

## A CASE FOR RECOGNISING NON-DISCRIMINATION AS A FUNDAMENTAL RIGHT AT COMMON LAW

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*This article seeks to make a case that the common law of Australia should now recognise non-discrimination as a fundamental right. To do so, we argue, would equip future generations of Australian judges with a normative and doctrinal tool that would commit the common law to take seriously – so far as institutionally and interpretively possible – the challenges of discrimination in the content and application of law. A conception of non-discrimination is offered, and we explain how it may inform the content of such a ‘right’ and the development of common law doctrine and interpretive principle. We then turn to consider where and how the recognition of non-discrimination as a fundamental right might perform meaningful work in contemporary Australian law. Our aim is a modest but important one. We hope to demonstrate that common law recognition of non-discrimination as a fundamental right is symbolically important and may prove doctrinally useful.*

### I INTRODUCTION

In his first McPherson Lecture on Statutory Interpretation and Human Rights, Spigelman CJ considered ‘the group of principles of the law of statutory interpretation which constitute, in substance, a common law bill of rights’.<sup>1</sup> He suggested that the rights recognised in international treaties might inform the domestic strength of these presumptions and even ‘influence the articulation of new presumptions’.<sup>2</sup> As to the latter, the example offered was non-discrimination.

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1 Justice James Jacob Spigelman, ‘The Common Law Bill of Rights’ (Lecture, University of Queensland, 10 March 2008) 4 (citations omitted).

2 Ibid 29.

[T]he legislative proscription of discrimination on the internationally recognised list of grounds – gender, race, religion, etc. – could well lead to a presumption that Parliament did not intend to legislate with such an effect. I am unaware of any authority which says that, but I can see how this proposition could now be added to the common law bill of rights.<sup>3</sup>

The Commonwealth Parliament’s enactment of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) might have hastened such a development. It requires Parliament to consider and state the compatibility or otherwise of proposed laws with the rights and freedoms enshrined in the seven international human rights treaties to which Australia is a party.<sup>4</sup> A foundational principle of each treaty is that ‘recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world’.<sup>5</sup> One might consider that this unequivocal parliamentary commitment to non-discrimination would signal the importance of its recognition as a fundamental right and so worthy of protection through common law doctrine and interpretive principle.

But such a development has not come to pass. Considering that the common law’s history regarding non-discrimination is a mostly unhappy one, this may be no surprise. As a doctrinal matter it long tolerated – and so perpetuated – discrimination on account of a person’s sex, race and religion.<sup>6</sup> Indeed, it was the common law’s intransigence which led, finally, to parliaments throughout the common law world legislating ‘to prohibit discrimination against people who have different attributes when undertaking a broad range of daily activities’.<sup>7</sup> That being so, the courts may consider the field of non-discrimination to be covered, exhaustively, by statute, making any common law intervention *now* an awkward and difficult proposition.<sup>8</sup> Yet clearly Spigelman CJ was not of that mind. Moreover, upon his retirement from the High Court Toohey J said it was ‘a matter of profound regret that the

3 Ibid.

4 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ss 3, 7–9 (‘*Human Rights Act*’).

5 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘*International Covenant on Civil and Political Rights*’); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008). The spirit of this principle, albeit in different wording, also appears in the preamble of the two remaining relevant human rights treaties: *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

6 See Geoffrey Robertson, *Freedom, the Individual and the Law* (Penguin Books, 7<sup>th</sup> ed, 1993) 462.

7 Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3<sup>rd</sup> ed, 2018) 1.

8 We note that the adoption of a human rights statute in the United Kingdom (‘UK’) has not limited the development of common law to protect those same rights: *R (Osborn) v Parole Board* [2014] AC 1115, 1145–8 [54]–[63] (Lord Reed JSC).

common law did not develop over time principles which were at odds with the discriminatory treatment of persons by reason of their sex or race'.<sup>9</sup>

In this article we seek to make a case that the common law of Australia should now recognise non-discrimination as a fundamental right. To do so, we argue, would equip future generations of Australian judges with a normative and doctrinal tool that would commit the common law to take seriously – so far as institutionally and interpretively possible – the challenges of discrimination in the content and application of law. That case is made in Part II. In order to do so, we first outline a conception of non-discrimination and explain how it may inform the content of such a 'right' and the development of common law doctrine and interpretive principle. It is, however, important to note the historical and doctrinal reasons for the reluctance of the common law regarding non-discrimination. We do so briefly. For it may seem paradoxical to contemplate the same institution which was long a source of discrimination now recognising non-discrimination as a fundamental right. But we consider that enough has changed in statutory and international law and the wider Australian legal landscape that a case can be made for such a common law development.

Part III considers where and how the recognition of non-discrimination as a fundamental right might perform meaningful work in contemporary Australian law. We argue that it could inform aspects of statutory interpretation, anti-discrimination statutes and administrative law. This analysis is, necessarily, preliminary and speculative. Our aim is a modest but important one. We hope to demonstrate that common law recognition of non-discrimination as a fundamental right *is* symbolically important and *may* prove doctrinally useful.

## II A FUNDAMENTAL RIGHT TO NON-DISCRIMINATION AT COMMON LAW

### A A Conception of Non-discrimination for the Common Law

In order to make our case, we must first offer a conception of non-discrimination for the common law. To do so is necessary for two reasons. First, common law recognition of non-discrimination as a fundamental right requires the courts to identify what such a 'right' entails. To supply that content, the common law could draw on this conception. As we detail in Part III(A) below, to do so would embed a fundamental right to non-discrimination at common law within the methodological architecture of the principle of legality. And second, the conception of non-discrimination offered could also provide a baseline principle to inform the development of relevant common law doctrine where appropriate and justified. That is of particular importance to the analysis undertaken in Part III(C) in the context of administrative law.

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<sup>9</sup> John Toohey, 'A Matter of Justice: Human Rights in Australian Law' (1998) 27(2) *University of Western Australia Law Review* 129, 134.

The conception of non-discrimination we offer here is to be distinguished from the notion of ‘legal equality’. This is important as it will help to explain why the focus of our analysis and argument is on the former not the latter. Legal equality recognises not only that everyone is equal before the law, but also that they are entitled to equal protection of the law. In an important sense legal equality is related to the principle of non-discrimination because both seek to exclude irrelevant attributes from decision making processes. However, legal equality is a broader concept than non-discrimination because it can require positive steps to be taken and people to be treated differently to achieve substantive equality.<sup>10</sup> As we detail in Part III below, common law method and technique is necessarily constrained in this regard. It cannot, for example, in the guise of interpretation supply *additional* content to a statute requiring positive steps be taken to achieve legal equality, nor is it appropriate or likely for the common law to now develop a rule doing so when anti-discrimination statutes in Australia already permit the undertaking of ‘special measures’ to promote legal equality.<sup>11</sup> To promote a substantive conception of legal equality through law is then, rightly, considered to be the primary responsibility of the political arms of government. That is so as the development of positive legal actions to this end raises complex and contested issues of policy – social and economic – for which the courts lack the institutional expertise and methodological capacity to satisfactorily resolve.<sup>12</sup> As Brennan J explained in *Gerhardy v Brown*:

Whether a measure is needed and is likely to alter the circumstances affecting a disadvantaged racial group in such a way that they will be able to live in full dignity, to engage freely in any public activity and to enjoy the public benefits of society equally with others if they wish to do so is, at least in some respects, a political question. A court is ill-equipped to answer a political question ...

It is the function of a political branch to make the assessment. It is not the function of a municipal court to decide, and there are no legal criteria available to decide, whether the political assessment is correct. The court can go no further than determining whether the political branch acted reasonably in making its assessment.<sup>13</sup>

That is why our focus is on the more limited but still difficult concept of non-discrimination. As Margaret Thornton has observed, ‘discrimination is one of the most difficult concepts introduced into the legal system ... because, like the cognate concepts of justice and equality, its essential malleability is conditioned by time and

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- 10 In saying that, we acknowledge that the concept of equality is contested in Australia and elsewhere. Indeed, Margaret Thornton describes its meaning as ‘elusive’. On the definition of equality see, eg, Margaret Thornton, *The Liberal Promise: Anti-discrimination Legislation in Australia* (Oxford University Press, 1990) ch 1 (*The Liberal Promise*); Sandra Fredman, *Discrimination Law* (Oxford University Press, 2<sup>nd</sup> ed, 2011) ch 1; Peter Westen, ‘The Empty Idea of Equality’ (1982) 95(3) *Harvard Law Review* 537; Hugh Collins, ‘Discrimination, Equality and Social Inclusion’ (2003) 66(1) *Modern Law Review* 16; Reg Graycar and Jenny Morgan, ‘Thinking about Equality’ (2004) 27(3) *University of New South Wales Law Journal* 833.
- 11 See, eg, *Racial Discrimination Act 1975* (Cth) s 8 (*Racial Discrimination Act*); *Disability Discrimination Act 1992* (Cth) s 45 (*Disability Discrimination Act*).
- 12 See Jeffrey Jowell, ‘What Decisions Should Judges Not Take?’ in Mads Adenas and Duncan Fairgrieve (eds), *Tom Bingham and the Transformation of Law: A Liber Amicorum* (Oxford University Press, 2009) 129, 136 <<https://doi.org/10.1093/acprof:oso/9780199566181.003.0009>>.
- 13 (1985) 159 CLR 70, 137–8 (Brennan J).

circumstance'.<sup>14</sup> Yet we aim to demonstrate that the common law has the capacity to recognise a conception of non-discrimination which is doctrinally useful and symbolically important. As noted above, to recognise non-discrimination as a fundamental right requires the courts to identify what such a 'right' entails. To supply that content the common law could draw on the concept of non-discrimination which the High Court has articulated in the constitutional domain:

A law is discriminatory if it operates by reference to a distinction which some overriding law decrees to be irrelevant or by reference to a distinction which is in fact irrelevant to the object to be attained; a law is discriminatory if, although it operates by reference to a relevant distinction, the different treatment thereby assigned is not appropriate and adapted to the difference or differences which support that distinction. A law is also discriminatory if, although there is a relevant difference, it proceeds as though there is no such difference, or, in other words, if it treats equally things that are unequal – unless, perhaps, there is no practical basis for differentiation.<sup>15</sup>

Amelia Simpson has called this 'the Court's universal conception of discrimination'.<sup>16</sup> That is so as the High Court has sought to use the same conception to inform the content and application of the *Australian Constitution's* range of non-discrimination rules. That is problematic in Simpson's view as this conception, due to 'its limited content, cannot provide guidance on some of the most significant questions when shaping constitutional non-discrimination rules'.<sup>17</sup> We accept the strength of this criticism in the constitutional context where each of the relevant non-discrimination rules is 'being directed to its own distinct configuration of objectives and intended beneficiaries'.<sup>18</sup> Yet, as Simpson notes, it is a conception with 'some minimal content'.<sup>19</sup> And importantly for our purposes and the common law, a core part of that content is its 'attention to substance over form'.<sup>20</sup>

[D]iscrimination may be discerned not just in the language in which an impugned law is expressed but also in the way that the law operates in practice. In other words, discrimination may be established by reference to the consequences that an impugned law has for legal subjects.<sup>21</sup>

This conception which focuses upon a law's practical operation provides a useful touchstone and analytical tool for the common law. In doing so, it draws on the familiar distinction between the legal and practical operation of a law which the High Court uses in its constitutional jurisprudence.<sup>22</sup> This technique is of particular importance and value when the Court has to determine whether a law offends a constitutional right, freedom or principle. For example, whether or not a law has a constitutionally obnoxious purpose (amongst others which may be legitimate) may

14 Thornton, *The Liberal Promise* (n 10) 2.

15 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 461, 478 (Gaudron and McHugh JJ).

16 Amelia Simpson, 'The High Court's Conception of Discrimination: Origins, Applications, and Implications' (2007) 29(2) *Sydney Law Review* 263, 264.

17 *Ibid.*

18 *Ibid* 290 (citations omitted).

19 *Ibid* 277.

20 *Ibid.*

21 *Ibid.*

22 See *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 492 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

only become apparent once the application of interpretive principles has determined a statute's legal and practical operation.<sup>23</sup> To the extent that it is interpretively possible, it ensures that a constitutional right, freedom or principle cannot be circumvented by legislative devices by 'smoking out' an unlawful purpose.<sup>24</sup> It is an orthodox interpretive technique which equips the common law conception of non-discrimination with a capacity to identify when a decision is made or a law is applied in a manner which discriminates on the basis of an irrelevant attribute or distinction. Importantly, as a consequence, it enables the common law to identify instances of both direct *and* indirect discrimination. For it is only upon the determination of a law's practical operation that the latter may become apparent.

This conception is consistent also with the account we offer in Part III below as to how common law recognition of non-discrimination might inform the development of doctrine and interpretive principle. In terms of the 'right' itself, we suggest that the core notion of non-discrimination is to prohibit decisions – whether, for example, in employment, education or the provision of goods and services – based on irrelevant attributes or distinctions. To further flesh out this conception of non-discrimination, the common law might consider those international treaties to which Australia is a party – and which Parliament has committed itself – to identify those 'attributes' and 'distinctions' which are 'irrelevant'. For example, article 2 of the *International Covenant on Civil and Political Rights* lists 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status' as examples of irrelevant distinctions.<sup>25</sup> Anti-discrimination statutes include similar lists of protected attributes.<sup>26</sup> We acknowledge that which attributes to protect is contested and which distinctions are irrelevant is not settled. The list of protected attributes in the statutes continues to expand,<sup>27</sup> and the common law has the methodological capacity to develop in a similar way if so minded.

We propose that this conception of non-discrimination ought now to be recognised by the common law. It would furnish the common law with a new fundamental right. But as with other common law 'rights', its recognition would not result in any independent cause of action. Rather, as we explain in Part III(A), the courts would presume that Parliament does not intend to enact legislation which is inconsistent with this right, though may do so by making its intention clear. Further, we argue in Parts III(B) and III(C) that this recognition would also provide a baseline principle which may have modest but real effects on anti-discrimination statutes and administrative law. Recognition of a common law conception of (and fundamental right to) non-discrimination may have effects beyond these areas, and have broader, symbolic significance as well.

23 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 57 (Brennan J).

24 See *Kruger v Commonwealth* (1997) 190 CLR 1, 161 (Gummow J).

25 *International Covenant on Civil and Political Rights* (n 5) art 2.

26 See, eg, the extensive list of attributes in section 6 of the *Equal Opportunity Act 2010* (Vic) ('EOAV').

27 For example, the Northern Territory recently added nine new attributes to its statute including 'gender identity', 'accommodation status' and 'HIV/hepatitis status': *Anti-Discrimination Amendment Act 2022* (NT) s 10, amending *Anti-Discrimination Act 1992* (NT) s 19.

## B The Common Law Reluctance Regarding Non-discrimination

In 1997 Keith J wrote of '[t]he historical reluctance of the common law to prohibit discrimination'. He explained that '[n]ot only did that ordinary law of the realm make many express distinctions, but even when it was silent it did not, in general, prevent the state or individuals discriminating on the grounds of race or religion'.<sup>28</sup> This, arguably, reflected the common law's Blackstonian conception of rights, the core of which was the protection of *individual* liberty.<sup>29</sup> In this regard, 'the first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals' which were 'vested in them by the immutable laws of nature'.<sup>30</sup> And of these absolute rights, there were only three: 'the right of personal security, the right of personal liberty; and the right to private property'.<sup>31</sup> Moreover, these rights 'only inhered in individuals by virtue of their rationality. ... Women, slaves, and others were characterized as irrational and emotional and therefore not entitled to the equal rights due to rational beings'.<sup>32</sup>

Even when Parliament's intervention suggested that discrimination was contrary to public policy, the common law's commitment to a conception of individual liberty held stubbornly firm. This, for example, was made clear by the unanimous decision of the House of Lords in *Dockers' Labour Club & Institute Ltd v Race Relations Board*.<sup>33</sup> There it was held that the *Race Relations Act 1965* (UK) was not breached when an associate member of an affiliated club was refused a drink and asked to leave due to a rule of the club not to serve 'coloured people'. Relevantly, Lord Diplock observed:

This is a statute which, however admirable its motives, restricts the liberty which the citizen has previously enjoyed at common law to differentiate between one person and another in entering or declining to enter into transactions with them. ... The arrival in this country within recent years of many immigrants from disparate and distant lands has brought a new dimension to the problem of the legal right to discriminate against the stranger.<sup>34</sup>

The common law's reluctance towards non-discrimination exerted also a doctrinal impact on contract law,<sup>35</sup> criminal law,<sup>36</sup> electoral law,<sup>37</sup> employment law,<sup>38</sup>

28 *Quilter v A-G (NZ)* (1998) 1 NZLR 523, 559 (Keith J), citing *Commissioner for Local Government Lands Settlement v Kaderbhai* [1931] AC 652, 658–9 (Lord Atkin for the Court) ('*Kaderbhai*').

29 William Blackstone, *Commentaries on the Laws of England* (William S Hein, 1<sup>st</sup> ed, 1992) vol 1, 122.

30 *Ibid* 120 (emphasis in original).

31 *Ibid* 125.

32 Fredman (n 10) 5 (citations omitted).

33 [1976] AC 285.

34 *Ibid* 295–6.

35 See Patrick S Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press, 1985) 387, 735–6.

36 For example, the rules of evidence long required the corroboration of a women's evidence in sexual assault cases due to concerns as to its inherent unreliability: Constance Backhouse, 'Skewering the Credibility of Women: A Reappraisal of Corroboration in Australian Legal History' (2000) 29(1) *Western Australian Law Review* 79.

37 For example, the *Municipal Franchise Act English 1869* (UK) extended to women the franchise in local elections and 'was immediately interpreted by the judges to exclude married women': Fredman (n 10) 39.

38 See, eg, *Roberts v Hopwood* [1925] AC 578, 594–5 (Lord Atkinson) ('*Hopwood*').

property law,<sup>39</sup> and the exercise of judicial review powers.<sup>40</sup> Importantly, distinctions made on account of race, religion and sex were not considered matters of law but of policy; the latter was considered the province of Parliament. These common law fundamentals continued to be of doctrinal and normative significance well into the 20<sup>th</sup> century. And consistent with the view that substantive discrimination was a matter of policy, it was left to Parliament to slowly remove these disabilities from the general law.

In Australia, these common law fundamentals were buttressed by constitutional and legislative decisions made at federation and shortly thereafter.<sup>41</sup> For example, the framers of the *Australian Constitution* rejected the need for an American-style equal protection clause for two relevant reasons. First, they well understood that an equal protection clause would imperil existing colonial legislation which discriminated on the basis of race.<sup>42</sup> Indeed, the perceived need to ensure Australian parliaments could ‘regulate the affairs of the people of coloured or inferior races who are in the Commonwealth’<sup>43</sup> was so strong that a clause expressly empowering the Commonwealth Parliament to legislate for ‘the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws’<sup>44</sup> was included in the final draft of the *Australian Constitution*. The second reason was the framers’ deep faith in the rights-protective capacity of the common law and Parliament.<sup>45</sup> That faith was well placed for the framers personally, who were ‘for the most part the big men of the established political and economic order, the men of property or their trusted allies’.<sup>46</sup> There were no women (or, of course, Aboriginal Australians) at the constitutional conventions.

These institutional and legal exclusions were significant. Common law reasoning and method is essentially reactive, so it is no surprise – indeed doctrinally orthodox – for it to reflect the discrimination which existed in Australian constitutional law, legislative policy, and social morality for much of the 20<sup>th</sup> century.<sup>47</sup> Brennan J observed that ‘the genius of the common law system consists in the ability of the Courts to mould the law to correspond with the contemporary values of society’.<sup>48</sup> But this cuts the other way too. Relevantly, ‘the acceptability of judge-

39 See *Kaderbhai* (n 28) 658–9 (Lord Atkin for the Court).

40 See *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 (‘*Browning*’) which overturned the decision of the New South Wales Supreme Court in *Browning v Water Conservation and Irrigation Commission* (1947) 47 SR 395.

41 *Australian Constitution* s 51(xxvi); *Immigration Restriction Amendment Act 1905* (Cth).

42 See, eg, the *Goldfields Act 1895* (WA) which stated ‘no Asiatic or African alien [could] get a miner’s right or go mining on a goldfield’. See also John Williams, ‘Race, Citizenship and the Formation of the *Australian Constitution*: Andrew Inglis Clark and the “14<sup>th</sup> Amendment”’ (1996) 42(1) *Australian Journal of Politics and History* 10, 11–16 <<https://doi.org/10.1111/j.1467-8497.1996.tb01346.x>>.

43 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 27 January 1898, vol 4, 228–9 (Sir Edward Barton).

44 *Australian Constitution* s 51(xxvi).

45 See Sir Owen Dixon, ‘Two Constitutions Compared’ in Severin Woinarski (ed), *Jesting Pilate: And Other Papers and Addresses* (William S Hein, 2<sup>nd</sup> ed, 1996) 101–2.

46 Lesley F Crisp, *Australian National Government* (Longman Chesire, 4<sup>th</sup> ed, 1978) 14.

47 On common law method see Sir Owen Dixon, ‘Concerning Judicial Method’ in Severin Woinarski (ed), *Jesting Pilate: And Other Papers and Addresses* (William S Hein, 2<sup>nd</sup> ed, 1996) 152.

48 *Dietrich v The Queen* (1992) 177 CLR 292, 319 (‘*Dietrich*’).



made common law must depend on its compatibility with contemporary views. If a change in the common law would be rejected by the community, it should not be made, however much the judge thinks that the change is in the community's interest'.<sup>49</sup> So when discrimination on account of sex, race and religion was the norm in Australian society, its reflection in common law doctrine was inevitable and orthodox.

### C A Case for Recognising Non-discrimination as a Fundamental Right

We now turn to make the case that our courts should recognise non-discrimination as a fundamental right at common law. In doing so, we again acknowledge that this is an argument for a development by an institution, and the body of law developed by it, which has historically been a source of discrimination. However, we think there are several reasons why such a development in the common law is now both institutionally possible and doctrinally appropriate.

First, it is important to explain briefly why we argue for non-discrimination as a fundamental common law right rather than seeking its vindication through, for example, the presumption of international law consistency.<sup>50</sup> It is true that the latter could promote non-discrimination through the interpretation and application of statutes in a manner which, to the greatest extent possible, conformed with the relevant international human rights treaties to which Australia is a party. But two aspects of the presumption of consistency in Australia diminish its likely effectiveness in the non-discrimination context. Unlike the principle of legality considered in Part III(A) below, the presumption of consistency requires statutory ambiguity before it can be applied.<sup>51</sup> And relatedly, the High Court has demonstrated a willingness to develop and apply the principle of legality but not the presumption of consistency. Australian judicial ambivalence (and sometimes hostility) with the latter likely relates to the *source* of the rights that the presumption operates to protect.<sup>52</sup> They are derived from international law, so are necessarily derived from a source *external* to the Australian legal system. On the other hand, fundamental rights protected by the principle of legality are derived from the common law, so in this sense are derived from an *internal* source. Australian judges may be concerned with the legitimacy of using an interpretive presumption to incorporate into the domestic legal system (through interpretation not legislation) norms derived from

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49 Michael McHugh, 'The Law-Making Function of the Judicial Process: Part II' (1988) 62(2) *Australian Law Journal* 116, 122.

50 Another possible source of protection from non-discrimination might be the judicial characterisation of anti-discrimination statutes as 'constitutional statutes'. But this technique – developed in the very different context of the unentrenched British constitution – has little purchase in Australia and, indeed, has attracted controversy and criticism in the UK as well: see, eg, Farrah Ahmed and Adam Perry, 'The Quasi-entrenchment of Constitutional Statutes' (2014) 73(3) *Cambridge Law Journal* 514 <<https://doi.org/10.1017/S0008197314000841>>.

51 *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 386 (Gummow and Hayne JJ).

52 See *Al-Kateb v Godwin* (2004) 219 CLR 562, 589–91 (McHugh J).

a source that is external to it. This legitimacy concern is, arguably, prompted by the strong separation of judicial power established by the *Australian Constitution*.<sup>53</sup>

Second, important and relevant changes regarding non-discrimination have occurred outside the courts and in the wider Australian legal landscape. Most notably, the legislative architecture in Australia makes clear that, as a general proposition, it is unlawful to discriminate in public life on account of a person's age, disability, sex, race, religion or sexuality. A number of Australian parliaments (including the Commonwealth) have a legal obligation to state the compatibility or otherwise of primary and secondary legislation with a catalogue of human rights including legal equality and non-discrimination.<sup>54</sup>

Third, the right to non-discrimination is a fundamental element of international human rights law, reflected by its protection in the foundational international treaties, to which Australia is a party. As Brennan J noted in *Mabo v Queensland [No 2]* ('*Mabo [No 2]*'), '[t]he common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights'.<sup>55</sup> Thus, we suggest that the development of Australian common law to reflect this enduring domestic and universal value would be entirely orthodox under the common law method.<sup>56</sup>

There is, therefore, a strong argument that discrimination is *now* antithetical to the values of Australian society. The High Court said in *Mabo [No 2]* that 'no case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system'.<sup>57</sup> That is significant. For if 'the contemporary values which justify judicial development of the law are ... the relatively permanent values of the Australian community'<sup>58</sup> – or 'values of an enduring kind'<sup>59</sup> – then non-discrimination is now, arguably, one of them. Relevantly, as Sir Anthony Mason has noted, '[n]on-discrimination ... does not perhaps have such a long provenance, but it is a value of an enduring kind acknowledged and mandated by international instruments'.<sup>60</sup>

Fourth, the common law in Australia has already relied on considerations of non-discrimination to reform specific areas of doctrine.<sup>61</sup> The classic example

53 See Dan Meagher, 'The Common Law Presumption of Consistency with International Law: Some Observations from Australia (and Comparisons with New Zealand)' [2012] 3 *New Zealand Law Review* 465, 475–81.

54 See *Human Rights Act* (n 4) ss 7–9; *Human Rights Act 2004* (ACT) ss 37–8; *Human Rights Act 2019* (Qld) ss 38–39; *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 28, 30.

55 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 30 (Brennan J) ('*Mabo [No 2]*').

56 See *Breen v Williams* (1996) 186 CLR 71, 115 (Gaudron and McHugh JJ).

57 *Mabo [No 2]* (n 55) 30 (Brennan J).

58 *Dietrich* (n 48) 319 (Brennan J).

59 Sir Anthony Mason, 'The Judge as Law-Maker' (1996) 3 *James Cook University Law Review* 1, 12.

60 Ibid 13. See also David Dyzenhaus, Murray Hunt and Michael Taggart, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) 1(1) *Oxford University Commonwealth Law Journal* 5, 32–3 <<https://doi.org/10.1080/14729342.2001.11421382>>.

61 See above Part II(A).

is the High Court's epochal decision in *Mabo [No 2]*.<sup>62</sup> There, it was said that '[t]o maintain the authority of those cases [which refused to recognise the rights and interests in land of Aboriginals and Torres Strait Islanders upon the Crown's acquisition of sovereignty] would destroy the equality of all Australian citizens before the law'.<sup>63</sup> '[A]n unjust and discriminatory doctrine of that kind can no longer be accepted'.<sup>64</sup>

To now formally recognise non-discrimination as a fundamental right at common law would be a logical and modest doctrinal step in our view. But in making this case we acknowledge that the capacity of law (especially common law) to satisfactorily address societal, structural and systemic discrimination, and inequality is limited. In terms of non-discrimination specifically, the common law would necessarily play a minor, supporting role to statute law. The latter provides an extensive legal framework to counter direct and indirect discrimination on a range of prohibited grounds *and* can address new contexts in which discrimination may arise. Even so, we consider that common law recognition of non-discrimination as a fundamental right *is* symbolically important and, as detailed in Part III below, as a baseline principle *may* prove doctrinally useful. To recognise non-discrimination as a fundamental right would provide future generations of Australian judges with an important analytical tool. Doing so would signify also that it is a social and legal norm worthy of protection and respect. It is justified in terms of method, useful in terms of doctrine and overdue in terms of the common law's history. To proceed, analytically, from a baseline principle of non-discrimination would ensure that the general law reflects, so far as institutionally and interpretively possible, this enduring value of Australian society.

### III A FUNDAMENTAL RIGHT TO NON-DISCRIMINATION AT COMMON LAW APPLIED

We now turn to consider where and how the recognition of non-discrimination as a fundamental right might perform meaningful work in contemporary Australian law. We examine three aspects of doctrine where it could have an impact: statutory interpretation, generally; the interpretation of anti-discrimination statutes, specifically; and fixing the scope of discretionary administrative powers.

#### A Statutory Interpretation

In terms of interpretive principle, recognition of non-discrimination as a fundamental right at common law would embed it within the methodological architecture of the principle of legality. Yet such recognition would not furnish a 'right' in the sense of being held by an individual, which is directly actionable in the courts and enforced through the provision of a remedy in the event of its

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62 *Mabo [No 2]* (n 55).

63 *Ibid* 58.

64 *Ibid* 42.

breach.<sup>65</sup> So the nomenclature of ‘rights’ in this common law context, though customary, is misleading, as Jason Varuhas has observed.<sup>66</sup> But to be protected by legality, the ‘right’ to non-discrimination must be something more than a residual liberty. Relevantly, the principle of legality cannot be meaningfully applied unless the ‘right’ to non-discrimination has a core content that provides the common law backdrop against which statutes are interpreted.<sup>67</sup> To facilitate legality’s analytical and rights-protective work, it must have some ‘independent and intrinsic weight’.<sup>68</sup> To supply that content the courts could, for example, draw on the conception of non-discrimination outlined above in Part II(A).

It would then be presumed at common law that Parliament does not intend to legislate in a manner which occasions these forms of discrimination. It could operate in a manner similar to the judicial application of interpretive mandates which currently exist in jurisdictions with statutory bills of rights.<sup>69</sup> In Victoria, for example, section 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) states that ‘[s]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights’. Section 8(2) provides that ‘[e]very person has the right to enjoy their human rights without discrimination’. In *PBU & NJE v Mental Health Tribunal*, for example, Bell J said that the capacity to give informed consent to medical treatment under the *Mental Health Act 2014* (Vic) had to be interpreted and applied compatibly with section 8. This required the statutory criteria to be interpreted in a manner that would not elevate the threshold for the capacity test for persons with a mental disability compared to those without.<sup>70</sup>

So *if* legality can be applied at common law, it provides an interpretive remedy to the litigant (and protection to others similarly situated) by ensuring the non-discriminatory application of the relevant statute. The principle of legality can of course be rebutted. But it is a well-established proposition at common law that a statute may only infringe a fundamental right by express words or necessary implication.<sup>71</sup> To do so expressly involves the use of ‘unmistakable and unambiguous language’.<sup>72</sup> Whilst it was long considered that an implication to

65 See Peter Bailey, *The Human Rights Enterprise in Australia and Internationally* (LexisNexis, 2009) 18–19.

66 See Jason Varuhas, ‘The Principle of Legality’ (2020) 79(3) *Cambridge Law Journal* 578, 580–2 <<https://doi.org/10.1017/S0008197320000598>>.

67 See Dan Meagher, ‘The Principle of Legality as Clear Statement Rule: Significance and Problems’ (2014) 36(3) *Sydney Law Review* 413, 429–35.

68 *Tajjour v New South Wales* (2014) 254 CLR 508, 545–6 (French CJ). See also Dan Meagher, ‘Is There a Common Law “Right” to Freedom of Speech?’ (2019) 43(1) *Melbourne University Law Review* 269, 282–7.

69 See, eg, *Human Rights Act 2004* (ACT) s 30; *Human Rights Act 2019* (Qld) s 48; *Human Rights Act 1998* (UK) s 3; *New Zealand Bill of Rights Act 1990* (NZ) s 6.

70 *PBU & NJE v Mental Health Tribunal* (2019) 56 VR 141, 195–8.

71 *Coco v The Queen* (1994) 179 CLR 427, 437–8 (Mason CJ, Brennan, Gaudron and McHugh JJ) (‘*Coco*’).

72 Ibid 437. This is the situation in all of the anti-discrimination statutes (except the *Racial Discrimination Act* (n 11)); they explicitly permit conduct that would otherwise be discriminatory. For example, section 26(3) of the *Age Discrimination Act 2004* (Cth) permits schools to restrict admission to students of a certain age and section 37 permits age to be taken into account when determining the conditions or terms of a life insurance or superannuation policy.

infringe fundamental rights was established only if it was necessary to prevent a statutory provision from becoming ‘inoperative or meaningless’,<sup>73</sup> a less stringent test has recently emerged on the High Court which turns on the importance of the right and the extent to which it is infringed on the statute’s ordinary meaning.<sup>74</sup>

In any event, if the ordinary meaning of a statute occasions discrimination on irrelevant or unjustified grounds, the courts must then consider whether an alternative interpretation is possible which does not have that effect.<sup>75</sup> The ‘remedial’ limits of the principle of legality are set by the constitutional distinction between statutory interpretation and (impermissible) judicial legislation.<sup>76</sup> As noted, an interpretive principle cannot supply *additional* content to a statute in order to remedy the discrimination which it occasions. Moreover, whether or not proportionality has a role in the application of legality to a statute to avoid or minimise discrimination is an important and difficult methodological issue.<sup>77</sup> At the very least there is an argument that some form of justification analysis could be used when applying legality in the context of secondary legislation – ie, when a broad secondary law-making power is said to authorise (to the extent necessary to facilitate its purpose) the relevant discrimination.<sup>78</sup> Relatedly, a stricter application of legality might be justified in the secondary legislation context if Parliament is unwilling or unable to discharge its constitutional role of providing effective scrutiny and supervision of such law.<sup>79</sup>

The interpretive upshot is that the courts would presume that, when legislating, Parliament does not discriminate on irrelevant or unjustified grounds. Parliament’s intention to do so must be manifest by express words or necessary implication.<sup>80</sup> As we detail in Part III(C) below, a fundamental right to non-discrimination (as baseline principle) might have further interpretive work to do in presumptively limiting the scope of statutory discretionary powers: both delegated law-making powers and administrative discretions.

## B Anti-discrimination Statutes

The recognition of non-discrimination as a fundamental right at common law could have a meaningful impact on the interpretation of anti-discrimination statutes as well. To date, these statutes have been interpreted narrowly by the courts, severely curtailing their utility. We suggest that superior court decisions which

73 *Coco* (n 71) 438.

74 See Dan Meagher, ‘On the Wane? The Principle of Legality in the High Court of Australia’ (2021) 32(1) *Public Law Review* 61, 67–71.

75 See below Part IV(A).

76 See *Momcilovic v The Queen* (2011) 245 CLR 1, 46 (French CJ).

77 See Dan Meagher, ‘The Principle of Legality and Proportionality in Australian Law’ in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) ch 7; Hanna Wilberg, ‘Common Law Rights Have Justified Limits: Refining the “Principle of Legality”’ in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) ch 8.

78 See Dan Meagher, ‘Fundamental Rights and Necessary Implication’ (2023) 51(1) *Federal Law Review* 102 <<https://doi.org/10.1177/0067205X221146332>>.

79 *Ibid* 126–7.

80 *Coco* (n 71), 437–8 (Mason CJ, Brennan, Gaudron and McHugh JJ).

proceed from a baseline principle of non-discrimination would be significant in the interpretation and application of anti-discrimination statutes. In doing so, we again acknowledge that such a development needs to happen within an institution that was long a source of discrimination and which has interpreted anti-discrimination statutes in a mostly unsatisfactory manner. But as we detailed above in Part II(B), there are several reasons why such a development might now be possible; our argument in this regard is directed also towards *future* generations of Australian judges for whom such a normative and doctrinal tool may be attractive and useful.

### 1 *The Interpretive Impact*

Over time, anti-discrimination statutes have become increasingly complex to understand and navigate due in part to the technical, restrictive way in which they have been interpreted. This is not aided by the fact that most claims settle or are withdrawn, leaving courts with few opportunities to determine cases. Consequently, the body of case law, particularly from superior courts, is small.

Scholars have bemoaned the fact that judges have interpreted anti-discrimination statutes increasingly narrowly.<sup>81</sup> In the context of disability discrimination, Thornton writes that the High Court has ‘subvert[ed] the intention’ of the legislation and favoured a ‘narrow and formalistic’ approach.<sup>82</sup> Comparing the High Court’s first decision on direct discrimination with its most recent one, Belinda Smith found that the Court’s jurisprudence has developed in a way that does little to promote substantive equality.<sup>83</sup> Alice Taylor found that the courts’ approach to interpretation lacks ‘coherence and consistency’, which makes it difficult to determine what constitutes unlawful discrimination.<sup>84</sup>

As human rights statutes, anti-discrimination laws should be given a beneficial, purposive interpretation. The High Court recognised this in *Waters v Public Transport Corporation*.<sup>85</sup> Dawson and Toohey JJ said that the provision in question should be given ‘a generous construction’.<sup>86</sup> McHugh J favoured a ‘a liberal interpretation ... in order to implement the objectives of the legislation’.<sup>87</sup> In *IW v City of Perth* (*IW v Perth*), Brennan CJ and McHugh J said that anti-discrimination legislation should be construed and applied in a way that promotes its objects.<sup>88</sup> Yet as Neil Rees, Simon Rice and Dominique Allen write, judges are

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81 Beth Gaze, ‘Context and Interpretation in Anti-discrimination Law’ (2002) 26(2) *Melbourne University Law Review* 325; Margaret Thornton ‘Disabling Discrimination Legislation: The High Court and Judicial Activism’ (2009) 15(1) *Australian Journal of Human Rights* 1 <<https://doi.org/10.1080/1323238X.2009.11910859>> (‘Disabling Discrimination Legislation’).

82 Thornton, ‘Disabling Discrimination Legislation’ (n 81) 21.

83 Belinda Smith, ‘From *Wardley* to *Purvis*: How Far has Australian Anti-discrimination Law Come in 30 Years?’ (2008) 21(1) *Australian Journal of Labour Law* 3, 27.

84 Alice Taylor, ‘The Conflicting Purposes of Australian Anti-discrimination Law’ (2019) 42(1) *University of New South Wales Law Journal* 188 <<https://doi.org/10.53637/TYBL5821>>.

85 (1991) 173 CLR 349 (*Waters*).

86 Ibid 394 (Dawson and Toohey JJ).

87 Ibid 407 (McHugh J).

88 (1997) 191 CLR 1, 15 (Brennan CJ and McHugh J) (*IW v Perth*).

‘seemingly unwilling to favour interpretations and constructions of the legislation that would best achieve [its] purpose or object’.<sup>89</sup>

Anti-discrimination statutes prohibit direct and indirect discrimination on a range of attributes in employment and in the provision of education, goods and services. Direct discrimination targets blatant forms of behaviour – less favourable treatment because of a listed attribute – and complainants are required to prove that they were treated less favourably than a person (real or hypothetical) without the attribute in question.<sup>90</sup> A female sex discrimination complainant must show, for example, that a male would have been hired or promoted in the same or similar circumstances. Indirect discrimination is more complex and targets seemingly neutral requirements, conditions, or practices that have a disadvantageous effect on a person because of their attribute and which are not reasonable.<sup>91</sup> A requirement that training materials are delivered online may disadvantage a visually impaired employee, for example, if it was not reasonable that they were only made available in that format.

Claims for direct and indirect discrimination have failed due to the narrow interpretation of discrimination and of the protected areas and attributes.<sup>92</sup> Consider the discrimination cases<sup>93</sup> the High Court has heard as examples: A child with a disability failed in his claim against the school that expelled him due to his violent outbursts when the Court found that the violence was not a manifestation of his disability and any child exhibiting that type of behaviour would have been treated the same way.<sup>94</sup> A group of female steel workers were unable to show that their employer’s retrenchment policy of ‘last on, first off’ indirectly discriminated against them even though women, as a group, had been hired more recently than men.<sup>95</sup> A soldier who was HIV positive was found to have been lawfully discharged when the Commonwealth argued that being able to bleed safely was an inherent requirement of being a soldier.<sup>96</sup> A council’s refusal to provide a planning permit for developing a drop-in centre for people who were HIV positive was upheld because the council had not acted discriminatorily when it provided the service (ie, considering the planning application).<sup>97</sup> A group of casual female teachers was unable to show that their family responsibilities prevented them from being permanent teachers because they could not agree to be deployed anywhere in New South Wales (‘NSW’), which was a requirement of holding a permanent position.<sup>98</sup> Most recently, the Deputy Registrar of a Queensland court was found not to have discriminated against a potential juror who sought the services of an Auslan interpreter to sit on a jury because provisions

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89 Rees, Rice and Allen (n 7) 24.

90 See, eg, *Sex Discrimination Act 1984* (Cth) s 5(1) (*‘Sex Discrimination Act’*).

91 See, eg, *ibid* s 5(2).

92 Thornton, ‘Disabling Discrimination Legislation’ (n 81); Taylor (n 84).

93 This excludes the two cases about special measures: *Gerhardy v Brown* (1985) 159 CLR 70; *Maloney v The Queen* (2013) 252 CLR 168.

94 *Purvis v Department of Education and Training (NSW)* (2003) 217 CLR 92 (*‘Purvis’*).

95 *Australian Iron and Steel Pty Ltd v Banovic* (1989) 168 CLR 165.

96 *X v Commonwealth* (1999) 200 CLR 177.

97 *IW v Perth* (n 88).

98 *New South Wales v Amery* (2006) 230 CLR 174 (*‘Amery’*).

in the *Jury Act 1995* (Qld) excluded people with disabilities from jury service.<sup>99</sup> The only successful complainants were a group of people with different disabilities who established that the Victorian government's decision to replace ticket inspectors on trams with 'scratch card' tickets discriminated against them.<sup>100</sup>

Beth Gaze writes that when interpreting anti-discrimination legislation, 'it is rare for judges to consider the policy or concepts underlying these laws'.<sup>101</sup> Alysia Blackham says it is difficult for judges to identify a single purpose because these laws often pursue multiple goals and reflect a political compromise.<sup>102</sup> But as Kirby J noted in *IW v Perth*,

unless courts are willing to give such legislation the beneficial construction often talked about, it seems likely that the legislation will continue to misfire. That risk may be greatest when those who invoke the legislation comprise individuals or groups in minorities most in need of protection but least likely to strike a sympathetic chord.<sup>103</sup>

Part of the problem is that the legislation contains little guidance for judges about its purpose.<sup>104</sup> Most anti-discrimination statutes contain an objects clause,<sup>105</sup> which is written at a 'high level of abstraction' and requires judges to be creative and 'interpret them meaningfully in light of the facts'.<sup>106</sup> This is how we suggest that recognising non-discrimination as a fundamental right could play a valuable role – by providing Australian judges (especially those of future generations) with a common law baseline of non-discrimination from which the interpretation of key concepts, along with the attributes and areas the legislation applies to, would proceed. This may prevent respondents from successfully arguing that the statutes should be interpreted in a manner which undermines their purpose.<sup>107</sup>

In terms of how such a baseline principle of non-discrimination might be interpretively useful, the experience of Victoria, which has a strong objects clause in its anti-discrimination law, may prove to be instructive.<sup>108</sup> The objects clause in section 3 of the *Equal Opportunity Act 2010* (Vic) ('*EOAV*') recognises the disadvantage that discrimination causes, acknowledges that equal treatment can lead to unequal outcomes, and notes it may be necessary to use positive measures to achieve equality. As noted in Part II(A), we do not suggest that the common law

99 *Lyons v Queensland* (2016) 259 CLR 518 ('*Lyons*').

100 *Waters* (n 85).

101 Gaze (n 81) 333.

102 Alysia Blackham, 'Defining "Discrimination" in UK and Australian Age Discrimination Law' (2017) 43(3) *Monash University Law Review* 760, 771–2. Thornton discusses this compromise in the context of the *Sex Discrimination Act* (n 90): Margaret Thornton, 'Sex Discrimination, Courts and Corporate Power' (2008) 36(1) *Federal Law Review* 31, 32.

103 (1997) 191 CLR 1, 53 (Kirby J).

104 Taylor (n 84) 188.

105 See, eg, *Sex Discrimination Act* (n 90) s 3; *Disability Discrimination Act* (n 11) s 3.

106 Thornton, 'Disabling Discrimination Legislation' (n 81) 3.

107 Thornton notes that the state did this in *X v Commonwealth* (n 96), *Purvis* (n 94) and *Amerly* (n 98): Thornton, 'Disabling Discrimination Legislation' (n 81) 17.

108 It is noted that Victoria, like the Australian Capital Territory and, more recently, Queensland, has enacted human rights legislation which includes the right to equal protection before the law. Human rights legislation has not had a significant impact upon the interpretation of the *EOAV* because cases are not often brought against a public authority when it is exercising functions of a public nature and so the right does not arise.



has the methodological capacity to go this far especially regarding the provision of special measures. It is necessarily constrained in terms of how it can address and remedy discrimination. Rather section 3 is used to illustrate the impact that a change in the underlying interpretive context could have on how anti-discrimination laws are understood and applied by judges. It shows also that even if judges were minded to take a more active approach and develop a baseline principle, there would still be a need to include interpretive guidance in anti-discrimination legislation due to the methodological constraints judges face.

The Supreme Court of Victoria has only considered section 3 in one case to date. At issue in *Owners Corporation OC1-POS539033E v Black*<sup>109</sup> was whether an owners' corporation was regarded a service provider with obligations under the *EOAV*.<sup>110</sup> Anne Black claimed that the owners' corporation discriminated against her on the basis of her disability by failing to modify the doors and ramp to the car park in her apartment building so she could access it. The owners' corporation argued that the *EOAV* should be read down and did not apply to them.

Richards J said that the objects clause was 'emphatic' about the *EOAV*'s purpose and there was 'little if any room' to read it down.<sup>111</sup> Of the *EOAV*, Richards J said it should generally be interpreted to give the widest possible effect to provisions that prohibit discrimination and promote equality. Correspondingly, courts should be slow to read down general provisions in the [*EOAV*] by implication, in the absence of express words of limitation.<sup>112</sup>

Taking this into account, her Honour found that the prohibition of discrimination in the provision of services and the obligation to make reasonable adjustments for a person with a disability applied to an owner's corporation in the context of common property.<sup>113</sup>

We suggest that the common law's recognition of non-discrimination as a fundamental right could fortify the statutory architecture in a similar fashion to the objects clause which has enhanced the interpretation of the *EOAV*. Following this approach, when faced with determining, say, whether a law which excludes a person with a physical or mental disability from serving on a jury was unlawful under an anti-discrimination statute,<sup>114</sup> the court would proceed from the common law baseline that Parliament did not intend to enact laws which are discriminatory and exclude citizens from participating in public life on the basis of an attribute. The focal point becomes whether the provision is discriminatory and if excluding people with a disability from jury service can be reconciled with the prohibition of discrimination in the statute and at common law.

Similarly, an important incidental benefit of recognising non-discrimination as a fundamental right is that it may shift judicial perceptions as to the nature of measures taken to advance legal equality. Anti-discrimination statutes allow an organisation to take measures to benefit a group with a particular attribute, known

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109 (2018) 56 VR 1 ('*Black*').

110 Specifically, sections 44 and 45.

111 *Black* (n 109) 19 [61].

112 *Ibid* 18 [57].

113 *Ibid* 19 [61]–[63].

114 See, eg, section 4(3)(1) of the *Jury Act 1995* (Qld), which was at issue in *Lyons* (n 99).

variously as ‘special’ or ‘welfare’ measures.<sup>115</sup> Examples are recruiting women or limiting access to a service to a designated group based on an attribute such as race, age, or disability. Under the legislation, special measures are seen as an *exception* to the non-discrimination principle so they are usually raised as a defence.<sup>116</sup> But special measures are designed to address past disadvantage; they are intended to level the starting point so members of the group in question can ‘compete’ equally. We suggest that if non-discrimination was recognised as a fundamental right, the perception of special measures may change. When considering whether an action taken by an organisation is a special measure or not, the court would proceed from the common law baseline principle of non-discrimination which recognised that the purpose of the measure was to promote legal equality. It would then examine whether or not the measure is likely to achieve that purpose.<sup>117</sup>

## 2 The Precedential Impact

The effect of a series of superior court decisions which proceed from a common law baseline of non-discrimination would be significant in the development of anti-discrimination law. While all decisions of superior courts influence lower courts, the influence would be greater in this context because the body of case law from the High Court is so small.<sup>118</sup> Yet the impact of these decisions is extensive. Not only do decisions affect all eight jurisdictions, they influence lawyers and the statutory agencies which provide the community with information about the law. Significantly, in this field, where the vast majority of complaints are settled, case law will influence a complainant’s decision about whether to settle or withdraw their claim.<sup>119</sup> It is important to acknowledge the extent of the ‘ripple effect’ of a good decision. This can be illustrated by considering the consequences of an unsatisfactory one.

In *Purvis v New South Wales* (‘*Purvis*’), perhaps its most critiqued and criticised discrimination decision,<sup>120</sup> the High Court interpreted the comparator requirement in a direct discrimination claim exceptionally narrowly, finding that the violent behaviour exhibited by a student with a disability was not to be considered as part of the ‘same or similar circumstances’ when comparing his treatment to that of a hypothetical student without a disability. Gleeson CJ said ‘the required comparison

115 See, eg, *Racial Discrimination Act* (n 11) s 8; *Sex Discrimination Act* (n 90) s 7D.

116 See Rees, Rice and Allen (n 7) 185–6.

117 This approach was used in *Re Waite Group* [2016] VCAT 1258.

118 The High Court has only heard nine discrimination cases (excluding cases where the procedural implications of anti-discrimination laws were at issue such as *Brandy v HREOC* (1995) 183 CLR 245).

119 Dominique Allen, ‘Behind the Conciliation Doors: Settling Discrimination Complaints in Victoria’ (2009) 18(3) *Griffith Law Review* 778 <<https://doi.org/10.1080/10854664.2009.10854664>>.

120 See Colin Campbell, ‘A Hard Case Making Bad Law: *Purvis v New South Wales* and the Role of the Comparator under the *Disability Discrimination Act 1992* (Cth)’ (2007) 35(1) *Federal Law Review* 111 <<https://doi.org/10.22145/flr.35.1.4>>; 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; Smith (n 83); Kate Rattigan, ‘*Purvis v New South Wales* (Department of Education & Training): A Case for Amending the *Disability Discrimination Act 1992* (Cth)’ (2004) 28(2) *Melbourne University Law Review* 532.

is with a pupil without the disability; not a pupil without the violence'.<sup>121</sup> The Court found that a student without a disability who exhibited the same behaviour would have been treated the same way and the claim failed.

In a strong dissent, McHugh and Kirby JJ held that the legislation should be construed 'in a manner that furthers the goal of truly equal treatment for disabled persons'.<sup>122</sup> For the *Disability Discrimination Act 1992* (Cth) to achieve its beneficial and remedial purpose, 'disability' had to be interpreted as including functional difficulties, namely the student's violent behaviour, not simply the underlying disorder which caused the violence. Moreover, their Honours found that the appropriate comparator was a student who did not misbehave:

the purpose of a disability discrimination Act would be defeated if the comparator issue was determined in a way that enabled the characteristics of the disabled person to be attributed to the comparator. If the functional limitations and consequences of being blind or an amputee were to be attributed to the comparator as part of the relevant circumstances, for example, persons suffering from those disabilities would lose the protection of the Act in many situations.<sup>123</sup>

Smith says that the implications of the *Purvis* decision are 'potentially very far-reaching'.<sup>124</sup> She showed that it is routinely applied by the federal courts in disability claims in the areas of education and employment, and that it has narrowed the scope of direct discrimination.<sup>125</sup> The High Court did not limit its reasoning to disability discrimination, so the case has been applied in other contexts including pregnancy<sup>126</sup> and age.<sup>127</sup> The decision's reach is not limited to anti-discrimination laws; the federal courts have applied *Purvis* in disability discrimination claims under the *Fair Work Act 2009* (Cth) even though that Act uses a different definition of discrimination.<sup>128</sup>

The *Purvis* case demonstrates how extensive the impact of a superior court decision can be. It is therefore important not to underestimate the significance of the common law recognising non-discrimination as a fundamental right not only by leading to better outcomes but ones that ripple throughout the legal system.

## C Administrative Law

### 1 *Non-discrimination as an Existing Limit on Discretion*

It would not take much of a conceptual leap for courts to recognise and apply non-discrimination as a fundamental right in the context of administrative law. Indeed, there is already a substantial body of case law across the common law world which does just this – albeit not in a uniform or coherent fashion. Most of the relevant jurisprudence has arisen in the context of the administrative law 'ground'

121 *Purvis* (n 94) 137, 185 (Gummow, Hayne and Heydon JJ).

122 *Ibid* 111 (McHugh and Kirby JJ).

123 *Ibid* 134–5.

124 Smith (n 83) 2.

125 *Ibid* 20.

126 See, eg, *Howe v Qantas Airways Ltd* (2004) 188 FLR 1 and the Federal Court decisions discussed by Smith (n 83) 19–23.

127 See, eg, *Travers v New South Wales* [2016] FCCA 905, discussed in Blackham (n 102) 790.

128 See, eg, *Hodkinson v Commonwealth* (2011) 207 IR 129.

or standard of unreasonableness, though discrimination may also give rise to other administrative law grounds.

The tests for unreasonableness set out in the foundational cases of *Kruse v Johnson*<sup>129</sup> and *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* ('*Wednesbury*'),<sup>130</sup> which remain influential,<sup>131</sup> provide support for the idea that the executive may act beyond power if it exercises legislative or administrative discretions respectively in a manner which unjustifiably discriminates against a particular class of people. The former case involved a challenge to a council by-law prohibiting a person from playing music or singing after being instructed by a police officer to cease. The by-law was challenged, unsuccessfully, on the basis that it was unreasonable; no discrimination claim was made. But Lord Russell CJ set out the enduring test for unreasonableness in this context, which provides that if by-laws were

found to be *partial and unequal in their operation as between different classes*; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires.'<sup>132</sup>

The *Wednesbury* case did involve a discriminatory rule, though discrimination was not argued in that case either. The licence condition imposed by the Council, that no children under 15 should be admitted to the cinema on Sundays, clearly discriminated on the basis of age. The cinema owners challenged the condition on several bases including, most famously, unreasonableness. And in articulating that test, Lord Greene MR commented that dismissing a teacher because she had red hair would be 'so absurd that no sensible person could ever dream that it lay within the powers of the authority', as well as unlawful on the basis of having considered extraneous matters.<sup>133</sup>

Both judgments clearly envisioned unjustified unequal treatment as arbitrary and so unreasonable, and also suggest that broad discretionary powers cannot ordinarily be exercised for the purposes of discrimination. Each of these statements has been relied on to assess the lawfulness of administrative action.

### (a) *Delegated Legislation*

The line of authority is strongest in the context of delegated legislation in Canada.<sup>134</sup> As Donald Gifford outlines, there is a consistent line of Canadian cases holding that delegated legislation which treats different classes of people differently without justification is beyond power. Though the further development of the

129 [1898] 2 QB 91.

130 [1948] 1 KB 223 ('*Wednesbury*').

131 See, eg, *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 348 [22], 350 [27]–[28] (French CJ), 364–5 [68]–[71] (Hayne, Kiefel and Bell JJ), 370 [88]–[89], 375 [106] (Gageler J).

132 *Kruse v Johnson* (n 129) 99 (emphasis added).

133 *Wednesbury* (n 130) 229.

134 See generally DJ Gifford, 'Discrimination as a Ground of Ultra Vires: Why is Canada Ahead of the Rest?' (2007) 14(4) *Australian Journal of Administrative Law* 202.

Canadian common law principle seems to have been overtaken by the adoption of the *Canadian Charter of Rights and Freedoms* in 1982 ('*Canadian Charter*')<sup>135</sup> and enactment of human rights statutes with 'quasi-constitutional' status.<sup>136</sup>

Many of the pre-*Canadian Charter* Canadian cases involved discrimination on the basis of place of residence.<sup>137</sup> For instance in *Jonas v Gilbert*,<sup>138</sup> decided before *Kruse v Johnson*, the Supreme Court of Canada held that a by-law imposing higher licence fees on non-resident traders was invalid, explaining:

I think this general power to tax by means of licenses involved the principle of equality and uniformity, and conferred no power to discriminate between residents and non-residents; that this is a principle inherent in a general power to tax; that a power to discriminate must be expressly authorized by law and cannot be inferred from general words such as are used in this statute; that a statute such as this must be construed strictly; and the intention of the legislature to confer this power of discrimination, must, I think, explicitly and distinctly, appear by clear and unambiguous words.<sup>139</sup>

Several other by-laws imposing different fees on different classes of residents have been found invalid by Canadian courts on this same basis.<sup>140</sup> There are also examples from other common law jurisdictions, many of which similarly involve discrimination based on place of residence in the context of taxation or employment, including a handful of Australian cases from the late 19<sup>th</sup> and early 20<sup>th</sup> centuries striking down discriminatory by-laws. For example, in *Ex parte Stafford*<sup>141</sup> the Supreme Court of Victoria found invalid a by-law which placed different rules on nightsoil collectors from within the municipality, and those located outside of it, on the basis that they were unreasonable.<sup>142</sup> However, Gifford argues that development of these principles was hampered in Australia because of Dixon J's 'attack on unreasonableness as an independent head of invalidity' for delegated legislation.<sup>143</sup>

In 1978 the New Zealand Court of Appeal applied these principles to find a regulation which treated female teachers less favourably than male teachers invalid.<sup>144</sup> The regulation provided that a married male teacher who was promoted was entitled to moving expenses covering the cost of moving his entire household,

135 *Canada Act 1982* (UK) cl 11, sch B pt I ('*Canadian Charter*'). The *Canadian Charter* provides a direct route to challenge the constitutional validity of legislative and executive action which infringes the right to equality in section 15. See, eg, *Little Sisters Book & Art Emporium v Canada (Minister of Justice)* [2000] 2 SCR 1120.

136 Vanessa MacDonnell, 'A Theory of Quasi-Constitutional Legislation' (2016) 53(2) *Osgoode Hall Law Journal* 508, 513–14.

137 Section 6 of the *Canadian Charter* (n 135) provides for mobility rights and makes explicit the limited circumstances in which it is acceptable to discriminate against people based on their place of residence, rendering this line of precedent redundant.

138 (1881) 5 SCR 356.

139 *Ibid* 365 (Ritchie CJ for the Court).

140 See, eg, *A-G (Canada) v City of Toronto* (1893) 23 SCR 514; *R v Pope* (1906) 4 WLR 278; *City of Hamilton v The Hamilton Distillery Co* (1907) 38 SCR 239; *Paulowich v Danochuk* [1940] 2 DLR 106. (1894) 20 VLR 23.

142 See also *Colman v Miller* [1906] VLR 622; *Re Bylaw No 23 of the Town of Glenelg; Ex parte Madigan* [1927] SASR 85.

143 Gifford (n 134) 212; *Williams v Melbourne Corporation* (1933) 49 CLR 142 ('*Melbourne Corporation Case*').

144 *Van Gorkom v A-G (NZ)* [1978] 2 NZLR 387 ('*Van Gorkom (CA)*').

whereas married female teachers could only claim their own possessions and travel expenses. The assumptions underpinning the discriminatory rule were that men were not usually dependent on their wives, and that families would not relocate as a result of a woman's work opportunities. The Court found the regulation unreasonable, and hence invalid, and dismissed the Minister's argument that he was empowered to discriminate on the basis of sex. Woodhouse J, agreeing with Cooke J at first instance, reasoned that delegated powers should not ordinarily be read as permitting discrimination on the basis of sex, because

in modern times, discrimination on the ground of sex alone is so controversial and so widely regarded as wrong, that I would not be prepared to infer authority to introduce it from such general language as found [in the legislation].<sup>145</sup>

These comments acknowledge that it has not always been correct to presume that Parliament does not intend for powers to be exercised in a non-discriminatory manner; but something had shifted 'in modern times'. Cooke J cited international human rights treaties as evidence of the legislature's general support for legal equality, and thus a presumed intention not to authorise discrimination, by the 1970s.<sup>146</sup> Richardson J, with whom Richmond J agreed, was less forthright about the existence of a presumption of non-discrimination. He found that the Minister *could* discriminate on the basis of sex, but that it was unreasonable to do so on the facts here: the assumption that families would only move for a woman's job opportunities 'where the husband is an invalid and financially dependent on his wife' was simply untrue.<sup>147</sup>

### (b) *Administrative Decision-Making*

Some have suggested that a presumption of non-discrimination only applies to delegated legislation and not the application of law to particular individual circumstances.<sup>148</sup> Discrimination is certainly a much less comfortable fit in the individual administrative decision-making context because of the fact that it 'pulls against' the principle that each case must be considered on its own merits.<sup>149</sup> While consistency is often said to be a 'value' or objective of administrative law and fundamental to administrative justice,<sup>150</sup> the fact that every administrative decision involves at least slightly different facts means that inconsistent treatment of two applicants in *similar* situations is generally not evidence of legal error.<sup>151</sup> As the courts have repeatedly stressed in their descriptions of unreasonableness,

145 Ibid 395 (Woodhouse J), quoting *Van Gorkom v A-G (NZ)* [1977] 1 NZLR 535, 541 (Cooke J) ('*Van Gorkom (HC)*').

146 *Van Gorkom (HC)* (n 145) 542.

147 *Van Gorkom (CA)* (n 144) 393 (Richardson J).

148 Gifford (n 134) 206, citing *Re Cosentino and the City of Toronto* [1934] OWN 715, 717 (Kingstone J).

149 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6<sup>th</sup> ed, 2017) 382–3.

150 See, eg, Karen Steyn, 'Consistency: A Principle of Public Law?' (1997) 2(1) *Judicial Review* 22, 22 <<https://doi.org/10.1080/10854681.1997.11426924>>; *Re Drake and Minister for Immigration and Ethnic Affairs [No 2]* (1979) 2 ALD 634, 639; Dame Sian Elias, 'National Lecture on Administrative Law: 2013 National Administrative Law Conference' (2013) 74 *Australian Institute of Administrative Law Forum* 1, 6.

151 See, eg, *Segal v Waverley Council* (2005) 64 NSWLR 177, 201–2 [96]–[98] (Tobias JA) ('*Segal*').

‘reasonable minds might differ’ in the conclusions they draw and choices they make on a single set of factual circumstances.<sup>152</sup> There are, though, a handful of examples of courts finding that inconsistency does amount to unreasonableness. For example, in *Dilatte v MacTiernan*<sup>153</sup> a decision to refuse the applicants permission to extend their house was found to be unreasonable, in part because adjoining properties had been permitted to extend their homes in similar ways, and also because it differed from the decision of the previous Minister.<sup>154</sup> In relation to the latter, Malcolm CJ (with whom the other judges agreed) explained that:

Inconsistency has the potential of bringing the decision making process into disrepute because it suggests that the decision is arbitrary, rather than one made in accordance with a disciplined approach reflecting the application of sound town planning principles and consistent with commonly accepted notions of justice ...<sup>155</sup>

There are other examples of cases in which inconsistency has led courts to conclude that a decision was unreasonable or otherwise an abuse of power, but not many.<sup>156</sup> There are many more which acknowledge that differential treatment *may* amount to unreasonableness, but that each administrative decision is different on its facts making the argument unlikely to succeed.<sup>157</sup> The NSW Court of Appeal has also emphasised that administrative decisions do not set precedents.<sup>158</sup> The result is that it will be challenging to argue that any differential treatment in administrative decisions is the result of, or constitutes, discrimination.

The exception will be where the reasons for the decision disclose discrimination, as in Lord Greene’s hypothetical example of the red-haired teacher. But presumably it will be a rare decision-maker who boldly or carelessly reveals their discriminatory intentions – at least today. One famous Canadian example, where a Minister did make his discriminatory intent clear, is *Roncarelli v Duplessis* (‘*Roncarelli*’).<sup>159</sup> The foundational case on ministerial discretion and liability raised a host of issues, and was ultimately decided based on the Premier of Quebec’s unlawful interference in the exercise of power by a statutory Commission. But at its heart, *Roncarelli* was about religious discrimination. The Premier ordered that Roncarelli’s liquor licence be cancelled because of Roncarelli’s religion and history of acting as bailsmen for Jehovah’s Witnesses charged with offences in connection with their distribution

152 See, eg, *A-G (NSW) v Quin* (1990) 170 CLR 1, 37 (Brennan J) (‘*Quin*’); *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 624 [32], 629 [55] (Gleeson CJ and McHugh J), 654 [137] (Gummow J); *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, 594 [155] (Edelman J).

153 [2002] WASCA 100.

154 *Ibid* [44]–[46], [59], [64], [66] (Malcolm CJ). The decision was also contrary to the recommendation by the Town Planning Appeal committee.

155 *Ibid* [61].

156 See, eg, *Sunshine Coast Broadcasters Ltd v Duncan* (1988) 83 ALR 121; Aronson, Groves and Weeks (n 149) 385–7.

157 See, eg, *Knight v Wise* [2014] VSC 76, [62]–[64] (Forrest J); *SZMIP v Minister for Immigration and Citizenship* [2009] FCA 217, [27]–[30] (Flick J); *Nevistic v Minister for Immigration and Ethnic Affairs* (1981) 51 FLR 325, 334–5 (Deane J); *Ibrahim v Minister for Immigration and Multicultural Affairs* [2000] FCA 1309, [15] (Burchett, Goldberg and Finkelstein JJ).

158 *Segal* (n 151).

159 [1959] SCR 121.

of religious literature.<sup>160</sup> The Premier did not deny that this was his intent, but announced publicly that his Government

had the firm intention to take the most rigorous and efficient measures possible to get rid of those who under the names of Witnesses of Jehovah, distribute circulars which in my opinion, are not only injurious for Quebec and its population, but which are of a very libellous and seditious character.<sup>161</sup>

The Premier saw the actions of Jehovah's Witnesses as going to their moral character, and hence relevant to provincial licensing decisions.<sup>162</sup> Both Rand J and Abbott J (writing separately) made it clear that this was an improper exercise of power because the discriminatory purpose for which the Premier (and by extension the Commission) had acted was not relevant under the statute.<sup>163</sup>

Therefore, while there has been general antipathy towards non-discrimination at common law, courts *have* recognised unjustified discrimination may result in an administrative decision-maker exceeding the limits of their power. There is, then, clearly scope for courts to further develop these principles should the common law recognise a fundamental right to non-discrimination.

## ***2 How Should Non-discrimination Affect the Scope of Administrative Discretions?***

We submit that a right to non-discrimination should apply as an implied limit on the scope of discretionary powers conferred on the executive branch – whether legislative or administrative. That is, it should be presumed that Parliament does not intend to authorise the making of delegated legislation or administrative decisions which are discriminatory in their operation. For the sake of clarity, we do not think that recognition of such a 'right' at common law ought to create any *duty* on the executive to exercise its powers to prevent discrimination,<sup>164</sup> only act as a *limit* on the lawful exercise of power.

As we explained above, to recognise non-discrimination as a fundamental right at common law would generate a presumption to protect the 'right' where interpretively possible. But that presumption, like others, would be rebuttable.<sup>165</sup> An example of rebuttal by necessary intentment would be in the migration context. Clearly the very existence of migration law requires differential treatment between Australian residents and non-residents; it is not necessary for the

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160 Ibid 131–3 (Rand J).

161 Ibid 137 (Rand J).

162 Ibid 150 (Martland J).

163 Ibid 140–1 (Rand J), 183–4 (Abbott J).

164 The Supreme Court of Canada rejected this argument in the *Canadian Charter* context: *Auton (Guardian ad litem of) v A-G (British Columbia)* [2004] 3 SCR 657. The High Court of Ireland considered and rejected this idea in the context of the unreasonableness ground: *O'Dwyer v Minister for the Environment* [2001] 1 IR 255, 261–2.

165 See, eg, section 117 of the *Australian Constitution* which provides that the 'resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State'. See generally Daniel Reynolds, 'Defining the Limits of Section 117 of the *Constitution*: The Need for a Theory of the Role of States' (2021) 44(2) *University of New South Wales Law Journal* 786 <<https://doi.org/10.53637/GFJP7494>>.



legislature to expressly spell out that this type of discrimination based on national origin is permitted. More difficult questions arise where subordinate legislation or administrative decisions treat non-residents from different countries differently. This issue arose in *De Silva v Minister for Immigration & Multicultural Affairs*,<sup>166</sup> which involved a challenge to regulations establishing visa requirements setting different eligibility dates for applicants from different countries, and for applicants from a single country based on their date of arrival. The applicants argued that the rules were arbitrary and capricious (and hence unreasonable), disproportionate, and discriminatory in contravention of section 9(1) of the *Racial Discrimination Act 1975* (Cth).<sup>167</sup> These arguments were dismissed, the Court finding relevantly that there *was* a rational basis for the different cut off dates and the rules did not discriminate against people based on a protected attribute (namely, national origin), as people from the same country were treated differently based on their date of arrival.<sup>168</sup> Had there not been a rationale for the choice of dates it is possible that the regulations would have been found invalid, and rightly so in our view.

The presumption could either operate as a standalone principle (or ‘ground of review’)<sup>169</sup> or be incorporated into existing administrative law principles and analytical methods. Here we show how the presumption could develop within our existing administrative law framework.

#### (a) *Unjustified Discrimination Is Unreasonable*

Australian courts have ‘shown some reluctance to adopt unreasonableness as a ground of review of delegated legislation’ as a result of Dixon J’s remarks in *Williams v Melbourne Corporation* that there is no such separate head of invalidity in Australia.<sup>170</sup> But the concept never totally disappeared from Australian administrative law, with judges referring to a principle that delegated law must not be ‘so oppressive or capricious that no reasonable mind can justify it’.<sup>171</sup> While the Australian version of unreasonableness in the context of delegated legislation may be narrower compared with its common law counterparts, there is no reason why it could not develop as the test has in the administrative decision-making context in the past decade.<sup>172</sup> In our view, there is sufficient scope within the ground and

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166 (1998) 89 FCR 502.

167 *Ibid* 506 (Black CJ, Goldberg and Finkelstein JJ).

168 *Ibid* 509–13.

169 Noting the inaccuracy, yet utility, of the language of ‘grounds’, see Janina Boughey, Ellen Rock and Greg Weeks, *Government Liability: Principles and Remedies* (LexisNexis, 2019) 102–3.

170 *Melbourne Corporation Case* (n 143) 154–5.

171 *City of Brunswick v Stewart* (1941) 64 CLR 88, 97 (Starke J). See other similar articulations in the cases referred to in Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis, 5<sup>th</sup> ed, 2017) 352–4.

172 See generally Janina Boughey, ‘Legal Unreasonableness: In Need of a New Justification?’ (2022) 45(1) *University of New South Wales Law Journal* 113 <<https://doi.org/10.53637/WOPX7767>>.

precedent to allow a presumption of non-discrimination to develop in the delegated law-making context.<sup>173</sup>

The presumption should also apply to the exercise of administrative discretions in individual cases. The unreasonableness ground applied in that context is sufficiently flexible to encompass discrimination,<sup>174</sup> as unequal treatment of two people in the same situation, without justification, *is* arbitrary. As explained, the difficulty in the administrative decision-making context is in proof; it will often be difficult to show that differential treatment between two people amounts to *discrimination*, as opposed to some difference in the factual circumstances of each case. However, if the decision-maker relied on a discriminatory policy in reaching their decision, this would clearly breach the limit. So, for example, if a statute made provision for payments based on the number of dependents a person has, it would be unlawful for government to apply a policy which presumed that a female was dependent on her spouse, but a male was not.

Developing discrimination within the broader umbrella of unreasonableness ensures that the executive retains discretion to differentiate between different people or groups *where doing so is justified*. For instance, the Manitoba Court of Appeal held that a by-law imposing different licence fees on the owners of ‘police dogs’, other male dogs, and other female dogs was valid because the differential taxes were justified.<sup>175</sup> Conversely in *Van Gorkom v Attorney-General*, the New Zealand Court of Appeal found the assumptions about the financial position of married women versus married men on which the Attorney-General’s discriminatory policy was based, were demonstrably not correct. Thus, there was no reasonable basis in fact to discriminate between those groups, making discrimination unreasonable and hence unlawful.<sup>176</sup> Authorising discrimination in circumstances where it can be justified is a natural consequence of treating unequal treatment as an aspect of unreasonableness, consistent with the explanations of unreasonableness in *Kruse v Johnson* and *Wednesbury*.

### (b) *Acting for a Discriminatory Purpose*

Another effect of a presumption of non-discrimination on administrative discretion would be that it would be unlawful to exercise powers *for the purpose* of discriminating against a person or group. For example, it would be unlawful to refuse to transfer a lease due to a person’s nationality as the High Court found the NSW Irrigation Commission lawfully did in *Water Conservation and Irrigation Commission (NSW) v Browning* (*‘Browning’*).<sup>177</sup> Delegated legislation would

173 In *Re Amin* [1983] 2 AC 818, the House of Lords found that discrimination under a non-statutory scheme was lawful because it did not fall within the type of discrimination prohibited by the *Sex Discrimination Act 1975* (UK). In our view, the presumption need not be limited to the protections afforded by anti-discrimination statutes, particularly given that their coverage varies in each Australian jurisdiction.

174 See Boughey (n 172).

175 *Re Smeaton and Shoal Lake Village Bylaw* [1934] 2 DLR 493, cited in Gifford (n 134) 206.

176 *Van Gorkom (CA)* (n 144) 393 (Richmond P and Richardson J).

177 The Commission refused consent to a transfer of an irrigation lease to a naturalised Australian of enemy origin (Italian), on the basis that they ‘considered that such irrigation farm lands ... should be kept

similarly be beyond power if made for the purpose of discriminating against a particular group vis-a-vis another, absent express or implied authorisation. This idea does not strike us as especially controversial. But nor is it likely to offer much protection against discrimination, as it is hard to imagine modern governments making arguments like those in *Browning* and *Roncarelli*. In addition, those particular examples would already be captured by anti-discrimination law.

(c) *Non-discrimination as a Relevant Consideration*

It is probably no more controversial to suggest that non-discrimination is now a *relevant* factor in administrative decision-making. In a 1925 case, the House of Lords held that a local council which had set the same minimum wage for male and female employees had acted unlawfully because they had ‘allowed themselves to be guided in preference by some eccentric principles of socialistic philanthropy, or by feminist ambition to secure the equality of the sexes in the matter of wages in the world of labour’.<sup>178</sup> However, it is difficult to imagine such an argument succeeding today. The High Court in *Murphyores v Commonwealth* indicated that governments are permitted to have regard to general policies which go beyond the specific subject matter of the relevant legislation in issue when exercising broad discretions – in that case environmental considerations.<sup>179</sup> The Court’s view that environmental impacts were a relevant consideration in that case was partly the result of Australia having signed on to international treaties and enacted legislation to protect the environment.<sup>180</sup> The longstanding existence of anti-discrimination legislation at the Commonwealth, state and territory levels, and numerous international treaties in which Australia has committed to equality support the view that non-discrimination is a lawful consideration for governments in the exercise of most, if not all, discretionary powers. Again, however, this principle is unlikely to have an enormous effect on decision-making in Australia, or offer much in the way of protecting against non-discrimination.

(d) *Discrimination May Breach Natural Justice*

Finally, the exercise of discretion in a discriminatory manner might give rise to arguments that a decision-maker has breached the duty to afford natural justice. For example, there may be a reasonable apprehension of bias if a decision-maker makes adverse comments about a person’s ethnicity or sexual orientation in the

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available for Australians, particularly returned soldiers, and also because it was found from experience that as a general rule Italians are not good farmers under irrigation methods and also because it is most undesirable that any further aggregation of Italians be built up on the [Murrumbidgee] irrigation area’: *Browning* (n 40) 495 (Latham CJ). Rich J made the awkward observation ‘that during the centuries B.C. the Romans were farmers and that in the Augustan period Virgil in the *Georgics* wrote a treatise or sort of handbook on agriculture and husbandry. We also know that during this war the Italians transformed very unpromising land in this land into flourishing gardens’: at 497 (Rich J). Nevertheless, the Court unanimously upheld the validity of the Commission’s exercise of their statutory discretion.

178 *Hopwood* (n 38) 594–5 (Lord Atkinson).

179 (1976) 136 CLR 1.

180 *Ibid* 9 (Gibbs J), 14 (Stephen J), 26 (Murphy J).

course of a hearing.<sup>181</sup> If discrimination occurs in the process of decision-making – for example with different categories of people treated differently – this could provide a basis for establishing what fairness in the circumstances looks like, and that the treatment of certain people fell short of that standard. There is a need for caution here, because Australian courts have made it clear that a person’s expectations as to how their case will be determined cannot fetter the powers of the executive to change its policies to adapt to changing circumstances.<sup>182</sup> Thus, a person cannot point to a general practice or procedural policy and claim it gives rise to an expectation that the same process will be followed in their case, and have that policy or practice applied to them. But, it *is* possible that breach of an implied undertaking about process, without notice, will lead to a decision-making process being unfair in the circumstances. Thus, we suggest that there may be some (albeit likely only small) amount of work for natural justice to do in protecting a fundamental right to non-discrimination.

#### IV CONCLUSION

The nature of the common law is that it reflects societal norms and values.<sup>183</sup> Historically, it failed to recognise discrimination on the basis of sex, race, religion, disability and other attributes. Those norms have changed and evolved significantly over time. Behaviour that may once have been tolerated is no longer acceptable in society or under statute law. We have argued that this makes it both possible and an appropriate time for the common law to recognise non-discrimination as a fundamental right. We do not suggest that this would lead to a dramatic shift in the Australian legal landscape; much of that change took place when the discrimination in various forms was prohibited by statute from the 1970s onwards. Those statutes, however, have not always lived up to expectations, in part due to the ongoing influence of the Blackstonian conception of rights which informed, historically and doctrinally, the common law’s reluctance regarding non-discrimination. We do not suggest that recognising non-discrimination as a fundamental right would be a panacea for addressing the limitations of anti-discrimination law, or the general law more broadly. But, we have argued that it could perform meaningful work and that this change, though incremental, is significant and would fill an important gap in our legal architecture.

Our suggestion is not radical. We have not, for example, advocated for the development of an enforceable individual right to non-discrimination. Only that, as a fundamental right at common law, it is presumed that Parliament does not intend to enact discriminatory laws or to confer power on the executive to do so via its delegated law-making and decision-making powers. The addition of non-

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181 As occurred in the decision reviewed in *Abboud v Minister for Immigration and Border Protection* [2018] FCA 185 [15] (Jagot J).

182 *Quin* (n 152). See generally Greg Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Hart Publishing, 2016) ch 6.

183 James J Allsop, ‘Values in Public Law’ (2017) 91(2) *Australian Law Journal* 118.

discrimination to the list of rights protected by the common law is a justified and orthodox step. While it will not produce radical change, we have suggested that its recognition as a fundamental right and baseline principle may perform meaningful work in statutory interpretation generally, the interpretation and application of anti-discrimination statutes specifically and in administrative law. Beyond this, there may be further value and potential in such a doctrinal development. To do so would equip future generations of Australian judges with a normative and doctrinal tool that would commit the common law to take seriously – so far as institutionally and interpretively possible – the challenges of discrimination in the content and application of law.