

# GIVING MEANING TO ‘SOCIAL ORIGIN’ IN INTERNATIONAL LABOUR ORGANIZATION (‘ILO’) CONVENTIONS, THE *FAIR WORK ACT 2009* (Cth) AND *THE AUSTRALIAN HUMAN RIGHTS COMMISSION ACT 1986* (Cth): ‘CLASS’ DISCRIMINATION AND ITS RELEVANCE TO THE AUSTRALIAN CONTEXT

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## I INTRODUCTION

Australia has two Acts which prohibit discrimination on the basis of ‘social origin’ yet these provisions are not utilised frequently. Section 351 of the *Fair Work Act 2009* (Cth) (‘*FW Act*’) prohibits an employer from taking adverse action against an employee or prospective employee on the basis of a number of grounds including that person’s ‘social origin’. Section 772 of the *FW Act* prohibits termination of employment on the basis of a number of grounds including ‘social origin’. In outlawing this type of discrimination in Australian labour law, the Commonwealth Parliament relied on *Convention (No 111) concerning Discrimination in respect of Employment and Occupation* (‘*ILO 111*’).<sup>1</sup> Litigants have, however, made little use of provisions in the *FW Act* which prohibit discrimination on the basis of ‘social origin’. Additionally, the *Australian Human Rights Commission Act 1986* (Cth) (‘*AHRC Act*’) prohibits discrimination in employment on the basis of a number of grounds including ‘social origin’.<sup>2</sup> The Commonwealth Parliament derived the meaning of discrimination within section 3 of the *AHRC Act*, which includes ‘social origin’, from *ILO 111*. However, very few complaints of ‘social origin’ discrimination have been made to the Australian Human Rights Commission (‘AHRC’). This article seeks to unpack ILO jurisprudence on the concept of ‘social origin’ discrimination to show that it has the potential to play a broader role in Australian labour law and anti-discrimination law.

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1 Opened for signature 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960).

2 Australian Human Rights Commission, *Federal Discrimination Law* (Online Handbook, 21 October 2011) 3–5 [1.3.2] <[http://www.austlii.edu.au/au/other/HRLRes/2009/1/FDL\\_all.pdf](http://www.austlii.edu.au/au/other/HRLRes/2009/1/FDL_all.pdf)>. See also Australian Human Rights Commission, *Other Areas of Workplace Discrimination* (Information Sheet, November 2014).

'Social origin' discrimination has been expressly defined by the ILO Committee of Experts on the Application of Conventions and Recommendations ('Committee of Experts') to include instances where a person faces discrimination because of his or her 'class', 'caste' or 'socio-occupational category'.<sup>3</sup> Clearly, the most relevant of these three constituent elements of 'social origin' to Australia is 'class'. This is particularly so reflecting on the stigmatised nature of lower-class status in Australia, as evidenced by the common use of pejorative terms which are used to describe people who appear to exhibit characteristics that are consistent with lower-class identity. These pejorative terms include 'bogan' (or its derivatives 'barry', 'bennie', 'boonie', 'chigger' or 'Ravo',<sup>4</sup> 'Charlene', 'Charmaine', 'cogger', 'feral', 'bevan', 'bev-chick', 'bog', 'booner', 'charnie bum', 'gullie', 'mocca' and 'scozzer', all of which are defined in similar terms as a 'bogan'),<sup>5</sup> 'cashed up bogan', 'dero', 'pov' or 'povo', 'ocker', 'yobbo', 'feral', 'westie', 'wog', 'shitkicker', 'dole bludger' and 'no-hoper'. Many of these are, it can be argued, examples of working-class stereotypes that are 'held up to middle-class ridicule'<sup>6</sup> – quite distinct from the more positively viewed middle–upper class 'yuppie' or 'hipster'.

Although the Committee of Experts expressly identifies 'class' as relevant to 'social origin', it is interesting to note that the Committee does not explain the concept of 'class'. Defining 'social origin' discrimination as 'class' discrimination does not seem to be very helpful because giving meaning to 'class' is almost as difficult as defining 'social origin'. This article will therefore focus on giving meaning to the concepts of 'class' and 'class discrimination'.

Part II of this article will provide a brief explanation of the ILO, its remit and the functions of its main supervisory bodies, specifically the Committee of Experts. Part III of this article will discuss the relevance of the reports of the Committee of Experts to Australian labour law and anti-discrimination law. Part IV of this article will give meaning to the concepts of 'class' and 'class

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- 3 Committee of Experts on the Application of Conventions and Recommendations, *Equality in Employment and Occupation: Report III (Part 4B): General Survey of the Reports on the Discrimination (Employment and Occupation) Convention (No 111) and Recommendation (No 111)*, International Labour Conference, 75<sup>th</sup> sess, Agenda Item 3 (1988) 53 [54] ('*General Survey 1988*'). See also Committee of Experts on the Application of Conventions and Recommendations, *Report III (Part 1B): General Survey on the Fundamental Conventions concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalization*, International Labour Conference, 101<sup>st</sup> sess, Agenda Item 3 (2012) 335–6 [802] ('*General Survey 2012*'); Committee of Experts on the Application of Conventions and Recommendations, *Equality in Employment and Occupation: Report III (Part 4B): Special Survey on Equality in Employment and Occupation in respect of Convention No 111*, International Labour Conference, 83<sup>rd</sup> sess, Agenda Item 3 (1996) 16 [43] ('*Special Survey 1996*').
- 4 Siobhan Maiden, 'Tasmanian Slang and Terminology', *ABC Northern Tasmania* (online), 31 January 2008 <<http://www.abc.net.au/local/stories/2008/01/31/2151038.htm>>. 'Chigger' is 'a derogatory term similar to "bogan"', which refers to Chigwell, 'an outer suburb of Hobart that was originally a Housing Commission area'. An 'equivalent' term 'seems to be Ravo', which refers to Ravenswood, a suburb east of Launceston.
- 5 *Macquarie Dictionary* (Macquarie Dictionary Publishers, 6<sup>th</sup> ed, 2013) 164 ('*Macquarie Dictionary*').
- 6 See Craig McGregor, *Class in Australia* (Penguin, 2<sup>nd</sup> ed, 2001) 11.

discrimination’, as they appear to be understood from applications of ‘social origin’ discrimination principles by the Committee of Experts. Part V of this article will then ask whether the ‘social origin’ and ‘class’ discrimination principles discussed in Part IV of this article are likely to be relevant to the Australian context, and whether ‘class discrimination’ is likely to be an issue in Australia.

## II THE ILO AND ILO SUPERVISORY BODIES

The ILO is an international organisation that brings together ‘governments, employers and workers to set labour standards, develop policies and devise programmes’.<sup>7</sup> International labour standards, which are drawn up by governments, employers and workers, are ‘legal instruments’ which set out ‘basic principles and rights at work’.<sup>8</sup> These labour standards ‘are either *conventions*, which are legally binding international treaties that may be ratified by member states, or *recommendations*, which serve as non-binding guidelines’.<sup>9</sup>

Australia has ratified a number of ILO conventions, the most relevant of which for the purposes of this article are *ILO 111* and *Convention (No 158) concerning Termination of Employment at the Initiative of the Employer* (*‘ILO 158’*).<sup>10</sup> Article 1 of *ILO 111* prohibits discrimination on the basis of a number of grounds including ‘social origin’ and article 5 of *ILO 158* prohibits termination of employment on the basis of a number of grounds including ‘social origin’.

While ILO conventions and recommendations are the ‘main source of international labour standards’,<sup>11</sup> compliance with these standards requires supervision. This supervision is undertaken by the ILO, which monitors the situation in member states to ILO conventions to determine whether those states are complying with such conventions. The ILO monitors member states in two ways. The first way is through regular systems of supervision and the second way is through special procedures.<sup>12</sup>

Regular supervision generally takes place in the form of ‘regular reporting and dialogue with the ILO’s supervisory bodies’.<sup>13</sup> Reports are prepared by

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7 International Labour Organization, *How the ILO Works: Tripartism and Social Dialogue* <<http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/lang--en/index.htm>>.

8 International Labour Organization, *Conventions and Recommendations* <<http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm>>.

9 Ibid (emphasis in original).

10 Opened for signature 22 June 1982, [1994] ATS 4 (entered into force 23 November 1985).

11 Constance Thomas, Martin Oelz and Xavier Beaudonnet, ‘The Use of International Labor Law in Domestic Courts: Theory, Recent Jurisprudence, and Practical Implications’ in *Les normes internationales du travail: Un patrimoine pour l’avenir* (International Labour Organization, 2004) 249, 253–4.

12 International Labour Organization, *ILO Supervisory System/Mechanism* <<http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-supervisory-system-mechanism/lang--en/index.htm>>.

13 Thomas, Oelz and Beaudonnet, above n 11, 254.

governments and these are reviewed by the Committee of Experts, which comprises 20 independent members<sup>14</sup> who are 'eminent jurists'<sup>15</sup> 'drawn from all parts of the world' and 'appointed by the Governing Body 'for renewable periods of three years'.<sup>16</sup> The findings of the Committee of Experts include: (1) 'a general report', which gives 'an overview of the Committee's work' and draws 'the attention of the Governing Body, the Conference and member States to matters of general interest or special concern'; (2) 'observations' on 'the application of ratified Conventions in member States', among other matters; (3) 'direct requests', which are 'individual comments addressed to governments by the Director-General of the ILO on behalf of the Committee'; and (4) 'General Surveys' on the 'national law and practice' of member states which tend to focus on particular subjects (such as 'one or several related Conventions and Recommendations').<sup>17</sup> The tripartite Conference Committee on the Application of Standards receives and examines the findings of the Committee of Experts and related information, and governments are invited to discuss these findings.<sup>18</sup>

Special procedures include ad hoc complaints being heard concerning 'cases of alleged non-satisfactory observance of ratified conventions'.<sup>19</sup> Members of the ILO may file a complaint with the International Labour Office if they believe that another member is not observing any of the ILO conventions which both of them have ratified.<sup>20</sup> Delegates to the International Labour Conference or the Governing Body may also file a complaint 'against a member state for not complying with a ratified convention'.<sup>21</sup> The Governing Body of the ILO has the discretion to appoint a Commission of Inquiry to hear the complaint.<sup>22</sup> A Commission of Inquiry therefore has a perceived 'judicial nature'<sup>23</sup> because it is seen to conduct a 'judicial investigation' and make findings based on that investigation.<sup>24</sup>

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14 Ibid.

15 International Labour Organization, *Committee of Experts on the Application of Conventions and Recommendations* <<http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--it/index.htm>>.

16 International Labour Standards Department, *Handbook of Procedures relating to International Conventions and Recommendations* (International Labour Organization, 2012) 34 [58].

17 Ibid 36 [59](k); Thomas, Oelz and Beaudonnet, above n 11, 254.

18 Thomas, Oelz and Beaudonnet, above n 11, 254–5; International Labour Standards Department, *Handbook of Procedures relating to International Conventions and Recommendations* (International Labour Organization, 2012) 38 [63]; International Labour Organization, *Conference Committee on the Application of Standards* <<http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/conference-committee-on-the-application-of-standards/lang--en/index.htm>>.

19 Thomas, Oelz and Beaudonnet, above n 11, 255.

20 *International Labour Organization Constitution* art 26.

21 International Labour Organization, *Complaints* <<http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/complaints/lang--en/index.htm>>.

22 *International Labour Organization Constitution* art 26(3).

23 *Commonwealth v Hamilton* (2000) 108 FCR 378, 390 [44] (Katz J), citing *South West Africa (Ethiopia v South Africa) (Preliminary Objections)* [1962] ICJ Rep 319, 427–8 (Jessup J).

24 Ibid.

The Committee of Experts and Commissions of Inquiry, by commenting on situations constituting non-compliance with ILO conventions (through regular supervision by the Committee of Experts and special ad hoc procedures such as a Commission of Inquiry), interpret ILO conventions *in practice*.<sup>25</sup> Though not binding<sup>26</sup> or authoritative,<sup>27</sup> interpretations of ILO conventions by the Committee of Experts and Commissions of Inquiry ‘are of undoubted moral value’ and must adhere to a ‘strictly legal method’ when evaluating ‘conformity of national situations with ILO standards’.<sup>28</sup> As such, their observations are carefully considered legal interpretations of ILO instruments by eminent jurists. These interpretations, for reasons that will now be discussed, are important materials which can help clarify the content of the term ‘social origin’ in not only ILO conventions but also the *FW Act* and the *AHRC Act*.

### III THE RELEVANCE OF THE REPORTS OF ILO SUPERVISORY BODIES TO AUSTRALIAN LABOUR LAW AND ANTI-DISCRIMINATION LAW

The prohibition against termination of employment on the basis of ‘social origin’ and other grounds (which is currently found in section 772 of the *FW Act*) was introduced into Australian labour legislation by the *Industrial Relations Reform Act 1993* (Cth) (*‘Reform Act’*).<sup>29</sup> The new section 170DF(1)(f) introduced by the *Reform Act* in the *Industrial Relations Act 1988* (Cth) (*‘IR Act’*) sought to prohibit termination of employment on the basis of a number of grounds including ‘social origin’. The new object of the *IR Act* was to help prevent and eliminate discrimination based on various grounds including ‘social origin’, and this reflected ‘certain obligations imposed by international treaties which [were] given effect by the bill’.<sup>30</sup> Section 170DF(1)(f) of the *IR Act* gave effect to a number of conventions and recommendations of the ILO<sup>31</sup> – in particular *ILO*

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25 Jean-Michel Servais, *International Labour Law* (Kluwer, 2<sup>nd</sup> ed, 2009) 82–3. See, eg, Holly Cullen, ‘Does the ILO Have a Distinctive Role in the International Legal Protection of Child Soldiers?’ (2011) 5 *Human Rights and International Legal Discourse* 63, 68; Holly Cullen, ‘The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights’ (2009) 9 *Human Rights Law Review* 61, 69.

26 Claire La Hovary, ‘Showdown at the ILO? A Historical Perspective on the Employers’ Group’s 2012 Challenge to the Right To Strike’ (2013) 42 *Industrial Law Journal* 338, 350.

27 Servais, above n 25, 82–3.

28 Ibid 83.

29 Peter Punch, *Australian Industrial Law* (CCH Australia, 1995) 860.

30 Supplementary Explanatory Memorandum, House of Representatives, Industrial Relations Reform Bill 1993 (Cth) 3. *ILO 111* and *ILO 158* were particularly influential with respect to s 170DF of the *IR Act*: see Explanatory Memorandum, House of Representatives, Industrial Relations Reform Bill 1993 (Cth) 23–4.

31 See Marilyn J Pittard, ‘International Labour Standards in Australia: Wages, Equal Pay, Leave and Termination of Employment’ (1994) 7 *Australian Journal of Labour Law* 170, 171–2.

111 and ILO 158.<sup>32</sup> These ILO instruments shaped the terminology and approach to termination of employment used in the *Reform Act*.<sup>33</sup>

The states challenged this new law and argued that certain grounds that were not mentioned in ILO 111 could not be given force under the Commonwealth's external affairs power. In *Victoria v Commonwealth ('Industrial Relations Act Case')*,<sup>34</sup> the High Court of Australia largely upheld the unlawful termination provisions. Only the ground of 'mental disability' was considered to be invalid<sup>35</sup> because it was not mentioned in ILO instruments and the various committees set up to comply with ILO instruments and recognise additional grounds of discrimination<sup>36</sup> had not recognised the ground as an additional ground to those already specified in ILO instruments.<sup>37</sup> 'Social origin', however, is a prohibited ground of discrimination in ILO 111 and ILO 158. Section 772(1)(f) of the *FW Act*, which currently prohibits termination of employment on the basis of a number of grounds including 'social origin', continues to rely on the external affairs power in the *Australian Constitution*<sup>38</sup> as it gives effect or further effect to ILO 158.<sup>39</sup> The object of the division of which section 772 is part is to give effect to, among other instruments, ILO 111 and ILO 158.<sup>40</sup> It seems that section 772 of the *FW Act* needs to give effect to and implement ILO conventions if it is to be valid under the external affairs power.<sup>41</sup> Obviously, to implement and give effect to ILO conventions, the provision must derive from, or be based on, these international instruments. It follows that the term 'social origin' in section 772 of the *FW Act* must also derive from, or be based on, these international instruments.

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32 Section 170DF(1) of the *IR Act* gave effect to 'Articles 5 and 6 of [ILO 158]' which 'list a number of reasons [including "social origin"] which do not constitute valid reasons for termination of employment' while subsection 170DF(2) concerning 'inherent requirements ... reflects the provisions of [ILO 111]': Explanatory Memorandum, House of Representatives, Industrial Relations Reform Bill 1993 (Cth) 23. See also Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-discrimination Law* (Federation Press, 2<sup>nd</sup> ed, 2014), 857–8 [14.1.1]–[14.1.3].

33 See Pittard, above n 31, 171–2.

34 (1996) 187 CLR 416.

35 *Industrial Relations Act Case* (1996) 187 CLR 416, 531–2 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

36 See Joshua Colangelo-Bryan, 'Discrimination Down Under: Lessons from the Australian Experience in Prohibiting Employment Discrimination on the Basis of Sexual Orientation' (1998) 7 *Pacific Rim Law & Policy Journal* 377, 388.

37 *Industrial Relations Act Case* (1996) 187 CLR 416, 531–2 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

38 See Explanatory Memorandum, Fair Work Bill 2008 (Cth) 213 [1342], 341 [2239], 407 [2702], 419 [2770]; Anna Chapman, 'Reasonable Accommodation, Adverse Action and the Case of Deborah Schou' (2012) 33 *Adelaide Law Review* 39, 71 n 172.

39 Explanatory Memorandum, Fair Work Bill 2008 (Cth) 407 [2702].

40 See *FW Act* ss 771(a), (c).

41 On the external affairs power, see generally George Williams, Sean Brennan and Andrew Lynch, *Australian Constitutional Law & Theory: Commentary and Materials* (Federation Press, 6<sup>th</sup> ed, 2014) 896 ff; Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (Lawbook, 4<sup>th</sup> ed, 2014) 130–145.

While section 351 of the *FW Act* does not rely on the external affairs power for its support,<sup>42</sup> the Discrimination Law Experts' Roundtable has submitted that the 'broad range of grounds protected from adverse action ... [including 'social origin'] in s 351 of the [*FW Act*] derive from Australia's international obligations'.<sup>43</sup> The objects of the *FW Act* include '[taking] into account Australia's international labour obligations',<sup>44</sup> and these obligations include ILO conventions such as *ILO 111* and *ILO 158*.<sup>45</sup> The Fair Work Act Review Panel also emphasised that one of the main reasons the Commonwealth enacted section 351 of the *FW Act* was 'to take into account Australia's international labour obligations'.<sup>46</sup> Additionally, section 351 of the *FW Act* is 'intended to broadly cover'<sup>47</sup> predecessor provisions such as section 659(2)(f) of the *Workplace Relations Act 1996* (Cth), which made 'it unlawful to dismiss an employee for discriminatory reasons'<sup>48</sup> (including 'social origin'), and which relied on the external affairs power.<sup>49</sup> This supports the position that when Parliament prohibited 'social origin' discrimination in section 351 of the *FW Act* to take into account its obligations under ILO conventions, it seems likely that it would have continued to adopt the term 'social origin' from ILO conventions.

Discrimination on the basis of 'social origin' is also prohibited in Australian anti-discrimination legislation. Under section 3 of the *AHRC Act*, discrimination is defined to include grounds, such as 'social origin', 'on which an act is to be treated as discrimination' and this meaning 'is derived from that appearing in' *ILO 111*.<sup>50</sup> Complaints of 'social origin' discrimination in employment can be made to the AHRC. Importantly, in establishing the AHRC under the *AHRC Act*, the AHRC was intended by the legislature to be 'the vehicle under which Australia's obligations under' *ILO 111* was to be implemented.<sup>51</sup>

Based on the above text, section 3 of the *AHRC Act* is derived from *ILO 111* to give effect to Australia's international obligations. The above discussion has also argued that, because section 772 of the *FW Act* implements and gives effect to ILO conventions, Parliament adopted the term 'social origin' in this provision from ILO conventions. If the term 'social origin' was not adopted or sourced

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42 See Explanatory Memorandum, Fair Work Bill 2008 (Cth) 213 [1342]; Chapman, above n 38, 71.

43 See Discrimination Law Experts' Roundtable, *Report on Recommendations for a Consolidated Federal Anti-discrimination Law in Australia* (Report, 31 March 2011) 8–9. See also Discrimination Law Experts' Group, Submission to Attorney-General's Department (Cth), *Consolidation of Commonwealth Anti-discrimination Laws*, 13 December 2011.

44 *FW Act* s 3(a).

45 See Explanatory Memorandum, Fair Work Bill 2008 (Cth) 342–3 [2251].

46 See Fair Work Act Review Panel, Department of Education, Employment and Workplace Relations (Cth), *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation* (Report, 15 June 2012) 239.

47 Explanatory Memorandum, Fair Work Bill 2008 (Cth) 229 [1424].

48 *Ibid.*

49 See Chapman, above n 38, 71 n 172.

50 Explanatory Memorandum, Human Rights and Equal Opportunity Commission Bill 1985 (Cth) 4.

51 *Ibid.* 1. In 2009, the Human Rights and Equal Opportunity Commission changed its name to the Australian Human Rights Commission: *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) sch 3.

from ILO conventions, the legislation would not 'give effect to' or 'implement' ILO conventions. It was also argued that the term 'social origin' in section 351 of the *FW Act* is likely to be sourced from ILO conventions, but this is not definitive. Even if the term 'social origin' in section 351 of the *FW Act* is not to be regarded as having been adopted from ILO conventions, the term 'social origin' in section 351 of the *FW Act* is to have a meaning which is consistent with the meaning which should be attributed to the term 'social origin' in section 772 of the *FW Act*.<sup>52</sup> This provides a solid foundation from which to now argue that the reports of ILO supervisory bodies can, and should, be used to clarify the content of 'social origin' in not only ILO conventions but also the *FW Act* and *AHRC Act*.

Given that the term 'social origin' in the *FW Act* and *AHRC Act* derives from or is based on the term 'social origin' in ILO conventions, the term 'social origin' in the *FW Act* and the *AHRC Act* should have the same meaning that the term 'social origin' bears in ILO conventions. In *Applicant A v Minister for Immigration and Ethnic Affairs*,<sup>53</sup> Brennan CJ commented:

If a statute transposes the text of a treaty or a provision of a treaty into the statute so as to enact it as part of domestic law, the prima facie legislative intention is that the transposed text should bear the same meaning in the domestic statute as it bears in the treaty. To give it that meaning, the rules applicable to the interpretation of treaties must be applied to the transposed text and the rules generally applicable to the interpretation of domestic statutes give way.<sup>54</sup>

Dennis Pearce and Robert Geddes write:

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52 In *Registrar of Titles (WA) v Franzone* (1975) 132 CLR 611, Mason J said that it 'is a sound rule of construction to give the same meaning to the same words appearing in different parts of a statute unless there is reason to do otherwise': at 618. Justice Mason's judgment was agreed with generally by Barwick CJ and Jacobs J: at 616 (Barwick CJ), 621 (Jacobs J). See also Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (LexisNexis, 8<sup>th</sup> ed, 2014) 150–2 [4.6]. There does not appear to be any reason to give 'social origin' in s 351 of the *FW Act* a different meaning to 'social origin' in s 772 of the *FW Act*. Rather, there appear to be good reasons to give 'social origin' in ss 351 and 772 a consistent meaning. By s 723 of the *FW Act* a 'person must not make an unlawful termination application in relation to conduct if the person is entitled to make a general protections court application in relation to the conduct'. Given that s 772 of the *FW Act* relies on the external affairs power, it covers all employers and provides a remedy for employees who are not covered by s 351 of the *FW Act*. It can be argued that Parliament would have envisaged the grounds in s 351 to have a consistent meaning with those in s 772 of the *FW Act*, in light of the way that s 772 serves to catch employees not covered by s 351. No contrary intention appears in the *FW Act*. See also Explanatory Memorandum, Fair Work Bill 2008 (Cth) 407 [2702] in which it is clarified that 'the general protections and unlawful termination provisions cover the same grounds of when a termination is for a prohibited reason'.

53 (1997) 190 CLR 225.

54 Ibid 230–1 (Brennan CJ), citing *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 265 (Brennan J); *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, 413 (Gaudron J). See also *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298, 305 (Gummow J), 335 (Einfeld J); *Shipping Corporation of India Ltd v Gamlen Chemical Co (Australasia) Pty Ltd* (1980) 147 CLR 142, 159–60 (Mason and Wilson JJ); *Maloney v The Queen* (2013) 252 CLR 168, 180–1 [14] (French CJ), 255–6 [235] (Bell J); *Iliafi v The Church of Jesus Christ of Latter-Day Saints Australia* (2014) 221 FCR 86, 104–5 [56]–[57] (Kenny J); *Subway Systems Australia Pty Ltd v Ireland* [2014] VSCA 142, [29]–[36] (Maxwell P); *Casey v Pel-Air Aviation Pty Ltd* [2015] NSWSC 566, [39] (Schmidt J); *Commonwealth v Hamilton* (2000) 108 FCR 378, 385–6 [31] (Katz J). See also Pearce and Geddes, above n 52, 53–6 [2.20].



Where legislation gives effect to an international convention or treaty or portion thereof by adopting the words of the convention or treaty, in the interests of certainty and uniformity it has been recognised that those provisions should be interpreted using the interpretive principles which are applied to the convention or treaty ...<sup>55</sup>

The question, then, is whether rules of convention interpretation permit recourse to the reports of the ILO supervisory bodies such as the Committee of Experts to aid the interpretation of ILO conventions. Based on a number of authorities that will now be discussed, it will be argued that the reports of ILO supervisory bodies can be useful guides to the proper construction of the ambiguous term ‘social origin’ in ILO conventions.<sup>56</sup> Accordingly, and based on these authorities, it appears that they can, and should, be used to clarify the content of ‘social origin’ in *ILO 111*, and the *FW Act* and *AHRC Act*.

Rules of convention interpretation are contained within the *Vienna Convention on the Law of Treaties* (‘*VCLT*’),<sup>57</sup> particularly in articles 31 and 32. In *Povey v Qantas Airways Ltd*<sup>58</sup> it was noted:

Article 31 [of the *VCLT*] provides that a treaty must be interpreted in good faith, in accordance with the ordinary meaning of the terms in their context and in the light of the object and purpose of the treaty. Interpretative assistance may be gained from extrinsic sources (Art 32) in order to confirm the meaning resulting from the application of Art 31, or to determine the meaning when interpretation according to Art 31 leaves the meaning ‘ambiguous or obscure’ or ‘leads to a result which is manifestly absurd or unreasonable’.<sup>59</sup>

Additionally, in *Fothergill v Monarch Airlines Ltd*,<sup>60</sup> Lord Scarman said:

We know that in the great majority of the contracting states the legislative history, the ‘travaux préparatoires’, the international case law (‘la jurisprudence’) and the writings of jurists (‘la doctrine’) would be admissible as aids to the interpretation of the convention. We know also that such sources would be used in the practice of public international law. They should, therefore, also be admissible in our courts: but they are to be used as *aids* only.<sup>61</sup>

Based on these principles of convention interpretation, there is authority for the proposition that the reports of the Committee of Experts are likely to be admissible as aids to interpreting ILO conventions. First, the European Court of Human Rights (‘ECtHR’) and the Inter-American Court of Human Rights

55 Pearce and Geddes, above n 52, 53–6 [2.20].

56 The term ‘social origin’ is not defined in *ILO 111* or *ILO 158*.

57 Opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

58 (2005) 223 CLR 189.

59 *Ibid* 202 [24] (Gleeson CJ, Gummow, Hayne and Heydon JJ). See also *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338, 349–50 (Dawson J).

60 [1981] AC 251.

61 *Ibid* 294E (emphasis in original). See also *Adan v Secretary of State for the Home Department* [1999] 1 AC 293, 307B, 308A (Lord Lloyd); *Diag Human SE v Czech Republic* [2014] 2 Lloyd’s Rep 283, 287 [9] (Eder J); *Lombard-Knight v Rainstorm Pictures Inc* [2014] 2 Lloyd’s Rep 74, 76 [3] (Tomlinson LJ); *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 100, 117 (Gummow J); *United Airlines Inc v Sercel Australia Pty Ltd* (2012) 260 FLR 37, 57 [78] (Allsop P); *NBGM v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 522, 563 [160] (Allsop J); *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, 399–400 (Dawson J), 405 (Toohey J), 416 (Gaudron J), 430 (McHugh J).

('IACHR') both 'engage in "systemic interpretation" ... relying on Article 31(3)(c) of the [VCLT] as a means to include ILO standards in their analysis and interpretation'.<sup>62</sup> Article 31(3)(c) of the VCLT provides that any 'relevant rules of international law applicable in the relations between the parties' shall be taken into account together with the context. Second, in *Commonwealth v Hamilton* ('*Hamilton*'),<sup>63</sup> Katz J was of the view that the opinions of the Committee of Experts are 'la doctrine':

The opinions of 'experts of recognized competence' or of 'prominent judges, professors, and labour law experts' (to repeat the two descriptions of the Committee of Experts which I have already quoted above) as to the meaning of [ILO 111] at the time of its adoption are capable, whenever expressed, of assisting in its *proper construction* and I have no reason to think that the Committee of Experts was doing other than expressing such an opinion on each of the occasions which I have mentioned. The use of those opinions as an aid to the construction of [ILO 111] is an unexceptional illustration of the use of 'la doctrine', a process in the construction of international agreements of which Lord Scarman spoke approvingly in *Fothergill v Monarch Airlines* (and see also *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs*).<sup>64</sup>

This statement by Katz J demonstrates that the reports of the Committee of Experts are not only admissible as extrinsic materials which can aid the interpretation of ILO conventions, but that they are *important guides to the proper construction of ILO conventions*.<sup>65</sup> The fact that a number of courts have used or referred to the reports of ILO supervisory bodies such as the Committee of Experts when interpreting ILO conventions tends to reinforce this position. These courts include the High Court of Australia,<sup>66</sup> Federal Court of

62 Franz Christian Ebert and Martin Oelz, 'Bridging the Gap between Labour Rights and Human Rights: The Role of ILO Law in Regional Human Rights Courts' (Discussion Paper No DP/212/2012, International Institute for Labour Studies, International Labour Organization, 2012) 13 <[http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms\\_192786.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_192786.pdf)>. See also *National Union of Rail, Maritime and Transport Workers v United Kingdom* (2014) 60 EHRR 199, 209–13 [26]–[37], 226 [76], 232–3 [97]–[98]; *Demir v Turkey* [2008] V Eur Court HR 395, 421–7 [65]–[84]; George Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21 *European Journal of International Law* 509.

63 (2000) 108 FCR 378.

64 Ibid 388 [39] (emphasis added) (citations omitted).

65 Additionally, art 38(1)(d) of the *Statute of the International Court of Justice* provides that the International Court of Justice 'whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply ... judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'. Article 38 is 'generally regarded as a complete statement of the sources of international law': Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 7<sup>th</sup> ed, 2008) 5. See also *Al-Kateb v Godwin* (2004) 219 CLR 562, 590 [64] (McHugh J); *Minister for Immigration and Citizenship v Anochie* (2012) 209 FCR 497, 509 [49] (Perram J). It can therefore be suggested that the reports of the Committee of Experts may be admissible as 'the teachings of the most highly qualified publicists'.

66 See, eg, *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, 304–5 [72]–[74] (McHugh J), 316 [106] (Gummow J), 339–40 [163] (Kirby J).

Australia,<sup>67</sup> Supreme Court of Canada,<sup>68</sup> ECtHR,<sup>69</sup> IACHR<sup>70</sup> and others.<sup>71</sup> In Australia, it has been described as “orthodox” to rely upon the expressions of opinion of the Committee of Experts for the purposes of interpreting [*ILO III*].<sup>72</sup>

While it seems from the above reasoning of Katz J in *Hamilton* that most weight will be attached to the reports of the Committee of Experts that existed when relevant provisions of the *FW Act* and the *AHRC Act* were enacted, it can also be argued that the reports of the Committee of Experts coming into existence after such enactments can assist in interpreting the legislation. The fact that a report of the Committee of Experts had ‘succeeded the passage’ of legislation ‘did not deter’ Black CJ in *Commonwealth v Bradley*<sup>73</sup> ‘from using that report as an aid to the construction’ of an ILO convention and the legislation in question.<sup>74</sup> Justice Katz, when considering the use of this report by Black CJ, was unable to ‘think of any good reason why that fact should have deterred him’.<sup>75</sup>

The usefulness of extrinsic materials such as reports of the United Nations Committee on the Elimination of Racial Discrimination (‘CERD’) to interpreting the *International Convention on the Elimination of All Forms of Racial Discrimination* (‘RDC’)<sup>76</sup> was considered in *Maloney v The Queen* (‘*Maloney*’).<sup>77</sup> The main message from *Maloney* is that extrinsic materials cannot be used where they would rewrite or alter the text of a convention or piece of legislation.<sup>78</sup> However, the High Court also differed on the usefulness of extrinsic materials.

67 See, eg, *Hamilton* (2000) 108 FCR 378, 387–90 [36]–[45] (Katz J); *Commonwealth v Bradley* (1999) 95 FCR 218, 237 [39] (Black CJ); *Konrad v Victoria* (1999) 91 FCR 95, 113–14 [57]–[59] (Finkelstein J); *Zhang v Royal Australian Chemical Institute Inc* (2005) 144 FCR 347, 352 [29] (Lander J), with whom Spender and Kenny JJ agreed: at 348 [1] (Spender J), 348 [2] (Kenny J); *Claveria v Pilkington Australia Ltd* (2007) 167 IR 444, 468–9 [105]–[106] (Kenny J).

68 See, eg, *Saskatchewan Federation of Labour v Saskatchewan* [2015] 1 SCR 245, 286 [67] (Abella J). See also *Health Services and Support – Facilities Subsector Bargaining Association v British Columbia* [2007] 2 SCR 391, 435–6 [76], in which McLachlin CJ and LeBel J recognised the ‘jurisprudence’ of the ILO Committee of Experts as applied in *Dunmore v A-G (Ontario)* [2001] 3 SCR 1016, 1041 [16] (Bastarache J).

69 See, eg, *National Union of Rail, Maritime and Transport Workers v United Kingdom* (2014) 60 EHRR 199, 209–13 [26]–[37], 226 [76], 232 [97].

70 See, eg, *Iuango Massacres (Colombia) (Preliminary Objections, Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Case Nos 12 050, 12 226, 1 July 2006).

71 See, eg, *Sapevski v Katies Fashions (Australia) Pty Ltd* [1997] IRCA 219; *Catusanu v Ray’s Guard Security Services Pty Ltd* [1997] IRCA 228; *Re Junior Rates Inquiry – 917/98 S Print Q9610* [1998] AIRC 1781; *Industrial Relations Commission Decision 852/1994* [1994] AIRC 691 (Unreported, Commissioner Fogarty, 9 May 1994).

72 See *Johansson v Masonic Homes Inc* [2013] AusHRC 65 (Unreported, Triggs P, 22 January 2014) 7 [38]; *TM v Linfox Australia Pty Ltd* [2014] AusHRC 81 (Unreported, Triggs P, 1 June 2014) 7 [21]–[22]. Both cases cite *Hamilton* (2000) 108 FCR 378, 387 [36] (Katz J).

73 (1999) 95 FCR 218.

74 *Hamilton* (2000) 108 FCR 378, 388 [39] (Katz J), citing *Commonwealth v Bradley* (1999) 95 FCR 218.

75 *Ibid.*

76 Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

77 (2013) 252 CLR 168.

78 *Ibid* 182 [15], 185 [23] (French CJ), 221–2 [134] (Crennan J), 235 [176] (Kiefel J), 255–6 [235]–[236] (Bell J).

Chief Justice French reasoned that

[a]n interpretation of a treaty provision adopted in international practice, by the decisions of international courts or tribunals, or by foreign municipal courts may illuminate the interpretation of that provision where it has been incorporated into the domestic law of Australia.<sup>79</sup>

For Crennan J, extrinsic materials 'guide States Parties in respect of the reporting obligations to which States Parties have agreed'.<sup>80</sup>

Justice Bell held that certain recommendations of CERD are not extrinsic materials of the kind referred to in articles 31(2)–(3) of the *VCCLT*.<sup>81</sup> However, Bell J accepted that 'it is appropriate to give weight to the construction that the international community places upon the [RDC]'.<sup>82</sup> Interestingly, to support this proposition, her Honour cited *Queensland v Commonwealth*.<sup>83</sup> In that case, pursuant to a construction that the international community would place on a convention, 'the majority deferred to the World Heritage Committee on the question of whether Australia had an international obligation to protect and conserve certain property'.<sup>84</sup> Her Honour then noted with apparent approval Justice Brennan's recognition in *Gerhardy v Brown*<sup>85</sup> 'that the rights embraced by the [RDC] may come to be identified with more precision under international law'.<sup>86</sup> Significantly, in *Polyukhovich v Commonwealth* ('*War Crimes Act Case*'),<sup>87</sup> Brennan J recognised that 'the teachings of the most highly qualified publicists of the various nations' are a source of international law (being 'subsidiary means for the determination of rules of law').<sup>88</sup> From the reasoning of Katz J in *Hamilton*, it can be argued that the Committee of Experts fits the description of 'the most highly qualified publicists of the various nations'.<sup>89</sup>

Justice Gageler accepted that while general recommendations of CERD are not binding they 'provide guidance to States Parties on the interpretation of the [RDC]' and are indicative of 'normative development'.<sup>90</sup> For Gageler J, it seems that legislation which has the object of giving effect to a convention must be interpreted consistently with contemporary international understanding, or else

79 Ibid 185 [23].

80 Ibid 222 [134].

81 Ibid 256 [235].

82 Ibid 256 [236].

83 (1989) 167 CLR 232, 240 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

84 Patrick Wall, 'The High Court of Australia's Approach to the Interpretation of International Law and Its Use of International Legal Materials in *Maloney v The Queen* [2013] HCA 28' (2014) 15 *Melbourne Journal of International Law* 228, 235.

85 (1985) 159 CLR 70.

86 *Maloney* (2013) 252 CLR 168, 256 [236] (Bell J), citing *Gehardy v Brown* (1985) 159 CLR 70, 126 (Brennan J).

87 (1991) 172 CLR 501.

88 Ibid 559 (Brennan J), quoting *Statute of the International Court of Justice* art 38(1). See also *Federal Commissioner of Taxation v Macoun* (2014) 227 FCR 265, 277 [53] (Perram J); *Ure v Commonwealth* (2015) 323 ALR 164, 191 [141] (Yates J).

89 As to the application of this principle to the United Nations Human Rights Committee, see *Minister for Immigration and Citizenship v Anochie* (2012) 209 FCR 497, 509–10 [49] (Perram J).

90 *Maloney* (2013) 252 CLR 168, 275–6 [289].

its object will not likely be achieved.<sup>91</sup> A recommendation of CERD was held by his Honour to reflect international understanding,<sup>92</sup> and there is no reason to think that the reports of the Committee of Experts do not similarly reflect the international understanding of ILO conventions, given the expertise of the Committee and the geographic diversity of its membership.<sup>93</sup>

Justice Kiefel was of the view that:

When resort is had to a convention or treaty, an Australian court may have regard to views expressed in extraneous materials as to the meaning of its terms, provided that they are well founded and can be accommodated in the process of construing the domestic statute.<sup>94</sup>

Justice Hayne noted:

The preamble to the [*Racial Discrimination Act 1975* (Cth) ('*RDA*')] recites that the [*RDA*] 'make[s] provision for giving effect to the [*RDC*]' and this Court has held that the [*RDA*] is a valid enactment of the Parliament because it implements Australia's obligations under the [*RDC*]. Of course, resort may be had to the [*RDC*] in interpreting provisions of the [*RDA*]. But, because an Act like the [*RDA*] is to be interpreted 'by the application of ordinary principles of statutory interpretation', the only extrinsic materials that may bear upon that task are materials of a relevant kind that existed at the time the [*RDA*] was enacted. Material published later, such as subsequent reports of United Nations Committees, may usefully direct attention to possible arguments about how the [*RDA*] should be construed but any debate about its construction is not concluded by reference to or reliance upon material of that kind.<sup>95</sup>

The reasoning of Hayne, Kiefel, Bell and Gageler JJ in *Maloney* appears to leave scope for using the reports of relevant expert bodies such as treaty bodies to help clarify, guide or construe the meaning of text in certain conventions or legislation which implements or gives effect to a convention. Additionally, based on the authorities discussed above, and in particular *Hamilton*, it does appear that the reports of ILO supervisory bodies such as the Committee of Experts can and

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91 Ibid 291–3 [324]–[328].

92 Ibid 292 [327].

93 See International Labour Organization, *Members of the Committee of Experts on the Application of Conventions and Recommendations* <[http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/WCMS\\_192093/lang--en/index.htm](http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/WCMS_192093/lang--en/index.htm)>.

94 *Maloney* (2013) 252 CLR 168, 235 [175].

95 Ibid 198–9 [61] (citations omitted).

should be used to clarify the meaning of 'social origin' in ILO conventions.<sup>96</sup> For reasons that have been discussed, the term 'social origin' in the *FW Act* and *AHRC Act* should have the same meaning that the term 'social origin' bears in *ILO 111*. This article will now turn to consider how the Committee of Experts understands the concept of 'social origin' discrimination.

#### IV 'CLASS DISCRIMINATION'?

The Committee of Experts, as noted, has clarified that 'social origin discrimination' includes 'class discrimination'. The Committee of Experts does not, however, explain the concept of 'class'. This seems to be problematic. Giving meaning to 'class' is almost as difficult as defining 'social origin' because there are many competing theories of 'class'.<sup>97</sup> Further, Craig McGregor describes class analysis as a 'sociological minefield'.<sup>98</sup> In light of such a problem, this article will now aim to clarify the way that 'class' appears to be understood by the Committee of Experts.

This Part of this article will determine how ILO supervisory bodies understand 'class' as a constituent element of 'social origin' in ILO conventions. It will show that the Committee of Experts has applied 'social origin' discrimination principles in such a way that suggests that a person's class position is: (1) measured by the extent of that person's economic, social, cultural and human capital; and (2) manifested in certain circumstances by that person's locality and geographic origins. This position by the Committee of Experts eliminates, at least for now, many class theories from the equation of 'social

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96 This is reinforced by the fact that, since *Maloney*, the courts continue to emphasise that the reports of expert bodies such as the United Nations Human Rights Committee are aids to determining the proper construction of relevant conventions such as the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). See, eg, *Bare v Independent Broad-Based Anti-corruption Commission* [2015] VSCA 197, [449] (Tate JA); *SZSSJ v Minister for Immigration and Border Protection* [2015] FCAFC 125, [45] (Rares, Perram and Griffiths JJ); *SZTCV v Minister for Immigration and Border Protection* [2015] FCCA 1677, [19]–[20] (Lloyd-Jones J); *Kuyken v Chief Commissioner of Police (Vic)* (2015) 249 IR 327, 338–40 [31]–[35] (Garde J); *SZTAL v Minister for Immigration* [2015] FCCA 64, [28] (Driver J). See also *CPCF v Minister for Immigration and Border Protection* (2015) 316 ALR 1, 69 [303] (Kiefel J); *SZTIB v Minister for Immigration and Border Protection* (2015) 321 ALR 81, 100–1 [86]–[87] (Robertson, Griffiths and Mortimer JJ); *DPP (Vic) v Kaba* (2014) 69 MVR 137, 177 [152] (Bell J); *Iliafi v Church of Jesus Christ of Latter-Day Saints Australia* (2014) 221 FCR 86, 105 [62], 111 [85], 111–12 [91]–[92], 113 [96], 113–15 [98]–[103] (Kenny J), with whom Greenwood and Logan JJ agreed: at 117 [115] (Greenwood J), 117 [116] (Logan J).

97 Some of the most famous class theories include those of Karl Marx, Max Weber, Emile Durkheim and Pierre Bourdieu, to name only a few. This article will not seek to explain each of these theories, but for an overview of different class theories, see 'Class' in William A Darity Jr (ed), *International Encyclopedia of the Social Sciences* (MacMillan Reference, 2<sup>nd</sup> ed, 2008) vol 1, 561; Cary J Nederman, 'Class' in Marianne Cline Horowitz (ed), *New Dictionary of the History of Ideas* (Thomson Gale, 2005) vol 1, 359–362; Lois A Vitt, 'Class' in George Ritzer (ed), *The Blackwell Encyclopedia of Sociology* (Blackwell Publishing, 2007) vol 2, 533.

98 McGregor, above n 6, 33.

origin' and supports the view that 'class' – as a constituent element of 'social origin' in ILO conventions – tends to be determined by the extent of a person's 'capital'.

### A Class Measured by Economic, Social, Cultural and Human Capital

Pierre Bourdieu is often credited with the view that a person's access to economic, social and cultural capital determines that person's class position.<sup>99</sup> It will be argued below that the Committee of Experts appears to adopt similar criteria to Bourdieu when identifying the 'social categories' that attract comment on 'social origin' discrimination in its various reports. Before considering the 'social categories' that the Committee of Experts discusses under the banner of 'social origin' seemingly due to their limited economic, social, cultural and human capital, it will first be necessary to briefly explain these forms of capital.

Economic capital is perhaps the most obvious determinant of class position because it refers to a person's access to money and property.<sup>100</sup> Economic capital can therefore be measured by a person's 'household income, household savings and house price'.<sup>101</sup> It is often used as the predominant or sole measure of class, but for Bourdieu, 'class' is also measured by other forms of capital, such as social capital and cultural capital. Although social capital and cultural capital can be more easily acquired when a person has access to economic capital,<sup>102</sup> they are distinct from economic capital.

Social capital is often described in terms of relationships available to a person which can be used as a resource or advantage. For Bourdieu, social capital is

the aggregate of the actual or potential resources which are linked to possession of a durable network of more or less institutionalized relationships of mutual acquaintance and recognition – or in other words, to membership in a group – which provides each of its members with the backing of the collectivity-owned capital, a 'credential' which entitles them to credit, in the various senses of the word.<sup>103</sup>

In other words, 'social capital' refers to the resources available to a person through their relationships with others which are a source of advantage over other people who do not have that same combination of relationships and access to resources.<sup>104</sup>

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99 Pierre Bourdieu, *Distinction: A Social Critique of the Judgement of Taste* (Richard Nice trans, Harvard University Press, 1984) [trans of: *La distinction: Critique sociale du jugement* (first published 1979)] 114; Pierre Bourdieu, 'The Forms of Capital' in J G Richardson (ed), *Handbook of Theory and Research for the Sociology of Education* (Greenwood Press, 1986) 241, 241–58. This approach to class was also recently adopted by Mike Savage and Fiona Devine when measuring class for the 2013 Great British Class Survey. See *How Do You Identify New Types of Class?* (3 April 2013) BBC Science <<http://www.bbc.co.uk/science/0/22001963>>; Mike Savage et al, 'A New Model of Social Class? Findings from the BBC's Great British Class Survey Experiment' (2013) 47 *Sociology* 219.

100 Bourdieu, 'The Forms of Capital', above n 99, 243.

101 Savage et al, above n 99, 227.

102 Bourdieu, 'The Forms of Capital', above n 99, 252–4.

103 Ibid 248–9.

104 See Alejandro Portes, 'Social Capital: Its Origins and Applications in Modern Sociology' (1998) 24 *Annual Review of Sociology* 1, 7.

Social capital can also be inherited and its inheritance may be symbolised by a famous family name, because the inheritor is 'known' and does therefore not need to make the acquaintance of people.<sup>105</sup> 'Social capital' reinforced by 'economic capital' is very important because parents rich in economic capital are a form of social capital to a child, and this social capital may make use of the economic capital at its disposal to develop the child's cultural and human capital.

Cultural capital is a complex idea and it can comprise of: (1) objectified cultural capital; (2) institutionalised cultural capital; and (3) embodied cultural capital.<sup>106</sup> Objectified cultural capital refers to 'cultural goods' such as 'pictures, books, dictionaries, instruments, machines, etc' that do not only reflect a person's buying power but their ability to understand and appreciate those cultural goods and draw profits from the use of such cultural capital.<sup>107</sup> Institutionalised cultural capital refers to the formal recognition of a person's cultural capital by institutions, such as in the form of qualifications or credentials.<sup>108</sup> Embodied cultural capital includes 'dispositions of the mind and body'<sup>109</sup> that may be acquired through socialisation and upbringing, such as accents or mannerisms, tastes, lifestyles, skills, cultural skills, knowledge, habits, attitudes, cultural traditions, personal character, ways of thinking etc.<sup>110</sup> It refers to 'external wealth converted into an integral part of the person' and to what Bourdieu refers to as a '*habitus*' which is not transmitted instantaneously (such as an inheritance for instance) but over time<sup>111</sup> and for the most part unconsciously.<sup>112</sup> Cultural capital can be acquired informally, such as when parents transmit cultural capital to children by acting with their 'embodied sensibilities'<sup>113</sup> or influencing a child's pronunciation of words that indicates their 'class' or origins.<sup>114</sup> It can also be acquired formally through economic capital when 'wealthy parents send their

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105 See Bourdieu, 'The Forms of Capital', above n 99, 250–1. Prime examples are members of the Windsor family in the United Kingdom, the Murdoch and Packer families in Australia and the Bush family in the United States of America.

106 Ibid 243.

107 Ibid 243, 246–7.

108 Ibid 247–8.

109 Ibid 243.

110 See, eg, Bourdieu, *Distinction: A Social Critique of the Judgement of Taste*, above n 99, 12, 27, 54, 70, 220, 260–95; J Lynn Gazley et al, 'Beyond Preparation: Identity, Cultural Capital, and Readiness for Graduate School in the Biomedical Sciences' (2014) 51 *Journal of Research in Science Teaching* 1021, 1023; Christiana Tsaousi, "'What Underwear Do I Like?'" Taste and (Embodied) Cultural Capital in the Consumption of Women's Underwear' (2014) *Journal of Consumer Culture* 1, 3–5 <<http://joc.sagepub.com/content/early/2014/04/07/1469540514521084.abstract>>; Soo-yong Byun, Evan Schofer and Kyung-keun Kim, 'Revisiting the Role of Cultural Capital in East Asian Educational Systems: The Case of South Korea' (2012) 85 *Sociology of Education* 219, 219–20; Alem Kebede, 'Cultural Capital' in Ronald L Jackson II and Michael A Hogg (eds), *Encyclopedia of Identity* (Sage Publications, 2010) vol 1, 161, 163; M Print, 'Social and Cultural Capital in Education' in Sanna Järvelä (ed), *Social and Emotional Aspects of Learning* (Elsevier, 2011) 276, 279.

111 Bourdieu, 'The Forms of Capital', above n 99, 244–5.

112 Gerbert Kraaykamp and Koen van Eijck, 'The Intergenerational Reproduction of Cultural Capital: A Threefold Perspective' (2010) 89 *Social Forces* 209, 210.

113 Kebede, above n 110, 163.

114 Kraaykamp and van Eijck, above n 112, 210.



children to prestigious schools'<sup>115</sup> and thus the children also acquire cultural capital from the people with whom they associate at school – their teachers, classmates or other parents. As examples of cultural capital accumulated in the embodied state, Bourdieu refers to 'culture, cultivation and *Bildung*'.<sup>116</sup> *Bildung* is a German term 'for which there is no satisfactory English substitute',<sup>117</sup> but for the purposes of this article it seems to refer to 'educative self-formation',<sup>118</sup> self-cultivation<sup>119</sup> and culture<sup>120</sup> that contributes to being a well-rounded individual.<sup>121</sup> Put differently, *Bildung* is a concept that is not quite captured by the English word 'education' but instead refers to the refinement and cultivation that results from the pursuit of 'individual perfection',<sup>122</sup> personal enrichment or development, 'shaping, deepening and perfecting one's own personality'.<sup>123</sup> Embodied cultural capital therefore seems to capture the properties of one's self which a person acquires or cultivates during one's life.<sup>124</sup>

James Coleman argues that social capital is very important to the creation of what he terms 'human capital'.<sup>125</sup> Human capital is very similar to cultural capital<sup>126</sup> because it refers to investment in the person such as through education, qualifications, health and training<sup>127</sup> and it is often seen as a determinant of class position because the development of human capital can be contingent on social capital. Coleman argues that social capital contributes to human capital,<sup>128</sup> which implies that class and family play a role in educational qualifications and associated cognitive abilities and skills.

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115 Kebede, above n 110, 163.

116 Bourdieu, 'The Forms of Capital', above n 99, 244.

117 Heinz Sünker, *Politics, Bildung and Social Justice: Perspectives for a Democratic Society* (Sense Publishers, 2006) vii.

118 Josef Bleicher, 'Bildung' (2006) 23(2–3) *Theory, Culture and Society* 364, 365.

119 See, eg, David Sorkin, 'Wilhelm von Humboldt: The Theory and Practice of Self-formation (*Bildung*), 1791–1810' (1983) 44 *Journal of the History of Ideas* 55.

120 W H Bruford, *The German Tradition of Self-cultivation: 'Bildung' from Humboldt to Thomas Mann* (Cambridge University Press, 1975) vii.

121 Ruth Iana Gustafson, *Race and Curriculum* (Palgrave MacMillan, 2009) 90; University of Oslo, *Bildung/Education* <<https://www.uv.uio.no/english/research/subjects/bildung/bildung-education.html>>. See also Bleicher, above n 118, 364.

122 Bruford, above n 120, 264.

123 Ibid vii.

124 See, eg, Saadet Türkmen, 'The Story in the Story of Gule' in Solmaz Golsabahi-Broclawski, Ibrahim Özkan and Artur Broclawski (eds), *Transkulturelle Psychiatrie: Erfahrungen von Experten aus der EU* (LIT Verlag, 2014) 41, 49 n 13, citing Pierre Bourdieu, 'Ökonomisches Kapital, kulturelles Kapital, soziales Kapital' in Kreckel (ed), *Soziale Ungleichheiten, Soziale Welt – Sonderband 2* (Verlag Otto Schwarz, 1983); Print, above n 110.

125 See generally James Coleman, 'Social Capital in the Creation of Human Capital' (1988) 94 (Supplement) *American Journal of Sociology* S95.

126 Tarja Tolonen writes that human capital 'equals Bourdieu's notion of cultural capital': Tarja Tolonen, 'Locality and Gendered Capital of Working-Class Youth' (2005) 13 *Young* 343, 346.

127 Gary S Becker, *Human Capital* (2008) The Concise Encyclopedia of Economics 2<sup>nd</sup> ed, Library of Economics and Liberty <<http://www.econlib.org/library/Enc/HumanCapital.html>>.

128 Coleman, above n 125, S109 ff.

For Bourdieu and other theorists, as discussed above, a person's economic, social, cultural and human capital can be criteria of their class identity. It will be shown below that the Committee of Experts appears to use very similar criteria when identifying social categories that warrant its comment on 'social origin' discrimination. It will now be argued that the Committee of Experts appears to measure 'class' by reference to economic, social, cultural and human capital.

## B Applications of 'Social Origin' Discrimination Principles

The Committee of Experts has identified a number of 'social categories' in its applications of 'social origin' discrimination principles, and it has expressed concern that those who are included in many of these social categories face obstacles which prevent equality of opportunity.<sup>129</sup> These social categories have included the underprivileged, the *buraku* in Japan, the 'socially and educationally disadvantaged' in India,<sup>130</sup> the *Dalit* in India,<sup>131</sup> Indigenous peoples in Australia,<sup>132</sup> rural migrant workers in China<sup>133</sup> and the children of unimportant families in

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- 129 *General Survey 2012*, above n 3, 335–6 [802]. This mention of 'social categories' was followed by a footnote citing *General Survey 1988*, above n 3, 53–5 [54]–[56]; *Special Survey 1996*, above n 3, 16–17 [43]–[44]; 'Observation: India: Discrimination (Employment and Occupation) Convention, 1958 (No 111)' in Committee of Experts on the Application of Conventions and Recommendations, *Report III (Part IA): General Report and Observations concerning Particular Countries*, International Labour Conference, 99<sup>th</sup> sess, Agenda Item 3 (2010) 424–5. ('*India Observation 2009*'). The 'social categories' expressly mentioned in *General Survey 1988* were the 'underprivileged', the 'untouchables' in India, and the 'socially and educationally disadvantaged': at 53–4 [55]. *India Observation 2009* referred to the *Dalit* social category: at 424–5. The *Special Survey 1996* does not refer to any particular groups: at 16–17 [43]–[44]. The Committee of Experts tends to focus on 'disadvantaged' groups when discussing 'social origin', or communities struck by poverty. On 'disadvantaged groups', see Committee of Experts on the Application of Conventions and Recommendations, *Direct Request: Bangladesh: Discrimination (Employment and Occupation) Convention, 1958 (C 111)* (2012); Committee of Experts on the Application of Conventions and Recommendations, *Direct Request: Bangladesh: Discrimination (Employment and Occupation) Convention, 1958 (C 111)* (2010). On communities struck by poverty, see 'Observation: Colombia: Discrimination (Employment and Occupation) Convention, 1958 (No 111)' in Committee of Experts on the Application of Conventions and Recommendations, *Report III (Part IA): General Report and Observations concerning Particular Countries*, International Labour Conference, 102<sup>nd</sup> sess, Agenda Item 3 (2013) 443–4. At the time of writing, all 'direct requests' made by the Committee of Experts may be found through the ILO's NORMLEX online information system at <[www.ilo.org/ilolex](http://www.ilo.org/ilolex)>. They may be accessed by selecting the 'Country profiles' link on the left hand side of the screen, and navigating to the relevant country. Then, under the heading 'Examination by the supervisory bodies', select the relevant year using the drop-down menu in the top-right of this section. Lastly, under the heading 'Comments of the Committee of Experts (CEACR)', select the relevant convention (eg, 'C 111') next to the bullet point 'Direct request on the application of a Convention'.
- 130 See *General Survey 1988*, above n 3, 53–4 [55]; see especially at 54 [55] n 150, citing International Labour Organization, 'India: Commission Seeks Social Justice for the Disadvantaged' [1982] *Social and Labour Bulletin* 409, which mentions the 'socially and educationally disadvantaged' in India, but offers very little further guidance: at 409.
- 131 *India Observation 2009*, above n 129, 424.
- 132 See 'Observation: Australia: Discrimination (Employment and Occupation) Convention, 1958 (No 111)' in Committee of Experts on the Application of Conventions and Recommendations, *Report III (Part IA): General Report and Observations concerning Particular Countries*, International Labour Conference, 103<sup>rd</sup> sess, Agenda Item 3 (2014) 280–2.
- 133 Committee of Experts on the Application of Conventions and Recommendations, *Direct Request: China: Discrimination (Employment and Occupation) Convention, 1958 (C 111)* (2009).

Germany.<sup>134</sup> It will be argued that the Committee of Experts appears to discuss a number of these ‘social categories’ under the banner of ‘social origin’ because members of these social categories seem to exhibit lack of economic, social, cultural and human capital, and as a result face disadvantage and lack of social mobility. The conception of ‘class’ in terms of capital also finds support in the Committee of Experts’ observations of Canada, which will also be discussed further below.

### *1 The Concept of the Underprivileged in France*

In *General Survey 1988*, the Committee of Experts applied ‘social origin’ discrimination principles to the ‘underprivileged’.<sup>135</sup> In this general survey, the Committee of Experts referred to legislative provisions<sup>136</sup> that it says were ‘intended to remedy discrimination’ on the basis of social origin ‘by establishing conditions of equality of opportunity and treatment for a number of categories of the population that are deemed to be underprivileged’.<sup>137</sup> An inference can be drawn from this statement that laws which aim to establish conditions of equal opportunity for the ‘underprivileged’ are intended to remedy discrimination on the basis of ‘social origin’. This inference is clear because the Committee of Experts did not appear to determine the ‘intent’ of the laws from any particular positive statement by any legislature, but from the focus of the laws in establishing conditions of equality of opportunity for the ‘underprivileged’.<sup>138</sup> Put another way, the Committee of Experts appears to conclude that the laws intended to remedy ‘social origin’ discrimination not based on any statement concerning that intent, but based on the operation of the laws in establishing equality of opportunity for the ‘underprivileged’. This seems to mean that ‘underprivileged’ status may be a proxy for ‘social origin’, to the extent that ‘underprivileged’ status can be an indicium of a person’s ‘social origin’ (and, by default, ‘class’), because for the Committee of Experts, laws that address

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134 *General Survey 1988*, above n 3, 55 [56] n 152.

135 *Ibid* 53–4 [55].

136 The Committee of Experts appears to refer to *General Labour Act 1981* (Angola) s 2, *Proclamation No 64 1975* (Ethiopia), *Greek Constitution* art 5, *Jamaican Constitution* art 24, *Labour Code* (Romania) s 2, and *Human Rights Commission Act 1977* (NZ): *ibid* 53 [54] n 147. A number of these legislative instruments, as they existed in 1988 when the Committee of Experts made this comment, did not cover the ground of ‘social origin’ and promoted equality of opportunity for the disadvantaged: see, eg, *Human Rights Commission Act 1977* (NZ) ss 15, 29. This supports the conclusion that when the Committee of Experts referred to the intention of these laws in relation to ‘social origin’, that reference was likely based on the Committee of Experts’ observation of the operation of these laws rather than any positive statement as to such an intention by the legislatures in those countries. The legislatures could not have exhibited an express intention to remedy ‘social origin’ discrimination if the instruments do not prohibit discrimination on this ground. However, this intention might be incidental to the way the laws operate.

137 *General Survey 1988*, above n 3, 53 [54]–[55]. The Committee of Experts discussed art 2 of *ILO 111* and the obligation to declare national policies which aim to ‘eliminate any discrimination in employment and occupation on the basis of social origin’: at 53 [54].

138 The operative word used by the Committee of Experts is ‘by’: ‘the legislative provisions that have been adopted are intended to remedy discrimination on this basis [social origin] by establishing conditions of equality of opportunity and treatment for a number of categories of the population that are deemed to be underprivileged’: *General Survey 1988*, above n 3, 53 [55] (emphasis added).

discrimination against the 'underprivileged' appear to also address discrimination on the basis of 'social origin'. The Committee of Experts' understanding of 'underprivileged' may therefore inform the meaning of 'class' as a constituent element of 'social origin'. The difficulty, however, is determining what the Committee of Experts means by 'underprivileged'.

After mentioning legislative provisions that it says aimed to remedy 'social origin' discrimination by taking measures to ensure equality of opportunity for the 'underprivileged', the Committee of Experts noted that measures in France 'favouring employment and training are of very little benefit to the most underprivileged social categories'.<sup>139</sup> This suggests that while policies aimed at enhancing equality of opportunity for the 'underprivileged' may be intended to remedy 'social origin' discrimination, the Committee of Experts felt that such policies in place at that time in France were not very effective. This statement by the Committee of Experts is important, because when the Committee of Experts referred to underprivileged social categories in France, it cited a report by the Economic and Social Council of France titled *Grande pauvreté et la précarité économique et sociale*<sup>140</sup> – the English translation of which is *Chronic Poverty and Lack of Basic Security*, also referred to as the *Wresinski Report of the Economic and Social Council of France* ('*Wresinski Report*'). By citing the *Wresinski Report* to support its conclusion that measures in France were not very successful in addressing equality of opportunity for the 'underprivileged', it may be argued that the *Wresinski Report* can clarify what the Committee of Experts meant by 'underprivileged'.

In a similar way that the Committee of Experts felt that measures in France 'favouring employment and training are of very little benefit to the most underprivileged social categories',<sup>141</sup> the *Wresinski Report* identified that 'general policies to stimulate employment do very little for the most disadvantaged'.<sup>142</sup> These 'disadvantaged populations'<sup>143</sup> may therefore appear to be what the Committee of Experts had in mind when it referred to underprivileged social categories in France. Therefore, the portrait of 'disadvantage' in France painted in the *Wresinski Report* can clarify what the Committee of Experts meant by 'underprivileged', which, as a proxy for 'social origin', can also give meaning to 'class' as a constituent element of 'social origin'. It will now be argued that the *Wresinski Report* appears to describe disadvantage and 'underprivileged' status in terms of a person's relative lack of economic, social, cultural and human capital. This, in turn, suggests that the Committee of Experts measures 'class' and 'social origin' – which, based on the reasoning of the Committee of Experts,

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139 Ibid.

140 Joseph Wresinski, Economic and Social Council of France, *Chronic Poverty and Lack of Basic Security: A Report of the Economic and Social Council of France* (NEW/Fourth World Movement trans, Fourth World Publications, 1994) [trans of: *Grand pauvreté et précarité économique et sociale* (first published 1987)]. See *ibid* 53 [55] n 148.

141 *General Survey 1988*, above n 3, 53 [55].

142 *Wresinski Report*, above n 140, 73.

143 *Ibid* 14.

can be understood in terms of ‘underprivileged’ status – by using indicia such as economic, social, cultural and human capital.

Lack of *economic capital* – a person’s (lack of) access to money – seems to be the first criteria used in the *Wresinski Report* to identify the ‘disadvantaged’. The *Wresinski Report* discussed disadvantaged populations in terms of ‘chronic poverty’ such as in the form of homelessness;<sup>144</sup> institutionalisation in shelters or halfway houses due to unstable childhoods, being abandoned by parents or left to the care of foster families or institutions;<sup>145</sup> becoming ‘wanderers’ from place to place due to lack of family support or because family was ‘dispersed’ for work, such as for ‘agricultural, seasonal and odd-job’ work;<sup>146</sup> household unemployment;<sup>147</sup> the receipt of social welfare;<sup>148</sup> long-term unemployment;<sup>149</sup> and ‘running at a deficit’ (for business owners).<sup>150</sup> It is therefore clear that a number of factors contributing to a person’s projection of poverty, financial insecurity or instability also project ‘disadvantage’, which in turn makes that person ‘underprivileged’.

Lack of *social capital* – a person’s (lack of) access to people who can help them – seems to be the second criteria used in the *Wresinski Report* to identify the ‘disadvantaged’. The *Wresinski Report* appeared to accept that parents and family are important resources for children, and it identified in particular that when a child’s family is deficient in resources, or stereotyped with a lower-class status, then the child may likely suffer ‘disadvantage’, not only as a child but also later in life. The *Wresinski Report* identified that a person can be ‘disadvantaged’ when he or she comes from a working-class family; is from a background that is under-represented at university due to being from a working-class family;<sup>151</sup> has one parent with bleak career prospects or little occupational training;<sup>152</sup> comes from a disadvantaged household in which he or she had a lack of opportunity to access occupations and education or training;<sup>153</sup> is a dependant of people who are innumerate or illiterate;<sup>154</sup> and has a lack of family support manifesting in personal poverty and destitution.<sup>155</sup> The *Wresinski Report* therefore quite clearly views a person’s lack of social capital – their (lack of) access to resources through networks such as family or parents (especially in early life) – as an indicium of ‘disadvantage’.

Lack of *cultural capital* and *human capital* – a person’s (lack of) education, training and upbringing that influences cognitive development and behaviour –

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144 Ibid 10.

145 Ibid.

146 Ibid.

147 Ibid 13.

148 Ibid 14.

149 Ibid.

150 Ibid.

151 Ibid 23–4.

152 Ibid 14.

153 Ibid 23.

154 Ibid 26.

155 Ibid 10.

seem to be the third and fourth criteria used in the *Wresinski Report* to identify the 'disadvantaged'. The *Wresinski Report* viewed a host of deficiencies in cultural and human capital as indicia of disadvantage, including lack of formal qualifications;<sup>156</sup> innumeracy or illiteracy;<sup>157</sup> gaps in early learning which could not be easily compensated for later in life;<sup>158</sup> underdeveloped cognitive ability (for children who did not have access to toys or other tools to help develop such cognitive ability due to an overcrowded home or lack of parental involvement);<sup>159</sup> and underdeveloped skills in children and young people whose lives had been marked by deprivation. People with deprived childhoods and upbringings were disadvantaged because, as children and young people, they were not given the opportunity to 'master basic reading, writing or mathematics'.<sup>160</sup> As a result they 'could not develop cognitive skills, the capacity to analyze and to make the most of what they learn by experience'<sup>161</sup> which meant they could not fully participate in the world around them,<sup>162</sup> presumably, due to deficient cultural and human capital which did not have a chance to develop during their upbringing. With all this in mind, the *Wresinski Report* also referred to an inclination for children to repeat the history of their parents,<sup>163</sup> particularly the children of the unskilled or semi-skilled,<sup>164</sup> such as labourers, farm workers or the unemployed.<sup>165</sup> This shows that in the *Wresinski Report*, 'disadvantage' was described in terms of deficiencies in human and cultural capital which result from upbringing, and which may in turn result in the intergenerational transfer of 'disadvantage'. Such lack of cultural or human capital may therefore project 'disadvantage', and as a result, people with deficient cultural and human capital may be 'underprivileged'.

It was argued above that the Committee of Experts appears to take the position that measures addressing discrimination against the 'underprivileged' are also intended to remedy discrimination on the basis of 'social origin', even if those measures do not expressly prohibit 'social origin' discrimination. Therefore, 'underprivileged' status can be viewed as a proxy for 'social origin'. This means that a person who is 'underprivileged' may in the view of the Committee of Experts project low class status because 'social origin' refers to 'class', which suggests that indicia of 'underprivileged' status can inform the meaning of 'class' as a constituent element of 'social origin'. The above discussion has, by referring to source material cited by the Committee of Experts, argued that the Committee of Experts appears to accept that 'underprivileged' status can be measured by many of the same criteria that Bourdieu and some

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156 Ibid 13–14.

157 Ibid 26.

158 Ibid 27.

159 Ibid 23.

160 Ibid.

161 Ibid.

162 Ibid.

163 Ibid 26, quoting Odile Benoit-Guilbot, 'Acteurs sociaux, politiques de l'emploi et structure du chômage. Le jeu du mistigri' (1985) 84–5 *Futuribles* 15.

164 Ibid.

165 Ibid 23–4.

other theorists use to measure low class status, in particular lack of economic, social, cultural and human capital. Therefore, ‘class’ – as a constituent element of ‘social origin’ in ILO conventions – appears to be informed by the extent of a person’s economic, social, cultural and human capital. This position is also supported by the Committee of Experts’ application of ‘social origin’ discrimination principles to the *buraku* in Japan and the children of unimportant families in Germany, each of which will now be discussed.

## 2 *The Buraku in Japan*

In *General Survey 1988*, the Committee of Experts indicated that the *buraku* in Japan faced discrimination on the basis of ‘social origin’, being a group ‘subject to discriminatory practices concerning its social position’.<sup>166</sup> In Japan a person tends to be identified as a *burakumin* where that person lives in traditional outcaste communities known as ‘*buraku*’, is engaged in ‘unclean’ occupations such as leather working, or has a lineage and ancestry connected with such *buraku* or unclean occupations.<sup>167</sup> While a *burakumin* is traditionally associated with a *buraku* ghetto,<sup>168</sup> *burakumin* identity does not appear to disappear upon moving out of such a *buraku* ghetto because for many *ippanjin* (‘average people’), *burakumin* identity is determined by ‘dirty blood’ and parentage.<sup>169</sup> It will be argued that this ‘dirty blood’ is apparent when a person projects cultural capital that is consistent with *burakumin* identity. Thus, this cultural capital may serve as a cue to *ippanjin* that the person is or may be a *burakumin* in a similar way that deficient cultural capital may serve as an indicator of ‘underprivileged’ status, and therefore ‘social origin’.

In a footnote immediately following the suggestion by the Committee of Experts that the *buraku* suffer discrimination on the basis of ‘social origin’ and ‘social position’, the Committee of Experts cited a statement made by the Japanese government on the ‘Dowa problem’.<sup>170</sup> In this statement (which, as source material cited by the Committee of Experts, can be an indication of the way the Committee of Experts viewed the *buraku*), the Japanese government stated that the ‘Dowa people’ (another, more politically correct some might say, word for *burakumin*) faced discrimination. This discrimination was said to be ‘based on a class system formed in the process of the historical development of Japanese society’ and, as a result of this discrimination based on their ‘social

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166 *General Survey 1988*, above n 3, 54 [55].

167 *Burakumin* (18 November 2015) Encyclopædia Britannica <<http://www.britannica.com/topic/burakumin>>; Richard Siddle, ‘Race, Ethnicity, and Minorities in Modern Japan’ in Victoria Lyon Bestor, Theodore C Bestor and Akiko Yamagata (eds), *Routledge Handbook of Japanese Culture and Society* (Routledge, 2011) 150, 153.

168 Masakazu Shirasawa, Department of the Science of the Living, Osaka City University ‘Living Conditions of the Elderly in Buraku Ghettos in Osaka-City’ (1987) 10 *Bulletin of Dowa-mundai* 57, 57.

169 Siddle, above n 167, 153.

170 *General Survey 1988*, above n 3, 54 [55], citing Permanent Mission of Japan to the United Nations, *Dowa Problem*, United Nations Commission on Human Rights, Sub-commission on Prevention of Discrimination and Protection of Minorities, 36<sup>th</sup> sess, UN Doc E/CN.4/Sub.2/1983/39 (23 August 1983).

standing',<sup>171</sup> this group was in an economically, socially and culturally inferior position.<sup>172</sup> Apart from the obvious ghettoisation of the *buraku* into Dowa districts, a *burakumin* appeared to be characterised by more than his or her place of residence in a Dowa area. A *burakumin* was a person that suffered from deficiencies in social infrastructure and education. Thus, the Japanese government aimed to address the Dowa problem by improving the 'living environment', 'social welfare and public health', 'district industries and employment', 'education and cultural activities' and the protection of human rights.<sup>173</sup> These measures aimed to achieve various goals, including the elimination of poverty, 'psychological isolation' and 'psychological discrimination' experienced by the Dowa.<sup>174</sup> One way the Japanese government felt the Dowa problem could be addressed was by bringing 'the surplus population stagnating in the Dowa districts into the productive process of principle modern industries'.<sup>175</sup> The way the Japanese government aimed to address the Dowa problem shows that the *buraku* were a visible minority in Japan and thus faced discrimination and isolation based on such visible traits due to their poverty and deficient cultural capital,<sup>176</sup> the latter of which will now be discussed.

The *buraku* are 'ethnically and linguistically indistinguishable from other Japanese people'<sup>177</sup> which means that there must be some cue that causes (or caused) mainstream Japanese people to discriminate against them. A person may signal to other Japanese people that he or she is a *burakumin* by a number of means,<sup>178</sup> but the statement by the Japanese government (which, as noted above, was cited by the Committee of Experts) appears to suggest that the *buraku* were characterised by their deficient cultural capital. This explains why education, cultural activities and bringing the *buraku* into the productive process were key measures aimed at addressing discrimination experienced by the *buraku*. The characteristics that appear to make the *buraku* a 'visible' minority in Japan therefore seem to be very similar to the characteristics that make the

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171 Permanent Mission of Japan to the United Nations, *Dowa Problem*, United Nations Commission on Human Rights, Sub-commission on Prevention of Discrimination and Protection of Minorities, 36<sup>th</sup> sess, UN Doc E/CN.4/Sub.2/1983/39 (23 August 1983) 1–2.

172 Ibid 1.

173 Ibid 3.

174 Ibid.

175 Ibid 2. Particularly in relation to *monozukuri*: see also Flavia Cangià, "Children of Kinogawa" and the Transformation of the "Buraku Identity" in Japan' (2012) 19 *Childhood* 360, 366–72.

176 The identity of the *burakumin* as a socio-occupational category and as a group which tend to occupy particular ghettos and localities is discussed below. It has been suggested that within *buraku* communities there may be a disincentive for people to invest in human capital, because they are perceived as 'acting white'. See Roland G Fryer Jr, 'An Economic Approach to Cultural Capital' (2003) (unpublished) 15 <<http://economics.yale.edu/sites/default/files/files/Workshops-Seminars/Industrial-Organization/fryer-030403.pdf>>.

177 See International Labour Organization, *Equality and Non-discrimination at Work in East and South-East Asia* (Guide, 2011) 29. See also Shirasawa, above n 168, 58.

178 Perhaps the most traditional indicia of being *buraku* is living in *burakumin* communities and engaging in traditional occupations associated with the *buraku*.



underprivileged ‘visible’ in France (and in both instances the characteristics appear to be the result of birth and family background). Thus, perhaps in addition to the view that a *burakumin* is identified by reference to his or her place of residence, registry records,<sup>179</sup> occupation or birth, he or she can also be identified by his or her projection of cultural capital.

The position that *burakumin* identity is characterised by cultural capital is supported by the work of a number of scholars. For Miki Ishikida, measures instituted by the Japanese government provide cultural capital to *burakumin* children by giving those children access to teachers who can transmit such cultural capital to the children,<sup>180</sup> especially in situations where the child cannot acquire such cultural capital through early socialisation, in the home or within formal education. Hiroshi Ikeda, discussing a report from 1984, attributed the poor school performance of *buraku* children to ‘serious disadvantages such as poverty, broken families, and a lack of cultural capital’, going on to say that ‘[t]his legacy is still evident in [*buraku*] communities today’.<sup>181</sup> Yoshio Sugimoto argues that the lack of educational success of *buraku* children, such as falling ‘behind in comprehension and use of sentences’, is attributed by researchers ‘to the lack of role-playing opportunities at home, and especially to it being less common for *burakumin* parents to read stories to their children’.<sup>182</sup> This would presumably limit the ability of many *burakumin*, while they are growing up, to acquire sufficient levels of cultural capital. This deficient cultural capital – and the fact that *burakumin* are distinguished on the basis of such cultural capital – is particularly pronounced when *burakumin* attempt to pass themselves off as *ippanjin*. Such ‘passing’ by *burakumin* appears to be contingent on altering *habitus* to one that is more consonant with that projected by mainstream Japanese society.<sup>183</sup>

Altering *habitus* appears to be difficult for people from poorer *burakumin* families who cannot afford appropriate education to address ‘*burakumin*-ness’ or *burakumin habitus* (such as social practices and speech).<sup>184</sup> ‘Passing’ as *ippanjin* therefore appears to require access to economic resources, in order to access

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179 Ian Neary, ‘Socialist and Communist Party Attitudes towards Discrimination against Japan’s *Burakumin*’ (1986) 34 *Political Studies* 556, 556. Neary argues that the *burakumin* are ‘only’ identifiable ‘by reference to their place of residence or registry records’: at 556. Since 1986 social research has increasingly shown the importance of cultural capital to the projection of group membership.

180 Miki Y Ishikida, *Japanese Education in the 21st Century* (iUniverse, 2005) 244.

181 Hiroshi Ikeda, ‘*Buraku* Students and Cultural Identity: The Case of a Japanese Minority’ in N Ken Shimahara, Ivan Holowinsky, Sandra Tomlinson-Clarke (eds), *Ethnicity, Race, and Nationality in Education: A Global Perspective* (Lawrence Erlbaum, 2001) 79, 81.

182 Yoshio Sugimoto, *An Introduction to Japanese Society* (Cambridge University Press, 3<sup>rd</sup> ed, 2010) 199. See also George Farkas, *Human Capital or Cultural Capital? Ethnicity and Poverty Groups in an Urban School District* (Aldine de Gruyter, 1996) 12.

183 Masami Degawa, *Racism without Race? The Case of Japan’s Invisible Group* (MA Thesis, Queen’s University, 2001) 92 n 22.

184 Ibid 64, citing John D Donoghue, ‘An Eta Community in Japan: The Social Persistence of Outcaste Groups’ (1957) 59 *American Anthropologist* 1000, 1013. See also Jeehwan Park, ‘Hierarchical Socialisation in a Japanese Junior High School: The Formation of a Sense of One’s Place’ (2014) 17 *Social Science Japan Journal* 189.

education or business opportunities which can permit a person to distance themselves from *burakumin* culture, locality and occupations.<sup>185</sup> In other words, cultural capital appears to be an important element of the *burakumin* identity as it is projected to the outside world, along with the more traditional elements of locality, traditional occupation and ancestry. Cultural capital appears to be among the most visible of these factors, particularly in employment and recruitment.

The *buraku* therefore appear to be characterised by a lack of economic capital and cultural capital,<sup>186</sup> the latter of which is a clear result of disadvantaged social capital. It appears to be this view of the *buraku* – as people with low levels of economic, social and cultural capital – that the Committee of Experts had in mind when it indicated that the *buraku* may have faced discrimination on the basis of 'social origin'. This position, again, appears to support the argument that the Committee of Experts uses very similar criteria to that employed by Bourdieu to measure class when it identifies the social categories that warrant comment on 'social origin' discrimination. This further suggests that 'class' – as a constituent element of 'social origin' – can be defined by the extent of a person's economic, social and cultural capital.

### 3 *The Children of Unimportant Families in Germany*

The recognition by the Committee of Experts that the underprivileged in France and the *buraku* in Japan have a discernable 'social origin' indicates that 'class' and social position can be measured by a person's access to economic and social capital, which in turn helps develop that person's cultural and human capital. This captures 'class' as it is projected by the person and which seems to be the result of upbringing and family background. A person's 'social origin' may also be projected by his or her family, and this is made plain in *General Survey 1988*, in which the Committee of Experts seems to confirm that 'social origin' discrimination may occur where a person is distinguished from another person based on the merits of his or her family.

In *General Survey 1988* the Committee of Experts stated that:

Legislative provisions and regulations which may have the effect of introducing discrimination in employment and occupation on the basis of social origin are infrequent. They may consist of preferences afforded to individuals on the basis of their social origin or the merits of their parents in order to obtain a job or receive training, or in exclusion from certain jobs or training courses on the same grounds.<sup>187</sup>

The Committee of Experts did cite an example of a law of the German Democratic Republic that appears to be relevant to discrimination on the basis of 'social origin':

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185 George De Vos and Hiroshi Wagatsuma, 'Group Solidarity and Individual Mobility' in George De Vos and Hiroshi Wagatsuma (eds), *Japan's Invisible Race: Caste in Culture and Personality* (University of California Press, 1967) 241, 247.

186 The *buraku* may also be a 'visible' minority because of their locality and traditional occupations, which will be discussed further below.

187 *General Survey 1988*, above n 3, 54–5 [56] (citations omitted).

The Committee of Experts noted in particular that in the German Democratic Republic, the Order of 5 December 1981 concerning admission to polytechnic secondary schools lays down, among other provisions, that eminent achievements of a candidate's parents in building socialism shall be taken into account in decisions concerning the admission of students and their continuation in the establishment.<sup>188</sup>

The provisions appear to confer an advantage in school admissions to certain children on the grounds of their parents' contribution to the socialist regime, and serve as a form of affirmative action benefitting the children of those of whom the regime approves. By applying 'social origin' discrimination principles to this kind of law, the Committee of Experts seems to assert that 'social origin' discrimination may occur where a person experiences discrimination because of the achievements (or lack thereof) of his or her parents. This discrimination appears to be based on social capital – a form of capital stemming from a person's family relationships which can, as Bourdieu writes, be 'instituted and guaranteed by the application of a common name' such as a family name.<sup>189</sup> Therefore, by basing an admissions decision on a candidate's family achievements, an educational institution may also base this decision on that person's 'social capital' and therefore 'class'. The position that the Committee of Experts measures 'social origin' and, as such, 'class' in terms of Bourdieu's 'capital' is also reflected in its observations of Canada, which will now be discussed.

#### 4 *The Concept of the Disadvantaged in Canada*

'Social condition' discrimination is prohibited in a number of Canadian provinces. Interestingly, the Committee of Experts has recently stated that "social condition" is used in Canadian legislation and jurisprudence in a manner consistent with the term "social origin" under [ILO 111].<sup>190</sup> This appears to show that the Committee of Experts regards Canadian jurisprudence on 'social condition' to be consistent with its conception of 'social origin' under ILO 111. In addition, 'the ground of "social condition" has been defined as covering

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188 Ibid 55 [56] n 152 (citations omitted).

189 Bourdieu, 'The Forms of Capital', above n 99, 249.

190 'Observation: Canada: Discrimination (Employment and Occupation) Convention, 1958 (No 111)' in Committee of Experts on the Application of Conventions and Recommendations, *Report III (Part 1A): General Report and Observations concerning Particular Countries*, International Labour Conference, 103<sup>rd</sup> sess, Agenda Item 3 (2014) 285. In a previous observation, the Committee of Experts referred to a 2009 research paper of the Canadian Human Rights Commission, presumably basing its conclusion on the jurisprudence as outlined in that report: 'Observation: Canada: Discrimination (Employment and Occupation) Convention, 1958 (No 111)' in Committee of Experts on the Application of Conventions and Recommendations, *Report III (Part 1A): General Report and Observations concerning Particular Countries*, International Labour Conference, 100<sup>th</sup> sess, Agenda Item 3 (2011) 420. This report appears to be Wayne MacKay and Natasha Kim, 'Adding Social Condition to the *Canadian Human Rights Act*' (Report, Canadian Human Rights Commission, February 2009) <[http://www.chrc-ccdp.gc.ca/sites/default/files/sc\\_eng\\_1.pdf](http://www.chrc-ccdp.gc.ca/sites/default/files/sc_eng_1.pdf)>. The Committee of Experts' more recent observation cited above makes no mention of the report, which suggests that jurisprudence even outside that report is now relevant.

“social origin”.<sup>191</sup> Therefore, ‘social condition’ jurisprudence in Canada can clarify what the Committee of Experts means by ‘social origin’ in *ILO 111*.

Discrimination on the basis of ‘social condition’ is prohibited in Québec,<sup>192</sup> the Northwest Territories<sup>193</sup> and New Brunswick.<sup>194</sup> New Brunswick and the Northwest Territories contain legislative definitions of ‘social condition’ while Québec relies on judicial interpretations of the concept. Although ‘social origin’ discrimination is prohibited in Newfoundland and Labrador<sup>195</sup> and ‘social disadvantage’ discrimination is prohibited in Manitoba,<sup>196</sup> the following discussion will focus solely on ‘social condition’ discrimination jurisprudence and legislation, because this is what the Committee of Experts noted is used in a manner consistent with ‘social origin’ under *ILO 111*.<sup>197</sup>

In New Brunswick, the Northwest Territories and Québec, ‘social condition’ refers to a person’s inclusion within a socially identifiable group that suffers from social or economic disadvantage.<sup>198</sup> In New Brunswick, the *Human Rights Act*, RSNB 2011, c 171 requires that this social and economic disadvantage be ‘on the basis of’ a person’s ‘source of income, occupation or level of education’.<sup>199</sup> In the Northwest Territories, the *Human Rights Act*, SNWT 2002, c 18 requires this social or economic disadvantage to result ‘from poverty, source of income, illiteracy, level of education or any other similar circumstance’.<sup>200</sup> In Québec, a person’s ‘social condition’ comprises of an objective component (whereby ‘economic rank or social standing’ is ‘based on factors such as income, occupation or level of education’)<sup>201</sup> and a subjective component (‘the value attributed to an individual based on social perceptions or stereotypes associated with factors such as income, occupation or level of education’).<sup>202</sup> Therefore,

191 *General Survey 2012*, above n 3, 336 [803], citing ‘Observation: Canada: Discrimination (Employment and Occupation) Convention, 1958 (No 111)’ in Committee of Experts on the Application of Conventions and Recommendations, *Report III (Part 1A): General Report and Observations concerning Particular Countries*, International Labour Conference, 100<sup>th</sup> sess, Agenda Item 3 (2011) 420.

192 *Charter of Human Rights and Freedoms*, RSQ 1975, c C-12, s 10.

193 *Human Rights Act*, SNWT 2002, c 18, s 5.

194 *Human Rights Act*, RSNB 2011, c 171, s 4.

195 *Human Rights Act*, SNL 2010, c H-13.1, s 9.

196 *Human Rights Code*, CCSM 2015, c H175, ss 9(1), 9(2)(m), 9(2.1), 14(1).

197 See ‘Observation: Canada: Discrimination (Employment and Occupation) Convention, 1958 (No 111)’ in Committee of Experts on the Application of Conventions and Recommendations, *Report III (Part 1A): General Report and Observations concerning Particular Countries*, International Labour Conference, 103<sup>rd</sup> sess, Agenda Item 3 (2014) 285.

198 *Human Rights Act*, RSNB 2011, c 171, s 2 (definition of ‘social condition’); *Human Rights Act*, SNWT 2002, c 18, s 1 (definition of ‘social condition’); *Commission des droits de la personne (Québec) v Gauthier* (1993) 19 CHRR D/312 (‘*Québec v Gauthier*’).

199 *Human Rights Act*, RSNB 2011, c 171, s 2 (definition of ‘social condition’). See generally New Brunswick Human Rights Commission, *Guideline on Social Condition* (at 27 January 2005) <<http://www.gnb.ca/hrc-cdp/e/g/Guideline-Social-Condition-Discrimination-New-Brunswick.pdf>>.

200 *Human Rights Act*, SNWT 2002, c 18, s 1 (definition of ‘social condition’).

201 MacKay and Kim, above n 190, 22, citing *Québec v Gauthier* (1993) 19 CHRR D/312.

202 *Ibid.* See generally Alberte Ledoyen, ‘La condition sociale comme critère de discrimination’ (Working Paper No 2.120.8.3, Commission des droits de la personne et des droits de la jeunesse (Québec), January 1994) <[http://www.cdpcj.qc.ca/Publications/condition\\_sociale\\_critere.pdf](http://www.cdpcj.qc.ca/Publications/condition_sociale_critere.pdf)>.

‘social condition’ appears to relate to a person’s social or economic disadvantage, economic rank or social standing, which is determined by such factors as their income, education, occupation, illiteracy or poverty.

It is clear from the outset that ‘social condition’ discrimination jurisprudence – at its simplest – does not appear to be very useful to employment disputes.<sup>203</sup> Many of the indicia of ‘social condition’ – social or economic disadvantage, economic rank or social standing due to occupation, education, income or illiteracy – may not serve as appropriate criteria of distinction. Candidates for the same position are likely to have similar occupations, educational history and literacy, while a person’s income or poverty (which may potentially be relevant) may often be difficult to ascertain in recruitment. While ‘social condition’ discrimination jurisprudence is admittedly limited,<sup>204</sup> there is potential for it to apply within workplaces. This is because ‘social condition’ ‘involves more than a low income or a low education level’<sup>205</sup> and it is broader than poverty, reliance on welfare or disadvantage that ‘impacts the ability of a person to obtain the necessities of life’.<sup>206</sup> It will now be argued that an often overlooked<sup>207</sup> aspect of ‘social condition’ discrimination law is that it prohibits discrimination on the basis of social class, and that social class is measured by a person’s economic, social and cultural capital.

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203 Additionally, ‘social condition’ discrimination principles have mostly been applied in response to allegations of discrimination outside of the context of employment. As to Québec, see *Veronneau v Bessette* (Unreported, Tribunal du Québec, 1979); *D’Aoust v Vallières* (1993) 19 CHRR D/322; *Québec v Gauthier* (1993) 19 CHRR D/312; *Commission des droits de la personne (Québec) v Janiro* (1996) 29 CHRR D/79; *Lambert v Ministère du tourisme (Québec)* (1996) 29 CHRR D/246; *Commission des droits de la personne (Québec) v JM Brouillette Inc* (1994) 23 CHRR D/495; *Commission des droits de la personne (Québec) v Poisson* (1980) 1 CHRR D/15. See also *Commission des droits de la personne et des droits de la jeunesse (Québec) v Sinatra* (Unreported, Tribunal des droits de la personne, Michèle Rivet, 21 September 1999), which involved discrimination against a freelance journalist in rental accommodation, because the journalist was stereotyped as having an uncertain income and this was ‘social condition’ discrimination. As to the Northwest Territories, see *Mantla v Yellowknife Housing Authority* (Unreported, Northwest Territories Human Rights Adjudication Panel, Adjudicator James Posynick, 23 August 2013). See also Shane Kilcommins et al, University College Cork Law Department, ‘Extending the Scope of Employment Equality Legislation: Comparative Perspectives on the Prohibited Grounds of Discrimination’ (Report, Department of Justice, Equality and Law Reform (Ireland), 2004) 84.

204 *Workers’ Compensation Board of the Northwest Territories and Nunavut v Mercer* [2012] NWTSC 78, [18] (Smallwood J) (*‘Mercer Costs Proceedings’*).

205 *Workers’ Compensation Board of the Northwest Territories and Nunavut v Mercer* [2012] NWTSC 57, [48] (Smallwood J) (*‘Mercer Supreme Court Proceedings’*), which then cited with apparent approval *Commission des droits de la personne (Québec) v Whitton* (1993) 20 CHRR D/349, D/353 [14] (Rivet J).

206 *Mercer Supreme Court Proceedings* [2012] NWTSC 57, [46]–[50].

207 For example, the detailed 154-page report by Wayne MacKay and Natasha Kim does not appear to fully emphasise the importance of ‘class’ to ‘social condition’, or aim to explain ‘class’: see MacKay and Kim, above n 190. For more, albeit outdated, discussions of ‘social condition’ in secondary materials see Murray Wesson, ‘Social Condition and Social Rights’ (2006) 69 *Saskatchewan Law Review* 101; Lynn A Iding, ‘In a Poor State: The Long Road to Human Rights Protection on the Basis of Social Condition’ (2003) 41 *Alberta Law Review* 513.

'Social condition' has been defined in terms of social rank and position,<sup>208</sup> social class and social status.<sup>209</sup> In *Commission des droits de la personne (Québec) v Whitton*,<sup>210</sup> it was noted that: "social condition" refers to the rank, place, position that a person holds in our society, through birth, income, level of education, occupation; all the circumstances and events that mean a person or group has a certain status or position in society'.<sup>211</sup>

The courts in Québec, when discussing 'social condition', have accepted that a person's class, status or standing in society (which refer to 'social condition') can be determined by or based on education, income or occupation<sup>212</sup> (which, as discussed above, may not be very practical indicia of distinction in employment), but also by birth,<sup>213</sup> family background,<sup>214</sup> and origins.<sup>215</sup> This suggests that social capital is an important indicator of one's class, status or standing (as constituent elements of 'social condition').

Social status and class, as constituent elements of 'social condition', also appear to be measured by reference to cultural capital. In guidelines on 'social condition' published by the Human Rights Tribunal of Québec (which the Committee of Experts noted with interest),<sup>216</sup> it was recognised that 'social condition' refers to social status and class,<sup>217</sup> and that:

What distinguishes these classes in terms of status is essentially the culture of different classes, identifiable by the manner of material and, above all, symbolic consumption (cultural baggage and habits). These opposing class cultures stem

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208 *Commission des droits de la personne (Québec) v Centre hospitalier St Vincent de Paul de Sherbrooke CS (St-François)* (Unreported, Tribunal du Québec, Tôth J, 7 September 1978).

209 *Commission des droits de la personne (Québec) v Cie Price Ltée* (1981) JE 81-866, 20 (Bernier J) (Supreme Court of Canada) ('*Québec v Cie Price Ltée*'), cited with apparent approval by the Supreme Court of Canada in *Commission des droits de la personne et des droits de la jeunesse (Québec) v Maksteel Québec Inc* [2003] 3 SCR 228, 239 [14] (Deschamps J) ('*Québec v Maksteel*').

210 (1993) 20 CHRR D/349.

211 *Ibid* D/353 [14] (Rivet J), quoting *Commission des droits de la personne (Québec) v Centre hospitalier St Vincent de Paul de Sherbrooke CS (St-François)* (Unreported, Tribunal du Québec, Tôth J, 7 September 1978). This statement was cited with approval by the Supreme Court of the Northwest Territories in *Mercer Supreme Court Proceedings* [2012] NWTSC 57, [48] (Smallwood J). This line of authority considered the meaning of 'social condition' in the *Human Rights Act*, SNWT 2002, c 18 and provides the first case law concerning the term in that province: see *Mercer Supreme Court Proceedings* [2012] NWTSC 57, [41] (Smallwood J); *Workers' Compensation Board of the Northwest Territories and Nunavut v Mercer* [2014] NWTCA 1, [7] (The Court) ('*Mercer Court of Appeal Proceedings*').

212 *Québec v Maksteel* [2003] 3 SCR 228, 239 [14] (Deschamps J), citing *Québec v Cie Price Ltée* (1981) JE 81-866, 20 (Bernier J) (Supreme Court of Canada).

213 *Ibid*.

214 *Québec v Gauthier* (1993) 19 CHRR D/312.

215 Evidence to Standing Senate Committee on Legal and Constitutional Affairs, Parliament of Canada, Ottawa, 4 June 1998 (Mary Hurley) <[http://www.parl.gc.ca/Content/SEN/Committee/361/lega/27ev-e.htm?comm\\_id=11&Language=E&Parl=36&Ses=1](http://www.parl.gc.ca/Content/SEN/Committee/361/lega/27ev-e.htm?comm_id=11&Language=E&Parl=36&Ses=1)>.

216 'Observation: Canada: Discrimination (Employment and Occupation) Convention, 1958 (No 111)' in Committee of Experts on the Application of Conventions and Recommendations, *Report III (Part 4A): General Report and Observations concerning Particular Countries*, International Labour Conference, 82<sup>nd</sup> sess, Agenda Item 3 (1995) 299.

217 Alberte Ledoyen, 'Lignes directrices sur la condition sociale' (Paper No 2.120.8.4, Commission des droits de la personne et de la jeunesse (Québec), 31 March 1994) 6.

primarily from the different levels of education, which are often associated with particular and identifiable levels of income.<sup>218</sup>

This reinforces that the distinguishing features of ‘class’ – as a constituent element of ‘social condition’ – are the traits Bourdieu identified as cultural capital and *habitus*, such as material consumption (objectified cultural capital) as well as habits and ‘cultural baggage’ (embodied cultural capital) that are formed in upbringing through education and more easily acquired with access to economic capital. This position also appears to have been taken by William Black, who has argued that ‘social condition’ applies to ‘people whose dress or patterns of speech identify them as coming “from the wrong side of the tracks”’.<sup>219</sup> It appears that ‘class’ – as an aspect of ‘social condition’ – is understood in terms of economic capital, social capital and cultural capital. It can be contended that such an approach is useful in the employment context because the projection of culture and *habitus* is likely to be a basis upon which an employer will distinguish candidates and employees.

In addition to clarifying the meaning of ‘class’, ‘social condition’ jurisprudence serves to clarify that ‘social condition’:

- can be a present situation, not just a person’s background or history;<sup>220</sup>
- refers to a socially identifiable group;<sup>221</sup>
- does not refer to a number of situations that have determinate length<sup>222</sup> or which are self-imposed such as criminal record,<sup>223</sup> failing to have particular legal representation,<sup>224</sup> pregnancy<sup>225</sup> or being unemployed due to a labour dispute;<sup>226</sup> and

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218 Ibid 12 [author’s trans]. My thanks to Per Even Allaire, Brand Ambassador at the Hine Cognac company in France, for his assistance in fine-tuning a translation of the French text by the Babylon human professional translation service. The original French text reads:

Ce qui distingue ces classes en termes de statut, ce sont essentiellement des «cultures de classe» différentes et identifiables par le mode de consommation matérielle et surtout symbolique (bagage et habitudes culturels). Ces cultures de classe opposables découlent principalement de niveaux d’éducation différents, lesquels sont souvent associés à des niveaux de revenu particuliers et identifiables.

219 William W Black, Government of British Columbia, *BC Human Rights Review: Report on Human Rights in British Columbia* (Report, 1994) 170 <[http://www.bchrc.net/bc\\_hr\\_commission\\_archives](http://www.bchrc.net/bc_hr_commission_archives)>, quoted in Ontario Human Rights Commission, *Social Condition – An Option for Human Rights Commissions* <<http://www.ohrc.on.ca/en/human-rights-commissions-and-economic-and-social-rights/social-condition-%E2%80%93-option-human-rights-commissions>>.

220 See *Québec v Gauthier* (1993) 19 CHRR D/312, D/317 [29] (Rouleau J); *D’Aoust v Vallières* (1993) 19 CHRR D/322, cited in MacKay and Kim, above n 190, 23.

221 *Human Rights Act*, RSNB 2011, c 171, s 2 (definition of ‘social condition’); *Human Rights Act*, SNWT 2002, c 18, s 1 (definition of ‘social condition’); *Québec v Gauthier* (1993) 19 CHRR D/312

222 It has, however, been found to include a temporary state such as receiving public assistance: see *D’Aoust v Vallières* (1993) 19 CHRR D/322.

223 *Québec v Maksteel* [2003] 3 SCR 228, 239 [14] (Deschamps J), 258 [71] (Bastarache J), citing *Québec v Cie Price Ltée* (1981) JE 81-866, 20 (Bernier J) (Supreme Court of Canada).

224 *Patel v Procureur général (Québec)* [2009] QCCS 601(17 February 2009) [78] (Blanchard J).

225 See *Commission des droits de la personne (Québec) v L’Equipe du Formulaire LT Inc* (1982) 3 CHRR D/1141.

226 *Gosselin v A-G (Québec)* [2002] 4 SCR 429, 657 [427] (LeBel J), citing *Johnson v Commission des affaires sociales* [1984] CA 61, 70 (Bisson J).

- protects only the disadvantaged rather than people with high levels of income or status, such as judges.<sup>227</sup>

Given that 'social condition' discrimination principles protect only the disadvantaged and that they include a person's historical or present situation, the meaning of 'class' can be further refined to refer to *lack of* economic, social or cultural capital.

The Committee of Experts' application of 'social origin' discrimination principles to the underprivileged in France, the *buraku* in Japan and certain segments of the population in Germany in *General Survey 1988* indicates that the Committee of Experts appears to use criteria that are very similar to those used by Bourdieu to measure 'class' when it identifies social categories that warrant comment on 'social origin' (and, by default, 'class') discrimination. In addition, Canadian jurisprudence on 'social condition' discrimination – which the Committee of Experts says is 'used in a manner consistent with' the term 'social origin' under *ILO 111* – reinforces this position. Therefore, a person's 'class' (and by default, 'social origin') seems to be formed by *lack of* economic, social, cultural and human capital.

For reasons that will follow, a person's class identity also seems to be formed by locality or geographic origins.

### 5 Applications Using Locality as an Indicium of 'Social Origin'

Where a person lives or comes from appears to play an important role in determining that person's 'social origin'.<sup>228</sup> Yet, to say that 'social origin' is simply locality or geographic origin seems to be incorrect, as the Committee of Experts notes that 'social origin' is distinct from 'place of origin'.<sup>229</sup> It will be shown that the Committee of Experts appears to take the position that locality and geographic origin may be factors that contribute to a person's 'social origin', where it is coupled with other indicia of class position or standing such as poverty, isolation, stigma, stereotypes or other factors that point to social degradation and disadvantage. Applications of 'social origin' discrimination principles by the Committee of Experts to the *buraku* in Japan (also discussed above), rural migrant workers in China and Indigenous peoples in Australia seem to clarify that such a locality may also need to project class identity, not merely geographic origin. These applications will now be discussed.

227 See MacKay and Kim, above n 190, 22–4.

228 In its direct request to Austria, the Committee of Experts referred to 'social origin' and noted that it has been observed in some countries that persons emanating from certain geographical areas or socially disadvantaged segments of the population (other than persons with an ethnic minority background) face exclusions with respect to recruitment, without any consideration of their individual merits: Committee of Experts on the Application of Conventions and Recommendations, *Direct Request: Austria: Discrimination (Employment and Occupation) Convention, 1958 (C 111)* (2007). See also *General Survey 2012*, above n 3, 336 [804].

229 'Observation: Canada: Discrimination (Employment and Occupation) Convention, 1958 (No 111)' in Committee of Experts on the Application of Conventions and Recommendations, *Report III (Part IA): General Report and Observations concerning Particular Countries*, International Labour Conference, 100<sup>th</sup> sess, Agenda Item 3 (2011) 420.



(a) *Buraku Ghettos and Neighborhoods in Japan*

As discussed above, in *General Survey 1988* the Committee of Experts seemed to identify that the *buraku* project a class identity and social status which make them prone to discrimination. While that class identity may be comprised of deficient economic and cultural capital, it also manifests itself in the form of locality because the *burakumin* tend to be associated with particular localities and ghettos.<sup>230</sup>

It is evident in source material used in *General Survey 1988* that the *buraku*, or Dowa people, tend to be associated with certain districts – in particular, communities formed in the ‘feudal days or around the outset of the 17<sup>th</sup> century (early in the Tokugawa Period)’ where some people settled due to the restrictions of their political, economic and social conditions.<sup>231</sup> *Buraku* or Dowa communities are typically associated with disadvantage and poverty, and ‘vast numbers of *burakumin* continue to live in ghetto-like communities throughout Japan’.<sup>232</sup> The *burakumin* minority of approximately three million are thought to inhabit some 6000 ‘ghettos in Japan’,<sup>233</sup> and these ghettos appear to be marked by disadvantage when compared to non-*burakumin* areas.<sup>234</sup> *Burakumin* are therefore associated with these disadvantaged localities, which in turn serves to reinforce the notion that a person’s geographic origin and locality can contribute to their class identity. This position is also supported by the application of ‘social origin’ discrimination principles to rural migrant workers in China and Indigenous peoples in Australia, both of which will now be discussed.

(b) *Rural Migrant Workers in China*

The Committee of Experts has stated that ‘social origin’ ‘may include household registration if privileges are attached to [that] registration’.<sup>235</sup> It then cited a 2009 direct request relating to China<sup>236</sup> which expressed concern, under the section of the direct request relating to ‘social origin’ discrimination, that ‘millions of internal migrant workers cannot obtain an urban residence and

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230 See Cangìà, above n 175, 361, 365.

231 *Dowa Problem*, UN Doc E/CN.4/Sub.2/1983/39, 2.

232 *Burakumin*, above n 167.

233 Shirasawa, above n 168, 57.

234 See generally Shirasawa, above n 168.

235 *General Survey 2012*, above n 3, 335 [802].

236 *Ibid* 335 [802] n 2018.

work permit (*hukou*).<sup>237</sup> This appears to mean that where rural Chinese face discrimination (ie, an inability to gain work in cities) because they are from the Chinese countryside rather than Chinese cities, they face such discrimination on the basis of their 'social origin'.

Referring to this 2009 direct request to China, the Committee of Experts noted that '[s]ocietal attitudes towards a concentration of certain formerly or presently stigmatized or marginalized social, ethnic or national groups may perpetuate new forms of discrimination based on a person's social origin'.<sup>238</sup> This suggests that where a geographic origin (such as rural China) is associated with a concentration of stigmatised or marginalised people, then a person from such a geographic origin might be prone to 'social origin' discrimination.<sup>239</sup> Based on the above text, a blanket prohibition on entire communities, such as rural Chinese in gaining work permits in cities; targeting people because they live in disadvantaged or less developed areas; or targeting people because they live in a locality in which there is a concentration of stigmatised people can be 'social origin' discrimination.

### (c) *Indigenous Peoples in the Northern Territory*

The Committee of Experts has expressed concern that Indigenous peoples in Australia may be facing discrimination on the basis of 'race, colour and social origin'.<sup>240</sup> This concern appears to stem from the Commonwealth's imposition

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237 Committee of Experts on the Application of Conventions and Recommendations, *Direct Request: China: Discrimination (Employment and Occupation) Convention, 1958 (C 111)* (2009); Committee of Experts on the Application of Conventions and Recommendations, *Direct Request: China: Discrimination (Employment and Occupation) Convention, 1958 (C 111)* (2012). In relation to rural migrant workers and 'social origin', see also Committee of Experts on the Application of Conventions and Recommendations, *Direct Request: Mauritius: Discrimination (Employment and Occupation) Convention, 1958 (C 111)* (2013). *Hukou* is a household registration system in China that serves as a barrier to rural Chinese in gaining access to the facilities and employment opportunities of cities: Kam Wing Chan, 'The Household Registration System and Migrant Labor in China: Notes on a Debate' (2010) 36 *Population and Development Review* 357, 357; Congressional-Executive Commission on China, *China's Household Registration System: Sustained Reform Needed to Protect China's Rural Migrants* (Special Topic Paper, 7 October 2005) 1.

238 *General Survey 2012*, above n 3, 336 [802] n 2020.

239 This also might further suggest that a person can project 'social origin' through cultural signals and *habitus* because urban Chinese often identify rural Chinese by their expressions, behaviour, manner of speaking, accents, dress and other cultural signals. On the cultural signals projected by rural Chinese, see Xiaofei Gan, 'How Do Urban People in China Form Stigmatization on Rural-to-Urban Migrant Children?' (Study Paper, Dandelion School, Beijing, China, April 2014) <<http://dukespace.lib.duke.edu/dspace/bitstream/handle/10161/8453/Xiaofei%20Gan%20MP%20April%2015.pdf?sequence=1>>.

240 See 'Observation: Australia: Discrimination (Employment and Occupation) Convention, 1958 (No 111)' in Committee of Experts on the Application of Conventions and Recommendations, *Report III (Part IA): General Report and Observations concerning Particular Countries*, International Labour Conference, 101<sup>st</sup> sess, Agenda Item 3 (2012) 480–1. See also 'Observation: Australia: Discrimination (Employment and Occupation) Convention, 1958 (No 111)' in Committee of Experts on the Application of Conventions and Recommendations, *Report III (Part IA): General Report and Observations concerning Particular Countries*, International Labour Conference, 103<sup>rd</sup> sess, Agenda Item 3 (2014) 280–2.

of the Northern Territory Emergency Response ('NTER').<sup>241</sup> Determining the discriminatory aspects of the NTER can help explain why the Committee of Experts considered the NTER relevant to discrimination based on race, colour and 'social origin'.

The NTER was primarily aimed at addressing the sexual abuse of children within Indigenous communities and responding to the recommendations in the Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse.<sup>242</sup> The NTER involved a 'blanket imposition' of particular policies on and within certain communities, which particularly affected Indigenous communities and Indigenous peoples.<sup>243</sup> For example, the government's NTER was contained in legislation which applied to Indigenous land.<sup>244</sup> The legislation provided for the compulsory acquisition of leases over land held by Indigenous communities,<sup>245</sup> imposed an income-management regime quarantining certain welfare payments so that they could only be spent on food and other essential items,<sup>246</sup> and imposed obligations to install filters on publicly-funded computers<sup>247</sup> as well as restrictions and bans on alcohol<sup>248</sup> and pornography<sup>249</sup> among other things.

For the Committee of Experts, the NTER 'resulted in restrictions on the rights of indigenous peoples to land, property, work and remedies'.<sup>250</sup> There was

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241 See above n 240. It should be noted here that the *Northern Territory National Emergency Response Act 2007* (Cth) was repealed by the *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012* (Cth).

242 Tom Calma, 'Social Justice Report 2007' (Report No 1/2008, Human Rights and Equal Opportunity Commission, 11 February 2008) 199–204. See also Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle: 'Little Children Are Sacred'* (Report, 2007) ('*Little Children Are Sacred Report*').

243 Department of Families, Housing, Community Services and Indigenous Affairs (Cth), *Northern Territory Emergency Response: Evaluation Report 2011* (Evaluation Report, November 2011) 3, 5, 11, 32, 43, 70, 72, 184 <[http://web.archive.org/web/20120317140037/http://www.facs.gov.au/sa/indigenous/pubs/nter\\_reports/Documents/nter\\_evaluation\\_report\\_2011.PDF](http://web.archive.org/web/20120317140037/http://www.facs.gov.au/sa/indigenous/pubs/nter_reports/Documents/nter_evaluation_report_2011.PDF)>.

244 *Northern Territory National Emergency Response Act 2007* (Cth) s 4.

245 *Northern Territory National Emergency Response Act 2007* (Cth) pt 4.

246 See *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth).

247 *Northern Territory National Emergency Response Act 2007* (Cth) pt 3.

248 *Northern Territory National Emergency Response Act 2007* (Cth) pt 2.

249 See, eg, *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) sch 1, inserting *Classification (Publications, Films and Computer Games) Act 1995* (Cth) pt 10. See also Calma, above n 242, 199, 205–8.

250 'Observation: Australia: Discrimination (Employment and Occupation) Convention, 1958 (No 111)' in Committee of Experts on the Application of Conventions and Recommendations, *Report III (Part IA): General Report and Observations concerning Particular Countries*, International Labour Conference, 101<sup>st</sup> sess, Agenda Item 3 (2012) 480–1.

concern that the measures constituted racial discrimination.<sup>251</sup> The measures were considered to be racial discrimination because they applied only to Indigenous peoples and communities but not to others, and this differential treatment involved the impairment of other human rights.<sup>252</sup> However, as 'social origin' is distinct from 'race',<sup>253</sup> characteristics of Indigenous peoples other than their race or colour seem to have prompted the Committee of Experts to express concern that the NTER was potentially also 'social origin' discrimination.<sup>254</sup>

The NTER stereotyped people within Aboriginal communities by arbitrarily applying measures to those people in an attempt to address the sexual abuse of children within those communities. People living within those communities were therefore targeted on the basis of where they lived, rather than on the basis of whether they were a genuine risk to children. It can thus be argued that arbitrarily differentiating people based on their locality – particularly where that locality raises stereotypes and presumptions about a person – is likely to be 'social origin' discrimination.

## 6 *An Overview of 'Class' as it Appears to be Understood by the ILO's Committee of Experts*

Thus far this article has focused on giving meaning to the idea of 'class' as a constituent element of 'social origin' in ILO conventions. First, the Committee of Experts appears to refer to the same or very similar criteria as those used by Bourdieu to measure 'class' when identifying the 'social categories' that warrant comment on 'social origin' discrimination. This in turn suggests that 'class' – as a constituent element of 'social origin' in ILO conventions – is to be measured by the extent (or perhaps more accurately, the lack) of a person's economic, social, cultural and human capital. Second, the Committee of Experts appears to take the position that a person's locality or geographic origins can also be relevant to 'social origin' (and by default 'class') where that locality serves as a

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251 Northern Territory Emergency Response Review, *Report of the NTER Review Board – Executive Summary* (October 2008) <[http://web.archive.org/web/20140306140944/http://www.nterreview.gov.au/docs/report\\_nter\\_review/execsumm.htm](http://web.archive.org/web/20140306140944/http://www.nterreview.gov.au/docs/report_nter_review/execsumm.htm)>; James Anaya, *Report by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, Human Rights Council, 15<sup>th</sup> sess, Agenda Item 3, UN Doc A/HRC/15/37/Add.4 (1 June 2010) app B, 25 [3], 27 [9], [11], 29 [14] ('*The Situation of Indigenous People in Australia*'). See also *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, Economic and Social Council, Committee on Economic, Social and Cultural Rights, 42<sup>nd</sup> sess, UN Doc E/C.12/AUS/CO/4 (12 June 2009) 3–4 [15].

252 *The Situation of Indigenous People in Australia*, UN Doc A/HRC/15/37/Add.4, app B, 30 [15]–[16].

253 See 'Observation: Canada: Discrimination (Employment and Occupation) Convention, 1958 (No 111)' in Committee of Experts on the Application of Conventions and Recommendations, *Report III (Part IA): General Report and Observations concerning Particular Countries*, International Labour Conference, 100<sup>th</sup> sess, Agenda Item 3 (2011) 420.

254 'Observation: Australia: Discrimination (Employment and Occupation) Convention, 1958 (No 111)' in Committee of Experts on the Application of Conventions and Recommendations, *Report III (Part IA): General Report and Observations concerning Particular Countries*, International Labour Conference, 101<sup>st</sup> sess, Agenda Item 3 (2012) 480–1, in which the Committee of Experts noted its concerns about the NTER with regards to discrimination on the basis of race, colour and social origin.

cue for a class identity or stereotype (whether the locality is notoriously poor, uneducated etc) such that to paint all members of such a locality with the same brush is likely to be ‘social origin’ discrimination.

It follows that ‘class discrimination’ can occur where a person faces discrimination on the basis of economic capital, social capital, cultural capital, human capital, and/or locality or geographic origins which tend to reflect class identity or stereotypes. This article will now consider whether the view of ‘class’ and ‘class discrimination’ which appears to have been adopted by the Committee of Experts is likely to be relevant and an issue in Australia.

## V IS CLASS DISCRIMINATION LIKELY TO BE RELEVANT AND AN ISSUE IN AUSTRALIA?

McGregor has already argued that in Australia a person’s class identity can be made up of economic capital (such as money),<sup>255</sup> social capital (such as family),<sup>256</sup> and cultural and human capital (such as education,<sup>257</sup> and culture including accents, behaviours, lifestyle, taste in goods, etc).<sup>258</sup> The concept of ‘class discrimination’ in Australia has, however, received little attention.<sup>259</sup> This article will now contend that the view of ‘class discrimination’ that appears to have been adopted by the Committee of Experts (discussed above) is likely to be relevant to the Australian context. This is likely to be the case because: (1) pejorative class-based stereotypes exist in Australia which appear to be measured by reference to lack of capital and certain localities; and (2) discrimination on the basis of certain forms of capital and locality appears to be an issue in Australia.

### A Pejorative Class-Based Stereotypes in Australia Appear to be Measured by Reference to Lack of Capital and Certain Localities

Part I of this article highlighted that certain pejorative terms exist in Australia which are used to describe certain people. These terms include ‘bogan’ and its derivatives<sup>260</sup> or ‘cashed-up bogan’, ‘dero’, ‘pov’ or ‘povo’, ‘ocker’, ‘yobbo’, ‘feral’, ‘westie’, ‘wog’, ‘shitkicker’, ‘dole bludger’ and ‘no-hoper’. It was argued that many of these terms are examples of working-class stereotypes that are ‘held

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255 McGregor, above n 6, 46–9.

256 Ibid 50–2.

257 Ibid 49–50.

258 Ibid 52–4.

259 But see generally David Wood, ‘Positive Discrimination and the High Court’ (1987) 17 *University of Western Australia Law Review* 128, 147; Margaret Thornton, ‘The Elusiveness of Class Discrimination’ (2012) 24(3) *Legaldate* 7; Rees, Rice and Allen, above n 32, 408–11; Rose Butler, ‘Schools, “Ferals”, Stigma and Boundary Work: Parents Managing Education and Uncertainty in Regional Australia’ (2015) 10 *Ethnography and Education* 340.

260 For example, ‘barry’, ‘bennie’, ‘boonie’, ‘chigger’, ‘Ravo’, ‘Charlene’, ‘Charmaine’, ‘cogger’, ‘feral’, ‘bevan’, ‘bev-chick’, ‘bog’, ‘booner’, ‘charmie bum’, ‘gullie’, ‘mocca’ and ‘scozzer’: *Macquarie Dictionary*, above n 5, 164.

up to middle-class ridicule'<sup>261</sup> and this is quite distinct from the more positively viewed middle–upper class 'yuppie'<sup>262</sup> and 'hipster'.<sup>263</sup> It will now be argued that, in keeping with the view of 'class discrimination' which seems to have been adopted by the Committee of Experts, people who tend to be called these pejorative terms are so labelled on the basis of the specific forms of economic and/or cultural capital they exhibit, or on the basis of their actual or assumed geographic origin.

A 'bogan' is defined as 'a person, generally from an outer suburb of a city or town and from a lower socio-economic background, viewed as uncultured; originally typified as wearing a flannelette shirt, black jeans and boots, and having a mullet hairstyle'.<sup>264</sup> The term 'bogan' may also be used to describe 'a loudmouthed, stupid person'.<sup>265</sup> Barbara Pini, Paula McDonald and Robyn Mayes write: 'the Bogan is associated with the consumption of particular clothes (such as flannelette shirts, tight black jeans), music (heavy metal, particularly AC/DC), alcohol (Victorian Bitter, rum), hairstyles (mulletts) or cars (with V8 engines)'.<sup>266</sup>

The emergence of the term 'cashed-up bogan',<sup>267</sup> particularly in light of the increases in earning capacity of the Australian working class during the Australian mining boom, indicates that acquiring economic capital does not always wash away a person's 'bogan' identity. It is apparent that a person will usually be called a 'bogan' where he or she projects cultural capital consistent with 'boganism'. 'Bogans' might therefore be noticeable by the names they choose for their children, where they go on holiday or the brands and products they buy.<sup>268</sup>

A 'wog' is a first-, second- or third-generation Australian who is usually of Mediterranean or Middle Eastern ethnicity. It appears that by growing up together in working-class localities that have served as immigration magnets, the children of unskilled or blue-collar immigrants can take on a 'wog' identity. Even with the accumulation of economic capital (wealth), and institutionalised cultural capital and human capital (education), the children of immigrants often 'retain many of the practices of working-class life that [differentiate] them from

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261 See McGregor, above n 6, 11.

262 A 'yuppie' is 'a young urban professional person, typified as having a good income and available cash to spend on luxury consumer goods': *Macquarie Dictionary*, above n 5, 1715.

263 A 'hipster' is defined as 'a member of generation Y who aspires to a counterculture status, as by embracing health fads, T-shirts with slogans, and a somewhat arcane taste in popular music, while assuming a laid-back attitude, thus appearing to combine hippie values and style with the technology of a digital world': *ibid* 704.

264 *Ibid* 164.

265 *Ibid*.

266 Barbara Pini, Paula McDonald and Robyn Mayes, 'Class Contestations and Australia's Resource Boom: The Emergence of the 'Cashed-Up Bogan' (2012) 46 *Sociology* 142, 146. The 'bogan' is portrayed in various Australian television shows: see, eg, *The Bogan Hunters* (Directed by Paul Fenech, Antichocko Productions, 2014); *Upper Middle Bogan* (Directed by Wayne Hope and Tony Martin, Gristmill, 2013).

267 See generally Pini, McDonald and Mayes, above n 266.

268 *Ibid* 150.

their Anglo peers',<sup>269</sup> and some exhibit a distinct embodied and objectified cultural capital.<sup>270</sup> The hallmark of the 'wog' is his or her accent, which is often called 'wogspeak'.<sup>271</sup> For Peter Collins, this accent is used by young Australians of Middle Eastern or Mediterranean descent 'to differentiate themselves from both their parents' values and those of the Anglo host culture'.<sup>272</sup>

Other pejorative terms, as noted above, also exist in Australia. These include:

- 'westie', which refers to 'a person, generally from an outer suburb of a city or town and from a lower socio-economic background' who is 'viewed as uncultured';<sup>273</sup>
- 'pov' or 'povo', which refers to 'a person who is poor' or relates to people who are poor;<sup>274</sup>
- 'ocker', which refers to 'the archetypal uncultivated Australian' who is 'boorish, uncouth [and] chauvinistic'<sup>275</sup> and who tends to have geographic origins from rural or outer suburban areas;
- 'yobbo', which refers to 'an unrefined, uncultured, slovenly young man'<sup>276</sup> who tends to have geographic origins from rural or outer suburban areas;
- 'dero', which refers to 'a vagrant, especially one with an unkempt or unhealthy appearance';<sup>277</sup>
- 'shitkicker', which refers to 'an assistant, especially one doing menial or repetitive jobs' or 'a person of little consequence';<sup>278</sup>
- 'dole bludger', which refers to 'someone who is unemployed and lives on social security benefits without making proper attempts to find employment' or 'any person on social security benefits';<sup>279</sup> and

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269 Scott Fabius Kiesling, 'A Variable, a Style, a Stance: Word-Final -er and Ethnicity in Australian English' (unpublished) 8 <<http://www.pitt.edu/~kiesling/kiesling-ER.pdf>>.

270 The 'wog' stereotype is portrayed on Australian television shows such as *Fat Pizza* (Directed by Paul Fenech, Village Roadshow Pictures, 2003) and by YouTube comedians Theo and Nathan Saidden who post videos under the name 'superwogl', which has a sizeable 513 021 YouTube subscribers as at 22 February 2016.

271 See, eg, Jane Warren, "'Wogspeak": Transformations of Australian English' (1999) 23(62) *Journal of Australian Studies* 85; Peter Collins, 'Australian English: Its Evolution and Current State' (2012) 1 *International Journal of Language, Translation and Intercultural Communication* 75, 83; Kiesling, above n 269, 3–4; Felicity Cox, 'Australian English Pronunciation into the 21st Century' (2006) 21(1) *Prospect* 3, 15–16, citing Michael Clyne, Edina Eisikovits and Laura Tollfree, 'Ethnic Varieties of Australian English' in David Blair and Peter Collins (eds), *English in Australia* (John Benjamins Publishing, 2001) 223–38.

272 Collins, above n 271, 83.

273 *Macquarie Dictionary*, above n 5, 1674.

274 *Ibid* 1152.

275 *Ibid* 1018.

276 *Ibid* 1713.

277 *Ibid* 403.

278 *Ibid* 1352.

279 *Ibid* 438.

- 'no-hoper', which refers to 'a social outcast' or 'vagrant'.<sup>280</sup>

The above discussion shows that a large number of pejorative terms or stereotypes exist in Australia, and that these terms and stereotypes clearly have a classed dimension. The pejorative nature of these terms and stereotypes demonstrates that people who fit the mould of these stereotypes may tend to face negative judgment or discrimination based on the criteria by which the stereotypes are measured – in particular, lack of economic capital, cultural capital, and association with a working-class locality. The existence of these pejorative class-based stereotypes – which it can be argued are primarily used by the middle and upper classes to ridicule the lower class – indicates that certain cues of lower-class identity are likely to be stigmatised in Australia. It follows that such stigmatised cues of lower-class identity can potentially be the focus of discrimination.

### **B Discrimination Based on Certain Forms of Capital and Locality Appears to be an Issue in Australia**

Even people who may not neatly fit the mould of a particular class-based stereotype, but who exhibit certain forms of 'capital' or who come from a particular locality, can potentially face class discrimination in Australia. This article will now argue that, in Australia, discrimination on the basis of economic capital, social capital, cultural capital and locality is likely to be an issue. It is important to emphasise that the following analysis will discuss some of the most obvious, rather than the only, reasons why class discrimination is likely to be an issue in Australia.

In relation to discrimination on the basis of economic capital, it can be argued that in Australia people who are experiencing homelessness, for example, may face discrimination.<sup>281</sup> In many cases, homelessness in Australia is intergenerational<sup>282</sup> and it can be argued that homelessness is linked to a person's social origins because being born into a wealthy and loving family can be a safety net against homelessness. In relation to discrimination on the basis of social capital, the findings of the Victorian Ombudsman that nepotism is 'rife' in

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280 Ibid 997.

281 Philip Lynch and Bella Stagoll, 'Promoting Equality: Homelessness and Discrimination' (2002) 7 *Deakin Law Review* 295; Philip Lynch, 'Homelessness, Poverty and Discrimination: Improving Public Health by Realising Human Rights' (2005) 10 *Deakin Law Review* 233, 234, 240–1; Tamara Walsh and Heather Douglas, 'Homelessness and Legal Needs: A South Australia and Western Australia Case Study' (2008) 29 *Adelaide Law Review* 359, 365; Rees, Rice and Allen, above n 32, 408–11.

282 See generally Paul Flatau et al 'Lifetime and Intergenerational Experiences of Homelessness in Australia' (Report No 200, Australian Housing and Urban Research Institute, February 2013) <[http://www.ahuri.edu.au/publications/download/ahuri\\_80516\\_fr](http://www.ahuri.edu.au/publications/download/ahuri_80516_fr)>.



the Victorian public service<sup>283</sup> signal that discrimination in employment based on family connections and networks is likely to occur in Australia. Rebecca Douglas also writes:

While out on an innocent dinner with a pair of fellow law school graduates, both products of elite private schools, conversation turned to the recruitment of final-year law students as clerks at my friend's firm. ...

My friend's firm had been inundated by applications and had chosen to filter them by insisting on grades of at least a distinction average (fair enough) and by eliminating all the public school applicants, regardless of merit (very much *not*). Apparently the reasoning was that private school kids would likely have connections that could benefit the firm. My other friend chimed in to say that her employer had taken the same approach. Both ladies, being good sorts, were suitably offended by this injustice, but didn't quite reach the levels of blind rage I managed to conjure.<sup>284</sup>

This concerning observation further supports the position that discrimination on the basis of 'social capital' – family connections and networks – may (and probably does) occur in Australia. In addition, complaints of 'postcode' discrimination by people who live in less desirable localities in Australia demonstrate that discrimination on the basis of 'locality' may also be an issue. Robin Banks, Tasmania's Anti-discrimination Commissioner, has noted:

one of the issues that is regularly raised with me in Tasmania is of people who, because of where they live and because they live in an area that is ... a bad suburb ... and a suburb that is dominated by people on Social Security benefits, [they] just cannot put their postal address on a job application; they are overlooked automatically. People in some of those suburbs in Tasmania will get a post office box in a nice suburb in order to avoid the problem of being discriminated against because of, in this case, a combination of where they live and the reputation of that suburb in terms of its social origin.<sup>285</sup>

While discrimination on the basis of economic capital, social capital and locality may be an issue in Australia, for reasons that will now be discussed, the widespread practice of hiring for 'cultural fit' in Australia also leaves scope for discrimination on the basis of cultural capital (and therefore class) in employment.

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283 G E Brouwer, 'Report on Issues in Public Sector Employment' (Report, Victorian Ombudsman, 26 November 2013), The Ombudsman identified that selection processes were 'compromised' by nepotism: at 11–12 [34]–[35]; and referred to case studies which demonstrated 'instances where public officers directly or indirectly assisted family members or friends to obtain employment within their agency': at 4 [12]. The Ombudsman 'substantiated a number of such allegations in relation to schools and tertiary education institutions': at 4 [12]. See also G E Brouwer, 'Conflict of Interest in the Victorian Public Sector – Ongoing Concerns' (Report, Victorian Ombudsman, 11 March 2014).

284 Rebecca Douglas, 'Did Public School Kids Ever Have a Chance?', *The Drum* (online), 29 July 2013 <<http://www.abc.net.au/news/2013-07-29/douglas-did-public-school-kids-ever-have-a-chance/4850542>> (emphasis in original).

285 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Exposure Draft of Human Rights and Anti-discrimination Bill* (2012) 28 [3.41] <[www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Completed\\_inquiries/2010-13/antidiscrimination2012/report/~media/wopapub/senate/committee/legcon\\_ctte/completed\\_inquiries/2010-13/anti\\_discrimination\\_2012/report/report.ashx](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/antidiscrimination2012/report/~media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2010-13/anti_discrimination_2012/report/report.ashx)>, quoting Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Melbourne, 23 January 2013, 54 (Robin Banks).

In one study, Lauren Rivera conducted 120 interviews with professionals directly involved in entry-level hiring in elite professional service firms (investment banks, law firms and management consulting firms), in part to better understand the idea of 'cultural fit' and how it is used in hiring decisions.<sup>286</sup> Rivera's study results highlight that 'cultural fit' tends to be assessed by reference to a person's 'lifestyle markers' and 'cultural similarities'<sup>287</sup> with a firm<sup>288</sup> – tastes, interests, leisure pursuits and extracurricular activities (such as certain musical, artistic or sporting interests), common experiences<sup>289</sup> and certain behaviours (such as self-presentation styles).<sup>290</sup> Rivera reveals:

fit was not about a match with organizational values. It was about personal fit. ...

To judge fit, interviewers commonly relied on chemistry ...

Discovering shared experiences was one of the most powerful sources of chemistry, but interviewers were primarily interested in new hires whose hobbies, hometowns and biographies matched their own.<sup>291</sup>

The qualities that the employers in Rivera's study tended to associate with 'cultural fit' are examples of cultural capital and *habitus*;<sup>292</sup> factors that are (as discussed above) strongly influenced by a person's upbringing and social origin.<sup>293</sup> These findings are supported by research which shows that people tend to like people who are much like themselves, as measured by similarities such as

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286 Lauren A Rivera, 'Hiring as Cultural Matching: The Case of Elite Professional Service Firms' (2012) 77 *American Sociological Review* 999, 1000, 1004, 1006–7.

287 Ibid 1000.

288 Ibid 1008–10, 1017.

289 Ibid 1009–10.

290 Ibid 1014.

291 Lauren A Rivera, 'Guess Who Doesn't Fit in at Work', *New York Times* (New York), 31 May 2015, SR5. Rivera further writes that '[b]onding over rowing college crew, getting certified in scuba, sipping single-malt Scotches in the Highlands or dining at Michelin-starred restaurants was evidence of fit; sharing a love of teamwork or a passion for pleasing clients was not'.

292 See, eg, Bourdieu, *Distinction: A Social Critique of the Judgment of Taste*, above n 99, 1–2, 12–18, 27, 30–1, 39, 70–1, ch 3, 228, 261–64; Kraaykamp and Eijck, above n 112, 209–11, 213–14, 217–18.

Embodied cultural capital can also include 'vacations, hobbies, social outings, sports, or recreational activities': Rachele Winkle-Wagne, 'Revolutionary Possibilities? – The Future of Cultural Capital in Educational Research' (2010) 36(1) *ASHE Higher Education Report* 91, 101. See also Douglas B Holt, 'Does Cultural Capital Structure American Consumption?' (1998) 25 *Journal of Consumer Research* 1, 6.

293 Bourdieu, *Distinction: A Social Critique of the Judgment of Taste*, above n 99, 1–2, 65, 75–8. Bourdieu writes:

Whereas the ideology of charisma regards taste in legitimate culture as a gift of nature, scientific observation shows that cultural needs are the product of upbringing and education: surveys establish that all cultural practices (museum visits, concert-going, reading etc), and preferences in literature, painting or music, are closely linked to educational level (measured by qualifications or length of schooling) and secondarily to social origin. The relative weight of home background and of formal education (the effectiveness and duration of which are closely dependent on social origin) varies according to the extent to which the different cultural practices are recognized and taught by the educational system, and the influence of social origin is strongest – other things being equal – in 'extra-curricular' and avant-garde culture. To the socially recognized hierarchy of the arts, and within each of them, of genres, schools or periods, corresponds a social hierarchy of the consumers. This predisposes tastes to function as markers of 'class'.

At 1–2 (emphasis added).

‘sports interests, musical taste, and languages’,<sup>294</sup> accents,<sup>295</sup> and neighbourhood residence or school localities.<sup>296</sup>

In addition to providing empirical support for the position that ‘cultural fit’ tends to be measured by certain forms of cultural capital, Rivera’s research illustrates the way that recruitment on the basis of ‘cultural fit’ (as defined) disadvantages people from lower classes. Successful candidates in Rivera’s study often needed cultural capital consistent with upper-middle class identity to excite their overwhelmingly upper-middle class selectors.<sup>297</sup> Where selectors are overwhelmingly middle and upper class, using ‘cultural fit’ to select job candidates may likely disadvantage people who exhibit cultural capital associated with lower-class status. This is because the qualities that employers most associate with ‘fit’ tend to mirror the employer’s own qualities.<sup>298</sup> This may produce a ‘social closure of elite occupations by cultural signals, particularly lifestyle markers associated with the white upper-middle class’.<sup>299</sup>

Interestingly, Rivera found that ‘[c]oncerns about shared culture were highly salient to employers and often outweighed concerns about productivity alone’.<sup>300</sup> Once job candidates passed initial screening, ‘fit was typically given more weight than grades, coursework, or work experience’.<sup>301</sup> This is likely to disadvantage job candidates from less affluent backgrounds. Disadvantage arises because students from working-class backgrounds tend to think that what matters to future prospects of employment is success in the classroom, but students from more privileged backgrounds tend to put stock and effort into amassing a leisure portfolio that employers can then use to assess ‘cultural fit’.<sup>302</sup>

It may well be that certain forms of cultural capital may be inherent requirements of a job, such as educational qualifications relevant to performing a job,<sup>303</sup> certain job-specific skills or even politeness. However, it seems unlikely that much of the criteria which Rivera’s detailed study identified as indicia of ‘cultural fit’ – tastes, personal interests, leisure pursuits and extracurricular activities such as certain musical, artistic or sporting interests – could accurately be deemed inherent to most jobs; that is, essential to the functions or tasks of the

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294 Jacques Launay and Robin I M Dunbar, ‘Does Implied Community Size Predict Likeability of a Similar Stranger?’ (2015) 36 *Evolution and Human Behavior* 32, 36.

295 Patricia E G Bestelmeyer, Pascal Belin and D Robert Ladd, ‘A Neural Marker for Social Bias toward In-Group Accents’ (2015) 25 *Cerebral Cortex* 3953, 3954, 3959.

296 Miller McPherson, Lynn Smith-Lovin and James M Cook, ‘Birds of a Feather: Homophily in Social Networks’ (2001) 27 *Annual Review of Sociology* 415, 426.

297 Rivera, ‘Hiring as Cultural Matching’, above n 286, 1018.

298 *Ibid* 1000, 1010–11.

299 *Ibid* 1018 (citations omitted). See also Lauren A Rivera, ‘Ivies, Extracurriculars, and Exclusion: Elite Employers’ Use of Educational Credentials’ (2011) 29 *Research in Social Stratification and Mobility* 71.

300 Rivera, ‘Hiring as Cultural Matching’, above n 286, 1000.

301 *Ibid* 1008.

302 See Rivera, ‘Ivies, Extracurriculars, and Exclusion’, above n 299, 88–9. See also Rivera, ‘Hiring as Cultural Matching’, above n 286, 1018.

303 See *General Survey 1988*, above n 3, 137 [125].

job in question.<sup>304</sup> Whether a form of cultural capital is an inherent requirement of a job will, of course, depend on the job in question. Certainly, the issue is complex. However, based on the above discussion, it does appear that discrimination on the basis of cultural capital is likely to be an issue in Australia.<sup>305</sup> This article merely seeks to propose that there is scope for class discrimination principles to have relevance and apply in the Australian context. The preceding analysis seems to support the position that they do.

## VI CONCLUSION

This article set out to unpack ILO jurisprudence on the concept of 'social origin' discrimination, with the primary aim of showing that the concept has the potential to play an important role in Australian labour law and anti-discrimination law.

This article has argued that the reports of ILO supervisory bodies such as the Committee of Experts can and should be used as aids which can clarify the content of 'social origin' in not only ILO conventions, but also the *FW Act* and the *AHRC Act*.

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- 304 On the meaning of an 'inherent' requirement of a job, see *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, 284 [1] (Brennan CJ), 294–5 [33]–[37] (Gaudron J), 303–5 [70]–[73], 308–9 [81]–[82] (McHugh J), 315–18 [104]–[115] (Gummow J), 339–44 [162]–[165] (Kirby J); *ibid* 138–9 [126]; *Complaint: Report of the Commission of Inquiry: Germany: Discrimination (Employment and Occupation) Convention, 1958 (C 111)* (1985) [531] <[http://www.ilo.org/dyn/normlex/en/F?p=1000:50012:0:NO:50012:P50012\\_COMPLAINT\\_PROCEDURE\\_ID,P50012\\_LANG\\_CODE:2507529,en:NO](http://www.ilo.org/dyn/normlex/en/F?p=1000:50012:0:NO:50012:P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:2507529,en:NO)>.
- 305 Assessing 'cultural fit' by reference to hobbies, personal interests, extra-curricular activities, 'likability' and 'chemistry' also appears to be common in Australia, which supports the relevance of Rivera's study to the Australian context. See *How to Write a Winning Resume* (19 February 2016) Ranstad Australia <<https://www.randstad.com.au/jobseekers/resource-centre/how-to-write-a-winning-resume>>; Rachel Sugar, 'Yes, "Cultural Fit" Matters – But It May Not Mean What You Think', *Business Insider Australia* (online), 2 June 2015 <<http://www.businessinsider.com.au/stop-overemphasizing-cultural-fit-2015-6>>; 'Hot Tip for Writing Resumes for Apprenticeships and Jobs' on *MIGAS Apprentices and Trainees: News* (7 September 2014) <<https://www.migas.com.au/news/>>; 'From the Top' on *AIM Blog* (1 September 2008) <<https://aim.com.au/blog/>>; Reyna Ge, 'Clerkship Conundrum' *Lawyers Weekly* (online), 30 September 2014 <<http://www.lawyersweekly.com.au/opinion/15768-clerkship-conundrum>>; Felicity Nelson, 'Beyond the Buzzword: What Is Culture and How Do You Change It?' *Lawyers Weekly* (online), 24 September 2015 <<http://www.lawyersweekly.com.au/news/17201-beyond-the-buzzword-what-is-culture-and-how-do-you-change-it>>. For example, Paul White writes '[i]nterests and hobbies help show the interviewers what you're like and this can help them determine whether you're a cultural fit': Paul White, 'How to Standout ...' on *White Ink. Consulting: Blog* (19 February 2015) <<http://whiteinkconsulting.net.au/blog/>> (emphasis in original). See also Belinda Fuller, 'Want the Job? Audit Your Online Profile' on *Katie Roberts Career Consulting: Career Advice Blog* (5 October 2015) <<http://www.katieroberts.com.au/career-advice-blog/>>; 'The 8 Most Revealing Interview Questions to ask Entry Level Candidates' on *Rookie Recruits: Employer Central* <<http://www.rookierecruits.com/category/employer-central/>>; Yolanda Redrup, 'Ahead of the Curve: How Smart50 Winner Grace Chu Started FirstClick Consulting' on *Smart Company: Profiles* (2 May 2014) <<http://www.smartcompany.com.au/leadership/profiles/>>; 'Excelling in Behavioural Interviews' on *Robert Walters: Career Advice* <<http://www.robertwalters.ie/career-advice/>>.

While discrimination on the basis of ‘social origin’ has been expressly defined by the Committee of Experts to include discrimination on the basis of ‘class’, it was interesting to note that the Committee of Experts does not expressly give meaning to this constituent element of ‘social origin’. As the concept of ‘class’ seems to be just as elusive as the concept of ‘social origin’, this article sought to clarify how the Committee of Experts potentially understands ‘class’ by looking to applications of ‘social origin’ discrimination principles by the Committee of Experts.

The Committee of Experts has applied ‘social origin’ discrimination principles in such a way that suggests ‘class’ is to be measured by the lack of a person’s economic, social, cultural or human capital. A person’s ‘class’ may also be evident from his or her locality or geographic origins, particularly where such locality or geographic origins project a certain class identity or stereotype. ‘Class discrimination’ therefore appears to include discrimination on the basis of any of these forms of capital, locality or geographic origin.

This view of ‘class discrimination’ is likely to be relevant to the Australian context because discrimination on the basis of economic capital, social capital, cultural capital and locality or geographic origins appears to be an issue in Australia. Therefore, it seems that ‘social origin’ and ‘class’ discrimination principles may have an important role to play in Australian labour law and anti-discrimination law.