

# EQUALITY RIGHTS AS HUMAN RIGHTS: REFRAMING DISCRIMINATION LAW TO ADVANCE EQUALITY?

ALYSIA BLACKHAM\*

*Equality rights can be positioned as human rights, in dedicated discrimination statutes, or as a part of employment law. This article interrogates whether this positioning makes a difference to equality rights in practice, drawing on comparative examination of legislation and case law from Australia and the United Kingdom. It represents the first detailed study of equality rights in human rights statutes in Australia. It concludes that the positioning of equality law can make a difference, though the potential benefits of reframing equality rights as human rights have not yet been fully realised in Australian jurisdictions.*

## I INTRODUCTION

Equality rights can be positioned as human rights, in dedicated discrimination statutes, or as a part of employment law. Equality law therefore sits in a liminal space at the boundaries of employment law and public law. In some jurisdictions, equality law is framed as being largely a creature of employment law, given its primary enforcement via labour courts and tribunals, and enactment in industrial statutes. In these jurisdictions, equality law might be perceived as a form of private law, akin to tort law, and primarily concerning the rights of private parties.<sup>1</sup> In other jurisdictions, though, equality law is positioned as being part of constitutional and human rights law, embedded in national constitutions, or part of human rights statutes. This is reflected, for example, in the growth of human rights instruments that include prohibitions of discrimination, such as the *International Covenant on Civil and Political Rights* ('ICCPR'), the *European Convention on Human Rights* ('Convention'), the *Charter of Fundamental Rights of the European Union* and, in Australia, statutes like the *Charter of Human Rights and*

---

\* Professor, Melbourne Law School, the University of Melbourne; alysia.blackham@unimelb.edu.au. I am grateful to participants at the ICON-S AUS-NZ Chapter Conference 2024 for comments on an earlier version of this article.

<sup>1</sup> See, eg, Sophia Moreau, 'Discrimination as Negligence' (2010) 40(supp 1) *Canadian Journal of Philosophy* 123; Sophia Moreau, *Faces of Inequality: A Theory of Wrongful Discrimination* (Oxford University Press, 2020) ('*Faces of Inequality*').

*Responsibilities Act 2006* (Vic) ('Charter').<sup>2</sup> Some jurisdictions sit at the intersection of these two approaches, with equality law having both employment and public law facets. Scholars and practitioners are divided as to whether this positioning makes a practical difference. Are those impacted by discrimination more likely to enforce their rights to equality, if the rights are seen as human rights, with broader significance?<sup>3</sup> Conversely, are employers more likely to comply with equality law, if it is seen as a species of employment law?<sup>4</sup>

This article considers what difference, if any, the positioning and framing of equality law makes in practice. It evaluates the possibilities and implications of (re)framing equality rights as human rights for the enforcement and effectiveness of equality law. The article provides the first detailed examination of equality rights in human rights statutes in Australia. This discussion is particularly pertinent given the Australian Human Rights Commission ('AHRC')'s and Parliamentary Joint Committee on Human Rights's renewed call to adopt a statutory human rights Act in Australia.<sup>5</sup>

Drawing on a comparative doctrinal case study of equality rights in Australia and the United Kingdom ('UK'), and comparing case law handed down in each jurisdiction, this article considers how the positioning and positionality of equality law affects the development and enforcement of equality rights. The UK is a particularly illuminating comparator for Australia in the context of equality rights: while both countries have a common legal tradition, and dedicated discrimination statutes, differences emerge in the protection of human rights. In Australia, human rights are protected by legislation in some jurisdictions; in the UK, statutory human rights law has the backing of the Convention. These differences in approach increase the potential for mutual learning,<sup>6</sup> reflecting a problem-solving or sociological approach to comparative analysis.<sup>7</sup> There is an underlying tension, though, in adopting a doctrinal method in this study, with its focus on court and tribunal decisions. Arguably, a focus on individual claims and cases undermines the de-personalisation that might be achieved by reframing equality rights as human rights (see Part II). Further, there is an argument that cases that

<sup>2</sup> Respectively, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953); *Charter of Fundamental Rights of the European Union* [2016] OJ C 202/393; *Charter of Human Rights and Responsibilities Act 2006* (Vic).

<sup>3</sup> See, eg, the discussion below of Alysia Blackham, *Reforming Age Discrimination Law: Beyond Individual Enforcement* (Oxford University Press, 2022) ('*Reforming Age Discrimination Law*').

<sup>4</sup> See, eg, the discussion below of Beth Gaze and Anna Chapman, 'The Human Right to Non-Discrimination as a Legitimate Part of Workplace Law: Towards Substantive Equality at Work in Australia?' (2013) 29(4) *International Journal of Comparative Labour Law and Industrial Relations* 355.

<sup>5</sup> This is considered in more detail in Part IV.

<sup>6</sup> Dagmar Schiek, 'Enforcing (EU) Non-Discrimination Law: Mutual Learning between British and Italian Labour Law?' (2012) 28(4) *International Journal of Comparative Labour Law and Industrial Relations* 489, 508.

<sup>7</sup> Esin Örüçü, 'Developing Comparative Law' in Esin Örüçü and David Nelken (eds), *Comparative Law: A Handbook* (Hart Publishing, 2007) 43, 52.

proceed to the courts and tribunals represent a failure to negotiate and resolve issues early. However, given case law represents a public record of how equality rights are adjudicated and applied, this focus on case law and judicial decisions represents a key entry point to examine the framing of equality law and its impact.

In Part II, I explore the potential benefits and drawbacks of framing equality rights as human rights, drawing on existing literature. In Part III, I position this discussion in relation to international human rights instruments, and how they articulate and protect equality rights. In Part IV, I explore the statutory human rights protections in place in selected Australian states and territories, and the way these instruments have influenced the legal development of equality rights, before turning to the UK in Part V. My focus in these parts is particularly (though not exclusively) on cases relating to work, as these cases best illustrate the different and multiple positionings that equality law might take (as employment rights, discrimination rights, and/or human rights). Part VI draws these comparative threads together, and Part VII concludes my analysis.

I argue that the framing of equality rights as human rights has the potential to enhance the process and reasoning in the adjudication of equality rights. While the framing of equality rights as human rights has not yet led to different judicial outcomes in Australia, it has affected the outcomes of claims in other jurisdictions. This article therefore offers new evidence of the importance of embedding equality rights as human rights in Australia, including through reform at the federal level.

## II FRAMING EQUALITY RIGHTS AS HUMAN RIGHTS

While the rationale of equality law is contested,<sup>8</sup> it is often grounded (at least, in part) in respecting and advancing human rights.<sup>9</sup> Human rights goals of equality law recognise the inherent equal worth and dignity of all people, irrespective of their protected characteristics.<sup>10</sup> A human rights approach would likely emphasise the broadest possible legislative protection from discrimination.<sup>11</sup> In practice, though, the legislative framework of equality law tends to be far more confined, including due to

---

<sup>8</sup> See, eg, Hugh Collins, 'Discrimination, Equality and Social Inclusion' (2003) 66(1) *Modern Law Review* 16; Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press, 2015); Moreau, *Faces of Inequality* (n 1); Sandra Fredman, *Discrimination Law* (Oxford University Press, 3<sup>rd</sup> ed, 2022); Blackham, *Reforming Age Discrimination Law* (n 3); Alice Taylor, *Interpreting Discrimination Law Creatively: Statutory Discrimination Law in the UK, Canada and Australia* (Hart Publishing, 2023) ('*Interpreting Discrimination Law Creatively*').

<sup>9</sup> See, eg, Simonetta Manfredi and Lucy Vickers, 'Retirement and Age Discrimination: Managing Retirement in Higher Education' (2009) 38(4) *Industrial Law Journal* 343, 344–5; Malcolm Sargeant, 'For Diversity, Against Discrimination: The Contradictory Approach to Age Discrimination in Employment' (2005) 21(4) *International Journal of Comparative Labour Law and Industrial Relations* 629 ('For Diversity'); Malcolm Sargeant, 'Distinguishing between Justifiable Treatment and Prohibited Discrimination in Respect of Age' [2013] (4) *Journal of Business Law* 398, 399.

<sup>10</sup> Sargeant, 'For Diversity' (n 9) 631.

<sup>11</sup> Blackham, *Reforming Age Discrimination Law* (n 3) 53.

extensive exceptions to the idea of ‘equality’ and the prohibition of discrimination.<sup>12</sup> Sandra Fredman argues, then, that equality law is primarily driven by economic considerations, not the intrinsic or human rights aims of discrimination law;<sup>13</sup> and Linda Dickens posits that human rights objectives are only pursued in equality law to the extent they are consistent with efficiency or economic ends.<sup>14</sup>

Prioritising human rights, and reframing equality rights as human rights, might therefore lead to a very different approach to equality law. Existing studies posit that reframing equality rights, to better emphasise their grounding in human rights, might offer three key benefits. First, it emphasises the public nature of inequality and discrimination, and the recognition of equality as a public good.<sup>15</sup> As I have argued elsewhere, reframing equality rights as human rights might enable a more holistic understanding of equality and discrimination, beyond a siloed view based on individual protected grounds, and therefore is better able to accommodate ideas of intersectionality in discrimination law.<sup>16</sup> This perspective offers a more authentic way of viewing discrimination, and can accommodate considerations of socio-economic inequality, which is often excluded as a protected ground from discrimination law.<sup>17</sup>

Second, in relation to enforcement, in a previous study of age discrimination law, I found that reframing equality rights as human rights might support the better enforcement of age discrimination law.<sup>18</sup> In particular, individuals who experienced age discrimination at work were unlikely to make a complaint, including for fear of stigma and being seen as a ‘complainer’. Reframing equality rights as human rights might encourage individuals to make better use of legal processes, as those impacted by discrimination might see their experiences and the advancement of equality as having a broader significance.<sup>19</sup> As mentioned elsewhere, ‘complaints are [then] cast as positive assertions of rights for the greater good, with broader significance’; this may motivate individuals to use legal processes.<sup>20</sup>

Third, adopting human rights instruments could have broader benefits for discrimination law. For example, Belinda Smith argues that Canadian discrimination law’s grounding in human rights law influences how

<sup>12</sup> Alysia Blackham, ‘A Compromised Balance? A Comparative Examination of Exceptions to Age Discrimination Law in Australia and the UK’ (2018) 41(3) *Melbourne University Law Review* 1085, 1118–19.

<sup>13</sup> Sandra Fredman, *Discrimination Law* (Oxford University Press, 2<sup>nd</sup> ed, 2011) 103–4, 106.

<sup>14</sup> Linda Dickens, ‘The Road Is Long: Thirty Years of Equality Legislation in Britain’ (2007) 45(3) *British Journal of Industrial Relations* 463, 468–71.

<sup>15</sup> Blackham, *Reforming Age Discrimination Law* (n 3) 246.

<sup>16</sup> *Ibid*; Alysia Blackham and Jeromey Temple, ‘Intersectional Discrimination in Australia: An Empirical Critique of the Legal Framework’ (2020) 43(3) *University of New South Wales Law Journal* 773.

<sup>17</sup> Blackham, *Reforming Age Discrimination Law* (n 3) 246; Margaret Thornton, ‘Social Status: The Last Bastion of Discrimination’ [2018] (1) *Anti Discrimination Law Review* 5.

<sup>18</sup> Blackham, *Reforming Age Discrimination Law* (n 3) 246.

<sup>19</sup> *Ibid*.

<sup>20</sup> *Ibid*.

discrimination law is interpreted:<sup>21</sup> for Smith, the open-textured nature of Canadian discrimination law has led to a more purposive and sophisticated approach to judicial interpretation than in Australia.<sup>22</sup> Similarly, Alice Taylor argues that courts with an established role in human rights review (like those in Canada) are more likely to adopt a creative approach to the interpretation of discrimination law.<sup>23</sup> Taylor sees a creative interpretation as one which applies a substantive, pluralist and multidimensional view of equality. This is a more active, expansive and normative approach to statutory interpretation than purposive interpretation, and focuses on the values underlying discrimination law.<sup>24</sup> For Taylor, a creative approach to interpretation is necessary for discrimination laws to be effective.<sup>25</sup> Thus, building on Taylor's work, I posit that adopting a national human rights act for Australia might 'prompt a shift in how courts approach their judicial role', including in relation to statutory interpretation.<sup>26</sup> Overall, then, reframing equality rights as human rights might lead to three important shifts in our understanding of equality law: to emphasise a public and holistic understanding of inequality, to prompt the better enforcement of equality rights, and to support a more nuanced judicial interpretation of equality rights.

For some authors, though, discrimination law in Australia is already framed in terms of human rights. For example, Taylor sees discrimination law statutes in Australia, the UK and Canada as quasi-constitutional,<sup>27</sup> making discrimination law both public *and* private law.<sup>28</sup> However, only Canada has used this quasi-constitutional status to justify a creative interpretation of discrimination law.<sup>29</sup> Similarly, Beth Gaze and Anna Chapman see Australia's equality statutes as human rights statutes (as opposed to labour law statutes),<sup>30</sup> at the federal level, grounded in international obligations and the external affairs power.<sup>31</sup> For Gaze and Chapman, this may undermine the protections afforded by discrimination law. Until the adverse action provisions were introduced into the *Fair Work Act*

---

<sup>21</sup> Belinda Smith, 'Rethinking the *Sex Discrimination Act*: Does Canada's Experience Suggest We Should Give Our Judges a Greater Role?' in Margaret Thornton (ed), *Sex Discrimination in Uncertain Times* (ANU E Press, 2010) 235, 246.

<sup>22</sup> *Ibid* 255–6.

<sup>23</sup> Taylor, *Interpreting Discrimination Law Creatively* (n 8) 8, 153.

<sup>24</sup> *Ibid* 9, 10, 27, 32.

<sup>25</sup> *Ibid* 2, 9.

<sup>26</sup> Alysia Blackham, 'Book Review: *Interpreting Discrimination Law Creatively: Statutory Discrimination Law in the UK, Canada and Australia* by Alice Taylor' (2024) 46(2) *Sydney Law Review* 261, 264 ('*Interpreting Discrimination Law Creatively*').

<sup>27</sup> Taylor, *Interpreting Discrimination Law Creatively* (n 8) 153, 166; see also Vanessa MacDonnell, 'A Theory of Quasi-Constitutional Legislation' (2016) 53(2) *Osgoode Hall Law Journal* 508. MacDonnell sees 'quasi-constitutional legislation as implementing constitutional imperatives', including in relation to the conferral of rights: at 511.

<sup>28</sup> Taylor, *Interpreting Discrimination Law Creatively* (n 8) 152, 188.

<sup>29</sup> *Ibid* 152, 157.

<sup>30</sup> Gaze and Chapman (n 4) 355–6, 358.

<sup>31</sup> *Ibid* 358.

2009 (Cth), Gaze and Chapman argued that ‘employment discrimination has been treated as a human rights matter and not as a legitimate and important matter for workplace law.’<sup>32</sup> The authors see this historical positioning — ‘as a poor relation of employment law’ — as inhibiting the effectiveness and legitimacy of discrimination law: ‘where the industrial relations system regards employment discrimination as something outside its sphere, it is more difficult to combat workplace discrimination, and protection for workers vulnerable to discrimination is reduced.’<sup>33</sup> For Gaze and Chapman, framing equality rights as human rights serves to weaken and marginalise discrimination law. There is a live question, then, of whether framing and positioning equality rights as human rights is likely to be desirable and beneficial, or perhaps even harmful, to the advancement of equality.

In the UK, by contrast, scholarship is increasingly emphasising the role human rights can and should play in advancing labour law.<sup>34</sup> As Philippa Collins argues, ‘Human rights possess a special normative weight in debates, both political and legal. ... The context of work is too central to our lives to allow it to be untouched by a concern for the human rights of workers.’<sup>35</sup> For Collins, a focus on human rights in the workplace resists the commoditisation of labour and reaffirms workers’ dignity.<sup>36</sup> Human rights generally might therefore strengthen and provide moral force to labour law,<sup>37</sup> especially when seen as complimentary to and pluralistic with the other aims of labour law.<sup>38</sup> The same, perhaps, could also be said of framing equality rights as human rights.

### III EQUALITY RIGHTS AS HUMAN RIGHTS IN INTERNATIONAL LAW

Equality as a human right is embedded in international human rights law. In many instruments, equality is protected as both an inherent right in itself, as well as an enabling right for other human rights. The ICCPR, for example, includes an enabling equality right in article 2(1), which operates in relation to other ICCPR rights:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex,

---

<sup>32</sup> Ibid 356.

<sup>33</sup> Ibid.

<sup>34</sup> See, eg, Colin F Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing, 2010); Philippa M Collins, *Putting Human Rights to Work: Labour Law, the ECHR, and the Employment Relation* (Oxford University Press, 2022).

<sup>35</sup> Collins (n 34) 4.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid 35.

<sup>38</sup> Ibid 47.

language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>39</sup>

Article 26 further creates an independent right to effective protection against discrimination. It provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>40</sup>

The Office of the High Commissioner for Human Rights has commented:

Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.<sup>41</sup>

The Human Rights Committee's view is that article 26 'provides in itself an autonomous right' which is not limited to Covenant rights.<sup>42</sup>

Non-discrimination is also an obligation in the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR'),<sup>43</sup> both in relation to Covenant rights, and more broadly. In relation to Covenant rights, article 2(2) says:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>44</sup>

Further, the ICESCR explicitly requires Covenant rights to be protected equally for men and women. Article 3 says:

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

The ICESCR also creates substantive rights to non-discrimination and equal opportunity in the context of work in relation to pay and progression.<sup>45</sup> These rights to non-discrimination are further developed in the *International Convention on the Elimination of All Forms of Racial Discrimination*,<sup>46</sup> the *Convention on the*

<sup>39</sup> *International Covenant on Civil and Political Rights* (n 2) art 2(1).

<sup>40</sup> *Ibid* art 26.

<sup>41</sup> Human Rights Committee, *General Comment No 18: Non-Discrimination*, 37<sup>th</sup> session (10 November 1989) [1].

<sup>42</sup> *Ibid* [12].

<sup>43</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

<sup>44</sup> *Ibid* art 2(2).

<sup>45</sup> *Ibid* art 7.

<sup>46</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

*Elimination of All Forms of Discrimination against Women*,<sup>47</sup> and the *Convention on the Rights of Persons with Disabilities*.<sup>48</sup> These Conventions form one basis for statutory discrimination law at the federal level in Australia.<sup>49</sup> The elimination of discrimination in employment is also a fundamental International Labour Organization ('ILO') right at work.

Protection from discrimination is therefore a well-developed right in international instruments; some instruments also create rights to equality. For Fredman, 'equality' is best viewed as a multidimensional principle of substantive equality, which encompasses redressing disadvantage (the redistributive dimension), addressing stigma, stereotyping, prejudice and violence (the recognition dimension), facilitating participation, inclusion and voice (the participative dimension), and accommodating difference and structural change (the transformative dimension).<sup>50</sup> Dominique Allen and others therefore distinguish 'legal equality' — which recognises that not all are equal before the law, all are entitled to equal protection of the law, and positive measures might need to be taken to achieve substantive equality — from 'non-discrimination', which involves a decision not being made based on an irrelevant attribute.<sup>51</sup>

#### IV HUMAN RIGHTS AND EQUALITY: AUSTRALIA

Australia has limited legislative protection of human rights at the federal level, with no human rights statute or legislated Bill of Rights. There is also minimal protection of human rights in the *Australian Constitution*. The key form of protection for human rights at the federal level arises from the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), which establishes the Parliamentary Joint Committee on Human Rights to examine Bills, legislative instruments and Acts for compatibility with human rights, and to report to Parliament.<sup>52</sup> The Act also requires statements of compatibility to be presented with new Bills and legislative instruments, assessing whether they are compatible with human rights.<sup>53</sup>

---

<sup>47</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

<sup>48</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

<sup>49</sup> See, eg, *Disability Discrimination Act 1992* (Cth); *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth).

<sup>50</sup> Fredman (n 8) 29–44.

<sup>51</sup> Dominique Allen, Janina Boughey and Dan Meagher, 'A Case for Recognising Non-Discrimination as a Fundamental Right at Common Law' (2023) 46(3) *University of New South Wales Law Journal* 902, 905–6, 907, citing *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 461, 478 (Gaudron and McHugh JJ).

<sup>52</sup> *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 7.

<sup>53</sup> *Ibid* ss 8, 9.

The AHRC has called for the enactment of a federal human rights Act,<sup>54</sup> including rights to recognition and equality before the law, and freedom from discrimination.<sup>55</sup> The AHRC's proposed Act would reflect a legislative dialogue model, focusing on interaction between the executive, legislature, and judiciary.<sup>56</sup> It would not involve constitutional protection of human rights, reflecting a degree of pragmatism regarding the difficulties of constitutional change under s 128 of the *Australian Constitution*, and a desire to maintain parliamentary supremacy.<sup>57</sup> As the AHRC summarises, 'a legislative model is the most pragmatic and compatible model with Australia's government structure and political norms. ... [T]he passage of a legislative model does not exclude the entrenchment of those rights in the *Australian Constitution* at a future date'.<sup>58</sup>

A federal human rights statute was further endorsed by the Parliamentary Joint Committee on Human Rights's *Inquiry into Australia's Human Rights Framework*,<sup>59</sup> which recommended the adoption of a statutory human rights act, including equality rights,<sup>60</sup> enforceable via stand-alone complaints, with conciliation at the AHRC, and direct claims to the federal courts, with remedies including damages.<sup>61</sup> The Committee's illustrative Human Rights Bill 2024 would define 'discrimination' by reference to the grounds protected in existing federal discrimination laws and the *Fair Work Act 2009* (Cth), though the Committee notes that further consideration should be given to the definition of 'discrimination' to ensure it captures all relevant grounds. Allen and others have further argued that the common law should also recognise non-discrimination as a fundamental right.<sup>62</sup> However, the authors note that this would likely play a 'supporting' role to legislation.<sup>63</sup>

Human rights legislation is already in place in Victoria,<sup>64</sup> Queensland,<sup>65</sup> and the Australian Capital Territory ('ACT').<sup>66</sup> All three statutes reflect a dialogue model across the three 'arms' of government,<sup>67</sup> seeking to embed human rights

---

<sup>54</sup> Australian Human Rights Commission, *Free and Equal: A National Human Rights Act for Australia* (Position Paper, December 2022).

<sup>55</sup> *Ibid* 17.

<sup>56</sup> *Ibid* 16.

<sup>57</sup> *Ibid* 70–1.

<sup>58</sup> *Ibid* 102.

<sup>59</sup> Parliamentary Joint Committee on Human Rights, *Inquiry into Australia's Human Rights Framework* (Report, May 2024).

<sup>60</sup> *Ibid* 300–1. See the Report's illustrative Human Rights Bill 2024 s 15: at 415–56.

<sup>61</sup> *Ibid* 309–10.

<sup>62</sup> Allen, Boughey and Meagher (n 51).

<sup>63</sup> *Ibid* 912.

<sup>64</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic).

<sup>65</sup> *Human Rights Act 2019* (Qld).

<sup>66</sup> *Human Rights Act 2004* (ACT).

<sup>67</sup> See also Tamara Walsh and Dominique Allen, 'Twenty Years of Human Rights Protection in the Australian Capital Territory: What Have We Learned?' (2024) 47(2) *University of New South Wales Law Journal* 391, 395.

in the development and scrutiny of legislation,<sup>68</sup> the way courts interpret legislation,<sup>69</sup> and the decisions and actions of public authorities.<sup>70</sup> While the human rights statutes in the ACT, Queensland and Victoria have close similarities, reflecting both international law and mutual learning across jurisdictions, there is also evidence of diversity and experimentation in these statutes.<sup>71</sup> First, in relation to the scope of protection, in the Victorian *Charter* the understanding of ‘discrimination’ is closely tied to that in discrimination law,<sup>72</sup> whereas in the ACT and Queensland the scope of the protection could be broader than that under discrimination law,<sup>73</sup> including by opening up protection for new protected grounds or characteristics. Second, in relation to enforcement, in the ACT, claimants have direct access to the Supreme Court to challenge breaches of human rights by public entities.<sup>74</sup> By contrast, in both Queensland and Victoria, ‘piggyback’ provisions are in place, requiring claimants to have another claim (for example, under equality law) before their human rights claim can proceed to the courts or a tribunal.<sup>75</sup> In Queensland and the ACT, breaches of human rights can be resolved via conciliation, but claims must first be raised with the entity involved before making a claim elsewhere.<sup>76</sup> This may support the early and better resolution of issues. Conversely, it might deter individuals from escalating enforcement further. These points, and their statutory basis, are developed in more detail in the sections to follow.

Tamara Walsh and Dominique Allen’s empirical investigation of the *Human Rights Act 2004* (ACT), drawing on interviews with lawyers and public servants, found the Act has had the greatest impact in influencing the executive’s decision-making process, including in drafting laws and policies, and in enabling the early resolution of disputes.<sup>77</sup> This echoes Helen Watchirs and Gabrielle McKinnon’s

---

<sup>68</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 28–31; *Human Rights Act 2004* (ACT) ss 37–9; *Human Rights Act 2019* (Qld) ss 38–47.

<sup>69</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 32–37; *Human Rights Act 2004* (ACT) ss 29–36; *Human Rights Act 2019* (Qld) ss 48–57.

<sup>70</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38; *Human Rights Act 2004* (ACT) ss 40–40D; *Human Rights Act 2019* (Qld) ss 58–60.

<sup>71</sup> See further Alysia Blackham, ‘Promoting Innovation or Exacerbating Inequality? Laboratory Federalism and Australian Age Discrimination Law’ (2023) 51(3) *Federal Law Review* 347.

<sup>72</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 3(1).

<sup>73</sup> *Human Rights Act 2004* (ACT); *Human Rights Act 2019* (Qld) sch 1. See the detailed discussion in Alice Taylor, ‘Substantive Equality and the Possibilities of the Queensland *Human Rights Act 2019*’ (2024) 43(1) *University of Queensland Law Journal* 41, 51 (‘Substantive Equality and the Possibilities of the Queensland *Human Rights Act 2019*’).

<sup>74</sup> *Human Rights Act 2004* (ACT) s 40C.

<sup>75</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39; *Human Rights Act 2019* (Qld) s 59. See further the discussion of each jurisdiction below.

<sup>76</sup> *Human Rights Commission Act 2005* (ACT) s 41D; *Human Rights Act 2019* (Qld) ss 65, 77, 79.

<sup>77</sup> Walsh and Allen (n 67) 394.

findings 15 years earlier.<sup>78</sup> These successes are unlikely to be evident in case law: case law likely underrepresents the early resolution and successful conciliation of human rights matters.<sup>79</sup> Case law is therefore only a partial representation of the success or potential of human right statutes in Australia. Indeed, while lawyers in Walsh and Allen's study reported raising human rights to bolster existing claims, they rarely pursued direct claims under the Act.<sup>80</sup> While acknowledging the limits of case law for analysing the impact of human rights statutes, then, in the sections that follow I examine the legislative framework and existing decisions in each jurisdiction, to consider how the framing of equality rights as human rights has influenced the development of equality law.

### A Victoria

In Victoria, the *Charter* is grounded in ideas of equality, diversity, and non-discrimination.<sup>81</sup> The Preamble states:

This Charter is founded on the following principles—

- human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;
- human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community ...

The *Charter* includes non-discrimination rights, both in relation to *Charter* rights themselves and more generally. In relation to *Charter* rights, s 8(2) provides: 'Every person has the right to enjoy their human rights without discrimination.' The *Charter* also includes broader rights to protection from discrimination. In this respect, s 8(3) says: 'Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.' The *Charter* clarifies, too, that '[m]easures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination'.<sup>82</sup>

---

<sup>78</sup> Helen Watchirs and Gabrielle McKinnon, 'Five Years' Experience of the *Human Rights Act 2004* (ACT): Insights for Human Rights Protection in Australia' (2010) 33(1) *University of New South Wales Law Journal* 136, 141.

<sup>79</sup> This is similar to discrimination law generally: see Alysia Blackham and Dominique Allen, 'Resolving Discrimination Claims Outside the Courts: Alternative Dispute Resolution in Australia and the United Kingdom' (2019) 31(3) *Australian Journal of Labour Law* 253.

<sup>80</sup> Walsh and Allen (n 67) 403.

<sup>81</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) Preamble.

<sup>82</sup> *Ibid* s 8(4).

As under the ICCPR, the right to equality in the *Charter* creates an ‘autonomous’ right.<sup>83</sup> As recognised in *Re Lifestyle Communities Ltd [No 3]*<sup>84</sup> by Bell P, article 26 of the ICCPR (and, likewise s 8(3) of the *Charter*)

is an autonomous human right. It operates independently according to its own terms. It is not a mere accessory to other recognised human rights. The right to equality and protection of the law without and against discrimination in s 8(3) of the *Charter* is likewise autonomous. It creates that right substantively and independently, not in terms which are purely protective of the other rights in the *Charter*.<sup>85</sup>

Equality is also embedded in the *Charter* as a consideration when assessing whether limits on rights are justifiable.<sup>86</sup> Non-discrimination is further embedded in the rights of children<sup>87</sup> and rights to participate in public life.<sup>88</sup>

The notion of discrimination in the *Charter* is developed by reference to discrimination law and, in particular, the *Equal Opportunity Act 2010* (Vic). Section 3(1) of the *Charter* defines ‘discrimination’ as ‘discrimination (within the meaning of the *Equal Opportunity Act 2010*) on the basis of an attribute set out in section 6 of that Act’. Thus, the grounds protected by the *Charter* are limited to those in the *Equal Opportunity Act 2010* (Vic).

The *Charter* binds public authorities,<sup>89</sup> including public officials and employees of the public service, councils, Victoria Police, and entities exercising public functions on behalf of the state. Under s 38(1), it is unlawful for a public authority ‘to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right’. However, human rights can be limited: under s 7(2), human rights may be

subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including –

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

<sup>83</sup> *Lifestyle Communities Ltd [No 3] (Anti-Discrimination)* [2009] VCAT 1869, [126].

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2). See the discussion below.

<sup>87</sup> *Ibid* s 17(2).

<sup>88</sup> *Ibid* s 18.

<sup>89</sup> *Ibid* s 4.

The *Charter* further provides in s 32(1) that '[s]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'. In *Momcilovic v The Queen*<sup>90</sup> the High Court considered how s 32(1) of the *Charter* should shape statutory interpretation. The majority of the Court viewed s 32(1) as operating in a similar way to the principle of legality.<sup>91</sup> As French CJ summarised: 'section 32(1) applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application.'<sup>92</sup> For Crennan and Kiefel JJ, 'section 32 does not state a test of construction which differs from the approach ordinarily undertaken by courts towards statutes';<sup>93</sup> instead, 'the process referred to in s 32(1) is clearly one of interpretation in the ordinary way'.<sup>94</sup> This approach to s 32(1) limits and confines its operation, removing its 'normative force'<sup>95</sup> and diluting the protections of the *Charter*.<sup>96</sup>

Individual enforcement of the *Charter* is limited. Under s 39, claims for a breach of the *Charter* by a public authority are limited to a 'piggyback' provision, which enables a *Charter* claim only when attached to some other civil claim. Section 39 provides:

If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.

A *Charter* claim might be 'piggybacked' onto an *Equal Opportunity Act 2010* (Vic) claim. However, damages cannot be awarded for breach of the *Charter*.<sup>97</sup> This may limit the benefit of bringing an additional claim under the *Charter*.

In practice, then, the *Charter* is rarely directly invoked by claimants, but can be relevant, especially to statutory interpretation.<sup>98</sup> In *Slattery v Manningham City Council* ('*Slattery*'),<sup>99</sup> for example, s 32(1) of the *Charter* supported an interpretation of the *Equal Opportunity Act 2010* (Vic) that did not require a

<sup>90</sup> (2011) 245 CLR 1.

<sup>91</sup> *Ibid* 50 [51] (French CJ), 210 [543]–[545], 217 [565]–[566] (Crennan and Kiefel JJ), 250 [684] (Bell J). Cf at 184 [455] (Heydon J).

<sup>92</sup> *Ibid* 50 [51].

<sup>93</sup> *Ibid* 217 [565].

<sup>94</sup> *Ibid* 219 [574].

<sup>95</sup> Bruce Chen, 'The Quiet Demise of Declarations of Inconsistency under the Victorian Charter' (2021) 44(3) *Melbourne University Law Review* 928, 942.

<sup>96</sup> It also has implications for other provisions of the *Charter*: see, eg, the critique in *ibid* 937–8, 941.

<sup>97</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39(3).

<sup>98</sup> *Ibid* s 32(1). Cf *Mulder v Victoria Police* [2020] VCAT 428, where the *Charter* did not change the interpretation of the *Equal Opportunity Act 2010* (Vic).

<sup>99</sup> *Slattery v Manningham City Council* [2013] VCAT 1869 ('*Slattery*').

comparator to establish direct discrimination.<sup>100</sup> In *Slattery*, the Council was found to have breached both the *Charter* and the *Equal Opportunity Act 2010* (Vic).<sup>101</sup>

In *Kuyken v Lay*,<sup>102</sup> which related to the introduction of new grooming standards for Victoria Police, the *Charter* supported an interpretation of the *Equal Opportunity Act 2010* (Vic) that included facial hair as a ‘physical feature’.<sup>103</sup> The Tribunal held that it

should prefer a broad and liberal interpretation of physical features that promotes the objects of the [*Equal Opportunity Act 2010* (Vic)] to one that does not. I also consider this interpretation of physical features to be the interpretation that is most compatible with human rights, particularly the right to equal and effective protection against discrimination, as required by section 32 of the *Charter*.<sup>104</sup>

In that case, though, the proposed disciplinary action was permitted under s 75 of the *Equal Opportunity Act 2010* (Vic), as it was done with statutory authority.<sup>105</sup> Further, the facial hair was not a form of protected expression under the *Charter*, and so the *Charter* was not engaged.<sup>106</sup> The decision was upheld on appeal to the Supreme Court of Victoria;<sup>107</sup> Garde J summarised the relevance of the *Charter* to statutory interpretation as:

- (1) s 32(1) does not permit the adoption of an interpretation that is contrary to the intention of the Parliament when it enacted the legislation;
- (2) s 32(1) does not create a new paradigm of interpretation which requires courts, in the pursuit of human rights compatibility, to depart from the ordinary meaning of the statutory provision and from the intention of Parliament when enacting the statute;
- (3) a statute is constructed against the background of human rights and freedoms set out in the *Charter* in the same way that the principle of legality is applied;
- (4) if the words of a statute are capable of more than one meaning, the court should give them whichever of the meanings best accords with the human rights in question; and
- (5) it is impermissible for a court to attribute a meaning to a provision which is inconsistent with both the grammatical meaning and the apparent purpose of the enactment.<sup>108</sup>

In the Victorian case law to date, there has not yet been a claim where the *Equal Opportunity Act 2010* (Vic) claim failed but the *Charter* claim succeeded.<sup>109</sup> In

<sup>100</sup> Ibid [52]–[53]. This approach was endorsed in *Tsikos v Austin Health* (2022) 314 IR 269, 284–5 [47].

<sup>101</sup> *Slattery* (n 99) [165].

<sup>102</sup> (2013) 240 IR 89.

<sup>103</sup> Ibid 103 [74].

<sup>104</sup> Ibid 102–3 [71] (footnotes omitted).

<sup>105</sup> Ibid 118 [166]–[167].

<sup>106</sup> Ibid 125 [208]–[211].

<sup>107</sup> *Kuyken v Chief Commissioner of Police* (2015) 249 IR 327.

<sup>108</sup> Ibid 351–2 [78] (citations omitted).

<sup>109</sup> See, eg, *Richardson v City of Casey Council (Human Rights)* [2014] VCAT 1294.

*Goode v Common Equity Housing Ltd*,<sup>110</sup> the appeal was allowed for a failure to consider the *Charter* claim when the *Equal Opportunity Act 2010* (Vic) claim failed. However, the *Charter* claim still ultimately failed.<sup>111</sup> Again, in *Rein v Australian Health Practitioner Regulation Agency*<sup>112</sup> the *Charter* claim was reinstated, even if the *Equal Opportunity Act 2010* (Vic) claim ultimately failed due to a statutory exception;<sup>113</sup> s 39(1) is directed to showing some other relief or remedy being available 'at the time the foundation proceeding was commenced'.<sup>114</sup> Again, though, in that case the *Charter* claim (like the *Equal Opportunity Act 2010* (Vic) claim) failed.<sup>115</sup> While the justification process under the *Charter* was different to the focus of s 75 of the *Equal Opportunity Act 2010* (Vic), the end result was the same.<sup>116</sup>

Overall, then, the *Charter's* equality rights may be influencing statutory interpretation, though perhaps not more than the principle of legality. There are not yet instances where a claim based on the *Charter* has led to a different outcome than under the *Equal Opportunity Act 2010* (Vic). The *Charter* right to non-discrimination is often invoked by self-represented claimants,<sup>117</sup> but does not necessarily strengthen the claim. In addition to the limited enforcement mechanisms under the *Charter*, another possible reason for the limited *Charter* case law in Victoria, particularly in the context of employment, is the referral of most industrial relations matters to the federal jurisdiction.<sup>118</sup> As a result, unlike in Queensland, *Charter* case law is not emerging from industrial tribunals in Victoria (compare Part IVC below). Matters relating to the *Equal Opportunity Act 2010* (Vic) remain state matters.<sup>119</sup>

## B ACT

In the ACT, the *Human Rights Act 2004* (ACT) includes a right to recognition and equality before the law. Section 8 says:

(2) Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind.

---

<sup>110</sup> [2014] VSC 585.

<sup>111</sup> *Goode v Common Equity Housing Ltd* [2016] VCAT 93.

<sup>112</sup> [2017] VCAT 452.

<sup>113</sup> *Ibid* [33].

<sup>114</sup> *Ibid*.

<sup>115</sup> *Ibid* [50].

<sup>116</sup> *Ibid*.

<sup>117</sup> See, eg, *Djime v Kearnes* [2015] VCAT 941; *Pham v Clark* [2012] VCAT 801; *Sloan v Victoria* [2021] VCAT 933.

<sup>118</sup> See, eg, *Fair Work (Commonwealth Powers) Act 2009* (Vic).

<sup>119</sup> *Ibid* s 3(1).

(3) Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.

There is no explicit provision for special measures to combat discrimination in the *Human Rights Act 2004* (ACT). Equality and non-discrimination are further embedded in the right to participate in public life,<sup>120</sup> the rights of children,<sup>121</sup> the right to education,<sup>122</sup> and the right to work,<sup>123</sup> but are not embedded as a consideration as to when human rights may be limited.<sup>124</sup>

'Discrimination' is not defined in the *Human Rights Act 2004* (ACT). This may mean that 'discrimination' in the Act is not confined to how that idea is developed under discrimination law. In *Islam v Director-General Justice and Community Safety Directorate [No 3]*,<sup>125</sup> Mossop AsJ opined that

the drafting of s 8(3) is such that the grounds of discrimination are not limited to those identified in the example. Nor are they limited to grounds which might be considered to be socially inappropriate forms of discrimination. A prohibition on 'discrimination on any ground' would, prima facie, prevent discrimination on grounds such as lack of intelligence, laziness, propensity to violence, unpleasantness of personality, lack of personal hygiene or poor grooming, unless such discrimination involved a 'limit set by laws' which were justified under s 28 of the HRAct. While such a result might appear to be an unusual one, it is not obvious how, by orthodox means of interpretation, the terms of s 8(3) could be read down to give them a more confined operation. ... There is no equivalent confinement of the scope of 'discrimination' in the Territory [as in Victoria].<sup>126</sup>

That case involved religion, which is a recognised ground in the *Discrimination Act 1991* (ACT) s 7, meaning 'it [was] not necessary to explore any consequences of the scope of s 8(3) which may be perceived to be anomalous'.<sup>127</sup> However, Mossop AsJ expressed the view that it might be necessary to confine the idea of discrimination in some way.<sup>128</sup>

As in Victoria, the *Human Rights Act 2004* (ACT) creates obligations for public authorities, making it unlawful for public authorities

- (a) to act in a way that is incompatible with a human right; or
- (b) in making a decision, to fail to give proper consideration to a relevant human right.<sup>129</sup>

---

<sup>120</sup> *Human Rights Act 2004* (ACT) s 17(c).

<sup>121</sup> *Ibid* s 11(2).

<sup>122</sup> *Ibid* s 27A(3).

<sup>123</sup> *Ibid* s 27B(5).

<sup>124</sup> *Ibid* s 28.

<sup>125</sup> [2016] ACTSC 27.

<sup>126</sup> *Ibid* [156].

<sup>127</sup> *Ibid*.

<sup>128</sup> *Ibid*.

<sup>129</sup> *Human Rights Act 2004* (ACT) s 40B(1).

Following passage of the *Human Rights (Complaints) Legislation Amendment Act 2023* (ACT), individuals can make a complaint about a human rights breach by a public authority to the ACT Human Rights Commission.<sup>130</sup> As in Queensland (discussed below), the complaint can only generally be made after first approaching the entity, and either not receiving a response within 45 days, or receiving an inadequate response.<sup>131</sup> The Commission may conciliate complaints,<sup>132</sup> or refer complaints to statutory office-holders.<sup>133</sup> However, unlike for discrimination complaints, the Commission cannot refer human rights complaints to the ACT Civil and Administrative Tribunal ('ACAT'). Rather, if conciliation is unlikely to succeed, the Commission may close the complaint and issue a final report including recommendations for action.<sup>134</sup> The Commission may publish information about the complaint,<sup>135</sup> and can publish information about the public authority as a non-complying entity if they do not fulfil the recommendations within the allocated time.<sup>136</sup>

Enforcement in the ACT is not limited to 'piggyback' enforcement. Dedicated proceedings against public authorities can be commenced in the Supreme Court, or rights under the *Human Rights Act 2004* (ACT) can be relied on in other legal proceedings.<sup>137</sup> Damages are not available, but the Supreme Court can grant any other relief it considers appropriate.<sup>138</sup> Watchirs and McKinnon, reflecting on five years of the Act's operation, viewed the non-availability of damages for most claims as having a 'dampening effect on [the Act's] uptake by potential litigants'.<sup>139</sup> In Walsh and Allen's empirical investigation of the *Human Rights Act 2004* (ACT), some respondents reported 'piggybacking' human rights complaints in ACAT proceedings to 'bolster' other claims.<sup>140</sup> However, direct action under s 40C in the Supreme Court was regarded as a 'last resort'.<sup>141</sup> Respondents did note, though, that even the threat of litigation could lead to change.<sup>142</sup> That study found that there was often a lack of knowledge of the Act, and of human rights, among lawyers and advocates, which might explain its limited use in the courts,<sup>143</sup> and the lack of jurisprudence in this area.<sup>144</sup>

---

<sup>130</sup> *Human Rights Commission Act 2005* (ACT) s 41D.

<sup>131</sup> *Ibid* s 41D(2).

<sup>132</sup> *Ibid* s 51.

<sup>133</sup> *Ibid* s 52A.

<sup>134</sup> *Ibid* s 82D.

<sup>135</sup> *Ibid* s 86A.

<sup>136</sup> *Ibid* s 86.

<sup>137</sup> *Human Rights Act 2004* (ACT) s 40C.

<sup>138</sup> *Ibid* s 40C(6).

<sup>139</sup> Watchirs and McKinnon (n 78) 169.

<sup>140</sup> Walsh and Allen (n 67) 403.

<sup>141</sup> *Ibid*.

<sup>142</sup> *Ibid* 403–4.

<sup>143</sup> *Ibid* 405.

<sup>144</sup> *Ibid* 405–6.

This is echoed by the case law findings in this study. In a search of Austlii case law databases conducted on 5 September 2024, 315 documents in the ACT Supreme Court mentioned the *Human Rights Act 2004* (ACT), and 70 documents in the Court of Appeal. Section 8 of the Act — the right to equality and non-discrimination — was raised in 27 documents in the ACT Supreme Court, and 5 documents in the Court of Appeal. Cases addressing equality rights variously related to criminal law and procedure,<sup>145</sup> rights of detainees,<sup>146</sup> native title rights,<sup>147</sup> medical care,<sup>148</sup> personal protection orders,<sup>149</sup> appeals against findings of the Legal Practitioners Disciplinary Tribunal,<sup>150</sup> the granting of exemptions under the *Discrimination Act 1991* (ACT),<sup>151</sup> and restitution.<sup>152</sup> A substantial number of these cases were brought by the same self-represented claimant, seeking an unrestricted legal practicing certificate.<sup>153</sup> Few joined cases in the ACT refer to both the *Human Rights Act 2004* (ACT) s 40C and the *Discrimination Act 1991* (ACT). Of the 11 cases that refer to both, 8 again related to that same self-represented claimant, who had filed at least 38 applications.<sup>154</sup> The claimant was eventually declared to be a vexatious litigant.<sup>155</sup>

<sup>145</sup> See, eg, *R v QX [No 2]* [2021] ACTSC 244 (Loukas-Karlsson J); *R v Forsyth* (2013) 281 FLR 62 (Penfold J); *Cattanach v Harrison* (2016) 307 FLR 188 (Walmsley AJ); *R v UM [No 2]* [2021] ACTSC 115 (Elkaim J); *NH v Dixon* [2022] ACTSC 218 (Elkaim J); *Re Application by a Person Summoned for Jury Service for Support* (2023) 20 ACTLR 151 (McCallum CJ); *R v Pye* [2012] ACTSC 79 (Refshaug J); *Achanfuoyeboah v The Queen* [2016] ACTCA 71 (Refshaug ACJ); *R v UG* [2020] ACTCA 8 (Murrell CJ, Burns and Mossop JJ).

<sup>146</sup> *Islam v Director General of the Justice and Community Safety Directorate* [2018] ACTSC 323 (McWilliam AsJ); *Islam v Director General of the Justice and Community Safety Directorate [No 2]* [2015] ACTSC 314 (Mossop AsJ); *Islam v Director-General Justice and Community Safety Directorate [No 3]* [2016] ACTSC 27 (Mossop AsJ); *Davidson v Director-General, Justice and Community Safety Directorate* (2021) 18 ACTLR 1 (Loukas-Karlsson J); *Islam v Director-General of the Justice and Community Safety Directorate* [2015] ACTSC 20 (Mossop M); *Williams v Australian Capital Territory* [2023] ACTSC 18 (McWilliam AsJ).

<sup>147</sup> *Mortimer v Land Development Agency* [2012] ACTSC 158 (Burns J).

<sup>148</sup> *Hassan v Calvary Private Hospital Health Care Canberra Ltd* [2018] ACTSC 53 (McWilliam AsJ).

<sup>149</sup> *Polleyatt v Aldcroft* [2019] ACTSC 174 (McWilliam AsJ); *SI v KS* (2005) 195 FLR 151 (Higgins CJ).

<sup>150</sup> *Lander v Council of the Law Society of the Australian Capital Territory* (2009) 168 ACTR 32 (Higgins CJ, Gray and Refshaug JJ).

<sup>151</sup> *ACT Human Rights Commission v Raytheon Australia Pty Ltd* [2009] ACTSC 55 (Harper M).

<sup>152</sup> *Beagle v Australian Capital Territory and Southern New South Wales Rugby Union Ltd* [2017] ACTCA 29 (Murrell CJ, Burns and Collier JJ).

<sup>153</sup> *Ezekiel-Hart v Council of the Law Society of the ACT* [2021] ACTSC 133 (McWilliam AsJ); *Ezekiel-Hart v Reis [No 2]* [2019] ACTSC 192 (Crowe AJ); *Ezekiel-Hart v Council of the Law Society of the ACT [No 3]* [2022] ACTSC 300 (Kennett J); *Ezekiel-Hart v The Council of the Law Society of the ACT [No 7]* [2024] ACTSC 12 (Curtin AJ); *Ezekiel-Hart v Reis* [2018] ACTSC 264 (McWilliam AsJ); *Ezekiel-Hart v Council of the Law Society of the ACT [No 2]* [2022] ACTSC 29 (Mossop J); *Ezekiel-Hart v The Council of the Law Society of the ACT [No 2]* [2023] ACTSC 207 (Curtin AJ); *Ezekiel-Hart v Reis* [2019] ACTCA 31 (Mossop J); *Ezekiel-Hart v The Law Society of the Australian Capital Territory* (2010) 173 ACTR 15 (Gray P).

<sup>154</sup> *Ezekiel-Hart v Council of the Law Society of the Australian Capital Territory (Appeal)* [2021] ACAT 116, 4 [13] (Presidential Member Symons); *Ezekiel-Hart v The Council of the Law Society of the ACT [No 7]* [2024] ACTSC 12, [14] (Curtin AJ).

<sup>155</sup> *Ezekiel-Hart v The Council of the Law Society of the ACT [No 7]* [2024] ACTSC 12 (Curtin AJ).

The situation in 2024 in relation to equality rights appears akin to that noted by Watchirs and McKinnon after five years of the *Human Rights Act 2004* (ACT):

In a great many cases ... the HR Act was merely mentioned, without any real examination of the content of the rights raised, or used to support a conclusion arrived at through the application of existing common law principles. This slow start is not solely the responsibility of the judiciary, but also reflects the lack of considered human rights arguments being made by the ACT legal profession.<sup>156</sup>

After 20 years of the *Human Rights Act 2004* (ACT), a ‘slow start’ is perhaps becoming a slow status quo. However, the introduction of conciliation for human rights complaints in the ACT may support the better enforcement of human rights claims going forward.

### C Queensland

Equality is embedded in the preamble to the *Human Rights Act 2019* (Qld), which recognises

- 1 The inherent dignity and worth of all human beings.
- 2 The equal and inalienable human rights of all human beings.

As in Victoria and the ACT, the *Human Rights Act 2019* (Qld) creates both enabling and autonomous rights to non-discrimination and equality. Section 15 relevantly says:

- (2) Every person has the right to enjoy the person’s human rights without discrimination.
- (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination.
- (4) Every person has the right to equal and effective protection against discrimination.
- (5) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

Discrimination is defined as including direct or indirect discrimination, ‘within the meaning of the *Anti-Discrimination Act 1991* (Qld), on the basis of an attribute’ in that Act.<sup>157</sup> As Taylor emphasises, however, the definition of discrimination in the *Human Rights Act 2019* (Qld) is not limited to the definition of discrimination in the *Anti-Discrimination Act 1991* (Qld): it could go further to better address substantive inequality.<sup>158</sup> In *Austin BMI Pty Ltd v Deputy Premier*,<sup>159</sup>

<sup>156</sup> Watchirs and McKinnon (n 78) 147.

<sup>157</sup> *Human Rights Act 2019* (Qld) sch 1.

<sup>158</sup> Taylor, ‘Substantive Equality and the Possibilities of the Queensland Human Rights Act 2019’ (n 73) 50.

<sup>159</sup> [2023] QSC 95 (Freeburn J).

which related to the right to participate in public life without discrimination under s 23, Freeburn J opined that:

The definition of ‘discrimination’ in the *Human Rights Act* is inclusive. That is consistent with the ACT equivalent, but contrasts with the Victorian and New Zealand equivalents which contain exhaustive definitions ...

The legislature, in choosing to tie the definition of ‘discrimination’ to the definition in the *Anti-Discrimination Act* 1991 in a non-exclusory way, must be taken to have left the door open for an analogous grounds of discrimination. In other words, in linking the definition of ‘discrimination’ to the definition of the same concept in the *Anti-Discrimination Act*, but not directly adopting that definition, it is reasonable to infer that Parliament intended for the definition to be read as allowing an analogous ground of discrimination. ...

In my view, Parliament’s use of the legislative device of defining the term ‘discrimination’ as including the concept of discrimination in the *Anti-Discrimination Act* means that these principles apply. First, the use of the word ‘includes’ means that the incorporation of the definition of ‘discrimination’ in the *Anti-Discrimination Act* is not intended to be exhaustive. Second, conduct qualifying as ‘discrimination’, by applying the ordinary use of that word, but beyond the definition of ‘discrimination’ in the *Anti-Discrimination Act*, may be comprehended. Third, to say that the concept of ‘discrimination’ includes various matters is a way of giving at least some meaning to the term; the concept of ‘discrimination’ cannot have some meaning independent of the meaning that it is given by the legislation.<sup>160</sup>

The scope of protection under human rights law may therefore be broader than that under discrimination law, perhaps enabling recognition of new protected grounds.<sup>161</sup> Further, as in Victoria, equality is embedded as a consideration as to when human rights may be limited.<sup>162</sup> Non-discrimination is further embedded in rights to take part in public life and to vote,<sup>163</sup> the protection of children,<sup>164</sup> and access to health services.<sup>165</sup>

The *Human Rights Act 2019* (Qld) binds public entities.<sup>166</sup> Section 58(1) makes it unlawful for a public entity

- (a) to act or make a decision in a way that is not compatible with human rights; or
- (b) in making a decision, to fail to give proper consideration to a human right relevant to the decision.

Complaints under the *Human Rights Act 2019* (Qld) must first be made to the public entity itself and, after 45 business days have passed, can then be made to the

<sup>160</sup> Ibid 83–4 [317]–[320].

<sup>161</sup> Taylor, ‘Substantive Equality and the Possibilities of the Queensland Human Rights Act 2019’ (n 73) 52–8.

<sup>162</sup> *Human Rights Act 2019* (Qld) s 13.

<sup>163</sup> Ibid s 23.

<sup>164</sup> Ibid s 26(2).

<sup>165</sup> Ibid s 37(1).

<sup>166</sup> Ibid s 9.

Human Rights Commissioner.<sup>167</sup> The Commissioner can conduct preliminary inquiries,<sup>168</sup> and can refer complaints to other entities.<sup>169</sup> The Commissioner can also refuse to deal with a complaint if there is a more appropriate course of action under a different law to deal with the complaint.<sup>170</sup> Equally, the Commissioner can deal with a complaint as if it was a complaint under the *Anti-Discrimination Act 1991* (Qld) if it is more appropriately dealt with under the latter Act.<sup>171</sup> Complaints can be subject to conciliation.<sup>172</sup> If they are not resolved by conciliation, the Commissioner must make a report on the complaint, which is given to the complainant and respondent.<sup>173</sup> The Commissioner can also publish information about complaints when it has finished dealing with them.<sup>174</sup> As in Victoria, complaints under the *Human Rights Act 2019* (Qld) can only proceed to the courts if the claimant 'may seek any relief or remedy in relation to an act or decision of a public entity on the ground that the act or decision was, other than because of section 58, unlawful'.<sup>175</sup> Damages cannot be awarded for a breach of the *Human Rights Act 2019* (Qld).<sup>176</sup>

Reflecting the situation in Victoria, then, it will be unlikely to see the *Human Rights Act 2019* (Qld) raised in case law. As in the ACT, most complaints will be resolved directly with the entity itself, or at the Commission. Indeed, this is a clear strength of the Act. Some information on equality rights and equality complaints might be ascertained from the Commission's reporting. In the Queensland Human Rights Commission's 2022–23 annual report on the operation of the *Human Rights Act 2019* (Qld), it noted 2,364 human rights complaints across selected public entities in Queensland, based on the entities' own annual reporting.<sup>177</sup> The Commission itself received 561 human rights complaints; of these, 241 were accepted, and 57 were resolved (51 via conciliation).<sup>178</sup> The most common outcome for a resolved complaint was an apology, which was provided in 14 complaints.<sup>179</sup> Seventy-three complaints were accepted but unconciliable, and therefore referred to tribunals; 41 were referred to the Queensland Civil and Administrative Tribunal ('QCAT'), which deals with discrimination complaints.<sup>180</sup> The rate of resolution for human rights only complaints (32%) was lower than for anti-discrimination only complaints (44%); the lowest rate of resolution, though, was for 'piggyback'

---

<sup>167</sup> Ibid s 65. Though the Commissioner can receive complaints earlier in exceptional circumstances: s 65(2).

<sup>168</sup> Ibid s 68.

<sup>169</sup> Ibid s 73.

<sup>170</sup> Ibid s 70(a).

<sup>171</sup> Ibid s 75.

<sup>172</sup> Ibid ss 77, 79.

<sup>173</sup> Ibid s 88.

<sup>174</sup> Ibid s 90.

<sup>175</sup> Ibid s 59(1).

<sup>176</sup> Ibid s 59(3).

<sup>177</sup> Queensland Human Rights Commission, *Progress and Pitfalls: 2022–23 Annual Report on the Operation of the Human Rights Act 2019* (Report, 2023) 95–7.

<sup>178</sup> Ibid 101.

<sup>179</sup> Ibid 103.

<sup>180</sup> Ibid 102.

complaints (20%).<sup>181</sup> The Commission explains this disparity as being because human rights only complaints can be deemed to be resolved, even without a settlement agreement, if the Commissioner deems the matter to be resolved.<sup>182</sup> The Commission is continuing to monitor these trends, however,<sup>183</sup> perhaps because they imply that human rights matters are more difficult to resolve. It may be, then, that claimants are better off pursuing only a discrimination claim, as these have a higher rate of resolution. Alternatively, it may mean that claims involving both discrimination and human rights complaints are the more complicated or intractable matters, which are more difficult to resolve via conciliation.

Recognition and equality before the law was the third most common human rights complaint finalised by the Commission in 2022–23.<sup>184</sup> 180 of these complaints were accepted and finalised, and 71 were not accepted and finalised.<sup>185</sup> In previous years, recognition and equality before the law had consistently been the most identified right in complaints.<sup>186</sup> In 2022–23, however, it was overtaken by the right to privacy and reputation, reflecting the high number of complaints about COVID-19 vaccination and bodily autonomy (43%).<sup>187</sup> Overall, though, recognition and equality before the law had a higher number of accepted complaints (180) than privacy and reputation (106).<sup>188</sup>

To examine how these provisions are impacting on case law in practice, a search was conducted of Austlii case law databases for cases referring to both the *Human Rights Act 2019* (Qld) s 15 (non-discrimination rights) and the *Anti-Discrimination Act 1991* (Qld). As at 21 August 2024, 80 documents from the Queensland Civil and Administrative Tribunal (QCAT) referred to the *Human Rights Act 2019* (Qld) s 15; 25 documents referred to both the *Human Rights Act 2019* (Qld) s 15 and the *Anti-Discrimination Act 1991* (Qld). Of these 25 documents, 16 related to an exemption application under the *Anti-Discrimination Act 1991* (Qld).<sup>189</sup>

Only nine decisions, across all courts, related to s 59 of the *Human Rights Act 2019* (Qld) (enabling individual enforcement) and the *Anti-Discrimination Act 1991*

---

<sup>181</sup> Ibid 104.

<sup>182</sup> Ibid.

<sup>183</sup> Ibid.

<sup>184</sup> Ibid 105.

<sup>185</sup> Ibid.

<sup>186</sup> Ibid 106.

<sup>187</sup> Ibid.

<sup>188</sup> Ibid 105–6.

<sup>189</sup> See *Anti-Discrimination Act 1991* (Qld) s 113. Similarly, many cases relating to both the *Anti-Discrimination Act 1991* (Qld) and the *Human Rights Act 2019* (Qld) s 58 relate to the granting of exemptions from the *Anti-Discrimination Act 1991* (Qld): see, eg, *Re Ipswich City Council* (2020) 305 IR 289 (Merrell DP); *Re Leidos Australia Pty Ltd* [2021] QIRC 229 (Hartigan IC); *Re Mackay Regional Council* [2022] QIRC 64 (Power IC); *Re Rheinmetall Defence Australia Pty Ltd* [2022] QIRC 440 (Dwyer IC); *Sunshine Coast Regional Council [No 2]* [2021] QCAT 439 (Sammon M); *Re Protech Personnel Pty Ltd* [2022] QIRC 29 (Merrell DP); *Miami Recreational Facilities Pty Ltd* [2021] QCAT 378 (Gordon M); *Burleigh Town Village Pty Ltd (3)* [2022] QCAT 285 (Roney M); *Re Cobham Aviation Services Australia Pty Ltd* [2022] QIRC 326 (McLennan IC); *Fernwood Womens Health Clubs (Australia) Pty Ltd* [2021] QCAT 164 (Traves M).

(Qld); three of the nine decisions related to exemptions granted to the Brisbane Housing Company.<sup>190</sup> None of the remaining six decisions determined the substantive merits of the piggybacked claims.<sup>191</sup> For example, in *Fraser v Queensland*,<sup>192</sup> Ms Fraser made claims of direct discrimination on the grounds of race and breach of her human rights in relation to the behaviour of police at James Cook University campus. QCAT found that it had jurisdiction to determine the complaint, as it was referred in time. The substance of the complaint was not resolved. In *Mizner v Queensland*<sup>193</sup> an interlocutory injunction was granted, preventing the claimant from being placed in a dual-occupancy cell, pending the hearing of both the discrimination and human rights complaints.

In the Queensland Industrial Relations Commission ('QIRC'), some substantive 'piggyback' decisions have been adjudicated; as in Victoria, though, so far, there is no case where the *Human Rights Act 2019* (Qld) claim has been successful yet the other claim has failed. In *Mocnik v Queensland*,<sup>194</sup> which related to a challenge to mandatory vaccination requirements for health service employees, claims were brought under the *Human Rights Act 2019* (Qld) and the *Anti-Discrimination Act 1991* (Qld) (as well as on other grounds). While the protected attribute for the discrimination claim was not clear,<sup>195</sup> it was held that any discrimination would be indirect discrimination, which would be reasonable.<sup>196</sup> There was no evidence regarding how the respondent had breached the *Human Rights Act 2019* (Qld), and any limit on human rights was justifiable.<sup>197</sup>

In *Gilbert v Metro North Hospital Health Service*<sup>198</sup> there was held to be no breach of discrimination or industrial law and no breach of the *Human Rights Act 2019* (Qld). The case related to a notice sent to a nurse to show cause for why she should not be disciplined for making comments in a newspaper without proper authority. The claimant argued the notice was sent because she was an officer or member of the Nurses' Professional Association of Queensland Inc ('NPAQ'), but NPAQ was held to not be a union or industrial association, and therefore the claimant's actions could not constitute trade union or industrial activity.<sup>199</sup> There was therefore no protected attribute.<sup>200</sup> Further, any limits on freedom of expression and association under the

<sup>190</sup> *Brisbane Housing Co Ltd [No 1]* [2024] QCAT 5 (Fitzpatrick SM); *Brisbane Housing Co Ltd [No 2]* [2024] QCAT 6 (Fitzpatrick SM); *Brisbane Housing Co Ltd [No 3]* [2024] QCAT 7 (Fitzpatrick SM).

<sup>191</sup> In *Dale v Queensland* [2022] QIRC 8 (Power IC), the claims under the *Human Rights Act 2019* (Qld) were not formally raised as grounds of appeal, and the claim based on equality rights was not expanded upon: see [45]–[46].

<sup>192</sup> [2024] QCAT 57 (Fitzpatrick SM).

<sup>193</sup> [2022] QCAT 245 (Fitzpatrick M).

<sup>194</sup> [2023] QIRC 58 (O'Connor VP).

<sup>195</sup> *Ibid* [29].

<sup>196</sup> *Ibid* [53].

<sup>197</sup> *Ibid* [75].

<sup>198</sup> [2021] QIRC 255 (O'Connor VP).

<sup>199</sup> *Ibid* [95], [116].

<sup>200</sup> *Ibid* [321].

relevant Code of Conduct were reasonable and demonstrably justifiable,<sup>201</sup> meaning there was no breach of the *Human Rights Act 2019* (Qld).

While there are few substantive ‘piggyback’ decisions in Queensland, the *Human Rights Act 2019* (Qld) may be prompting a more considered approach to the granting of exemptions under s 113 of the *Anti-Discrimination Act 1991* (Qld). In determining whether to grant an exemption, the QIRC has been held to be acting in an administrative capacity, and must therefore comply with the *Human Rights Act 2019* (Qld).<sup>202</sup> Therefore, ‘the Commission must not act to make a decision in a way that is not compatible with human rights and, in making a decision, the Commission must not fail to give proper consideration to a human right relevant to the decision.’<sup>203</sup> In *Re: Rheinmetall Defence Australia Pty Ltd*,<sup>204</sup> for example, which related to an application for an exemption to comply with US export control laws, it was noted that the determination required a robust application of the proportionality test in s 13 of the *Human Rights Act 2019* (Qld),<sup>205</sup> which was more intensive than applying the criteria in the *Anti-Discrimination Act 1991* (Qld) for granting an exemption.<sup>206</sup> Regardless, the tests reached the same conclusion, and the exemption was granted.

## V THE UK

Like Australian jurisdictions, the UK has a dedicated piece of equality legislation: the *Equality Act 2010* (UK). Equality rights are protected by the Convention, which the UK remains a member of, but only in relation to Convention rights (that is, as an enabling right). Article 14 of the Convention says:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Parties to the Convention are required to ‘secure to everyone within their jurisdiction the rights and freedoms’ in the Convention.<sup>207</sup> Some scholars have argued that the Convention (and the European Court of Human Rights) have come to be a form of constitutional statute and constitutional court,<sup>208</sup> though the UK

---

<sup>201</sup> Ibid [380].

<sup>202</sup> *Re Ipswich City Council* [2020] QIRC 194, [36] (Merrell DP).

<sup>203</sup> Ibid [37].

<sup>204</sup> [2022] QIRC 440 (Dwyer IC).

<sup>205</sup> Ibid [70]–[90].

<sup>206</sup> Ibid [91]–[102].

<sup>207</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms* (n 2) art 1.

<sup>208</sup> Robert Harmsen, ‘The European Court of Human Rights as a “Constitutional Court”’: Definitional Debates and the Dynamics of Reform’ in John Morison, Kieran McEvoy and Gordon Anthony (eds), *Judges, Transition, and Human Rights* (Oxford University Press, 2007) 33.

sees its obligations to comply with decisions of the European Court of Human Rights as a matter of international (not constitutional) law.<sup>209</sup>

For a provision to be discriminatory under article 14 requires a difference in treatment that is

- based on an identifiable characteristic or status;<sup>210</sup>
- ‘of persons in analogous, or relevantly similar, situations’;<sup>211</sup> and
- ‘which has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised’.<sup>212</sup>

However, states have a margin of appreciation in assessing whether differences justify different treatment.<sup>213</sup>

The UK gives effect to the Convention through the *Human Rights Act 1998* (UK). The Act makes it unlawful for a public authority to act in a way incompatible with a Convention right.<sup>214</sup> Unlawful acts by public authorities can be pursued in a court or tribunal, or relied on in other legal proceedings.<sup>215</sup> However, Employment Tribunals (‘ETs’), which are the primary forum for resolving employment-related disputes in the UK (and therefore the primary forum for hearing discrimination claims in the UK), have no jurisdiction to determine self-standing claims under the Convention.<sup>216</sup> As articulated in *Walsh v Ministry of Defence*:<sup>217</sup>

The Employment Tribunal is a creature of statute and only has jurisdiction to hear matters that the legislature has given it power to hear. Unlike the High Court, it has no ‘inherent’ jurisdiction. It also has no ‘freestanding’ jurisdiction under the *Human Rights Act 1998* (HRA 1998) as it has not been given any such jurisdiction by way of subordinate legislation made under s 7 of that Act, nor is it a ‘court’ within the meaning of s 4(5) of that Act and so it does not have jurisdiction under that section to make a declaration of incompatibility in respect of any legislation that it might consider to be incompatible with the provisions of the European Convention on

<sup>209</sup> *R (on the application of Chester) v Secretary of State for Justice* [2014] AC 271, 299 [28] (Lord Mance JSC, Lord Kerr and Lord Hughes JJSC and Lord Hope agreeing).

<sup>210</sup> *Kjeldsen v Denmark* (1976) 1 EHRR 711, 24–5 [56]; *British Gurkha Welfare Society v United Kingdom* (No 44818/11) [2016] ECHR 755 (15 September 2016) 13–14 [62] (‘*British Gurkha Welfare*’).

<sup>211</sup> See *DH v Czech Republic* [2007] ECHR 922, 62 [175]; *Burden v United Kingdom* (European Court of Human Rights, Grand Chamber, Application no 13378/05, 29 April 2008) 21 [60]; *British Gurkha Welfare* (n 210) 13–14 [62].

<sup>212</sup> *British Gurkha Welfare* (n 210) 13–14 [62].

<sup>213</sup> *Burden v The United Kingdom* (European Court of Human Rights, Grand Chamber, Application no 13378/05, 29 April 2008) 21 [60]; *Ibid* 13–14 [62].

<sup>214</sup> *Human Rights Act 1998* (UK) s 6(1).

<sup>215</sup> *Ibid* s 7.

<sup>216</sup> See, eg, *Wastenev v East London NHS Foundation Trust* [2016] ICR 643, 653 [48]; *Greenwood v Caldeale and Huddersfield NHS Foundation Trust* [2022] UKET 1801272/2022.

<sup>217</sup> [2023] UKET 2208894/2022.

Human Rights (ECHR) incorporated into domestic law by s 1 to that Act ('the Convention rights'). The Employment Tribunal is obliged by s 3 of the HRA 1998 to interpret legislation compatibly with the Convention rights.<sup>218</sup>

The Convention is therefore primarily relevant to how ETs interpret and give effect to legislation.<sup>219</sup>

The potential significance of Convention non-discrimination rights to the interpretation of employment rights is illustrated by the UK Supreme Court decision of *Gilham v Ministry of Justice* ('*Gilham*').<sup>220</sup> In that case, the UK Supreme Court considered whether a district judge was a 'worker' or a 'person in Crown employment' for the purposes of whistleblower protections in Part IVA of the *Employment Rights Act 1996* (UK). The claimant argued that, if she was excluded from statutory whistleblowing protections, this would be a breach of article 14 read with article 10 (freedom of expression), meaning the section should be read to bring her within the protections. The Supreme Court accepted this argument, holding that the claimant had been treated less favourably than employees would be treated in being excluded from the protections in Part IVA,<sup>221</sup> and that this less favourable treatment was on the basis of her occupational classification (which could be a 'status' for article 14).<sup>222</sup> There was no legitimate aim for the exclusion of judges from these protections:<sup>223</sup> indeed, offering judges protection for public interest disclosures could enhance judicial independence.<sup>224</sup> The Supreme Court held, then, that the *Employment Rights Act 1996* (UK) should be read and given effect to extend the whistle-blowing protections to judicial office holders.<sup>225</sup>

To examine how Convention rights are impacting equality rights in practice, a search of ET decisions was conducted on 22 August 2024 on the GOV.UK website.<sup>226</sup> The phrase 'European Convention on Human Rights' was included in 306 of 114,255 decisions (0.2% of decisions). The vast majority of these decisions (226 of 306) raised at least one ground of discrimination (age, disability, harassment, race, religion or belief, sex, sexual orientation or victimisation). Seventy of these 306 decisions related to religious or belief discrimination. Nearly a third of the decisions (93 of 306) referred to 'anonymity', often reflecting the role of Convention rights in informing decisions on anonymity orders.<sup>227</sup> Indeed,

<sup>218</sup> Ibid [9].

<sup>219</sup> See, eg, *Wastenev v East London NHS Foundation Trust* [2016] ICR 643, 653 [48]; *Greenwood v Caldedale and Huddersfield NHS Foundation Trust* [2022] UKET 1801272/2022.

<sup>220</sup> [2019] 1 WLR 5905.

<sup>221</sup> Ibid 5916 [30] (Baroness Hale PSC, Lord Kerr, Lord Carnwath and Lady Arden JJSC and Sir Declan Morgan agreeing).

<sup>222</sup> Ibid 5916 [32].

<sup>223</sup> Ibid 5917 [37].

<sup>224</sup> Ibid 5917 [36].

<sup>225</sup> Ibid 5919 [44].

<sup>226</sup> 'Employment Tribunal Decisions', GOV.UK (Web Page) <<https://www.gov.uk/employment-tribunal-decisions>>.

<sup>227</sup> See, eg, *Ithia v MUFG Securities EMEA plc* [2023] UKET 2206616/2020, [21]–[23], anonymising the names of comparators; *Kassem v North Tees and Hartlepool NHS Foundation Trust* [2021] UKET 2502292/2019.

123 of these 306 decisions referred to ‘article 8’ (the right to private life), and 81 of 306 referred to ‘rule 50’ (relating to anonymity orders).<sup>228</sup>

In this search, only 42 decisions referred to ‘European Convention on Human Rights’ and ‘article 14’; 5 referred to the Convention and ‘art 14’. In some of these decisions, the ET drew on Convention rights to aid legislative interpretation, and this occasionally was held to expand the scope of discrimination and equality law. For example, arguments based on Convention rights informed ET decisions regarding who is a ‘worker’ for the purposes of employment law<sup>229</sup> and whistleblowing protections, in some cases extending the statutory definition (that is, a *Gilham*-style argument). In other cases, an interpretation grounded in Convention rights led to the reading in of terms into the *Equality Act 2010* (UK) to allow selected claims against the armed forces to proceed.<sup>230</sup>

A search was also conducted for ‘Human Rights Act’ and ‘article 14’; this produced 40 ET decisions, though the vast majority of these decisions had already been captured by the earlier search.<sup>231</sup> Most of the additional decisions mentioned article 14 in passing<sup>232</sup> or in the description of the claim.<sup>233</sup> One case related to an application for an anonymity order.<sup>234</sup> In *Aukett v Sentimental Care Ltd*,<sup>235</sup> though, an argument based on *Gilham* (for an extension of whistleblowing protections) was unsuccessful.

Substantively, in UK employment decisions, article 14 has commonly been invoked in relation to article 1 of Protocol 1 (the protection of property) in relation

<sup>228</sup> *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013* (UK) r 50.

<sup>229</sup> *Newman v The St Albans Diocesan Board of Finance* [2023] UKET 3310171/2022; *Moon v Lancashire and South Cumbria NHS Foundation Trust* [2022] UKET 2414248/2021; *Griffiths v The Institution of Mechanical Engineers* [2020] UKET 2200023/2020; *Mok v Fitzmaurice House Ltd* [2023] UKET 2201796/2022; *Green v The Lichfield Diocesan Board of Finance* [2023] UKET 2409635/2022. Note, though, that arguments based on Convention rights were not accepted in relation to extending equality rights to volunteers: *Randall v The Bishop of Derby* [2023] UKET 2600807/2022. Arguments based on Convention rights were also not accepted as extending protections for public interest disclosures to job applicants: *Sullivan v Isle of Wight Council* [2022] UKET 1406053/2020. Arguments based on Convention rights were not accepted as expanding the territorial scope of employment law beyond the UK: *Bradley v BAE Systems plc* [2023] UKET 2208689/2022; though see *Beldica v The British Council* [2023] UKET 2202073/2021, where the ET was found to have jurisdiction.

<sup>230</sup> *Rubery v Ministry of Defence* [2022] UKET 3312963/2021; *T v Ministry of Defence* [2021] UKET 2201755/2021. But see *Gregory v Ministry of Defence* [2022] UKET 3207239/2021; *Dunn v Ministry of Defence* [2024] UKET 3309378/2023. See also *Zulu v Ministry of Defence* [2019] UKET 2205687/2018 and 2205688/2018.

<sup>231</sup> A search for ‘Human Rights Act’ and ‘art 14’ returned no additional decisions.

<sup>232</sup> See, eg, *Mackereth v Department for Work and Pensions* [2019] UKET 1304602/2018; *Kahn v VisitDenmark* [2019] UKET 2202549/2015; *Muda v Malaysia* [2024] UKET 2203623/2021.

<sup>233</sup> See, eg, *Onyebalu v The Governing Body of Gascoigne Primary School* [2023] UKET 3205347/2021; *Onyebalu v The Governing Body of Gascoigne Primary School* [2023] UKET 3200006/2022; *Goodison v High Speed Two Ltd (HS2)* [2022] UKET 2207032/2021; *Stevenson v Scottish Police Authority* [2023] UKET 4106994/2019; *Dimitrova v Barchester Healthcare Ltd* [2022] UKET 1803315/2021; *Hamam v British Embassy in Cairo* [2018] UKET 2207403/2017. In *Bilsbrough v Berry Marketing Services Ltd* [2019] UKET 1401692/2018, arguments based on art 14 were put in the alternative.

<sup>234</sup> *Kirkham v United Kingdom Research and Innovation* [2019] UKET 2501482/2018.

<sup>235</sup> [2021] UKET 3201600/2020.

to pension rights<sup>236</sup> and the granting of interim relief,<sup>237</sup> and article 9 (freedom of thought, conscience and religion) in relation to religion and belief at work.<sup>238</sup> Article 9 says:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

In this context, Convention rights are relevant to how courts and tribunals interpret what is a 'belief' for the purposes of s 10 of the *Equality Act 2010* (UK),<sup>239</sup> often extending the scope of a recognized 'belief' for equality law. In particular, article 14 and article 9 have been invoked by those refusing to recognise transgender people in the workplace or holding gender critical beliefs.<sup>240</sup>

## VI DISCUSSION

As explored in Part II, reframing equality rights as human rights might lead to three important shifts in our understanding of equality law: to emphasise a public and holistic understanding of inequality, to prompt the better enforcement of equality rights by individuals, and to support a more nuanced judicial interpretation of equality rights. Indeed, in the ACT and Queensland, the scope of

<sup>236</sup> See, eg, *British Gurkha Welfare* (n 210).

<sup>237</sup> *Marshall v The Doctors Laboratory Ltd* [2020] UKET 2203491/2020.

<sup>238</sup> See, eg, *Cave v The Open University* [2023] UKET 3313198/2020 (belief in English Nationalism); *Burch v British Airways plc* [2023] UKET 3309902/2022 (belief in being a sovereign being who has a right to breathe freely without a mask); *Uncles v National Health Service Commissioning Board* [2017] UKET 1800958/2016 (belief in English Nationalism); *Thomas v Surrey and Borders Partnership NHS Foundation Trust* [2021] UKET 2304056/2018 (belief in English Nationalism); *Edwards v Cliff College* [2024] UKET 1804160/2023 (orthodox Christian beliefs about homosexuality); *Casamitjana Costa v The League Against Cruel Sports* [2020] UKET 3331129/2018 (belief in ethical veganism); *Corby v Advisory, Conciliation and Arbitration Service* [2023] UKET 1805305/2022 (belief on race/racial equality and sex/feminism); *Embery v Fire Brigades Union* [2021] UKET 2203219/2019 (belief in National Independence ('pro-Brexit')); *Sleath v West Midlands Trains Ltd* [2021] UKET 1310379/2020 (belief in secularism and atheism); *Ngole v Touchstone Leeds* [2024] UKET 1805942/2022 (Christian religious beliefs); *Legge v Environment Agency* [2024] UKET 3314044/2021 (non-feminist beliefs); *Omooba v Michael Garret Associates Ltd* [2021] UKET 2202946/2019 and 2602362/2019 (belief that you cannot be born gay).

<sup>239</sup> *Mackereth v Department for Work and Pensions* [2022] EAT 99, [84]; *Forstater v CGD Europe* [2022] ICR 1, [53], [68]. Section 10(2) of the *Equality Act 2010* (UK) says: 'Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.'

<sup>240</sup> See, eg, *Mackereth v Department for Work and Pensions* [2022] EAT 99, [84]; *Forstater v CGD Europe* [2022] ICR 1.

the protection for equality under human rights law could be broader than that under discrimination law,<sup>241</sup> potentially opening up protection for new grounds or characteristics and for intersectional claims. This potentially reflects a more holistic understanding of inequality.

In mapping the case law that has arisen in relation to equality rights under human rights statutes in Australia and the UK, this article has illustrated the ways in which the framing of equality rights as human rights could enhance the process and reasoning in the adjudication of equality rights. This is evident, for example, in how the QIRC considers applications for exemptions under s 113 of the *Anti-Discrimination Act 1991* (Qld), which involves a more robust examination under human rights law than under equality law. There is some evidence, then, that framing equality rights as human rights might support a more nuanced judicial interpretation of equality rights. In the cases that have been considered in this article, the ability to justify limitations on equality rights typically means that the outcome under human rights legislation is the same as under equality legislation, though the decision-making process often involves different considerations. While the framing of equality rights as human rights has not yet led to different judicial outcomes in Australia, it has affected the outcomes of claims in the UK. That said, even in the Australian jurisdictions, there are signs that framing equality rights as human rights is leading to a more sophisticated and nuanced analysis of claims and exemptions. The more embedded equality rights are, the more impact their framing as rights is likely to have in practice.

Overall, though, the case law analysed in this article arguably shows that the potential of framing equality rights as human rights has not yet been realised in Australia. This, in part, reflects the difficulties of enforcement under existing human rights Acts, where claims need to be ‘piggybacked’ (in Victoria and Queensland) or pursued in the high-cost jurisdiction of the Supreme Court (in the ACT), and where damages are not available. These barriers to enforcement mean human rights statutes — as currently drafted — are unlikely to prompt the better enforcement of equality rights by individuals. Indeed, given these barriers, it is likely that case law undersells the successes and influence of the human rights Acts, especially in conciliation (in Queensland and the ACT) and in shaping executive decision-making and behaviour.

This article therefore offers new evidence of the potential importance of embedding equality rights as human rights in Australia, including through reform at the federal level. However, to realise this potential, human rights legislation needs to be supported by effective enforcement mechanisms, including by enabling conciliation, making damages available, and in enabling access to justice in low-cost tribunals. Indeed, in framing equality rights as human rights, multiple decisions need to be made about how equality rights are positioned,

---

<sup>241</sup> *Human Rights Act 2004* (ACT); *Human Rights Act 2019* (Qld) sch 1. See the detailed discussion in Taylor, ‘Substantive Equality and the Possibilities of the Queensland *Human Rights Act 2019*’ (n 73) 51.

which will affect their efficacy in practice. Equality rights might be entrenched or embedded as constitutional rights (as flagged, but likely rejected, in Australia) or provided for only in legislation (as in Victoria, Queensland and the ACT). Human rights statutes might bind only the public sector and governments, or could apply more broadly to all organisations and individuals. Equality rights could be independent, autonomous rights (as in Victoria, Queensland and the ACT), or could be framed solely as enabling rights for other human rights (as in the UK). Individual enforcement can be enabled in various ways, and with different limits or restrictions. This might mean that claims can only be pursued directly in certain courts (as in the UK and ACT) or as piggyback claims (in Queensland and Victoria). Conciliation might be enabled (as in Queensland and the ACT), but might require first approaching the entity concerned. Claims might then also be limited in whether they can proceed to the courts if conciliation is unsuccessful.

This positioning, and these decisions, matter in practice, and can support or curtail the impact of human rights statutes. In Australia, for example, individual enforcement of human rights statutes remains particularly fraught, and this has likely limited the case law that is emerging across the jurisdictions. The importance of the framing of equality rights as human rights can also be seen, for example, in how equality rights influence statutory interpretation. In the UK, courts and tribunals may interpret legislation, including by reading in terms, to ensure it is consistent with the Convention. As the UK experience shows, the scope of equality law, and the grounds it protects, can be extended through statutory interpretation aided by human rights instruments. As discussed in Part V, this has led to the expansion of employment and discrimination rights to benefit a broader group of workers. In the ACT, Victoria and Queensland, however, courts and tribunals have more limited powers in ensuring statutory interpretation aligns with human rights statutes, with interpretive provisions now seen as requiring something akin to the principle of the legality.<sup>242</sup> The High Court's decision in *Momcilovic v The Queen*<sup>243</sup> has confined and dampened the potential for the Victorian *Charter* (and other human rights statutes) to meaningfully shape statutory interpretation in Australia. This likely reflects the positioning of equality rights in Australia in legislation that is not embedded as a constitutional right.

Further, confining human rights statutes to public authorities, as in Australia, potentially limits the transformative effect of framing equality rights as human rights. According to the Australian Bureau of Statistics, in June 2024, state and local governments<sup>244</sup> in Victoria, Queensland and the ACT collectively

---

<sup>242</sup> Note the discussion above of *Momcilovic v The Queen* (2011) 245 CLR 1.

<sup>243</sup> *Ibid.*

<sup>244</sup> While noting that 'public authorities' includes a broader group of entities than just state and local governments.

employed around 1,037,800 people,<sup>245</sup> compared to 6,981,900 total employed persons across the jurisdictions.<sup>246</sup> While human rights statutes capture a broader group of entities than just state and local governments, these statistics imply that the vast majority of the workforce in the private sector is unlikely to be able to invoke human rights in the workplace. This is despite the clear importance of human rights to and at work,<sup>247</sup> including equality rights. The absence of a federal human rights Act has even more significant consequences for the reach of human rights: in June 2024, there were 14,370,200 employed persons across Australia.<sup>248</sup> At present, then, in the context of work, human rights statutes might be relevant to around 7% of employed persons in Australia. The impact of human rights legislation could be felt far beyond the context of work; but these statistics help to illustrate the limited scope of human rights statutes, both in the absence of federal reform and when their scope is confined to public entities.

## VII CONCLUSION

This article has interrogated what difference, if any, the positioning and framing of equality law makes in practice, and whether the framing of equality rights as human rights might better support the advancement of equality. This article has illustrated the significant potential for the (re)framing of equality rights as human rights to de-individualise equality rights, expand the grounds protected by discrimination law, expand the scope of those protected by discrimination law, and to prompt a more nuanced and robust examination of equality rights and exceptions. This discussion could not be more timely, given the AHRC's and Parliamentary Joint Committee on Human Rights's renewed calls to adopt a statutory human rights Act in Australia. These findings support and bolster the calls for a federal human rights Act, emphasising the potential significance of (re)framing equality rights as human rights to the development and interpretation of equality law.

In Australian jurisdictions like the ACT, Queensland and Victoria, though, the significant potential of (re)framing equality rights as human rights to shape equality law remains just that: *potential*. The limited enforcement mechanisms in place under human rights statutes have severely curtailed the case law on these issues. As a result, the potential benefits of framing equality rights as human

---

<sup>245</sup> Australian Bureau of Statistics, *Public Sector Employment and Earnings, 2023–24* (Catalogue No 6248.0.55.002, 7 November 2024) <<https://www.abs.gov.au/statistics/labour/employment-and-unemployment/public-sector-employment-and-earnings/latest-release>> and author's own calculations.

<sup>246</sup> Australian Bureau of Statistics, *Labour Force, Australia, Detailed, June 2024* (Catalogue No 6291.0.55.001, 25 July 2024) <<https://www.abs.gov.au/statistics/labour/employment-and-unemployment/labour-force-australia-detailed/jun-2024>> ('*Labour Force*') and author's own calculations.

<sup>247</sup> See also a discussion of Collins (n 34) above.

<sup>248</sup> Australian Bureau of Statistics, *Labour Force* (n 246) and author's own calculations.

rights remain largely unrealised to date. In developing a statutory human rights act for Australia, then, it is critical that the Parliamentary Joint Committee on Human Rights's recommendations — of rights enforceable via stand-alone complaints, with conciliation at the AHRC, and direct claims to the federal courts, with remedies including damages<sup>249</sup> — be embedded in any proposed Act. Further, the private sector should be brought within the scope of reform. The key successes of human rights Acts may not yet be evident in case law. Regardless, fully realising the benefits of reframing equality rights as human rights requires the effective enforcement and development of equality rights in the courts.

---

<sup>249</sup> Parliamentary Joint Committee on Human Rights (n 59) 309–10.