Reducing the Burden of Proving Discrimination in Australia

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Abstract

Complainants face an arduous task in attempting to establish that they were subject to unlawful discrimination. In most instances, the complainant bears the entire onus of proof and they are unlikely to have access to the evidence needed to discharge their burden. The difficulties that complainants confront have been acknowledged for the duration of Australian anti-discrimination law and yet they have not been addressed, even though there are useful mechanisms operating in other countries that Australia could adopt. This article examines three mechanisms used in the United Kingdom and Ireland that attempt to overcome the challenges complainants face in proving discrimination. Based on this examination, it argues that Australian law should introduce a statutory 'questionnaire procedure', through which the complainant can obtain information relevant to the complaint, non-discretionary inferences if the respondent fails to provide an explanation for their behaviour, and a shift in the burden of proof once the complainant has established a prima facie case of discrimination.

* B Comm (Canberra) LLB (Hons) (ANU) PhD (Melbourne). This article is taken from my PhD thesis and draws upon research conducted for the project, 'Improving the Effectiveness of Australia's Anti-Discrimination Laws', which was funded by the Australian Research Council and the Victorian Equal Opportunity and Human Rights Commission. I am grateful to Beth Gaze and Jenny Morgan for their valuable comments and feedback and to the anonymous referees for their helpful comments. Any errors are my own.

Introduction

Australian courts hear very few discrimination complaints each year. Most complaints are resolved earlier through conciliation, or are settled or withdrawn prior to hearing.[1] Complainants who proceed to hearing face an arduous task because, in most instances, they bear the entire onus of proving discrimination. Commentators have identified that complainants find discrimination difficult to prove,[2] particularly race discrimination.[3] Jonathon Hunyor found that, during the first three years that the Federal Court heard discrimination complaints, it heard 15 complaints lodged under the *Racial Discrimination Act 1975* (Cth) ('RDA'). Only three were successful and they were all complaints of racial vilification.[4] Proof is central to enforcement; if the complainant cannot prove their complaint, then, in effect, they have no right. Despite these difficulties, Australian legislatures have altered the burden of proof in only four instances. None have introduced legislative mechanisms to assist complainants with proving discrimination. This is most surprising when considering that comparable countries, such as the United States and the United Kingdom, take a different approach and have reduced the complainant's burden. Some of the alternative mechanisms used in these countries pre-date Australia's anti-discrimination legislation, yet they were not adopted here. There is a growing consensus amongst the international community that victims of discrimination should not be subject to an undue burden in attempting to establish their complaint.[5] It is therefore appropriate to introduce mechanisms into Australian law that would reduce the burden of proving discrimination.

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1 For example, 1550 discrimination complaints were lodged at the Victorian Equal Opportunity and Human Rights Commission in 2007 (excluding sexual harassment and vilification complaints) but the Victorian Civil and Administrative Tribunal heard only 11 discrimination complaints that year: Victorian Equal Opportunity and Human Rights Commission, *Annual Report* (2006–2007) 36. Statistics from other jurisdictions are similar. See, eg, Human Rights and Equal Opportunity Commission, *Annual Report* (2006–2007); Anti-Discrimination Commission Queensland, *Annual Report* (2006–2007). It must be acknowledged that direct comparisons of complaint statistics and cases are difficult, because the Equality Commissions report by financial year and the cases are quantified annually. Further, these statistics do not take into account the time lag: cases heard in one year will have been lodged at the Equality Commission during previous years. On complaint statistics, see also Dominique Allen, 'Behind the Conciliation Doors — Settling Discrimination Complaints in Victoria' (2009) 18(3) *Griffith Law Review*.

2 Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (2008) 146; Beth Gaze, 'Has the *Racial Discrimination Act* Contributed to Eliminating Racial Discrimination? Analysing the Litigation Track Record 2000–04' (2005) 11 *Australian Journal of Human Rights* 171.

3 The *Racial Discrimination Act 1975* (Cth) was criticised internationally on this basis. See United Nations Committee on the Elimination of Racial Discrimination, *United Nations Committee on the Elimination of Racial Discrimination: Concluding Observations, Australia*, [15], UN Doc CERD/C/AUS/CO/14 (2005).

4 Jonathon Hunyor, 'Skin-deep: Proof and Inferences of Racial Discrimination in Employment' (2003) 25 *Sydney Law Review* 535, 535.

The purpose of this article is to propose reforms to the methods of proving discrimination in Australia based on mechanisms used in the United Kingdom and Ireland. Part One presents an overview of the two main problems with proving discrimination: the evidence required to prove discrimination is usually in the respondent's possession, so the complainant must rely on circumstantial evidence and ask the court[6] to draw an inference of discrimination, which the courts are reluctant to do; and courts regularly subject evidence to the higher standard required by *Briginshaw v Briginshaw* ('*Briginshaw*').[7] The effect of both problems is that it is difficult for the complainant to discharge their burden. The majority of this article is concerned with examining the alternative approaches to proving discrimination used in the United Kingdom and Ireland. Part Two examines a statutory tool that was developed to assist the complainant with obtaining information — the 'questionnaire procedure'. It then turns to how courts approach drawing an inference of discrimination before considering shifting the onus of proof, which the United Kingdom and Ireland recently introduced following a European Council Directive. The article concludes in Part Three by proposing reforms to assist complainants with proving discrimination in Australia, and identifying some limitations, most significantly, that the complainant may still have difficulty establishing the technical legislative definitions of discrimination.

From the outset, it must be acknowledged that proving discrimination is not the only problem that complainants face. A related problem is the technical way that higher courts have interpreted the legislative definitions of direct and indirect discrimination, thereby exacerbating the difficulties the complainant has with

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5 For example, since 1997, the European Council has required Member States to ensure that once a complainant has established prima facie discrimination, the respondent bears the onus of proving that there was no discrimination. Earlier European Court of Justice decisions had established the same approach. See, eg, *Anya v University of Oxford* [2001] IRLR 377; *Bailieborough Community School v Carroll*, DEE 4/1983 Labour Court; *Dublin Corporation v Gibney* EE 5/1986 Equality Officer; *Ross v Royal & Sun Alliance Insurance Plc* ES/2001/164, [7.2]–[7.4]. This is discussed further in the context of the United Kingdom and Ireland in Part Two. Christopher McCrudden notes that there is international agreement that judicial practices must be reconsidered in relation to the level of proof required to establish race discrimination and that the onus of proof must rest on the respondent to rebut the complainant's allegation: Christopher McCrudden, 'International and European Norms Regarding National Legal Remedies for Racial Inequality' in Sandra Fredman (ed), *Discrimination and Human Rights: The Case of Racism* (2001) 251, 299. McCrudden refers to the views expressed by experts in preparation for the United Nations World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance in Durban, South Africa, 2001. See United Nations Preparatory Committee on the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Report of the Expert Seminar on Remedies Available to the Victims of Racial Discrimination, Xenophobia and Related Intolerance and on Good National Practices*, [52]–[54], UN Doc A/Conf.189/PC 1/8 (2000).

6 'Court' and 'tribunal' are used interchangeably throughout this article, except when they are used to refer to a specific court or jurisdiction.

7 (1938) 60 CLR 336.

establishing discrimination.[8] Furthermore, complaints are usually settled with compensation, often at low amounts, and the resolution process can be costly, particularly if it results in litigation.[9] It is outside the scope of this article to consider these problems, but it can be said that anti-discrimination legislation is failing to achieve the objectives of addressing discrimination and promoting equality of opportunity[10] if these problems — and the difficulties of proving discrimination — are discouraging complainants from pursuing their complaint. Suffice it to say, making the complainant's task of proving discrimination less arduous would bring the legislation closer to meeting its objectives.

1. Problems with Proving Discrimination in Australia

In Australia, the complainant bears the onus of proof in a direct discrimination complaint and in an indirect discrimination complaint,[11] except in the four instances discussed below. The respondent bears the onus if they are relying on an exemption or exception. The standard of proof is the civil standard: the balance of probabilities.[12] In a direct discrimination complaint, the complainant must establish that they were treated less favourably because of a prohibited attribute.[13] In effect, the complainant must establish a discriminatory reason for the respondent's behaviour, although they are not required to prove motive.[14] Therefore, to prove direct discrimination, the complainant must establish something known to the respondent — the reason for their behaviour. In an indirect discrimination complaint, the complainant must prove that the respondent's imposition of a condition, requirement or practice was indirectly discriminatory

8 A notable example is *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92 ('*Purvis*'). On this issue, see also Margaret Thornton, 'Revisiting Race' in Race Discrimination Commissioner, *The Racial Discrimination Act 1975: A Review* (1995) 81; Phillip Tahmindjis, 'The Law and Indirect Racial Discrimination: Of Square Pegs, Round Holes, Babies and Bathwater?' in Race Discrimination Commissioner, *Racial Discrimination Act 1975: A Review* (1995) 101; Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' (2002) 26 *Melbourne University Law Review* 325, 340–354.

9 Allen, above n 1; Gaze, above n 2, 181–182; Beth Gaze, 'The Costs of Equal Opportunity' (2000) 25 *Alternative Law Journal* 125.

10 This is an objective of the laws in Victoria, the Australian Capital Territory, Queensland, the Northern Territory and Western Australia. See, eg, *Equal Opportunity Act 1995* (Vic) s 3.

11 This is specified in some statutes. See, eg, *Anti-Discrimination Act 1991* (Qld) s 204. Other jurisdictions state it in their rules of civil procedure or evidence, eg, *Evidence Act 1995* (NSW) s 140. Loretta De Plevitz suggests that the absence of an explicit statement about the burden is part of the reason 'some judges wrongly suggest that the requisite standard of proof lies somewhere between the balance of probabilities and beyond a reasonable doubt': Loretta De Plevitz, 'The *Briginshaw* "Standard of Proof" in Anti-Discrimination Law: "Pointing with a Wavering Finger"' (2003) 27 *Melbourne University Law Review* 308, 331.

12 *O'Callaghan v Loder* (1984) EOC ¶92–024, 75 511; *Qantas Airways Ltd v Gama* (2008) 167 FRC 537; [2008] FCAFC 69, [132]. This is specified in some statutes. See, eg, *Anti-Discrimination Act 1991* (Qld) s 204.

13 See, eg, *Equal Opportunity Act 1995* (Vic) s 8(1).

14 See *Equal Opportunity Act 1995* (Vic) s 10; *Anti-Discrimination Act 1991* (Qld) s 10(3). See also *Reddrop v Boehringer Ingelheim Pty Ltd* (1984) EOC ¶92–031, 75 569.

and it was unreasonable.[15] Regardless of whether the complaint is one of direct or indirect discrimination, the complainant's task is the same: they must establish each element of the complaint on the balance of probabilities. This section explores two related problems with proving discrimination in Australia: courts are reluctant to infer discrimination in the absence of direct evidence and the complainant bears the entire onus of proof in most situations.[16]

A. Circumstantial Evidence and Inferences

The first obstacle the complainant faces is attempting to access relevant evidence. The respondent has what Laurence Lustgarten terms a 'monopoly of knowledge' about the process of decision-making that led to the complainant's treatment.[17] Lustgarten describes it this way because the respondent controls the information that the complainant needs to establish their complaint. Furthermore, the respondent is not under any obligation to explain their decision. If there are witnesses, Lustgarten says they are usually what he terms 'interested parties',[18] such as employees of the respondent, so they may not be interested in testifying against the respondent and jeopardising their own situation. The second obstacle for the complainant is that direct evidence may not exist. Discrimination is often unconscious, so the respondent may not have articulated a reason for their decision. Alternatively, the evidence may not be available. For instance, in regard to establishing proportionality in an indirect discrimination complaint, the necessary statistical data may not have been collected.[19]

Without a 'smoking gun' or access to sufficient information, the complainant must rely on circumstantial evidence and ask the court to consider the 'cumulative effect' of the evidence.[20] The court will be asked to draw an inference of discrimination based on the evidence adduced, even if, when viewed on its own, none of the evidence would have supported the inference.[21] However, particularly

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15 See, eg, *Equal Opportunity Act 1995* (Vic) s 9.

16 The technical way in which courts have interpreted the elements of the definitions of discrimination exacerbate these problems: see *Purvis* (2003) 217 CLR 92; Thornton, above n 8; Tahmindjis, above n 8; Gaze, above n 8.

17 Laurence Lustgarten, 'Problems of Proof in Employment Discrimination Cases' (1977) 6 *Industrial Law Journal* 212, 213. Margaret Thornton refers to the respondent's 'monopoly on knowledge': Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990) 180.

18 Lustgarten, above n 17, 215.

19 For example, this was a problem for an Aboriginal complainant in Western Australia. The complainant was unable to obtain statistics to support a complaint of indirect discrimination with regard to access to housing, because the State's Housing Department either did not keep or did not analyse such data: Western Australia Equal Opportunity Commission, *Review of the Equal Opportunity Act 1984: Report* (2007) 30. See also European Council Burden of Proof Directive 1997/80/EC, art 4(1). The Directive was recently restated: see EC Recast Directive 2006/54/EC, which replaces the Burden of Proof Directive as of 15 August 2009. The 1997 Directive codified earlier principles developed by the European Court of Justice and extended them from equal pay to equal treatment: *Vasiliki Nikoloudi v Organismos Tilepikinonion Ellados AE* (C-196/02) [2005] ECR I-01789, [69].

20 *Sharma v Legal Aid (Qld)* (2002) 115 IR 91 ('*Sharma*') 98.

with regard to race discrimination complaints, courts are reluctant to infer discrimination without sound evidence.[22] A prime example is the decision in *Department of Health v Arumugam* ('*Arumugam*'), which was a complaint of race discrimination in a medical appointment. Dr Arumugam had no direct evidence of discrimination and relied upon being the best qualified person for the position, and asked the then Victorian Equal Opportunity Board to draw an inference that the reason he was not appointed was his race. The Board upheld Dr Arumugam's complaint.[23] However, on appeal, the Victorian Supreme Court overturned the decision.[24] Fullagar J found that it was not open to the Board to infer race discrimination even though the Board had found that Dr Arumugam was qualified for the job and had rejected the explanation offered by the respondent. His Honour said:

> 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.[25]

The respondent is not required to tender any evidence to refute the complaint or offer an explanation for their behaviour. In *Arumugam*, the Victorian Supreme Court said that an inference cannot be drawn from the respondent's failure to explain a decision.[26] Therefore, the respondent can remain silent, forcing the complainant to discharge their burden and, if they do not, the respondent can make a 'no case' submission.

B. The Briginshaw *Standard of Evidence*

In *Arumugam*, Fullagar J said that an accusation of race discrimination was a serious matter and 'not lightly to be inferred.'[27] The Full Federal Court approved of this in *Sharma*.[28] The courts' perception that an accusation of discrimination is a serious matter with grave consequences has created another difficulty for complainants: courts subject the evidence adduced in a discrimination complaint to a higher standard. The Full Federal Court said in *Sharma*: 'the standard of *proof* for breaches of the RDA is the higher standard referred to in *Briginshaw v Briginshaw*'.[29]

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21 *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521.
22 Hunyor, above n 4, 539–540.
23 *Arumugam v Health Commission of Victoria* (1986) EOC ¶92–155.
24 *Department of Health v Arumugam* [1988] VR 319 ('*Arumugam*').
25 Ibid 330.
26 Ibid. See also Hunyor, above n 4, 540–544.
27 *Arumugam* [1988] VR 319, 330.
28 *Sharma* (2002) 115 IR 91, 98.
29 Ibid (emphasis added).

There is, however, no third standard of proof in Australian law. The standard of proof in anti-discrimination law is the balance of probabilities; *Briginshaw* relates to the standard of *evidence*,[30] as explained in the comment of Dixon J below. This was later corrected by a different constitution of the Full Federal Court.[31] In *Briginshaw*, Dixon J said:

> The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.[32]

Following *Briginshaw*, a court must continue carefully and ensure that it has cogent evidence upon which to base a finding of fact. Loretta De Plevitz states:

> *Briginshaw* … directs a court to proceed cautiously in a civil case where a serious allegation has been made or the facts are improbable. If the finding is likely to produce grave consequences, the evidence should be of high probative value … There is no third standard of proof in the common law. More proof means nothing more than better evidence.[33]

The *Briginshaw* standard is most often used in cases of serious misconduct or cases with serious consequences. De Plevitz examined other civil jurisdictions that apply the *Briginshaw* standard and found that it is applied in situations of serious misconduct, such as allegations of sexual abuse of children in custody cases in the Family Court, or where the consequences may be permanent or damaging to either party, for example, doctors or lawyers being struck off their professional roll.[34] Hunyor's examination of allegations of race discrimination revealed that courts regard them as sufficiently serious to require a higher standard of evidence.[35] The Australian Human Rights Commission (formerly the Human Rights and Equal Opportunity Commission) also noted recently that the *Briginshaw* standard is applied to race discrimination complaints without any analysis of the seriousness of the allegation or the consequences.[36] De Plevitz found the application of the *Briginshaw* standard is more extensive. She says that, unlike other civil jurisdictions, anti-discrimination tribunals apply the *Briginshaw* standard 'as a matter of course' in both direct and indirect discrimination cases because they perceive any allegation of discrimination to be a serious matter.[37]

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30 See also De Plevitz, above n 11, 311; Hunyor, above n 4, 539. Chris Ronalds expresses a contrary view: Chris Ronalds, *Discrimination Law and Practice* (3rd ed, 2008) 202.

31 *Victoria v Macedonian Teachers Association of Victoria Inc* (1999) 91 FCR 47, [14]-[21].

32 *Briginshaw* (1938) 60 CLR 336, 361–2. In *Briginshaw*, a husband accused his wife of adultery as grounds for divorce and the 'grave consequences' for the wife were being found to have acted immorally and losing her status as a married woman: *Briginshaw* (1938) 60 CLR 336, 372 (McTiernan J).

33 De Plevitz, above n 11, 311. See *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449, 449 (Mason CJ, Brennan, Deane and Gaudron JJ).

34 De Plevitz, above n 11, 312–318.

35 Hunyor, above n 4, 540.

36 Human Rights and Equal Opportunity Commission, *An International Comparison of the Racial Discrimination Act 1975: Background Paper No 1* (2008) 93. See, eg, *Sharma* (2002) 115 IR 91.

This problem is illustrated by the decision in *Victoria v Macedonian Teachers Association of Victoria*. In that case, the complainants lodged a complaint of race discrimination at the then Human Rights and Equal Opportunity Commission about a directive issued by the Victorian Premier that required persons from the Former Yugoslav Republic of Macedonia to be referred to as Slav Macedonians. The Commission applied the *Briginshaw* standard, which was upheld by Weinberg J at first instance, who said: 'It is no badge of honour for any government to be found to have contravened a provision of an anti-discrimination statute.'[38]

On appeal, the Full Federal Court found that the complainants did not make and did not intend to make a serious allegation against the government and the fact that a government has contravened a provision of an anti-discrimination statute was not sufficient to attract the *Briginshaw* standard without considering the circumstances of the contravention.[39]

The application of *Briginshaw* was somewhat settled recently by the Full Federal Court in *Qantas Airways Ltd v Gama*.[40] Branson J devoted considerable time to the correct application of *Briginshaw* in discrimination cases. Her Honour summed up the correct position as follows:

> in my view … references to, for example, "the *Briginshaw* standard' or 'the onerous *Briginshaw* test" and, in that context, to racial discrimination being a serious matter not lightly to be inferred, have a tendency to lead a trier of facts into error. The correct approach to the standard of proof in a civil proceeding in a federal court is … that the strength of the evidence necessary to establish a fact in issue on the balance of probabilities will vary according to the nature of what is sought to be proved — and, I would add, the circumstance in which it is sought to be proved.[41]

C. Alternative Approaches

The difficulties a complainant faces in proving a complaint have been acknowledged for the duration of Australian anti-discrimination law. Commentators have considered whether it is appropriate for the complainant to bear the entire evidentiary burden[42] and legislative reviews have suggested shifting the burden of proof.[43] To date, only the *Sex Discrimination Act 1984* (Cth)

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37 De Plevitz, above n 11, 318–319.

38 *Macedonian Teachers' Association of Victoria Inc v Human Rights and Equal Opportunity Commission* (1998) 91 FCR 8; 160 ALR 489, 523.

39 *Victoria v Macedonian Teachers Association of Victoria Inc* (1999) 56 ALD 333, [20].

40 *Qantas Airways Ltd v Gama* (2008) 167 FCR 537; [2008] FCAFC 69, [132].

41 Ibid [139], [110] (Branson J, with whom French and Jacobson JJ agreed).

42 For an early discussion see W B Creighton, 'The *Equal Opportunity Act* — Tokenism or Prescription for Change?' (1978) 11 *Melbourne University Law Review* 503. See also Beth Gaze, 'Problems of Proof in Equal Opportunity Cases' (1989) 63 *Law Institute Journal* 731, 732; Thornton, above n 8 93–96; Hunyor, above n 4.

43 New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977*, Report No 92 (1999) [3.101]–[3.107]. More recently, this was recommended by the Western Australia Equal Opportunity Commission, above n 19, 33; and, with regard to indirect discrimination, by Victoria Department of Justice, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report* (2008) 89.

('SDA') and the *Disability Discrimination Act 1992* (Cth) ('DDA') have been amended.[44] The *Age Discrimination Act 2004* (Cth) ('ADA') and the *Anti-Discrimination Act 1991* (Qld) were enacted with a requirement that the respondent bears the onus of proving reasonableness in an indirect discrimination complaint.[45]

Under the SDA, the complainant must establish the imposition of a condition, requirement or practice that has the effect of disadvantaging persons of the same sex as the complainant.[46] Section 7B provides that this does not constitute indirect discrimination if the condition, requirement or practice is reasonable[47] and section 7C places the burden of proving reasonableness on the respondent.[48] The ADA and DDA are more straightforward than the SDA. Both state that, in an indirect discrimination complaint, the respondent bears the onus of proving that a condition, requirement or practice was reasonable.[49] The Commonwealth government has not brought the indirect discrimination provisions of the RDA in line with the other pieces of Commonwealth anti-discrimination legislation, which is surprising considering that commentators have noted how difficult RDA complaints are to prove.[50]

The only State or Territory where the respondent bears some of the burden of proof is Queensland. In an indirect discrimination complaint, the respondent must prove that a term complained of is reasonable.[51] The Anti-Discrimination Tribunal has considered whether the respondent had discharged their onus in two cases.[52] Although the respondents were successful in both cases, the judgments demonstrate that the respondent was better placed to adduce adequate evidence to establish reasonableness than the complainant was to establish unreasonableness. However, in both decisions, the Tribunal paid little attention to the operation of the shift in burden; it focused on the definition of reasonableness, evidence and the credibility of witnesses.[53]

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44 *Sex Discrimination Amendment Act 1995* (Cth) s 3; *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) sch 2.

45 Compare Commonwealth industrial relations law, which goes a step further than any anti-discrimination statute. An employer is prohibited from terminating an employee's employment on the basis of certain attributes, including race, sex and age. The employee is not required to prove that they were terminated on the basis of an attribute, but it is a defence if the employer can show the termination was for a reason other than a prohibited one: *Workplace Relations Act 1996* (Cth), s 659(2)(f), 664 (repealed).

46 *Sex Discrimination Act 1984* (Cth) s 5(2). For marital status and pregnancy see ss 6(2), 7(2).

47 The matters to be considered when determining 'reasonableness' are stated in *Sex Discrimination Act 1984* (Cth) s 7B(2) and apply to ss 5(2), 6(2), 7(2).

48 See, eg, *Howe v Qantas Airways Ltd* [2004] FMCA 242.

49 *Age Discrimination Act 2004* (Cth) s 15(2). To date, the Federal Court has not considered the burden of proof in the *Age Discrimination Act 2004* (Cth). Commonwealth Parliament amended the *Disability Discrimination Act 1991* (Cth) s 6(4) in June 2009: *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) sch 2.

50 See, eg, Hunyor, above n 4, 535.

51 *Anti-Discrimination Act 1991* (Qld) ss 204, 205. Reasonableness is defined in *Anti-Discrimination Act 1991* (Qld) s 11.

52 *I v O'Rourke and Corinda State High School and Minister for Education for Queensland* [2001] QADT 1; *Parker v North Queensland Animal Refuge Inc* [1998] QADT 4.

2. *Mechanisms Used in the United Kingdom and Ireland*

The difficulties with proving discrimination described above are not unique to Australia but, as the remainder of this article shows, courts and legislatures in the United Kingdom and Ireland have not only acknowledged that proving discrimination is difficult, they have taken steps towards improving the situation. For instance, the Irish Labour Court said:

> a person who discriminates unlawfully will rarely do so overtly and will not leave evidence of the discrimination within the complainant's power of procurement. Hence, the normal rules of evidence must be adapted in such cases so as to avoid the protection of antidiscrimination [sic] laws being rendered nugatory by obliging complainants to prove something which is beyond their reach and which may only be in the respondents [sic] capacity of proof.[54]

This section considers three mechanisms used in the United Kingdom and Ireland: the 'questionnaire procedure', drawing an inference of discrimination, and shifting the onus of proof. As well as considering relevant literature and judicial decisions, the discussion draws upon interviews the author conducted with academics and staff at the statutory Equality Commissions[55] in both countries and the Irish Equality Tribunal.

A. The Questionnaire Procedure

The statutory 'questionnaire procedure'[56] in the United Kingdom is intended to address the difficulties complainants face in obtaining sufficient evidence by giving them access to information and helping them to identify material relevant to the complaint.[57] Subsection 65(1) of the *Race Relations Act 1976* (UK) ('RRA(UK)') states the questionnaire procedure was introduced:

> With a view to helping a person … who considers he [sic][58] may have been discriminated against … in contravention of this Act to decide whether to institute proceedings and, if he [sic] does so, to formulate and present his case in the most effective manner.[59]

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53 Compare the United Kingdom courts, which have developed substantial jurisprudence about how the shift in burden in that jurisdiction operates, as discussed below.

54 *Massinde Ntoko v Citibank* [2004] 15 ELR 116.

55 Equal Opportunity or Anti-Discrimination Agencies are typically identified as a Commission, Authority or Board. For ease of reference, the term, 'Equality Commission' is used throughout this article.

56 It is known as the 'questionnaire procedure' in Britain, the 'questions procedure' in Northern Ireland and the 'requestion for information' in Ireland. For ease of reference, the term, 'questionnaire procedure' is used throughout this article.

57 Aileen McColgan, *Discrimination Law: Text, Cases and Materials* (2nd ed, 2005) 318; Geoffrey Bindman, 'Proof and Evidence of Discrimination' in Bob Hepple and Erika M Szyszczak (eds), *Discrimination: The Limits of Law* (1992) 50, 61.

58 Contemporary United Kingdom anti-discrimination legislation does not use gender-neutral language. This is also true of recent court decisions. See, eg, *Igen Ltd v Wong* [2005] ICR 931, [76] ('*Igen*'). Remaining errors are reproduced without reference to this omission.

In Ireland, the complainant has a statutory right to ask for relevant information to assist them with deciding whether or not to lodge a complaint at the Equality Tribunal.[60] Although the respondent is not legally obliged to respond to the complainant's questions, if they fail to do so, the Equality Tribunal can draw an adverse inference if it hears the complaint.[61] The questionnaire procedure in the United Kingdom and Ireland are substantially the same. The complainant can ask the respondent any question relevant to the alleged discrimination and questions and responses are admissible as evidence.[62]

(i) Information-Gathering Using the Questionnaire Procedure

Complainants use the questionnaire procedure to gather information relevant to the complaint before they decide to commence proceedings.[63] The statutory Equality Commissions also use the questionnaire procedure to gather information about the complaints that they are assisting complainants to resolve.[64] For instance, as part of the assistance the Commission for Racial Equality ('CRE')[65] offered select complainants,[66] the CRE's legal officers drafted the questionnaire, advised the complainant on the merits of the complaint when the respondent's reply was received, followed up with the respondent if their reply was late and determined whether a second questionnaire was needed to gather further information.[67]

There are advantages to using the questionnaire to gather information and receiving the respondent's reply before commencing proceedings: it means the complainant, or the Equality Commission if it is assisting them, can determine early on whether they have a case[68] and assess the merits of their case,[69] it identifies the issues in dispute and whether they are factual or legal, it provides the

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59 *Race Relations Act 1976* (UK) c 74, s 65. See also *Sex Discrimination Act 1975* (UK) c 65, s 74; *Disability Discrimination Act 1995* (UK) c 50, s 56; *Race Relations (Northern Ireland) Order 1997* NI 6, art 63; *Sex Discrimination (Northern Ireland) Order 1976* NI 15, art 74; *Fair Employment and Treatment (Northern Ireland) Order 1998* NI 21, art 44. The procedure was introduced in 1975 in the *Sex Discrimination Act 1975* (UK) and included in the *Race Relations Act 1976* (UK) the following year: Creighton, above n 42, 529.

60 *Equal Status Act 2000–2004* (Ireland) para 21(2)(b); *Employment Equality Act 1998–2004* (Ireland) s 76.

61 *Equal Status Act 2000–2004* (Ireland) s 26; *Employment Equality Act 1998–2004* (Ireland) s 81. The complainant can lodge a complaint once they receive the response or one month after the request for information was sent.

62 Provided requirements relating to format, time limits and manner of service are complied with. These requirements are prescribed by subordinate legislation. See, eg, the *Race Relations (Questions and Replies) Order 1977* (Ireland) S.I. 1977, No 842, sch 1.

63 Questionnaires, including follow-up questionnaires, can be served once proceedings commence, with leave of the tribunal: *Carrington v Helix Lighting Ltd* [1990] IRLR 6 EAT.

64 Interview with Graham O'Neill, Senior Legal Policy Officer, Commission for Racial Equality (London, 18 September 2007); Interview with Mary Kitson, Senior Legal Officer, Equality Commission for Northern Ireland (Belfast, 25 September 2007). Bob Hepple et al also note that questionnaires are widely used when the Equality Commissions assist complainants: Bob Hepple, Mary Coussey and Tufyal Choudhury, *Equality: A New Framework: Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (2000) 94.

65 The Commission for Racial Equality closed in October 2007 when, it, along with the other two British Equality Commissions, was amalgamated into the Equality and Human Rights Commission.

complainant with information about the complaint that they can later adduce in evidence, and having this information in advance may lead to an early settlement.[70] However, these advantages depend on the questions the complainant asks and how those questions are framed. According to Graham O'Neill, Senior Legal Policy Officer at the CRE, for the questionnaire to be effective it is important that the questions are not just a 'fishing expedition'. He said that complainants need to ask 'targeted, intelligent questions which get to the heart of the instances of alleged [race] discrimination that have been suffered.'[71] In his experience, respondents are often evasive in their response and he had found that by asking targeted questions, respondents were less able to reply evasively.[72] Camilla Palmer et al suggest that complainants should ask questions about why they were treated in the alleged discriminatory way and how those in similar circumstances were treated. For instance, they suggest that in employment matters, the complainant should seek statistical information about the composition of the workplace and the employer's equal opportunity policy.[73]

In Ireland, there is a prescribed questionnaire and response form for employment discrimination matters[74] that prompts complainants to ask targeted questions. This is not a restrictive set of pro-forma questions; individual documents can be tailored to the complainant's circumstances. The pro-forma includes prompts to help the complainant elicit information that will be relevant and useful to their complaint[75] — the complainant is required to select the ground upon which they believe they were discriminated against from a list and they are prompted to explain the circumstances of the alleged discrimination, including the dates, locations and other relevant facts. Pro-forma questions are also included for the respondent to answer. For example, the respondent is asked: 'Do you agree that

66 Unlike the Equality Commissions in Australia, the Equality Commissions in the United Kingdom and Ireland can advise and assist complainants with resolving their complaint, including by funding litigation.

67 O'Neill, above n 64.

68 For example, the respondent's answers may indicate that there were legitimate reasons why a complainant did not get a job, and, if the complainant is satisfied with the response, there will be no need for further action.

69 Both Graham O'Neill and Mary Kitson said that being able to assess the merits of a case early on is an advantage of the procedure: O'Neill, above n 64; Kitson, above n 64.

70 O'Neill, above n 64. See also Hepple, Coussey and Choudhury, above n 64, 94.

71 He was also concerned that the Employment Tribunal might look unfavourably upon a complainant who had asked a lot of questions that were not targeted, because it viewed this as vexatious: O'Neill, above n 64.

72 Ibid. The complainant can use an evasive response to attack the respondent in court. Mary Kitson also said that asking targeted questions was most effective: Kitson, above n 64.

73 Camilla Palmer, Barbara Cohen, Tess Gill, Karon Monaghan, Gay Moon and Mary Stacey, *Discrimination Law Handbook* (2nd ed, 2007) 673. By contrast, Colm O'Cinneide said that one of the difficulties with the procedure is that respondents might simply include a copy of their equality opportunity policy in their reply: Interview with Colm O'Cinneide, Senior Lecturer, University College London (London, 15 September 2007).

74 They are known as the 'Request for Information' (Form EE.2) and the 'Response to Request' (Form EE.3) forms and are prescribed by the *Employment Equality Act 1998–2004 (Section 76 — Right to Information) Regulations 1999 (Ireland)* S.I. 1999 No 321.

75 Forms in equal status complaints follow a similar formula to employment-related forms.

the circumstances outlined at paragraph 3 [sic] of this Questionnaire are accurate? If not, in what respect do you disagree, or what is your version of the situation?'[76]

Finally, there is space for the complainant to ask additional questions so that they can adapt the questionnaire to suit their circumstances. The prescribed questionnaire response form corresponds to this outline — the respondent can either agree with the complainant or they can dispute the points raised by the complainant and provide an alternative explanation.

(ii) Using the Questionnaire in Evidence

The complainant can adduce the questionnaire and response in evidence if they litigate. Graham O'Neill said that he thought that answers to the questionnaire were 'the main basis for finding unlawful discrimination, as opposed to the actual unequivocal proof that it's happened.'[77] Colm O'Cinneide, Senior Lecturer at the Faculty of Laws, University College London, said that adducing the respondent's answers in evidence helps the complainant stay 'above water',[78] meaning it assists them to reach the prima facie stage of the inquiry.[79] For example, the complainant could obtain statistical information about the workplace through the questionnaire, which they could adduce as evidence in an indirect discrimination complaint.[80] However, the questionnaire's usefulness in evidence depends upon the respondent replying and providing an adequate response. In fact, Graham O'Neill said, respondents often have to be reminded to submit a reply and even then some do not reply.[81]

If the respondent fails to reply or is evasive or equivocal in their reply, the complainant can use this to attack the respondent by asking the court to draw an adverse inference. In the United Kingdom, if a respondent fails to reply to a questionnaire without a reasonable excuse or within a reasonable timeframe, or if the respondent is deliberately evasive or equivocal in their reply, the court may draw any inference it considers just and equitable, including that the respondent acted unlawfully.[82] Similarly, the Irish Equality Tribunal can draw inferences from the respondent's failure to reply or if the respondent provides a false, misleading or unhelpful reply.[83] In practice, courts do not often draw an inference on this basis. Mary Kitson, Senior Legal Officer at the Equality Commission for Northern

76 'Request for Information' (Form EE.2), 4, available at <http://www.equalitytribunal.ie/uploadedfiles/AboutUs/ee_2.pdf> at 28 September 2009.

77 O'Neill, above n 64.

78 O'Cinneide, above n 73.

79 In both countries, once the complainant reaches the prima facie stage, the burden of proof shifts to the respondent, as discussed below.

80 It is common practice to request statistics in the United Kingdom: Jason Galbraith-Marten, *The Fight Against Discrimination in Practice: Shifting the Burden of Proof and Access to Evidence* (2007) 36.

81 O'Neill, above n 64. Where there is no reply and the complainant litigates, the complainant will have to obtain information through discovery: Hepple, Coussey and Choudhury, above n 64, 95.

82 *Race Relations Act 1976* (UK) c 74, para 65(2)(b); *Sex Discrimination Act 1975* (UK) c 65, para 74(2)(b); *Disability Discrimination Act 1995* (UK) c 50, para 56(3)(b). Questionnaires are now required to note the consequences of failing to reply. This was amended as a result of a recommendation by Hepple et al: Hepple, Coussey and Choudhury, above n 64, 94-95 (Recommendation 43).

Ireland ('ECNI'), said that the tribunal will criticise respondents for failing to respond to a questionnaire, but this does not affect its decision.[84] Similarly, Colin Bourn and John Whitmore say that 'tribunals are reluctant to draw inferences except in extreme circumstances'.[85] Bernadette Treanor, an adjudicator at the Irish Equality Tribunal, said that when she is making a decision, often she does not need to draw an inference: 'most of the time … where you would be able to [draw an inference], you actually don't need to do it because there's enough [evidence] there anyway, so then you wouldn't bother.'[86]

Therefore, there are two problems with relying on the responses to the questionnaire as a source of evidence — information may not exist and the respondent might not reply. An example of the first problem is attempting to obtain statistical information about the composition of a workplace to establish indirect discrimination. Complainants using the questionnaire procedure in the United Kingdom regularly seek statistical information.[87] They are able to use the questionnaire procedure for this purpose because this type of information is recorded. For example, the CRE's *Code of Practice on Racial Equality in Employment* recommends that employers monitor the racial make-up of their workforce.[88] Other legislation requires specified public bodies to monitor racial groups in recruitment and employment.[89] By contrast, Australian employers are not under the same obligations with regard to data collection about workplace composition. Therefore, the questionnaire procedure does not offer a complete solution to accessing relevant information; data collection by relevant institutions is also required or statutory definitions of discrimination should focus less on technical requirements.

The second problem with relying on the respondent's answers as a source of evidence is if the respondent fails to respond. This leaves the complainant without sufficient evidence to meet their burden of proof. In that instance, the complainant can ask the tribunal to draw an inference of discrimination but, as discussed above, tribunals in the United Kingdom and Ireland have been unwilling to do so. Part of the problem in the United Kingdom is that tribunals are not *required* to draw an inference; it is discretionary, as the next section shows.

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83 *Equal Status Act 2000–2004* (Ireland) s 26; *Employment Equality Act 1998–2004* (Ireland) s 81. See, eg, *Mr John Maughan and Mrs Mary Maughan v The Humbert Inn* (Dec-S2006-040).

84 Mary Kitson could not recall a decision where an inference was drawn from the failure to reply to a questionnaire: Kitson, above n 64.

85 Colin Bourn and John Whitmore, *Race and Sex Discrimination* (2nd ed, 1993) 109–110. The authors cite *Virdee v EEC Quarries Ltd* [1978] IRLR 295 (IT), in which the respondent did not answer any questions except for partially answering one. Geoffrey Bindman also notes the tribunal's reluctance in this regard: Bindman, above n 57, 61.

86 Interview with Bernadette Treanor, Equality Officer, Equality Tribunal (Dublin, 27 September 2007).

87 Galbraith-Marten, above n 80.

88 Commission for Racial Equality, *Code of Practice on Racial Equality in Employment* (2005), 34 available at <http://www.equalityhumanrights.com/uploaded_files/code_of_practice_ on_ racial_equality_in_employment.pdf> at 28 September 2009.

89 See, eg, *Race Relations Act 1976 (Statutory Duties) Order 2001* (UK).

B. Inferences

The United Kingdom Court of Appeal has developed guidelines for the Employment Tribunals about drawing inferences in discrimination complaints. The guidelines were authoritatively stated by Neill LJ in *King v The Great Britain-China Centre* ('*King*').[90] In *King*, the English Court of Appeal held that it will be legitimate for a tribunal to draw an inference of (race) discrimination where the evidence points to the possibility of discrimination and, when asked, the respondent cannot explain the differential treatment or the tribunal considers the explanation to be inadequate or unsatisfactory.[91] The Court did not introduce a shift in the burden of proof, but it did acknowledge the problems the complainant has with meeting their burden:

> 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 from those facts. They should then reach a conclusion on the balance of probabilities, bearing in mind 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.[92]

The House of Lords expressly approved of the Court of Appeal's approach in *Zafar v Glasgow City Council* ('*Zafar*').[93] The House of Lords acknowledged the problems a complainant faces in attempting to prove discrimination. It said that RRA(UK) and *Sex Discrimination Act 1975* (UK) ('SDA(UK)') complaints:

> present special problems of proof for complainants since those who discriminate on the grounds of race or gender do not in general advertise their prejudices: indeed they may not even be aware of them.[94]

In *Zafar*, the House of Lords also clarified how courts should draw inferences in discrimination complaints. It said that although a tribunal *may* draw an inference when there is differential treatment and the employer either fails to explain it or to explain it adequately, the tribunal is not *required* to draw the inference.[95]

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90 [1992] ICR 516, 528–529. In *Madarassy*, the Court of Appeal noted that this passage from *King* was one of the most frequently cited in anti-discrimination law and worked well in practice: *Madarassy v Nomura International Plc* [2007] EWCA Civ 33 ('*Madarassy*') [6].

91 *King* [1992] ICR 516, 518. In *King*, the inference of race discrimination was based upon the response to the questionnaire and other material. In the absence of an adequate explanation, it is not open for the tribunal to invent one for which there was no evidentiary basis: *Kaur and Bakshi v Falkirk District Council* (EAT/116/95).

92 *King* [1992] ICR 516, 529.

93 [1998] 2 All ER 953 ('*Zafar*') 958.

94 Ibid.

95 Ibid. This approach was adopted in Ireland: *Davis v Dublin Institute of Technology* (Unreported, High Court of Ireland, Quirke J, 23 June 2000). See also *Mitchell v Southern Health Board* [2001] ELR 201.

(i) Hunyor's Proposal to Reform Inferences in Australia

The difficulties with drawing inferences in discrimination cases in Australia were discussed in Part One. To overcome them, Hunyor has suggested that Australian law adopt the approach taken by the House of Lords in *Zafar* by recognising that:

> the true basis for a decision … is peculiarly within the knowledge of an employer, [therefore] an evidential burden should rest on a respondent employer to provide an explanation for that decision. In the absence of such an explanation, and in the event that there is no reasonable explanation for the failure by that party to call such evidence, it is suggested that … an inference of discrimination *should* be drawn.[96]

Hunyor says that in cases where there is already evidence that supports a finding of discrimination, his proposal may amount to no more than applying what is commonly referred to as 'the rule in *Jones v Dunkel*'.[97] The rule is that an inference may be drawn against a party for failing to adduce evidence in circumstances where it would have been expected that the party would have done so during the proceedings.[98] This is consistent with the *King* and *Zafar* approaches. In applying the rule in *Jones v Dunkel*, it is open to the court to infer that the evidence would not have assisted the party, thus the court can draw the inferences available to it more confidently.[99] The rule in *Jones v Dunkel* has not been subject to a great amount of judicial consideration in the anti-discrimination context. The reason appears to be that there is no expectation that the respondent will adduce evidence to explain their behaviour, so there is no reason to ask the court to draw an inference of discrimination on the basis that the respondent did not adduce evidence that they were expected to adduce.[100]

This peculiarity of Australian anti-discrimination law must be acknowledged when considering how to reform courts' use of inferences. It is necessary to take the rule in *Jones v Dunkel* a step further so that courts are more readily able to draw inferences in discrimination complaints. This could be addressed through a legislative amendment that follows the judicial guidelines in *King* and *Zafar*. The amendment would state that there is an expectation that the respondent will provide an explanation for their behaviour and that an inference should be drawn against the respondent for failing to do so.

Hunyor's proposal moves slightly beyond the *King* and *Zafar* approaches by placing the respondent on notice that they are required to put forward evidence to

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96 Hunyor, above n 4, 552 (emphasis in original).

97 Ibid. For example, Branson J refers to it as such in *Booth v Bosworth* (2001) 114 FCR 39, 49.

98 *Jones v Dunkel* (1959) 101 CLR 298. The reasoning also applies when it is a party who fails to give evidence: *Booth v Bosworth* (2001) 114 FCR 39, 49. The inference should not be drawn when there is a reasonable explanation for the failure: *Fabre v Arenales* (1992) 27 NSWLR 437.

99 *Booth v Bosworth* (2001) 114 FCR 39, 50.

100 The rule in *Jones v Dunkel* only applies when a party is required to explain or contradict something. An inference cannot be drawn unless evidence is given of facts 'requiring an answer': *Jones v Dunkel* (1959) 101 CLR 298, 321–322. In *Arumugam*, the Victorian Supreme Court said that an inference cannot be drawn from the respondent's failure to explain a decision: *Arumugam* [1988] VR 319.

explain their decision. This would be an improvement to the current situation in Australia and assist the complainant with proving their complaint because it acknowledges that the respondent is best placed to explain or justify their behaviour, so they should bear the responsibility of doing so. However, it is not a complete solution to the problem. Like *King* and *Zafar*, Hunyor's approach leaves the tribunals with the discretion to draw an inference of discrimination. He does not suggest reversing — or even shifting — the evidentiary burden of proof; the burden remains on the complainant. Moreover, there are limits to relying solely on inferences to overcome the difficulties in proving discrimination, as considered below, which suggests that a mechanism that shifts some of the burden of proof to the respondent is necessary.

(ii) Limitations of Inferences

The discussion of inferences in this article has revealed some of the limitations of relying on inferences to establish discrimination. The first is the risk that the tribunal will not draw an inference without cogent evidence. The experience of the tribunals in the United Kingdom and Ireland suggest that if the tribunal has discretion to draw an inference, it will do so only when presented with compelling evidence, in which case inferring discrimination is probably not even necessary.[101] Similarly, Australian tribunals are reluctant to draw inferences without sound evidence.[102] Another limitation is that the respondent is still not required to bear any of the evidentiary burden. The only consequence for the respondent is that an adverse inference may be drawn if they do not provide an adequate explanation for the complainant's treatment, but this is a tactical risk. The respondent can weigh the risk of an adverse inference against the complainant's evidence not being persuasive enough for the tribunal to make a finding of discrimination.

Bourn and Whitmore have identified a third problem with inferences. In their opinion, the *King* guidelines on inferences are most helpful if they are applied by a tribunal that is experienced in deciding discrimination complaints because less experienced tribunals will be more willing to accept the respondent's explanations at face value.[103] They state that a tribunal that is unfamiliar with the subtleties of discrimination may accept an employer's explanation that the complainant had the 'wrong personality', or that they 'lack leadership qualities', even if the tribunal is presented with contrary evidence about the complainant's experience and qualifications.[104] This would be a significant limitation of relying on inferences in Australia because most complaints are heard by a general civil tribunal, rather than a specialist tribunal.[105]

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101 See Treanor, above n 86.

102 See discussion of *Arumugam* above.

103 Bourn and Whitmore, above n 85, 108.

104 Ibid. Compare Jennifer Ross, who found that the Scottish tribunals *were* aware of the *King* guidelines and how to apply them. However, she says that, due to the smaller number of cases heard in Scotland, there is a greater degree of specialisation by tribunal chairs: Jennifer Ross, 'The Burden of Proving Discrimination' (2000) 4 *International Journal of Discrimination and the Law* 95, 98–100, 103–104. This supports Colin Bourn and John Whitmore's assertion that inferences will be more effective if they are applied by an experienced adjudicator.

Bourn and Whitmore's concern highlights the final limitation of using inferences: following the *King* and *Zafar* approaches, the respondent is only required to offer an explanation for their behaviour. The respondent does not have to establish a non-discriminatory explanation for their behaviour; they only need to provide an explanation that the tribunal accepts. For instance, the respondent's explanation may be that the reason the complainant was not hired was that they had the 'wrong personality'. Alternatively, the respondent's explanation may be that they treat everyone badly, not just the complainant, so there is no less favourable treatment.[106] The danger for the complainant is that the tribunal will accept the respondent's explanation as adequate. This illustrates the strength of shifting the burden of proof to the respondent. If there is a shift in the burden of proof, the respondent is obliged to *prove* that their explanation is true once the complainant establishes a prima facie case.

C. Shifting the Burden of Proof

In the United Kingdom and Ireland, the evidentiary burden of proof shifts to the respondent once the complainant has established a prima facie case of discrimination. The law has always required the respondent to prove 'justifiability' in an indirect discrimination complaint. Recently, this approach was extended to direct discrimination complaints. This discussion focuses on the shift of burden in direct discrimination complaints in the United Kingdom because that was a substantial change to the country's discrimination law[107] and there is more material available, including commentary and judicial decisions.

(i) The European Council Directives

Changes were made to the burden of proof in the United Kingdom and Ireland after a European Council Directive required Member States to take measures to ensure that once a complainant has established facts from which it may be presumed that there was direct or indirect sex discrimination in employment, it is for the respondent to prove that there was not.[108] A similar Directive affects discrimination based on racial and ethnic origin.[109]

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105 Only Queensland and South Australia have retained a specialist adjudicator for hearing discrimination complaints, but the Queensland Anti-Discrimination Tribunal is to be amalgamated into the Queensland Civil and Administrative Tribunal when it commences operation in December 2009.

106 The United Kingdom Court of Appeal has improved this somewhat by requiring that an employer who wants to rely on the explanation that it treated everyone badly to establish that the treatment was applied regardless of race or sex: *Anya v University of Oxford* [2001] IRLR 377. Since the shift of burden in the United Kingdom, employers must now *prove* a non-discriminatory reason once the complainant establishes a prima facie case.

107 Compare Ireland, where courts were applying the shift in the burden of proof before the European Council Directives required them to. A shift in the burden of proof had developed in case law for non-gender employment and non-employment complaints as well: *Bailieborough Community School v Carroll*, DEE 4/1983 Labour Court; *Dublin Corporation v Gibney* EE 5/1986 Equality Officer; *Ross v Royal & Sun Alliance Insurance Plc* ES/2001/164, [7.2]–[7.4]. See also 112.

Anti-discrimination legislation in the United Kingdom was changed accordingly.[110] The Irish Government also implemented the shift in the burden of proof,[111] although the Equality Tribunal and the Labour Court were already applying it.[112] As a result, once a complainant has established a prima facie case of discrimination, the onus shifts to the respondent to show that their behaviour was not on discriminatory grounds. If the respondent fails to rebut the prima facie evidence, the tribunal must find for the complainant.[113] The United Kingdom Court of Appeal said that the reason for the shift to the respondent is that 'a complainant can be expected to know *how* he or she has been treated by the respondent whereas the respondent can be expected to explain *why* the complainant has been so treated.'[114]

Initially, some commentators in the United Kingdom were unsure whether the legislative amendments did any more than codify and clarify the application of *King* and *Zafar* and thought that there would be little change in practice,[115] but it is clear from subsequent Court of Appeal decisions that the amendments altered the existing position.[116] Unlike the reasoning in *King* and *Zafar* with regard to inferences, there is no discretion; the evidentiary burden automatically shifts to the respondent. In *Igen*, the Court of Appeal said that if the respondent's explanation is inadequate, it will not be 'merely legitimate but also necessary' for the tribunal to uphold the complaint.[117] Bob Hepple et al note that the shift in the burden of proof also has symbolic value: it makes the respondent aware of their responsibility 'to show a credible non-discriminatory reason for their conduct.'[118]

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108 European Council Burden of Proof Directive 1997/80/EC, art 4(1). The Directive was recently restated: see EC Recast Directive 2006/54/EC, which replaces the Burden of Proof Directive as of 15 August 2009. The 1997 Directive codified earlier principles developed by the European Court of Justice and extended them from equal pay to equal treatment: *Vasiliki Nikoloudi v Organismos Tilepikinonion Ellados AE* (C-196/02) [2005] ECR I-01789, [69].

109 European Council Racial Equality Directive 2000/43/EC, art 8. See also European Council Employment Equality Directive 2000/78/EC, art 10.

110 *Sex Discrimination Act 1975* (UK) c 65, ss 63A, 66A; *Race Relations Act 1976* (UK) c 74, ss 54A, 57ZA; *Disability Discrimination Act 1995* (UK) c 50, s 17A(1C); *Race Relations (Northern Ireland) Order 1997* NI 6, art 52A; *Sex Discrimination (Northern Ireland) Order 1976* NI 15, arts 63A, 66A.

111 *Employment Equality Act 1998–2004* (Ireland) s 85A.

112 See discussion in *Ross v Royal & Sun Alliance Insurance Plc* ES/2001/164, [7.2]–[7.4]. Carol Ann Woulfe said that codifying the shift in Ireland has not changed things dramatically for the complainant, only that it is easier to establish because the shift is now clearly in the legislation: Interview with Carol Anne Woulfe, Solicitor, Equality Authority (Dublin, 26 September 2007). See also above n 106.

113 *Madarassy* [2007] EWCA Civ 33, [60]. See also *Mitchell v Southern Health Board* [2001] ELR 201.

114 *Igen* [2005] ICR 931, [31] (emphasis added).

115 Michael Connolly, 'Recent Legislation — *The Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001* (S.I. 2001 No 2260)' (2001) 30 *Industrial Law Journal* 375, 377, arguing that formalising the burden of proof will have little practical effect in discrimination cases. See also discussion of responses to an earlier European Council proposal to shift the burden, which expresses a similar opinion: Ross, above n 104, 101–104.

116 See, eg, *Igen* [2005] ICR 931, [18]; *Madarassy* [2007] EWCA Civ 33, [60].

117 *Igen* [2005] ICR 931, [18].

(ii) The Guidelines in Igen Ltd v Wong

The United Kingdom Court of Appeal considered the operation of the shift in the burden of proof in *Igen*. The Court heard a series of direct discrimination cases together, all of which related to sex or race. Significantly, each case raised questions about the operation of the shift in the evidentiary burden of proof. Annexed to the Court of Appeal's judgment is a 13-step guide for the tribunals on applying the shift in the burden of proof.[119] Of most relevance to this discussion are guidelines 9–13. The first two state:

> (9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.
>
> (10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.[120]

Clauses 9 and 10 describe a two-stage process. At the first stage, the complainant is required to prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an unlawful act of discrimination. The tribunal must exclude the respondent's explanation for the treatment when it is assessing whether the complainant has made a prima facie case.[121] If the complainant has established a prima facie case, the second stage arises and the respondent is required to prove that they did not commit the unlawful act.[122] The Court of Appeal said that it will hear all of the evidence before performing these two stages of analysis and determining whether the complainant has met the requirements of the first stage and, if so, whether the respondent discharged their onus.[123] The other relevant guidelines from *Igen* state:

> (11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.
>
> (12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
>
> (13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence

118 Hepple, Coussey and Choudhury, above n 64, 102.

119 The guidelines were based on an earlier decision of the Employment Appeal Tribunal, *Barton v Investec Securities Ltd* [1992] ICR 516. The Court of Appeal approved, with slight modification, the Tribunal's similar guidance on the operation of the shift in the burden of proof.

120 *Igen* [2005] ICR 931, [76].

121 *Laing v Manchester City Council* [2006] IRLR 748, [59]. The absence of an adequate explanation is relevant if the complainant establishes a prima facie case: *Madarassy* [2007] EWCA Civ 33, [58].

122 *Igen* [2005] ICR 931, [17].

123 Ibid [18]. See also *Madarassy* [2007] EWCA Civ 33, [69]–[72].

> to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.[124]

At the second stage, the respondent must prove that there was a non-discriminatory reason or explanation for their conduct and the Court requires them to adduce 'cogent evidence'. This approach is regarded as a shift in the evidentiary burden of proof and not a reversal of the onus of proof because it does not impose a positive obligation on the respondent to prove that they did not discriminate unlawfully; the respondent is only obliged to establish a non-discriminatory explanation for their behaviour. However, the shift in the burden of proof requires more of the respondent than the *King* and *Zafar* approaches because the respondent must not only provide a plausible explanation, but also establish that it is true. Once the evidentiary burden shifts, the respondent must prove that the complainant had the 'wrong personality' or that they 'lack leadership qualities'.

The shift in the burden of proof does have limitations, as considered below, so if the complainant does not succeed in shifting the burden to the respondent, they can attempt to prove discrimination on the balance of probabilities[125] and the tribunal can still draw an inference based on the *King* and *Zafar* guidelines.[126]

(iii) Indirect Discrimination

The original definitions of indirect discrimination in the United Kingdom and Ireland were based on the United States Supreme Court's landmark decision in *Griggs v Duke Power Co* ('*Griggs*').[127] They are similar to the two Australian jurisdictions that require the respondent to prove 'reasonableness' in an indirect discrimination complaint.[128] In *Griggs*, the Supreme Court found that the burden of proof was on the complainants to show that the respondent's practices had a discriminatory impact upon them. Once they had done so, the burden shifted to the respondent to show that the practice was related to job performance. Burger CJ said: 'Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.'[129]

Following *Griggs*, under the RRA(UK) and SDA(UK), once the complainant established that a requirement or condition had a substantially higher impact on them than on a person of a different race or sex, the onus shifted to the respondent to establish that the requirement or condition in question was 'justifiable'.[130] Irish

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124 *Igen* [2005] ICR 931, [76].

125 *Laing v Manchester City Council* [2006] IRLR 748, [77].

126 *Igen* [2005] ICR 931, [76], approving *Barton v Investec Securities Ltd* [1992] ICR 516. See also Naomi Cunningham, 'Discrimination Through the Looking-Glass: Judicial Guidelines on the Burden of Proof' (2006) 35 *Industrial Law Journal* 279.

127 401 US 424 (1971) ('*Griggs*').

128 The Commonwealth and Queensland, as discussed above.

129 *Griggs*, 401 US 424 (1971), 432.

130 *Race Relations Act 1976* (UK) c 74, para 1(1)(b); *Sex Discrimination Act 1975* (UK) c 65, para 1(1)(b). The *Disability Discrimination Act 1995* (UK) c 50 does not prohibit indirect discrimination.

employment discrimination law was much the same.[131] The United Kingdom Court of Appeal, applying an earlier European Court of Justice decision, held that 'justifiable' requires an objective balance between the discriminatory effect of the requirement or condition against the respondent's reasonable need for it.[132]

As a result of the European Council Directives considered above, on most grounds,[133] British law requires that to justify indirect discrimination, the respondent must show that the 'provision, criterion or practice' in question is 'a proportionate means' of achieving a legitimate aim.[134] Tribunals have interpreted the new requirement of proportionality in a similar way to 'justifiable'.[135] The change from 'requirement or condition' to 'provision, criterion or practice' has received the most academic attention because this was a significant change to United Kingdom law under which tribunals had previously interpreted 'requirement or condition' narrowly.[136] Courts have not devoted substantial attention to interpreting the statutory requirements in relation to the burden of proof in indirect discrimination complaints the way they have with direct discrimination complaints. The United Kingdom jurisprudence focuses on the interpretation of 'justifiable', just as Australian courts are concerned with 'reasonableness'. Therefore, it is not possible to evaluate whether the amendments resulting from the European Council Directives have made it easier for the complainant to prove indirect discrimination because the amendments did not change the burden of proof.

(iv) Limitations of the Shift in the Burden of Proof

There are two limitations in the operation of the shift in the evidentiary burden of proof. The first is that a specialist adjudicator appears to apply the shift in the burden of proof more effectively than a generalist decision-maker. Commenting on the effectiveness of the shift in the burden of proof, Carol Ann Woulfe, a Solicitor at the Irish Equality Authority, said that in Ireland, its usefulness depends on how

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131 *Employment Equality Act 1977* (Ireland) para 2(c). Now see *Employment Equality Act 1998–2004* (Ireland) ss 22, 31. For non-employment complaints, see *Equal Status Act 2000–2004* (Ireland) para 3(1)(c).

132 *Hampson v Department of Education and Science* [1990] 2 All ER 25, 34, adopting the European Court of Justice's decision in *Bilka-Kaufhaus v Weber von Hartz* (Case 170/84) [1986] ECR 1607. The test was approved by the House of Lords in *Webb v EMO Air Cargo (UK) Ltd* [1992] 4 All ER 929.

133 The law was amended with regard to direct and indirect discrimination, but only in relation to the Directive grounds and only in employment, so the original definitions still apply to some grounds under the *Race Relations Act 1976* (UK) c 74 and the *Sex Discrimination Act 1975* (UK) c 65. Thus, there are currently multiple tests operating. See also Colm O'Cinneide, *Executive Summary: United Kingdom Country Report on Measures to Combat Discrimination* (2007) 27–31.

134 *Race Relations Act 1976* (UK) c 74, s 1(1A); *Sex Discrimination Act 1975* (UK) c 65, para 1(2)(b).

135 O'Cinneide, above n 133, 30. As of May 2009, there were no reported decisions by higher courts interpreting the new definition.

136 *Perera v Civil Service Commission (No 2)* [1983] IRLR 166. See also Connolly, above n 115, 377–380.

familiar the adjudicator is with its operation and how they interpret and apply it. She said:

> If you're dealing with somebody who doesn't deal with equality law … (some of our cases now go to the District Court), that whole burden of proof issue is not something that they'd be as familiar with, and it hasn't really made much of an impact there because they're not specialist bodies.[137]

In *Madarassy*, the United Kingdom Court of Appeal noted that the Employment Tribunals were having difficulty applying the shift in the burden of proof, despite the guidelines on its application that the Court had developed earlier in *Igen*.[138] Part of the problem, the court said, was attributable to the tribunals adapting to the change from the *King* guidelines to the shift in the burden of proof.[139]

The second limitation is that the utility of the shift in the burden of proof depends on whether the complainant can establish a prima facie case. To shift the burden in direct discrimination, the complainant is still required to prove less favourable treatment on a prohibited ground[140] and they can rely on inferences drawn from the primary facts.[141] Commentators have noted that in the United Kingdom, complainants have found it difficult to reach the prima facie stage.[142] This was the problem for the complainant in the Court of Appeal case of *Madarassy*. Most of Ms Madarassy's allegations of sex discrimination failed because she could not establish that a hypothetical male comparator would have been treated differently in the same situation.[143] In *Madarassy*, the Court of Appeal held that it is not enough to prove a difference in status and less favourable treatment. That is enough to indicate the possibility of discrimination but it is not enough to establish a prima facie case.[144] Thus, the complainant must still prove causation. Furthermore, even though the respondent bears some of the burden of proving indirect discrimination in the United Kingdom and Ireland, complainants have still grappled with trying to produce complex statistics to establish a prima facie case.[145] Therefore, shifting the burden does not resolve the problems with the legislative definitions of discrimination.

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137 Woulfe, above n 112. Unlike the United Kingdom, Ireland has a specialist tribunal for hearing discrimination complaints.

138 *Madarassy* [2007] EWCA Civ 33, [5]. This was the ground of appeal in *Madarassy* and the two cases heard with it.

139 Ibid [6].

140 *Igen* [2005] ICR 931, [76] (Guideline 9). See also *Igen* [2005] ICR 931, [29].

141 Ibid [76] (Guidelines 3–7).

142 O'Cinneide, above n 73. Fiona Palmer also states that early indications from European Council Member States were that establishing a prima facie case remained an obstacle for complainants: Fiona Palmer, 'Re-dressing the Balance of Power in Discrimination Cases: The Shift in the Burden of Proof' (2006) 4 *European Anti-Discrimination Law Review* 23, 28.

143 *Madarassy* [2007] EWCA Civ 33, [85]–[99].

144 Ibid [56]–[58]; *Nathan v Bailey Gibson* [1998] 2 IR 162, 178.

145 See also discussion in Michael Connolly, *Townshend-Smith on Discrimination Law: Text, Cases and Materials* (2nd ed, 2004) 257–273.

3. *Reducing the Burden of Proving Discrimination in Australia*

As explored earlier, proving discrimination in Australia is problematic because, in most instances, the complainant bears the entire burden of proof and they have difficulty obtaining the direct evidence required to meet that burden. The complex judicial interpretations of the substantive requirements of direct and indirect discrimination exacerbate these problems. The preceding discussion illustrated that other countries have acknowledged these problems and introduced mechanisms to address them. It also showed that the Australian laws that require the complainant to bear the entire burden of proof in discrimination complaints are out of step with their international counterparts. More so considering that, since 1997, European Council Directives have required all Member States to ensure that the burden of proof shifts to the respondent in both direct and indirect discrimination complaints.[146]

Based on the experience of the United Kingdom and Ireland, this article proposes that, to assist complainants with proving discrimination, Australian law should incorporate the following mechanisms: the questionnaire procedure, non-discretionary inferences and shifting the burden of proof to the respondent once the complainant establishes a prima facie case of direct or indirect discrimination. These mechanisms are most effective when working in concert, as discussed below, but they do not provide a complete solution because they do not resolve the problems of how Australian courts understand and interpret discrimination. To do this, legislation would have to move away from defining discrimination in a formalistic, technical way so that courts can take a contextual approach to interpretation.[147]

A. *Introducing a Questionnaire Procedure*

The questionnaire procedure is a useful way for the complainant to obtain pertinent information about their complaint. Provided the respondent supplies adequate information, the procedure's strength is that it allows the complainant to assess early on whether they have a case. The discussion of the questionnaire procedure in this article suggests that it works most effectively if the complainant has obtained advice about drafting the questions. In both the United Kingdom and Ireland, the Equality Commissions provide such advice to select complainants. This would be difficult to replicate in Australia due to the Equality Commissions' function as a complaint handler and conciliator. However, either the Equality Commission or the Tribunal could produce a guide for both parties containing sample questions and replies, like the ECNI[148] and the Irish Equality Tribunal.[149] In addition, a standard form of the questionnaire and response could be prescribed

146 See, above n 108, n 109.

147 See, eg, decisions from the South African Constitutional Court. For example, *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC); *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC).

148 To assist complainants it could not represent, the Equality Commission for Northern Ireland developed sample questionnaires, such as a pregnancy dismissal questionnaire: Kitson, above n 64.

in legislation as it is in Ireland. The pro-forma questionnaire could be drafted in such a way that it is adaptable to the circumstances of the individual complainant and includes prompts so that the complainant obtains information relevant to their complaint, which they can use to evaluate whether they have a complaint and adduce in evidence if they decide to litigate.

As determined above, the questionnaire's effectiveness as a source of evidence depends upon the respondent providing an adequate response. If the respondent provides sufficient information, it can be adduced in evidence to help the complainant reach the prima facie stage of the inquiry. This becomes particularly important if the complainant is trying to shift the burden of proof to the respondent. For example, a complainant could request statistical information about workplace composition to establish prima facie indirect discrimination. Questionnaires are used for this purpose in the United Kingdom and they could be used in the same way in Australia. However, this type of information is not as readily available in Australia as it is elsewhere. For example, employers and other bodies are required to collect data about workplace composition in the United Kingdom.[150] Australian workplaces are not under the same obligation.[151] Unless Australian employers are also required to monitor workplace composition or educational institutions, and service providers are required to collect statistical data, the existing problems with establishing discrimination are likely to remain. Equally, establishing causation in a direct discrimination complaint will continue to be problematic unless the respondent has recorded the basis for their decision or unwittingly admits it in their questionnaire response.

B. Non-Discretionary Inferences

This article considered the United Kingdom's approach to drawing inferences, as established in *King* and *Zafar*. Following this approach, the court may draw an inference of discrimination when there is differential treatment and the respondent fails adequately to explain their behaviour. Hunyor has suggested that Australian courts adopt this approach. However, the experience of courts in the United Kingdom and Ireland suggests that compelling evidence is required before the court will draw an inference, unless the requirement to draw an inference is not

149 Forms in equal status complaints are not prescribed by law. The Equality Tribunal produced a standard notification form and a guide for complainants ('Form ES.1') and one to assist respondents ('Form ES.2'), available at The Equality Tribunal, Ireland, <http://www.equalitytribunal.ie/index.asp?locID=6&docID=-1> at 24 September 2009.

150 Galbraith-Marten, above n 80. Employers in Northern Ireland are required to collect information on workplace composition: *Fair Employment and Treatment (Northern Ireland) Order 1998* NI 21, Part VII. Public authorities in the United Kingdom are also required to collect information in relation to the positive duty to promote equality. See, eg, *Northern Ireland Act 1998* (UK) c 47, s 75.

151 For example, statistical information is collected about the Commonwealth and state public services. See, eg, *Public Service Act 1999* (Cth) s 44; *Equal Opportunity in Public Employment Act 1992* (Qld) s 7. Other organisations are not required to collect data unless they are covered by the *Equal Opportunity for Women in the Workplace Act 1999* (Cth), which only requires employers to collect information about gender.

discretionary. Therefore, it is proposed that Australian anti-discrimination law should be amended to state that there is an expectation that the respondent will provide the tribunal with an explanation for their behaviour and that an inference should be drawn against a respondent who fails to explain their behaviour or who fails to do so adequately.

C. Shifting the Burden of Proof

By introducing the questionnaire procedure and non-discretionary inferences into Australian law, the respondent would be required to provide the complainant with information relevant to the complaint and offer an explanation for their behaviour. This is a step beyond the current situation in Australia, where the respondent bears no evidential responsibility. Both mechanisms are advantageous in that respect. Even so, a heavy burden remains on the complainant, which may still deter them from pursuing the complaint. This suggests that introducing a shift in the burden of proof is more effective than drawing inferences because it operates automatically and puts the respondent on notice that they bear an evidentiary burden.

Employment Tribunals in the United Kingdom initially experienced some difficulty with applying the shift in the burden of proof.[152] The change for courts in that country is slight compared to what Australian courts would experience — only two Australian jurisdictions are accustomed to applying a shift in the burden of proof in an indirect discrimination complaint.[153] None is familiar with the respondent bearing any of the burden of proof in direct discrimination complaints. One way of moderating the effect of this change would be for Australian legislatures to develop guidelines about applying the shift in the burden of proof, similar to the guidelines that the Court of Appeal developed in *Igen*, to assist courts.

Finally, it must be acknowledged that the shift in the evidentiary burden of proof only addresses the complainant's inability to explain the respondent's behaviour or to establish the unreasonableness of the respondent's implementation of a requirement or condition. The shift in the burden of proof does not assist the complainant with reaching the prima facie threshold. As noted above, higher courts have interpreted the substantive law in a technical and restrictive manner.[154] Shifting the evidentiary burden to the respondent will not address the difficulties that the complainant often has with meeting these technical interpretations of discrimination, but if the shift in the burden of proof is used in conjunction with the questionnaire procedure, the complainant may be better able to reach the prima facie stage of the inquiry because they have access to additional information. This is contingent upon the respondent providing the required information and subject to appropriate information being available. The legal systems of the United

152 *Madarassy* [2007] EWCA Civ 33, [5].

153 Queensland Courts and the Federal Court.

154 Specifically, the tests for identifying a comparator and establishing causation in a direct discrimination complaint and showing proportionality and establishing reasonableness in an indirect discrimination complaint. See above n 8.

Kingdom and Ireland are grappling with similar problems in their substantive law. Neither has resolved them; their laws continue to define direct and indirect discrimination in terms similar to Australian statutes.

Conclusion

As this article shows, in all except four instances in Australia, the complainant bears the entire burden of proof in a discrimination complaint[155] and they have difficulty meeting that burden due to their inability to obtain direct evidence.[156] Although courts have acknowledged the complainant's predicament, their reluctance to draw an inference of discrimination and the application of the *Briginshaw* standard has hindered rather than helped the complainant.[157] Based on an examination of mechanisms used in the United Kingdom and Ireland, this article proposes introducing three reforms to reduce the burden of proving discrimination in Australia: a questionnaire procedure to assist the complainant with obtaining information; a non-discretionary requirement that the court draws an inference of discrimination in certain circumstances; and shifting the evidentiary burden of proof to the respondent once the complainant establishes a prima facie case of direct or indirect discrimination. Introducing these reforms would bring anti-discrimination law closer to achieving its statutory objectives — addressing discrimination and promoting equality.

155 See above n 44–52.
156 See above n 17–26.
157 See above n 27–41.