

## THE CONFLICTING PURPOSES OF AUSTRALIAN ANTI-DISCRIMINATION LAW

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*The underlying rationale for prohibiting discrimination continues to be subject to significant debate. This debate leads to a lack of clarity with respect to the kinds of harms anti-discrimination law is designed to prevent and the kinds of behaviours it is designed to capture. A frequent criticism of the Australian courts' approach to discrimination law is that it fails to grapple with the underlying purpose of anti-discrimination law. The consequence of this failure is a jurisprudence that is underdeveloped. This paper makes a different argument. This article argues that the Australian courts can and do give a purposive interpretation to anti-discrimination law but the purpose that the courts draw on lacks an underpinning coherence or consistency. This paper will make this argument by considering three recent Australian appellate court decisions on disability discrimination to consider the different ways in which the court exhibits an understanding of the purpose of anti-discrimination law.*

### I INTRODUCTION

The underlying rationale for prohibiting discrimination continues to be subject to significant debate. Is anti-discrimination law designed to further an individual's liberty or is it to produce a formal kind of equality or even a substantive form of equality? Despite legislative prohibitions on discrimination remaining relatively static over the past 30 years, their underlying foundations remain uncertain. In their elaborative role,<sup>1</sup> courts are one body to consider and articulate the answers to these foundational questions.

This article will argue that the Australian case law gives no clear answers to these overarching questions because the Australian approach lacks an underpinning coherence or consistency. In different decisions on related provisions, the courts draw upon and rely on different strands of the theoretical literature on the purpose of anti-discrimination law. Some of the case law identifies

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\* PhD Candidate, ANU College of Law. This research is supported by the Australian Government Research Training Scheme. The author would like to thank Kate Falconer, Sarah Bishop and the anonymous reviewers for their insightful comments on an earlier draft of this article. An earlier version of this article was presented at the Berkeley Comparative Equality and Discrimination Law Conference and the author would like to thank the participants for their thoughtful comments on that earlier version.

1 Susan Sturm, 'Owen Fiss, Equality Theory and Judicial Role' (2002) 2 *Issues in Legal Scholarship* 1, 5.

an individual's liberty and the protection of individual rights as the overarching purpose of anti-discrimination law. In contrast, in other cases the courts mandate a formal notion of equality. A few cases show tentative signs towards taking a more substantive approach. As this article will demonstrate, without clarity and consistency as to the underlying rationale, it becomes more difficult to understand the kinds of harms that anti-discrimination law is designed to ameliorate, the kinds of behaviours that the protections are designed to capture and the appropriate remedies that should be offered.

To make this argument, this article will consider the three most recent appellate court decisions on disability discrimination: the High Court decision of *Lyons v Queensland*,<sup>2</sup> the Full Court of the Federal Court decision in *Sklavos v Australasian College of Dermatologists*,<sup>3</sup> and the Queensland Court of Appeal decision in *Woodforth v Queensland*<sup>4</sup> to argue that each of these cases understands and applies a different normative account of anti-discrimination law. A comparison of the approaches taken in these cases is useful and appropriate because they each involve a claim of disability discrimination. Two of these cases applied the *Anti-Discrimination Act 1991* (Qld) ('ADA') and one considered the *Disability Discrimination Act 1992* (Cth) ('DDA'). In addition, each involves a consideration of whether the failure to provide reasonable accommodation or reasonable adjustment constituted direct discrimination. It is notable that these were the only cases considering the substantive provisions of anti-discrimination law relating to any protected attribute heard by an appellate court in 2016 or 2017. Given the limited interaction that appellate courts have in this area of law, these cases are appropriate to use to consider the approach of appellate courts to anti-discrimination matters more generally.

This article will summarise and consider competing understandings of the purpose of anti-discrimination law and outline how these theories manifest in Australian case law. Part II will outline an approach to anti-discrimination law focused on liberty using the case of *Lyons v Queensland* as an illustration. Part III will examine a formal equality approach to anti-discrimination by considering the decision of *Sklavos v Australasian College of Dermatologists*, and Part IV shows how *Woodforth v Queensland* adopted a substantive equality approach to anti-discrimination law.

Anti-discrimination law can be characterised as sitting between the higher ideals of equality and liberty and the more practical considerations of enforcement, administration and compliance.<sup>5</sup> The interpretation and justification of anti-discrimination law inevitably depends on how the relationship between these competing considerations is developed.<sup>6</sup> The ideals that anti-discrimination law is designed to promote and protect are universal: liberty and equality. However, the

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2 (2016) 259 CLR 518.

3 (2017) 256 FCR 247.

4 [2018] 1 Qd R 289.

5 George Rutherglen, 'Concrete or Abstract Conceptions of Discrimination?' in Deborah Hellman and Sophia Moreau (eds), *Philosophical Foundations of Discrimination Law* (Oxford University Press, 2013) 115, 116–17.

6 *Ibid.*

understanding of these two concepts is varied and controversial and often anti-discrimination law can end up reflecting the wide variety of different understandings of these two competing concepts leading to a distinct absence of foundational clarity.

While an absence of foundational clarity is a problem for any area of law, there are reasons that this lack of foundational clarity is particularly problematic for anti-discrimination law. First, it leaves tribunals, commissions and respondents without clear guidance with respect to precedent and behaviours, and provides potential litigants with remaining questions about the futility of action. Second, as anti-discrimination law is still a comparatively new area of rights protection without a constitutional or common law basis, courts are given considerable scope to develop, elaborate and define the foundational principles of anti-discrimination law when applying anti-discrimination to new scenarios.<sup>7</sup> Those new scenarios can be open to multiple interpretations. The lack of a normative agreement on first principles with respect to what anti-discrimination law is ultimately meant to achieve has the capacity to lead to an unnecessarily narrow and confusing approach to matters of discrimination and a failure to develop those principles in a clear or consistent manner.

The aim of this article is to consider the application of these various theoretical strands within the context of anti-discrimination law as it is currently conceived in Australia. This article follows on from some of the seminal work of Thornton,<sup>8</sup> Gaze,<sup>9</sup> and Smith.<sup>10</sup> It does so by examining the most recent anti-discrimination cases brought before the courts and it argues that these cases do demonstrate the adoption of a purposive approach but that each conceives of this differently.

While some of the recent scholarship in this area has focused on finding a singular normative account on which all legal norms of anti-discrimination law can rest, the aims of this article are more modest.<sup>11</sup> It accepts that anti-discrimination might be an inherently pluralistic concept and that different theoretical strands are given effect through different mechanisms. It acknowledges that there are limitations and qualifications with respect to each of the theoretical approaches explored in this article. There may be no single principle or theory to explain all the norms contained in anti-discrimination law.<sup>12</sup>

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7 Colm O’Cinneide, ‘The Uncertain Foundations of Contemporary Anti-Discrimination Law’ (2011) 11 *International Journal of Discrimination and the Law* 7; Denise G Réaume, ‘Of Pigeonholes and Principles: A Reconsideration of Discrimination Law’ (2002) 40 *Osgoode Hall Law Journal* 113.

8 Margaret Thornton, ‘Disabling Discrimination Legislation: The High Court and Judicial Activism’ (2009) 15(1) *Australian Journal of Human Rights* 1; Margaret Thornton, ‘Sex Discrimination, Courts and Corporate Power’ (2008) 36 *Federal Law Review* 31.

9 Beth Gaze, ‘Context and Interpretation in Anti-Discrimination Law’ (2002) 26 *Melbourne University Law Review* 325.

10 Belinda Smith, ‘From Wardley to Purvis – How Far Has Australian Anti-Discrimination Law Come in 30 Years?’ (2008) 21 *Australian Journal of Labour Law* 3.

11 Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press, 2015) 6; Iyiola Solanke, *Discrimination as Stigma: A Theory of Anti-Discrimination Law* (Hart Publishing, 2017) 4, 63.

12 Colm O’Cinneide, ‘Justifying Discrimination Law’ (2016) 36 *Oxford Journal of Legal Studies* 909, 916; Patrick S Shin, ‘Is There a Unitary Concept of Discrimination?’ in Deborah Hellman and Sophia Moreau (eds), *Philosophical Foundations of Discrimination Law* (Oxford University Press, 2013) 163.

That there is no single principle or theory is not necessarily a problem because anti-discrimination law is often designed to achieve a variety of different objectives. Anti-discrimination legislation generally contains several distinct obligations each designed to change different behaviours or practices. Some provisions of anti-discrimination law are designed to achieve a basic level of equal treatment, while other provisions are focused on providing an equality of opportunity or an accommodation of difference. The courts can and should take different approaches to the different kinds of prohibitions contained in anti-discrimination legislation to recognise the variety of ways in which anti-discrimination law is designed to change behaviours. What this article does advocate for, however, is a degree of consistency and conceptual coherence when the judiciary is considering a specific duty such as the duty to accommodate. Where there is a variety of purposive approaches given to the same general duty (in this case, the duty to make reasonable adjustments or accommodation), the underlying rationale for having such a provision becomes unclear. As this article will show, without clarity as to the underlying rationale, it becomes more difficult to understand the kinds of harms that the duty to accommodate is designed to ameliorate, the kinds of behaviours that the provision is designed to capture and the appropriate remedies that should be offered.

## II A LIBERTY APPROACH TO ANTI-DISCRIMINATION LAW

One aspect of the debate surrounding the purpose of anti-discrimination law focuses on the relationship between anti-discrimination law and two intersecting broader norms: equality and liberty.<sup>13</sup> The key difference that is identified by these approaches is the extent to which they require a comparison to be made between persons and their respective treatment.<sup>14</sup>

There are a variety of views on the ways in which anti-discrimination laws operate to promote and protect liberty. However, these views share some common traits. By conceptualising anti-discrimination as a violation of liberty, an individual action, policy or law is wrong where it infringes on a liberty or right that a person is individually entitled to.<sup>15</sup> Consequently, anti-discrimination as an assault on liberty is not inherently comparative or relational.<sup>16</sup> It is not comparative because there is no consideration of how someone is treated as compared to the treatment of someone else who does not have the specific characteristics. The issue is not that a person is being treated differently or worse than someone else, but that they are being denied, or being given limited access to a right, freedom or liberty that they are fundamentally entitled to by virtue of their personhood. In this

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13 Hanoch Sheinman, 'Two Faces of Discrimination' in Deborah Hellman and Sophia Moreau (eds), *Philosophical Foundations of Discrimination Law* (Oxford University Press, 2013) 28.

14 Sophia Reibetanz Moreau, 'Equality Rights and the Relevance of Comparator Groups' (2006) 5 *Journal of Law & Equality* 81, 82; Colin Campbell and Dale Smith, 'Direct Discrimination Without a Comparator? Moving to a Test of Unfavourable Treatment' (2015) 43 *Federal Law Review* 91, 100.

15 Deborah Hellman, 'Two Concepts of Discrimination' (2016) 102 *Virginia Law Review* 895, 899.

16 Moreau, 'Equality Rights and the Relevance of Comparator Groups', above n 14, 82.

account, it is the denial of rights and freedoms which makes discriminatory conduct wrong and why it requires legal sanction.

There are some benefits to this approach. As comparison is not necessary, the focus is on the exclusion or limitation of rights rather than on whether the treatment was different to how someone without those characteristics was or would have been treated in similar circumstances. It also limits the capacity for a 'levelling down' approach where different treatment is ameliorated by simply limiting rights or freedoms for everyone. Westen argues that it is better to understand the purpose of anti-discrimination law as one related to liberty.<sup>17</sup> He maintains that whilst prima facie anti-discrimination claims seem comparative and substantively concerned with 'equality', any claim of discrimination 'must originate in a substantive idea of the kinds of wrongs from which a person has a right to be free'.<sup>18</sup> He claims that the right to equal treatment on its own, without reference to other rights, is meaningless, and when articulated with reference to those other rights becomes merely a restatement of those rights rather than a separate and distinctive right of its own.<sup>19</sup> An example of this collapse of equality into a restatement of other rights that he gives is the right to vote: in his view, a statement that all citizens have an equal right to vote is no different to a statement that all citizens have a right to vote.<sup>20</sup>

Moreau also conceptualises discrimination as a limitation on liberty and individual choice.<sup>21</sup> She argues that the purpose of prohibitions on discrimination is to protect an individual's freedom to choose how to live their life.<sup>22</sup> This individual choice, she contends, is a right to which each person is entitled. Anti-discrimination law operates to allow people who are from specific groups, who would otherwise be denied this right, to exercise this freedom.<sup>23</sup> The conception of non-discrimination rights as a protection of liberty can also be seen in the work of Sen and Nussbaum. For both Sen and Nussbaum, non-discrimination is about the protection of choice as well as building the capacity which allows for those who have been excluded from making choices for significant periods of time to exercise individual choices, rights and freedoms.<sup>24</sup> The understanding of discrimination as a limitation on liberty is most clearly seen in the literature and case law from the United States where the United States Supreme Court has conceptualised breaches to the Fourteenth Amendment as individual liberty claims focused on a breach of due process rather than comparative group-based equality claims.<sup>25</sup>

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17 Peter Westen, *Speaking of Equality: An Analysis of the Rhetorical Force of 'Equality' in Moral and Legal Discourse* (Princeton University Press, 1990) 189.

18 Peter Westen, 'The Empty Idea of Equality' (1982) 95 *Harvard Law Review* 537, 567.

19 *Ibid* 538.

20 *Ibid* 563–4.

21 Sophia Moreau, 'What Is Discrimination?' (2010) 38 *Philosophy & Public Affairs* 143, 148.

22 Sophia R Moreau, 'The Wrongs of Unequal Treatment' (2004) 54 *University of Toronto Law Journal* 291, 300.

23 *Ibid*.

24 Amartya Sen, *Inequality Reexamined* (Oxford University Press, 1992) 4–5; Martha Nussbaum, 'Women and Equality: The Capabilities Approach' (1999) 138 *International Labour Review* 227.

25 An often cited and critiqued example of this approach is *Lawrence v Texas*, 539 US 558 (2003) and this change of approach by the United States Supreme Court is considered in Rebecca L Brown, 'Liberty, the New Equality' (2002) 77 *New York University Law Review* 1491; Laurence H Tribe, '*Lawrence v Texas*:

In the Australian context, this liberty approach to anti-discrimination law is present in both the legislative text prohibiting discrimination as well as in judicial decisions. For example, a liberty-based understanding of discrimination is reflected in the *Racial Discrimination Act 1975* (Cth) ('*RDA*') both in the Act's prohibitions on discriminatory conduct and the requirement for equality before the law. For example, section 9(1) of the *RDA* states:

It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.<sup>26</sup>

The wording of this provision as well as some others in the Act,<sup>27</sup> could reflect a liberty-based understanding of anti-discrimination law's purpose. This is seen through the accepted absence of a requirement for a comparison of treatment,<sup>28</sup> and the provision's focus on the impairment of exercise of any human right or fundamental freedom. In the case of the *RDA*, the purpose of the provision is to ultimately protect a person's exercise of other rights and freedoms. This approach to racial discrimination is also apparent in the High Court judgments on section 10 of the *RDA*.<sup>29</sup> This liberty approach to anti-discrimination law is not only apparent with respect to the *RDA*, but can be seen in the Court's approach to other areas of anti-discrimination law as well.

One case in which this article will argue that approach may be illustrated is the 2016 High Court decision of *Lyons v Queensland*.<sup>30</sup> In *Lyons*, the appellant claimed she had been unlawfully discriminated against by the Queensland government where she had been excluded from consideration for jury duty because she was deaf and consequently required Auslan interpretation in the courtroom and the jury room to converse properly with the other jurors.<sup>31</sup> The appellant argued that this exclusion constituted direct discrimination (or, in the alternative, indirect discrimination) on the basis of impairment.<sup>32</sup> In making this argument, the appellant argued that the *ADA* stipulated that it was irrelevant to the determination of whether someone is treated less favourably than someone without the attribute,

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The "Fundamental Right" that Dare Not Speak Its Name' (2004) 117 *Harvard Law Review* 1893; Catherine A MacKinnon, 'The Road Not Taken: Sex Equality in *Lawrence v Texas*' (2002) 65 *Ohio State Law Journal* 1081.

26 *RDA* s 9(1).

27 The wording of the equality before the law provision at s 10 is also similar.

28 *Australian Medical Council v Wilson* (1996) 68 FCR 46, 63 (Heerey J).

29 *Maloney v The Queen* (2013) 252 CLR 168, 190–1 (French CJ), 199 (Hayne J), 227–30 (Kiefel J), 250–1 (Bell J), 301 (Gageler J).

30 (2016) 259 CLR 518 ('*Lyons*').

31 Ibid 521 (French CJ, Bell, Keane and Nettle JJ). For discussion of the issue of the inclusion of persons who are deaf on jury panels more broadly see Brock Budworth, Trevor Ryan and Lorana Bartels, 'Reigniting the Lamp: The Case for Including People Who Are Blind or Deaf as Jurors' (2017) 42(2) *University of Western Australia Law Review* 29, 31; David Spencer et al, 'Justice is Blind as Long as It Isn't Deaf: Excluding Deaf People From Jury Duty – An Australian Human Rights Breach' (2017) 23 *Australian Journal of Human Rights* 332.

32 *Lyons* (2016) 259 CLR 518, 527 (French CJ, Bell, Keane and Nettle JJ); *ADA* s 10.

that a person required special services or facilities.<sup>33</sup> It was common ground that Auslan interpretation constituted special services or facilities.

In response, the respondent argued that the appellant had not been excluded from jury duty because she was deaf, but because she was ineligible for jury service pursuant to section 4(3)(1) of the *Jury Act 1995* (Qld) ('*Jury Act*').<sup>34</sup> Section 4(3)(1) states that a person who has a physical or mental disability that makes that person incapable of effectively performing the function of a juror is ineligible for jury service.<sup>35</sup> The respondent argued that the appellant was incapable of performing jury duty because the *Jury Act* would not allow for a 13<sup>th</sup> person to be in the room when the jury was deliberating. In addition, the *Oaths Act 1867* (Qld) ('*Oaths Act*') contained no oaths that could be administered to ensure that an Auslan interpreter was appropriately sworn in to interpret the evidence faithfully and keep the jury discussions and the juror's identity secret.<sup>36</sup> In response, the appellant highlighted that section 54(1) of the *Jury Act* could be read to allow, with a judge's leave, for a person to communicate with a jury member and this provision could apply to an Auslan interpreter.<sup>37</sup>

A unanimous High Court dismissed the appeal. The plurality found that excluding the appellant from jury service was not discrimination because she was ineligible for jury service pursuant to section 4(3)(1) of the *Jury Act*.<sup>38</sup> She was ineligible for jury service because, absent a specific statutory provision, the disclosure of jury deliberations to an Auslan interpreter could not be allowed by law.<sup>39</sup> This was based on the understanding that the common law had long required the jury to be kept separate and communication between a juror and a member of the public has been found to be an irregularity that has been held to vitiate the verdict.<sup>40</sup> The plurality rejected the appellant's argument with respect to section 54(1) of the *Jury Act*, due to its limited application it could not be utilised to allow for communication with an Auslan interpreter.<sup>41</sup> In addition, the plurality highlighted the criminal sanctions that applied to communicating with a jury member or releasing information relating to individual jurors which would have unclear application with respect to an Auslan interpreter present in the jury room.<sup>42</sup>

In his judgment, Gageler J found that implicit in the prohibition of direct discrimination was that the appellant's disability needed to be a 'substantial reason' for the treatment that the appellant received.<sup>43</sup> In considering whether the appellant's impairment was the substantial reason for her treatment, Gageler J considered the interaction between the eligibility requirements contained in the *Jury Act* and the operation of the *ADA*. Gageler J concluded that section 4(3)(1) of

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33 *ADA* s 10(5).

34 *Lyons* (2016) 259 CLR 518, 529 (French CJ, Bell, Keane and Nettle JJ).

35 *Jury Act* s 4(3)(1).

36 *Jury Act* ss 50, 54(1).

37 *Lyons* (2016) 259 CLR 518, 528–9 (French CJ, Bell, Keane and Nettle JJ).

38 *Ibid* 531–2 (French CJ, Bell, Keane and Nettle JJ).

39 *Ibid* 529–30 (French CJ, Bell, Keane and Nettle JJ).

40 *Ibid*.

41 *Ibid* 529.

42 *Ibid* 531.

43 *Ibid* 532–3.

the *Jury Act* excluded the complainant from jury service.<sup>44</sup> As such, there was no decision made by the Deputy Registrar and as the Deputy Registrar had no capacity to alter that definition, she was merely giving effect to the definition contained in the *Jury Act*.<sup>45</sup> Giving effect to the definition in the Act could not constitute direct discrimination because the complainant's impairment could not be the substantial reason for the treatment.<sup>46</sup> The treatment was caused by the definition contained in the *Jury Act*. Gageler J found that this reading was the most appropriate because this reading allowed for consistent operation between the *Jury Act* and the *ADA*.<sup>47</sup>

The decision in *Lyons* has been criticised for failing to be conducive to the spirit of the *Convention on the Rights of Persons with Disabilities* and it stands in opposition to the decisions of the United Nations Committee on the Rights of Persons with Disabilities.<sup>48</sup> In both *Lockrey v Australia* and *Beasley v Australia* the United Nations Committee on the Rights of Persons with Disabilities concluded that the ineligibility of deaf persons from jury selection constituted a breach of their human rights.<sup>49</sup> Further, the decision in *Lyons* could justify the exclusion of other potential jurors on the basis of different disabilities.<sup>50</sup>

The *Lyons* decision is also somewhat difficult to understand with respect to the application of anti-discrimination law because the plurality judgment, in particular, focuses on whether the *Jury Act* can allow for a deaf person to serve as a juror with the assistance of an Auslan interpreter, rather than the application of the relevant provisions of the *ADA*. The plurality judgment outlines the relevant provisions but does not explicitly apply these provisions to the case or engage with their underpinning logic. It is possible to view the *Lyons* decision as a continuation of the High Court's 'narrow and formalistic' approach to anti-discrimination cases evident since the mid-1990s.<sup>51</sup> But it is difficult to do so given that even a legalistic approach would require at least *some* engagement with the provisions of the *ADA* and their application to the facts of the case which is not apparent in the plurality's judgment. In this way, the decision in *Lyons* is distinctive from some of the Court's previous decisions in anti-discrimination matters such as *Purvis v New South Wales* and *New South Wales v Amery*.<sup>52</sup> These cases did demonstrate a legalistic approach to the application of anti-discrimination legislation by *engaging* with the legislation. The lack of engagement in *Lyons* makes it somewhat distinctive from the cases that came before it.

What could explain this failure to engage in the application of these provisions is an understanding of this case as an illustration of an approach to anti-

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44 Ibid 533.

45 Ibid 534.

46 Ibid.

47 Ibid.

48 Spencer et al, above n 31, 332.

49 Committee on the Rights of Persons with Disabilities, *Views: Communication No 13/2013*, 15<sup>th</sup> sess, UN Doc CRPD/C/D/13/2013 (30 May 2016) ('*Lockrey v Australia*'); Committee on the Rights of Persons with Disabilities, *Views: Communication No 11/2013*, 15<sup>th</sup> sess, UN Doc CRPD/C/15/D/11/2013 (25 May 2016) ('*Beasley v Australia*').

50 Budworth, Ryan and Bartels, above n 31, 32.

51 Thornton, 'Disabling Discrimination Legislation: The High Court and Judicial Activism', above n 8, 21.

52 (2003) 217 CLR 92; (2006) 230 CLR 174.



discrimination law which requires the infringement of a right *other* than the right to equal treatment prior to a protection being engaged. Implicit in the reasoning of the plurality, and explicit in the judgment of Gageler J is that Ms Lyons was not directly discriminated against because the real reason she was excluded from jury service was because she was ineligible.

As the Court appears to conclude that there is no ‘right’ to be a juror, there was no reason to read the Acts consistently in a manner to allow the appellant to be eligible for jury duty. In this way, principles of anti-discrimination law are simply not engaged. This consideration was made without any consideration of the reason *why* she was ineligible: her hearing impairment. Whether such exclusion could constitute indirect discrimination was not considered in significant depth in either of the written judgments, with Gageler J concluding that if the application of the definition in the *Jury Act* was a rule that the complainant could not comply with, then the mere application could not be unreasonable. But he did not draw on any case law with respect to the test for the reasonableness of a requirement or condition in anti-discrimination law.<sup>53</sup> This focus on whether the *Jury Act* can allow for someone with a hearing impairment to serve as a juror underscores that the concern of the court is primarily whether the complainant has been denied a right to something that she was individually entitled to. As she was not entitled to serve as juror pursuant to the *Jury Act*, there was no need for the application of the *ADA* and there was no need to attempt to read the provisions of the *ADA*, the *Jury Act*, and the *Oaths Act* to operate consistently in a manner which could have allowed her to have an equal opportunity to serve as a juror.

The decision in *Lyons* highlights that understanding of discrimination as a violation of liberty is not without conceptual and practical problems. First, it can be an inherently individualistic account of the harm that is caused by discrimination. It focuses attention on singular, individual discriminatory acts rather than understanding the harm as a series of actions that affect stigmatised groups as a collective. This is consequential in the case of *Lyons* because a liberty approach to anti-discrimination law cannot necessarily direct the analysis where it involves a more complex chain of societal interaction and social policy such as whether deaf jurors can serve on a jury. Anti-discrimination law is constructed focusing on group characteristics but if it is focused on liberty, its ultimate purpose is focused on the individual rather than the group. This means that whilst it can seem conceptually coherent, it ignores many aspects of the disadvantages that anti-discrimination law is designed to remedy.

Second, this approach in practice seems to require the infringement of other rights for a claim of a violation of non-discrimination rights to be found. This leads to the conclusion that anti-discrimination law also requires each claim of discrimination to successfully demonstrate that another right, other than a right to equal treatment, has been infringed. This search for a right focuses attention on whether there is a fundamental right that has been breached rather than a focus on the harm caused by the discriminating conduct *per se*. Finally, discrimination as a violation of liberty can lead to a focus on the process by which a person has been

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53 *Lyons* (2016) 259 CLR 518, 534.

denied individual choice, rather than addressing the underlying systematic disadvantage that the denial has caused. In the case of *Lyons*, this is important because as there is no individual right to be included as a possible juror, anti-discrimination law has no role to play in protecting and furthering the appellant's choice of actions in this way.

By conceiving anti-discrimination law in this manner, the kind of harm that anti-discrimination law is designed to prevent is the infringement or violation of other rights. This approach does not comprehend or acknowledge that discriminatory treatment can cause harm to an individual by the very fact that the treatment was discriminatory. In this conception of anti-discrimination law, the behaviours that anti-discrimination law is designed capture are behaviours that inhibit another individual's capacity to exercise their rights and freedoms rather than behaviour which makes unjust or irrelevant distinctions on the basis of individual characteristics.

In the next two parts, this article will consider and highlight how an approach to anti-discrimination law that is centred on equality can lead to different conclusions on these issues.

### III A FORMAL EQUALITY APPROACH

Other recent anti-discrimination appellate court decisions have adopted an approach to anti-discrimination law that is centred on equality rather than liberty. However, the kind of equality that anti-discrimination law is intended to promote has not been consistent. Some judicial decisions considering equality in a formal sense and others showing tentative signs towards an understanding built on a more substantive account. This section will consider the recent case law which applies a formal equality approach to non-discrimination law.

Equality as a principle of egalitarianism appears relatively easy to understand. It involves the basic understanding that the law should treat like individuals alike.<sup>54</sup> In this fundamental Aristotelean conception, equality operates as a confirmation that law should be applied equally and is, in essence, different terminology for the rule of law.<sup>55</sup> In this sense, formal equality is a fundamental norm of common law legal systems. As Lord Steyn described when discussing the shared history of the United Kingdom and United States legal systems:

embedded in our systems is the principle of equality. It is a fundament tenet of democracy that both law and government accord every individual equal concern and respect for their welfare and dignity. Everyone is entitled to equal protection of the law, which should be applied without fear or favour. Law's necessary distinctions must be justified but must never be made on the grounds of race, colour,

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54 Aristotle, *Nicomachean Ethics* Vol 3, 1131a10-B15, cited in Stefan Gosepath, 'Equality' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Metaphysics Research Lab, Stanford University, Spring 2011 Edition) <<https://plato.stanford.edu/archives/spr2011/entries/equality/>>.

55 Westen, *Speaking of Equality*, above n 17, 143.

belief, gender or any other irrational ground. Individuals in both our countries are protected by law from discrimination on those grounds.<sup>56</sup>

However, as simple as this formulation is, there will always remain the problem of how to determine whom is alike to whom when considering whether two persons should be treated the same.

Anti-discrimination law embeds this formal notion of equality through the explicit delineation of the characteristics that cannot be used when determining whom is alike to whom. It confirms that certain characteristics – race, gender, sexual orientation, disability and age – do not equate to a difference between individuals that allows for a difference in treatment. Anti-discrimination law further articulates the formal notions of equality through prohibitions on directly discriminatory conduct.<sup>57</sup> The prohibition on directly discriminatory treatment requires consistency of treatment of persons who are similarly situated.

This conception of formal equality understands equality as consistency of treatment. However, there are problems with this conception. For instance, there is no requirement that this consistent treatment is beneficial or positive. Prohibitions on discrimination will achieve their purpose so long as those without protected characteristics are treated as badly as those who have protected characteristics.<sup>58</sup> If a similarly situated person without the specified characteristic is also underpaid or undervalued, there is no breach of a formal non-discrimination principle.<sup>59</sup> A common and well-known example of this type of situation is the United States Supreme Court case of *Palmer v Thompson*,<sup>60</sup> where the Supreme Court upheld a decision of the city council in Mississippi to close all the swimming pools in the district, rather than open a swimming pool for non-whites. Another problem with conceiving equality as equal or consistent treatment is that it focuses primarily on one individual's treatment as compared to another, rather than viewing inequality as an issue that inherently affects groups of similarly situated individuals.

The formal equality conception of anti-discrimination law also conforms to Khaitan's 'lay' conception of equality law.<sup>61</sup> The common or lay conception of discriminatory conduct focuses on the discriminator's actions and whether they should be found at 'fault' for discriminatory conduct.<sup>62</sup> Khaitan finds that there are two problems with this approach.<sup>63</sup> First, it views discriminatory conduct as actions constituting a singular event rather than an accumulation of different and negative treatment and second, it focuses on the individual fault of the discriminator as the legitimate basis for imposing a legal sanction.<sup>64</sup> This necessarily focuses much of

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56 Lord Steyn, 'A Common Bond' in American Bar Association, *Common Law – Common Values – Common Rights: Essays on Our Common Heritage by Distinguished British and American Authors* (West Group, 2000) xii, xv.

57 Aileen McColgan, *Discrimination, Equality and the Law* (Hart Publishing, 2014) 38.

58 Sandra Fredman, *Discrimination Law* (Oxford University Press, 2<sup>nd</sup> ed, 2011) 10.

59 Ibid.

60 403 US 217 (1971).

61 Khaitan, above n 11, 1–2, 144.

62 Ibid.

63 Ibid.

64 Ibid.

the attention on the actions of the discriminator rather than the impact that discriminatory conduct has on the person who has been treated in a discriminatory manner.<sup>65</sup>

For the reasons explained above, an understanding of the purpose of anti-discrimination law as merely a tool to establish formal equality will limit the overall effectiveness of anti-discrimination law's capacity to change behaviours and practices. While there are numerous criticisms of formal equality as an underlying rationale for a prohibition on discriminatory conduct, it does have some role to play in eliminating the most overt kinds of discrimination.<sup>66</sup> As such, a formal approach to equality can be found in most Australian anti-discrimination legislation, most clearly seen through the prohibitions on direct discrimination and through the closed and often symmetrical list of attributes to which the protections apply to. However, there are also other provisions of Australian anti-discrimination legislation which denote an appreciation that formal equality is not enough. Some provisions, such as prohibitions on indirect discrimination and the requirement to make reasonable adjustments, are designed to achieve more substantive outcomes.<sup>67</sup> The prohibition on indirect discrimination is designed to combat more insidious forms of discrimination by acknowledging that seemingly neutral rules, policies, practices or procedures can be discriminatory because of existing societal barriers.<sup>68</sup> Similarly, provisions requiring reasonable adjustments to be made are also provision designed to achieve some form of substantive equality by first acknowledging that different treatment is sometimes required to achieve a similar outcome.

An example of a provision requiring a duty to accommodate is section 5(2) of the *DDA* which provides that direct discrimination on the grounds of disability occurs where the duty-bearer does not make, or proposes not to make reasonable adjustments for a person with a disability, and the failure to make the reasonable adjustment has the effect that the aggrieved person is treated less favourably than a person without the disability would be treated in the circumstances.<sup>69</sup> Section 5(2) was introduced to the *DDA* in 2009. In introducing the amendment bill, the Attorney-General Robert McClelland stated that the purpose of the amendment was to 'introduce an explicit and positive duty to make reasonable adjustments for

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65 Ibid.

66 And this overt kind of discrimination still exists. For example, in 2018 a Queensland law firm was forced to apologise for an advertisement for a solicitor position which explicitly stated that only male candidates would be considered: Kay Dibben, 'Y Did I Send That E-male', *Courier-Mail* (Brisbane), 24 February 2018, 9.

67 *Paulley v FirstGroup Plc* [2017] 1 WLR 423, 449 (Baroness Hale).

68 Sandra Fredman, 'Direct and Indirect Discrimination: Is There Still a Divide?' in Hugh Collins and Tarunabh Khaitan (eds), *Foundations of Indirect Discrimination Law* (Hart Publishing, 2018) 31, 31–2.

69 The precise wording is:

For the purposes of this Act, a person (the *discriminator*) also discriminates against another person (the *aggrieved person*) on the ground of a disability of the aggrieved person if: (a) the discriminator does not make, or proposes not to make, reasonable adjustments for the person; and (b) the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of the disability, treated less favourably than a person without the disability would be treated in circumstances that are not materially different.

(Emphasis altered).

people with disability'.<sup>70</sup> He also acknowledged that in its original incarnation, the original intention of the Act was to recognise that positive action may be required to avoid disability discrimination, but the necessity of positive action was brought into doubt by the High Court in their decision in *Purvis v New South Wales* in 2003.<sup>71</sup> The amendments were made as an attempt to rectify this. From the Explanatory Memorandum accompanying both the original Disability Discrimination Bill in 1992 and the amendment bill in 2008, it is apparent that the federal Parliament intended that the *DDA* should require more than formal equality.<sup>72</sup> The requirement to make reasonable adjustments recognises and acknowledges that equal treatment can and will lead to inequitable outcomes and so positive duties to 'level the playing field' are required.<sup>73</sup> The purpose of the provisions is to provide for a more substantive form of equality for persons with disabilities.

However, the recent Full Federal Court decision in *Sklavos v Australasian College of Dermatologists* requires a rethink as to the extent of the positive obligation placed on duty-holders.<sup>74</sup> In *Sklavos*, the Full Federal Court considered the operation of section 5(2) of the *DDA*. In *Sklavos*, the appellant complainant was training to become a dermatologist. To become a dermatologist, he was required to undertake the respondent's training program and pass the respondent's examinations in order to become a Fellow of the College. During this training, the appellant began to suffer from a specific phobia of the College's assessment. At trial, it was accepted that he had such a psychiatric condition and that this phobia fell within the meaning of disability as defined by section 4 of the *DDA*. Due to this specific phobia, the appellant requested that he be admitted as a Fellow of the College without having to sit the examinations set by the College. The respondent refused his request. In response, the appellant brought an action for discrimination arguing that the respondent's decision constituted disability discrimination. The appellant made three arguments.<sup>75</sup> First, that the respondent's failure to make reasonable adjustments to the method by which it assessed his eligibility for a fellowship meant he was subjected to direct discrimination on the basis of disability in contravention of section 5(2) of the *DDA*. Second, that the requirement for the complainant to pass the College's examinations constituted a requirement or condition that he could not comply with due to his disability and consequently was indirectly discriminatory in contravention of section 6(1) of the *DDA*. And third, that the respondent was in breach section 32 of the *DDA* by failing to comply with the *Disability Standards for Educations 2005* (Cth). While the appellant was unsuccessful with respect to each of these contentions, this article

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70 Commonwealth, *Parliamentary Debates*, House of Representatives, 3 December 2008, 12292 (Robert McClelland, Attorney-General).

71 Ibid.

72 Explanatory Memorandum, Disability Discrimination Bill 1992 (Cth) 5–6; Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth) [35].

73 Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 125.

74 (2017) 256 FCR 247 ('*Sklavos*').

75 Ibid 251 (Bromberg J).

will focus on the judgment made with respect to the reasonable adjustment provision contained at section 5(2) of the Act.<sup>76</sup>

Before considering the detail of the provisions, Bromberg J (with Griffiths and Bromwich JJ agreeing) highlighted the purpose of the *DDA* was to address ‘disadvantage, or less favourable treatment, brought *about or caused by* a person’s disability. That fundamental concern applies irrespective of whether the discrimination is direct or indirect’.<sup>77</sup>

In determining whether the appellant had been discriminated against through the failure to provide reasonable adjustments, Bromberg J focused on the operation of the causative test required to prove that the complainant was treated the way he was ‘because of’ his disability.<sup>78</sup> The appellant had argued that section 5(2) required a different approach to causation to that required by section 5(1), which contained the general definition of direct discrimination.<sup>79</sup> He argued that this distinction related to the fact that section 5(1) of the *DDA* is focused on the reason for the treatment, while section 5(2) is focused on the effect of the failure to make reasonable adjustments on the person with a disability.<sup>80</sup> Due to this difference, the appellant argued that the correct approach to section 5(2) was to consider the effect or consequences of the failure to provide reasonable adjustments on the person with a disability rather than the reason why the duty-bearer refused to make the reasonable adjustment.<sup>81</sup>

Bromberg J rejected this construction of the causative test. He considered that as the phrase ‘because of disability’ appeared in the provision, it required the court to conduct a causative inquiry.<sup>82</sup> Bromberg J found that the central question for both sections 5(1) and 5(2) was for the court to determine why the complainant was treated the way they were.<sup>83</sup> It was for a complainant to prove with respect to both sections 5(1) and 5(2) that the substantial reason that they were treated the way they were was because of their disability.<sup>84</sup> In addition, Bromberg J considered that this approach to section 5(2) was the only way to achieve harmony between the two definitions of discrimination contained in the Act:

That construction is in harmony with the structure adopted by the *DDA* for separating direct disability discrimination from indirect disability discrimination, as well as providing internal harmony for s 5 itself. To construe the causation question as addressing the effect of the discriminator’s conduct rather than the reason for that conduct would severely undermine that intended harmony. It would also have the result that two provisions (s 5(2) and s 6(2)) would be essentially addressing the same subject matter of discrimination brought about merely where disability explains disadvantage. It would also serve to significantly deny what seems to be the obvious intent of the *DDA* as demonstrated by s 6(3), that conduct which is not driven (in part or in whole) by the disability (indirect discrimination) is more

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76 Ibid.

77 Ibid 254 (emphasis added).

78 Ibid.

79 Ibid 256 (Bromberg J).

80 Ibid.

81 Ibid.

82 Ibid.

83 Ibid.

84 Ibid 258 (Bromberg J).

amenable to being justified and excused if it is reasonable than conduct that is based (in part or in whole) upon the disability (direct discrimination).<sup>85</sup>

For the appellant, it meant that his treatment was to be compared to another person without a psychiatric disability who also wanted to become a fellow of the Society who had not passed the examinations.<sup>86</sup> In those circumstances, the appellant was treated in the same way had that person also asked for the adjustments that the appellant requested.<sup>87</sup> As he was treated the same as any other applicant to the College, there could be no direct discrimination and no utilisation of section 5(2) of the Act.

This approach turns what was described in the second reading speech as a positive obligation: to make changes to existing structures and practices to accommodate difference, into a negative obligation. It becomes a negative obligation because a duty-bearer is *only* required by the Act to make a reasonable adjustment where the reason for the refusal is the disability itself. If a duty-bearer's reason for refusal is based on the cost of the adjustment or the inconvenience of making the adjustment, there is no obligation on the duty-bearer to make an adjustment to existing practice. Bromberg J's reasoning appears to be based on a concern for both the internal harmony of section 5 and ensuring a clear distinction between section 5 and section 6 (the indirect discrimination provision of the *DDA*).<sup>88</sup> This approach to section 5(2) of the *DDA* is one which adopts an understanding of anti-discrimination law's purpose as one of only formal equality; that persons in similar circumstances should be treated the same. This is even where to have the possibility of equal outcomes, they, in fact, require different treatment. In doing so, it highlights and confirms many of the inherent problems in the formal approach to equality. This approach confirms that there is and should be a universal comparator, but it fails to grasp the existing and structural nature of disability discrimination. Finally, this approach focuses on a degree of 'fault' of the duty-bearer in the sense that there needs to be something inherently wrongful about the behaviour to warrant legal sanction.

Formal equality necessarily has a place in anti-discrimination law as it confirms that irrelevant characteristics should not be used in making determinations as to whom is alike from whom, and prohibits blatant discriminatory practices. In doing so, it conceives the harm caused by discriminatory treatment as irrelevant distinctions made on the basis of attributes, but is singularly focused on the similarity between persons and their capacity to conform to existing standards of practice. Conceived in this way, anti-discrimination law is designed to protect individuals from obvious forms of discriminatory treatment but does not require any broader change to practices or policy which continue to exclude those who are different. But it is an ineffective framework to utilise when considering provisions designed to provide a more positive and substantive form of equality.

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85 Ibid 259.

86 Ibid 260–1 (Bromberg J).

87 Ibid.

88 Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3<sup>rd</sup> ed, 2018) 89, 367.

#### IV A SUBSTANTIVE EQUALITY APPROACH

A more substantive form of equality focuses on the equality of opportunity or outcome rather than treatment.<sup>89</sup> A substantive equality interpretation of anti-discrimination law does not focus on the formal distinctions that are made between persons, but instead directs a focus on two separate issues. First, whether the distinction that was made was inappropriate, irrelevant or unjust and second, the ramifications of such a distinction at both an individual and group level on dignitary and socio-economic status.<sup>90</sup> While these issues, on their face, appear to be relatively easy to understand, the development of legal tests to support a substantive equality interpretation of both constitutional and statutory equality regimes has charted a more difficult course. As highlighted by the former Chief Justice of Canada, the Right Hon McLachlin:

Substantive equality is recognized worldwide as the governing legal paradigm. It is here to stay. We can count on it. But we must also recognize that it introduces a new difficulty that formal equality did not possess – the need to decide when a distinction is inappropriate or unjust. Substantive equality requires the court to determine whether a given situation is ‘substantially the same’ or ‘substantially unlike’ another. Here we find ourselves back in the uncertain sea of value judgements ... Relevance, disadvantaged group, human dignity – these concepts and more attest to our search for a simple rule that will indicate whether a particular distinction treats persons in a way that is substantially the same or substantially different.

Whatever words are used, drawing the line between appropriate and inappropriate, just and unjust, distinctions, inevitably involves the courts in weighing and balancing conflicting values.<sup>91</sup>

In an attempt to structure the balancing exercise between these competing and conflicting values, three different approaches to substantive equality have been developed. The first is one that focuses on human dignity and the inherent worth of the individual.<sup>92</sup> This focus on human dignity can be a useful tool when considering statutory prohibitions on discrimination because it confirms that there is an inherent, inviolate principle of human worth.<sup>93</sup> This intrinsic value in each person necessarily leads to the conclusion that each person is worthy of equal respect and value.<sup>94</sup> However, while human dignity is an important concept when understanding a substantive approach to equality, it does have limitations. One of the limitations is that it is open to different interpretations and can, ultimately, be a question of values.<sup>95</sup> The question of whether a person’s dignity has been assaulted, in the sense that one individual feels humiliated and undervalued, is an

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89 Colm O’Cinneide, ‘The Right to Equality: A Substantive Legal Norm or Vacuous Rhetoric?’ [2008] (1) *UCL Human Rights Review* 80, 87.

90 Beverley McLachlin, ‘Equality: The Most Difficult Right’ (2001) 14 *Supreme Court Law Review* 17.

91 *Ibid* 21.

92 David Feldman, ‘Human Dignity as a Legal Value: Part 1’ [1999] (Winter) *Public Law* 682.

93 Paolo G Carozza, ‘Human Dignity and Judicial Interpretation of Human Rights: A Reply’ (2008) 19 *European Journal of International Law* 931.

94 Aharon Barak, ‘Human Dignity: The Constitutional Value and the Constitutional Right’ in Christopher McCrudden (ed), *Understanding Human Dignity* (British Academy, 2013) 361, 363, 365.

95 Sandra Fredman, ‘Facing the Future: Substantive Equality Under the Spotlight’ (Research Paper No 57, University of Oxford, July 2010) 2.



individual one and cannot necessarily be appropriately developed into a legal test.<sup>96</sup> When there have been attempts to turn human dignity into a legal test, it has often created more, rather than fewer, barriers for potential claimants by making the test for proving discriminatory conduct stricter rather than more flexible.<sup>97</sup> Instead of conceiving discriminatory conduct and irrelevant distinctions as a wrong in and of themselves, whether a person's human dignity is violated becomes the central question.<sup>98</sup> Requiring a complainant to prove that discriminatory conduct had a detrimental effect on their dignity makes the test to prove discriminatory treatment a significantly more difficult one.<sup>99</sup>

In contrast to the human dignity model, Catharine MacKinnon advocates for an understanding of substantive equality which conceives its guiding principle as social hierarchy. Instead of an approach focused on human dignity or an approach focused on 'dimensions' of inequality and disadvantage, MacKinnon argues that substantive equality can only be understood in terms of hierarchy.<sup>100</sup> By focusing on the hierarchical structures that are in place, it becomes evident that the effects of inequality are almost always material as well as dignitary. She argues that by focusing on the nature of the hierarchical structure, both the material and dignitary dimensions will be evident and it is significantly more difficult to ignore the substance of inequality.<sup>101</sup> For MacKinnon, a substantive approach to equality requires two steps. First, it requires asking what the substance of a particular inequality is and second, whether the facts are an instance of that inequality.<sup>102</sup> Her core insight is that inequality is a social relation of rank ordering typically based on characteristics.<sup>103</sup> Inequality is therefore always relational, comparative and vertical.<sup>104</sup> However, she acknowledges that where inequality is actualised in specific domains the way in which it operates is often in an intersecting and overlapping manner. MacKinnon's conception of substantive equality is based on the proposition that discrimination is harmful because it is predicated on unfair and factually false rankings based on characteristics: 'The resulting materials and dignitary deprivations and violations are substantive indication and consequences of this hierarchy, but it is the hierarchy itself that defines the core inequality problem.'<sup>105</sup>

In her defence of social hierarchy as the single principle that is necessary to understanding inequality and critique of the multiple dimensions, she acknowledges that social hierarchy may not be a principle in a philosophical sense

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96 Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 *European Journal of International Law* 655.

97 Thomas MJ Bateman, 'Human Dignity's False Start in the Supreme Court of Canada: Equality Rights and the Canadian Charter of Rights and Freedoms' (2012) 16 *International Journal of Human Rights* 577.

98 Ibid.

99 Ibid.

100 Catharine A MacKinnon, 'Substantive Equality: A Perspective' (2011) 96 *Minnesota Law Review* 1, 6.

101 Ibid 12.

102 Ibid 13

103 Ibid.

104 Ibid.

105 Ibid 12.

because it is not an abstraction, but instead operates as the social content specific to each 'pre-existing disadvantage' based on concrete grounds.<sup>106</sup> Social hierarchy is the key identifying principle upon which equality is based.

The final model of substantive equality is the one advocated for by Sandra Fredman. Fredman advocates for understanding equality as a four-dimensional concept.<sup>107</sup> She argues that equality cannot be captured by a single principle because one principle cannot encapsulate the many ways in which discrimination operates to a person's detriment. Fredman outlines substantive equality as a concept with four intersecting aims. First, a multidimensional approach to equality aims to break the cycle of disadvantage that is associated with 'out' groups.<sup>108</sup> Second, substantive equality should be utilised to promote respect for dignity and worth for all individuals and consequently, reduce stigma, stereotyping, humiliation and violence based on specific identifying factors.<sup>109</sup> Third, substantive equality requires the facilitation of full participation in society.<sup>110</sup> Fourth, a substantive approach to equality must accommodate difference and create structural change.<sup>111</sup> This approach recognises that equality cannot require assimilation to be the price for equal treatment.

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

Each of these four dimensions can operate singularly but they can also operate together. The purpose of these different dimensions is to acknowledge the layered and structural way inequality operates. A multidimensional approach acknowledges that inequality operates in a multitude of different directions rather than just as a vertical power imbalance and manifest across different dimensions.<sup>112</sup>

Fredman's multidimensional approach is designed for practical application, both in the design of legislation and mechanisms to facilitate equality and for the interpretation of both constitutional and statutory protections. However, in considering the Australian legislation, a question remains as to whether it is possible to read Australian anti-discrimination law with substantive equality as a frame of reference. In *Purvis v New South Wales*, Gummow, Hayne and Heydon

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106 Catharine A MacKinnon, 'Substantive Equality Revisited: A Reply to Sandra Fredman' (2016) 14 *International Journal of Constitutional Law* 739, 740.

107 Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 *International Journal of Constitutional Law* 712.

108 *Ibid* 727.

109 *Ibid*.

110 *Ibid*.

111 *Ibid*.

112 *Ibid* 728.

JJ determined that the *DDA* was *not* designed to achieve substantive equality for persons with disabilities.<sup>113</sup> In addition, when considering direct discrimination provisions, Fredman herself acknowledges that generally, direct discrimination is designed to provide for equal treatment and is not particularly well suited to the multidimensional approach.<sup>114</sup>

Nevertheless, the multidimensional framework is still useful and has been used before to understand the court's approach to anti-discrimination law in Australia. In the case of reasonable adjustments, it can be particularly useful because it gives a framework of reference to determine the kinds of harms that anti-discrimination law is designed to be preventing and the ways in which it can and should operate to change behaviours of duty-bearers. More recently, there have been some tentative steps towards a more substantive understanding of equality in the case law, particularly the case law from state Courts of Appeal.<sup>115</sup>

In *Woodforth v Queensland*,<sup>116</sup> the appellant had a hearing impairment. She primarily communicated in Auslan and found communicating in English difficult and ineffective. This inability to communicate in English was a characteristic of her impairment.<sup>117</sup> The appellant made a complaint against the Queensland police with respect to the way in which they handled a complaint she requested that they investigate.<sup>118</sup> The complaint was that she had been assaulted and had personal property stolen. Over a period of a week after making these complaints to the Queensland police, the police failed to provide her with an interpreter which would have allowed the police to take and understand her evidence with respect to the complaint she had made.<sup>119</sup>

She argued that this failure to take her evidence using an interpreter within a reasonable period of time constituted direct discrimination pursuant to section 10 of the *ADA*.<sup>120</sup> It constituted direct discrimination because she had suffered unfavourable treatment: the failure to investigate her complaint in a timely manner. She argued that a person without her hearing impairment would not have been treated this way in the circumstances of the case.<sup>121</sup> In the alternative, she argued that the Queensland police's response was indirect discrimination prohibited pursuant to section 11. She argued that it was indirect discrimination because the police required her to comply with a condition or requirement of being able to communicate in English for her complaint to be dealt with in a timely manner.<sup>122</sup> She sought a public apology, compensation and an order that the police implement

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113 (2003) 217 CLR 92, 154–5.

114 Fredman, *Discrimination Law*, above n 58, 166–7.

115 See also Bobbi Murphy, 'Balancing Religious Freedom and Anti-Discrimination: *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd*' (2016) 40 *Melbourne University Law Review* 594, 605–7.

116 [2018] 1 Qd R 289.

117 *Ibid* 292 (McMurdo JA).

118 *Ibid*.

119 *Ibid*.

120 *Ibid* 295 (McMurdo JA).

121 *Ibid*.

122 *Ibid*.

programs to ensure that the police did not act in a discriminatory manner against other hearing impaired persons.<sup>123</sup>

The appellant's complaint was dismissed by both the Queensland Civil and Administrative Tribunal ('QCAT') and the Appeal Tribunal of QCAT.<sup>124</sup> The member rejected the appellant's complaint on two bases. First, the member found as a matter of fact, the complainant was not treated unfavourably because the failure to take her evidence did not have a significant impact on the overall investigation.<sup>125</sup> Second, the member found that the appellant had not been treated unfavourably where her treatment was compared to someone who was not hearing impaired but did have communication difficulties.<sup>126</sup> In making this finding, the tribunal member noted that a person generally had no 'right' to an interpreter.<sup>127</sup> Further, the member did not consider whether having communication difficulties was a characteristic of being hearing impaired.<sup>128</sup>

The complainant appealed this finding to the Appeal Tribunal of QCAT. In particular, with respect to the claim of direct discrimination, the complainant argued that the member's choice of comparator was inappropriate because the appropriate comparison should have been between someone with a hearing impairment and unable to communicate in English and a person without a hearing impairment and able to communicate in English using conventional speech.<sup>129</sup> The appellant argued that this was the appropriate comparison because it aligned the complainant's attribute, her hearing impairment, to the necessary characteristic of that impairment, being unable to communicate in conventional speech.<sup>130</sup> By comparing the complainant to someone who shared her characteristic, the member was not conducting an appropriate comparison. She also argued that by conducting the comparison with someone who was not hearing impaired, but could not converse in conventional English, the member was essentially comparing her treatment to the treatment of someone else who also had a protected attribute (such as someone of a different racial background).<sup>131</sup>

The Appeal Tribunal agreed with the member and dismissed the appeal. On the issue of the appropriate comparator, the Tribunal agreed with the member that the appropriate comparator to use was a person who was not hearing impaired but did have communication difficulties using conventional speech.<sup>132</sup> The Tribunal disagreed that such a comparison could only capture a comparison between persons who had different protected attributes because the complainant's treatment could be compared to a hearing person who had consciously undertaken a vow of silence and such a person would not have a protected attribute and would have

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123 Ibid 292 (McMurdo JA).

124 Ibid.

125 Ibid 300 (McMurdo JA).

126 Ibid.

127 *Woodforth v Queensland* [2014] QCAT 680 [73] (Member Clifford).

128 *Woodforth v Queensland* [2018] 1 Qd R 289, 299–300 (McMurdo JA).

129 Ibid 301 (McMurdo JA).

130 Ibid.

131 *Woodforth v Queensland* [2016] QCATA 7.

132 Ibid [61]–[65] (Senior Member Brown and Member Guthrie).

been treated in similar manner in the circumstances.<sup>133</sup> The Tribunal also accepted the evidence of the police officers that the investigation had proceeded in a timely fashion so there was no unfavourable treatment.<sup>134</sup>

In considering the findings of the member and the Appeal Tribunal, the Queensland Court of Appeal rejected the approach that each had taken to the matter. McMurdo JA (with Holmes CJ and Bond J agreeing) found, first, that both the member and the Tribunal had misunderstood the complainant's case and consequently framed her contention as one where the police had failed to investigate her complaint at all, rather than focusing on the discriminatory conduct that she alleged had occurred in the week immediately following her complaint.<sup>135</sup> Further, the Court of Appeal found that the member and the Tribunal had misunderstood its task with respect to the comparison exercise it was required to undertake.<sup>136</sup> McMurdo JA found that as it was necessary to include in the complainant's impairment and the characteristic that she was unable to converse in conventional English, the Tribunal erred in determining the appropriate comparator.<sup>137</sup> The Court of Appeal accepted that the appropriate comparator in the complainant's case was a person who was not hearing impaired *and* could communicate in conventional English. With this guidance, the matter was remitted for re-hearing.<sup>138</sup>

This decision does make some tentative steps towards a more substantive understanding of anti-discrimination law's purpose. It does so in two ways. First, it accepts the dignitary harm suffered by the complainant. It accepts the dignitary nature of the harm by understanding that the less favourable treatment was not related to the impact of the appellant's treatment on the way in which the overall investigation was carried out. There was no indication that the failure to take her evidence had any real prolonged impact on the way in which the Queensland police conducted the investigation. Instead, the harm was identified as the distress caused to the complainant through the police failing to take her evidence for that week. This harm to the complainant's sense of self and to her dignity was enough to constitute unfavourable treatment regardless of its implications for the overall investigation. In doing so, this judgment recognises that the harms caused by discrimination can be of a dignitary nature.

In addition, in accepting that the appropriate comparator in the complainant's case was a person without her impairment and without the inability to communicate in conventional English, the Queensland Court of Appeal accepted that the *ADA* requires different treatment of persons with different attributes. In doing so, it draws on the third and fourth dimension of Fredman's framework. It does so by recognising that assimilation is not the desired goal as the complainant should not have to 'cope' with her treatment by the police and get by with minimal lip-reading, but should possibly be given additional services to help her give her

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133 Ibid [47] (Senior Member Brown and Member Guthrie).

134 *Woodforth v Queensland* [2018] 1 Qd R 289, 302 (McMurdo JA).

135 Ibid.

136 Ibid 305 (McMurdo JA).

137 Ibid 306.

138 Ibid.

evidence in her own language. By doing so, it gives her a better voice for dealing with public authorities such as the police. In coming to these, admittedly still tentative conclusions given that the matter was ultimately remitted QCAT, the Queensland Court of Appeal accepted that anti-discrimination law has a broader application in both the kinds of harms that it offers protection from and its capacity to achieve more substantive outcomes.

The substantive equality approach to anti-discrimination law is different to the understanding provided by the liberty approach because it acknowledges a broader array of harms, including dignitary harms caused by discriminatory treatment. The substantive approach is different to the formal equality approach because it requires more of duty-bearers by focusing on the outcome of the failure to accommodate a difference rather than the reason for the failure to accommodate a difference.

## V CONCLUSION

This article has argued that the more recent Australian case law on anti-discrimination law does exhibit an understanding of the purpose of anti-discrimination law, drawing on themes apparent in the theoretical literature. However, the problem with this case law is that it lacks consistency in approach. The various conceptual and theoretical frameworks all have their place in understanding the reasons why discriminatory conduct should be prohibited. Each theoretical thread gives context to the broader societal goals which anti-discrimination law is designed to achieve.

The continuing problem with the lack of coherence and consistency in the courts' approach to anti-discrimination law is that it results in continued uncertainty as to the kinds of harms that anti-discrimination law is designed to prevent. Does anti-discrimination law require the infringement of an individual's rights and liberties; does there need to be the manifestation of an economic or physical damage or can it also be concerned with dignitary harms? What kinds of actions are required by duty-bearers when making reasonable adjustments? Are duty-bearers only required to make a reasonable adjustment where the reasoning underpinning their failure to do so directly relates to a person's characteristic? Or is the purpose of anti-discrimination law to require a positive action to ensure that those with protected characteristics have the opportunity for full participation in public life? The answers given in the recent case law discussed in this article give no clear answers to these questions.

That different provisions in the various Acts may reflect these different understandings is both understandable and reasonable. There is a problem, however, in the interpretation of the same kind of right without reference to a consistent underlying conception for such a prohibition. This is problematic because without reference to a consistent conceptual framework, it becomes very difficult to understand the kinds of behaviours that should be captured by such a provision, what kinds of harms it is trying to eliminate, and what the requirements are of duty-bearers. Without a consistent frame of reference to an underlying

conceptual basis for anti-discrimination, the case law lacks a clear sense of cohesion and it becomes more difficult to determine what actions should constitute unlawful discrimination, and what kinds of actions are required by duty-bearers to remedy discriminatory conduct.