Strengthening Australia's Workplace Laws to Promote Equality in the Post-Covid-19 Era

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Introduction

In March 2020, as Australia, like the rest of the world, prepared to respond to the threat of COVID-19, the Australian Human Rights Commission (AHRC) released a lengthy report of its national inquiry into sexual harassment in the workplace. *Respect@Work* (AHRC 2020) was the culmination of 18 months of research including interviews with workers, employers, industry, government, unions and academics. Overall, the AHRC consulted with over 600 individuals and received 460 written submissions to its inquiries, including from victims of sexual harassment.

In her Foreword to *Respect@Work*, Sex Discrimination Commissioner, Kate Jenkins, wrote that the "current legal and regulatory system is simply no longer fit for purpose" and called on employers to join her in creating "safe, gender-equal and inclusive workplaces" (AHRC 2020:10). *Respect@Work* contained 55 recommendations for improving the current framework. Throughout the COVID-19 pandemic and ensuing lockdowns, Commissioner Jenkins tirelessly promoted the findings in the report. Indeed, the pandemic itself highlighted the inequality of women in the workplace. Women shouldered more of the burden for caring for children during the extensive periods of government-imposed lockdowns in 2020–21 (WGEA 2020) and women dominated the industries that continued to work 'in person' and care for others during the pandemic such as nurses, midwives, aged care workers and teachers (Lipton et al. 2021; WGEA 2020). As women are more likely than men to be employed on a casual basis and in insecure work (Victoria. Department of Premier and Cabinet 2021), they were more likely to be prevented from working by the lockdowns.

However, women are not the only group to experience discrimination and inequality in the workplace, before the pandemic, during it or since. In 2021–22, the AHRC received 3,736 discrimination complaints, 1,960 were about disability discrimination[1] (AHRC 2022). Australia has an aging population (ABS 2020b) that it is racially diverse[2] (ABS 2022b). The workforce features a high level of casualisation, particularly amongst women and young people (Gilfillan 2020). People with a disability have a much lower participation in the workforce (ABS 2020a). The gender pay gap is 22.8% and it has remained the same for the past two years. It is highest in the Professional, Scientific and Technical Service industry at 25.3% (WGEA, n.d.).

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1. The AHRC does not separate employment complaints from non-employment complaints.
2. The last national census revealed that 27.6% of the Australian population was born overseas and the top five countries of birth were England, India, China, New Zealand and the Philippines. 3.2% of the population identify as being of Aboriginal and/or Torres Strait Islander origin.

The impact of the COVID-19 pandemic and the ensuing internal and external border closures and lockdowns were felt across the workforce. The Australian Bureau of Statistics (ABS) reported that in 2020, young people experienced the greatest fall in jobs, the income disparity between male and female workers increased and, not surprisingly, Accommodation, Food Services and Retail Trade were the industries hardest hit by the pandemic (ABS 2022a). There is, therefore, work to be done to address inequality in the post-COVID era which is not limited to anti-discrimination laws.

In late 2020 the then Morrison federal government made a commitment to implement some of the 55 recommendations in *Respect@Work* (Attorney-General's Department of Australia 2021). The Opposition (which won government in early 2022) committed to implementing the remaining legislative changes. All except one of them has now been implemented.[3] This article considers two changes which represent a departure from how the law has addressed discrimination and inequality to date. It is argued that this approach is transferable and could be utilised to tackle discrimination faced by other workers. Part I contains an overview of the legal framework for addressing workplace inequality in Australia, considering both the equality law framework and the *Fair Work Act 2009* (Cth) (FW Act). Part II presents two recent changes which are designed to prevent workplace harm and shift the burden for addressing discrimination away from the individual worker. Part III suggests that this new approach could be extended to other forms of discrimination and canvasses future directions for law reform in this area.

Part I. The legal framework for tackling inequality

Workplace discrimination is prohibited by equality laws at both the State and Territory and federal levels, as well as by federal labour laws. Since this article primarily considers the *Sex Discrimination Act 1984* (Cth) (SDA), it will be used as a point of reference.[4] As Part I explains, three systems operate in parallel, but employees are prohibited from lodging claims under more than one system in relation to the same course of conduct.[5]

Equality laws

Legislation in each State and Territory and at the federal level prohibits workplace discrimination on the basis of a range of attributes including race, sex, age, disability.[6] Sexual harassment and victimisation are also prohibited.[7] Typically, the legislation applies across the employment relationship to employees, job applicants and contractors.[8]

3. Currently employees may be subject to an adverse costs order if they pursue the claim in the federal courts. *Respect@Work* recommended that parties should bear their own costs unless one party acted vexatiously or unreasonably in pursing the claim: Recommendation 25. At the time of writing, the government was conducting an inquiry into the most appropriate model for determining costs in all types of discrimination claims with a report expected in the second half of the year. See https://consultations.ag.gov.au/rights-and-protections/cost-model-anti-discrimination-laws/user_uploads/discussion-paper-review-appropriate-cost-model-commonwealth-anti-discrimination-laws.pdf.
4. Separate federal legislation deals with race, age and disability discrimination in a similar fashion.
5. See eg FW Act ss 725, 734.
6. See for example s 6 of the *Equal Opportunity Act 2010* (Vic) which applies to 20 attributes: age, disability employment activity, expunged homosexual conviction, gender identity, industrial activity, lawful sexual activity, marital status, parent and carer status, physical features, political belief or activity, pregnancy and breastfeeding, profession, trade or occupation, race, religious belief or activity, sex, sex characteristics, sexual orientation, spent conviction, and personal association with someone who has or is assumed to have an attribute.
7. See eg SDA, ss 28A, 47A.
8. See eg SDA Part II Div 1.

Direct and indirect discrimination are prohibited. Direct discrimination occurs when an employee is treated less favourably because of a defined attribute, in this instance, their sex.[9] Indirect discrimination occurs when an employer imposes a requirement, condition or practice that has, or is likely to have, the effect of disadvantaging persons of the same sex as the employee in question which is not reasonable.[10] The employee bears the onus of proof, so they must establish a causal connection between their sex and the way in which they were treated or show the disadvantageous effect on them because of their sex. In most instances, the employee must also show that the requirement, condition, or practice was not reasonable in an indirect discrimination claim.

Specific action taken to address past disadvantage, known as 'special measures,' is permitted such as advertising for an Indigenous only job applicant[11] or implementing female focused training programs.[12] Overall, the legislation contains few provisions requiring positive action to address inequality; discrimination is addressed retrospectively.

The process of enforcing a discrimination claim varies only marginally in each jurisdiction. An employee who has experienced discrimination is required to lodge a complaint at the statutory equality commission in their jurisdiction or at the AHRC before they can litigate.[13] Provided the complaint has substance and falls within the equality commission's jurisdiction, it will attempt to resolve it through conciliation.[14] If the claim does not settle, the employee can refer it to court.[15] However, discrimination claims have a low success rate due in part to the fact that the employee bears the onus of proof and the narrow, restrictive approach successive judges have taken to interpreting the law (Gaze 2002; Thornton 2009; Smith 2008). If an employee succeeds in their claim, they usually receive compensation, but this is often awarded at low amounts and may not be adequate to cover their legal fees (Allen 2010).

The equality commissions do not play a role in enforcing the law nor can they advise or assist employees. They are a neutral player in the enforcement process and their primary role is to handle discrimination complaints and provide specialist dispute resolution services.[16] They are also charged with educating the community about discrimination law. Specialist Commissioners at the AHRC are responsible for specific type of discrimination, such as the Sex Discrimination Commissioner.[17]

Labour law

Since 2009, federal labour laws have prohibited discrimination that occurred because of an employee or prospective employee's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.[18] The FW Act uses quite different terminology from equality laws in that employers are prohibited from taking "adverse action" because of a listed attribute.[19] Adverse action is defined as dismissal, injuring the employee

9. See eg SDA, s 5(1).
10. See eg SDA, ss 5(2), 7B.
11. See eg *Racial Discrimination Act 1975* (Cth) s 8.
12. See eg SDA, s 7D.
13. See eg the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act), Part IIB.
14. The exception is Victoria where employees have the option of lodging the claim at either the equality commission or a civil tribunal. The tribunal will most likely try to resolve the complaint informally in the first instance.
15. AHRC Act, Part IIB.
16. See eg AHRC Act, Part II.
17. See eg SDA, Part V.
18. FW Act, s 351. The list of prohibited attributes was expanded in December 2022 and now includes breastfeeding, gender identity and intersex status.
19. Section 351.

in their employment, altering the employee's position to their detriment, or discriminating against the employee.[20] Employees and unions can bring claims, and so can the regulator, the Fair Work Ombudsman (FWO). Claims are lodged at the Fair Work Commission (FWC) which will attempt to resolve the claims via conciliation and if that is unsuccessful, the employee can pursue their claim in the Federal Court or the Federal Circuit and Family Court. If the claim relates to a termination, it must be lodged within 21 days of the dismissal.[21] The court can make any order it deems appropriate but employees usually seek compensation or reinstatement.[22] Employees can also ask for financial penalties to be imposed on the employer which could be up to AUD$16,500 per contravention for an individual and up to AUD$82,500 for an employer.[23]

Part II. Recent legislative changes

The AHRC's weighty inquiry into workplace sexual harassment, *Respect@Work*, is over 900 pages in length and contains 55 recommendations for improving not only the law in relation to sexual harassment and sex discrimination but also the systems for responding to and addressing this behaviour in the workplace. The AHRC described its proposed approach as victim-centred, practical, adaptable for business of all sizes and in all industries and designed to minimise harm (AHRC 2020: 34). To that end, many of its recommendations focused on improving the culture of organisations particularly at the upper levels, supporting workers who have been subject to unlawful behaviour, and collecting data about the status of workplaces.

Twelve recommendations required legislative reform and all except one were implemented, first by the Morrison government in 2021[24] and then by the incoming Albanese government in 2022, as part of its raft of changes to federal labour laws.[25] There is not scope to discuss all of the *Respect@Work* changes, some of which were technical in nature. This Part focuses on two changes which shift how discrimination is understood and addressed, an approach which could be transplanted to other forms of discrimination. These changes attempt to address two significant problems with the existing system – it operates retrospectively once the harm has already occurred, and it relies on the individual to remedy discrimination and harassment by enforcing the law.

Preventing harm

As described above, the law currently addresses discrimination once harm has already occurred, without placing any obligation on an employer to do anything in advance to identify issues before they become problematic. Some employers may do so to avoid being held vicariously liable for their employee's actions.[26] But there will be others who weigh up the risk of having a claim lodged against them compared to the cost of taking action pre-emptively and then deciding what to do, if anything.

Central to the proposals in the *Respect@Work* report is the importance of preventing harm. This was modelled on framework used in workplace health and safety and the acknowledgement that workers have a right to be free from sexual harassment at work and that this is a safety right, as well as a human right (AHRC

20. Section 342.
21. Section 366.
22. Section 545.
23. Sections 539, 546.
24. *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth).
25. *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth); *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth).
26. Under the SDA, for example, an employer will not be liable if it can show that it took "all reasonable steps" to prevent the employee's unlawful behaviour from occurring: s 106.

2020: 26). Two mechanisms were introduced to encapsulate this approach.

The first enables a worker to seek a 'stop order' from the FWC if they are being sexually harassed at work and there is a risk that they will continue to be sexually harassed at work.[27] The FWC can make any order it considers to be appropriate to prevent the worker from being sexually harassed[28] other than an order for compensation.[29] This may include ordering an individual to stop behaving in a specific way, changing working arrangements and requiring an employer to monitor workplace behaviour.[30] Contravening a stop order can result in the imposition of financial penalties.[31]

The other new mechanism is that employers now bear a duty to eliminate sex discrimination. The duty requires employers and persons conducting a business or undertaking to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and acts of victimisation.[32] The obligation is not discretionary; employers are required to take action to eliminate discrimination. Failure to comply does not amount to discrimination but non-compliance may result in the AHRC conducting an inquiry, as considered below. The AHRC is preparing guidelines and other materials to assist employers to understand their obligations and what they need to do to comply. Factors used to assess compliance include the employer's size, nature of the organisation, its resources and the practicability and cost of the measures required to eliminate discrimination.[33]

The stop order and the positive duty redirect equality and labour law at prevention instead of compensation. They are designed to identify and remove the drivers of discrimination, thereby preventing harm before the behaviour escalates. In doing so, they shift the focus away from the individual worker towards the employer as it has the means to change the workplace.

Shifting the burden

One of the significant failings of Australia's equality laws are that they rely on the individual victim to enforce their rights; there is no scope for a regulator to take action on behalf of an employee. Two changes shift the burden of enforcing the law away from the individual to a statutory body with the knowledge and experience to seek compliance with the law.

From December 2023 the AHRC will have the power to conduct an inquiry into whether an employer has complied with the new positive duty in the SDA.[34] If the President of the AHRC finds that the person has not complied, it must provide them with written notice of this decision which sets out the failure to comply, the actions needed to rectify the failure and give them a reasonable period to take such action.[35] Compliance notices are enforceable.[36]

Unlike equality laws, labour laws do not rely on an individual for enforcement; the FWO enforces the FW

27. FW Act, s 527J(1).
28. FW Act, s 527J(1).
29. FW Act, s 527J. An employee would have to seek compensation under an equality law, such as the SDA. Since 2023 they can also pursue a sexual harassment claim under the FW Act.
30. Revised Explanatory Memorandum, Fair Work Amendment Bill 2013 (Cth), p. 36 [121].
31. FW Act, s 527K.
32. SDA, s 47C.
33. SDA, s 47C(6).
34. Schedule 2 Part 2 of the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) inserted s 35A(d) and (e) into the AHRC Act.
35. Schedule 2 Part 2 of the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) inserted s 35F into AHRC Act.
36. Schedule 2 Part 2 of the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) inserted s 35J into the AHRC Act.

Act including the prohibition of discrimination in s 351. The FW Act did not prohibit sexual harassment until 2023. *Respect@Work* recommended that the FW Act prohibit sexual harassment, and this recommendation was implemented in 2022.[37] Consequently, the FWO now has the power to enforce compliance with the prohibition of sexual harassment. Its compliance powers include issuing a notice which sets out actions the recipient needs to take to comply, accepting an enforceable undertaking from the employer, and seeking the imposition of civil penalties.[38]

The statutory equality commissions in each State and Territory and the national AHRC are responsible for tackling equality[39] but they cannot enforce the law;[40] their role is to educate employers and employees about their rights and obligations, receive discrimination complaints and provide dispute resolution services. The burden of addressing discrimination rests on the individual worker. Both of these changes shift that burden away from the individual onto an agency that can work with employers to change practices and behaviours across the organisation instead of being restricted to acting in response to an instance of unlawful behaviour. The FWO also wields the 'big stick' of court action and penalties, which may mean an employer is more willing to comply voluntarily rather than risk court action (Allen 2015).

Part III. Future directions

For quite some time, discrimination law scholars in Australia and elsewhere have recognised that the existing approach of addressing unlawful behaviour once the harm has occurred is not effective. Nor is addressing discrimination on a case-by-case basis without addressing the systems that may well have caused the harm. The changes described above show the beginnings of a conceptual shift in how discrimination is understood by policymakers. However, this shift has only taken place in relation to sex discrimination and sexual harassment, and it was no doubt fuelled by the worldwide #MeToo movement.

Having made this change in relation to one form of discrimination, there is no reason that it could not be extended to other types of discrimination. Take for example employees with a disability. There will be many instances in which an employee with a disability will require an adjustment so that they can perform the job and the type of adjustment they need will depend on the nature of the work and of the disability. Under equality laws, employers are only required to make 'reasonable adjustments' unless doing so would impose an unjustifiable hardship on the employer[41] and there is no obligation on employers in the FW Act to make adjustments so that an employee can perform a job. Victoria is the only state or territory where the employer must make reasonable adjustments unless the employee could not perform the genuine and reasonable requirements of the job even after the adjustments were made.[42] Extending the proactive approach now found in the SDA to disability discrimination would mean that employers would be required to take measures to eliminate discrimination encountered by employees with a disability provided those measures were reasonable and proportionate. Similarly, there is no reason that the duty to take reasonable and proportionate measures to eliminate sex discrimination could not be introduced into the *Racial Discrimination Act 1975*

37. Schedule 1 Part 8 Division 1 of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) inserted s 527D into the FW Act.
38. FW Act, ss 539(2), 715.
39. The Fair Work Ombudsman can take discrimination and sexual harassment claims on behalf of employees (FW Act, s 539) but it has not pursued very many workplace discrimination claims. Unions can also take claims on behalf of their members.
40. However, the AHRC will have the power to enforce the positive duty in regard to sex discrimination from December 2023 by conducting inquiries into an employer's compliance with the duty.
41. *Disability Discrimination Act 1992* (Cth), ss 5(2), 11.
42. *Equal Opportunity Act 2010* (Vic), s 20.

(Cth), *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth).

Conclusion

The recent changes implemented in Australia in relation to sex discrimination and sexual harassment are a radical shift away from how the law has historically dealt with these forms of behaviour in the workplace. The changes have created a system designed to prevent discrimination and sexual harassment from occurring, complemented by the duty to eliminate sex discrimination which requires employers of all sizes and compositions to consider the impact on equality when making decisions. The individual complaints-based system (whether that is used to seek a stop order or to make a discrimination complaint) operates in parallel and is reinforced by these mechanisms, and by the AHRC's new role of investigating compliance with the duty. It remains to be seen whether this new approach will be applied to other forms of discrimination, and if the outdated approach to dealing with inequality will be reevaluated in the post-COVID era.

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