

10. Rethinking the *Sex Discrimination Act*: Does Canada's Experience Suggest we Should give our Judges a Greater Role?

Belinda Smith

It is not uncommon to hear laments about how Australian judges have failed to progress or have even undermined gender equality by providing conservative or technical interpretations of anti-discrimination legislation and reinforcing merely a formal notion of equality. A comparison of Australian and Canadian anti-discrimination statutes suggests, however, that the way in which Australian anti-discrimination laws have been drafted both reflects and possibly reinforces a very limited role for our judiciary in mediating value conflicts and addressing complex social problems such as inequality. The open-textured drafting style of Canadian human rights statutes and the advent of the Charter of Rights and Freedoms have given the Canadian courts the power and legitimacy to develop more interesting and effective approaches to equality and discrimination than judges in Australia, who have highly prescriptive legislation that reflects and reinforces a strict separation of powers and narrow judicial role. This raises the question: should we give our judges a greater role?

Introduction

Seeking to understand how the *Sex Discrimination Act 1984* (Cth) (SDA) has operated in the past 25 years and why it has not achieved all we might have wished of it, this contribution compares the Act with equivalent legislation in Canada and contrasts the approaches taken by each nation's judiciary in interpreting this legislation. This comparison prompts the question: should Australian judges be given a greater role in determining what constitutes discrimination and what is meant by 'equality'?

At first glance, Canada's anti-discrimination laws do not appear to differ greatly from Australia's, apart from the important constitutional backdrop of Canada's Charter of Rights and Freedoms. The regulatory frameworks for anti-discrimination laws look similar: a statutory prohibition on discrimination

on particular grounds, such as sex, in particular fields such as employment, enforceable by an individual complaints mechanism, through the courts.¹ A comparison of the central element of anti-discrimination laws, however—namely, the definition of discrimination—reflects three features that fundamentally distinguish the Canadian model from Australia's. The most striking difference is the legislative drafting approach and specifically the level of detail provided in the legislation; the Canadian Acts prohibit discrimination, but do not in fact define this term—in stark contrast with the prescriptive formulations found in Australia. With less prescription from the legislature, Canadian courts are thereby allocated much greater scope for identifying and shaping the meaning of discrimination and the vision of equality. Australia's compulsory conciliation model also means few discrimination matters reach the courts for determination.

Having been given scope to identify and address inequality issues, the Canadian judiciary has transparently engaged with this complex problem, developing sophisticated jurisprudence and shaping equality debates. And it is here, in the jurisprudence of the Canadian courts, that we find a second significant difference: an explicit acknowledgment that the kind of equality sought is substantive, not merely formal equality.² I question whether the absence of much opportunity for judicial debate in Australia about equality and inclusion has undermined the development of public awareness and commitment to human rights.

Finally, in the struggle to give meaning and effect to the notion of substantive equality, the Supreme Court of Canada in the case of *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 SCR 3 (known as *Meiorin*, after the applicant) significantly revised the definition of discrimination to create a unified test that covers direct and indirect discrimination and includes both procedural and substantive components. This provides a mechanism that could promote the institutional transformation necessary for addressing inequality in a sustainable and legitimate way.

The limited role given to Australian courts reflects a very traditional notion of the separation of governmental powers that denies the judiciary a legitimate role in mediating value conflicts and shaping public norms. It also *reinforces* this limited judicial role, as judges, lacking a wider mandate, choose narrow and technical interpretations under the guise of fulfilling parliamentary intent; the limited discretion given by the legislature is exercised in a conservative way by the courts responding to a traditional notion of the judicial role. In this way, the drafting of anti-discrimination laws has constrained the development of progressive equality jurisprudence, a sophisticated understanding of discrimination generally and public equality norms.

1 This comparison does not deal comprehensively with employment equity legislation.

2 See 'Judicial Approaches to Discrimination' below.

To explore these ideas, I will first outline what powers each nation's government has given to its judiciary under their respective anti-discrimination laws and what this suggests about different conceptions of the separation of powers. In the subsequent section, I examine what each judiciary has done with this power and implications for the development of human rights rules and norms, concluding with a provocative suggestion that Australian judges should be given a greater role in addressing inequality.

What Powers Have the Courts Been Given?

In all fields of human endeavour that we seek to regulate by law there are issues of normative ambiguity. In respect of the twin notions of discrimination and inequality, this ambiguity is substantial. In the face of a lack of clear consensus about what behaviour is appropriate and what behaviour is wrong, a simple prohibition will be ineffective. Any such legal prohibition needs elaboration—traditional, legislative or judicial—to provide guidance to those governed by the law.

There is a range of regulatory models for proscribing discrimination and dealing with this ambiguity. One way to categorise the different models is on a continuum from 'open' to 'closed' in respect of the definition of the discrimination that is prohibited.³ In an open model, discrimination is very generally defined, leaving it largely up to the courts to determine what behaviour constitutes discrimination and when, if ever, discrimination is justified or permissible. The alternative model is a closed one in which prohibited discrimination is carefully and precisely defined, leaving less discretion to the courts.

Attempts by Canada and Australia to address inequality through anti-discrimination laws reflect the open and closed models, respectively. I argue that the use of these two different models indicates a fundamental difference in these nations' understanding of the appropriate role for their courts in addressing complex social problems such as inequality.

A typical Canadian equality law prohibits discrimination in employment in the following way:

Discrimination in employment

13 (1) A person must not

3 Aalt Heringa, 'Standards of Review for Discrimination: The Scope of Review by the Courts' in Titia Loenen and Peter Rodrigues (eds), *Non-Discrimination Law: Comparative Perspectives*, Kluwer Law, The Hague, 1999, pp. 25–37.

- (a) refuse to employ or refuse to continue to employ a person, or
- (b) discriminate against a person regarding employment or any term or condition of employment

because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

...(4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.⁴

What is notable is that there is no definition of discrimination in the legislation. This single, short section contains the discrimination prohibition, across all grounds including race, sex and disability, and a general exception, but the official role of defining discrimination in Canada is given to the judiciary. Much discretion is given to the courts to determine the nature of discrimination, the meaning of 'bona fide requirement' and the onus in respect of this element, and to then apply these rules. With this scope for interpretation, the courts are invited and even required to establish principles and, importantly, also to revise them over time as society changes. The legislature provides the prompt or mandate and then allows the court to do what it supposedly does well in a common-law legal system: develop rules on a case-by-case basis, attuned to the specific details of each parties' circumstances, and occasionally articulate overarching principles, factors and tests.⁵

In drafting Australian laws, a number of contributors have pointed out the range and intensity of constraints faced in trying to get the *SDA* enacted. What is clear is that in comparison with the Canadian drafting, the Australian legislation reflects a significantly more closed model, attempting to precisely define a formula for discrimination, on specific grounds in specific areas and with specific exceptions. The legislated definition of sex discrimination in the *SDA*, for instance, provides:

4 *Human Rights Code*, RSBC 1996, c 210.

5 Michael Kirby (*Judicial Activism: Authority, Principle and Policy in the Judicial Method*, Hamlyn Lecture Series, Sweet & Maxwell, London, 2004, pp. 90–1)—referring to the common law as a garden tended to by judges who occasionally perform 'horticultural activism' when they attempt to clean up a section of law.

5 Sex discrimination

(1) For the purposes of this Act, a person (in this subsection referred to as the *discriminator*) discriminates against another person (in this subsection referred to as the *aggrieved person*) on the ground of the sex of the aggrieved person if, by reason of:

- (a) the sex of the aggrieved person;
- (b) a characteristic that appertains generally to persons of the sex of the aggrieved person; or
- (c) a characteristic that is generally imputed to persons of the sex of the aggrieved person;

the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of the opposite sex.

(1A) To avoid doubt, breastfeeding (including the act of expressing milk) is a characteristic that appertains generally to women.

(2) For the purposes of this Act, a person (the *discriminator*) discriminates against another person (the *aggrieved person*) on the ground of the sex of the aggrieved person if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of the same sex as the aggrieved person.

(3) This section has effect subject to sections 7B and 7D.

What is immediately obvious is that the Australian legislature has chosen to define discrimination and its exceptions—and in some detail. Following a relatively standard format for Australian anti-discrimination law, the prohibitions are then set out in separate sections covering various fields, followed by specific exceptions. Different definitions of discrimination in respect of race, disability and age are set out in three other pieces of Australian federal legislation,⁶ along with different prohibitions and exceptions. So, in the federal sphere alone, there are four different definitions of discrimination, four different sets of prohibitions and four different sets of exceptions. Such differences would be tolerable if they reflected legislative efforts to tailor each Act to the particular circumstances of the disadvantaged group it was serving, but there is little evidence of this.

⁶ *Disability Discrimination Act 1992* (Cth) (*DDA*) (ss 5–6), *Racial Discrimination Act 1975* (Cth) (*RDA*) (ss 8–9), *Age Discrimination Act 2004* (Cth) (*ADA*) (ss 14–16).

Building into the definition the distinction between direct and indirect discrimination is partly historical. By the time Australia enacted its first anti-discrimination laws, in the 1970s, US courts had already developed the distinction in *Griggs v Duke Power*. The UK Government had picked up this distinction and sought to codify it by enacting legislation that specifically defined discrimination as direct and indirect. The Australian Government and the Australian States, in designing their anti-discrimination laws, adopted the UK model, including the dichotomous definition.⁷

Greater specificity can, in some cases, provide greater certainty and clarity, and legislation can be more accessible than case law. Certainty, clarity and accessibility are desirable for users of the law, as compliance and norm development depend at least in part on parties knowing and understanding their obligations and rights. In this case, however, in seeking to codify discrimination, the statute has been made significantly more detailed, but arguably no clearer. One member of the High Court of Australia asserted that in defining 'discrimination in this manner language has been employed which is both complex and obscure and productive of further disputation'.⁸ This drafting has not provided certainty, clarity or accessibility.

Setting such detail into legislation had the effect of establishing a model in Australia of parliamentary prescription over judicial discretion. The prescriptive and formulaic drafting of anti-discrimination law suggests three things: first, a belief that equality can be reduced to a formula of words applicable across fields, context and time. It suggests or assumes that discrimination is amenable to clear and precise definition. Inequality is, however, too complex to capture in a single formula, as demonstrated by the decades of reformulations undertaken by the Canadian Supreme Court in search of the right rule for discrimination.⁹ While not exactly a command-and-control form of regulation,¹⁰ the Australian model contains elements of this approach of seeking to set a clear standard, the breach of which is assessed post-facto and subject to sanction. As Susan Sturm has argued persuasively, this rule-based approach can work to address blatant and intentional discrimination that contradicts a clear norm, but will not be able to capture more subtle and complex forms of bias that are embedded in social practices and structures.¹¹

7 The *RDA* is peculiar because its open wording parallels the international convention underpinning it. The drafters were motivated to ensure that this first federal anti-discrimination Act was a constitutionally valid exercise of the external affairs power.

8 *IW v City of Perth* (1997) 191 CLR 1, 137 per Gummow J referring to the *Equal Opportunity Act 1984* (WA).

9 See 'Judicial Approaches to Discrimination', below.

10 Belinda Smith, 'A Regulatory Analysis of the *Sex Discrimination Act 1984* (Cth): Can it Effect Equality or Only Redress Harm?' in Christopher Arup, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell and Anthony O'Donnell (eds), *Labour Law and Labour Market Regulation*, Federation Press, Sydney, 2006.

11 Susan Sturm, 'Second Generation Employment Discrimination: A Structural Approach' (2001) 101 *Columbia Law Review* 458.

Second, including detail, such as direct and indirect conceptions of discrimination, could have seemed smart and progressive at the time as it was an attempt to codify jurisprudential developments from other jurisdictions;¹² however, it placed on the legislature the burden of identifying future developments in law and practice and updating the legislation in a timely way. As other contributors have noted, there have been a number of key amendments made to the *SDA* since its enactment, but many calls for law reform have also gone unheeded. This reflects the difficulties faced by an elected body in updating protections for disadvantaged groups.

Finally, the message that this prescriptive Australian drafting sends is that the legislature is the (only) appropriate body to design solutions to such social problems and the judiciary's role is merely to apply the formula. The subtext is that we, the legislature, not only have made the value judgments in identifying the undesirable behaviour to be regulated but also have taken the next step of capturing this in a code or formula for the courts to apply. Of course, in Australia the courts are given very little chance even to apply the *SDA* and other anti-discrimination legislation because of the compulsory conciliation model. The limited traditional conception of judicial function conflicts with the now relatively well-accepted view that judges do more than declare the law and cannot adjudicate mechanically; the indeterminacy of language and legal authority means that there are always 'leeways for choice'.¹³ Yet, as I argue more fully in the next section, at least the High Court of Australia has accepted and used this limited conception of its role to adopt very narrow, technical and formalistic interpretations.¹⁴

Almost without exception, legal regulatory initiatives either establish or assume a judicial role in the regulatory framework. This prompts descriptive questions about the nature of the role assigned to the judiciary, normative questions about whether the judiciary should be performing the particular role and pragmatic questions of how effective the judiciary is in performing the role.

These questions about the nature, appropriateness and effectiveness of the roles given to courts under anti-discrimination laws echo a central debate that emerged in Australia's recent National Human Rights Consultation.¹⁵ The opponents of any bill or charter of rights being introduced focused primarily on how such an instrument would give the judiciary greater power and an inappropriate role, and this risked upsetting the (supposedly effective) workings of Australian

12 See 'Judicial Approaches to Discrimination', below.

13 Julius Stone, *Social Dimensions of Law and Justice*, Maitland Publications, Sydney, 1966, pp. 649–50.

14 See, for example: *Purvis v New South Wales (Dept of Education and Training)* (2003) 217 CLR 92 (*Purvis*) (direct discrimination); *New South Wales (Dept of Education) v Amery* (2006) 226 ALR 196 (*Amery*) (indirect discrimination).

15 Commonwealth of Australia, *National Human Rights Consultation Report*, Attorney-General's Department, Canberra, 2009 [*Brennan Report*].

governance and democracy. Parliament, as an elected body, was characterised as the only institution that has a democratic mandate to mediate or regulate public disputes about social, economic and political issues (which would include human rights). The basic corollary was that the judiciary should not play more than a limited interpretative role in democracy because it is not elected.

In essence, this position reflects a majoritarian notion of democracy. It also overestimates both the representativeness and the power of the legislature and underestimates the dominance of the executive. Are policy decisions about human rights really developed and debated by the legislature or presented by the cabinet for limited debate and voting? Are the myriad details contained in legislative instruments such as regulations effectively scrutinised by the legislature or do time, expertise and other resource limitations render this infeasible? Are there effective mechanisms in place for limiting executive power and holding the executive accountable for breaches of human rights? The answers to these questions suggest a legitimate and vital role for the judiciary in promoting and sustaining democracy, as all other democracies have concluded by enacting either statutory or constitutional bills of rights that give the judiciary a role to scrutinise and evaluate government action.

Some opposition to greater judicial discretion is based on concerns about Australian courts not being sufficiently representative of the diverse citizenry to be able to appreciate fully the experience of discrimination.¹⁶ Lack of diversity on the Australian Bench is undeniable.¹⁷ This should, however, further strengthen the case for reform of judicial selection and training, rather than a limitation on their role that denies the important role—both symbolic and instrumental—that the judiciary already plays. All judges have the potential to make law under a common-law legal system and denial of this was described by Justice Kirby as the ‘noble lie’ in his controversial Hamlyn Lectures in 2003.¹⁸ The High Court of Australia already has significant power in being the highest court of the land and being able to decide legislative validity under the *Commonwealth Constitution*.¹⁹ Australian judges already hold positions of power and exercise discretion; they clearly have less discretion than their Canadian counterparts but failure to acknowledge the discretion that does exist is problematic.

16 See, for example: Beth Gaze, ‘Context and Interpretation in Anti-Discrimination Law’ (2002) 26 *University of Melbourne Law Review* 325.

17 See, for example: George Williams, ‘High Court Appointments: The Need for Reform’ (2008) 30 *Sydney Law Review* 16.

18 Kirby, *Judicial Activism*, p. 11.

19 While not explicitly stated, it is well accepted that the High Court of Australia has power to strike down federal legislation if it determines that the Federal Parliament has exceeded its limited legislative capacity under Sections 51 or 52 of the *Constitution*, and it may declare invalid State legislation to the extent it is inconsistent with federal law under Section 109.

Few issues are as normatively contested as equality. Entrusting the Canadian courts to determine the definition of discrimination and thereby the test of whether an equality norm has been breached reflects an acceptance that the judiciary has a legitimate role to play in mediating conflicting public values and shaping public norms.²⁰ The courts were given this role under the constitutional Charter of Rights and Freedoms (1982)²¹ (and, before that, a more limited role under the statutory Bill of Rights in 1960),²² which allocated to the judiciary a right to evaluate government action, including legislative action, against a list of human rights. In this context, the judicial role granted under anti-discrimination or human rights statutes would not have been unusual or controversial.

The Honourable Claire L'Heureux-Dubé described the role of the equality provision in the Charter in the following way:

The year 2005 marks the twentieth anniversary of section 15 of the Charter. It celebrates a generation of constitutional protection for equality rights in Canada. In this time, the Charter has become deeply engrained in the Canadian consciousness and identity. It provides a language for and expresses aspirations for how Canadians view their relationships with the state and with each other. *It fundamentally shapes the meaning of Canadian democracy.*²³

In this sense, the constitutional equality framework reflects and reinforces a substantive and central role for the judiciary in Canadian democracy—a role that is replicated under human rights codes and that contrasts starkly with the more limited Australian judicial role.

Having been granted these different powers, how have the judges used them?

Judicial Approaches to Discrimination

There is no single understanding of equality, not even among equality advocates. The concept has been used extensively to animate movements for social change over time, but it has been used in a myriad different ways. Rosemary Hunter notes:

20 To some extent, as with international instruments, this highly general drafting could reflect a lack of consensus in the Parliament and a compromise of leaving elaboration to other institutions.

21 Canadian Charter of Rights and Freedoms, Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (UK), c 11 (note that the equality provision came into effect in 1985).

22 Canadian Bill of Rights, SC 1960. Note that the Bill of Rights was a statutory charter and the judiciary had no power under it to invalidate legislation.

23 Claire L'Heureux-Dubé, 'Preface' in Fay Faraday, Margaret Denike and M. Kate Stephenson (eds), *Making Equality Rights Real: Securing Substantive equality under the Charter*, Irwin Law, Toronto, 2006, p. 3 (emphasis added).

[A]rguments about equality are...bedeviled by varying—and competing—conceptions of what is actually included in the term ‘equality’, with feminist and liberal theorists having advanced a panoply of arguments as to the most useful, desirable or defensible content of the concept. These have included the notions of formal and substantive equality...parité, equality of opportunity, equality of results or outcome, equality of condition, equality of power, recognition of differences, social equivalence, anti-subordination, an equal minimum threshold enjoyment of capabilities, equal concern, complex equality, and ‘equal protection of the imaginary domain’.²⁴

Legislation to prevent discrimination is expressly intended to promote equality and hence anti-discrimination litigation has been a major site for judicial consideration of the concept of equality. The definition of discrimination depends on the concept of equality that underpins it and is central to the operation and effect of anti-discrimination laws in a number of ways. The definition is the characterisation of the problem and determines the nature of the right to be free of discrimination. If discrimination is defined too narrowly—to cover only conscious or intentional conduct based on prejudice, for instance—it will operate to address only a narrow band of discrimination and promote a limited form of equality. If the definition is too complex or difficult to prove, the law will be less enforceable and thus less effective at changing behaviour. Importantly, the way in which discrimination is defined also determines whether duty holders—employers, educators, service providers, and so on—are required merely to refrain from using prejudice and assumption or are required to do something proactive to promote inclusion and participation of traditionally excluded groups. In this way, the definition allocates responsibility for change and draws lines between different types of discrimination and required responses.

Canadian Courts: Rules and Roles

The Supreme Court of Canada has not shied away from the difficult question of defining discrimination. With the grant of power and nod of legitimacy under the human rights codes, the Court has entered the fray, openly and transparently struggling to define discrimination and thereby articulate a vision of equality. In case after case, the Court has attempted to frame a rule that would apply across grounds and fields and circumstances. Along the way, it has invoked extensive commentary for its successes and failures in this endeavour.²⁵ What is notable,

24 Rosemary Hunter, ‘Introduction: Feminism and Equality’ in Rosemary Hunter (ed.), *Rethinking Equality Projects in Law: Feminist Challenges*, Hart Publishing, Portland, Ore., 2008, pp. 2–3 (references removed).

25 Recent examples of collections on equality jurisprudence under the Charter are: Sheila McIntyre and Sandra Rodgers (eds), *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms*,

however, and noticeably different to Australia,²⁶ is the fact that the judiciary in this quest has engaged openly with academic scholarship and public debate, through judgments²⁷ and extra-curial writings.²⁸

So, how have the Canadian courts interpreted discrimination under their general prohibitions? In seeking to understand the nature of discrimination, the starting point usually is the notion of direct discrimination or different treatment. This is premised on a notion of formal equality or ‘treating likes alike’ and covers blanket and blatant kinds of discrimination, such as ‘women need not apply’. The challenge for courts faced with open or general prohibitions such as the Canadian ones has, however, been to decide whether and how other forms of discrimination are to be prohibited. An alternative form of discrimination is one that results not from such category-based distinctions, but from the unfair, disproportionate *impact* of apparently neutral rules. The classic example is a minimum height requirement for a job that does not single out women for different treatment but would disproportionately exclude them. This ‘indirect’ form of discrimination would not be covered by a narrow definition or interpretation that merely required the same treatment of similarly situated individuals.

The Canadian courts, following on from the American judgment of *Griggs v Duke Power*²⁹ in 1971, extended their initial interpretation of discrimination to include this adverse impact or indirect form of discrimination in the 1985 case of *O’Malley*.³⁰ Importantly, in this same case, the Court determined that the burden for establishing whether the discriminatory conduct or standard was justifiable—and thus not unlawful—was to be borne by the employer or respondent.³¹ This dichotomous and two-stage definition was thus established by the courts under Canadian human rights law:

The conventional approach to applying human rights legislation in the workplace requires the tribunal to decide at the outset into which of two categories the case falls: (1) ‘direct discrimination’, where the standard

LexisNexis, Markham, Ontario, 2006; Faraday et al., *Making Equality Rights Real*.

26 Former Justice of the High Court of Australia Michael Kirby represents an exception in this regard, as he was prolific in his extra-curial writings and presentations and regularly referred to academic scholarship and international jurisprudence in his judgments (<<http://www.michaelkirby.com.au>>).

27 Reference to academic scholarship within judgments is common. See, for example: *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 SCR 3 (*Meiorin*), McLachlin J at [34], [41], [49], citing extensively Shelagh Day and Gwen Brodsky, ‘The Duty to Accommodate: Who Will Benefit?’ (1996) 75 *Canadian Bar Review* 433; extensive list of authors cited in *R v Kapp* 2008 SCC 41, McLachlin CJ and Abella J at [22].

28 For example, L’Heureux-Dubé, ‘Preface’; Claire L’Heureux-Dubé, ‘Conversations on Equality’ (1999) 26 *Manitoba Law Journal* 273; Beverley McLachlin, ‘Equality: The Most Difficult Right’ (2001) 14 *Supreme Court Law Review* (2d) 17.

29 *Griggs v Duke Power Co* 401 US 424 (1971).

30 *Ontario Human Rights Commission and O’Malley v Simpsons-Sears Ltd* [1985] 2 SCR 536 (*O’Malley*).

31 *Ibid.*

is discriminatory on its face, or (2) ‘adverse effect discrimination’, where the facially neutral standard discriminates in effect: Ontario Human Rights Commission and O’Malley v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536...at p. 551, per McIntyre J. If a prima facie case of either form of discrimination is established, the burden shifts to the employer to justify it.³²

While the Australian legislation embedded the dichotomous definition—covering different treatment and adverse impact—it is the second stage, and specifically the shifting of burden to the respondent, that is the first point of difference between the Canadian and Australian definitions. As noted below, generally the respondent in Australia has borne little more than a minimal evidentiary burden in anti-discrimination litigation.

It is critical to reflect on the constitutional backdrop of these cases. While it was the open model that allowed the Canadian Supreme Court to develop and revise the interpretation of discrimination under the human rights statutes, this does not necessarily explain its willingness to do so in this progressive way. It is probably undeniable that the constitutional role given to the judiciary—first under the Bill of Rights and then the Charter—to interpret equality provisions and evaluate governmental action against equality rights has profoundly influenced the role it has played in interpreting human rights codes.

The granting of the power in itself represents a vote of legitimacy that could have influenced the way in which the power was exercised but there is still a distinction between the granting of a power and what a court is willing and able to do with it. The broader understanding of a legitimate judicial role and possibly also the capacity, values and interests of specific judicial members would have also influenced how the power was wielded.³³

The Charter jurisprudence has clearly influenced statutory human rights jurisprudence and vice versa, and this started early in the life of the Charter. Building on the identification of adverse impact discrimination and shifting burden in the 1985 statutory case of *O’Malley*, the Court expressly articulated a commitment to substantive equality in the first Charter equality case in 1989. This commitment was recently summarised by Chief Justice McLachlin and Abella J, in *R. v Kapp*:

[14] Nearly 20 years have passed since the Court handed down its first s. 15 decision in the case of *Andrews v. Law Society of British Columbia*...

32 *Meiorin* [1999] 3 SCR 3, 19.

33 See Kim Brooks (ed.), *Justice Bertha Wilson: One Woman’s Difference*, UBC Press, Vancouver, 2009.

[1989] 1 S.C.R. 143. Andrews set the template for this Court's commitment to substantive equality—a template which subsequent decisions have enriched but never abandoned.

[15] Substantive equality, as contrasted with formal equality, is grounded in the idea that: 'The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration': *Andrews*, at p. 171, *per* McIntyre J., for the majority on the s. 15 issue. Pointing out that the concept of equality does not necessarily mean identical treatment and that the formal 'like treatment' model of discrimination may in fact produce inequality, McIntyre J. stated (at p. 165):

To approach the ideal of full equality before and under the law—and in human affairs an approach is all that can be expected—the main consideration must be the impact of the law on the individual or the group concerned. Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another. In other words, the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another.

While acknowledging that equality is an inherently comparative concept (p. 164), McIntyre J. warned against a sterile similarly situated test focussed on treating 'likes' alike. An insistence on substantive equality has remained central to the Court's approach to equality claims.³⁴

Over the years, the courts struggled to develop a principled definition of discrimination that would be effective in promoting substantive equality. In 1999, the Supreme Court of Canada took the opportunity in the case of *Tawney Meiorin*³⁵ to review and overhaul the test of discrimination in the statutory human rights context. The *Meiorin* case was one of sex discrimination in the employment of firefighters, but set a precedent for anti-discrimination cases generally in Canada. *Meiorin* challenged a fitness test imposed by her employer, arguing that it was discriminatory because it disproportionately impacted on women and did not reflect the real needs of the job—a job she had successfully held for two years before undergoing the test. The Court reviewed the traditional

³⁴ *R. v Kapp* [2008] 2 SCR 483.

³⁵ *Meiorin* [1999] 3 SCR 3.

distinction between direct and indirect discrimination and rejected it, replacing it with a unified test. Under the two-stage process that the Court retained, once the claimant establishes that the rule or treatment is *prima facie* discriminatory, the burden falls on the respondent to prove in defence that the standard is a bona fide operational requirement. The fundamental change came in the formulation of how a respondent employer could prove or justify a standard. Starting with the presumption that the legislature intended to promote substantive equality, not merely formal equality, the unanimous Court stated:

An employer may justify the impugned standard by establishing on the balance of probabilities:

1. that the employer adopted the standard for a purpose rationally connected to the performance of the job;
2. that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work related purpose;
3. that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.³⁶

This test has objective elements in respect of the job (1), subjective elements to capture intentional discrimination (2) and a built-in acknowledgment that substantive equality could require some adjustments or accommodation by the employer as well as the employee (3). It allows for an examination of both the employer's purpose and the means of achieving the purpose, and builds in an obligation to design workplace standards in a way that is inclusive:

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

³⁶ Ibid. [54].

various human rights statutes and must be replaced. *The standard itself is required to provide for individual accommodation, if reasonably possible.* A standard that allows for such accommodation may be only slightly different from the existing standard but it is a different standard nonetheless.³⁷

Demonstrating cognisance of the need to provide guidance on how the test would apply, the Court even listed practical steps:

Some of the important questions that may be asked in the course of the analysis include:

- (a) Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?
- (b) If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?
- (c) Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?
- (d) Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?
- (e) Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?
- (f) Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles?³⁸

The case has been welcomed by leading Canadian equality experts. Judy Fudge and Hester Lessard described it as 'groundbreaking' because it is

the Court's most emphatic and clear endorsement of a substantive approach to discrimination and equality cases that recognizes that equality is more than treating like case alike (formal equality) and, thus, requires attention to how social norms, social practices and institutions create and reinforce advantage and disadvantage.³⁹

37 Ibid. [68] (emphasis added).

38 Ibid. [65].

39 Judy Fudge and Hester Lessard, *Challenging Norms and Creating Precedents: The Tale of a Woman Firefighter in the Forests of British Columbia*, Unpublished ms, University of Victoria, British Columbia, 2009, p. 1.

Similarly, Colleen Sheppard characterised it as providing ‘significant and positive contributions to human rights’⁴⁰ because it ‘reinforces the importance of redressing systemic inequalities that result in exclusion and prejudice through institutional transformation and not merely by individual special treatment’.⁴¹

For Australian observers, *Meiorin* provides an example of a sophisticated judicial understanding of equality that contrasts starkly with the approach taken by Australian courts, outlined below.

Australian Contrasts

In the first decade or so of Australian anti-discrimination laws the courts seriously grappled not only with the detailed wording of the Acts, but also with the purpose and underlying principles. As other contributors have noted, at that time, the legislation was considered radical and even the limited discretion given to the courts under the prescriptive drafting model was used by the High Court to articulate some tentative but significant steps in promoting equality.

The year 1992, however, represented a turning point in the judiciary’s foray into human rights. It was the year in which the High Court issued its most important human rights judgment to date. This was the landmark native title judgment in *Mabo*, acknowledging that Australia was not *terra nullius* on English settlement in 1788 and granting (limited) native title rights to Indigenous Australians after more than a century of denial.⁴² This judgment unleashed on the Court a barrage of strident, venomous attacks for its ‘inappropriate’ judicial activism. Notably, the Attorney-General did not respond to or moderate these attacks in defence of the Court, thereby reinforcing the message that it was not up to the judiciary to engage in such fundamental public policy issues.

More recently, the record of the courts in affording and promoting human rights has been far more constrained, as summarised pointedly by Justice Kirby in a 2006 (dissenting) judgment:

86. This case joins a series, unbroken in the past decade, in which this Court has decided appeals unfavourably to claimants for relief under anti-discrimination and equal opportunity legislation.

40 Colleen Sheppard, ‘Of Forest Fires and Systemic Discrimination: A Review of *British Columbia (Public Service Employee Relations Commission) v BCGSEU*’ (2001) 46 *McGill Law Journal* 533, 535.

41 Ibid. 558.

42 *Mabo v Queensland (No. 1)* (1989) 166 CLR 186. The *RDA* played an important part in this litigation, allowing the High Court to invalidate legislation enacted by Queensland that sought retrospectively to abolish native title.

87. It was not always so. In the early days of State and federal anti-discrimination legislation, this Court, by its approach to questions of validity and application, upheld those laws and gave them a meaning that rendered them effective...Few cases that now reach this Court are unarguable. The Court's successive conclusions in these cases reflected the beneficial interpretation of the laws in question, ensuring they would achieve their large social objectives...

88. The wheel has turned. In no decision of this Court in the past decade concerned with anti-discrimination laws, federal or State, has a party claiming relief on a ground of discrimination succeeded. If the decision in the courts below was unfavourable to the claimants, it was affirmed. If it was favourable, it was reversed.

89. This is what occurred [in *IW v City of Perth, Qantas Airways Limited v Christie, X v The Commonwealth, Purvis v New South Wales*.] In each of these cases, the Court produced a finding unfavourable to the complainant. The differences in the Court's present approach to anti-discrimination legislation may lie in considerations of approach. That possibility is lent further support by the outcome of the present appeal.⁴³

The two most recent High Court cases on discrimination serve to illustrate the narrow, technical approach taken by the Court. The last case of direct discrimination determined by the High Court was *Purvis v New South Wales (Dept of Education and Training)*.⁴⁴ A student with multiple disabilities was expelled from a school because of antisocial and aggressive behaviour, which was a manifestation of his disability. The student brought a claim of direct discrimination, arguing that in being expelled because of his behaviour he had been treated differently to non-disabled students. Instead of the focus being on whether the school had done enough to enable this student to participate (and meet its other obligations to staff and students), the question for the Court became a highly technical and artificial one about the comparator: with whom should the student be compared—a non-disabled student who was well behaved or one who shared the same behavioural problems? The Court chose the latter and found that the school had not discriminated because it treated this disabled student the same as it would treat all students *who behaved the same way*. Notably absent from this litigation was a focus on the human right of the student to participate equally in education.

As noted above, the Australian legislation embeds a dichotomous definition of discrimination—encompassing both direct and indirect. In litigating a

43 *Amery* [2006] HCA 14 [86]–[89].

44 *Purvis* (2003) 217 CLR 92.

discrimination case under Australian law, an applicant must specify which kind of discrimination they plead. In the case of *Purvis*, only direct discrimination was argued. Without a specific exception or general justification provision, the Court was not able to assess whether the behavioural requirements imposed by the school were reasonable or whether the school was justified in suspending the student. Seemingly driven by the result of avoiding a finding of wrong against the school or acknowledging the deficiencies of legislative drafting, the Court, however, followed a tortuous path of reasoning that denied the student a remedy, set an extraordinarily narrow national precedent and thereby undermined the development of human rights norms.

The *Purvis* approach means that the prohibition on direct discrimination merely requires employers and education providers to 'treat likes alike' and, importantly, lets the employer or school decide who is like whom.⁴⁵ Direct discrimination provisions do not prevent employers (education providers, and so on) from using criteria that very closely connect or overlap with traits that are supposedly protected by the anti-discrimination laws. For example, while an employer may be prohibited from applying a blanket exclusion of women, *direct* discrimination provisions allow the employer to choose the candidate who can work 24/7, can do overtime on short notice, will not take extended leave, will not take their entitlement to carer's leave, can pass a fitness test based on male physiology or any other criteria that could have a gendered element but is not expressly 'sex'.

Further, under direct discrimination actions, such criteria are not subjected to any evaluation of legitimacy or connectedness to the job and there is no obligation to provide reasonable accommodation.⁴⁶ The *Purvis* decision removes the criteria from judicial scrutiny and makes clear that reasonable adjustments are not required in determining whether there has been direct discrimination.⁴⁷

In making this decision, the Court clarified and reinforced a stark distinction between direct and indirect discrimination. The artificiality and complexity of the distinction between these categories are particularly problematic given that in Australia it is victims alone who must prove breaches of anti-discrimination laws, without even the benefit of a shifting burden of proof in most cases.

The indirect discrimination provisions are still available to challenge standards or criteria, but with all the uncertainty and burden-of-proof barriers that indirect discrimination provisions entail. Until recently, most federal and

45 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.

46 Note: a limited duty to provide reasonable accommodation was recently introduced in respect of disability, first under the Disability Standards for Education (2005) and more generally under the *Disability Discrimination Amendment (Education Standards) Act 2005* (Cth).

47 At least not under the *SDA*; recent amendments to the *DDA* insert such a requirement.

State anti-discrimination statutes formulated indirect discrimination in similar terms. This formulation required applicants to prove four points for an indirect discrimination claim: 1) that a requirement or condition had been imposed; 2) with which the applicant could not or did not comply; 3) with which a substantially higher proportion of people without the applicant's gender/disability/race were able to comply; and, importantly, 4) that the requirement or condition was 'not reasonable' in all the circumstances.⁴⁸ The High Court's most recent pronouncement on indirect discrimination further illustrates the Court's uneasiness with the role of mediating public values and engaging in real debates about human rights.

In the case of *Amery*,⁴⁹ the Court was asked to determine whether the payment of casual teachers at a rate lower than permanently engaged teachers, regardless of experience and competence, constituted indirect sex discrimination under the *Anti-Discrimination Act 1977* (NSW) because it impacted disproportionately on female teachers who were not able to comply with the permanency requirement (as it required consent to be posted to any school in the State). The pay rates had been set by an industrial tribunal and later a collective agreement, but both of these instruments set minimum rather than real pay rates and compliance with such instruments was no longer an explicit defence to discrimination. It became an implicit defence, however, with the Court refusing to enter into the industrial arena to scrutinise the appropriateness or reasonableness of the rates of pay. Rather than assess the 'reasonableness' of the different pay structures for casuals and permanents—an exercise that would have led the Court into unfamiliar territory traditionally left to industrial relations tribunals—the Court avoided the substantive issue by focusing on a technical question of whether the respondent had imposed a 'requirement or condition'. Ultimately, it held that there was no permanency requirement imposed on 'teachers'; there were separate categories of teachers—casuals and permanents—and, since the applicants were engaged as casuals, permanency was simply not relevant.⁵⁰ In doing so, the Court ignored or sidestepped well-established precedents in which these terms had been widely interpreted, generally shifting the focus onto the issue of reasonableness. Even the *SDA* definition—which is more advantageous for claimants because the respondent bears the onus in respect of reasonableness—would not have helped here because the court entirely avoided the question of reasonableness. This case is a clear example of how the separation of discrimination laws and industrial relations laws, discussed by

48 Note reforms for the *SDA* and the *ADA* and recent changes to the *DDA*.

49 *Amery* [2006] HCA 14.

50 *Ibid.* [71]–[82] per Gummow, Hayne and Crennan JJ (with whom Gleeson CJ and Callinan J concurred on orders).

Sara Charlesworth in her contribution, has made it difficult to challenge the gender equality dimension of employment practices and classifications, such as ‘casual’.

These precedents make discrimination litigation even more complex and significantly limit the progressive potential of Australian anti-discrimination laws, including the *SDA*. The *Purvis* precedent serves to narrow the scope of direct discrimination to the limited cases of prejudice and assumption, requiring applicants who wish to challenge the standard itself rather than merely its application to argue an indirect discrimination claim. The *Amery* precedent makes clear that even under the indirect discrimination provisions, the courts are unwilling to engage in the analysis required to assess the reasonableness of a standard that has been proven to impact disproportionately.

Was the Court hamstrung by the closed-model legislation and the poor definitions it had to work with? Clearly, it was constrained; the absence of a general obligation to provide reasonable accommodation for the protected classes and the absence of any burden-shifting mechanism left the applicants in both the *Purvis* and the *Amery* cases with an onerous burden. The majority judges in *Purvis* were able to conclude that the absence of an obligation to provide reasonable accommodation in the Australian *Disability Discrimination Act 1992* meant the Act was focused on equality of treatment rather than substantive equality—justifying the narrow approach taken. This narrow approach had previously been taken by the Federal Court in respect of the *SDA*⁵¹ and was, in effect, affirmed by *Purvis*.

In both the *Purvis* and the *Amery* case, however, dissenting judges⁵² illustrated that alternative, progressive interpretations were available, drawing support from the objects clauses,⁵³ legislative direction to take a purposive approach to interpretation,⁵⁴ academic scholarship,⁵⁵ domestic jurisprudence and the legislation’s international law underpinnings.⁵⁶ In doing so, however, Kirby J demonstrated once again that his view of the judicial role is significantly different and wider than the views of many of his judicial peers.

In taking a conservative line, the Court has in the past decade denied or obscured the limited discretion it has been granted, (mis)characterising its position as merely performing statutory interpretation and fulfilling parliamentary intent.⁵⁷

51 *Thomson v Orica Australia Pty Ltd*, [2002] FCA 939.

52 Kirby J, joined in *Purvis* (2003) 217 CLR 92 by McHugh J.

53 McHugh and Kirby JJ, *Purvis* (2003) 217 CLR 92 [44].

54 *Acts Interpretation Act 1901* (Cth).

55 For example: McHugh and Kirby JJ, *Purvis* (2003) 217 CLR 92 [17], [44], [67] fn21; fnn 33, 39.

56 For example: *ibid.* [44].

57 Margaret Thornton, ‘Disabling Discrimination Legislation: The High Court and Judicial Activism’ (2009) 15 *Australian Journal of Human Rights* 1.

It has necessarily still made value judgments in adjudication, but conservative choices are less apparently value judgments because of the inherent invisibility of dominant norms.⁵⁸

Lessons for Australia?

From an Australian perspective, the *Meiorin* definition adopted by Canada provides ideas that should be considered. It has at least four advantages over the Australian legal tests of direct and indirect discrimination, outlined above. First, it starts from a goal of substantive equality and this is reflected in the requirement to provide reasonable accommodation not merely the same treatment, which elicits only formal equality. Second, the onus in litigation for establishing that reasonable accommodation has been provided is on the potential discriminator, reflecting and reinforcing a more public and collective responsibility for promoting equality. Third, the *Meiorin* development sees the bifurcated test of direct and indirect discrimination abandoned for a unified test, thereby eliminating the need to spend resources arguing over an artificial distinction. Finally, the definition of discrimination and the embedded obligation to provide reasonable accommodation have both substantive and procedural components, requiring employers for instance to examine their selection criteria and investigate less exclusionary alternatives.⁵⁹ The test ensures that the criteria used to select (and exclude) employees or applicants are subjected to some assessment of legitimacy in light of the goals of equality laws. Importantly, the Canadian test also allows for an assessment of the reasonableness of the means by which an employer seeks to achieve its goals and into this is built a limited obligation on employers to accommodate difference or make reasonable adjustments to the extent of undue hardship.

Meiorin might not be ‘the’ answer, but it does have these advantages over the Australian rules. It is arguable that it emerged in the Canadian jurisprudence as an evolutionary step—possible only because the courts were given wide discretion (and litigants were given correspondingly wide scope for creative arguments about the meaning of equality and discrimination). The Supreme Court of Canada—at least in the past 20 or so years—has been prepared to engage publicly in the hard question of defining discrimination and developing legal rules that promote substantive equality.

Australian anti-discrimination law jurisprudence indicates that limiting the judicial role can simply lead to unmanageable complexity as judges, faced with

58 Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law*, Cornell University Press, Ithaca, NY, 1990.

59 Sheppard, ‘Of Forest Fires and Systemic Discrimination’.

facts that pose real questions of normative ambiguity, are permitted and even encouraged to perform legal contortions to answer the question rather than given scope to develop appropriate principles and mechanisms for promoting problem solving. By issuing conservative and technical interpretations of anti-discrimination statutes, the courts have reinforced a simplistic formal conception of equality, which requires little of institutions and those who currently benefit from dominant norms and leaves those who are marginalised to conform or carry the burden of social change.⁶⁰

In exploring legal reforms of the *SDA*, I suggest that we need to consider changing not merely the legislative prescription but also the prescriptiveness of the model and thereby the role of the judiciary. Rewriting the definitions without taking a look at the bigger picture of what role judges could (and should?) play might help to update the test but leaves a regulatory framework that is still ill equipped to evolve over time.

Bibliography

Books and articles

Brooks, Kim (ed.), *Justice Bertha Wilson: One Woman's Difference*, UBC Press, Vancouver, 2009.

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

Faraday, Fay, Denike, Margaret and Stephenson, M. Kate (eds), *Making Equality Rights Real: Securing Substantive Equality under the Charter*, Irwin Law, Toronto, 2006.

Fudge, Judy and Lessard, Hester, *Challenging Norms and Creating Precedents: The Tale of a Woman Firefighter in the Forests of British Columbia*, Unpublished ms, University of Victoria, British Columbia, 2009.

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

Heringa, Aalt, 'Standards of Review for Discrimination: The Scope of Review by the Courts' in Titia Loenen and Peter Rodrigues (eds), *Non-Discrimination Law: Comparative Perspectives*, Kluwer Law, The Hague, 1999.

60 Margaret Thornton, 'Sex Discrimination, Courts and Corporate Power' (2008) 36 *Federal Law Review* 31.

- Hunter, Rosemary, 'Introduction: Feminism and Equality' in Rosemary Hunter (ed.), *Rethinking Equality Projects in Law: Feminist challenges*, Hart Publishing, Portland, Ore., 2008.
- Kirby, Michael, 'Julius Stone and the High Court of Australia' (1997) 20 *University of New South Wales Law Journal* 239.
- Kirby, Michael, *Judicial Activism: Authority, Principle and Policy in the Judicial Method*, Hamlyn Lecture Series, Sweet & Maxwell, London, 2004.
- L'Heureux-Dubé, Claire, 'Conversations on Equality' (1999) 26 *Manitoba Law Journal* 27.
- L'Heureux-Dubé, Claire, 'Preface' in Fay Faraday, Margaret Denike and M. Kate Stephenson (eds), *Making Equality Rights Real: Securing Substantive Equality under the Charter*, Irwin Law, Toronto, 2006.
- McIntyre, Sheila and Rodgers, Sandra (eds), *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms*, LexisNexis, Markham, Ontario, 2006.
- McLachlin, Beverley, 'Equality: The Most Difficult Right' (2001) 14 *Supreme Court Law Review* (2d) 17.
- Minow, Martha, *Making All the Difference: Inclusion, Exclusion, and American Law*, Cornell University Press, Ithaca, NY, 1990.
- Sheppard, Colleen, 'Of Forest Fires and Systemic Discrimination: A Review of *British Columbia (Public Service Employee Relations Commission) v BCGSEU*' (2001) 46 *McGill Law Journal* 533.
- Smith, Belinda, 'A Regulatory Analysis of the *Sex Discrimination Act 1984* (Cth): Can it Effect Equality or only Redress Harm?' in Christopher Arup, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell and Anthony O'Donnell (eds), *Labour Law and Labour Market Regulation*, Federation Press, Sydney, 2006.
- Smith, Belinda, 'From Wardley to Purvis— How Far has Australian Anti-Discrimination Law Come in 30 Years?' (2008) 21 *Australian Journal of Labour Law* 3.
- Stone, Julius, *Social Dimensions of Law and Justice*, Maitland Publications, Sydney, 1966.
- Sturm, Susan, 'Second Generation Employment Discrimination: A Structural Approach' (2001) 101 *Columbia Law Review* 458.

Thornton, Margaret, 'Sex Discrimination, Courts and Corporate Power' (2008) 36 *Federal Law Review* 31.

Thornton, Margaret, 'Disabling Discrimination Legislation: The High Court and Judicial Activism' (2009) 15 *Australian Journal of Human Rights* 1.

Williams, George, 'High Court Appointments: The Need for Reform' (2008) 30 *Sydney Law Review* 16.

Legislation

Age Discrimination Act 2004 (Cth)

Acts Interpretation Act 1901 (Cth)

Canadian Bill of Rights, SC 1960

Canadian Charter of Rights and Freedoms, Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (UK), 1982, c 11

Disability Discrimination Amendment (Education Standards) Act 2005 (Cth)

Disability Discrimination Act 1992 (Cth)

Human Rights Code, RSBC 1996, c 210

Racial Discrimination Act 1975 (Cth)

Sex Discrimination Act 1984 (Cth)

Cases

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

Griggs v Duke Power Co 401 US 424 (1971)

IW v City of Perth (1997) 191 CLR 1

Mabo v Queensland (No. 1) (1989) 166 CLR 186

Mabo v Queensland (No. 2) (1992) 175 CLR 1

New South Wales Department of Education v Amery (2006) 226 ALR 196

Ontario Human Rights Commission and O'Malley v Simpsons-Sears Ltd [1985] 2 SCR 536

Purvis v New South Wales (Dept of Education and Training) (2003) 217 CLR 92

R. v Kapp 2008 SCC 41

Thomson v Orica Australia Pty Ltd [2002] FCA 939

Report

Commonwealth of Australia, *National Human Rights Consultation Report*,
Attorney-General's Department, Canberra, 2009 [*Brennan Report*].