SUBSTANTIVE EQUALITY AND THE POSSIBILITIES OF THE QUEENSLAND *HUMAN RIGHTS ACT 2019*

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The passage of the Human Rights Act 2019 *(Qld) ('*HRA 2019*') was a significant achievement, particularly in a state often known for its parochial conservatism and disinterest in, if not outright rejection of, human rights. The* HRA 2019 *is substantially based upon the human rights Acts in place in Victoria and the Australian Capital Territory. However, there are some small, but potentially important differences between the* HRA 2019 *and the corresponding state and territory equivalents. In this article, I focus on one of these differences: the definition of discrimination contained in the* HRA 2019*. Unlike the* Charter of Human Rights and Responsibilities Act 2006 *(Vic) the definition of discrimination in the HRA* 2019 *is not tied to the definition or grounds of discrimination in the state discrimination legislation. This small but important distinction could feasibly allow courts to define discrimination and the broader notion of equality in a more substantive manner, covering a wider variety of actions and conduct, and apply that wider definition to a broader range of attributes (commonly understood as 'grounds'). The purpose of this article is to consider the possibilities and potential challenges confronting Queensland courts in broadening the definition of discrimination in the context of* HRA 2019*. I argue that, though a substantive interpretation of discrimination and equality is challenging and requires a degree of 'creativity' on the part of judges, it is a challenge worth undertaking.*

I INTRODUCTION

The manner in which the meanings of discrimination and equality have been interpreted by Australian courts has been consistently critiqued.[1] With respect to anti-discrimination statutes, while courts have accepted that such statutes should be interpreted purposively, and some explicitly state that the purpose of doing so is to achieve substantive equality, courts' interpretations have, for decades, often been criticised as narrow and formalistic.[2] In the context of

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1 See, eg, Margaret Thornton, 'Disabling discrimination legislation: The High Court and Judicial Activism' (2009) 15(1) *Australian Journal of Human Rights* 1, 2; Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' (2002) 26(2) *Melbourne University Law Review* 325, 326–7; Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 26.

2 Gaze, (n 1) 326–7; Rees, Rice and Allen (n 1) 26.

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constitutional law, the High Court's interpretation of the concept of discrimination has been criticised, not as narrow, but as broad to the point of abstraction and inefficacy.[3] Understanding the meaning, content and scope of the term 'equality' is important, as Mary Gaudron highlighted extra-curially long ago:

> 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.[4]

Within that context, state and territory human rights schemes offer a new opportunity to reinterpret and re-engage with the underlying meanings of discrimination and equality within the Australian context. Since Bell J's decision in *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* ('*Lifestyle Communities*'),[5] tribunals and courts in Victoria, the Australian Capital Territory ('ACT'), and Queensland have accepted that the right to equality contained in the state and territory human rights schemes is a right to substantive equality.[6]

Nevertheless, the meaning and scope of substantive equality within the Australian context remains elusive. Part of the reason for this is that, in Victoria, the meaning of discrimination is closely tied to its meaning in the state anti-discrimination scheme,[7] giving courts and tribunals less scope for independence or creativity in determining what attributes are protected from discrimination and inequality in the human rights context or the overarching meaning of the concept of discrimination. It is within this context that the *Human Rights Act 2019* (Qld) ('*HRA 2019*') provides a new opportunity. Unlike its Victorian counterpart, the *HRA 2019* does not tie the definition of discrimination in the *Anti-Discrimination Act 1991* (Qld) ('*ADA 1991*').[8] The purpose of this article is to interrogate the potential possibilities open to Queensland courts and tribunals to develop a substantive approach to equality and discrimination within the context of the *HRA 2019*. In undertaking this interrogation, I argue that, although an expansive and substantive interpretation of equality can be challenging and can

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3 Amelia Simpson, 'The High Court's Conception of Discrimination: Origins, Applications, and Implications' (2007) 29(2) *Sydney Law Review* 263, 263.

4 Mary Gaudron, 'In the Eye of the Law: The Jurisprudence of Equality' (Mitchell Oration, Adelaide, 24 August 1990).

5 (2009) 31 VAR 286 ('*Lifestyle Communities*').

6 *Islam v Director-General, Justice and Community Safety Directorate (No 3)* [2016] ACTSC 27, 31 [155] (Mossop AsJ) ('*Islam*'); *Miami Recreational Facilities Pty Ltd* [2021] QCAT 378, 10–11[52]–[54] (Member Gordon) ('*Miami Recreational Facilities*').

7 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 3 ('*Victorian Charter*'). Specifically, the definition of discrimination in the *Victorian Charter* is: 'Discrimination in relation to a person, means discrimination (within the meaning of the *Equal Opportunity Act 2010*) on the basis of an attribute set out in section 6 of the Act.'

8 *Human Rights Act 2019* (Qld) sch 1 (definition of 'discrimination') ('*HRA 2019*').

require a degree of creativity on the behalf of judges, it is a challenge worth undertaking.

This article canvasses the interpretation of equality in the human rights schemes in Victoria, the ACT and Queensland and outlines the possibilities provided by a more expansive definition of discrimination (within the right to equality in those schemes). In Part II, I start by outlining the case law from Victoria, the ACT and Queensland on the values that the right to equality is designed to enliven. In Part III, I look to three distinct aspects of the right to non-discrimination and equality: who is protected from discrimination (and thus provided a right to equality); what unlawful discrimination entails for the purpose of the state and territory human rights Acts; and, third, when can differential treatment be justified? In Part IV, I address some of the challenges that will continue to be faced in creating substantive equality jurisprudence. In particular, I highlight the relatively active and creative role that such an approach requires judges to adopt. I conclude by arguing that, though challenging, a substantive interpretation of discrimination and equality in the state and territory based human rights schemes has conceptual, jurisprudential, and practical benefits.

II Equality in the Australian Human Rights Acts and Charters

As with all human rights, the starting point in the interpretation of the right to equality is its meaning and scope.[9] The general process for determining claims made pursuant to state and territory human rights Acts have three distinct stages of inquiry.[10] The first stage of the inquiry asks if the right has been engaged by the law, policy or act complained of.[11] The second stage interrogates whether the law, policy or act limits the right or rights that have been engaged,[12] and the third stage considers whether any limitation is nevertheless justified.[13]

How each of these stages is understood is, in part, dependent on the articulation through the legislative language and through the interpretation by court of the scope of the right in question.[14] Without appropriately considering the right's scope, it can be difficult to determine if a particular legislative provision or administrative action has engaged or limited the right.[15] Without the legislature or the courts articulating the importance or fundamentality of the

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9 Kevin Bell, 'Certainty and Coherence in the *Charter of Human Rights and Responsibilities Act 2006* (Vic)' (Research Paper, Faculty of Law, Monash University, 5 August 2021) 3.

10 *Baker v DPP (Vic)* (2017) 270 A Crim R 318, 331 [56] (Tate JA) ('*Baker*'). See also ibid 3; Alistair Pound and Kylie Evans, *Annotated Charter of Human Rights* (Thomson Reuters, 2nd ed, 2018) 54–5.

11 *Baker* (n 10) 331 [56] (Tate JA).

12 Ibid.

13 Ibid.

14 Bell (n 9) 6–7.

15 Ibid.

right, it is difficult to determine whether the interference has been justified.[16] The state and territory human rights schemes do not articulate the precise scope of the human rights that are protected.[17] Though the rights are modelled on international human rights instruments, predominately the *International Convention on Civil and Political Rights* ('*ICCPR*'),[18] they have not been directly imported and as such the meaning of these rights within the Australian context still needs to be determined.[19]

Each of the state and territory human rights Acts contains a right to equality. The right to equality in each Act is substantially similar, though there are some differences. The *HRA 2019* provides a right to equality in s 15. Section 15 of the *HRA 2019* provides for recognition and equality before the law. Section 15 provides individuals with the following rights:

(1) That every person has the right to recognition as a person before the law.

(2) That every person has the right to enjoy the person's human rights without discrimination.

(3) That every person is equal before the law and is entitled to the equal protection of the law without discrimination.

(4) That every person has the right to equal and effective protection against discrimination.

(5) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.[20]

The individual provisions are modelled on Arts 2(1), 16(1) and 26 of the *ICCPR*.[21] There are some differences in the structure of the right in each of the state and territory Acts. For example, the *HRA 2019* separates the clauses relating to the equal protection of the law and the right to equal and effective protection against discrimination, which neither the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Victorian Charter*') nor the *Human Rights Act 2004* (ACT) ('*ACT Human Rights Act*') does.[22] Further, unlike the *ACT Human Rights Act* though as with s 8(4) of the *Victorian Charter*, s 15(5) of the *HRA 2019* specifically provides for special measures.[23]

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16 Ibid.
17 Kylie Evans and Nicholas Petrie, *Annotated Queensland Human Rights Act* (Thomson Reuters, 2023) 17.
18 Ibid 6.
19 Ibid 17.
20 *HRA 2019* (n 8) s 15.
21 Explanatory Notes, Human Rights Bill 2019 (Qld) 3.
22 *Victorian Charter* (n 7) s 8; *Human Rights Act 2004* (ACT) s 8.
23 *HRA 2019* (n 8) s 15(5).

The right to equality provides several different protections from unequal treatment. The right to recognition as a person before the law is modelled on Art 16(1). It ensures that all persons are entitled to their legal rights but does not confer a right to access the courts or capacity to act.[24] The right to enjoy human rights without discrimination is based upon Art 2(1) of the *ICCPR*. Similarly to the equality rights contained at Art 14 of the *European Convention on Human Rights* ('*ECHR*'), it does not provide a standalone right to non-discrimination but instead provides that there can be no discrimination in the application of a person's other rights and freedoms.[25] From *Lifestyle Communities*, it appears that, similarly to Art 14, there is no need for a breach of another right to be established. What matters is that the discrimination occurs within the 'ambit' of another right or freedom.[26] The right to equality before the law provides for formal equality between persons and is focused on procedural fairness in the administration of laws rather than the substance and content of the laws themselves.[27] In contrast, the second limb of s 15(3) and the entirety of s 15(4) require more than formal equality as tribunals and courts have recognised that vulnerable persons may need to be treated differently to achieve similar outcomes to those who hold more privileged positions in society.[28] Much of the case law is focused on the right to non-discrimination and the substantive meaning of discrimination within the human rights frameworks. Consequently, the link between the right to non-discrimination and the right to equality in this context will be the focus of this article.

Both the *Victorian Charter* and the *HRA 2019* explicitly indicate that measures adopted to overcome disadvantage caused by historical and continuing discrimination are not discriminatory. In *Parks Victoria (Anti-Discrimination Exemption)*, the Tribunal indicated that the special measures provision in the *Victorian Charter* may be narrower than that contained in the *Equal Opportunity Act 2010* (Vic) ('*EOA 2010*'), because the *Victorian Charter* special-measures provision required that the disadvantage *be caused* by discrimination rather than allowing for special measures generally.[29] In the ACT, though special measures are not explicitly mentioned in the *ACT Human Rights Act*, it is still nevertheless likely that measures adopted to overcome disadvantage will not amount to 'discrimination' given the commentary on Art 2(1) and Art 26 on which s 8 is based.[30] The manner in which the special-measures provisions are worded and are operationalised can distort the three-stage inquiry outlined above. To determine whether a particular

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24 *Lifestyle Communities* (n 5) 342–3 [278]–[279] (Bell J).

25 Ibid 343 [279]–[280].

26 Ibid 343 [280].

27 Ibid 343–4 [285]–[286].

28 Ibid 341 [265]–[268]; *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 81 [249] (Tate JA) ('*Taha*').

29 *Parks Victoria (Anti-Discrimination Exemption)* [2011] VCAT 2238, [60] (Member Dea); *Re Stawell Regional Health (Anti-Discrimination Exemption)* [2011] VCAT 2423 [33]–[35] (Member Dea).

30 Human Rights Committee, *CCPR General Comment No 18: Non-Discrimination*, 37th sess, UN Doc HRI/GEN/1/Rev.1 (10 November 1989) [10].

measure is a special measure requires a decisionmaker to determine whether there is unequal treatment and if that unequal treatment is justified at the engagement step of the analysis.

A *The Elusive Nature of Equality*

The underlying meaning, nature, and scope of the right to equality remains contested and somewhat elusive at an international, supranational and constitutional levels worldwide.[31] A question remains as to what is meant by the term 'equality' as understood in Australian law, both with respect to statutory anti-discrimination schemes and the state and territory human rights statutes. Within the human rights Acts, equality is both an underlying value as well as a fundamental right.[32] Equality is an abstract concept and can require different actions and different outcomes depending on what 'kind' of equality is the focus of analysis.[33] Equality can simply refer to the need to treat like persons 'alike' or what is often referred to as 'formal equality'.[34] It can require an equality of opportunity or of results, or it can require a variety of different responses to achieve 'substantive equality'.[35]

Formal equality is the basic principle that likes should be treated 'alike'.[36] Non-discrimination principles operate to achieve formal equality in two important ways. First, concepts like direct discrimination embed the notion that laws designed to combat discrimination aim to achieve the same treatment of everyone regardless of their circumstances.[37] By doing so, non-discrimination laws operate on the premise that, by treating individuals 'equally' with others, they will be judged on their individual abilities.[38] Second, traditionally, non-discrimination and equality rights operate by emphasising that certain characteristics (such as race, gender, age or disability) are not relevant differences that make persons unalike.[39]

There are a number of problems with utilising a formal equality approach to understanding equality and non-discrimination rights. One of those problems is that such an approach fails to appreciate the integral nature of an attribute to a person's sense of self and being. Formal equality also embeds the dominate

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31 Sandra Fredman, *Discrimination Law* (Oxford University Press, 3rd ed, 2022) 1.

32 See, eg, *HRA 2019* (n 8) Preamble, s 15.

33 Alice Taylor, 'The Conflicting Purposes of Australian Anti-Discrimination Law' (2019) 42(1) *University of New South Wales Law Journal* 188, 190.

34 Fredman (n 31) 9.

35 Ibid 16–23.

36 Dominique Allen, 'An Evaluation of the Mechanisms Designed to Promote Substantive Equality in the *Equal Opportunity Act 2010* (Vic)' (2020) 44(2) *Melbourne University Law Review* 459, 464.

37 Ibid.

38 Ibid 465.

39 Ibid.

cultural construct (often white, male, able-bodied and heteronormative) as the standard to which others should be compared to when considering equal treatment.[40] A particular problem in a public law context is that the executive and the legislature are often required to make decisions that differentiate between persons. The question becomes whether or not this is justified. A formal equality model does not clearly assist with identifying the legitimacy of decisions that differentiate between persons, except upon the clearly identified specified grounds. For example, rules or policies that explicitly exclude people on the basis of gender or race are captured by a non-discrimination rule based upon formal equality. However, formal equality models fail to provide an answer to the question of legitimacy when a rule or policy is neutral in its language but creates or exacerbates disadvantages in effect.

To tackle this problem, a right to equality in other jurisdictions has been interpreted as requiring something more than equal treatment. However, there are still difficulties in conceptualising what a substantive approach to equality might require in practice. As Beverley McLachlin, the former Chief Justice of Canada, 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 groups, 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.
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> 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.[41]

There are various normative approaches that guide an approach to substantive equality. Some are focused on a singular principle or animating norm such as the protection of human dignity,[42] or the prevention of the perpetuation of stigma.[43] Other normative approaches have adopted a more expansive or pluralist account of substantive equality by considering the various and intersecting ways in which discrimination and inequality impact the individual on both a socio-economic and dignitary basis.[44] These accounts look to the ways in which equality laws can

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40 Ibid.

41 Beverley McLachlin, 'Equality: The Most Difficult Right' (2001) 14 *Supreme Court Law Review* 17, 21.

42 Denise G Réaume, 'Discrimination and Dignity' (2003) 63(3) *Louisiana Law Review* 645, 646.

43 Iyiola Solanke, *Discrimination as Stigma: A Theory of Anti-Discrimination Law* (Hart Publishing, 2017) 5–6.

44 Fredman (n 31) 29; Sophia Moreau, *Faces of Inequality: A Theory of Wrongful Discrimination* (Oxford University Press, 2020) 11.

transform a society to remake structures to be more inclusive and accessible to marginalised groups.[45] Another group of scholars rejects the idea that equality should be considered a grounding principle for non-discrimination protection, arguing that the fundamental enlivening principle is one of individual liberty.[46]

B *The Right to Equality in State and Territory Human Rights Acts: Formal, Substantive or Neither?*

As was highlighted in Part I, courts and tribunals have accepted that the purpose of equality provisions in the state and territory human rights Acts is to provide substantive equality. This purpose was first confirmed in *Lifestyle Communities*.[47] *Lifestyle Communities* concerned the appropriate interpretation of the exemption provision contained in the *Equal Opportunity Act 1995* (Vic) ('*EOA 1995*').[48] Section 83 of that Act allowed for exemptions to be granted by the Victorian Civil and Administrative Tribunal ('VCAT') to certain businesses or industries so that they were no longer required to comply with the provisions of the *EOA 1995*.[49] The applicant sought an exemption in order to build an over-50s accommodation village.[50] Without an exemption, refusing persons from accommodation on the basis of their age would be discrimination.[51] The question in *Lifestyle Communities* was what factors could be taken into account when making an exemption determination and how the exemption determination could be read consistently with ss 8(3)–(4) of the *Victorian Charter*.[52]

In his judgment, Bell J concluded that equality pursuant to the *Victorian Charter* required substantive equality rather than only formal equality. He stated:

> The human rights of equality and non-discrimination are of fundamental importance to individuals, society and democracy. Any limitations must be subject to a stringent standard of objective justification. Equality means substantive equality, not just formal equality. Where differentiation is a measure for redressing disadvantage, it is not discrimination because it furthers equality.[53]

From Bell J's judgment in *Lifestyle Communities*, it appears that in this context, substantive equality enlivens the principle or value of human dignity. Justice Bell

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45 Fredman (n 31) 29.

46 Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press, 2015) 130.

47 *Lifestyle Communities* (n 5) 311 [107] (Bell J), which was subsequently considered in *PBU v Mental Health Tribunal* (2018) 56 VR 141 ('*PBU*'); *Victoria v Turner* (2009) 23 VR 110; *Bare v Independent Broad-Based Anti-Corruption Commission* (2015) 48 VR 129 ('*Bare*') [34]; *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624 ('*Matsoukatidou*').

48 *Lifestyle Communities* (n 5) 290 [6]–[9] (Bell J).

49 Ibid 290 [6].

50 Ibid 290 [8]–[9].

51 *Equal Opportunity Act 1995* (Vic) s 8, as repealed by *Equal Opportunity Act 2010* (Vic) s 191.

52 *Lifestyle Communities* (n 5) 311 [107] (Bell J).

53 Ibid.

emphasised the importance of the inherent dignity of every human being, drawing on the decision of Judge Tanaka in his dissent in *South West Africa (Ethiopia v South Africa) (Second Phase*) *(Judgment)* and the judgment of Iacobucci J in *Law v Canada*.[54] Justice Bell also emphasised the importance of recognising the 'potential for personal and social development' as an underlying value of substantive equality.[55] Flowing from these underlying values, Bell J accepted that there was a distinction between differentiation that is utilised to redress disadvantage on the one hand, and differentiation that amounts to discrimination on the other.[56] He further clarified that affirmative action or compensatory measures can be justified on the basis that they are focused on providing equal opportunities and results for otherwise marginalised and disadvantaged groups.[57]

In the context of *Lifestyle Communities*, Bell J concluded that interpreting s 83 of the *EOA 1995* consistently with the *Victorian Charter* required the Tribunal to determine either that the exemption constituted a special measure and was consistent with s 8(4) of the *Victorian Charter* because the purpose of the exemption was to promote the interests of a disadvantaged group,[58] or alternatively would need to be justified pursuant to s 7(2) of the *Victorian Charter*.[59]

C *The Link Between Equality and Discrimination in the State and Territory Human Rights Acts*

Since *Lifestyle Communities*, judges and tribunal members have emphasised that the *purpose* of the right to equality as provided for in the state and territory schemes is to provide substantive rather than formal equality.[60] Nevertheless, the capacity to utilise human rights instruments to achieve substantive equality will depend on how the rights to equality and non-discrimination are interpreted.

Each of the state and territory schemes have a different approach to the definition of discrimination. In the *Victorian Charter*, discrimination is mentioned in ss 8(2)–(4). Discrimination is defined in s 3. The definition of discrimination in the *Victorian Charter* is:

> Discrimination in relation to a person, means discrimination (within the meaning of the *Equal Opportunity Act 2010* [*EOA 2010*]) on the basis of an attribute set out in section 6 of the Act.[61]

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54 Ibid 311–12 [108]–[110], citing *South West Africa (Ethiopia v South Africa) (Second Phase) (Judgment)* [1966] ICJ Rep 6, 297; *Law v Canada* [1999] 1 SCR 497, 530 [53].

55 *Lifestyle Communities* (n 5) 347–8 [312].

56 Ibid 290 [4], 311 [107].

57 Ibid 314 [118].

58 Ibid 357 [375]–[377].

59 Ibid 357 [374].

60 See, eg, *PBU* (n 47) 174 [113];);); *Matsoukatidou* (n 47) 641 [53]).

61 *Victorian Charter* (n 7) s 3.

In the *ACT Human Rights Act*, s 8(2) states that '[e]veryone has the right to enjoy his or her human rights without distinction or discrimination *of any kind*' (emphasis added). Section 8(3) states that '[e]veryone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination *on any ground*' (emphasis added). Discrimination is not defined in the *ACT Human Rights Act*.

In s 15 of the *HRA 2019*, the right to non-discrimination is in similar terms to that in the *Victorian Charter*. The *HRA 2019* does define the term 'discrimination' but utilises different wording to the *Victorian Charter*. The definition of discrimination provided for in the *HRA 2019* is as follows:

> Discrimination, in relation to a person, *includes* direct discrimination or indirect discrimination, within the meaning of the *Anti-Discrimination Act 1991*, on the basis of an attribute stated in section 7 of that Act.[62]

The important distinction between this definition and that in the *Victorian Charter* is the inclusion of the word 'includes'.[63] By incorporating the word 'includes' the definition is not only limited to what is provided for in the *ADA 1991* but can also go beyond the meaning and provisions in the *ADA 1991* to provide for newer conceptions of discrimination, expand the grounds or attributes that are protected and the extent to which justifications or exceptions are understood and incorporated into the definition of discrimination.

The direct link between the definition of discrimination in the *Victorian Charter* and the *EOA 2010* has two significant limitations. First, discrimination is limited to the attributes set out in the *EOA 2010* and cannot be broadened to include other groups that are similarly disadvantaged to those protected in the *EOA 2010*. Second, the definition of discrimination is the same as, and is governed by the same limitations as apply to, the definition contained in the *EOA 2010*, and is required to be consistent with the interpretation of the non-discrimination provisions in the *EOA 2010*. However, while the definition of discrimination and the attributes that were protected from discriminatory conduct in the *Victorian Charter* are defined by reference to the *EOA 2010*, the Supreme Court of Victoria accepted in *Director of Public Prosecutions (Vic) v Natale* ('*Natale*') that the concept of discrimination is not defined with reference to the specific exceptions that are contained in the *EOA 2010*.[64]

In both the ACT and in Queensland, courts or tribunals have accepted that the definition of discrimination is broader than that contained in the *Victorian Charter*. In *Islam v Director-General Justice and Community Safety Directorate (No 3)* ('*Islam*'), Mossop AsJ accepted that s 8 of the *ACT Human Rights Act* and the

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62 *HRA 2019* (n 8) sch 1 (emphasis added).

63 Scott McDougall, 'Making Rights Real: The Promise and Potential Pitfalls of the *Human Rights Act 2019* (Qld)' (2020) 32(1) *Bond Law Review* 115, 127.

64 *DPP (Vic) v Natale* [2018] VSC 339 37–8 [88]–[89]. ('*Natale*').

definition of discrimination was broader than that contained in the *Victorian Charter*.[65] In particular, he noted that s 8(3) prohibited discrimination on 'any ground' — broadening its scope to attributes not captured by the list of protected attributes in either Art 26 of the *ICCPR* or (implicitly) in the *Discrimination Act 1991* (ACT).[66] In Queensland, tribunal members have cautiously accepted that the definition of discrimination in the *HRA 2019* is broader than that found in the *Victorian Charter*.[67] In *Miami Recreational Facilities Pty Ltd* ('*Miami Recreational Facilities*'), Member Gordon expanded upon what this broader definition of discrimination may entail in the context of the *HRA 2019*:

> It remains to be seen whether the combination of section 15 and this definition of 'discrimination' protects persons from discrimination of a type outside the *ADA* [*1991*]. The use of the word 'includes' in the definition of discrimination suggests that it is a human right not to suffer other types of discrimination not covered by the *ADA* [*1991*]. One obvious possibility is that it might be a human right in Queensland not to suffer discrimination in contravention of Commonwealth legislation. The protection here is against 'discrimination' and not against 'unlawful discrimination'. Discrimination is only unlawful if in an 'area' covered by the *ADA* [*1991*]. This means that the protection in section 15 is very wide.[68]

While s 15 of the *HRA 2019* and its broader implications have not been considered in significant detail by a higher court, Member Gordon's statements do raise the possibility that s 15 could be interpreted broadly, with expansive implications with respect to which grounds or attributes are captured by the *HRA 2019*, the meaning of discrimination (as compared to unlawful discrimination) and the areas in which the right to equality and non-discrimination could apply to.

III The Architecture of Discrimination: Grounds, Duties, and Justification

International, constitutional, and statutory equality laws all have a central architecture that distinguishes discrimination and equality laws as an area of law.[69] These involve identifying personal characteristics of those whom the law protects, the duties or obligations that duty-bearers hold to those who are entitled to protection, and any justifications for conduct which distinguishes or discriminates between persons.[70]

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65 *Islam* (n 6) 31 [154].

66 Ibid 31 [154]–[155].

67 *Terrace-Haven Pty Ltd* [2022] QCAT 23, 13 [54] (Member Sammon) ('*Terrace-Haven*'); *Miami Recreational Facilities* (n 6) 10–11 [52]–[54] (Member Gordon).

68 *Miami Recreational Facilities* (n 6) 10–11 [52]–[54].

69 Khaitan (n 46) 46–7.

70 Ibid.

In Australia, statutory discriminatory laws are prescriptive, with a closed list of grounds or attributes for protection, technical definitions of discrimination, and a specific list of exceptions rather than general justifications or defences, which might broadly apply to all conduct and duty-bearers. As highlighted above, the state and territory human rights schemes all (to varying extents) have the potential for broader definitions and more expansive applications. In this Part, I canvass the possibilities of this potential breadth with respect to the three central features of discrimination and equality laws architecture: grounds, duties, and justification.

A *Grounds*

A criticism of statutory discrimination laws is that they provide protection to a closed list of 'grounds', which are necessarily exclusionary and cannot account for all unfair differential treatment on the basis of a specific attribute of a claimant.[71] One solution to the limitations of discrimination law based on specific 'grounds' would be to adopt a version of discrimination law that is not reliant on grounds as a defining concept.[72] In criticising a grounds-based system, some advocate for a root-and-branch change to the structure of discrimination law to focus on socio-economic disadvantage and redistributional justice rather than recognitional justice focusing on specific attributes.[73] In this conception, discrimination and equality laws should focus primarily on matters of economic justice and social inclusion rather than specific identity factors. But, as others such as Atrey and Moreau have concluded, such an approach would be misguided. Grounds continue to be a centrepiece or an integral part of the architecture of discrimination law.[74] A grounds-based approach defines the disadvantage that people face due to their membership of certain groups and allows for a clearer identification of the disadvantage that discrimination law can redress.

A closed list of grounds can create difficulties in providing substantive equality for a range of groups. One difficulty has been seen in Victoria in the application of the *Victorian Charter* to persons who may be disadvantaged, but do not have an attribute that is protected by the *EOA 2010*. In Victoria, *EOA 2010* covers 20 attributes which include: race, sex, disability, age, gender identity, sexual orientation, physical features, and care responsibilities, amongst other status grounds. The *EOA 2010* also protects associates of persons with those attributes from discrimination.[75] In *Matsoukatidou v Yarra Ranges Council*

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71 Fredman (n 31) 172–5.

72 Kate Malleson, 'Equality Law and the Protected Characteristics' (2018) 81(4) *Modern Law Review* 598, 617.

73 Ibid 617.

74 Shreya Atrey, *Intersectional Discrimination* (Oxford University Press, 2019) 147; Moreau (n 44) 42.

75 *Equal Opportunity Act 2010* (Vic) s 6 ('*EOA 2010*').

('*Matsoukatidou*') it was accepted that demonstrating that one has a protected attribute is a core component of an equality claim under the *Victorian Charter.* [76]

In *Matsoukatidou*, the complainants were a mother and daughter who brought an action for reinstatement of an appeal from orders made in the Magistrates Court.[77] The hearing was conducted quickly and the appeal was dismissed.[78] The complainants had both been charged with certain offences against the *Building Act 1993* (Vic).[79] At the original hearing, the complainants were self-represented and were fined.[80] The complainants appealed to the County Court of Victoria. At the County Court hearing, the complainants continued to be unrepresented.[81] It was accepted that neither understood the proceedings and were provided with limited assistance.[82] The appeal in the County Court was dismissed.[83].[84] The complainants sought judicial review of the decision and raised questions of law as to the application of the *Victorian Charter*.[85] In particular, they asked whether the County Court was obliged to comply with ss 8 and 24(1) of the *Victorian Charter* in the conduct of the hearing.[86] Drawing on his judgment in *Lifestyle Communities*, Bell J concluded that s 8(3) had three elements of operation: a requirement for 'equality before the law', which required tribunals and courts to apply and administer laws equally; a requirement for every person to have equal protection of the law without discrimination; and equal and effective protection against discrimination.[87] However, as Bell J had concluded in *Lifestyle Communities*, the latter two elements were limited by the definition of 'discrimination' provided for in the *EOA 2010*.[88] In *Matsoukatidou*, the limitations of s 8(3) were stark because of the differences in the attributes held by the two women.[89] While one of the complainants (Maria) was disabled, the other (Maria's mother, Betty) was not (and had no other relevant attributes).[90] While one could argue that Betty was an associate of Maria's as her mother and thus possibly captured by the *EOA 2010*, Betty's difficulties in court were not related to the fact that she was associated to Maria. Consequently, she was not considered to have a relevant attribute. Thus, one of the women was protected by s 8(3) and the other was not. As put by Bell J:

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76 *Matsoukatidou* (n 47) 643 [59] (Bell J).
77 Ibid 627 [1]–[5].
78 Ibid.
79 Ibid 627 [1].
80 Ibid.
81 Ibid [3].
82 Ibid.
83 Ibid.
84 Ibid.
85 Ibid.
86 Ibid 634 [33].
87 Ibid 636–7 [37]–[44], 640 [50]–[52].
88 Ibid 641 [53]–[55].
89 Ibid 643 [59]–[61].
90 Ibid.

> As it happens, Maria has a disability protected by the limited definition of discrimination that is incorporated by reference. Fortunately, her equality rights are fully protected in the circumstances by the other elements of the right (the third is pertinent). The circumstances of Maria's mother, Betty, are otherwise identical and, it might be thought, demand a like response under the human right to equality. Unfortunately, she is not protected by the other elements of the right in s 8(3) because of the limited definition of discrimination. The inconsistent manner in which the substantive aspect of the equality right in s 8(3) applies in the facts of this case thus gives right to cause for reflection.[91]

While Betty had no protected characteristics, she was nevertheless still in a vulnerable position because she was unable to speak English. However, an inability to speak English has rarely been found to be a relevant characteristic or another attribute and is not protected independently by the *EOA 2010*.[92] The reflection that Bell J appears to be requesting is one that considers why two people who were in different, but similarly disadvantageous positions cannot be equally protected by the *Victorian Charter*.[93]

Matsoukatidou is a demonstration of a common critique of the use of grounds in discrimination law, which is that they are often few, exclusive, and isolated. The problem with grounds and their limited and isolated exclusivity is that individuals and groups with many forms of disadvantage entitled to protection under discrimination law, struggle to have their claims accepted. In *Matsoukatidou*, this is highlighted by the fact that both women are vulnerable as litigants but for different reasons: Maria's disability and Betty's inability to speak English. Due to the limited nature of grounds in the *EOA 2010*, Maria's claim could be accepted, and she should have been entitled to reasonable adjustments in the manner that the hearing was held, but Betty was not. While in some cases, such as *Natale*, the Supreme Court of Victoria has accepted that a disadvantage, such as an inability to speak English effectively, was a characteristic, or an incident, of a protected attribute,[94] in other cases claimants have failed in their claims, in part because they do not have a protected characteristic pursuant to the *EOA 2010*.[95]

Both the *ACT Human Rights Act* and the *HRA 2019* provide an opportunity for an expansion of the grounds that underpin the other statutory schemes. The expansive nature of the *ACT Human Rights Act* was identified by Mossop AsJ in *Islam*, though not necessarily in favourable terms. In *Islam*, the discriminatory

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91 Ibid 643 [59].

92 *EOA 2010* (n 75) s 6. Though in *Natale* the Supreme Court concluded that an inability to speak English well was a 'characteristic' of the applicant's national origin: *Natale* (n 64) [90] (Bell J). For a broader discussion of an inability to speak English and minority language claims: see Alice Taylor, *Interpreting Discrimination Law Creatively: Statutory Discrimination Law in United Kingdom, Canada and Australia* (Bloomsbury Publishing, 2023) 71–3; Alice Taylor, 'Anti-Discrimination Law as the Protector of Other Rights and Freedoms: The Case of the *Racial Discrimination Act*' (2021) 42(2) *Adelaide Law Review* 405.

93 *Matsoukatidou* (n 47) 643 [59]–[61].

94 *Natale* (n 64) 32 [71] (Bell J).

95 *She v RMIT University* [2021] VSC 2, 30 [114] (Incerti J).

conduct was alleged to be based upon a recognised attribute — religion. Nonetheless, Mossop AsJ went on to highlight the breadth of protection offered by s 8(3) of the *ACT Human Rights Act*:

> However, the drafting of s 8(3) is such that the grounds of discrimination are not limited to those identified in the example. Nor are they limited to grounds which might be considered socially inappropriate forms of discrimination. A prohibition on 'discrimination on any ground' would, prima facie, prevent discrimination on grounds such as lack of intelligence, laziness, propensity to violence, unpleasantness of personality, lack of personal hygiene or poor grooming unless such discrimination involved a 'limit set by laws' which were justified under s 28 of the *HR Act*.[96]

Associate Justice Mossop seemed to indicate that there should be some limitation on the types of grounds that may be captured by s 8(3) but is not explicit as to the method that could be adopted to identify such limitations.

In Queensland, early case law from the Queensland Civil and Administrative Tribunal ('QCAT') seemed to suggest that the use of the term 'includes' in connection to the definition of discrimination provided in the *HRA 2019* gives courts and tribunals the scope to identify new and emerging grounds for protection from discrimination in a human rights context.[97] In contrast to the *Victorian Charter*, which has a closed list of grounds, or the *ACT Human Rights Act*, which leaves grounds almost entirely open, the *HRA 2019* appears to provide a semi-open list that requires reasoning by analogy to expand the list of grounds from that which appears in the *ADA 1991*. These suggestions from QCAT have been further bolstered by the decision by the Supreme Court of Queensland in *Austin BMI Pty Ltd v Deputy Premier* ('*Austin BMI*').[98] In *Austin BMI*, the Supreme Court of Queensland considered the meaning of the term 'discrimination', though in connection with the right to take part in the conduct of public affairs without discrimination contained in s 23 rather than s 15. When considering the meaning of discrimination within the context of s 23 and the *HRA 2019* more generally, Freeburn J accepted that the definition of discrimination in the *HRA 2019* was inclusive rather than exhaustive.[99]

Such an approach was consistent with the *ACT Human Rights Act* but differed from the *Victorian Charter*.[100] Justice Freeburn accepted that, with respect to determining the attributes captured by the definition of discrimination, the approach that should be adopted in determining new attributes should be one of analogy. As he highlighted:

> The legislature, in choosing to tie the definition of 'discrimination' to the definition in the *Anti-Discrimination Act 1991* in a non-exclusory way, must be taken to have left the

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96 *Islam* (n 6) 31 [156].
97 See, eg, *Miami Recreational Facilities* (n 6).
98 [2023] QSC 95 ('*Austin BMI*').
99 Ibid 83 [317].
100 Ibid.

> door open for an analogous grounds of discrimination. In other words, in linking the definition of 'discrimination' to the definition of the same concept in the *Anti-Discrimination Act*, but not directly adopting that definition, it is reasonable to infer that Parliament intended for the definition to read as allowing an analogous ground of discrimination.[101]

When determining whether additional or new attributes should be captured for protection from discrimination, the court should look to the list of attributes contained in the *ADA 1991* to consider analogous grounds which could be captured by this broader definition.

The various definitions (or lack of definitions) in each of the statutory schemes gives a different approach to determining the recognised grounds. In Victoria, there is no capacity for additional attributes to be added for protection unless these are first added to the *EOA 2010*. In the ACT, there is no limitation to the attributes that can be captured, but as *Islam* highlights, courts are also given no guidance as to what is or is not captured. As highlighted in *Austin BMI*, while simply expanding discrimination law to cover more attributes or grounds would be useful, the flexibility in the definition of discrimination in the *HRA 2019* provides judges with a greater opportunity than simple additions. The flexible wording allows for a greater degree of interrogation of the underlying rationale for attributes to be protected, whether attributes should be protected symmetrically and how courts can utilise discrimination law to determine intersectional claims of discrimination.

Such an interrogation is important because, while it is possible to conceive the *HRA 2019* as paving the way for new and analogous attributes to be added for protection, there remains a question as to the appropriate test to determine discrimination law's coverage. Traditional understandings of discrimination law have often focused on the immutability of protected attributes or characteristics.[102] Historically, attributes were often granted protection from discrimination because they were attributes that were irrelevant to the decision being taken, were not chosen and could not be changed.[103] The early legislative interventions to prohibit discrimination indicate an emphasis on immutability as these early pieces of legislation often covered attributes such a race and sex, all of which were thought to be immutable.[104] In the coverage of these immutable characteristics there is often a degree of symmetry with equal protection granted to those who have suffered from historical disadvantage and exclusion and to those who have not.[105] The exception to this rule is the attribute of disability, which has generally been given asymmetrical protection.[106]

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101 Ibid 83 [318].
102 Michael P Foran, 'Grounding Unlawful Discrimination' (2022) 28(1) *Legal Theory* 3, 22–3.
103 Jessica A Clarke, 'Against Immutability' (2015) 125(1) *Yale Law Journal* 2, 13–14.
104 Ibid 8–9.
105 Foran (n 102) 33.
106 See, eg, *Disability Discrimination Act 1992* (Cth) ss 5–6.

While discrimination law's early coverage may have begun with a focus on immutable characteristics, immutability is no longer a clear indicator for protection both from a descriptive and conceptual perspective.[107] From a descriptive perspective, the reach of discrimination law has extended far beyond the traditional bounds of immutability.[108] In the *ADA 1991*, immutable characteristics such as race are captured but protected grounds also include religious belief, political opinion and trade union activity.[109] All of these characteristics involve a degree of personal choice but Parliament has not deemed that to be a justification for discriminatory treatment. From a more conceptual perspective, even for attributes that were traditionally considered to be immutable, this assumption appears to be less certain.[110] For example, a person's gender is now alterable. Given the malleability of the definition of sex in the *ADA 1991*, there is no reason to suggest that sex is necessarily an immutable characteristic.[111] Additionally, immutability, or even constructive immutability, fails to appreciate the distinctly different disadvantages and prejudice that different people face due to the attributes that they have.[112]

Consequently, an expanded and more nuanced understanding of the kinds of disadvantage that equality is intended to address needs to operate. This nuance can be provided in judgments, rather than through the strictures of legislative language. Instead of a focus on a single feature such as immutability as an indicium of inclusion, a substantive and flexible approach to grounds could consider a range of factors that indicate a certain characteristic, attribute or group should be granted protection. By utilising a range of factors, a court has the capacity to understand the impact and lived experience of disadvantage that a right to equality can be utilised to ameliorate.[113] This approach looks to whether a group of persons suffer from disadvantage that is pervasive and substantial. A possible way to adopt such an approach is provided by the dissenting judgment of L'Heureux-Dube J in *Egan v Canada* ('*Egan*').[114] In *Egan*, L'Heureux-Dube J emphasised the need to focus on the effects of disadvantage and connect the law to 'real people's real experiences'.[115] The approach suggested by L'Heureux-Dube J is to consider whether a group of persons is socially vulnerable as compared to another group because of a range of factors including historical disadvantage, stereotyping, social prejudice and marginalisation.[116] Such an approach both

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107 Clarke (n 103) 27.
108 Ibid.
109 *Anti-Discrimination Act 1991* (Qld) s 7 ('*ADA 1991*').
110 Clarke (n 103) 27.
111 *ADA 1991* (n 109) sch 1, in which 'sex' is left undefined as a concept.
112 Clarke (n 103) 27.
113 Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (McGill-Queen's University Press, 2010) 11.
114 [1995] 2 SCR 513.
115 Ibid 552.
116 Ibid 554–5.

appreciates the contextual nature of the disadvantage a right to equality could ameliorate and provides an independent and interactive system to broaden the scope of equality provision's reach to new and emerging grounds.[117]

B *Duties*

The second step of an analysis of discrimination is to consider what conduct constitutes discrimination. As with the interpretation of grounds, the *Victorian Charter* defines discrimination consistently with the definitions provided for in the *EOA 2010*.[118] The consequence of this is that, pursuant to s 8 of the *Victorian Charter*, both direct and indirect forms of discrimination are captured and there is a requirement for reasonable accommodations in some circumstances such as on the basis of disability in employment, education, the provision of goods and services, and for caring responsibilities in the workplace.[119] The prohibition of 'any discrimination' in the *ACT Human Rights Act* is presumably broader than this and could capture conduct not otherwise considered unlawful discrimination pursuant to the *Discrimination Act 1991* (ACT).[120] In Queensland, the definition of 'discrimination' again indicates that it 'includes' unlawful discrimination as defined in the *ADA 1991* but, as was indicated in *Miami Recreational Facilities*, is not necessarily limited only that specific conduct.[121]

Tying the definition of discrimination to that contained in the statutory discrimination schemes can be limiting. Depending on the scheme, the definitions of both direct and indirect discrimination can be highly technical, and courts have emphasised that conduct must be defined as either direct or indirect rather than both.[122] Considering the earlier definition of direct discrimination contained in the *EOA 1995*, which required a comparator, in *Castles v Secretary of the Department of Justice* ('*Castles*') the claimant brought a claim against the Department of Justice for failing to allow her to continue IVF treatment whilst she was a low-security inmate.[123] Among other Charter claims, the claim was based on s 8(2) of the *Victorian Charter*.[124] The discrimination that the complainant argued existed in her case was direct discrimination on the basis of a disability, which was her infertility.[125] To prove direct discrimination on the basis of disability, pursuant to the *EOA 1995*, she was required to prove, first, that she had been treated 'less favourably' than a fertile female prisoner in otherwise

117 Ibid.
118 *Victorian Charter* (n 7) s 3.
119 *EOA 2010* (n 75) ss 8–9, 19–20, 22, 22A, 40, 45.
120 *Islam* (n 6) 31 [154].
121 *Miami Recreational Facilities* (n 6) 10–11 [52]–[54] (Member Gordon).
122 *Sklavos v Australasian College of Dermatologists* (2017) 256 FCR 247, 253 [16] (Bromberg J).
123 (2010) 28 VR 141, 145 (Emerton J).
124 Ibid 155.
125 Ibid.

materially similar circumstances and, second, that her infertility was a 'substantial reason' for her less favourable treatment.[126] Justice Emerton concluded that the complainant could prove neither of these elements.[127] He concluded that fertile female prisoners would have the same difficulties conceiving while in prison and thus there was no 'less favourable' treatment and that even if there was 'less favourable' treatment, the complainant's disability was not a substantial reason for this to exist.[128]

The interpretation of 'discrimination' as defined in s 8(2) was consistent with the terms of the *EOA 1995* and anti-discrimination jurisprudence but does not further the goals of substantive equality. In particular, the decision with respect to the 'less favourable' treatment applies a narrow formal conception of equality rights and allows for the state to adopt a 'levelling-down' approach to equal treatment. Levelling-down occurs where a person's solution to disparity in treatment is to subject everyone to the same detrimental treatment or outcome.[129] In this case, because the fertility rights of all female prisoners was impeded, the complainant could not prove that she was treated 'less favourably' than other female prisoners.

Some of the problems identified in the reasoning in *Castles* have been resolved with the substantial amendments made to anti-discrimination legislation in Victoria in the *EOA 2010*, which allow for an interpretation more consistent with substantive equality. For example, direct discrimination now focuses on the 'unfavourable' treatment rather than 'less favourable' treatment of the complainant, removing the need to demonstrate that their treatment was less favourable than a similarly placed comparator.[130] Utilising the 'unfavourable' test in *Castles*, the complainant may have been able to demonstrate that not allowing her to access fertility treatments was unfavourable treatment because the question as to whether or not it was offered to other inmates would not have necessarily been relevant to the claim of direct discrimination.

It can be useful to conceive of discrimination as encompassing more than 'direct' and 'indirect' discrimination. A shift away from understanding these concepts as mutually exclusive allows for a doctrinal consideration and a 59econceptualization of discrimination to better reflect substantive equality. In *Austin BMI*, Freeburn J accepted that the concept of discrimination could be expanded from what was contained in the *ADA 1991*.[131] Again, he concluded that the definition was not entirely open and needed to still be informed by concept of discrimination contained in the *ADA 1991*:

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126 Ibid 164–5.
127 Ibid 165.
128 Ibid.
129 Fredman (n 31) 10.
130 *EOA 2010* (n 75) s 8.
131 *Austin BMI* (n 98) 83 [318].

> In my view, Parliament's use of the legislative device of defining the term 'discrimination' as including the concept of discrimination in the *Anti-Discrimination Act* means that these principles apply. *First*, the use of the word 'includes' means that the incorporation of the definition of 'discrimination' in the *Anti-Discrimination Act* is not intended to be exhaustive. *Second*, conduct qualifying as 'discrimination,' by applying the ordinary use of that word, but beyond the definition of 'discrimination' in the *Anti-Discrimination Act*, may be comprehended. *Third*, to say that the concept of 'discrimination' includes various matters is a way of giving at least some meaning to the term; the concept of 'discrimination' cannot have some meaning independent of the meaning that it is given by the legislature.[132]

Again, as with the consideration of the attributes captured by the *HRA 2019*, the meaning of the concept or duties that non-discrimination entails are informed by that contained in the *ADA 1991*, but they are not limited by such a definition, leaving scope for a broader interpretation of non-discrimination in the *HRA 2019* that is nevertheless informed by existing approaches in Australian anti-discrimination law.

One of the more potentially transformative approaches to non-discrimination duties pursuant to the state statutory schemes is a broader incorporation of an accommodation-duty or a duty to make reasonable adjustments. In some of the statutory discrimination schemes, there are some requirements to make adjustments or accommodations on the basis of disability (and a limited right for adjustments for caring responsibilities in an employment context in the *EOA 2010*).[133] Accommodations and adjustments are considered as part of a substantive equality framework in that they require rules, regulations and practices to be adjusted to accommodate the needs of others.[134] Accommodations and adjustments can be individual, in the sense that a rule or practice is amended so that a singular person, or a group of people, are able to participate and engage in a different manner to that originally anticipated.[135] Alternatively, accommodations and adjustments can involve abolishing the rule or requirement entirely for everyone to better enable access for all regardless of any attribute that they may hold.[136] Accommodations and adjustments can be transformative and are a key aspect of substantive equality because they require decision makers to question the underlying basis and need for a rule or requirement and consider whether there are any alternatives that provide opportunities for better engagement and access to those who are often marginalised and excluded.[137]

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132 Ibid 83 [320] (emphasis in original).

133 See, eg, *EOA 2010* (n 75) ss 19–20, 22, 22A, 40, 45.

134 Fredman (n 31) 42–4.

135 Shelagh Day and Gwen Brodsky, 'The Duty to Accommodate: Who Will Benefit' (1996) 75(3) *Canadian Bar Review* 433, 435.

136 Ibid.

137 Fredman (n 31) 42–4.

Accommodations and adjustments are fundamental to disability discrimination and are a core aspect of the *United Nations Convention on the Rights of Persons with Disabilities* ('*CRPD*').[138] In the Australian context, accommodation and adjustments are predominately understood with respect to disability discrimination. However, there is no conceptual or practical reason that accommodations and adjustments should *only* be relevant to disability discrimination. In other jurisdictions, notably in North America, the requirement to make reasonable accommodations or adjustments did not emerge in the context of disability discrimination, but instead in the context of discrimination on the basis of religious belief where individuals could not comply with a variety of workplace requirements with respect to hours and uniforms due to their religious beliefs.[139] In Victoria, there has been an attempt to broaden the scope of reasonable adjustments to those with caring responsibilities in a workplace context but, thus far, these have not been interpreted in an expansive manner.[140]

That the right to equality incorporates the need for accommodations and adjustments has been acknowledged for some time in the case law. In *Victorian Police Toll Enforcement v Taha* the Victorian Court of Appeal concluded that:

> The second limb of s 8(3) protects substantive equality, one that accommodates difference. This is a principle of equality that recognises uniformity of treatment between different persons may not be appropriate or adequate, but that disadvantaged or vulnerable persons may need to be treated differently to ensure they are treated equally.[141]

The benefits and possibilities of understanding the right to equality contained in the state and territory human rights schemes can be seen in the QCAT decision of *SF v Department of Education* ('*SF*').[142] In *SF*, the applicant wished to home school one of her children due to that child's disability.[143] To do so, the complainant had to register with the Queensland Education Department. As part of the registration process, the applicant had to provide an address with a street number, street name and town name to the Department.[144] The applicant could not do so as she had been required to move due to domestic violence and had a reasonable fear and belief that her ex-partner would be able to find her and her children if she provided her address to the Education Department.[145] She claimed the requirement to provide her address in order to register for home schooling

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138 Anna Lawson, *Disability and Equality Law in Great Britain* (Hart Publishing, 2008) 3.

139 Ravi Malhotra, 'The Legal Genealogy of the Duty to Accommodate American and Canadian Workers with Disabilities: A Comparative Perspective' (2007) 23(1) *Washington University Journal of Law and Policy* 1, 18.

140 Bill Swannie, 'Reasonable Accommodation of Employees' Parenting and Carer Responsibilities: A Human Rights Perspective' (2022) 48(2) *Monash University Law Review* 208, 209.

141 *Taha* (n 28) 70–1 [210] (Tate JA).

142 [2021] QCAT 10.

143 Ibid 3 [1]–[2] (Member Hughes).

144 Ibid.

145 Ibid.

breached her and her child's rights to equality as well as her right to privacy and reputation.[146] In a decision on the merits, QCAT determined that the original decision that the applicant provide her address was not the preferable and correct decision .[147] She had provided necessary details to ensure that the Department had the capacity to contact her, and she had a reasonable fear for herself and the safety of her children if her address was disclosed.[148] While not explicit in the decision, Member Hughes does, in a sense, provide an accommodation or an adjustment for the applicant due to her circumstances to ensure that her human rights are upheld.[149] The rule or requirement that required a specific address for home schooling purposes was found to create an unequal outcome for the applicant and her children and thus could be interpreted in a broad manner to allow for a variation in practice to accommodate the applicant's specific circumstances and vulnerabilities.[150]

Providing accommodations and adjustments for a range of attributes has a particular benefit in a public and statutory law context because there are necessarily policies, practices and procedures which can place already marginalised individuals in a more vulnerable position. In the case of *SF*, while she could have had protection from discriminatory conduct in Queensland as an 'associate' or parent of a child with a disability, the reason for her vulnerability and inability to comply with the Education Department's requirements was that she had been a victim of domestic violence (currently not a recognised ground under the *ADA 1991*). The decision in *SF* both appears to provide protection on a ground not otherwise specified in the *ADA 1991* and provides for a degree of accommodation and adjustment which is also not specified in the *ADA 1991*.

C *Justification*

The final aspects of the concepts of discrimination and equality that can be reinterpreted and potentially expanded are the justifications and defences to discriminatory conduct. In statutory discrimination and equality Acts in Australia, there is no general justification or defence for directly discriminatory conduct. Instead, there are a multitude of exceptions contained in the Acts related to specific entities, grounds, and areas in which the conduct occurred.[151] In *Miami Recreational Facilities*, when discussing the more expansive definition of discrimination, Member Gordon raised the prospect of a narrower approach to

146 Ibid 11–12 [43]–[44].
147 Ibid 13 [48].
148 Ibid 13 [47]–[48].
149 Ibid 13 [49].
150 Ibid 14 [52]–[53].
151 Rees, Rice and Allen (n 1) 162.

justification, noting that the specific exemptions for directly discriminatory conduct may not apply:

> One example can demonstrate the change. Under the *ADA* an educational authority may operate a school for students of a particular religion and exclude students of other religions. This is because although such an act is directly discriminatory, it is not a contravention of the *ADA* because of an exemption which says that discrimination of this sort is not unlawful. But now, since every person has a human right to effective protection from discrimination whether or not it is unlawful under the *ADA*, the operation of such a school would be a limitation of that human right for those excluded. On a legal challenge therefore, the education authority would have to show that it was justified under the tests of the *Human Rights Act* to exclude students of other religions from the school.[152]

While, as Member Gordon foreshadows, it may be that the various specific exemptions or exceptions in the *ADA 1991* could be narrowed when considering an equality claim pursuant to the *HRA 2019*, it is also possible that the courts could interpret a broader right of justification, which applies to direct discrimination, indirect discrimination or a more unified model of discrimination. In Australia, as in other jurisdictions such as the United Kingdom and the European Union, there has generally been a reluctance to create a general justification clause for direct discrimination.[153] This is because there are concerns that a general justification clause will be used to justify a broad array of discriminatory conduct on the basis of cost, economic efficiency or customer preference, lessening the impact of non-discrimination measures.[154]

On the other hand, jurisdictions such as Canada have long had a general justification provision for both claims made pursuant to s 15 of the *Canada Act 1982* (UK) c 11, sch B pt 1 ('*Canadian Charter of Rights and Freedoms*') and pursuant to the statutory human rights codes.[155] At least with respect to the statutory schemes, having a general justification provision for discriminatory conduct has not led to a lessening of discriminatory protections.[156] Instead, the approach to the codes provide a structured test that focuses not on whether the claimant can prove discriminatory conduct, but on whether or not the claimant can be better accommodated and if the discriminatory conduct can be justified on another basis.[157]

It is important to recognise that, when considering s 15 of the *HRA 2019*, the justification of measures that treat persons differently can be considered at two

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152 *Miami Recreational Facilities* (n 6) 11 [55].

153 Fredman (n 31) 251.

154 Ibid.

155 See, eg, *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*') ss 1, 15; *Canadian Human Rights Act*, RSC 1985, c H-6, s 15.

156 Denise Réaume, 'Defending the Human Rights Codes from the *Charter*' (2012) 9 [Spring] *Journal of Law and Equality* 67, 68.

157 Ibid.

separate steps of the analysis. The first is considering whether the measure is designed to assist or advance persons who have historical and continuing disadvantage due to discrimination on the basis of an attribute that they hold.[158] If the measure is deemed to have this purpose, then s 15(5) would apply and the right to equality would not be limited.[159] If s 15(5) did not apply and a measure was considered to limit the right to equality as provided for in s 15, then it may nevertheless be justified pursuant to s 13.[160] Section 13(1) provides that human rights can be limited where such limitations are reasonable and 'demonstrably justified in a free and democratic society based on human dignity, equality and freedom'.[161] Section 13(2) provides a list of factors which may be relevant when considering whether or not a limitation of a human right is justified.[162] The application of ss 13–15 could be considered somewhat circular given that any justification of a limit to a right to equality must be justified on the central principle of equality.[163] As a matter of reasoning, it would seem odd that a judge could find that a measure limited the right to equality pursuant to s 15 but was nevertheless justified in a free and democratic society based on the foundational value of equality. The challenge that this may present has yet to emerge in Victoria or the ACT so it remains to be seen if this circularity will pose a problem for justification analyses in the future.

Much of the focus on justifications for discriminatory treatment has been in VCAT and QCAT's administrative capacity to approve exemptions from the state anti-discrimination schemes to allow for conduct which could otherwise be considered unlawful discrimination pursuant to the state anti-discrimination laws. In *Lifestyle Communities*, Bell J confirmed with respect to the *Victorian Charter* that when determining whether to grant a temporary exemption pursuant to the *EOA 1995* (and then later the *EOA 2010*) the tribunal must be mindful of its administrative functions pursuant to the *Victorian Charter* and make determinations consistently with its terms.[164] In *Re Ipswich City Council* ('*Re Ipswich*'), Merrell DP of the Queensland Industrial Relations Commission ('QIRC') agreed that the same approach applied when considering temporary exemption applications made pursuant to the *ADA 1991*.[165] Necessarily when determining temporary exemptions to the application of the *ADA 1991*, the right to equality and discrimination is engaged.[166] Deputy President Merrell accepted that making a determination that was compatible with human rights required him to consider

158 Evans and Petrie (n 17) 120; *Fernwood Womens Health Clubs (Australia) Pty Ltd* [2021] QCAT 164, 7–8 [35] (Member Traves) ('*Fernwood*').
159 Evans and Petrie (n 17) 120.
160 *Fernwood* (n 158) 7–8 [35] (Member Traves).
161 *HRA 2019* (n 8) s 13(1).
162 Ibid s 13(2).
163 Ibid.
164 *Lifestyle Communities* (n 5) 295 –7 [33]–[47].
165 [2020] QIRC 194, 8–9 [25] ('*Re Ipswich*').
166 Ibid 15 [50].

whether the granting of the exemption would not limit a human right, or alternatively, if it did limit a human right, whether it did so in a manner and only to the extent that it was reasonable and demonstrably justified in accordance with s 13.[167]

In Queensland, thus far, s 15 has been predominately considered by QCAT and the QIRC within the context of exemption applications. A common reason for organisations to apply for temporary exemptions is to ensure that hiring programs or the provision of specialist services for underrepresented groups, such as women or Aboriginal and Torres Strait Islander persons, will not be challenged as discriminatory on the basis of sex or race pursuant to the *ADA 1991* on the basis that they disadvantage men or people who are not Aboriginal or Torres Strait Islander.[168] While such programs are likely to be found to be non-discriminatory as they are affirmative action measures targeted at groups which have suffered from historical marginalisation, exclusion and discrimination, organisations often want the security from possible complaints that temporary exemptions provide. Such cases have been considered with respect to the application of section 15 of the *HRA 2019* to the *ADA 1991*. For example, in *Re Ipswich*,[169] *Fernwood Womens Health Clubs (Australia) Pty Ltd*,[170] and *Re Protech Personnel Pty Ltd*,[171] temporary exemptions to the *ADA 1991* were granted so that the organisation could provide specialised employment opportunities for women in professions in which there is a low representation of women or alternatively provide specialist services for women.[172] In *Sunshine Coast Regional Council [No 2]*,[173] and *Re Mackay Regional Council* ('*Re Mackay*'),[174] exemptions were granted to specialist tourism programs and employment training programs for Aboriginal and Torres Strait Islander persons where the Tribunal found that such programs were designed to combat discrimination and disadvantage otherwise faced by Aboriginal and Torres Strait Islander people.[175] In *Re Mackay*, the Tribunal accepted that the rights contained in ss 15(3)–(4) are engaged in the determination of whether to grant the exemption.[176] However, as the right contained in s 15(5) was also engaged in these decisions, the temporary exemptions where not discrimination and there would be no breach of s 15.[177] As

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167 Ibid 13 [44].
168 Rees, Rice and Allen (n 1) 54.
169 *Re Ipswich* (n 165) 3 [1] (Merrell DP).
170 *Fernwood* (n 158) 2 [2] (Member Traves).
171 [2022] QIRC 29, 3 [12] (Merrell DP).
172 See, eg, *Re Ipswich* (n 165) 17–18 [56] (Merrell DP).
173 [2021] QCAT 439, 2 [1] (Member Sammon) ('*Sunshine Coast Regional Council*').
174 [2022] QIRC 64, 2 [1] (Power IC) ('*Re Mackay*').
175 *Sunshine Coast Regional Council* (n 173); *Re Mackay* (n 174).
176 *Re Mackay* (n 174) 9–10 [29]–[33] (Power IC).
177 Ibid.

such, there was no need for the Tribunal to consider the operation of s 13 when granting the exemptions.[178]

Another common reason for requesting an exemption from the *ADA 1991* relates to the requirement of some organisations to comply with the USA's *International Traffic in Arms Regulations* ('*ITAR*'),[179] which denies access to specified controlled defence articles by certain countries and their nationals. Organisations that require access to controlled defence articles consequently require exemptions from the *ADA 1991* in order to discriminate in employment on the basis of race and nationality.[180] Thus far, the QIRC has found that the use of s 113 in this context is consistent with the *HRA 2019*.[181]

A more contentious area for temporary exemptions has been with respect to housing designated specifically for persons over a specific age, most often the age of 50.[182] The issue in the case law is demonstrating that the exemption can be justified on the basis of a special need for older persons to find affordable accommodation.[183] The difficulty can be establishing that the need for affordable accommodation is particular and peculiar to older persons in Australia rather than an experience that impacts many persons regardless of age.[184]

What is noticeable in the case law from both Victoria from *Lifestyle Communities* onwards and in Queensland since the *HRA 2019* commenced operation is that, pursuant to their administrative responsibilities articulated in the human rights statutes, tribunals are providing a robust analysis in justifying the granting or refusal of an exemption. This analysis involves balancing the various rights and interests of those who benefit from the exemptions (notably persons wanting accommodation in an age-segregated community), those who would not (predominately younger people also struggling to find affordable housing) and the community as a whole in creating age-inclusive spaces. A useful and recent illustration of this balancing approach is *Burleigh Town Village Pty Ltd*.[185] The applicant, a manufactured-home-park provider, applied for an exemption to the provisions of the *ADA 1991* in order to provide accommodation solely to persons aged 50 and older.[186] Drawing on *Miami Recreational Facilities*, the Tribunal accepted that, in determining the exemption application, it was

178 Ibid.

179 22 CFR § 120 (2003).

180 For more information on *ITAR* and discrimination law, see generally Simon Rice, 'Staring Down the ITAR: Reconciling Discrimination Exemptions and Human Rights Law' (2011) 10(2) *Canberra Law Review* 97.

181 *Re Leidos Australia Pty Ltd* [2021] QIRC 229; *Re Cobham Aviation Services Australia Pty Ltd* [2022] QIRC 326.

182 See, eg, *Burleigh Town Village Pty Ltd (3)* [2022] QCAT 285 ('*Burleigh Town Village*'); *Terrace-Haven* (n 67); *Miami Recreational Facilities* (n 6).

183 *Burleigh Town Village* (n 182) 10 [58] (Member Roney QC).

184 Ibid 11 [67].

185 Ibid.

186 Ibid 2–3 [1]–[4].

important to balance the rights and interests of a variety of parties.[187] The applicant articulated their interest as that of those over 50 who wished to live in the village with other persons over the age of 50 as 'the right to live in a protected environment for senior citizens to create a positive, safe and friendly environment of like-minded individuals at the same stage of life', following the conclusions in *Miami Recreational Facilities*.[188] On the other hand, the Tribunal accepted the concerns of the Queensland Human Rights Commission that housing affordability is a concern for persons of all ages in Queensland and segregated-housing on the basis of age is based on negative and unfair stereotypes about young people that does not support the creation of an age-friendly society more generally.[189] Weighing all these various factors, the Tribunal declined to grant the exemption.[190]

The decision can be contrasted with the two previous decisions to grant an exemption to Burleigh Town Village in 2011 and 2017.[191] Those decisions were much shorter and simply accepted the need for affordable accommodation for older Australians without robust interrogation of the broader equality ramifications for other groups in society. Comparing and contrasting the decisions pre- and post- the *HRA 2019* indicates that the Act has focused the Tribunal's attention, in its administrative capacity at least, on the need for proportionality, justification and balancing with respect to non-discrimination and equality rights.

IV The Challenges of Substantive Interpretation

In Part III, I canvassed the potential expansions of the right to non-discrimination and equality that the state and territory human rights Acts could provide. In each jurisdiction there is the capacity for a substantive interpretation of the right to equality. However, I argued that the capacity for nuanced expansion was possible to a greater extent in the ACT and Queensland because in both jurisdictions the definition of discrimination is not tied to the definitions provided in the state anti-discrimination schemes. This affords an opportunity for a greater array of attributes to be captured, and a different and more nuanced understanding of discriminatory conduct and how it can be justified. However, in this Part I will consider the potential challenges of the proposed substantive interpretation. While it has been accepted that the right to equality in Australia is a right to substantive equality, there are challenges to interpreting equality 'substantively' from both a conceptual and doctrinal basis. The conceptual

187 Ibid 18 [105]–[112].
188 Ibid 16 [96].
189 Ibid 16–17 [98]–[99].
190 Ibid 24 [158].
191 *Burleigh Town Village Pty Ltd* [2011] QCAT 646; *Burleigh Town Village Pty Ltd* [2017] QCAT 161.

challenges as to the underlying meaning of equality were canvassed in Part II and relate to aligning the interpretive reasoning to an underlying conception of equality. The challenges from a doctrinal perspective include building a body of case law from the ground up in a broader jurisdictional context that has been historically considered to be 'reluctant about rights',[192] and which still has comparatively limited experience with human rights statutes.

In terms of drawing on the jurisprudence from other states and territories, as judges from both the ACT and Victoria have acknowledged, in both jurisdictions judges have been at the forefront of developing the body of human rights jurisprudence.[193] While there are the beginnings of a substantive interpretation of equality in the human rights statutes in Victoria and the ACT, due to the limitations in both of those Acts, Queensland judges do require a degree of creativity to engage with the possibilities and potential that the definition of discrimination in the *HRA 2019* provides. Compounding this challenge is the fact that, as has been commented many times previously, and highlighted earlier in this article, anti-discrimination statutes in Australia have often been interpreted narrowly, and not particularly 'substantively'.[194] As such, there is little from those bodies of case law to support a broader and more substantive right to equality and non-discrimination that Queensland judges can necessarily draw upon.

Frequently, the capacity for an expansive interpretation of human rights by judges has been critiqued on the basis that it could descend into 'judicial activism'.[195] The critique of judicial activism is that this approach takes the judge beyond the legitimate scope of the role of the judiciary, and their decision may be based upon personal values or views rather than based upon legal rules or principles.[196] While it has long been established that judges are not merely 'oracles',[197] the extent to which judges can legitimately adopt an expansive approach is still debated. When considering their role, judicial officers have remarked that judging can involve a degree of 'creativity' in judicial interpretation or expansion to human rights where the conclusions and approach align to community expectations or core and underlying values of the Australian legal system.[198]

Extra-curially, some former senior members of the judiciary have commented that the value of equality is an underlying and core value of the

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192 Hilary Charlesworth, 'The Australian Reluctance about Rights' (1993) 31(1) *Osgoode Hall Law Journal* 195.

193 Bell (n 9) 5.

194 See, eg, Thornton, (n 1) 2; Gaze (n 1) 326–7; Rees, Rice and Allen (n 1) 26.

195 Jeffrey Goldsworthy, 'Tom Campbell on Judicial Activism' (2017) 42(1) *Australian Journal of Legal Philosophy* 247, 247–8.

196 Ibid 248. See also Thornton (n 1) 1.

197 Lord Reid, 'The Judge as Law Maker' (1972) 12(1) *Journal of the Society of Public Teachers of Law* 22, 22.

198 See, eg, *Dietrich v The Queen* (1992) 177 CLR 292, 319 (Brennan J).

Australian legal system.[199] However, as discussed in Part II, while equality and non-discrimination may be considered fundamental and underlying values of both the Australian legal system and underlying the human rights Acts, this assertion does not assist in articulating what such an underlying value provides. Though potentially considered underlying values, there is little interrogation of their meaning and scope in the broader case law. As such, as values, they remain abstract without fixed borders or substance that could be utilised in developing an approach to the concept as understood in the *HRA 2019*. Human rights Acts expand the scope for judges to interpret legislative provisions consistently with human rights. By passing human rights Acts, the legislature has provided the opportunity for consideration of the meaning of these underlying values of the Australian legal system. Particularly, with respect to non-discrimination and equality, it provides benefits to litigants and individuals by interrogating and capturing the range of disadvantages that a right to non-discrimination and equality is intended to ameliorate and provides a language and understanding as to what these terms mean as values within the context of the Australian legal system. Such an interrogation can still be linked and understood with reference to decades of anti-discrimination law and jurisprudence, but as emphasised by Freeburn J in *Austin BMI*, it is not confined to the technical language of the anti-discrimiantion statutes such as the *ADA*.[200]

V Conclusion

In this article, I have canvassed the possibilities and the potential challenges provided by the open definition of discrimination in the *HRA 2019*. Though in Victoria, in particular, it is accepted that the *Victorian Charter* is designed to provide for substantive rather than formal equality, its capacity to achieve this aim is limited by its definition of discrimination, which is inextricably tied to the attributes and definition of discrimination in the *EOA 2010*. This has created limitations in the attributes that are captured for protection by the *Victorian Charter* and the definition of discriminatory conduct. In Queensland, the early case law has accepted that the right to equality contained in s 15 does provide a right to substantive equality, drawing on the Victorian case law. The case law also accepts that the definition of discrimination could a support a broader and more expansive definition of the discriminatory conduct as provided for in the *ADA 1991*. I considered what this broader and more expansive definition could entail with respect to the attributes that are captured, the definition of discrimination, the areas of operation, and the capacity for justification, canvassing a range of different options for interpretation. Nevertheless, while initially there appears to

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199 See, eg, James Allsop, 'The Judicialisation of Values' (Speech, Law Council of Australia and Federal Court of Australia FCA Joint Competition Law Conference Dinner, 30 August 2018) 1.

200 *Austin BMI* (n 98) 83 [317].

a willingness to engage with the possibilities that the *HRA 2019* provides, there are still difficulties from conceptual and doctrinal perspectives in developing a substantive jurisprudence on the meaning and scope of equality and discrimination. It remains to be seen whether or not he Queensland judiciary will take up his opportunity.