

Book Review

Interpreting Discrimination Law Creatively: Statutory Discrimination Law in the UK, Canada and Australia
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Alysia Blackham*

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I Introduction

It is not contentious to say that some Australian judicial decisions in discrimination law have been disappointing. While the text of statutory discrimination law appears broad and protective, the potential of equality law has been limited by its judicial interpretation and application. In *Purvis v New South Wales*, for example, a student who exhibited antisocial and aggressive behaviour due to his disability was suspended and ultimately expelled from school.¹ The High Court of Australia was asked to identify the relevant comparator under the *Disability Discrimination Act 1992* (Cth): should the student be compared to a non-disabled student who was well behaved, or a non-disabled student with the same behavioural problems? The High Court chose the comparator with the same behavioural problems,² which meant the student was treated no differently to any other student who acted out, even though the behavioural problems were caused by his disability. For Gleeson CJ, the required comparison is with a pupil without the disability, not a pupil without the violence.³ Campbell has described this decision as 'positively wrong' and 'unconvincing' — a hard case making bad law.⁴

* Associate Professor, Melbourne Law School, University of Melbourne, Victoria, Australia. Email: alysia.blackham@unimelb.edu.au; ORCID iD: <https://orcid.org/0000-0002-8149-4887>.

¹ *Purvis v New South Wales* (2003) 217 CLR 92.

² *Ibid* 100–1 [11] (Gleeson CJ), 161 [225] (Gummow, Hayne and Heydon JJ). Cf 136 [134] (McHugh and Kirby JJ).

³ *Ibid* 100–1 [11] (Gleeson CJ).

⁴ Colin D Campbell, 'A Hard Case Making Bad Law: *Purvis v New South Wales* and the Role of the Comparator under the *Disability Discrimination Act 1992* (Cth)' (2007) 35(1) *Federal Law Review* 111.

It is into this fraught field of judicial interpretation of discrimination law that Alice Taylor's book *Interpreting Discrimination Law Creatively: Statutory Discrimination Law in the UK, Canada and Australia* steps. This deceptively slim work provides a wide-ranging consideration of discrimination law, statutory interpretation and the judicial role, drawing on comparative analysis of Australia, the United Kingdom and Canada. The work is engaging and clear, covering a broad and complex field using a light yet sophisticated approach.

II Grounding and Evaluating 'Creative' Interpretations

Building on Lester and Bindman,⁵ Taylor argues that judges must be 'creative' interpreters of discrimination law for statutory discrimination laws to be effective.⁶ Lester and Bindman posit that courts are best positioned as 'creative interpreters of the legislative intent, rather than as the instrument for radical reforms'⁷ — this, in part, explains the limited development of equality rights in the common law prior to statutory reform.

For Taylor, a 'creative' interpretation is not just a purposive interpretation, consistent with general rules of statutory interpretation. Indeed, for Taylor, a purposive interpretation and existing statutory interpretation rules do not apply easily to discrimination law,⁸ as the laws themselves — and the Parliaments who pass them — are often unclear as to what their purpose is. The purpose of discrimination law is rarely articulated by Parliament, meaning there is no discoverable intent behind the laws.⁹ Further, there is no shared learning or understanding of discrimination law in the common law that can enable a purposive approach.¹⁰ There is a need, then, to look to the normative and theoretical literature to ascertain the purpose of discrimination law.

For Taylor, drawing on Fredman¹¹ and Moreau,¹² the purpose of discrimination law is multidimensional and pluralist.¹³ A creative interpretation applies this pluralist account to the interpretation and application of discrimination law. A creative interpretation is therefore a more expansive version of a purposive

⁵ Anthony Lester and Geoffrey Bindman, *Race and Law* (Longman, 1972).

⁶ Alice Taylor, *Interpreting Discrimination Law Creatively: Statutory Discrimination Law in the UK, Canada and Australia* (Hart Publishing, 2023) 2, 9.

⁷ Lester and Bindman (n 5) 71.

⁸ Taylor (n 6) 29.

⁹ *Ibid* 7, 10.

¹⁰ *Ibid* 31.

¹¹ Sandra Fredman, *Discrimination Law* (Oxford University Press, 3rd ed, 2022). Fredman describes a multidimensional principle of substantive equality that 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): at 29–44.

¹² Sophia Reibetanz Moreau, *Faces of Inequality: A Theory of Wrongful Discrimination* (Oxford University Press, 2020). Moreau sees the rationale of discrimination law as being pluralist: she argues that there are at least three ways in which a practice can disadvantage someone on the basis of a trait, and therefore fail to treat them as an equal. For Moreau, this includes subordinating people to others, denying people deliberative freedoms, and leaving people without access to basic goods required to participate as an equal in society: at 11.

¹³ Taylor (n 6) 43, 54.

interpretation,¹⁴ and one which is informed by the normative literature.¹⁵ This approach to statutory interpretation is more active than established approaches, and seeks to elaborate the underlying values of discrimination law.¹⁶ It is also an approach to interpretation that is contextual, takes into account socio-economic inequalities,¹⁷ and challenges systemic barriers to equality via a focus on redistribution.¹⁸

Having elaborated what a creative interpretation of discrimination law might entail, Taylor then considers whether courts interpret discrimination law creatively in practice. She concludes, ultimately, that while jurisprudence across the jurisdictions can be confused and contradictory,¹⁹ courts are more likely to adopt a creative interpretation if they have an established role in human rights review:²⁰ a creative interpretation 'requires the judiciary to have an accepted role in the articulation of fundamental values and the protection of rights'.²¹ This role is well established in Canada, somewhat established in the United Kingdom, and underdeveloped in Australia.²² Understandably, then, in the jurisdictions Taylor studies, a creative interpretation is most often evident in Canada, sometimes present in the United Kingdom, and largely absent in Australia.²³ Taylor concludes that the Australian judiciary's approach to discrimination law is one focused on formal equality, which does not seek societal transformation.²⁴ Instead, the approach taken to proving discrimination, and justification, by Australian courts is one 'focused on fault and punishment'.²⁵ This is far more limited than what is envisaged by a pluralist and multidimensional view of equality.

Taylor therefore argues that the differences in approach to statutory interpretation arise from the 'different institutional contexts' for judicial decision-making in each country.²⁶ For Taylor, statutory discrimination law is quasi-constitutional in all three jurisdictions;²⁷ this categorisation has been used in Canada to justify a creative and expansive interpretation of discrimination law,²⁸ grounded in values and not technicalities,²⁹ but has not led to the same approach in Australia or the United Kingdom.³⁰ Again, Taylor sees this difference as reflecting the Canadian judiciary's well-established role in rights review;³¹ Canadian courts have an established, accepted and legitimate function in articulating community norms

¹⁴ Ibid 9.

¹⁵ Ibid 10, 32.

¹⁶ Ibid 27.

¹⁷ Ibid 55.

¹⁸ Ibid 56.

¹⁹ Ibid 147.

²⁰ Ibid 8, 153.

²¹ Ibid 167.

²² Ibid 153, 176, 181.

²³ Ibid 148–50.

²⁴ Ibid 135.

²⁵ Ibid 143. See also at 147.

²⁶ Ibid 171.

²⁷ Ibid 153, 166.

²⁸ Ibid 152, 157.

²⁹ Ibid 158.

³⁰ Ibid 153.

³¹ Ibid 181.

and values, and this is reflected in their approach to statutory interpretation.³² Thus, while a ‘creative’ approach to interpretation, going beyond what was originally anticipated by Parliament, may be seen as posing challenges to the judiciary’s institutional legitimacy,³³ a different understanding of the judicial role emphasises a different (and larger) role for the courts in the development of rights (and equality law).³⁴

Further, Taylor argues that discrimination law’s status as both public and private law justifies the judiciary’s active intervention in matters of distribution and resource allocation by governments.³⁵ Indeed, this active involvement is critical to achieve both the recognitional and redistributive aspects of equality law.³⁶ At present, though, this potential is under-realised — reflecting not the limits of discrimination legislation³⁷ but ‘embedded understandings’ of the judicial role and enduring beliefs in the limited institutional capacity of judges to make ‘political’ decisions.³⁸

III Implications

Taylor’s work explicitly does not focus on making proposals for law reform.³⁹ It has clear implications, though, for the Australian Human Rights Commission’s call to adopt a national human rights Act in Australia.⁴⁰ Not only could adopting such legislation better protect human rights in Australia, it might also prompt a shift in how courts approach their judicial role, particularly in the interpretation of discrimination law. If a ‘creative’ interpretation goes hand in hand with an established judicial role in rights review, it is arguably critical that human rights instruments be adopted to facilitate this judicial role and potential shift in interpretive approach. For Taylor, this would ‘provide courts with the language and institutional legitimacy to bring to life a “creative” interpretation’.⁴¹ Without ‘constitutional transformation’, though, Taylor sees statutory equality rights as likely to remain ‘relatively ineffective in securing substantive change’.⁴² The question, then, is whether the adoption of human rights statutes — as has occurred in the Australian Capital Territory, Victoria and Queensland — is sufficient to achieve this shift in the judicial role and interpretation, or whether broader constitutional change is required. It was presumably beyond the scope of this work to consider any differences in approach across the Australian states and territories; Taylor explicitly focuses her analysis at a high level, concentrating on ‘creative’ (and non-creative) appellate

³² Ibid 183.

³³ Ibid 151.

³⁴ Ibid 172.

³⁵ Ibid 152, 188.

³⁶ Ibid 190.

³⁷ Ibid 197.

³⁸ Ibid 188, 195.

³⁹ Ibid 6.

⁴⁰ Australian Human Rights Commission, ‘Free and Equal: An Australian Conversation on Human Rights’ (Issues Paper, April 2019); Australian Human Rights Commission, *Revitalising Australia’s Commitment to Human Rights: Free & Equal Final Report* (Report, 2023).

⁴¹ Taylor (n 6) 213.

⁴² Ibid.

judicial decisions.⁴³ But there is clearly more work to be done to consider the dynamic interplay between human rights law and equality law, particularly in the context of federalism.

Taylor also emphasises the clear disconnect between the courts and the normative literature on discrimination law.⁴⁴ This separation has implications for the courts and judges, and how they approach their role in interpreting and applying discrimination law. As scholars of equality law, we can only hope that the judiciary engages deeply with Taylor's work. Equally, though, there is a need for normative literature that more closely engages with judicial decisions. It is here, for example, that Moreau's normative work represents a departure from other theoretical scholarship, as it intentionally engages case law and real-world complaints of discrimination to develop and test theory.⁴⁵ It is perhaps unsurprising that there is such a disconnect between judicial decisions and theory, if neither is consciously engaging with the other. Taylor's careful scholarship offers a potential bridge to link the normative and the judicial, enriching both fields of work.

Taylor's work flags the ways in which statutory discrimination law might present a challenge to some established understandings of the judicial role; but it also offers an invitation to reframe and recast the institutional role of the judiciary. For Taylor, a more active judicial approach to interpreting and applying discrimination law is consistent with both the framing of discrimination law statutes, and a broader understanding of the judicial role. As Taylor concludes, the way the judiciary responds to discrimination law is critical for ensuring the law's effectiveness and success.⁴⁶ The courts and Parliament should work in partnership to better protect equality rights.⁴⁷ Achieving this shift is going to require significant institutional support for the judiciary, to help reframe and reshape existing approaches to interpretation. In addition to adopting human rights instruments, we might consider how we can better support judges to engage with discrimination law in a meaningful, creative way that best advances equality.

This book is critical reading for equality and discrimination law scholars. However, it also speaks to the rules of statutory interpretation, and the role of the courts. It will therefore have broad appeal to scholars of public law.

⁴³ Ibid 6, 7.

⁴⁴ Ibid 10, 34, 210.

⁴⁵ Moreau (n 12) 28–9, 30, 104.

⁴⁶ Taylor (n 6) 213.

⁴⁷ Ibid.