (Minisrtry of Health) 2010 BCCA 56
Attaran v Attorney-General of Canada 2015 FCA 37
Attorney General of Quebec c. Association of Jurists of the State 2017 QCCA 103
Ayangma v French School Board 2005 PESCAD 18
B v Ontario (Human Rights Commission) [2002] 3 SCR 403

Canada (Human Rights Commission) v Canada (Armed Forces) [1994] 3 FC 188
Canada (Human Rights Commission) v Canada (Attorney General) [2015] 3 FCR 103
Canada (Human Rights Commission) v Canada (Attorney-General) 2005 FCA 154
Canada (Human Rights Commission) v Canadian Airlines International Ltd [2006] 1 SCR 3
Canada (Human Rights Commission) v Canadian Airlines International Ltd [2006] 1 SCR 3
Canada (Human Rights Commission) v Canadian Transport Agency 2011 FCA 332
Canada (Human Rights Commission) v Taylor [1990] 3 SCR 892
Canada (Human Rights Commission) v Taylor [1990] 3 SCR 982
Canada (Human Rights Commission) v Toronto-Dominion Bank [1998] 4 FC 205
Canadian Elevator Industry Welfare Trust Fund v Skinner 2018 NSCA 31
Canadian Human Rights Commission v Canada (Attorney General) [2015] 3 FCR 103
Canadian Human Rights Commission v Cruden [2015] 3 FCR 103
Canadian Jewish Congress v New Brunswick (Minister of Labour) [1998] 100 NBR (2d) 181
Canadian National Railway Co v Canada (Canadian Human Rights Commission) [1987] 1 SCR 1114
Canadian National Railway v Seeley 2014 FCA 111
Carrigan v Nova Scotia (Department of Community Services) [1997] 145 DLR (4th) 740
Carter v Travelex Canada Limtied 2009 BCCA 180
Central Alberta Dairy Pool v Alberta (Human Rights Commission) [1990] 2 SCR 489
Central Okanagan School District No 23 v Renaud [1992] 2 SCR 970
City of Saint John v Canadian Union of Public Employees, Local 18 and M.B 2015 NBCA 35
Commission des droits de la personne et des droits de la jeunesse (X) c. Commission scolaire de Montréal, 2017 QCCA 286
Commission des droits de la personne et des droits de la jeunesse c. 9185-2152 Québec inc. (Radio Lounge Brossard), 2015 QCCA 577
Commission des droits de la personne et des droits de la jeunesse c. Centre hospitalier universitaire de Sherbrooke, 2012 QCCA 306
Commission scolaire regionale de Chambly v Bergevin [1994] 2 SCR 525
Communications, Energy & Paperworkers' Union, Local 707 v Suncor Energy Inc 2012 ABCA 307
Communications, Energy & Paperworkers' Union of Canada (CEP) v. Domtar Inc., 2009 BCCA 52
Council of Canadians with Disabilities v VIA Rail Canada Inc [2007] 1 SCR 650
Desroches c. Quebec (Commission on Human Rights) [1997] 149 DLR (4th) 425
Dickason v University of Alberta [1992] 2 SCR 1103
Entrop v Imperial Oil Limited [2000] 50 OR (3d) 18
Espinoza v Coldmatic Refrigeration of Canada Ltd 1995 25 CHRRD/35
Farinacci c. Quebec (Attorney General), 2013 QCCA 1564
Flatt v Canada (Attorney General) 2015 FCA 250
Flinn v Halifax Regional School Baord 2014 NSCA 64
Forsyth v Coal Mountain Bus Company and Canadian Auto-Workers Local 2200 2013 BCCA 257
Foster v Nova Scotia (Human Rights Commission) 2015 NSCA 66
Francescutti v Vancouver (City) 2017 BCCA 242
Gale v Hominick [1997] 147 DLR (4th) 53
Gay Alliance v Vancouver Sun [1979] 2 SCR 435
Gaz metropolitain inc v Commission des droits de law personne et des droits de la jeunesse [2011] RJQ 1253
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GNWT v Portman 2018 NWTCA 4
Gould v Yukon Order of Pioneers [1996] 1 SCR 571

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Oak Bay Marina Ltd v British Columbia (Human Rights Commission) 2002 BCCA 495
Okanagan College Faculty Association v Okanagan College 2013 BCCA 561
Ontario (Disability Support Program) v Tranchemontagne 2010 ONCA 593
Ontario (Human Rights Commission) v Naraine [2001] 209 DLR (4th) 465
Ontario (Ministry of Community and social services) v Grievance Settlement Board [2000] 50 OR (3d) 191
Ontario Human Rights Commission v Borough of Etobicoke [1982] 1 SCR 203
Ontario Human Rights Commission v Simpson-Seers Ltd [1985] 2 SCR 536
Ontario Nurses' Association v Orillia Soldiers Memorial Hospital et al (1999) 42 OR (3d) 692 (CA)
O'Quinn v Nova Scotia Workers' Compensation Board [1995] 131 DLR (4th) 318
Partridge v Botony Dental Corporation 2015 ONCA 836
Peel Law Association v Pieters [2013] ONCA 396
Public Service Alliance of Canada v Canada (Attorney General) 2015 FCA 174
Public Service Alliance of Canada v Canada (Department of National Defence) [1996] 3 FC 789
Public Service Alliance of Canada v Canada (Department of National Defence) [1996] 3 FC 789
Public Service Alliance of Canada v Canada Post Corporation [2011] 2 FCR 22
Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux [2018] 1 SCR 464
Quebec (Commission des droits de la personne et des droits de la jeuness) v Bombardier Inc (Bombardier Aerospace Training Center) [2015] 2 SCR 789
Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City) [2000] 1 SCR 665
Quebec (Commission des droits de la personne et des droits de la jeunesses v Montreal (City) [2000] 1 SCR 665
Quebec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v Caron [2018] 1 SCR 35
Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Maksteel Québec Inc [2003] 3 SCR 228
Re Blainey and Ontario Hockey Association [1986] 54 OR (2d) 513
Re Osborne and Inco Ltd [1984] 15 DLR (4th) 723
Regina (City) v Kivela 2006 SKCA 38
Robichaud v Canada (Treasury Board) [1987] 2 SCR 84
Ross v New Brunswick School District No. 15 [1996] 1 SCR 825
Saggers v Calgary (City of) 2000 ABCA 259
Saskatchewan (Human Rights Commission) v Moose Jaw (City) [1989] 2 SCR 1317
Saskatchewan (Human Rights Commission) v Prince Albert Elks Club Inc 2002 SKCA 106
Saskatchewan (Human Rights Commission) v Saskatoon (City) [1989] 2 SCR 1297
Saskatchewan (Human Rights Commission) v Whatcott [2013] 1 SCR 467
Schafer v Canada (Attorney General) 1997 35 OR (3d) 1
School Board Jean-Rivard c. Quebec (Commission on Human Rights) [1999] EYB 1999-14708
School Board of Phares c. Commission on Human Rights and Youth Rights 2012 QCCA 988
Schrenk v British Columbia (Human Rights Tribunal) 2016 BCCA 146
SGEU v Saskatchewan (Environment), 2018 SKCA 48
Shaw v Phipps 2012 ONCA 155
Silver Campsites Ltd v James 2013 BCCA 292
Simser v Canada 2004 FCA 414
Sketchley v Canada (Attorney General) [2006] 3 FCR 392
Sparrow v Johnson (1899) 15 Que CS 104

United Kingdom

Applin v Race Relations Board [1975] AC 259
Archibald v Fife Council [2004] ICR 954
Association of British Civilian Internees (Far Eastern Region) v Secretary of State for Defence [2003] EWCA Civ 473
Aster Communities Ltd (Formerly Flourish Homes Ltd) v Akerman-Livingstone [2015] AC 1399
Aylott v Stockton and Tees City Council [2010] ICR 1278
Ayodele v Citylink Ltd [2018] ICR 748
Aziz v Trinity Street Taxis Ltd [1989] QB 463
Bahl v The Law Society [2004] EWCA Civ 1070
Barclays Bank Plc v Kapur [1991] 2 AC 355
Barnsley County Council v Norton and Ors [2011] EWCA Civ 834
Barry v Midland Bank Plc [1999] 1 WLR 1465
Beart v HM Prison Service [2003] EWCA Civ 1207
Beedles v Guiness Northern Counties Ltd [2011] EWCA Civ 442
Bird v Sylvester & Anor [2007] EWCA Civ 1052
Birmingham City Council v Equal Opportunities Commission [1989] 1 AC 1155
Black v Wilkinson [2013] 1 WLR 2490
Blackwood v Birmingham and Solihull Mental Health NHS Foundation [2016] EWCA Civ 607
Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening) [2009] ICR 1056
British Airways Plc v Mak & Ors [2011] EWCA Civ 184
British Medical Association v Chaudhary [2007] EWCA Civ 788
Brown v London Borough of Croyden [2007] EWCA Civ 32
Brown v TNT Express Worldwide (UK) Ltd [2011] ICR 182
Bullock v Alice Ottley School [1993] ICR 138
Burke v College of Law [2012] EWCA Civ 37
Burnip v Birmingham City Council [2012] EWCA Civ 629
Campbell v Thomas Cook Tour Operations [2014] EWCA Civ 1669
Carter v Ashan [2008] AC 696
Charter v Race Relations Board [1973] AC 868
Chaudhary v Specialist Training Authority Appeal Panel [2005] EWCA Civ 282
Chief Constable of Bedfordshire Police v Liversidge [2002] EWCA Civ 894
Chief Constable of Kent County Constabulary v Baskerville [2003] EWCA Civ 1354
Chief Constable of the Royal Ulster Constabulary v Sergeant A [2000] NI 261
Chief Constable of West Midlands Police v Harrod [2017] EWCA Civ 191
Chief Constable of West Yorkshire Police v A (No 2) [2005] 1 AC 51
Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48
Clark v Novacold Ltd [1999] ICR 951
Coleman v Skyrail Oceanic Ltd (Trading as Goodmos Tours) [1981] ICR 864
Collins v Royal National Theatre Board [2004] EWCA Civ 144
Commission for Racial Equality v Dutton [1989] 1 QB 783
Coutinho v Rank Nemo (DMS) [2009] EWCA Civ 454
Croft v Royal Mail Group Plc [2003] EWCA Civ 1045
Dawkins v Department of Environment, sub nom Crown Supplies (Property Services Agencies) [1993] ICR 571
Deer v University of Oxford [2015] EWCA Civ 52

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Dhatt v McDonalds Hamburgers Ltd [1991] ICR 238.
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Duke v Reliance Systems Ltd [1988] AC 618
Dunn v Secretary of State for Justice [2018] EWCA Civ 1998
Ealing London Borough Council v Race Relations Board [1972] AC 342
English v Thomas Sanderson Blinds Ltd [2009] ICR 543
Essop v Homes Office (UK Border Agency) [2015] EWCA Civ 609.
Essop v Homes Office (UK Border Agency) [2017] 1 WLR 1343
Eweida v British Airways Plc [2010] ICR 890
Farah v Commissioner of Police of the Metropolis [1998] QB 65
Finnegan v Clowney Youth Training Programme Ltd [1990] 2 AC 407
Finnigan v Chief Constable of Northumbria Police [2013] 1 WLR 445
Garland v British Rail Engineering Ltd [1983] 2 AC 751
Gibson v Sheffield City Council [2010] EWCA Civ 63
Gilbank v Miles [2006] EWCA Civ 543
Gill v El Vino Co Ltd [1983] 1 QB 423
Glasgow City Council v Zafar [1997] 1 WLR 1659
Griffiths v Secretary of State for Work and Pensions [2017] ICR 160
Grundy v British Airways plc [2007] EWCA Civ 1020
H v Commissioner of Police of the Metropolis [2013] EWCA Civ 69
H v Lord Advocate [2013] 1 AC 413
Hackney London Borough Council v Sivanandan [2013] ICR 672
Halfpenny v IGE Medical Systems Ltd [2001] ICR 73
Hall v Woolston Hall Leisure Ltd [2001] 1 WLR 225
Hallam & Anor v Avery & Anor [2001] UKHL 15
Hamnett v Essex County Council [2017] EWCA Civ 6
Hampson v Department of Education and Science [1990] 1 AC 171
Hardy and Hanson plc v Lax [2005] ICR 1565
Hardys and Hanson plc v Lax [2005] EWCA Civ 846
Hashwani v Jivraj [2011] UKSC 40
Hayes v Malleable Working Men's Club and Institute [1985] ICR 703
Health and Safety Executive v Cadman [2005] ICR 1546
Heath v Commissioner of Police for the Metropolis [2004] EWCA Civ 943
Hertfordshire County Council v Davies [2018] EWCA Civ 379
Hewage v Grampian Health Board [2012] ICR 1054
Higam v Horton [2004] EWCA Civ 941
Hillingdon London Borough Council v Commissioner for Racial Equality [1982] AC 596
HM Chief Inspector of Education, Children's Services and Skills [2017] EWCA Civ 1426
Home Office v Holmes [1984] ICR 678
Homer v Chief Constable of West Yorkshire Police [2012] ICR 704
Horne v Poland [1922] 2 KB 364
Hotak v Southwark London Borough Council [2016] AC 811

Hounga v Allen [2014] 1 WLR 2889

Hussain v King's College Hospital NHS Trust [2002] EWCA Civ 1269

Igen Ltd v Wong; Emokpae v Chamberlain Solicitors; *Webster v Brunel University* [2005] ICR 931

In re Prestige Group Plc [1984] 1 WLR 335

Islington London Borough Council v Ladele [2010] 1 WLR 955

James v Eastleigh Borough Council [1990] 2 AC 751

Jenkins v Kingsgate (Clothing Productions) Ltd [1981] 1 WLR 1485

Jessemy v Rowstock Ltd [2014] EWCA Civ 185

Johnson v South Wales Police Authority [2014] EWCA Civ 73

Jones v Tower Boot Co Ltd [1997] ICR 254

Jones v University of Manchester [1993] ICR 474

JP Morgan Europe Ltd v Chweidan [2011] EWCA Civ 648

K v Governing Body of Slough Grammar School & Anor [2007] EWCA Civ 165

Khan v General Medical Council [1996] ICR 1032

Khan v Royal Mail Group Ltd [2014] EWCA Civ 1082

King v Great Britain-China Centre [1992] ICR 516

Kingston upon Hull City Council v Matuszowicz [2009] EWCA Civ 22

Kirton v Tetrosyl Ltd [2003] EWCA Civ 619

Lambeth London Borough Council v Commission for Racial Equality [1990] ICR 768

Lee v Ashers Baking Co Ltd [2018] 3 WLR 1294

Lewisham London Borough Council v Malcolm (Equality and Human Rights Commission intervening [2008] AC 1399

Lindsay v London School of Economics [2013] EWCA Civ 1650

Litster v Forth Dry Dock and Engineering Co Ltd [1990] 1 AC 546

Lockwood v Department of Work &Pensions [2014] ICR 1257

London Underground Ltd v Edwards (No. 2) [1999] ICR 494

Lord Chancellor v Coker & Osamor [2001] EWCA Civ 1756

Macdonald v Ministry of Defence [2002] ICR 174

MacGregor Wallcoverings Ltd v Turton [1979] 1 WLR 754

Madarassy v Nomura International Plc [2007] EWCA Civ 33

Manchester City v Romano [2004] EWCA Civ 834

Mandla (Sewa Singh) and Anor v Dowell Lee [1983] QB 1

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Marks & Spencer Plc v Martins [1998] ICR 1005

Matuszowicz v Kingston upon Hull [2009] EWCA Civ 22

Mba v Merton London Borough Council [2013] EWCA Civ 1562

McCausland v Dungannon District Council [1993] 1 WLUK 212;

McCloud v Lord Chancellor and Secretary of State for Justice [2018] EWCA Civ 2844

McDougall v Richmond Adult Community College [2008] EWCA Civ 4

McFarlane v Relate Avon Limited [2010] EWCA Civ 771

McNicol v Balfour Beatty Rail Maintenance Ltd [2002] EWCA Civ 1074

Meade-Hill v British Council [1995] ICR 847

Meer v London Borough of Tower Hamelets [1983] ICR 428

Meikle v Nottinghamshire County Council [2004] EWCA Civ 859

MHC Consulting Services Ltd v Tansell [2000] ICR 789
Ministry of Defence v Jeremiah [1980] QB 87
Ministry of Defence v Kemeh [2014] EWCA Civ 91
Ministry of Justice v O'Brien (No 2) [2015] EWCA Civ 1000; [2016] ICA 182
Morgan Europe Ltd v Chweidan [2011] EWCA Civ 648
Mruke v Khan [2018] ICR 1146
Murphy v Slough Borough Council [2005] EWCA Civ 122
Muschett v HM Prison Service [2010] EWCA Civ 25
Naeem v The Secretary of State for Justice [2015] EWCA Civ 1264
Nagarajan v London Regional Transport [2000] 1 AC 501
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Nairn & Ors v University of St Andrews [1909] AC 147
Newham Sixth Form College v Sandars [2014] EWCA Civ 734
North West Thames Regional Health Authority v Noone [1988] ICR 813
Nottinghamshire County Council v Meikle [2004] EWCA Civ 859
O'Hanlon v Revenue and Customs Comrs [2007] ICR 1359
O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145
Ojituku v Manpower Services Commission [1982] ICR 661
Onu v Akwiku & Anor ;Taiwo v Olaigbe & Anor; [2016] 1 WLR 2653
Orphanos v Queen Mary College [1985] AC 761
Owen & Briggs v James [1982] ICR 618
Oyarce v Cheshire County Council [2008] ICR 1179
Paragan Asra Housing Ltd v Neville [2018] EWCA Civ 1712
Parker v Flint (1699) 12 Mod Rep 254
Patmalniece v Secretary of State for Work and Pensions [2011] 1 WLR 783
Patterson v Legal Services Commission [2003] EWCA 1558
Paulley v First Group Plc [2017] 1 WLR 423
Peake v Automotive Products Ltd [1978] QB 233
Pearce v Governing Body of Mayfield Secondary School [2003] ICR 937
Pemberton v Inwood [2018] EWCA Civ 564
Percy v Church of Scotland Board of National Mission [2006] 2 AC 28
Perera v Civil Service Commission (No 2) [1983] ICR 428
Pike v Somerset County Council [2010] ICR 46
Pimlico Plumbers Ltd v Smith [2018] ICR 1511
Porcelli v Strathclyde Regional Council [1986] ICR 564
Post Office v Adekeye [1997] ICR 110
Post Office v Jones [2001] EWCA Civ 558
Preddy v Bull [2013] 1 WLR 3741
R (Al Rawi) v Secretary of State for Foreign and Commonwealth Affairs (United Kingdom) [2006] EWCA Civ 1279
R (Bailey) v London Borough of Brent and All Souls College [2011] EWCA Civ 1586
R (E) v Governing Body of JFS and Anor (United Synagogue and others intervening) [2010] 2 AC 728
R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213
R (European Roma Rights Centre and others) v Immigration Officer at Prague Airport and Anor (United Nations High Commission for Refugees intervening) [2005] 2 AC 1

R (H) v Ealing Borough Council [2017] EWCA Civ
R (HS2 Action Alliance Ltd) v Secretary of State for Transport [2014] 1 WLR 324
R (Interim Executive Board of Al-Hijrah School) v
R (Interim Executive Board of Al-Hijrah School) v HM Chief Inspector of Education, Children's Services and Skills [2017] EWCA Civ
R (on the application of Domb) v Hammersmith and Fulham [2009] EWCA Civ 941
R (on the application of McDonald) v Royal Borough of Kensington and Chelsea [2011] UKSC 33
R (on the application of Wilson) v Wychavon DC [2007] EWCA Civ 55
R (on the application of Wilson) v Wychavon District Council [2007] EWCA Civ 55
R (UNISON) v Lord Chancellor [2016] ICR 1
R (UNISON) v Lord Chancellor [2017] UKSC 51; [2017] 3 WLR 409
R (VC) v Secretary of State for the Home Department [2018] EWCA Civ 57
R v Commission for Racial Equality; ex parte Prestige Group Plc [1984] ICR 473
R v Entry Clearance Officer, Bombay, Ex parte Amin [1983] 2 AC 818
R v Immigration Appeal Tribunal Ex parte Kassam [1980] 1 WLR 1037
R v Secretary of State for Education and Science, Ex parte Keating (1985) 84 LGR 469
R v Secretary of State for Employment; Ex p Seymour-Smith (No 2) [2000] 1 WLR 435
R v Secretary of State for Employment; ex parte Equal Opportunities Commission and Anor [1995] 1 AC 1
R(Bailey) v London Borough of Brent and All Souls College [2011] EWCA Civ 1586.
Race Relations Board v Charter [1973] AC 868
Redcar & Cleveland Borough Council v Bainbridge and Ors (No 1) [2007] EWCA Civ 929
Redfearn v Serco Ltd (Trading as West Yorkshire Transport Service) [2006] EWCA Civ 659
Regina (Coll) v Secretary for State for Justice (Howard League for Penal Reform intervening) [2017] 1 WLR 2093
Reynolds v CLFIS (UK) Ltd [2015] EWCA Civ 439
Rhys-Harper v Relaxation Group Plc [2003] ICR 867
Roads v Central Trains Ltd [2004] EWCA Civ 1541
Roberts v Cleeveland Area Health Authority [1979] 1 WLR 754
Ross v Ryanair Ltd & Anor [2004] EWCA Civ 1751
Rowstock Ltd v Jessemey [2014] EWCA Civ 185
Saggar v Ministry of Defence [2005] EWCA Civ 413
Savjani v Inland Revenue Commissioners [1981] QB 458
Secretary of State for Trade and Industry v Rutherford (No 2) [2006] ICR 785
Seldon v Clarkson Wright & Jakes [2012] ICR 716
Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337
Sheikh v Chief Constable of Greater Manchester Police [1990] QB 637
Showboat Entertainment Centre v Owens [1984] ICR 65
Simon v Brimham Associates [1987] ICR 596
Smith v Churchill Stairlifts Plc [2005] EWCA Civ 1220
Smith v Gardner Merchant Ltd [1999] ICR 134.
Smith v Safeway Plc [1996] ICR 868
Smyth v Croft Inns Limited [1996] IRLR 84
Spicers v Government of Spain [2004] EWCA Civ 1046
Steel v Union of Post Office Workers and Anor [1978] 1 WLR 64
Tattari v Private Patients Plan Ltd [1998] ICR 106

Taylor v OCS Group Limited [2006] EWCA Civ 702

Timbrell v Secretary of State for Work and Pensions [2010] ICR 1369

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