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Equality Law and Positive Duties: Recommendations for Federal Reform

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The Centre for Employment and Labour Relations Law's policy brief series aims to distil academic research in the fields of employment, labour relations and equality law into policy analysis and clear recommendations, drawing on cutting-edge research by leading scholars at the CELRL and other academic institutions around Australia, as well as from our wider international networks. The initial policy briefs are based on some of the presentations to a symposium with the theme 'Labour Law Reform under the Albanese Government', hosted by the Centre on 12 August 2022, and timed to coincide with the Albanese Government's 'Jobs and Skills Summit' held on 1-2 September 2022. However, the series is intended to be an ongoing forum for clear and concise discussion of current policy issues as they emerge. The series is edited by CELRL Directors Associate Professor Tess Hardy and Professor John Howe.

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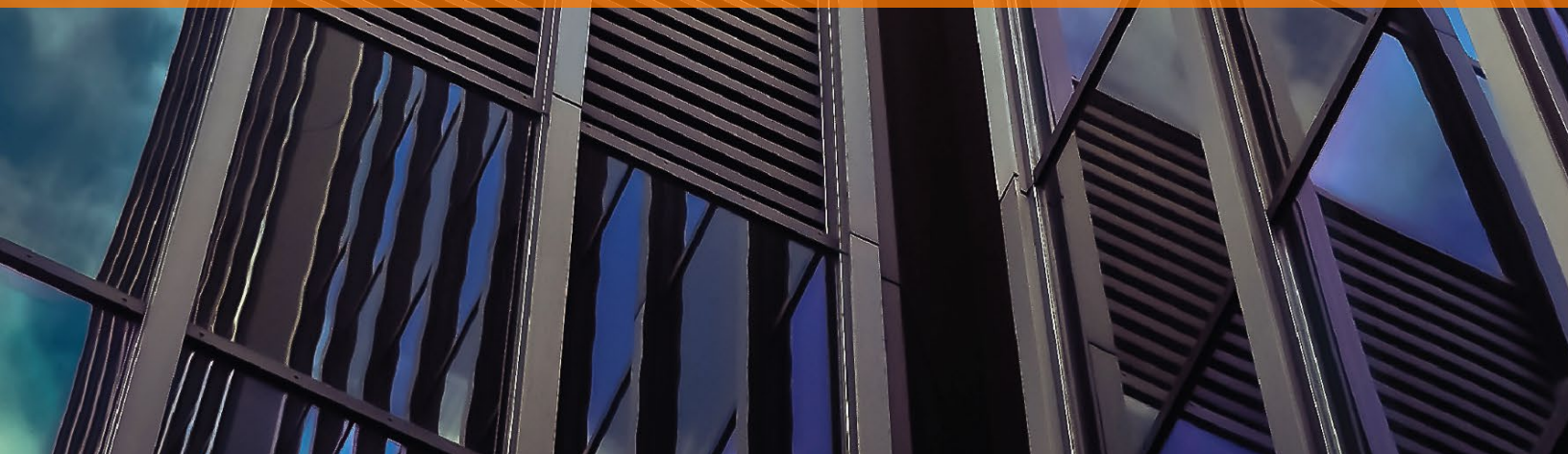

I. Introduction

Discrimination at work in Australia is pervasive, occurring across the life-cycle of employment, from recruitment to termination. The 2014 General Social Survey, conducted by the Australian Bureau of Statistics, found that work was the most common context in which most forms of discrimination were reported.[2] Discrimination on the basis of multiple grounds was particularly common at work.

II. Limits of the Legal Framework

Discrimination law primarily relies on **individual enforcement** for the prevention and redress of discrimination at work. Individual enforcement – that is, individuals making claims to statutory equality agencies or the courts – is the primary mechanism by which rights to be protected from discrimination are enforced.

Individual enforcement is **fundamentally flawed** for addressing discrimination at work, because:

- It reflects a view of equality as an individual wrong, when inequality is better viewed using a group-oriented approach, a focus on organizational change, and/or recognising inequality as a societal harm.
- It assumes those who experience discrimination fit the archetype of the rational, utility maximising individual, able to (1) perceive discrimination and (2) who will logically wish to see discrimination addressed and remedied. This is not realistic in practice, as:
    - It is difficult to 'name' or identify discrimination when it is subtle and not overt, and hard to identify why things have occurred.
    - People react to experiencing discrimination in different ways. This diversity is not accommodated within the legal framework. Discrimination law overlooks cases where claimants are pro-social, seeking to mend relationships, or choose to withdraw from a situation.

Individual enforcement will therefore only address a small minority of instances of discrimination, avoidance and exclusion. In practice, individual enforcement is likely to be the exception, not the norm. This is exacerbated by:

- Power disparities between employers and employees, including in the legal process.
- Limited legal remedies, which are reactive and do not match what people want.
- Putting the burden of achieving structural change on individuals and community groups, rather than government and organizations, who are in a better position to effect meaningful change.

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[1] This position paper draws on research conducted as part of an Australian Research Council funded project: (DE170100228 '*Addressing age discrimination in employment*'). The views expressed herein are my own and are not necessarily those of the Australian Government or Australian Research Council. While the project gathered data related to age discrimination law specifically, it offers insights into equality law more broadly. The full findings of the project, and suggested reforms, are published as Alysia Blackham, *Reforming Age Discrimination Law: Beyond Individual Enforcement* (Oxford University Press, 2022) ('*Reforming Age Discrimination Law*').

[2] Alysia Blackham and Jeromey Temple, 'Intersectional Discrimination in Australia: An Empirical Critique of the Legal Framework' (2020) 43(3) *UNSW Law Journal* 773 ('Intersectional Discrimination').

A. Claiming

Individuals appear far more likely to 'lump it', exit or attempt to resolve a matter internally than to approach external agencies or bring legal proceedings.[3] Claims to statutory agencies are rare compared to the reported prevalence of discrimination at work. In the context of age discrimination, for example, there are noticeable **gaps in enforcement** for women, those with caring responsibilities, First Nations Australians, those in insecure work, young workers, and those over 60. These gaps in complaining are particularly evident in jurisdictions where costs are awarded (as under Australian federal discrimination law).

Barriers to claiming are substantial, and the perceived risks or costs of taking action far outweigh the perceived benefits of claiming. In particular, claiming is inhibited by:

- Fear of retribution, victimization or reputational damage
- Fear of being exposed to costs orders
- The non-financial costs of claiming, including increased stress, anxiety, and mental load and adverse mental health impacts
- A lack of information and advice, and limited access to legal expertise
- Difficulty navigating different state, territory and federal claiming processes, to choose a jurisdiction in which to bring a claim
- Limited remedies, which do not address the harm experienced
- Restrictive time limits
- Limited proof or evidence
- Social norms against claiming
- Limited accessibility of legal processes

To reduce these barriers to claiming, law reform is essential.

Recommendations:

1. That a questionnaire procedure be adopted in Australian federal discrimination law, to allow claimants to ask questions of respondents early in the claiming process. This could be modelled on the former process under the UK Equality Act 2010.
2. That a shifting burden of proof be adopted in federal discrimination law. This could be modelled on the UK Equality Act 2010.
3. That there be explicit recognition of intersectional discrimination in federal discrimination law. This should be modelled on section 3.1 of the Canadian *Human Rights Act*, RSC 1985.[4]
4. That reasonable accommodations be required for all protected grounds.
5. That discrimination legislation be amended to extend time limits for lodging a discrimination claim to 24 months, as in the ACT.
6. That ss 366 and 774 of the *Fair Work Act 2009* (Cth) be amended to allow applications relating to dismissal and termination to be brought within 6 years (not the current 21 days), as is the case for other FWA claims (under s 544).

[3] That said, there is no evidence that disputes are being resolved effectively informally or locally, rather than directed to statutory agencies.
[4] Blackham and Temple (n 2).

1. That exceptions to discrimination laws be reviewed, to consider whether they appropriately reflect modern social expectations and norms.[5]
2. That the federal government adopt a human rights statute, including equality rights. That the government fund a specialist equality law legal service to assist claimants. This could be modelled on the Victoria Legal Aid Equality Law Program. This should be in addition to funding for Working Women's Centres.
3. That discrimination law be consolidated, to create one equality statute at the federal level.
4. That the comparator requirement be removed from federal discrimination law. Instead, the test for discrimination could be that of 'unfavourable treatment' (not less favourable treatment), as in Victoria. Comparisons could still be used if they assisted judicial reasoning.
5. That the direct/indirect discrimination distinction be removed from federal discrimination law, as in Canada.

B. Alternative dispute resolution

At the federal level, discrimination claims are subject to mandatory conciliation by the Australian Human Rights Commission; or, for adverse action claims, the Fair Work Commission. There is a difference between intensive conciliation (conducted by Australian equality agencies), which is time and resource intensive, focused on restorative justice, and highly effective at resolving disputes; and light-touch conciliation (conducted by the Fair Work Commission), which is highly efficient, but does not always address the underlying issues in the dispute.

Given the sheer number of claims resolved via alternative dispute resolution (ADR) (or withdrawn or abandoned during ADR processes),[6] **transparency is essential to strengthen the individual and systemic outcomes achieved via conciliation**. Further, statutory agencies need to closely monitor whether trends in withdrawal and conciliated outcomes are gendered or disproportionately affect those with other protected characteristics. Increasing transparency, including through better data collection and communication, is a key reform for advancing equality in practice. There is a clear case, too, for removing statutory secrecy requirements for equality agencies; instead, these obligations should be managed via privacy law.[7]

Recommendations:

1. That statutory secrecy provisions in equality law be repealed.
2. That the AHRC and federal courts be provided with targeted funding to improve data collection and management, to identify gaps in claiming and trends in conciliated outcomes.
3. That the use of non-disclosure agreements in discrimination cases be more closely regulated.

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[5] Alysia Blackham, 'A Compromised Balance? A Comparative Examination of Exceptions to Age Discrimination Law in Australia and the UK' (2018) 41(3) *Melbourne University Law Review* 1085 ('A Compromised Balance?').

[6] Alysia Blackham and Dominique Allen, 'Resolving Discrimination Claims Outside the Courts: Alternative Dispute Resolution in Australia and the United Kingdom' (2019) 31 *Australian Journal of Labour Law* 253 ('Resolving Discrimination Claims').

[7] Dominique Allen and Alysia Blackham, 'Under Wraps: Secrecy, Confidentiality and the Enforcement of Equality Law in Australia and the UK' (2019) 43(2) *Melbourne University Law Review* 384 ('Under Wraps'). This recommendation has been endorsed by the AHRC: Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (2021).

C. Court proceedings

The initial costs of claiming – financial, personal, reputational, and relational – are amplified as claims progress to the more formal processes of a court. As costs escalate, the combined effects of time limits, a lack of legal assistance (or costly legal assistance), the burden of proof, and the risk of adverse costs orders make discrimination claims unlikely. That said, Australian courts and tribunals rarely collect or publish disaggregated statistics on discrimination claims. It is difficult to track how many claims are filed, withdrawn, or abandoned in Australian courts and tribunals. This represents a **substantial gap in the Australian data**. **There appear to be particular barriers facing women and younger workers in proceeding to a court or tribunal.**

The Australian federal discrimination jurisdiction is the **only one in Australia where costs follow the event**. In practice, this means men appear more likely than women to pursue a claim in the federal jurisdiction.

Recommendations:

1. That federal discrimination law be amended to introduce qualified, one-way costs shifting, allowing costs to be recovered by claimants only.

III. Beyond Individual Enforcement

While a range of reforms can and should be made to individual enforcement, these systems are operating in a workplace context that is likely to inhibit claiming. We therefore also need to **look beyond individual enforcement**.

There are **three practical alternatives** or complements to individual enforcement:

- strengthening positive duties;
- bolstering the roles of statutory agencies; and
- enhancing collective enforcement, whether by trade unions, groups of individuals or the third sector.

These alternatives work best *alongside* improvements to individual enforcement – the reforms are mutually reinforcing and mutually supportive.

A. Strengthen positive duties

Positive equality duties could be an important alternative and addition to the individual enforcement of discrimination law. They represent a proactive tool to prevent discrimination and address inequality. Positive equality duties are in place in equality laws in the UK, Canada, and in Victoria; and in place under human rights legislation in Queensland, the ACT and Victoria. To be effective, positive equality duties need four interlocking mechanisms: self-regulation by organizations; consultation and engagement; central scrutiny; and individual enforcement.

Recommendation:

1. That positive equality duties be adopted in federal discrimination law.
2. That positive duties:

    - Apply to both the public and private sectors in their role as employers.
    - Require both proper consideration and proportionate action to eliminate discrimination and advance equality of opportunity.
    - Require consultation and engagement, and include general principles for how engagement processes should be conducted.
    - Be enforceable by
        - statutory equality agencies
        - a direct cause of action to the relevant tribunal, with the possibility of damages, in a similar jurisdiction to that established under discrimination laws.
    - Give equality agencies statutory powers to receive and conciliate complaints relating to positive duties.

B. Bolstering statutory agencies

Statutory agencies are an essential back-up for securing compliance with equality law; they play a key role in assisting, building capacity, and addressing instances where self-regulation fails. However, statutory agencies currently have limited powers for securing compliance with equality law; they lack the budgets and staffing to effectively use even their existing powers.

Recommendation:

1. That the AHRC be given adequate funding to enable the strategic exercise of its enforcement powers, and resourcing and staffing commensurate with the scale and diversity of its responsibilities.
2. That the AHRC be given more extensive powers to escalate enforcement in the event of non-compliance, to support individual claimants, and standing to bring complaints on behalf of individuals. This could be modelled on the powers held by the Fair Work Ombudsman.

C. Collective action

Collective approaches are important complements to individual enforcement, and offer significant advantages over the individual enforcement model. Collective enforcement of discrimination law is currently limited: joint, group and representative claims mechanisms are under-utilized; trade unions rarely prioritize equality issues; and there can be limited social and NGO activity in this space. **There is a need to build a stronger social and collective presence in relation to equality**, including by supporting NGO activity, and for trade unions to prioritize support for discrimination complaints.

Recommendation:

1. That federal procedural rules be revised, to provide that those who have standing to bring a complaint to the AHRC can commence court proceedings.
2. That discrimination law be reformed to create a legal duty to consult and engage on equality issues.
3. That the government provide better support and funding of community organizations to advance equality.