CONDITIONAL, CONTESTED AND COMPROMISED? (RE)EXAMINING THE RATIONALE FOR DISCRIMINATION LAW IN AUSTRALIA

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What is the rationale and purpose of discrimination law? In this paper we seek to interrogate how political actors understand discrimination law and express its aims through an analysis of second reading speeches and parliamentary debates for each of the existing federal discrimination law statutes. Although extrinsic materials do not necessarily tell the whole story about policy or partisan objectives, we nonetheless argue that such an examination reveals much about the contested politics of rights in Australia. Importantly, these parliamentary discourses highlight the consistent failure to formulate a coherent account of the objectives of discrimination law. We argue that this lack of conceptual clarity has ongoing consequences, not only for how law is interpreted, but in continuing to shape and inform law reform efforts.

I INTRODUCTION

Discrimination law is commonly understood as a response to the common law's failure to develop adequate protections against discrimination.[1] Yet, the aims and policy underpinnings of discrimination law are not easy to pin down with any conceptual, theoretical or practical clarity.[2] This challenge is not unique to Australia, with uncertainty surrounding the underlying rationale for discrimination law worldwide.[3] Much of the confusion stems

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[1] Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2018) 26.

[2] Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 7.

[3] Ibid.

from a failure to properly distinguish between the definitional, purposive, and distributive aspects of discrimination law.[4] Significantly, this uncertainty has led to a failure to develop the principles of discrimination law in a clear or coherent way.[5] Without this clarity, it is difficult to identify the types of harms that discrimination law is designed to prevent and/or remedy.[6] While it nevertheless offers a symbolic function, this symbolic value of discrimination law is seriously undermined if the legislation fails as an instrument against discrimination. Some understanding of the purpose/s of discrimination law is thus needed in order to properly assess the effectiveness of legislation in this area.

Certainly, legal academics have further recognised the sometimes changing (and often unclear) aims of discrimination laws; Gaze commented that when these laws were passed it 'was in recognition of wide-spread discriminatory practices in society that should be prevented… But what is not clear is how far it was intended that these laws should actually bring about change in those social structures and practices.'[7] Morris has referred to the law's shortcomings in this regard as 'a source of embarrassment in a liberal state'.[8] The lack of clarity has also significantly impacted judicial interpretations of discrimination legislation. Writing in relation to the *Age Discrimination Act 2004*, Blackham notes that the 'narrow, conservative, and unempathetic' approach of the Australian courts is a reflection of the legislation's ambivalence and ambiguity.[9] Although we agree that the lack of clarity has had important implications for how discrimination law is interpreted by the Courts (and by extension, its effectiveness), that is not the focus of this paper.

In this paper we seek to interrogate how political actors understand discrimination law and express its aims through an analysis of second

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[4] Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press, 2015) 117.
[5] Alice Taylor, 'The Conflicting Purpose of Australian Anti-Discrimination Law' (2019) 42 *University of New South Wales Law Journal* 188, 190.
[6] Ibid 188–9.
[7] Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' (2002) 26 *Melbourne University Law Review* 325.
[8] Andrew J Morris, 'On the Normative Foundations of Indirect Discrimination Law: Understanding the Competing Models of Discrimination Law as Aristotelian Forms of Justice' (1995) 15(2) *Oxford Journal of Legal Studies* 199, 201.
[9] Alysia Blackham, 'Defining Discrimination in UK and Australian Age Discrimination Law' (2017) 43(3) *Monash University Law Review* 760, 795.

reading speeches and parliamentary debates for each of the existing federal discrimination law statutes. Although extrinsic materials do not necessarily tell the whole story about policy or partisan objectives, we nonetheless argue that such an examination reveals much about the contested politics of rights in Australia. This close analysis unveils the disconnect between the expressed idealism and the text of the legislation, accentuating the obscurities of rights discourse in Australia. We note that this kind of examination is not entirely novel. For example, Rees et al briefly canvass second reading speeches in their textbook to demonstrate their wider point about the lack of conceptual clarity in these laws.[10]

The second reading speeches and parliamentary debates interrogated in this paper reflect the dominant sensibilities of the time and cannot always accurately inform us about contemporary understandings of discrimination law. As outlined by Gaze and Smith, Australia's discrimination laws have been amended incrementally over time, with this legal change evincing a developing understanding of discrimination as a phenomenon.[11] Further, it is clear that discrimination legislation does not operate in a vacuum. Writing in relation to sex discrimination, Charlesworth and Charlesworth note that the legislation's 'possibilities and limitations are as much shaped by changes in the political, institutional and social context as the actual content of its legislative provisions'.[12] Nevertheless, the historical extrinsic material remains worthy of consideration. In tracing the complex history of how political actors understand discrimination law in Australia, we can learn something historically significant about how discrimination laws were conceptualised *at the time* they were legislated. While there have certainly been shifts in how discrimination law is understood and legislated over time, the analysis undertaken in this paper reveals that the passage of such laws has always been marred by uncertainty and disagreement. By tracing this lack of clarity back to its source, we can better understand *how* and *why* confusion as to the very purpose of discrimination law continues to shape contemporary perspectives and practice.

The paper is structured as follows. We begin with an overview of the literature, drawing out the (contested) scholarly understandings of the purpose of discrimination law. We then move to an analysis of each of the

[10] Rees, Rice and Allen (n 2) 7–12.
[11] Gaze and Smith (n 1) 45.
[12] Hilary Charlesworth and Sara Charlesworth, 'The Sex Discrimination Act and International Law' (2004) 27(3) *UNSW Law Journal* 858, 865.

four federal pieces of discrimination legislation, providing a brief background of the enactment of each Bill (the *Racial Discrimination Act 1975* ('RDA'), the *Sex Discrimination Act 1984* ('SDA'), the *Disability Discrimination Act 1992* ('DDA') and finally, the *Age Discrimination Act 2004* ('ADA'),[13] and then interrogating the second reading speeches and debates. Although we acknowledge that second reading speeches are afforded a particular authority as tools of statutory interpretation,[14] we are nonetheless interested in capturing the wider tenor of the political arena. We see the debates as an important part of the official account of legislative history, as well as, our wider cultural and political history. We therefore think they are important sources not just in understanding the law we have, but the contested political discourses that underpin them. We identify key themes in these speeches, namely the contested and conditional conceptualisation of rights. Through this thematic analysis we trace repeated motifs through the Bills, such as the weaponisation of the social status quo, resistance framed as scepticism regarding the limits of the law in affecting cultural change, and the delineation of various marginalised groups as 'other'. In doing so, we are able to highlight the fragmentation between the material limits articulated in the legislation and the rhetoric expressed by political actors.

In the final part of the paper, we seek to interrogate the implications of the lack of a clear and coherent rationale for discrimination law, as expressed in these debates. We argue that the Religious Discrimination Bill 2019 brought into sharp relief the contested and conditional nature of the protections afforded by discrimination laws. As one might expect based on the lack of cohesion demonstrated in our analysis, the proposed law compromised accepted understandings of the rationale and scope of discrimination law, prioritising one group over another and continuing the law's traditional marginalisation of the LGBT+ community and women.[15]

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[13] Note that in this paper we are only examining debates around the initial enactment of each of the four key pieces of Federal discrimination legislation. Although we acknowledge that examining debates regarding subsequent amendments would no doubt be fruitful, we do not have the space to examine these matters in this paper.

[14] *Acts Interpretation Act 1901* (Cth) s15AB(2)(f).

[15] See Discrimination Law Experts, Submission to Department of the Prime Minister and Cabinet, Expert Panel on Religious Freedom, *Inquiry: Religious Freedoms Review* (14 February 2018). They observed '[t]he institution of religion, and its associated beliefs and practices, are uniquely privileged in Australian anti-discrimination law, and exempt in many respects from complying with our national commitment to equality': at 7.

Finally, looking into the future, we argue that such clarity is essential as we confront significant law reform challenges.

A *The Origins and Purposes of Discrimination Law*

Uncertainty about an underlying rationale for discrimination law is more problematic than it might be in other areas, given that 'anti-discrimination law is still a comparatively new area of rights protection without a constitutional or common law basis'.[16] This is an area which has generated considerable debates as scholars have attempted to identify a singular normative account. According to the formal approach, discrimination laws 'rest on an implicit assumption that reducing discrimination will tend to increase equality.'[17] Nevertheless, the particular notion/s of equality that these laws are designed to promote is often unclear.[18] As noted by Fredman, 'we all have an intuitive grasp of the meaning of the right to equality and what it entails. Yet the more closely we examine it, the more its meaning shifts'.[19] Bamforth has suggested that within discrimination law, the notion of equality serves at least three different roles: (i) as a philosophical justification for discrimination laws; (ii) as a particular society's constitutional provisions or norms; and (iii) as a social goal of discrimination law.[20] In focusing on the similarities between persons in order to guard against obvious forms of discriminatory treatment, the problem with formal equality is its indifference to the need for broader changes to discriminatory practices or policies.[21] Discrimination laws have also been justified on the basis that they are necessary to protect the inherent dignity of each individual,[22] and/or ensure all members of society

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[16] Taylor (n 5) 190.
[17] Gaze and Smith (n 1) 15.
[18] Belinda Smith, 'Australian Anti-Discrimination Laws - Framework, Developments and Issues' (Seminar Paper, JILPT Comparative Labor Law Seminar, 18–19 February 2008) 11.
[19] Sandra Fredman, *Discrimination Law* (Oxford University Press, 3rd ed, 2022) 1.
[20] Nicholas Bamforth, 'Conceptions of Anti-Discrimination Law' (2004) 24(4) *Oxford Journal of Legal* Studies 693, 704–707.
[21] Taylor (n 5) 202.
[22] David Feldman, 'Human Dignity as a Legal Value: Part 1' [1999] *Public Law* 682, 695; David Feldman, 'Human Dignity as a Legal Value: Part 2' [2000] *Public Law* 61, 74; Gaze (n 7) 353.

can participate in major social institutions.[23] Writing in relation to discrimination on the grounds of sexual orientation, Fredman, for instance, characterises this as 'a particularly vicious denial of dignity and equality' which strikes 'the very core of an individual's identity and well-being'.[24] More broadly, discrimination laws have been justified on the basis of a distributive justice rationale.[25] Other scholars argue in favour of a liberty-based justification for discrimination law.[26] Westen, for instance, claims that the notion of discrimination 'must originate in a substantive idea of the kinds of wrongs from which a person has a right to be free.'[27] By conceptualising discrimination as a violation of liberty, the focus shifts from the fact that an individual is being treated less favourably than a comparator, to the fact 'they are being denied, or given limited access to a right, freedom or liberty that they are fundamentally entitled to by virtue of their personhood.'[28] Liberal theories have been extensively criticised,[29] including for focusing on 'singular, individual discriminatory acts rather than understanding the harm as a series of actions that affect stigmatised groups as a collective.'[30]

As noted by Hewitt, disagreement over the underlying rationale for discrimination law is unsurprising given the broad scope of prohibitions of discrimination.[31] Indeed, rather than attempting to identify a singular normative account, some scholars have highlighted the pluralistic nature of discrimination law.[32] Taylor, for instance, argues that discrimination law

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[23] Hugh Collins, 'Discrimination, Equality and Social Inclusion' (2003) 66(1) *Modern Law Review* 16, 28.
[24] Fredman (n 19) 130.
[25] John Gardner, 'Discrimination as Injustice' (1996) 16(3) *Oxford Journal of Legal Studies* 353; Fredman (n 19) 18–19.
[26] Sophia Moreau, 'What is Discrimination?' (2010) 38(2) *Philosophy & Public Affairs* 143, 148; Khaitan (n 4) 120.
[27] Peter Westen, 'The Empty Idea of Equality' (1982) 95(3) *Harvard Law Review* 537, 567.
[28] Taylor (n 5) 191.
[29] See, eg, Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990).
[30] Taylor (n 5) 196.
[31] Anne Hewitt, 'Can a Theoretical Consideration of Australia's Anti-Discrimination Laws Inform Law Reform?' (2013) 41(1) *Federal Law Review* 35, 69.
[32] See, eg, Colm O'Cinneide, 'Justifying Discrimination Law' (2016) 36(4) *Oxford Journal of Legal Studies* 909, 916; Taylor (n 5) 190.

is often designed to achieve a variety of different objectives.[33] One example of this can be seen in age discrimination law which reflects an underlying tension between economic or instrumental goals, and human rights or dignity goals.[34] From this perspective, the lack of an underlying principle is not necessarily problematic.[35] Bamforth, Malik and O'Cinneide have similarly suggested that considering a range of possible justifications for discrimination law may be more useful than attempting to identify one unifying principle.[36] Thornton suggests that discrimination law 'serve[s] an important symbolic and educative function' and therefore can have 'different objectives for different people'.[37] The conditional and contested nature of discrimination law is therefore intrinsic to even the very foundation of this concept.

The symbolic function of discrimination law is also important given the inability of legislation itself to provide a 'complete answer' to discrimination. Writing in relation to race discrimination, Gaze has argued that '[c]hanging deep seated patterns of social exclusion and disadvantage by legislation is not an easy task', and 'legislation cannot be expected to eliminate the attitudes that lead to xenophobia and racism'.[38] This is largely because '[t]he causes of that disadvantage are much more complex, and the solutions needed are much broader than a prohibition on discrimination.'[39] Nevertheless, legislation can still serve an important symbolic function by providing a clear statement of condemnation in relation to racial and ethnic discrimination.[40] The symbolic function of discrimination legislation is particularly important in areas where discriminatory attitudes are more widely entrenched. In relation to age discrimination, for instance, it has been observed that the endurance of 'age norms', or age entrenched social

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[33] Taylor (n 5) 191.
[34] See Alysia Blackham, *Reforming Age Discrimination Law: Beyond Individual Enforcement* (Oxford University Press, 2022) 53.
[35] Ibid.
[36] Nicholas Bamforth, Maleiha Malik and Colm O'Cinneide, *Discrimination Law: Theory and Context* (Sweet and Maxwell, 2008) 170, 172.
[37] Thornton (n 29) 261.
[38] Beth Gaze, '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* 171, 172.
[39] Ibid.
[40] Ibid 176.

and cultural attitudes, means that age discrimination is often regarded as ‘different’ to, and less harmful than, other forms of discrimination.[41]

B *The Australian Experience*

The Australian experience of discrimination legislation manifests as a hybrid of the rationales noted above. Reflecting a formal approach, there is also evidence of attempts to achieve more substantive outcomes, including through prohibitions on indirect discrimination, and reasonable adjustments provisions.[42] However, Australia’s current discrimination legislation conceives of discrimination as an isolated event, rather than a wider, more systematic, problem.[43] On this view, discrimination is analogous to a personal wrong, akin to a tort, and more reflective of Westen’s individual liberty approach.[44] Rice describes this focus on overt and explicit forms of inequality as a flawed execution of policy.[45] Indeed, much of the criticism of Australia’s discrimination legislation is based on this prioritisation of what Fredman has termed a ‘fault-based model’ of regulating equality.[46] This broadly aligns with McCrudden’s ‘process’-based purpose of discrimination law, which is concerned with illegitimate decision-making by ‘bad’ individuals, in contrast to a ‘results’-based approach which views discrimination as institutional.[47] The verity of this approach can be traced through the discrimination Bills, each of which are focused on individual rather than systemic discrimination. Gaze highlights how the RDA is concerned with the resolution of individual cases of alleged racial discrimination.[48] Thornton has similarly noted that while the

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[41] Blackham (n 34) 29.
[42] Taylor (n 5) 199.
[43] Catherine O’Regan, ‘Equality at Work and the Limits of the Law: Symmetry and Individualism in Anti-Discrimination Legislation’ [1994] *Acta Juridica* 64, 79; Dominique Allen, ‘Remedying Discrimination: The Limits of the Law and the Need for a Systemic Approach’ (2010) 29(2) *The University of Tasmania Law Review* 85, 86–7; Gaze (n 7) 326–7.
[44] Deborah Hellman and Sophia Moreau, ‘Introduction’ in Deborah Hellman and Sophia Moreau (eds), *Philosophical Foundations of Discrimination Law* (Oxford University Press 2013) 3.
[45] Simon Rice, ‘Basic Instinct: The Heroic Project of Anti-Discrimination Law’ (Conference Paper, Adelaide Festival of Ideas, 19 October 2013).
[46] Sandra Fredman, ‘Changing the Norm: Positive Duties in Equal Treatment Legislation’ (2005) 12 *Maastricht Journal of European and Comparative Law* 369, 369.
[47] Christopher McCrudden, ‘Introduction’ in Christopher McCrudden (ed), *Anti-Discrimination Law* (1991) xvii.
[48] Gaze (n 38) 175.

SDA is useful for individual complainants, it fails to see discrimination as a systematic problem.[49] In relation to the DDA, Campbell notes that the law fails to recognise that the disadvantage of disabled people is often entrenched structurally.[50] Finally, Thornton and Luker have argued that while the ADA may provide a remedy for individual complainants, it is incapable of addressing the systemic nature of ageism.[51] Across the board, the available remedies also reinforce the idea that discrimination is an isolated event.[52] In predominantly remedying discrimination with compensation, the assumption is that it is only necessary to remedy the specific act of unlawful behaviour.[53] Significantly, in nations comparable to Australia such as the UK and Canada, there has been a move away from the fault-based model of regulation.[54] Put simply, Australia‘s discrimination legislation has left Australia 'lagging behind international consensus on human rights and equality.'[55]

This academic investigation into the purposive nature of the Australian legislation is valuable, however, significant nuance can also be achieved by a parallel examination of the contextual factors present during the conception of the legislation. In canvassing the rhetoric present in the political arena, the fragmentation between desired aims and the practical implementation of the legislation is revealed, allowing a more refined understanding of the trajectory of rights within Australia to develop. It is crucial, therefore, to turn from an academic evaluation to the historical reality of the passage of discrimination legislation in Australia, namely through the parliamentary Second Reading speeches and debates. We acknowledge the limits of such an approach. Second Reading speeches, which are aspirational in nature but provide minimal detail about the aims of the legislation, provide only limited assistance.[56] Similarly, it is common for parliamentary debates to focus on 'rhetorical flourish', at the expense

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[49] Thornton (n 29) 102–7.
[50] 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 *Macquarie Law Journal* 201, 207–8.
[51] Margaret Thornton and Trish Luker, 'Age Discrimination in Turbulent Times' (2010) 19(2) *Griffith Law Review* 141, 167.
[52] See, eg, Campbell (n 50) 208.
[53] Allen (n 43) 86.
[54] Belinda Smith and Dominique Allen, 'Whose Fault is it? Asking the Right Questions when Trying to Address Discrimination' (2012) 37(1) *Alternative Law Journal* 31, 31
[55] Ibid.
[56] Rees, Rice and Allen (n 2) 2.

of more careful engagement with the legislation's policy goals.[57] Legislative objects clauses are themselves often 'coy' about the specific conduct that is proscribed,[58] with commentators calling for vague references to 'equality' to be replaced with clear statements on what the legislation is seeking to achieve.[59] It is also notable that these laws are frequently enacted against a backdrop of strong opposition from segments of the community.[60] As noted by Creighton, questions arise as to whether discrimination legislation is a mere tokenistic remedy, allowing politicians to claim that discrimination has been dealt with.[61]

While our approach does have its limits, we nonetheless argue that such an examination reveals crucial knowledge about the contested politics of rights in Australia, while also providing a scaffold to frame and understand future discourse.

II Analysis of the Discrimination Legislation Parliamentary Debates

A *Racial Discrimination Bill*

The *Racial Discrimination Act 1975* (Cth) (RDA) was the clear result of growing domestic and international pressure on the Australian Government to introduce legislative protection. Chesterman describes it as a direct, albeit belated, response to the international movement against racial discrimination.[62] The 'pioneering role' of this legislation in Australia is demonstrated in its different form and structure when compared to later discrimination legislation.[63] Whereas the subsequent federal discrimination statutes prohibit direct and indirect discrimination on the basis of an attribute, the RDA — which was enacted before the

[57] Smith (n 18) 7.
[58] Thornton (n 29) 2.
[59] Blackham (n 9) 795.
[60] Smith (n 18) 8.
[61] W B Creighton, 'The Equal Opportunity Act — Tokenism or Prescription for Change?' (1978) 11 *Melbourne University Law Review* 503, 535.
[62] John Chesterman, 'Defending Australia's Reputation: How Indigenous Australians Won Civil Rights: Part Two' (2001) 32 *Australian Historical Studies* 201, 219.
[63] Chris Ronalds and Elizabeth Raper, *Discrimination Law in Practice* (Federation Press, 4th ed, 2012) 3.

direct/indirect discrimination model had been developed — 'defines discrimination differently, namely, as a distinction which has the purpose or effect of impairing or nullifying a person's human rights or fundamental freedoms'.[64]

Whilst the Act renders unlawful discrimination against all racial groups, it is clear that the prevention of discrimination against Indigenous people was a prime objective. In the lead up to the 1972 election, Gough Whitlam's promise to legislate to prohibit race-based discrimination was accompanied by an acknowledgment that Australia's Indigenous people had been denied 'basic rights' for 180 years.[65] Upon introducing the RDA into Parliament, Attorney-General Lionel Murphy referred to the hardship endured by Australia's Indigenous people as 'perhaps the most blatant example of racial discrimination in Australia'.[66] The influence of international law was also clear, with UN human rights instruments identified as the inspiration for the legislation.[67] Lionel Murphy had to introduce the Bill three times, with it passing on its fourth iteration tabled by his successor, Attorney-General Kep Enderby.[68] While both Murphy and Enderby's Second Reading speeches invoked the common humanity inherent in all persons,[69]

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[64] 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, 409.

[65] Fiona Allison, 'A Limited Right to Equality: Evaluating the Effectiveness of Racial Discrimination Law for Indigenous Australians through an Access to Justice Lens' (2013/14) 17(2) *Australian Indigenous Law Review* 3, 4, quoting Gough Whitlam, 'It's Time for Leadership' (Speech, Blacktown Civic Centre, Sydney, 13 November 1972).

[66] Commonwealth of Australia, *Parliamentary Debates*, Senate, 21 November 1973, 1976–7 (Lionel Murphy).

[67] Ibid. Indeed, the *International Convention on the Elimination of All Forms of Racial Discrimination* (1965) not only inspired the RDA, but also provided its constitutional grounding, with the Commonwealth relying on its external affairs power to enact the legislation. It must be noted that there was, at that time, significant concern as to the constitutional validity of the legislation which was crucial to the drafting experience of the RDA. See Smith and Allen (n 54) 4.

[68] Australian Human Rights Commission, *The Whitlam Government and the Racial Discrimination Act,* (Web Page, 6 November 2015) <https://humanrights.gov.au/about/news/speeches/whitlam-government-and-racial-discrimination-act>.

[69] Commonwealth of Australia, *Parliamentary Debates*, Senate, 21 November 1973, 1975–1978 (Lionel Murphy); Commonwealth of Australia, *Parliamentary Debates*, Senate, 4 April 1974, 673–674 (Lionel Murphy); Commonwealth of Australia, *Parliamentary Debates*, Senate, 31 October

Enderby assumed adherence to the international norms and in contrast emphasised the social support the legislation would provide to assist people in 'resist[ing] social pressures that result in discrimination'.[70] This points to the contested political terrain the first iteration of the Bill was debated, and the compromises and alterations deemed necessary to successfully navigate to a majority in the Senate.

1 Analysis of Debates

The perspectives expressed by politicians during the debates can be collated into three broad positions.

First were those who supported the Bill. Of this group, there was a tendency to highlight the history of racial discrimination against Aboriginal people when discussing the existence of discrimination in Australian society. Supporters generally recognised that, while racial discrimination could not be curbed solely by legal means, the Bill would play an important educative role, with the ultimate aim of changing community attitudes.

Second, there was a category of politicians who seemed to support the underlying aim of the Bill, but did not believe that legislation could change human motivations and conduct.

Third, there was a group of politicians who saw the Bill as 'dangerous'. Some in this group simply denied that racism existed in Australia (eg, '[a] song and dance is being made about nothing when we are said to be racists,[71]), and were of the view that Australians were already 'bending over backwards in playing up to the Aborigines [sic]'.[72] Others saw the legislation as 'dangerous' in restricting the free speech of Australians, or discriminating against Australians in the education sphere.[73]

The debates demonstrate the uncomfortable reality of race relations and identity politics that was central to the Australian experience at the time. It

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1974, 2192–2193 (Lionel Murphy). Commonwealth of Australia, *Parliamentary Debates*, Senate, 13 February 1975, 285–286 (Kep Enderby).

[70] Commonwealth of Australia, *Parliamentary Debates*, Senate, 13 February 1975, 285–286 (Kep Enderby).

[71] Commonwealth, *Parliamentary Debates*, Senate, 15 May 1975, 1544 (Ian Wood).

[72] Ibid 1543.

[73] Ibid 1541; Commonwealth, *Parliamentary Debates*, Senate, 15 May 1975, 1527 (Glen Sheil); Commonwealth, *Parliamentary Debates*, Senate, 22 May 1975, 1809 (Cleaver Bunton).

cannot be ignored that those in the room during the debates represented a very particular subset of Australia. While there were those championing social progression, there were also those who believed, 'what is left of Western civilization is under significant and severe attack'.[74] Those present purported to abhor racial discrimination, but the existence of it within Australia, as well as the role of the law in countering it, if it even was present, were sources of contention. The fundamental truth of the Australian psyche in this area was on full display.

Those who supported the Bill framed it as a crucial step toward ensuring the 'equality and essential dignity of all human beings.'[75] This is consistent with scholarly understandings of the purpose of discrimination law; as noted in Part A of this paper, discrimination laws have been widely justified on the basis that they are necessary to protect the inherent dignity of each individual. In acknowledging the realities of the past, and that 'it appears that some people think Aborigines [sic] are so low that they should not be allowed decent elementary rights',[76] proponents of the Bill critiqued opponents as perpetuating 'the effects of the past handicaps to the advantage of those who did not suffer them'.[77] The Bill was regarded as both a necessary legal enforcement mechanism, even though '[o]ne does not expect laws to overcome socially ingrained prejudices overnight. But one does expect that, within a generation, people will obey those laws'.[78] Education was also seen as a necessary corollary of the Bill, as it was acknowledged that 'racial discrimination cannot be curbed solely by legal means',[79] with 'governmental and community-based programs to combat racial discrimination' also needed.[80] In this way, the Bill itself was seen as a starting point from which societal growth would be achieved. Here, a link can once more be drawn to our discussion in Part A, where it was noted

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[74] Commonwealth, *Parliamentary Debates*, Senate, 6 March 1975, 1220 (James Killen).
[75] Commonwealth, *Parliamentary Debates*, Senate, 21 November 1973, 1975–1976 (Lionel Murphy).
[76] Commonwealth, *Parliamentary Debates*, Senate, 22 May 1975, 1805–1807 (James Cavanagh).
[77] Commonwealth, *Parliamentary Debates*, Senate, 21 November 1973, 1975–1976 (Lionel Murphy).
[78] Commonwealth, *Parliamentary Debates*, Senate, 27 May 1975, 1979–1884 (Alan Missen).
[79] Commonwealth, *Parliamentary Debates*, Senate, 15 May 1975, 1528–1536 (Arthur Gietzelt).
[80] Commonwealth, *Parliamentary Debates*, Senate, 13 February 1975, 285–286 (Kep Enderby).

that discrimination legislation can serve an important symbolic and educative function, even if it cannot provide a complete answer to the problem of discrimination.

Opponents of the Bill cemented their position in the supremacy of certain rights over others. This confrontation of rights, a notion still prevalent today, was framed through faux concern for the rights of 'real' Australians, prophesying that this Bill would result in the situation that 'large numbers of positions in technical and educational establishments and in government departments will be filled with students from overseas to the exclusion of Australians'.[81] This position was bookended by the outright dismissal of the existence of racism, with Ian Wood describing a divide of Australia due to racism and discrimination as 'absolute nonsense'.[82]

In response, Senator Neville Bonner, the first Indigenous Australian to be elected to parliament, told of his experience — 'for so many years of my life I have known racial prejudice and discrimination' — and suggested to those who believe there was no discrimination:

> [A]sk an Italian, a Sicilian, or a Greek who has been called … a wop or a greaser or ask a Jew who has been called a hooknose or 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.[83]

A secondary debate underpinned the discourse: whether law should alter society or whether society should alter the law. The scepticism about the law's ability to achieve the aims it proposed was prominent, with many lacking conviction and expressing concern that the Bill would 'exacerbate the tensions which [it is] expressly designed to avoid'[84] and would 'create

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[81] Commonwealth, *Parliamentary Debates*, Senate 15 May 1975, 1526–1527 (Glen Sheil).
[82] Commonwealth, *Parliamentary Debates*, Senate, 22 May 1975, 1790–1792 (Ian Wood).
[83] Commonwealth, *Parliamentary Debates*, Senate, 27 May 1975, 1884 (Neville Bonner). We have not used 'sic' to denote offensive language in this quote, even though we have used it elsewhere in this paper, as, while the words used are slurs, the Senator is referencing others' use of the terms, rather than employing them himself.
[84] Commonwealth, *Parliamentary Debates*, Senate, 15 May 1975, 1513–1518 (Ivor Greenwood).

more discrimination, not less'.[85] The notion of the cart being placed before the horse was articulated, with one member stating that 'I would have thought that the ability to educate and to influence people in terms of their community obligations is a far more vital role than that of legislation which simply lays down the laws'.[86] The natural response to these concerns was 'the fact that racial discrimination is unlawful will make it easier for people to resist social pressures that result in discrimination',[87] and that 'law has a place in moulding community attitudes.'[88]

The discourse surrounding the Bill articulates the fissure between the written content of the law and the purported aspirational goals and aims voiced by the proponents. The Bill operated as a bare bones backstop, providing solid legal recourse to individual instances of racial discrimination. As evidenced through the debates, however, proponents and opponents critiqued it for failing to provide social and cultural measures to create the structural change to effectively counter the existence of racial discrimination.

B *Sex Discrimination Bill*

The passage of the *Sex Discrimination Act 1984* ('SDA') followed Australia's ratification of the *Convention on the Elimination of All Forms of Discrimination against Women* ('CEDAW') in 1983.[89] As was the experience with the RDA, the UN Convention was used to provide the constitutional grounding of the legislation. As outlined by Thornton and Luker, '[t]he 1970s was a distinctive period in Australian political history' and law 'was seen as a positive force for change'.[90] Australian women's organisations, who had begun pressing for legal and social recognition in

[85] Ibid 1526–1527 (Glen Sheil).
[86] Ibid 1513–1518 (Ivor Greenwood).
[87] Commonwealth, *Parliamentary Debates*, Senate, 21 November 1973, 1975–1976 (Lionel Murphy).
[88] Commonwealth, *Parliamentary Debates*, Senate, 22 May 1975, 1801–1805 (Fred Chaney).
[89] Hilary Charlesworth and Sara Charlesworth, 'The *Sex Discrimination Act* and International Law' (2004) 27(3) *University of New South Wales Law Journal* 858, 858.
[90] Margaret Thornton and Trish Luker, 'The *Sex Discrimination Act* and its Rocky Rite of Passage' in Margaret Thornton (ed), *Sex Discrimination in Uncertain Times* (ANU Press, 2010) 25, 27.

the early 1970s,[91] laid the groundwork and when, in 1975, the UN declared it to be International Women's Year, the role of women in Australian society was pushed to the front of the public agenda.[92] The SDA, therefore, formed part of a broader international movement focused on recognising the human rights of women.[93] Interestingly, the Australian drafters detoured from the coverage approach in CEDAW.[94] While CEDAW applies an asymmetrical approach to coverage, (meaning it operates with a focus on women and the disadvantages experienced by women), the SDA opted for a symmetrical approach (meaning it sought to protect everyone without reference to individual capacities, choices and needs).[95] Gaze has argued that this choice may have been intentional in order to placate certain sections of society and therefore achieve the majority required to pass it.[96]

In proposing the Bill, the Hon Susan Ryan acknowledged the limits of the law, remarking that 'it is a part of the achievement of social change, a necessary, if not sufficient, part'.[97] Ryan's initial, more idealistic view was of the SDA as potential vehicle that may 'create opportunities for women which did not previously exist and that this in turn breaks down community prejudice against women'.[98] Upon its second proposal, Ryan had made concessions concerning the affirmative action provisions, yielding in order to make formal progress rather than continuing to advocate for substantive measures. Ryan recalled that 'the initiative met with sustained, vociferous and irrational opposition from powerful sectors of the community' with 'some of the most ferocious critics … women'.[99] Notwithstanding the onslaught, the Bill passed in 1984. In the years that have followed, the SDA's many amendments have exemplified 'contradictions and

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[91] Jocelynne Scutt, 'In Pursuit of Equality: Women and Legal Thought 1788–1984' in Jacqueline Goodnow and Carole Pateman (eds), *Women, Social Science and Public Policy* (1985) 116, 122–4.
[92] Ronalds and Raper (n 63) 3–4.
[93] Gail Mason and Anna Chapman, 'Defining Sexual Harassment: A History of the Commonwealth Legislation and its Critiques' (2003) 31 *Federal Law Review* 195, 197.
[94] Gaze and Smith (n 1) 77.
[95] Ibid 76.
[96] Ibid 77.
[97] Commonwealth, *Parliamentary Debates*, Senate, 26 November 1981, 2705–2708 (Susan Ryan).
[98] Ibid.
[99] Susan Ryan, 'The 'Ryan Juggernaut' Rolls On' (2004) 27(3) *UNSW Law Journal* 828, 829.

ambiguities', with 'the nature, context and harm of sexual harassment [continuing] to defy simplistic definition.'[100]

1 *Analysis of debates*

Proponents, conceding that legislation could not be the whole answer to discrimination, highlighted the Bill's symbolic function and ability to offer women courage and an awareness of rights.[101] Opponents, on the other hand, founded their arguments on the inability of legislation to alter community attitudes.[102] As discussed in Part A when considering the theoretical debates, references to discrimination law's symbolic role and the challenges posed by entrenched community attitudes are not unique to sex discrimination.

Concerns about the repercussions of enactment were also a feature of the debates with allegations that 'it will do no more than create divisions and long-term conflict, not just among women but between men and women, religious groups, families and employers'.[103] There was also consternation about affirmative action provisions (which are seen as a form of 'social engineering'),[104] as well as the 'abuse' of the *Constitution* through the external affairs powers.[105] As with the debate surrounding the enactment of the RDA, there was some argument that discrimination was not actually a problem in Australian society, or at least, not a concern of the voting public.[106] Supporters of the Bill were more active during the debates in countering the arguments offered by the opposition, resisting claims and asserting that the legislation was intended to prevent injustice.

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[100] Mason and Chapman (n 93) 223.

[101] See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 2 March 1984, 399–402 (Jeannette McHugh).

[102] See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 1 March 1984, 372–5 (Peter McGauran); Commonwealth, *Parliamentary Debates,* House of Representatives, 5 March 1984, 467–9 (John Spender).

[103] Commonwealth, *Parliamentary Debates*, Senate, 6 December 1983, 3335–3338 (Florence Bjelke-Petersen).

[104] Ibid; Commonwealth, *Parliamentary Debates*, House of Representatives, 1 March 1984, 345–8 (Peter Drummond).

[104] See, eg, Commonwealth, *Parliamentary Debates*, Senate, 9 December 1983, 3626–30 (Noel Crichton-Browne).

[105] Ibid.

[106] Commonwealth, *Parliamentary Debates*, House of Representatives, 1 March 1984, 367–70 (Raymond Groom).

The debates exposed the hysteria and vitriol that the notion of sexual equality evoked in (some) Parliamentarians, representative of the perceptions held in certain quarters of the larger Australian society. There were also appeals to traditional family values, with statements asserting that the Bill would 'force women out of the home',[107] would destroy 'traditional values'[108] and 'our traditional Australian way of life',[109] or would 'widen the scope for deliberately procured abortions'.[110] Opponents regularly called the Bill 'anti-family' or 'unnecessary', and 'an ineffective attempt to impose upon society values, standards and principles which are not acceptable to the community at large',[111] all the while perpetuating social myths such as 'most ordinary, natural women are homely and caring, that they are not wildly ambitious, that they are not naturally dominating and that they are mostly inclined to avoid authority', in a clear attempt to ignore the real gaps evident in Australian society.[112]

Resistance also came in the form of critique of the Bill's many amendments, which were intended to increase its readiness for parliamentary debate.[113] The Bill was described as 'legalistic, punitive and

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[107] Ibid 364–366 (Neil Andrew).

[108] Ibid 372–375 (Peter McGauran); Commonwealth, *Parliamentary Debates*, House of Representatives, 5 March 1984, 3626–3630 (Michael Hodgman).

[109] Commonwealth, *Parliamentary Debates*, House of Representatives, 5 March 1984, 3626–3630 (Michael Hodgman).

[110] Commonwealth, *Parliamentary Debates*, Senate, 21 October 1983, 1930–1934 (Brian Harridine).

[111] Commonwealth, *Parliamentary Debates*, Senate, 9 December 1983, 3626–3630 (Noel Chrichton-Browne); Commonwealth, *Parliamentary Debates*, House of Representatives, 5 March 1984, 1801–1805 (Michael Hodgman); Commonwealth, *Parliamentary Debates*, Senate, 1 March 1984, 357–361 (William Coleman); Commonwealth, *Parliamentary Debates*, Senate, 6 December 1983, 3335–3338 (Florence Bjelke-Petersen); Commonwealth, *Parliamentary Debates*, House of Representatives, 1 March 1984, 364–366 (Neil Andrew); Commonwealth, *Parliamentary Debates*, Commonwealth, *Parliamentary Debates*, House of Representatives, 1 March 1984, 367–370 (Raymond Groom).

[112] Commonwealth, *Parliamentary Debates*, Senate, 8 November 1983, 2291–3000 (Brian Archer).

[113] See Commonwealth, *Parliamentary Debates*, Senate, 21 October 1983, 1930-1934 (Brian Harridine); Ibid 2291–3000 (Brian Archer), 2315–2318 (Shirley Walters); Commonwealth, *Parliamentary Debates*, House of Representatives, 1 March 1984, 357–361 (Peter Coleman).

authoritarian',[114] and an attempt to 'legislate for personal worth'.[115] As one parliamentarian suggested at the time, these kinds of arguments were to mask the real opposition to the Bill, 'that basically they do not like women', and are 'scared' of women and what they could achieve in a more equal society.[116]

Proponents of the Bill centred the need for it in the acknowledgement of women's 'right to personhood, to dignity, to respect and to freedom from discrimination'.[117] As outlined in Part A when considering the origins and purposes of discrimination law, the notion that sex discrimination is a particularly abhorrent affront to human dignity is supported in the academic literature. Proponents of the Bill also recognised the need for substantial structural change that was limiting the fulfilment of achieving actual equality. Employment was a specific area of concern, as was education; two domains where the lack of equality at the time was apparent.[118] Parliament was also asked to consider hidden bias towards women, drawing on the experience in other Australian States 'where similar legislation operates [and] has demonstrated beyond doubt that such legislation creates opportunities for women which did not previously exist and that this in turn breaks down community prejudice against women'.[119] Proponents highlighted the false narrative parroted again and again, stating that '[t]he Bill has been accused of doing all kinds of things of which it is incapable. It can neither force women out of the home, nor require them to stay there. Nor, of course, should it'.[120] Repeatedly during the debates, those in favour attempted to reinforce that the Bill was simply about ensuring that half the population was treated as such.

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[114] Commonwealth, *Parliamentary Debates*, House of Representatives, 1 March 1984, 357–361 (Peter Coleman).

[115] Commonwealth, *Parliamentary Debates*, Senate, 29 November 1983, 2961–2964 (Ronald Boswell).

[116] Commonwealth, *Parliamentary Debates*, House of Representatives, 5 March 1984, 489–492 (Alan Steedman).

[117] Commonwealth, *Parliamentary Debates*, Senate, 8 November 1983, 2292–2297 (Rosemary Crowley).

[118] Ibid; Commonwealth, *Parliamentary Debates*, Senate, 21 October 1983, 1921–1926 (Michael Tate).

[119] Commonwealth, *Parliamentary Debates*, Senate, 26 November 1981, 2705–2708 (Susan Ryan).

[120] Commonwealth, *Parliamentary Debates*, Senate, 5 March 1984, 480–484 (Robert Hawke).

The concern about the 'conflict of people's rights' was again a feature in the debates, with it being argued that '[t]o increase advantages and opportunities for one, the risk is run of diminishing it for another'.[121] In comparison to the RDA debates, this argument featured much more prominently in relation to the SDA. Senator Durak commented that:

> As legislators we should try to reconcile that conflict as best we can, knowing the very great difficulties involved. Our approach to this legislation must be to ensure that as far as possible, in promoting one set of rights for one person, we do not destroy the rights of another.[122]

The most blatant example of this kind of thinking was the statement by Senator Bjelke-Petersen who said the Bill was 'sexist',[123] arguing that:

> It must be realized that any anti-discrimination in favour of some must discriminate against someone else. While accepting the justice of women being equally eligible for work, education and financial recompense as men, forcing employers, education authorities and the Public Service to ignore pregnancy, de facto relationships and the best interests of children is not acceptable to many and makes some of us very concerned. This Bill aims at changes in moral and social values that I do not think should be included. It will infringe on civil liberties of employers when affirmative action is introduced.[124]

This framing, whereby groups are pitted against one another, is salutary in that it acknowledges that the status quo advantages one group (men), while positioning measures to redress that historical marginalisation as discrimination.

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[121] Ibid 484–486 (Evan Adermann).
[122] Commonwealth, *Parliamentary Debates*, Senate, 21 October 1983, 1919–1921 (Peter Durak).
[123] Commonwealth, *Parliamentary Debates*, Senate, 6 December 1983, 3335–3338 (Florence Bjelke-Petersen).
[124] Ibid.

C *Disability Discrimination Bill*

The *Disability Discrimination Act 1992* (Cth) ('DDA') constituted a further significant step in fulfilling Australia's international obligations.[1] The US had led the way with disability discrimination laws in the aftermath of the Vietnam War,[2] with the US legislation partly serving as a model for the DDA,[3] although the drafters' primary focus was on existing state and territory legislation in this area.[4]

Internationally, the impetus for legislation flowed from a philosophical shift that saw the issue presented as one about the civil or human rights of people with disabilities.[5] In Australia, a more limited initial proposal to broaden the employment opportunities of people with disabilities was abandoned following a strong public response which favoured tougher protections in the form of discrimination legislation.[6] The Second Reading speech is notable for containing significantly more rhetorical flourish than the speeches introducing the Racial and Sex Discrimination Bills. Proposer Senator Brian Howe stated that the Bill would be 'instrumental in continuing social change', with references to rights, equality and opportunity as cornerstone reasons for the Bill.[7] Howe positioned the Bill as an instrument that would 'benefit not only people with disabilities, but society as a whole'.[8] In this way, the policy and purpose underpinning these assertions is one of substantive purpose.

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[125] Including the *Convention Concerning Discrimination in Respect of Occupation and Employment*, signed 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).
[126] Ronalds and Raper (n 63) 5.
[127] Ibid 4.
[128] Jennifer Hamilton, '"Disability" and "Discrimination" in the Context of Disability Discrimination Legislation: The UK and Australian Acts Compared' (2000) 4(3) *International Journal of Discrimination and the Law* 203, 205.
[129] Gwyneth Pitt, 'Book Reviews: Disability, Discrimination and Equal Opportunities: A Comparative Study of the Employment Rights of Disabled Persons, Human Rights and Disabled Persons' (1995) 2(4) *Maastricht Journal of European and Comparative Law* 421, 421.
[130] Hamilton (n 128) 205.
[131] Commonwealth, *Parliamentary Debates*, House of Representatives, 26 May 1992, 2750–2755 (Brian Howe).
[132] Ibid.

The parliamentary debate that ensued was also characterised by considerably less opposition to the introduction of strong disability discrimination legislation.[9] However, the effectiveness of the DDA has been examined extensively in the years since. As outlined by Andrews, there is evidence that the DDA has actually reduced labour force participation among disabled people.[10] Andrews argues that while the discrimination model 'was chosen by virtue of its status as the go-to model for legislation aimed at minorities', it is questionable whether this model is well suited to the goal of empowering people with disabilities.[11] According to Campbell, the legislation's failure 'stems largely from a reliance on, and application of, problematic understandings of disability by those applying the law'.[12]

1 *Analysis of Debates*

Proponents again recognised that legislation cannot, by itself, eliminate discrimination, while opponents raised concerns that the Bill would fail to overcome stereotypes. However, almost all of those who criticised the Bill did so on the basis that it was too weak. That is, unlike the Racial and Sex Discrimination Bills, there was no real argument here that legislation prohibiting disability discrimination was 'dangerous' or 'unwanted' or 'unnecessary'. Rather, there was concern about the use of "one size fits all" legislation, as well as the use of disabled people as "political footballs". There was some, albeit minimal, consideration of what is meant by social justice and equality in this context. The language used (or not used) in the debates largely reflected the idea, outlined by Fredman, that '[d]isability differs from other types of discrimination in that it is a possibility which faces all members of society. The borderline between 'we' and 'they' is not only arbitrary but shifting'.[13]

As a result, the tone of the debates was markedly different to that of the earlier federal Bills. Proponents and opponents appeared to agree on the necessity of tackling discrimination against people with disabilities but disagreed on the type of legislation that should be enacted to address it. In contrast with the earlier discrimination Bill debates, language also shifted;

[133] Hamilton (n 128) 206.
[134] Helen Andrews, *The Limits of Australian Anti-Discrimination Law* (Centre for Independent Studies, Research Report 17, August 2006) 1.
[135] Ibid 8.
[136] Campbell (n 50) 201.
[137] Fredman (n 19) 150.

social norms became 'attitudinal barriers',[14] and discrimination became 'social justice'.[15] There was also a measure of acceptance that this legislation would be part of 'continuing social change', thereby however loosely recognising the effects that the earlier legislation created.[16] Even with these shifts, however, themes which featured in the earlier discrimination Bill debates surfaced again.

'Opportunity' was the word routinely used by supporters of the Bill.[17] Arguments in favour were cemented in the notion of amending a defect that would allow the 'same rights to equality' to be experienced by people with disabilities.[18] This Bill was purported to allow persons the ability to participate to 'the degree that they wish'[19] and with 'the opportunities for a full citizenship offered to other Australians'.[20] This notion of 'participation' was discussed in Part A, where ensuring that all members of society can participate in major social institutions was identified as a key goal of discrimination legislation. That the Bill was an exercise in social justice was not shied away from by supporters, even though this fact was used to attack the Bill; in fact, in the Second Reading speech it was stated that 'I do not believe there is any better example of social justice than this legislation'.[21]

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[138] Commonwealth, *Parliamentary Debates*, House of Representatives, 26 May 1992, 2750–2755 (Brian Howe); Commonwealth, *Parliamentary Debates*, Senate, 19 August 1992, 144–146 (Bruce Scott); Commonwealth, *Parliamentary Debates*, Senate, 7 October 1992, 1309–1315 (Grant Tambling).

[139] Commonwealth, *Parliamentary Debates*, House of Representatives, 26 May 1992, 2750–2755 (Brian Howe); Commonwealth, *Parliamentary Debates*, Senate, 7 October 1992, 1320–1322 (Kay Patterson).

[140] Commonwealth, *Parliamentary Debates*, House of Representatives, 26 May 1992, 2750–2755 (Brian Howe).

[141] Commonwealth, *Parliamentary Debates*, House of Representatives, 26 May 1992, 2750–2755 (Brian Howe); Commonwealth, *Parliamentary Debates*, Senate, 19 August 1992, 211–214 (Brian Gibson); Commonwealth, *Parliamentary Debates*, House of Representatives, 19 August 1992, 218–221 (Peter Duncan).

[142] Commonwealth, *Parliamentary Debates*, House of Representatives, 26 May 1992, 2750–2755 (Brian Howe).

[143] Commonwealth, *Parliamentary Debates*, House of Representatives, 19 August 1992, 152–154 (Mary Crawford).

[144] Ibid 146–150 (Elaine Darling).

[145] Commonwealth, *Parliamentary Debates*, House of Representatives, 26 May 1992, 2750–2755 (Brian Howe).

Opponents mostly critiqued the Bill as being 'inappropriate' but not in the same way as the SDA was. The Bill was alleged to be inappropriate in that it would 'put impediments in the way of people with disabilities',[22] rather than removing such impediments, and the Bill was marked as 'mak[ing] the situation more complicated than it ought to be'.[23] Opponents ventured that what was required was legislation 'to make sure that people who have disabilities have every possible help'. In this way, 'treating people equally … is … a nonsense concept. People need to be treated appropriately'.[24] Ultimately, compared to the other debates surveyed above, these debates were a tame experience, even if, yet again, the resultant legislation was far from radical.

D *Age Discrimination Bill*

In 2004, age joined the incrementally expanding list of protected attributes at the federal level with the passage of the *Age Discrimination Act 2004* (Cth) ('ADA'). As outlined by Lindsay, the legislative imperative reflected a hybrid of interests and purposes.[25] On one level, a strengthening social idealism inspired the prohibition of discrimination pertaining to age.[26] This is reflected in the rationale of the legislation, which seeks to recognise the inherent worth and dignity of all workers, regardless of age.[27] On another level, the legislation was a pragmatic strategy,[28] informed by economic rationalist imperatives.[29] Concerns about the growing economic and social consequences of Australia's ageing population (and entrenched ageism),[30] alongside the effects of compulsory retirement,[31] had served as the impetus for a series of inquiries into age discrimination in the early 2000s.[32] On this level, the ADA thus seeks to respond to the costs of ageing by removing

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[146] Commonwealth, *Parliamentary Debates*, House of Representatives, 19 August 1992, 200–204 (Russell Broadbent).
[147] Ibid 207–211 (John Bradford).
[148] Ibid 204–207 (Graeme Campbell).
[149] Katherine Lindsay, '"Cradle to Grave": Age Discrimination and Legislative Policy in Australia' (1996) 3(1) *Australian Journal of Human Rights* 97, 103.
[150] Ibid 103.
[151] Blackham (n 9) 761.
[152] Lindsay (n 149) 103.
[153] Thornton and Luker (n 51) 147.
[154] Ibid 155.
[155] Nick O'Neill, Simon Rice and Roger Douglas, *Retreat from Injustice: Human Rights Law in Australia* (The Federation Press, 2nd ed, 2004) 495.
[156] Thornton and Luker (n 51) 155.

barriers to participation in the workforce by older workers.[33] Indeed, this key argument was offered by Attorney-General Senator Daryl Williams in his First Reading speech, stating that the Bill would ensure 'all Australians have equality of opportunity to participate in the social and economic life of our country' and that 'the Bill will play a key role in changing negative attitudes about older and younger Australians'.[34]

1 *Analysis of Debates*

As with the Disability Discrimination Bill, there was no real discussion as to whether or not age discrimination existed, or whether or not legislation was needed during these debates. This was in stark contrast to the debates leading to the enactment of the RDA and SDA. Indeed, the discussion seemed to even go a step further than in relation to the DDA, in that there was no longer comment about legislation not being capable of attitudinal change. Much of the aspirational talk about the great educative value of discrimination legislation was also missing. Instead, the focus was on how to make the Bill stronger and ensure it was easier for people to make successful complaints. Here, the 'dominant reason' test was widely criticised. The perceived importance of the legislation was also demonstrated by the number of politicians who noted they supported the Bill despite its limitations. As with the Disability Discrimination Bill, the tone of the debates largely reflected the idea that '[s]ince we have all been young and many of us will become old, the opposition between 'Self' and 'Other' prevalent in other types of discrimination is not as stark.'[35]

The ADA was introduced by a Liberal National Coalition Government. The trajectory of this Bill was markedly different in that Labor was unlikely to stridently oppose such social advancement. Thus partisan 'point scoring' featured, as demonstrated by the comment made by Catherine King, who stated '[i]t seems for the government that, now the issue of age discrimination has some political currency, some issues of discrimination are actually worth legislating against'.[36] Generally, therefore, the Bill was

[157] Blackham (n 9) 761.
[158] Commonwealth, *Parliamentary Debates*, Senate, 26 June 2003, 17621–17622 (Williams).
[159] Fredman (n 19) 161.
[160] Commonwealth, *Parliamentary Debates*, Senate, 6 November 2003, 22400–22405 (Catherine King).

supported as another step towards an inclusive and equality ensured society.

This is not to say that the debates were devoid of critique. The 'dominant reason' test was assessed as 'a more stringent test' than exists for any other discrimination law, which 'signals to the community that age discrimination is of less importance than other forms of discrimination'.[37] The need to effectively meet this standard was labelled 'a costly and time-consuming exercise'[38] that 'will make it harder for people…to make successful complaints',[39] and which does 'not address the many unseen ways that age discrimination operates'.[40] Here, the parliamentary debates identify a key issue with age discrimination legislation identified by Blackham (and discussed in Part A of this paper): the idea that age discrimination is less harmful than other forms of discrimination, with instrumental or economic goals generally prioritised over recognition of human dignity. The Bill was also critiqued as having 'entrenched [age discrimination] in one particular case' in relation to its treatment of youth wages.[41] Despite these concerns, overall support for the Bill remained strong, with this issue and others failing to significantly deter support. This was likely due to the composition of the parliament at the time, alongside the absence of any genuine desire to derail the Bill.

III Implications and Impacts of the Lack of Conceptual Clarity about Discrimination Law

In tracing the complex history of discrimination law in Australia through the key moments selected, we see that the protection afforded by the passage of such laws has been conditional and contested. It is evident that the reality of compromise is also a crucial factor: those proposing legislation have conceded as much in their Second Reading speeches. The contested nature of discrimination legislation is seen in the dismissal and downplaying of the 'need' for such legislation. Rooted in a dogged commitment to the status quo, in the speeches opposing discrimination law, we see the repeated downplaying of the existence of discrimination and in

[161] Ibid 22409–22412 (Jill Hall).
[162] Ibid 22400–22405 (Catherine King).
[163] Ibid 22414–22418 (Sharryn Jackson).
[164] Ibid 22422–22426 (Julia Irwin).
[165] Ibid 22428–22434 (Anna Burke).

some instances, the reality of discrimination being seen as the natural order of things. Such opinions, while reflecting the dominant sensibilities of the time, were riddled with language that certainly offends modern understandings. The contest element, however, has not simply been between two opposing sides; both proponents and opponents questioned the power of the law, expressing scepticism about the extent to which the law can operate to create effective cultural change. Even the Second Reading speeches, which by their very nature argue in favour of the Bill, challenge the use and effectiveness of discrimination legislation.

The conditional aspect stems from the particular model the legislation is predicated on: the preference for formal equality over measures which might achieve substantive equality. This is paired with the preference for symmetrical rather than asymmetrical coverage (with the exception of disability). While these conditions may be recognised in the written text of the legislation, the assertions, demands and propositions articulated through the Second Reading speeches and debates invoked ulterior conditions, positioning the approach so far employed in crafting Australian discrimination legislation to be a complex hybrid.

The contested and conditional situation in Australia is not unique. Overlaying the experience with a contextual lens provides a level of refinement for this analysis. Discrimination law is a product of its time and the people who are the gatekeepers of the legislative process. Discrimination law in Australia was created without a backdrop of constitutionally protected rights or a legislated Bill of Rights. Beyond that, in every single instance, the people debating the extension of legal protections have predominately been white, cis-gendered, non-disabled men. We know this because this has been the hallmark of the composition of Australia's federal parliament. We see here the 'benefactor' model. As noted by Thornton and Luker, somewhat ironically in light of the substance of the SDA, women were still reliant on the good graces of men to alter entrenched gender norms.[42] In this way, decisions are made about marginalised people without any true experience of their circumstances, contributing to the 'othering' of those who might be understood to be the subjects and beneficiaries of discrimination law.

This brings us to the nub of the matter: *who*, or *what,* is discrimination law for? The academic theories perused above permit several avenues of

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[166] Thornton and Luker (n 90) 31–2.

conception, none of which appear to have been undertaken through an analysis of the performative spectacle that is the parliamentary setting. The approach of borrowing and the subsequent manipulation of aspects of theories reflects that which is palatable at the time of drafting but offers none of the substantive relief sought by the rhetoric. In some ways, this is no surprise — it stands to reason that political actors motivated by different ideological perspectives marinated in different social and cultural contexts will come to different conclusions. The implications of this lack of cohesion have been made out in terms of the ineffectiveness of discrimination law and the confusing history of judicial interpretation.[43]

Again, none of the above is unique to the Australian experience. What is significant, however, is the impact that the contested and conditional nature of discrimination laws has had on the evolution of the compromise of rights. This compromise is not just simply how certain attributes have been validated and/or dismissed, but also how the subject of discrimination legislation itself has been compromised. These complexities go beyond judicial interpretation to how law reform initiatives are framed. We saw these complexities play out in the (now shelved) attempts to legislate for religious freedoms.

The Religious Discrimination Bill was conceived during a period of social reconstruction in Australia. On 22 November 2017, as a placatory addendum to calling for the Australian Marriage Law Postal Survey, then Prime Minister Malcolm Turnbull announced a review into the protection of religious freedom in Australia.[44] Despite finding that Australia did not have a religious freedom problem,[45] the *Religious Freedom Review* called for a statutory protection package for religious freedom, from which the Religious Discrimination Bill 2019 emerged.[46] The first piece of federal

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[167] Taylor (n 5).

[168] Department of Prime Minister and Cabinet, *Religious Freedom Review* (Web Page) <https://www.pmc.gov.au/domestic-policy/religious-freedom-review>.

[169] AAP/Lukas Coch, 'Third Time Lucky? What has Changed in the Latest Draft of the Religious Discrimination Bill?' *The Conversation* (online, 23 November 2021) <https://theconversation.com/third-time-lucky-what-has-changed-in-the-latest-draft-of-the-religious-discrimination-bill-172386>.

[170] In total, the report offered 20 recommendations, 15 of which were accepted directly or in principle. See *Religious Freedom Review* (Final Report, 18 May 2018) 5; Attorney-General's Department, *Religious Freedom Reforms* (Outline paper, 10 December 2019) 1; Attorney-General's Department, *Explanatory Note – Religious Discrimination Bill 2019* (29 August 2019) 2.

discrimination legislation tabled in more than a decade deviated from the historical supplication of rights as well as the customary balance between attributes. The original iteration of the Bill supported not just protection from discrimination on the basis of religion, but also the invocation of religious identity and beliefs to permit discrimination against others in public life, including in healthcare settings. During the Second Reading speech for the 2021 draft, then Prime Minister Scott Morrison stated that the Bill was a 'product of a tolerant and mature society that understands the importance of faith and belief to a free society, while not seeking to impose those beliefs on or ever seeking to injure other in the expression of those beliefs'.[47] Yet, Part 2 of the Bill was titled '[c]onduct etc. that is not discrimination' and clause 12 permitted discriminatory 'statements of belief', that is statements that are 'of a belief that the person genuinely considers to be in accordance with the doctrines, tenets, believes or teachings of that religion'. Opponents argued during the debates that such a clause permitted statements that could be 'cruel, offensive or humiliating just because you can say it with conviction or point to a religious text to back it up'.[48]

This is not to say that religious discrimination is warranted; it is acknowledged that prohibiting discrimination of the grounds of religious belief is generally consistent with the rationale of human rights. The proposed Bill, however, would have compromised the rights of others including people with disabilities, LGBTQIA+ persons and women — groups that have been afforded protection by discrimination law.[49] In addition, the proposed Bill would have also subverted the accepted understanding of the rationale and scope of discrimination law by confusing the understanding of individual rights compromise at both an academic and international level. As Lixinski argued at the time, the Bill 'was about enshrining a right to discriminate against others. Very few readings of religion require discrimination against others. Despite this, the

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[171] Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 25 November 2021, 10811–10814 (Scott Morrison).
[172] Commonwealth, *Parliamentary Debates,* House of Representatives, 8 February 2022, 63 (Bridget Archer).
[173] We do note that sexual orientation, gender identity and intersex were only afforded legal protections at the Federal level in 2013 with the enactment of the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013*.

Bill attempted to turn that idea into law.'[50] The privileging of rights, framed as 'freedom' in Scott Morrison's Second Reading speech, was not the conventionally held belief of freedom *from* discrimination, but rather freedom *to* discriminate.[51] In this way, the proposed legislation did not simply call for the compromise of individual rights, but also compromised the very purpose of discrimination law.

The experience of the Religious Discrimination Bill is likely to be repeated in future rights debates, in particular the national debate poised (again) to be had over a national Human Rights Act.[52] It is imperative that political actors and society continue to invest in debates about the purpose and scope of discrimination law, specifically who such legislation seeks to protect, how that protection is to be utilised, and the limits of such protection. By unpacking the sites of contestation, the values that underpin discrimination law assist in the development of useful frameworks and language to sculpt the debate to the actual benefit of Australian society.

IV CONCLUSION

While the conceptual challenge of distilling a purpose and aim of discrimination law is not unique to Australia, the Australian experience captures the inherent complexities and lasting legacies of this failure. This inability to articulate the harms to be prevented or remedied leads to a multifaceted approach which predictably results in legislation with divergent priorities. In tracing extrinsic materials made in relation to

[174] Lucas Lixinski, 'Explainer: what happened to the Religious Discrimination Bill?' (Web Page, 2 December 2021) <https://www.humanrights.unsw.edu.au/research/commentary/explainer-what-happened-religious-discrimination-bill>.

[175] Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 25 November 2021, 10811–10814 (Scott Morrison). Morrison invoked the language of freedom extensively, using the word 25 times. This framing is distinct from what we have seen in equivalent Second Readings speeches where 'freedom' has been mentioned sparingly, and always in the context of enjoying freedom *from* discrimination: see, eg, Commonwealth of Australia, *Parliamentary Debates*, Senate, 21 November 1973, 1976–7 (Lionel Murphy).

[176] In March 2023, the Australian Human Rights Commission officially launched its Position Paper outlining a proposal for a Human Rights Act. The position paper is available here: <https://humanrights.gov.au/human-rights-act-for-australia>.

The result of such a concoction leads to legislation such as the Religious Discrimination Bill 2019, which would have permitted discrimination against one group in order to purportedly prevent discrimination against a primary group. While this lack of clarity about the purpose of discrimination law persists, it is likely that such instances will recur in current and future rights debates, to the expected detriment of the greater Australian society as a whole.