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RESEARCH ARTICLE

Proving Discrimination: Addressing the Problem of Proof

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Abstract

Proof is a fundamental problem facing those who experience discrimination in the workplace. Statutory discrimination law in Australia typically relies on an individual claimant proving their case, without a shifting burden of proof. Using age discrimination as a lens to facilitate analysis, and drawing on innovative findings from a multi-year, mixed methods empirical study of the enforcement of age discrimination law in Australia and the UK, this article offers the first empirically-informed assessment of what difference a shifting burden of proof would make to Australian discrimination law. It argues that while a shifting burden of proof may be important in finely balanced cases, and should be adopted for that reason, it is insufficient to overcome the limits of individual enforcement, and the dramatic information disparities between workers and employers. It offers important additional strategies or tools that might also help address the problem of proof, to better advance equality.

Keywords: age discrimination; Australia; claiming; discrimination; evidence; proof; United Kingdom

I. Introduction

Proof is a fundamental problem facing those who experience discrimination in the workplace. Workplace discrimination is increasingly subtle and less overt, making it difficult to identify and prove in legal proceedings. And yet, statutory discrimination law in Australia typically relies on an individual claimant proving all aspects of their case. Unlike in other jurisdictions such as the United Kingdom (UK), or under the *Fair Work Act 2009* (Cth) ('*FWA*'), there is generally no shifting burden of proof in Australian discrimination law in cases of direct discrimination.[1]

[1]Note, though, that the Australian Capital Territory (ACT) has adopted a rebuttable presumption for cases referred to Tribunal. See the discussion below. There is also, to some extent, a shifting burden of proof

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This shifting burden refers to cases where, after a claimant presents some level of evidence, or establishes some elements of a claim, some evidentiary onus shifts to the respondent. Rather, in cases of direct discrimination, complainants must generally prove all elements of a claim on the balance of probabilities. The question, then, is whether a shifting burden of proof would be sufficient to address these problems of proof.[2]

Drawing on a multi-year, mixed methods empirical study of the enforcement of age discrimination law in Australia and the UK,[3] this article considers the 'problem of proof' in discrimination law, and how it should best be addressed in the statutory framework and case law. In this context, 'the problem of proof' encompasses both potential difficulties in obtaining evidence to prove a discrimination case, and how a discrimination case is proved at law.

The UK was selected as an appropriate comparator for considering the question of proof, and the efficacy of discrimination laws more generally, given its similar legal system and common legal tradition to Australia, and similar statutory model for prohibiting discrimination. However, unlike in Australia, the UK has a shifting burden of proof in discrimination matters, meaning there is scope for mutual learning between the jurisdictions. Utilising explanatory comparative legal analysis, then, this article seeks to identify similarities and differences between jurisdictions, and account for these variances,[4] reflecting what Örücü describes as a 'problem-solving' or sociological approach to comparative law.[5]

in indirect discrimination cases in Australian law; for example, under the *Age Discrimination Act 2004* (Cth) s 15(2), the burden is on the respondent to show that a condition, requirement or practice is reasonable in the circumstances.

[2]A shifting burden of proof could be formulated or framed in a range of different ways; this is addressed in the parts that follow.

[3]This method is developed further below, and discussed in detail in Alysia Blackham, *Reforming Age Discrimination Law: Beyond Individual Enforcement* (Oxford University Press, 2022) ('*Reforming Age Discrimination Law*'); Alysia Blackham, 'Enforcing Rights in Employment Tribunals: Insights from Age Discrimination Claims in a New "Dataset"' (2021) 41(3) *Legal Studies* 390 ('Enforcing Rights in Employment Tribunals'); Alysia Blackham, 'Why Do Employment Age Discrimination Cases Fail? An Analysis of Australian Case Law' (2020) 42(1) *Sydney Law Review* 1 ('Why Do Employment Age Discrimination Cases Fail?'). This article builds on the previous discussion of proof in those outputs. This research had ethics approval from the Human Research Ethics Committee of the University of Melbourne (ID number 1748973.4). Participants provided informed written consent. To maintain source anonymity, each interview respondent is identified with A or UK and a number (e.g. A1). While age discrimination occurs across society, my focus in this study was particularly on age discrimination in employment, given the potential economic value and individual significance of extending working lives.

[4]Maurice Adams, 'Doing What Doesn't Come Naturally: On the Distinctiveness of Comparative Law' in Mark van Hoecke (ed), *Methodologies of Legal Research: What Kind of Method for What Kind of Discipline?* (Hart, 2011) 229, 237.

[5]Esin Örücü, 'Developing Comparative Law' in Esin Örücü and David Nelken (eds), *Comparative Law: A Handbook* (Hart, 2007) 43, 52.

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This article's specific focus on age discrimination law reflects the common understanding that age discrimination claims are notoriously unsuccessful in Australia.[6] Indeed, at the federal level, it took nearly 20 years for a successful age discrimination case to be handed down.[7] Yet age discrimination is frequently reported by people of all ages: in 2021, the Australian Human Rights Commission ('AHRC') found that the majority of Australians (63%) had experienced ageism in the last five years; this was most commonly reported by young people (at 68%).[8] Age discrimination occurs across the life cycle of employment, from recruitment, to performance evaluation and training, to dismissal.[9] Given the prevalence of age discrimination, and the evident difficulties in bringing a successful claim, age is a critical case for examining the impact of proof on claiming. Further, most claims of age discrimination relate to employment, reflecting the social, economic, and emotional importance of work.[10] While this article draws on an empirical case study of age discrimination law, and uses the ground of age as a lens to facilitate analysis, the findings and argument offer broader insights for discrimination law more generally.[11] Reflecting the focus of most age discrimination complaints and case law, the emphasis of this article is primarily on how issues of proof relate to claims of direct (not indirect) discrimination.[12]

Using age discrimination as a lens to facilitate analysis, and drawing on the comparative UK experience, and that under the *FWA* and Australian Capital Territory ('ACT') discrimination law, this article considers what difference a shifting burden of proof would make to Australian direct discrimination law. It argues that while a shifting burden of proof may be important in finely balanced cases, and should be adopted for that reason, it is insufficient to overcome the limits of individual enforcement, and the dramatic information disparities between claimants and respondents. The problem of proof, then, demands a fundamental rethink of the statutory dependence on individual enforcement of discrimination law.

This article commences with a broad overview of the age discrimination law framework in Australia, and the questions of proof that arise under statute (Part II). Then, the problem of proof is contextualised more generally, drawing on the findings of the

[6]Therese MacDermott, 'Resolving Federal Age Discrimination Complaints: Where Have All the Complainants Gone?' (2013) 24(2) *Australasian Dispute Resolution Journal* 102 ('Resolving Federal Age Discrimination Complaints'); Blackham, 'Why Do Employment Age Discrimination Cases Fail?' (n 3).

[7]*Gutierrez v MUR Shipping Australia Pty Limited* [2021] FedCFamC2G 56; *Gutierrez v MUR Shipping Australia Pty Limited* [2023] FCA 399; see Alysia Blackham, 'Federal Age Discrimination Law Finally Coming of Age: *Gutierrez v MUR Shipping Australia Pty Ltd*' (2023) 36(3) *Australian Journal of Labour Law* 289 ('Federal Age Discrimination Law Finally Coming of Age').

[8]Australian Human Rights Commission, *What's Age Got to Do with It? A Snapshot of Ageism across the Australian Lifespan* (Report, 2021) 37–8 <https://humanrights.gov.au/our-work/age-discrimination/publications/whats-age-got-do-it-2021>.

[9]Blackham, *Reforming Age Discrimination Law* (n 3) 17–24.

[10]Ibid ch 4.

[11]See, eg, Jonathan Hunyor, 'Skin-Deep: Proof and Inferences of Racial Discrimination in Employment' (2003) 25(4) *Sydney Law Review* 535.

[12]Noting, though, that discrimination law includes multiple other prohibitions, including against indirect discrimination, harassment, failure to make reasonable adjustments, victimisation and accessorial liability, which are beyond the scope of this article.

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empirical study, to consider how proof is being exacerbated by the changing nature of discrimination and information asymmetries at work (Part III). Part IV flags the problems that proof might pose for relying on individual enforcement mechanisms to address discrimination. The article then considers how the problem of proof is addressed in different jurisdictions, through legislative shifting of the burden of proof in the UK, the *FWA*, and the ACT (Part V). In Part VI, recommendations are made to better address problems of proof, which go beyond a shifting burden of proof. Part VII concludes.

II. The age discrimination law framework

In Australia, age discrimination is prohibited at state, territory and federal level. The various laws have numerous similarities, but also significant doctrinal differences.[13] The federal law, the *Age Discrimination Act 2004* (Cth) ('*ADA*'), provides that a person directly discriminates against another if:

> (a) the discriminator treats or proposes to treat the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of a different age; and
> (b) the discriminator does so because of [age].[14]

In the ACT, the *Discrimination Act 1991* (ACT) ('*ACT Act*') offers a more straightforward definition of discrimination: s 8(2) provides that

> a person directly discriminates against someone else if the person treats, or proposes to treat, another person unfavourably because the other person has 1 or more protected attributes.'[15]

In each jurisdiction, age discrimination is prohibited in employment, including in recruitment, setting the terms and conditions of work, providing access to promotion or training, and in dismissal.[16] However, the prohibition of age discrimination is subject to significant exceptions, which vary across jurisdictions.[17] In the federal *ADA*, for example, there are exceptions for domestic duties,[18] the inherent requirements of the

[13] These differences can impact on enforcement: see Alysia Blackham, 'Promoting Innovation or Exacerbating Inequality? Laboratory Federalism and Australian Age Discrimination Law' (2023) 51(3) *Federal Law Review* 347 ('Promoting Innovation or Exacerbating Inequality?').

[14] *Age Discrimination Act 2004* (Cth) s 14 ('*ADA*').

[15] *Discrimination Act 1991* (ACT) s 8(2) (emphasis in original) ('*ACT Act*'). A similar definition is used in Victoria: *Equal Opportunity Act 2010* (Vic) s 8.

[16] *ADA* (n 14) s 18; *ACT Act* (n 15) s 10.

[17] 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?').

[18] *ADA* (n 14) s 18(3).

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role,[19] youth wages,[20] and direct compliance with other laws.[21] Narrower exceptions are included in the *ACT Act*.[22]

The onus is typically on the claimant to show that a claim is made out. In Australia, it is exceptional for discrimination law to provide for a shifting burden of proof in cases of direct discrimination. For example, s 204 of the *Anti-Discrimination Act 1991* (Qld), as it currently applies, requires a complainant to prove a contravention of the Act on the balance of probabilities.[23] However, the onus is generally on the respondent to establish any relevant exceptions or defences.[24]

In practice, then, for a successful claim of direct discrimination, a claimant in the discrimination jurisdiction must typically establish that:

- their claim falls within the scope of the Act (for example, is made against an employer, and relates to employment);
- they have a protected characteristic or ground (here, age will be fairly self-evident, as we all have an age);
- they were treated, or proposed to be treated:
  - unfavourably (in Victoria and the ACT); or
  - less favourably than someone of a different age, in circumstances that are the same or are not materially different (in the federal jurisdiction); and
- the treatment or proposed treatment was 'because' or 'because of' age (what might be described as causation).

If a claim is successful, a claimant must also show any loss or damage in seeking specific remedies.

While establishing unfavourable treatment may be straightforward in some cases, it can be harder to establish less favourable treatment, as is required in the federal jurisdiction. Establishing 'less favourable' treatment requires the claimant to show that they were treated less favourably than a comparator who did not have the relevant protected characteristic 'in circumstances that are the same or are not materially different'.[25] It can be complex for claimants to establish the appropriate real or hypothetical comparator, particularly where multiple comparators might be chosen.[26] Further, it can be difficult

[19] Ibid s 18(4)–(5).

[20] Ibid s 25.

[21] Ibid s 39.

[22] *ACT Act* (n 15) ss 24, 30, 33B, 33C, 57B.

[23] Though respondents typically bear the onus of establishing any defence or exception: see *Anti-Discrimination Act 1991* (Qld) ss 133(2), 205, 206 (as they currently apply). Note that ss 204–206 of the *Anti-Discrimination Act 1991* (Qld) have been repealed and replaced by the *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 47A, but the impact of these changes has been delayed, as discussed below. Note, too, the law in the ACT, discussed below.

[24] See, eg, *ACT Act* (n 15) s 70.

[25] See, eg, *ADA* (n 14) s 14. See further *Purvis v New South Wales* (2003) 217 CLR 92, 100, 101 (Gleeson CJ) ('*Purvis*').

[26] See, eg, *Purvis* (n 25) 100, 101 (Gleeson CJ), cf 134–5 [129]–[130] (McHugh and Kirby JJ). See further Shreya Atrey, 'Comparison in Intersectional Discrimination' (2018) 38(3) *Legal Studies* 379.

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to establish how a hypothetical comparator would have been treated. The comparator requirement therefore makes proof of discrimination far more complex.[27]

And yet, it is in the context of causation — 'why' was the person treated this way? — that proof becomes particularly problematic. In *Purvis v New South Wales* ('*Purvis*')[28] which related to the *Disability Discrimination Act 1992* (Cth), Gleeson CJ emphasised that 'because of' relates to the 'true basis of the decision' (there, the decision of the principal to suspend and expel the student).[29] As McHugh and Kirby JJ (in dissent) expounded, 'it is the reason why the discriminator acted that is relevant.[30] … [The correct test] focuses on the "real reason" for the alleged discriminator's act.'[31]

This test is not subjective;[32] however, it does focus on the mental state of the alleged discriminator[33] to identify the 'true basis' for the act.[34] As Gummow, Hayne and Heydon JJ emphasised,

> [T]he central question will always be — *why* was the aggrieved person treated as he or she was? If the aggrieved person was treated less favourably was it 'because of', 'by reason of', that person's disability? Motive, purpose, effect may all bear on that question. But it would be a mistake to treat those words as substitutes for the statutory expression 'because of'.[35]

While this test is not subjective, it does hinge on the alleged discriminator's mindset. This focus is likely to pose significant challenges for claimants in relation to proof; evidence of an alleged discriminator's mindset is far more easily provided by the alleged discriminator themselves.

The approach in *Purvis* may be contrasted with the decision in the Victorian case of *Austin Health v Tsikos*[36] where the claimant argued that she had been discriminated against because of age and sex in setting her pay over many years. The case was described at first instance as 'a complaint of systemic discrimination by a large organisation, and could not be reduced to a few isolated interactions with specific individuals.'[37] In this context, causation could not be determined by focusing on what

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

[28] (2003) 217 CLR 92.

[29] Ibid 102 [13] (Gleeson CJ).

[30] Ibid 139 [148] (McHugh and Kirby JJ).

[31] Ibid 144 [166] (McHugh and Kirby JJ).

[32] Ibid 142 [157] (McHugh and Kirby JJ), citing *Australian Iron and Steel Pty Ltd v Banovic* (1989) 168 CLR 165, 184 (Dawson J).

[33] *Purvis* (n 25) 144 [236] (McHugh and Kirby JJ).

[34] Ibid 142 [157] (McHugh and Kirby JJ), citing *Australian Iron and Steel Pty Ltd v Banovic* (1989) 168 CLR 165, 184 (Dawson J).

[35] *Purvis* (n 25) 163 [236] (Gummow, Hayne and Heydon JJ).

[36] [2023] VSCA 82 ('*Austin Health v Tsikos*'); 324 IR 1.

[37] *Tsikos v Austin Health* [2022] VSC 174; 314 IR 269, [99].

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'actuated' the managers' responses.[38] Rather, the Supreme Court considered other evidence, including expert evidence of gender bias in the workplace, and the failure of the respondent to call the latest manager to provide evidence.[39] This evidence, taken together, showed sex was a substantial reason for the pay disparity.[40] In the Court of Appeal, the use of the word 'actuated' in this context was described as 'unhelpful' and 'best avoided'[41] as it was 'apt to mislead'.[42] However, the judge's approach to the question of causation was otherwise upheld, reflecting a far more flexible and purposive approach to the question of causation than that in *Purvis*.

In federal discrimination law, too, the rules of evidence apply to the hearing of discrimination claims in the Federal Court of Australia and the Federal Circuit and Family Court of Australia.[43] However, in most state and territory tribunals, the rules of evidence do not apply,[44] which again, will impact upon the question of proof.

The *Briginshaw v Briginshaw* ('*Briginshaw*') 'standard of evidence'[45] may also increase the evidentiary hurdle facing claimants. Following *Briginshaw*, a successful claim of discrimination may be seen as having 'grave consequences' for respondents, meaning courts and tribunals may require evidence of high probative value to prove a claim.[46] *Briginshaw* does not create a third standard of proof, but requires a decision-maker to 'proceed with caution at arriving at a state of satisfaction because of the seriousness of the allegations made in a discrimination case'.[47] That said, the Full Federal Court in *Qantas Airways Ltd v Gama* raised concerns about the application of *Briginshaw*, noting that it can lead courts into error, and not all cases will warrant the application of the *Briginshaw* principle.[48] The Queensland Human Rights Commission has therefore concluded that courts are applying this principle in a 'measured way' and '[a]s this issue is mostly settled, no legislative change is required.'[49]

Australian courts also appear reluctant to infer discrimination without sound evidence: in *Department of Health v Arumugam*,[50] for example, Fullagar J held that, in the absence of direct evidence of discrimination:

[38] Ibid.

[39] Ibid.

[40] Ibid [100].

[41] *Austin Health v Tsikos* (n 36) [124].

[42] Ibid [125].

[43] See, eg, *Qantas Airways Limited v Gama* (2008) 167 FCR 537, 558 [58] ('*Qantas Airways*').

[44] See, eg, *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 98, 102; *ACT Civil and Administrative Tribunal Act 2008* (ACT) ss 8, 26.

[45] *Briginshaw v Briginshaw* (1938) 60 CLR 336 ('*Briginshaw*').

[46] See the summary in Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' (2009) 31(4) *Sydney Law Review* 579, 584–6.

[47] *McCauley v Club Resort Holdings Pty Ltd (No 2)* [2013] QCAT 243, [21] ('*McCauley*'); *Victoria v Macedonian Teachers' Association of Victoria Inc* [1999] FCA 1287, [14]–[15].

[48] *Qantas Airways* (n 43) 571 [110] (French and Jacobson JJ), 556–7 [139] (Branson J).

[49] Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 203–4 <https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0012/40224/QHRC-Building-Belonging.WCAG.pdf> ('*Building Belonging*').

[50] [1988] VR 319.

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> If all that is proved, by inference or otherwise, in the absence of explanation, is less than all the elements of proof required for the complaint to succeed, neither a total absence of explanation nor a non-acceptance of an explanation can by itself provide an element of proof required … The fact that the occurrence of racial discrimination may often be difficult to prove cannot justify 'convicting' on something less than proof.[51]

As Allen concludes, then, discrimination claimants in Australia face 'an arduous task' in establishing their claim if they proceed to hearing.[52]

III. The problem of proof

Overall, then, considering the statutory framework, and the way it has been applied by the courts, proof appears likely to be a significant problem in federal discrimination law, particularly in relation to the question of causation. However, relying only on doctrinal analysis of reported age discrimination cases is likely to prove misleading, as most experiences of age discrimination are not pursued in the courts. Most experiences of age discrimination are never pursued or reported, and many claims are conciliated or abandoned.[53] As a result, there are few age discrimination cases to support traditional doctrinal analysis.[54] To complement this limited case law, this section draws on a mixed methods empirical research project on the enforcement of age discrimination law. The findings of this research help to contextualise the 'problem' of proof and how it is being exacerbated by the changing nature of discrimination and information asymmetries at work.

A Method

This mixed methods empirical study synthesises qualitative and quantitative data relating to the enforcement of age discrimination law. In particular, the study integrates:

- comparative legal doctrinal analysis of discrimination laws in Australia and the UK;
- semi-structured qualitative expert interviews;
- qualitative and quantitative content analysis of 1208 UK Employment Tribunal ('ET') age discrimination decisions published between February 2017 and 17 April 2019, and 108 Australian age discrimination cases published to 31 December 2017;
- statistical analysis of data from public surveys, statutory agencies, and community legal centres; and

[51] Ibid 330. See the detailed discussion of inferences in the absence of a shifting burden of proof in *McCauley* (n 47) [22]–[41].

[52] Allen (n 46) 580.

[53] See the detailed discussion in Blackham, *Reforming Age Discrimination Law* (n 3) ch 4, ch 5. See also Alysia Blackham and Dominique Allen, 'Resolving Discrimination Claims Outside the Courts: Alternative Dispute Resolution in Australia and the United Kingdom' (2019) 31(3) *Australian Journal of Labour Law* 253 ('Resolving Discrimination Claims'); MacDermott (n 6).

[54] Blackham, 'Why Do Employment Age Discrimination Cases Fail?' (n 3).

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- a survey of 76 legal practitioners and advocates in the UK and Australia working on age discrimination matters.

In particular, Parts III and IV of this article draw on the results of the expert interviews and the survey. Semi-structured qualitative interviews were conducted with 101 respondents from across the UK nations and Australian states and territories. Respondents included representatives from equality bodies, legal practice, age lobby groups, government, and unions. Interviews were conducted in July 2015 (the pilot stage) and between March 2018 and September 2020. Most interviews were conducted in person, though phone and Zoom interviews were conducted during the COVID-19 pandemic. Interviews were recorded and transcribed. Content analysis was used to categorize key patterns in the data.[55] Transcripts were coded inductively, drawing on themes from the literature and from the transcripts.[56] Coding was undertaken using NVivo qualitative data analysis software.

B. Empirical findings: the problem of proof

At a general level, issues of proof are intertwined with the nature of age discrimination, which tends to be subtle and increasingly less overt.[57] Indeed, modern forms of discrimination are increasingly more subtle and less overt.[58] Sturm sees this as inherent to 'second generation' discrimination, which is more subtle than 'first generation' discrimination, and grounded in unequal structures, systems and processes.[59] While discrimination is often subtle and insidious,[60] individuals are more likely to both identify discrimination and take action when the discrimination they experience is overt.[61] Thus, the nature of 'second generation' discrimination may make the evolution of disputes, via a process of 'naming, blaming and claiming',[62] problematic.

Even if individuals have a sense that they may have been discriminated against, it is difficult to know or identify the subjective reasons that might drive an employer's

[55] Michael Quinn Patton, *Qualitative Evaluation and Research Methods* (Sage, 2nd ed, 1990) 381.

[56] Gery W Ryan and H Russell Bernard, 'Data Management and Analysis Methods' in Norman K Denzin and Yvonna S Lincoln (eds), *Collecting and Interpreting Qualitative Materials* (Sage, 2nd ed, 2003) 259, 275–6.

[57] Interviews with A100, A101, A102, A103, A113, A150, A153 and UK78; cf interview with UK80.

[58] Susan Sturm, 'Second Generation Employment Discrimination: A Structural Approach' (2001) 101(3) *Columbia Law Review* 458, 459–60 ('Second Generation Employment Discrimination').

[59] Ibid 460.

[60] Interviews with A158, UK117, UK78 and UK80.

[61] Alex Lindsey et al, 'When Do Women Respond against Discrimination? Exploring Factors of Subtlety, Form, and Focus' (2015) 45(12) *Journal of Applied Social Psychology* 649, 657 ('When Do Women Respond against Discrimination?').

[62] William LF Felstiner, Richard L Abel and Austin Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming …' (1980) 15(3/4) *Law & Society Review* 631, 636 ('The Emergence and Transformation of Disputes').

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decision-making. Behaviour and events, and subtle discrimination,[63] can be ambiguous. It is often difficult to identify or 'attribute' why the behaviour has occurred:[64]

> [I]t could be my accommodation status, but it might be because I'm female or it might be because I'm a white female person of X age. … how am I supposed to narrow down what the thinking was on the other side of the table?[65]

And yet, as mapped in Part II, *why* the behaviour occurred is critical to establishing causation in discrimination law. Most jurisdictions require discrimination to occur because of,[66] on the grounds of,[67] or 'on the basis of',[68] a protected ground (here, age). However, age does not need to be the only, sole, or dominant reason,[69] though in some jurisdictions it must be 'a substantial reason'.[70] In the ACT, too, the statute is explicitly required to be interpreted in a way that is beneficial to those with protected attributes.[71] Regardless, it is necessary to prove that the protected ground or characteristic was a reason for the treatment.

Difficulties of proof are further compounded by the fundamental information asymmetries between claimants (employees) and respondents (employers): respondents typically hold 'all the power, all the information rests with them',[72] yet it is for claimants to establish the claim or (in the UK) a prima facie case of age discrimination. Workers are unlikely to have access to information, documents and records that might help to prove their case. Instead, respondents hold, for example, all information about why a candidate is not provided a job offer, not promoted, or selected for redundancy.[73] While court and tribunal procedures like discovery might help to address these information disparities, it is difficult for a claimant to know whether it is even worth pursuing a claim to that stage.

Information asymmetries are likely to become worse over time, as employers increasingly turn to digital technologies and algorithms to 'screen' job applicants and

[63] Kristen P Jones et al, 'Subtle Discrimination in the Workplace: A Vicious Cycle' (2017) 10(1) *Industrial and Organizational Psychology* 51, 53 ('Subtle Discrimination in the Workplace').

[64] Jennifer Crocker et al, 'Social Stigma: The Affective Consequences of Attributional Ambiguity' (1991) 60(2) *Journal of Personality and Social Psychology* 218 ('Social Stigma').

[65] Interview with A105.

[66] See, eg, *Equal Opportunity Act 2010* (Vic) s 8(1); *Equal Opportunity Act 1984* (SA) s 85A; *ACT Act* (n 15) s 8(2).

[67] *Anti-Discrimination Act 1977* (NSW) s 49ZYA; *Equal Opportunity Act 1984* (WA) s 66V.

[68] *Anti-Discrimination Act 1998* (Tas) s 14(2); *Anti-Discrimination Act 1992* (NT) s 20(1); *Anti-Discrimination Act 1991* (Qld) s 10(1).

[69] *Equal Opportunity Act 2010* (Vic) s 8(2); *Anti-Discrimination Act 1992* (NT) s 20(3); *Anti-Discrimination Act 1998* (Tas) s 14(3).

[70] See, eg, *Equal Opportunity Act 2010* (Vic) s 8(2); *Anti-Discrimination Act 1991* (Qld) s 10(4).

[71] *ACT Act* (n 15) s 4AA.

[72] Interview with A71.

[73] Evidence to Women and Equalities Committee, Parliament of the United Kingdom, London, 10 January 2018, Q43 (Dee Masters) <https://committees.parliament.uk/event/10892/formal-meeting-oral-evidence-session/>.

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manage staff.[74] Algorithms that are trained using biased information will, inevitably, replicate that bias in their operation.[75] Further, there is a fundamental lack of transparency in the algorithms that are used at work, and the data that is used to train the algorithms.[76] This makes algorithmic discrimination nearly impossible to challenge as an individual:[77]

> the discrimination is invisible, and it's not something that's easily challenged. People are having enough trouble challenging things that are quite direct discrimination; they're certainly not going to know how the automation process works in the background of HR, of a company they've never worked for.[78]

Thus, issues of proof are likely to increase in the future. Technology and algorithmic discrimination pose new challenges to discrimination law, which existing legal frameworks are ill-designed to accommodate.[79]

IV. Proof and individual claiming

The question, then, is the extent to which difficulties of proof and a lack of evidence are inhibiting individual enforcement of age discrimination law. This is a particularly critical question for jurisdictions like Australia that predominantly rely on individual claims to address systemic and structural inequalities.[80] Overall, this empirical study indicates that issues of proof are severely inhibiting the individual enforcement of age discrimination law.

In this study, proof, and a lack of proof, was a recurring issue in the case sample, expert interviews and advocate survey. While proof is an issue in all discrimination

[74]Interviews with A104 and A113; Jeremias Adams-Prassl, 'What if Your Boss Was an Algorithm? Economic Incentives, Legal Challenges, and the Rise of Artificial Intelligence at Work' (2019) 41(1) *Comparative Labor Law & Policy Journal* 123 ('What if Your Boss Was an Algorithm?'); Natalie Sheard, 'Employment Discrimination by Algorithm: Can Anyone Be Held Accountable?' (2022) 45(2) *UNSW Law Journal* 617 ('Employment Discrimination by Algorithm'); Alysia Blackham, 'Setting the Framework for Accountability for Algorithmic Discrimination at Work' (2023) 47(1) *Melbourne University Law Review* 63 ('Setting the Framework for Accountability for Algorithmic Discrimination at Work').

[75]Interview with A104.

[76]See Alysia Blackham, '"We Are All Entrepreneurs Now": Options and New Approaches for Adapting Equality Law for the "Gig Economy"' (2018) 34(4) *International Journal of Comparative Labour Law and Industrial Relations* 413 ('We Are All Entrepreneurs Now'); Blackham, 'Setting the Framework for Accountability for Algorithmic Discrimination at Work' (n 74).

[77]Interview with A104. See also Blackham, 'We Are All Entrepreneurs Now' (n 76).

[78]Interview with A104.

[79]See the discussion in Sheard, 'Employment Discrimination by Algorithm' (n 74) 646. Cf Jeremias Adams-Prassl, Reuben Binns and Aislinn Kelly-Lyth, 'Directly Discriminatory Algorithms' (2023) 86(1) *Modern Law Review* 144, where the authors argue that existing (UK) discrimination laws can address directly discriminatory algorithms; for the authors, traceability means that automated decisions may be *more* examinable than human decisions, reducing problems of proof: at 171. I see this argument as too optimistic, as not all algorithms are designed to be transparent in this way: Blackham, 'Setting the Framework for Accountability for Algorithmic Discrimination at Work' (n 74) 101–2.

[80]See Blackham, *Reforming Age Discrimination Law* (n 3) ch 3.

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claims, it is particularly acute in relation to age discrimination, especially in claims relating to recruitment.[81]

While overt age discrimination is rare, these are the only cases that tend to be successfully pursued:[82] proving a case otherwise is 'very, very difficult';[83] 'from a legal point of view, the less subtle anything is, the easier it is to enforce because you can see it and identify it.'[84] As one practitioner noted, 'it's really rare to find a case with good evidence. … I think I see far more age discrimination than I do bring age discrimination claims.'[85] Indeed, some respondents viewed age discrimination as the most difficult form of discrimination to prove[86] as it is typically hidden and rarely backed up by tangible evidence.[87] Even if age is clearly a factor in an employee's mistreatment, that cannot be included in a claim without evidence 'to back it up'.[88]

In cases where evidence is 'nebulous', success largely rests on having a persuasive and articulate claimant, who can express their treatment in a way that is meaningful to a court or tribunal.[89] In these 'he said, she said' cases, the outcome will largely turn on credibility.[90] Those who are 'better educated, more articulate claimants are more likely to fare better'[91] in giving evidence in the hostile environment of a court or tribunal. Issues of credibility can also arise if the claimant has problems with their memory.[92] This is consistent with Patrice Rosenthal and Alexandra Budjanovcanin's study of UK ET sexual harassment decisions: in that study, claimant credibility was key to a claim's success,[93] and 'credibility' was shaped by the claimant's occupation, their initial reaction to the harassment, the way they left the organisation and other breaches of employment rights.[94]

While the 'credibility' of a claimant is therefore critical, those who experience age discrimination may be poor witnesses, as they often do not even realise they are experiencing age discrimination themselves.[95] Internalised age norms and expectations may mean people do not understand their treatment to be discriminatory or have lower

[81] Interview with A71.

[82] Interviews with A109, A110, A113, UK167 and UK78.

[83] Interview with A109.

[84] Interview with UK78.

[85] Interview with A115.

[86] Interviews with A99, A110 and A113.

[87] Interview with A113.

[88] Interview with A108.

[89] Interview with UK97.

[90] Interviews with A150, A151 and A158.

[91] Interview with UK97.

[92] Interview with A109.

[93] Patrice Rosenthal and Alexandra Budjanovcanin, 'Sexual Harassment Judgments by British Employment Tribunals 1995–2005: Implications for Claimants and Their Advocates' (2011) 49(S2) *British Journal of Industrial Relations* s236 ('Sexual Harassment Judgments by British Employment Tribunals 1995–2005').

[94] Ibid s241.

[95] Interview with A110.

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expectations as to how they should be treated.[96] Even where a claimant believes evidence to exist, further investigation often reveals that documentation does not exist, or that colleagues who might have witnessed behaviour are unwilling to go on the record in support of a claim;[97] it is often hard to corroborate a claim of age discrimination.[98]

These hurdles all operate to inhibit claiming.[99] Understandably, then, age discrimination complaints are remarkably rare, and do not reflect the prevalence of age discrimination reported in workforce surveys.[100] Expert respondents in this study therefore saw proof (and an absence of proof) as a major barrier to claiming;[101] proof was mentioned in 38 of the expert interviews. In many cases, it is impossible to establish age discrimination, even if the claimant *knows* they have been discriminated against.[102] As respondents described:

> [The] allegation will be [about] … what's not there, rather than what's there. So we get an allegation of age discrimination and it'll go … 'I'm 68, I applied for the job, I've been in this business for 40 years … on any objective view I'm super qualified; what else could it be but my age?' And [the courts have] previously held that the 'what else could it be' argument is not sufficient. There has to be actually some evidence of … something, an inference that can be drawn or whatever. … simply … declaring 'what else could it be' will not cut it.[103]

> It's those hidden [cases] where people don't come forward or they have very little evidence. … there's no tangible evidence. And that's I think why a lot of people don't [seek] conciliation because … many of the age discrimination complaints would get knocked out in the first round. Because when people ask 'what have you got apart from this gut feeling that he's been discriminated against?' … well, you know, there's no point in going forward. Particularly when we've asked the respondent and they're like 'Absolutely no way. Here's all the reasons that they weren't as good as somebody else.'[104]

Experts therefore saw a lack of evidence as one of the main reasons why age discrimination law was not being enforced.[105] This was exacerbated by the onus of proof being on the claimant in most Australian jurisdictions.[106] For a claim to succeed, evidence of overt discrimination was seen as critical.[107] Without 'smoking gun' evidence, a claim

[96] Ibid.

[97] Ibid.

[98] Interview with A6.

[99] Interview with A110.

[100] Blackham, *Reforming Age Discrimination Law* (n 3).

[101] Interviews with A3, A5, A103, A107, A108, A109, A112, A113, A115, A118, A150, A155, A158, A160, A164, UK80, UK161 and UK84.

[102] Interview with A113.

[103] Interview with A71.

[104] Interview with A113.

[105] Interview with A104.

[106] Interview with A158.

[107] Interview with A109.

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was seen as unlikely to succeed, especially in a court or tribunal.[108] Thus, claimants were often deterred from claiming due to a lack of proof, or the difficulty of proving their claim.[109]

In the advocate survey, practitioners and union officials were asked to assess the impact of various barriers on workers' decisions not to pursue an age discrimination claim. One of the most influential factors in deterring claiming, according to these respondents, related to difficulties of proof: 84% of advocate respondents (28 of 33) saw difficulties in proving age discrimination as fairly influential (7 of 33), very influential (15 of 33) or determinative (6 of 33) in their clients choosing not to pursue potential age discrimination matters. Only one respondent said that difficulties of proof were not at all influential in their clients' decisions not to pursue a claim.

V. Proof and the legal framework: comparative approaches to shifting the burden of proof

When expert respondents in this study were asked about the key reforms that could be made to age discrimination laws to improve their enforcement or effectiveness, multiple respondents independently identified the need to shift the burden of proof in Australian discrimination law,[110] as in the UK and under the *FWA*. For some respondents, this was seen as being potentially 'incredibly beneficial'[111] to claimants.

Calls for a shifting burden of proof are also backed by multiple reviews of discrimination law in Australia. While the AHRC's 2016 report *Willing to Work: National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability* did not make any recommendation regarding the burden of proof,[112] it did suggest that future reviews of discrimination law give consideration to proof.[113] In 2021, the AHRC's *Free & Equal: A Reform Agenda for Federal Discrimination Laws* recommended that a shifting evidentiary burden be introduced in federal direct discrimination laws, with the burden shifting once an applicant has established a prima facie case of discrimination, similar to the UK approach.[114]

Similarly, the Queensland Human Rights Commission has recommended adopting what it calls a 'shared burden of proof',[115] modelled on s 136 of the *Equality Act 2010* (UK) ('*EqA*'), and informed by *Igen Ltd v Wong*[116] (discussed below). Following the Commission's report, the *Respect at Work and Other Matters Amendment Act 2024*

[108] Ibid.

[109] Interview with A112.

[110] Interviews with A71, A106, A112 and A113.

[111] Interview with A112; see also Interview with A113.

[112] Australian Human Rights Commission ('AHRC'), *Willing to Work: National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability* (Inquiry Report, 2 May 2016) 335–6 ('*Willing to Work*').

[113] Ibid.

[114] AHRC, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (Position Paper, November 2021) 203, 210.

[115] Queensland Human Rights Commission, *Building Belonging* (n 49) 24.

[116] [2005] EWCA Civ 142 ('*Igen*').

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(Qld) s 47A repealed and replaced ss 204–206 of the *Anti-Discrimination Act 1991* (Qld), effective 1 December 2024, to create a new shifting burden of proof. Section 204 now reads (in part):

> (1) In a complaint proceeding, if there are facts from which it could be decided, in the absence of any other explanation, that the respondent contravened the provision of the Act the subject of the alleged contravention, the respondent is taken to have contravened the provision.
>
> (2) Subsection (1) does not apply if the respondent proves, on the balance of probabilities, that the respondent did not contravene the provision.
>
> …

This is closely modelled on s 136 of the *EqA*. However, the impact of this change has been delayed by s 37 of the *Crime and Corruption (Restoring Reporting Powers) and Other Legislation Amendment Act 2025* (Qld), which inserted a new s 285AA into the *Anti-Discrimination Act 1991* (Qld) and reverted to the old burden of proof provisions until a date fixed by proclamation.

The WA Law Reform Commission has also recommended that, for direct discrimination claims, the *Equal Opportunity Act 1984* (WA) be amended to 'impose an evidentiary burden on a complainant to establish a prima facie case of discrimination. Once this evidentiary burden has been established, a persuasive burden should be imposed on the respondent to establish that their conduct did not constitute unlawful discrimination.'[117]

Shifting the burden of proof is also backed by normative arguments: a shifting burden of proof shifts the weight of enforcement, in part, off a claimant, instead requiring respondents to produce information and evidence that might be in their possession. This partial transfer of the burden of enforcement is seen as appropriate, given 'respondents need to do a lot more … when they come to defending a claim of discrimination. All the power, all the information rests with them.'[118]

These reviews, recommendations and normative arguments make consideration of proof, and alternative models of proof, particularly timely. The question, then, is how a shifting burden of proof might operate in practice, and whether it would address the fundamental difficulties of proof inherent in 'second generation' discrimination cases. These questions can be considered by examining proof requirements in the *EqA*, the *FWA* and in the ACT. In the sections that follow, then, this article examines how such a shifting burden might work, drawing on comparative experiences in the UK, under the *FWA* and in the ACT, and how it might advance the existing discrimination law statutory framework and address the problem of proof.

Of course, even with a shifting burden of proof, some cases will not meet the burden of proof requirements (see below).[119] Further, most discrimination claims in Australia

[117] Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA): Project 111 Final Report* (May 2022) 213 <https://www.wa.gov.au/system/files/2022-08/LRC-Project-111-Final-Report_0.pdf>.

[118] Interview with A71.

[119] Interview with UK97.

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are resolved via confidential conciliation;[120] in conciliation, proof can be treated in a more flexible way[121] and there is arguably no need to adhere to standards of proof or evidence.[122] That said, issues of proof become more critical once a complaint progresses to a tribunal or court.[123]

Thus, while a lack of proof may not prevent a claim from being brought to a statutory equality agency or being conciliated, it will make claimants think twice about bringing a claim to a court or tribunal, even with a low risk of costs being awarded in most state and territory jurisdictions.[124] A lack of proof may also deter claiming (as discussed in Part IV), particularly for those unfamiliar with how conciliation works in practice.

It is worth noting, too, that some expert respondents in this study felt that difficulties in proving discrimination could be overcome, in some cases, by pursuing an unfair dismissal complaint instead;[125] stronger employment protection laws could overcome difficulties of proof under discrimination law.[126] However, this is not an argument against reforming discrimination law to address problems of proof: there are many cases beyond the scope of employment protection and unfair dismissal laws, such as those relating to independent contractors, casual and zero-hours workers, those who have not fulfilled the service requirements to make a claim for unfair dismissal, and cases relating to areas other than dismissal. While unfair dismissal possibly offers a more straightforward route to claiming, it is ill-equipped for dealing with circumstances where an employment relationship remains in place. There is therefore a need to re-consider proof in discrimination cases, and how difficulties of proof might be overcome, including through a shifting burden of proof.

A. UK: The EqA

Historically, the common law allowed, but did not require, a court or tribunal to infer that discrimination had occurred where the claimant could establish a prima facie case, and the respondent offered no explanation for the treatment.[127] This was not seen as 'shifting' the burden of proof: as opined in *King v Great Britain-China Centre*,

> It is unnecessary and unhelpful to introduce the concept of a shifting evidential burden of proof. At the conclusion of all the evidence the tribunal should make findings as to the primary facts and draw such inferences as they consider proper

[120] Blackham and Allen, 'Resolving Discrimination Claims' (n 53) 253, 260–1, 267–8.

[121] Interviews with A99 and A101.

[122] Harold Brown, 'Alternative Dispute Resolution: Realities and Remedies' (1997) 30(3) *Suffolk University Law Review* 743, 747; but see Jack M Sabatino, 'ADR as "Litigation Lite": Procedural and Evidentiary Norms Embedded within Alternative Dispute Resolution' (1998) 47(4) *Emory Law Journal* 1289, 1324–7.

[123] Interviews with A99, A101 and A158.

[124] Interviews with A112 and A158. In the federal jurisdiction, the risk of an adverse costs order was previously high. This risk has been substantially reduced by the *Australian Human Rights Commission Amendment (Costs Protection) Act 2024* (Cth), which creates a modified 'equal access' cost protection provision for federal discrimination claims.

[125] Interviews with A109 and A157.

[126] Interview with A157.

[127] *King v Great Britain-China Centre* [1992] ICR 516, 529 (Neill LJ) ('*King*').

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> from those facts. They should then reach a conclusion on the balance of probabilities, bearing in mind both the difficulties which face a person who complains of unlawful discrimination and the fact that it is for the complainant to prove his or her case.[128]

Further, while it was *open* to a court or tribunal to make such an inference, saying that they 'should' do so 'put the matter too high'.[129]

These decisions on the use of inference were grounded in and supported by s 65 of the *Race Relations Act 1976* (UK) (the '*1976 Act*'), which made provision for a questionnaire procedure. Section 65(2) then provided:

> Where the person aggrieved questions the respondent (whether in accordance with an order under subsection (1) or not)—
>
> …
>
> (b) if it appears to the court or tribunal that the respondent deliberately, and without reasonable excuse, omitted to reply within a reasonable period or that his reply is evasive or equivocal, the court or tribunal may draw any inference from that fact that it considers it just and equitable to draw, including an inference that he committed an unlawful act.[130]

Thus, the drawing of inferences was evidently *encouraged* by the relevant statute, where the respondent failed to offer an explanation for the treatment. There is no similar provision or questionnaire procedure in Australian jurisdictions, perhaps explaining why case law has diverged on this point between the UK and Australia (see below). That said, inferences that may be made include — but, implicitly, are not necessarily limited to — those in accordance with s 65(2)(b) of the 1976 Act.[131]

A shifting burden of proof was effected by *Directive 97/80/EC of the Council of the European Union of 15 December 1997 on the Burden of Proof in Cases of Discrimination Based on Sex* (the 'Burden of Proof Directive').[132] The preamble to the Burden of Proof Directive explicitly noted the difficulties of proving a claim of discrimination, and that reform was necessary to ensure laws in this area were effective:

> plaintiffs could be deprived of any effective means of enforcing the principle of equal treatment before the national courts if the effect of introducing evidence of an apparent discrimination were not to impose upon the respondent the burden of proving that his practice is not in fact discriminatory[.][133]

Under art 4(1) of the Burden of Proof Directive,

[128] Ibid. This was grounded in and supported by s 65 of the *Race Relations Act 1976* (UK), which made provision for a questionnaire procedure. See below.

[129] *Glasgow City Council v Zafar* [1997] 1 WLR 1659, 1665; [1998] ICR 120, 126 (Lord Browne-Wilkinson).

[130] *Race Relations Act 1976* (UK) s 65(2) (the '*1976 Act*').

[131] *King* (n 127) 528–9 (Neill LJ).

[132] [1998] OJ L 14/6 (the 'Burden of Proof Directive').

[133] Ibid preamble [17].

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> Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.[134]

This did not prevent Member States from introducing rules more favourable to claimants.[135] The Burden of Proof Directive was later extended to apply to the UK,[136] and integrated into specific discrimination directives. The burden of proof for age discrimination proceedings is specified in art 10 of *Directive 2000/78/EC of the Council of the European Union of 27 November 2000 establishing a general framework for equal treatment in employment and occupation* (the 'Framework Directive'),[137] in identical terms to that under art 4(1) of the Burden of Proof Directive.

In *Igen*,[138] decided under the *Sex Discrimination Act 1975* (UK) and the *Race Relations Act 1976* (UK), the UK Court of Appeal interpreted the burden of proof provisions as entailing two 'stages':

> The first stage requires the complainant to prove facts from which the tribunal could, apart from the section, conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld. …[139]

> It is for the applicant complaining of discrimination only to make out his or her case to satisfy the first stage requirements. If the second stage is reached, and the respondent's explanation is inadequate, it will be not merely legitimate but also necessary for the employment tribunal to conclude that the complaint should be upheld. The statutory amendments shift the evidential burden of proof to the respondent if the complainant proves what he or she is required to prove at the first stage.[140]

While proof involves two stages, courts and tribunals do not necessarily need to divide a hearing into two parts: more likely, they will hear all the evidence before deciding

[134] Ibid art 4(1).

[135] Ibid art 4(2).

[136] *Council Directive 98/52/EC of 13 July 1998 on the extension of Directive 97/80/EC on the burden of proof in cases of discrimination based on sex to the United Kingdom of Great Britain and Northern Ireland* [1998] OJ L 205, p 66.

[137] [2000] OJ L 303, p 16 (the 'Framework Directive').

[138] *Igen* (n 116) ICR 931.

[139] Ibid 940, [17].

[140] Ibid [18].

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if the first stage is satisfied.[141] Thus, burden of proof provisions should not be over-complicated.[142]

Section 136 of the *EqA* now provides:

> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.[143]

Early cases held that s 136 meant the claimant did not need to prove *anything*, that is, the claimant had no burden of proof,[144] given the shift in wording from requiring that 'the complainant proves facts' (under s 54A(2)) of the *Race Relations Act 1976* (UK)) to the more neutral 'if there are facts' in the *EqA*.[145] However, in *Ayodele v Citylink Ltd,*[146] the Court of Appeal confirmed that a claimant is still required to establish a prima facie case for the burden of proof to shift under s 136.[147] For the Court of Appeal, s 136 was better seen as an example of 'no more than a legislative "tidying up" exercise. It was not intended to change the law in substance'.[148] This was affirmed in the Supreme Court case of *Royal Mail Group Ltd v Efobi* ('*Efobi*'),[149] where the Court held that the change in wording in the *EqA* made no substantive change to the law;[150] the claimant must still establish a prima facie case.[151] This requirement was considered necessary 'to strike a fair balance' between claimants and respondents: 'it would be unduly onerous to require an employer to disprove a mere assertion of discrimination'.[152]

Efobi also clearly articulates the need for a shifting burden of proof to address information asymmetries between claimants and respondents.[153] As Lord Leggatt outlines (with whom Lord Hodge, Lord Briggs, Lady Arden and Lord Hamblen agreed):

> the relevant information about the reasons for treating the claimant less favourably than a comparator is, in its nature, in the employer's hands. A claimant can seek to draw inferences from outward conduct but cannot give any direct evidence about the employer's subjective motivation[.][154]

[141] Ibid [19].
[142] *Ladele v London Borough of Islington* [2009] ICR 387, 396–7, [40].
[143] *Equality Act 2010* (UK) s 136(2)–(3) ('*EqA*').
[144] *Efobi v Royal Mail Group Ltd* [2018] ICR 359, [78].
[145] *EqA* (n 143) s 136(2).
[146] [2018] ICR 748.
[147] Ibid [92]–[93], 765 (Singh LJ).
[148] Ibid [105], 767 (Singh LJ).
[149] [2021] UKSC 33 ('*Efobi*').
[150] Ibid [26], [34].
[151] Ibid [30].
[152] Ibid [15].
[153] Ibid.
[154] Ibid [15].

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In Northern Ireland ('NI'), the *Employment Equality (Age) Regulations (Northern Ireland) 2006* contain the historical formulation of the burden of proof in reg 42(2):

> Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this regulation, conclude in the absence of an adequate explanation that the respondent—
>
> (a) has committed against the complainant an act to which regulation 41 (jurisdiction of industrial tribunals) applies; or
>
> (b) is by virtue of regulation 26 (liability of employers and principals) or regulation 27 (aiding unlawful acts) to be treated as having committed against the complainant such an act,
>
> the tribunal shall uphold the complaint unless the respondent proves that he did not commit, or as the case may be, is not to be treated as having committed, that act.[155]

B. The shifting burden in practice: Employment Tribunal age discrimination decisions

What practical impact does the shifting burden of proof have on age discrimination law in the UK? More specifically, does this shift address the problems of proof seen in Australia? Drawing on qualitative and quantitative content analysis of 1208 UK ET age discrimination decisions, published between February 2017 and 17 April 2019,[156] it is possible to offer some empirical insights into the practical impacts of the shifting burden of proof in the context of age discrimination law.

Despite the legislative shifting of the burden of proof, a lack of evidence was a recurring issue in the UK case sample, being raised as an (often determinative) issue in 87 cases.[157] In the case sample, a lack of evidence proved to be an insurmountable issue in a number of claims, to the point where a prima facie case could not be established, and the burden of proof did not shift. The burden of proof was explicitly held to not shift to the respondent in 28 cases; other cases did not even progress this far due to a complete lack of evidence.[158] In some cases, the claimant's evidence was held to be unreliable; in others, the claim was merely speculative or an 'assertion' without evidential backing, or was not particularised or actively pursued. Where a lack of evidence did not hamper a claim, this was often because the respondent failed to produce relevant evidence.[159]

That said, in some cases the burden of proof shifted, and this could be critical to the success of a case, especially where the claim related to recruitment. In *James v Coedffranc Community Council*,[160] for example, the claimant established facts from which the ET could conclude, in the absence of an adequate explanation, that the

[155] *Employment Equality (Age) Regulations (Northern Ireland) 2006* (NI) SR 2006/261, reg 42(2).

[156] See the detailed discussion of method in Blackham, 'Why Do Employment Age Discrimination Cases Fail?' (n 3); Blackham, 'Enforcing Rights in Employment Tribunals' (n 3).

[157] Blackham, *Reforming Age Discrimination Law* (n 3) 234.

[158] Ibid.

[159] Blackham, 'Enforcing Rights in Employment Tribunals' (n 3) 399–400.

[160] [2018] UKET 1600068/2018.

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respondent had committed an act of age discrimination in recruitment. Evidence brought forward included comments relating to age made in a job interview by a Councillor; interview notes which noted the ages of only the two oldest job applicants, and which circled the age of the successful (younger) candidate; and that this Councillor's lower marks for the claimant 'was a game changer in the decision to appoint' the younger candidate: the claimant had top marks from the other two interviewers.[161] The circling of the age of the successful, younger, candidate enabled the ET to 'properly infer that the age of the claimant was a matter that [the Councillor] bore in mind when making her decision.'[162] The respondent could not discharge its burden of proof, and the ET could not conclude that the decision 'had nothing to do with the claimant's age.'[163] That said, the claimant's case was also supported by other evidence, including written evidence of a job application form with space for a date of birth, and the claimant's contemporaneous complaint to the respondent.

The shifting burden of proof was also instrumental in *Amu v Department for Work and Pensions*.[164] In this case, the claimant alleged discrimination and harassment on the basis of age and ethnicity when she was targeted, excluded and ridiculed by other trainees in her training group. There were facts from which the ET could infer that the claimant was treated less favourably than someone who did not share her age group would have been treated. Equally, there were facts from which the ET could infer that the claimant was treated less favourably than someone who did not share her race would have been treated.[165] The burden of proof therefore passed to the respondent, and was not discharged.[166]

Where there is competing evidence from the claimant and respondent, it is a potentially high bar to succeed with a claim of age discrimination. This challenge is particularly acute in relation to recruitment, where the respondent likely holds the weight of evidence. In these sorts of cases, the shifting burden of proof can be a key factor in determining the outcome of a claim. For example, the shifting burden of proof was essential to the claim's success in *Khan v Roadrunners GB Ltd*.[167] In that case, the claimant's employment ended after a meeting with two of the respondent's managers. One manager failed to give evidence.[168] The claimant and the other manager gave conflicting evidence of what occurred in the meeting: the claimant said he was dismissed; the manager said the claimant had 'agreed mutually' to retire.[169] The claimant's evidence was preferred to that of the manager, including his recollection of the meeting:

> It is simply not credible that the Claimant was summoned to a meeting without being given any information about the subject matter of that meeting in advance,

[161] Ibid [47]–[49].
[162] Ibid [47].
[163] Ibid [50].
[164] [2018] UKET 1600465/2017.
[165] Ibid [224.4], [231].
[166] Ibid [224.4], [235].
[167] [2019] UKET 2302696/2017.
[168] Ibid [1].
[169] Ibid [11].

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> and then simply agreed to retire immediately. He was not able to draw his State pension at the time and had been earning about £325 a week net. That income could not be replaced immediately.[170]

The claimant also told a colleague that he had been fired after the meeting.[171] The respondent gave evidence that retirement was discussed at the meeting, which was sufficient to establish a prima facie case.[172] The respondent could not discharge its burden of proof, and the age discrimination claim succeeded.

Even with a shifting burden of proof, claimants potentially face onerous evidential requirements. In the successful NI case of *Matier v Spring & Airbrake Ireland Ltd*,[173] the claimant was allegedly discriminated against in recruitment at the respondent's place of business. After speculatively attending the respondent's premises to apply for employment, the claimant alleged he was told by someone in authority there was no point applying due to his age.[174] The claimant's evidence was corroborated by his friend, who accompanied him to the respondent's premises but did not actually enter the premises to witness the exchange, and who was told of the events immediately after the claimant exited the premises.[175] Further, there was written documentation created by the claimant's job centre advisor after the claimant reported the incident to the Jobs and Benefits Office; and evidence from the respondent itself, which admitted to asking job seekers for their age.[176] The respondent failed to discharge its burden of proof, as it denied the claimant ever came to its premises.[177] Having succeeded in this claim, however, the claimant was only awarded damages for injury to feelings of GBP3000, a comparatively miserly amount given the effort required to prove a claim of this nature.

That said, too much (or unhelpful) evidence could undo a claimant's case. In *Angeli v The Orthopaedic Footwear Company Ltd*,[178] the claimant covertly recorded a disciplinary meeting; the recording supported the respondent's account of events. Without that recording, the claimant would have benefitted from the shifting burden of proof, and may well have succeeded.[179]

The shifting burden of proof may therefore be critical in finely balanced cases; it is not a panacea, though, for issues of proof more generally. This conclusion is consistent with the findings from the qualitative expert interviews, where the shifting burden of proof was seen as having some, limited, impact on discrimination law by UK practitioners. While the shifting burden of proof rarely 'has a decisive impact',[180] as 'most cases are not decided on the burden of proof',[181] 'it does have an impact on

[170] Ibid [14].
[171] Ibid [15].
[172] Ibid [20].
[173] *Matier v Spring & Airbrake Ireland Ltd* [2018] NIIT 5465/18IT.
[174] Ibid [7].
[175] Ibid.
[176] Ibid.
[177] Ibid [8].
[178] [2019] UKET 2201663/2018.
[179] Ibid [123].
[180] Interview with UK78.
[181] Ibid.

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some cases' with very particular fact scenarios.[182] The shifting burden of proof will therefore only assist a claimant in a 'finely balanced' case, and these cases are the exception: 'By the time all the evidence comes out, normally a decision-maker has reached a view or is able to reach a view one way or the other.'[183] The shifting burden of proof, which is largely a European concept, does not fit well within the UK legal system, where parties are already required to disclose all relevant documents in proceedings.[184] Thus, with the way the courts have interpreted s 136, it has become 'a much watered-down version of what the European law was actually seeking'.[185] A shifting burden of proof must therefore also be accompanied by sympathetic and purposive judicial interpretation; without this, much of the potential of these provisions may be lost.

C. Australia: The FWA

A similar experience has emerged in Australia under the *FWA*. Under s 361(1) of the *FWA*, for general protections cases:

> If:
> (a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and
>
> (b) taking that action for that reason or with that intent would constitute a contravention of this Part;
>
> it is presumed, in proceedings arising from the application, that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.

Following the High Court case of *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* ('*Barclay*'),[186] relating to industrial activity, the shifting burden of proof under s 361 can be discharged by an employer's own evidence regarding the reason for their actions.[187] According to French CJ and Crennan J in *Barclay*, 'direct evidence of a decision-maker as to state of mind, intent or purpose will bear upon the question of why adverse action was taken, although the central question remains "why was the adverse action taken?"'[188] An employer's professed reason for acting is likely to be accepted, even if the reason itself is irrational.

[182] Ibid.
[183] Ibid.
[184] Ibid.
[185] Interview with UK82.
[186] (2012) 248 CLR 500 ('*Barclay*').
[187] Ibid 517 (French CJ and Crennan J). See also at 542 (Gummow and Hayne JJ).
[188] Ibid 517 (French CJ and Crennan J). See also at 542 (Gummow and Hayne JJ).

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Anna Chapman, Kathleen Love and Beth Gaze contrast this narrow, '*Barclay* approach'[189] with a 'broader approach', where courts apply a 'wider lens' to 'independently consider the extent to which the stated innocent reason of the employer, and sometimes more broadly the decision of the employer, is linked to the alleged prescribed ground'.[190] For the authors, these approaches are 'two end points on a continuum or spectrum of judicial approaches to the reverse onus of proof and the causal link'.[191] Claimants are more likely to succeed where the broader approach is adopted,[192] yet the *Barclay* approach remains dominant.

Understandably, then, given this narrow interpretation, and enduring focus on the employer's mindset, expert respondents in this study did not see the shifting burden of proof under the *FWA* as making a substantial difference in practice, given how it has been interpreted and applied. As one practitioner noted, 'I think the general protections cases have made us all a bit of afraid of general protections',[193] particularly due to the way *Barclay* considered the mind of the decision-maker.[194] Despite the shifting burden of proof, then, courts have remained very deferential to employers' evidence;[195] the *FWA*'s reverse burden of proof is seen as a 'façade'.[196] As a result, the impact of s 361(1) in practice has been limited, particularly given the other limitations of the federal court system for hearing discrimination and work disputes.[197] That said, the reverse burden of proof might be a useful tool in negotiations or conciliation.[198]

Even with a reverse onus of proof, the evidence backing many claims is insufficient, in part because human behaviour itself is complex, and driven by multiple factors:[199]

> If you're commencing a proceeding, you have to have a reasonable basis to make the claim. You can't do it on the basis of suspicion even if you've got the benefit of a reverse onus … . That's not grounds for a solicitor to sign an application to a court or a tribunal … it's just not a sufficient basis to make the claim.[200]

Overall, proof, or a lack of proof, was a recurring theme in many unsuccessful Australian age discrimination cases in the case sample, with a lack of evidence being raised in 32 of the 108 cases across discrimination and industrial law. This often related

[189]Where, 'if the decision-maker gives evidence that they did not take adverse action "because" of a prescribed ground, and that evidence is accepted, there will not be a breach. Evidence of surrounding circumstances may be relevant, but only to test the veracity of the evidence of the employer': Anna Chapman, Kathleen Love and Beth Gaze, 'The Reverse Onus of Proof Then and Now: The Barclay Case and the History of the Fair Work Act's Union Victimisation and Freedom of Association' (2014) 37(2) *University of New South Wales Law Journal* 471, 488–9.

[190]Ibid 498.

[191]Ibid 489.

[192]Ibid 498.

[193]Interview with A115.

[194]Ibid.

[195]Interview with A5.

[196]Ibid.

[197]Interview with A115.

[198]Interview with A5.

[199]Interview with A111.

[200]Ibid.

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to the alleged detriment or adverse treatment, or to causation. However, in *Carr v Blade Repairs Australia Pty Ltd (No 2)*,[201] decided under the *Workplace Relations Act 1996* (Cth) (*WRA*) unfair dismissal legislation, a reverse burden of proof proved essential to the claimant's success. Under the *WRA* s 664, Tracey J held that the 'respondent bears the onus of proving that the termination was for a reason or reasons that do not include a proscribed reason'[202] such as age; the applicant did not have the burden of proof. Thus, while the employer denied the claimant's evidence that he was told that the clients "'don't want young blokes working on the wind farms anymore",[203] and Tracey J could not decide between the conflicting accounts of the conversation, this meant the claimant was successful.[204]

This stands in stark contrast to how such a claim might be decided under discrimination law, or under the current approach to the *FWA*. For example, in the South Australian case of *Choong v Bridgestone Australia Ltd*,[205] the claimant alleged he was told 'Your age was the issue. When you reach age 65 you cannot work anymore'.[206] The employer denied saying this, or that the reason the claimant was not appointed to the boiler attendant's position was due to age.[207] In this case, though, the Tribunal was able to distinguish between the evidence of the claimant and respondent, and preferred the respondent's account of events.[208]

Again, in *North v City of Sydney Council*,[209] the claimant's argument that he was not interviewed for a position due to his age was unsuccessful; the Tribunal noted that:

> [T]he onus is on the Applicant to satisfy the Tribunal on the balance of probability and having regard to the serious nature of the allegation, that the reason for the Respondent to have discriminated against the Applicant in choosing other applicants in preference to him, to be interviewed for the position was because he was older than the other applicants. In the face of the denial of such a reason by Mr Saunders and in the absence of any other supporting material for the claim by the Applicant, the Tribunal is not able to find that this claim of discrimination on the ground of age has been substantiated.[210]

Clearly, then, there are finely balanced cases emerging in Australia, which could be swayed by a shifting burden of proof.

[201] [2010] FCA 688.
[202] Ibid [15].
[203] Ibid [13], [14].
[204] Ibid [29].
[205] [2009] SAEOT 8.
[206] Ibid [28].
[207] Ibid [29].
[208] Ibid [30].
[209] [2001] NSWADT 75.
[210] Ibid [51].

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D. ACT: cases referred to ACAT

For the most part, Australian discrimination law does not provide for any shifting of the burden of proof. However, in the ACT, for cases referred to the ACT Civil and Administrative Tribunal (ACAT), there is a rebuttable presumption of discrimination under the *Human Rights Commission Act 2005* (ACT) s 53CA (introduced by the *Discrimination Amendment Act 2016* (ACT)). The presumption applies in the context of direct discrimination if the claimant can prove that the treatment or proposed treatment is unfavourable;[211] and 'presents evidence that would enable ACAT to decide, in the absence of any other explanation', that the treatment or proposed treatment is because of a protected attribute.[212] The presumption is then rebutted if the respondent establishes that the treatment is not because of a protected attribute.[213]

Unlike the position under the *EqA* and *FWA*, this provision is only relevant to cases referred to ACAT; it does not apply to the bulk of claims and complaints, which will be resolved via conciliation.[214] This may simply reflect the flexible nature of conciliation; issues of proof are only strictly enlivened once a claim proceeds to tribunal. That said, given a reverse or shifting burden of proof might be a useful tool in negotiations or conciliation,[215] this appears to be a major omission from the ACT provisions.

When originally introduced, the ACT's rebuttable presumption was clearly intended to make enforcement of discrimination law less onerous for claimants, recognising the information asymmetries between parties.[216] While framed as a 'rebuttable presumption', the Bill's Explanatory Memorandum talks about the 'threshold requirements for a prima facie case', and that 'the onus [then] shifts to the respondent'.[217] That said, the 'rebuttable presumption' in the ACT appears less generous than the reverse burden of proof articulated in the *FWA*: claimants in ACAT must still show that they experienced unfavourable treatment *and* produce evidence that would allow the Tribunal to conclude that the unfavourable treatment was because of a protected characteristic. This places a significant evidentiary burden on the claimant. It is also less generous than what was recommended by the ACT Law Reform Advisory Council ('LRAC').[218] The LRAC, in its report, summarised the legislative choices as follows:

> A complainant is currently responsible for demonstrating that the respondent treated them unfavourably because of a protected attribute. It can, however, be difficult for the complainant to establish the reasons for the respondent's conduct, because they cannot know what was in the mind of the respondent. One possible alternative is to require the complainant to show that they were treated unfavourably and then to require the respondent to show that the treatment was

[211] *Human Rights Commission Act 2005* (ACT) s 53CA(2)(a)(i).

[212] Ibid s 53CA(2)(b)(i).

[213] Ibid s 53CA(3)(a).

[214] Blackham and Allen, 'Resolving Discrimination Claims Outside the Courts' (n 53) 253, 260–1.

[215] Interview with A5.

[216] Explanatory Statement, Discrimination Amendment Bill 2016 (ACT) ('*the Bill*').

[217] Ibid 18.

[218] ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991* (ACT) (Final Report, 18 March 2015) 142 <https://www.austlii.edu.au/au/other/lawreform/ACTLRAC/2015/3.pdf>.

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> not for discriminatory reasons. This is the approach taken in the Commonwealth Fair Work Act.[219]
>
> A slightly different approach is to require the complainant to show that they were treated unfavourably and to provide evidence from which the court could decide that the respondent treated them unfavourably because of a protected attribute. The respondent would then be required to show that the treatment was not for discriminatory reasons. This approach was proposed in the Exposure Draft of the Commonwealth Human Rights and Anti-Discrimination Bill, and is the approach taken in the UK, Canada, US and European Union. …[220]
>
> In LRAC's view, complainants should be required to demonstrate that they were treated unfavourably. The burden of proof should then shift to the respondent to demonstrate that the person was not treated unfavourably because of a protected attribute. This would address the current difficulty encountered by complainants in being required to demonstrate what was in the mind of the complainant at the time of the unfavourable treatment.[221]

Thus, the LRAC recommended an approach similar to that under the *FWA*. What was ultimately adopted, though, was the more exacting approach of the UK. The Bill's explanatory materials help to explain this choice. When originally introduced, the reverse burden of proof was described as 'arguably limit[ing] the right to fair trial' under s 21(1) of the *Human Rights Act 2004* (ACT) ('*HRA*').[222] That provision says:

> Everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

There is arguably nothing in a shifting burden of proof that would affect this right.[223] Despite this, it is possible that this concern for human rights led to a more limited provision than the ACT LRAC originally recommended. As noted in the Explanatory Statement,

> The Bill adopts a middle ground approach to that recommended by LRAC (which more closely mirrors the Fair Work Act) by still requiring the complainant to show evidence to support an assertion that the discrimination occurred because of a protected attribute of the complainant.[224]

This 'limitation' or 'middle ground' was seen as 'reasonable and justifiable in a free and democratic society',[225] in accordance with s 28 of the *HRA*. Thus, a conscious decision was made to adopt a weaker provision in the ACT, where claimants must still provide

[219] Ibid.
[220] Ibid.
[221] Ibid 143.
[222] Legislative Assembly for the Australian Capital Territory (n 216).
[223] See the related discussion in Queensland Human Rights Commission (n 49) 197–198.
[224] Legislative Assembly for the Australian Capital Territory (n 216).
[225] Ibid.

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some evidence that treatment was on the basis of a protected characteristic, ostensibly to comply with the *HRA*. The irony, of course, is that equality is also a human right protected by the *HRA*.

In applying s 53CA, then, claimants must still articulate a coherent and clear case of discrimination: as described by Senior Member Hyman in *Complainant 201931 v Australian Capital Territory (represented by Access Canberra)*,[226] s 53CA:

> lays out the way in which the onus lies on the parties: the complainant, to succeed, must establish unfavourable treatment or disadvantage resulting from an imposed condition or requirement (depending on whether direct or indirect discrimination is asserted), and advance sufficient evidence that the treatment or disadvantage is caused by the protected attribute or attributes to persuade the Tribunal, in the absence of any other explanation. The respondent, to succeed, must advance evidence that rebuts any case the complainant has made by showing, where the complainant has established the rebuttable presumption that discrimination has occurred, that any unfavourable treatment or disadvantage had some other cause. The respondent's obligation to rebut extends to, and not beyond, the case the complainant has made; the respondent has no obligation to rebut a case that was available to the complainant but not articulated.[227]

As ACAT cases show, the weaker burden of proof provisions in the ACT have not necessarily achieved effective protection against discrimination. Claimants have repeatedly failed to present sufficient evidence to show that there was a discriminatory reason for their treatment; that is, that their treatment was 'because of' the protected ground. In *Puri v Iconic Markets and Events Pty Ltd (Appeal)*,[228] for example, it was held that even with the rebuttable presumption, 'there was insufficient evidence to enable the Appeal Tribunal to decide, in the absence of any other explanation, that the treatment was because of Mr Puri's race' (regardless, the respondent established to the Tribunal's satisfaction that the treatment was not because of race).[229] In a series of cases, the claimant has failed to meet the evidentiary threshold to enliven the rebuttable presumption.[230]

However, in *Abraham v Thomas (Discrimination)*,[231] the claim for discrimination in work on the basis of immigration status was successful, and potentially assisted by the rebuttable presumption. The claimant argued that she was subjected to unfavourable treatment — namely, being threatened by the respondent that her 457 visa sponsorship

[226] [2021] ACAT 9.

[227] Ibid [74].

[228] [2019] ACAT 28 (1 March 2019).

[229] Ibid [79].

[230] See, eg, *Pojohishgar v University of Canberra (Discrimination)* [2022] ACAT 53; *Johnston v Ainslie Football Club Ltd (Discrimination)* [2018] ACAT 104, [42]; *M v B (Discrimination)* [2017] ACAT 14; *Ezekiel-Hart v Reis (Discrimination)* [2017] ACAT 3; *Phillips v Australian Capital Territory (Discrimination)* [2021] ACAT 22, [103]; *Complainant 201931 v Australian Capital Territory (Represented by Access Canberra) (Discrimination)* [2021] ACAT 9, [115]–[123]; *Andreopoulos v University of Canberra (Discrimination)* [2020] ACAT 95, [248]; *Complainant 201808 v Transport Canberra and City Services (Discrimination)* [2018] ACAT 132, [100]–[104]; *Elbashir v Canberra Institute of Technology (Discrimination)* [2024] ACAT 10, [32].

[231] [2020] ACAT 41.

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would be withdrawn, and that she would have to leave Australia — if she did not work more hours than she was being paid to work, and did not participate in a 'cash back' scheme initiated by the respondent (where the claimant was required to pay $511.40 per fortnight to the employer to cover the tax the respondent had paid the ATO). The Tribunal found the claimant to be 'honest, reliable and consistent', and her evidence was corroborated by other witnesses and contemporaneous emails.[232] By contrast, the Tribunal 'was not favourably impressed with the evidence given by the respondent.'[233] The Tribunal concluded, then, that:

> the applicant is also entitled to the rebuttable presumption under section 53CA HRCA that the unfavourable treatment is deemed to have occurred because of discrimination. In making that finding I am satisfied that the applicant presented evidence that would enable me to decide, in the absence of any other explanation, that the unfavourable treatment occurred because of the applicant's immigration status. I am also satisfied that the evidence presented by the respondent did not individually or collectively rebut the presumption.[234]

Given the weight of the evidence in this case, and the credibility of the claimant as a witness, it appears likely that the claim would have been successful even without the rebuttable presumption.

Similarly, in *Applicant DT 30 of 2021 v Respondent DT 30 of 2021 (Discrimination)*,[235] another successful claim, there was no need for the Tribunal to make use of s 53CA. In *Complainant 202012 v Australian Capital Territory (as Represented by the Director-General, Community Services Directorate) (Discrimination)*,[236] a rebuttable presumption of discrimination was established,[237] and was not rebutted.[238] In this case, the respondent's reasons for acting were explained in a statement of reasons provided by the relevant Delegate, which explicitly gave weight to the protected ground of irrelevant criminal record.[239] Again, this is fairly compelling evidence, and the claim would likely have succeeded without the assistance of s 53CA.

Overall, then, it appears unlikely that s 53CA is significantly shifting the status quo of the burden of proof in the ACT. As one respondent in this study noted,

> [claimants] know that there's issues around burden of proof, and even though the legislation says the burden is on the employer to prove that they didn't discriminate, people know it's their word against theirs, and that the employer can just come up with some sneaky language to get rid of it.[240]

[232] Ibid [100]–[101].
[233] Ibid [102].
[234] Ibid [115]–[117].
[235] [2022] ACAT 17.
[236] [2023] ACAT 17.
[237] Ibid [91]–[92].
[238] Ibid [109].
[239] Ibid [88].
[240] Interview with A104.

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Thus, a shifting burden of proof (at least as it is framed in the ACT) is not necessarily enough to encourage individuals to pursue a complaint, or sufficient to address existing barriers to proving a claim of discrimination.

VI. Recommendations: beyond a shifting burden of proof

As this survey of Australian and UK age discrimination case law has illustrated, introducing a shifting burden of proof is not, in itself, enough to address the enduring limits of discrimination law. Statutory reform must be accompanied by purposive and sympathetic judicial approaches, which seek to give meaningful effect to these legislative provisions. Shifting the burden of proof might have unpredictable effects if courts are not sympathetic to discrimination claims. It means 'the whole culture of the trial process would be shifted and it would actually turn the focus around to the respondent', even creating sympathy for the respondent: 'The poor respondent being put in this situation where they have to justify [their behaviour]'.[241] Further, even with a shifting burden of proof, a claimant still has to 'bring your case, if not prove your case. You've still got to establish a basic case.'[242] This may explain limited levels of success under the *FWA* and *EqA*, even with a shifting burden of proof.[243]

Thus, while a shifting burden of proof is an important reform priority for Australian discrimination law, is it not a panacea for the problem of proof. Measures to address information asymmetries and promote accountability for organisational practices are arguably just as important, if not more so, than a shifting burden of proof. Four strategies might advance this end.

First, an inability to prove discrimination in particular cases might be overcome through organisational data collection, to identify systemic patterns and trends.[244] For example, while identifying and proving age-based discrimination in recruitment can be difficult for individuals, at an organisational level, workforce data could demonstrate age-based preferences or 'unwritten policies' against employing older workers (as, for example, in *Virgin Blue Airlines Pty Ltd v Hopper*).[245] Statistical evidence of the composition of the workforce, and of the outcomes of recruitment processes, might be an important form of evidence to counter employers' arguments that processes are age-neutral.[246] However, strong evidence would be required to prove systemic discrimination of this nature,[247] and any investigation of this nature would be difficult.[248] That said, employers are already being required to reveal some information of this nature, at least in the context of gender.[249]

[241] Interview with A153.

[242] Interview with A115.

[243] Interview with A113. See Blackham, 'Why Do Employment Age Discrimination Cases Fail?' (n 3); Blackham, 'Enforcing Rights in Employment Tribunals' (n 3).

[244] Interview with UK81.

[245] [2007] QSC 75; Interview with A110.

[246] Interview with A110.

[247] Ibid.

[248] Ibid.

[249] *Gender Equality Act 2020* (Vic); *Workplace Gender Equality Act 2012* (Cth).

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To some extent, too, this reveals the limitations of discrimination law as a tool for addressing systemic discrimination or poor treatment related to a protected ground, particularly when age often overlaps with experience and vulnerability. Young people are more likely than those of other ages to be underpaid or mistreated at work, but it can be difficult to prove they have been treated unfavourably on the basis of age.[250]

Second, then, a proactive statutory equality agency, responsible for conducting conciliation, could help to address information asymmetries between the parties through requesting disclosure by the parties. As one agency noted,

> when we get, for instance, complaints around recruitment what we will generally do is seek a response, and as part of the response information we'll seek de-identified information about other successful candidates for interview and their age, and de-identified information as to the age of the successful candidate. … in some situations when a person says, you know, they're 45 and they think that they didn't get the job because of their age, and we get provided with information that supports the person who was a successful candidate was 52, it would tend not to support that their age was a factor.[251]

The difficulty with this approach, of course, is that a woman at age 45 could be held to quite different standards than a man at age 52, reflecting ideas of gendered ageism. This means, then, that data and information obtained must be considered via an intersectional lens; age data alone is not enough to disprove unequal treatment. Further, statutory equality agencies must focus on better communicating with the public regarding the flexibility of conciliation, which can avoid problems of proof. This is essential if individuals are to be encouraged to make use of legal mechanisms, and not be deterred by issues of proof and evidence.

Third, information asymmetries could be addressed through a questionnaire procedure, like that previously in place in the UK.[252] A questionnaire procedure can be an important tool for improving workplace communication and transparency,[253] enabling claimants to ask questions of their employer at an early stage in the dispute process, before commencing tribunal or court proceedings, to see if they have a claim. Obtaining information through the questionnaire procedure potentially 'makes a huge difference' to claimants and their representatives:[254] otherwise, all the information and power remains with the respondent.[255] Requiring more transparency may also encour-

[250]Interview with A112.

[251]Interview with A151.

[252]Formerly *EqA* s 138. Allen put forward detailed arguments for the adoption of a questionnaire procedure in Australia, prior to the abolition of the procedure in the UK: Allen (n 46) 588–92, 602–3.

[253]House of Commons (n 73) Q45.

[254]Interview with UK162.

[255]Ibid; Interview with A112.

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age claims to resolve earlier.[256] The questionnaire procedure was abolished in the UK as it was seen as too demanding for employers,[257] with claimants often asking too many questions. However, this could be mitigated by providing standard (and limited) questionnaire templates to assist claimants.[258] Further, it is arguably more onerous for employers to have to respond to a tribunal claim than to answer a claimant's questions at an early stage.

Fourth, and finally, positive equality duties, particularly when focused on transparency and organisational accountability, could be an important complement to a shifting burden of proof. Positive equality duties are an important tool for shifting from a reactive, individually-focused model of equality law, to a focus on proactive, systemic ways to advance equality.[259] They are a critical means of addressing 'second generation' discrimination, that does not hinge on individual enforcement. In other work, I have previously mapped the way positive duties might support organisational accountability through targeted transparency,[260] by cultivating an action cycle of engagement between employers, workers, unions, the community and other stakeholders. Overcoming problems of proof requires better organisational accountability and transparency. Positive duties can be a critical tool in removing the veil that shrouds inequality at work.[261]

VII. Conclusion

The problem of proof is not going away. Indeed, as employers increasing embrace new technological and algorithmic tools to help manage their workforce, information asymmetries are only likely to increase. While discrimination laws in Australia should adopt a shifting burden of proof, there is also a need to adopt strategic and holistic strategies that reduce reliance on individual enforcement to address inequality and discrimination, and address the growing information asymmetries between employers and workers. These measures are likely to be critical for addressing the growing impact of technology and algorithmic management on the workplace. Creating a more equal and inclusive future of work requires addressing information inequalities as well as workplace inequalities.

[256] Interview with A112; House of Commons (n 73) Q97.

[257] Government Equalities Office, *Equality Act 2010: Employment Tribunals' Power to Make Wider Recommendations in Discrimination Cases and Obtaining Information Procedure: Government Response to the Consultation* (October 2012) 15, 76.

[258] Interview with UK162.

[259] Sandra Fredman, 'Breaking the Mold: Equality as a Proactive Duty' (2012) 60(1) *American Journal of Comparative Law* 265 ('Breaking the Mold').

[260] Alysia Blackham, 'Positive Equality Duties: The Future of Equality and Transparency?' (2021) 37(2) *Law in Context* 98 ('Positive Equality Duties').

[261] Dominique Allen and Alysia Blackham, 'Under Wraps: Secrecy, Confidentiality and the Enforcement of Equality Law in Australia and the United Kingdom' (2019) 43(2) *Melbourne University Law Review* 384 ('Under Wraps').

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