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Using Empirical Research to Advance Workplace Equality Law Scholarship: Benefits, Pitfalls and Challenges

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Abstract: Legal scholars are increasingly attuned to the substantial benefits that can be derived from empirical and socio-legal scholarship. While drawing on the knowledge of legal insiders – such as legal practitioners, judges or academics – to critique and evaluate the effectiveness of law and legal reform is an established means of empirically evaluating legal impact, this approach can be particularly problematic in relation to empirical equality research, as legal insiders are unlikely to be members of the under-represented groups that are the focus of equality regulation, and are instead more likely to represent the majoritarian status quo. Drawing on two empirical projects conducted in Australia and the UK, this paper considers the benefits, potential pitfalls and challenges of undertaking empirical equality research in the workplace. Using an insider / outsider lens to facilitate analysis, it canvasses existing gaps in empirical equality law scholarship and considers how future research could address these limitations.

Part 1 – Introduction

Legal scholars are increasingly attuned to the substantial benefits that can be derived from empirical and socio-legal scholarship.¹ Empirical legal research offers new and challenging insights into law in the real world and how law operates in practice. While scholars have considered the benefits and challenges of empirical research for law generally,² there has been less consideration of these issues in the context of equality law. That said, empirical research on equality issues faces particular theoretical and practical challenges in its formulation and execution.

One established means of empirically evaluating legal impact is by drawing on the knowledge of legal insiders – such as legal practitioners, judges or academics – to critique and evaluate the effectiveness of law and legal reform. Many scholars have considered the insider/outsider distinction in empirical research, particularly in the context of ethnographic studies, for situating the researcher themselves.³ Others have identified insiders and outsiders in the labour market –

¹ See, for example, Cane and Kritzer (2010a).

² See, for example, Baldwin and Davis (2003); Cane and Kritzer (2010a); Cummings (2013); Ludlow and Blackham (2015); McConville (2007).

³ See, for example, Dwyer and Buckle (2009), Darra (2008), Oakley (1981).

insiders being incumbents whose positions are protected, and outsiders being those who are unemployed or lack job security;⁴ in the public policy process;⁵ and in the social order in a small community – insiders being those with ‘roots’ in the community, and outsiders being migrant workers, ‘strangers’ and those who are ‘foreign’.⁶ However, it is less common for scholars to consider the insider/outsider distinction in the context of classifying and identifying research respondents, as we do here.

The insider/outsider dichotomy is one that is only loosely defined, and highly context dependent. For Maloney, Jordan and McLaughlin, writing in the context of public policy, the appeal of the terms ‘rests on their flexibility and looseness’ to describe the influence, knowledge, access and status of different groups.⁷ This may lead to a key criticism of the insider/outsider distinction: for Maloney, Jordan and McLaughlin, ‘This looseness in definition ... can also give rise to contradictions and confusion, and detracts from the fact that the terms have more to offer than a rudimentary dichotomy of the group world.’⁸ Further, the insider/outsider distinction is not always clear or compelling, and may not accurately categorise some individuals or groups. Some stakeholders may be better seen as ‘thresholders’, vacillating between insider and outsider status.⁹ Equally, some insiders could be core or peripheral, depending on the circumstances and their relevance to the issue at hand.¹⁰

While acknowledging some of the challenges in using the insider/outsider distinction, which are explored in more detail below, we argue in this article that the prevailing focus on legal insiders as research respondents in empirical equality research is particularly problematic, as legal insiders are unlikely to be members of the under-represented groups that are the focus of equality regulation, and are instead more likely to represent the majoritarian status quo. In this context, insider insights will necessarily be mediated through the experts’ own interests and agendas, potentially limiting the veracity and representativeness of empirical research design, and denying a voice to those who stand to benefit from equality regulation.

Drawing on two empirical projects conducted in Australia and the UK, this article considers the benefits, potential pitfalls and challenges of undertaking empirical equality research in the workplace. It canvasses the existing gaps in empirical equality scholarship and considers how future research could address these limitations. In the first part of this article we outline the benefits and challenges of conducting empirical legal research before explaining the common focus on ‘legal insiders’ in the field of equality law, particularly in Australian empirical scholarship. The

⁴ Lindbeck and Snower (1988).

⁵ Maloney, Jordan and McLaughlin (1994).

⁶ Engel (1984).

⁷ Maloney, Jordan and McLaughlin (1994).

⁸ Maloney, Jordan and McLaughlin (1994).

⁹ Maloney, Jordan and McLaughlin (1994).

¹⁰ Maloney, Jordan and McLaughlin (1994).

bulk of this paper is concerned with the benefits and challenges we have experienced in conducting our own empirical research. Before outlining these projects, we consider previous research in the field in Australia and the UK, the methodological approaches adopted, and the limitations of these studies.

We focus on these two jurisdictions for three reasons. The first is pragmatic: they are the jurisdictions in which our own research is posited, and the jurisdictions with which we are most familiar. The second is theoretical, and based on our view of comparative method: discrimination law in Australia and the UK is similar in many ways; indeed, much Australian discrimination law was based on that pre-existing in the UK. Empirical scholars working in each jurisdiction therefore face similar doctrinal settings, and may encounter similar advantages and difficulties in conducting empirical research. It is this similarity that warrants the comparison.¹¹ The third rationale relates to impact: empirical equality research is comparatively underdeveloped in both jurisdictions. However, there is a growing field of research in this area, and more scholars are showing a willingness to undertake empirical research on equality law. Thus, this article has a particular relevance to these jurisdictions, and offers insights that can shape the methods of an emerging field of research at a critical juncture. This may be compared with the more established and extensive field of empirical equality scholarship in the USA, which is less likely to be agile and malleable.¹²

Drawing on scholarship in these jurisdictions, then, we argue that in cases where empirical equality research largely draws on the expertise of legal insiders, this risks embedding the status quo in research findings. Given issues of access and cost, we argue that legal insiders are likely to continue to play a significant role in empirical equality research, particularly in Australia. However, we offer words of caution in relying on legal insiders as a sole form of research ‘data’, and instead call for mixed method studies to ensure the corroboration and triangulation of expert perspectives in empirical equality research.

Part 2 – The Case for Conducting Empirical Equality Research

Empirical legal research involves the use of direct methods¹³ to study how law operates in practice. As noted by Genn, Partington and Wheeler, ‘empirical research helps us to understand the law better and an empirical understanding of the law in action helps us to understand society better’.¹⁴ Therefore, empirical research facilitates investigation beyond ‘law on the books’ to consider legal results.¹⁵ In the context of labour law, Blackham and Ludlow have argued that empirical legal research helps to understand the practical effects of legal change, challenge assumptions about law and its effectiveness, inform evidence-based policy-making, and provide new insights into legal

¹¹ See Örüçü (2007).

¹² See, for example, Nielsen and Nelson (2005), Nelson, Berrey and Neilsen (2008), Epstein and King (2002).

¹³ Baldwin and Davis (2003), pp 880–881.

¹⁴ Genn, Partington and Wheeler (2006), p 1. See also Mertz (1994), p 1261.

¹⁵ Teitelbaum (1985), p 466.

problems.¹⁶ These benefits are equally applicable to equality law, both within and outside the workplace. Thus, there is a compelling case for undertaking empirical equality research, to extend and enhance our knowledge of equality law in practice.

While recognising these benefits, empirical equality research also poses a number of challenges for legal researchers. First, legal scholars may lack the research skills and training to effectively complete empirical projects. Indeed, Genn, Partington and Wheeler have noted a serious lack of skills and training among legal academics in the UK for undertaking empirical research.¹⁷ Second, empirical scholarship tends to be costly, time consuming and messy in practice, and often requires both research funding and ethics approval. These practical barriers may deter some legal scholars, who would justifiably prefer the comparative efficiency and manageability of doctrinal research. Finally, the legal academy, while increasingly open to empirical scholarship, still tends to prioritise doctrinal projects, including in the avenues available for publication. Top legal journals in many jurisdictions are hesitant, if not openly hostile, to the publication of empirical research.¹⁸ At the same time, many legal empirical projects are seen as too niche or ‘legal’ to be published in journals in other disciplines. The substantial data generated by empirical projects can also be too expansive to fit within the confines of traditional journals and limited word counts. Thus, empirical researchers may struggle to find a home for their work, even if an empirical project is successfully managed to completion. This lack of literature may in turn inhibit other scholars from undertaking empirical projects.¹⁹

In sum, then, there are both significant benefits and substantial challenges facing empirical equality research, like empirical legal research generally. However, empirical equality research faces additional challenges, including those related to the use of legal insiders in facilitating research projects, as we discuss in more detail in this paper in the context of past studies and our own empirical research.

Part 3 – Assessing the Use of Legal Insiders in Empirical Equality Research

A. The Purpose and Methods of Empirical Equality Research

Empirical research could be used for many purposes in legal research projects, such as examining the law in action, investigating the impact of law reform, and obtaining the views of players in the legal system and the (often silent) views of those citizens who are impacted by the law. Relatedly, empirical research into equality law could attempt to investigate a variety of phenomena. It could consider how equality law operates in practice. It could investigate internal or external perceptions of equality law and its operation. It could inquire into the ‘efficacy’ of the legal system, including by assessing how effectively it prevents or addresses instances of discrimination, or helps members

¹⁶ Blackham and Ludlow (2015), p 1.

¹⁷ Genn, Partington and Wheeler (2006), p 9.

¹⁸ Though, in the US, the *Journal of Empirical Legal Studies* offers a venue for publication.

¹⁹ Cane and Kritzer (2010b), p 3.

of excluded groups. It could develop data to facilitate a normative assessment of the merits and limitations of legal provisions, with a view to proposing legal reform and change. The empirical studies in equality law that we survey in Part 4 have attempted to do all of these things.

The appropriate methods for empirical equality research will primarily depend on the goals and objectives of the research. In some cases, methods studying legal insiders will be of substantial assistance in advancing a research project's goals. This is particularly the case where a project is looking at internal perceptions of law and legal processes. However, the knowledge of legal insiders tends to be drawn upon in a whole host of projects in order to achieve all the goals and objectives listed above, as we explore in Part 4. It is in this broader context that the use of the knowledge of legal insiders as data may become theoretically problematic.

B. Distinguishing Legal 'Insiders' and 'Outsiders'

First, though, it is important to clarify who 'legal insiders' might be. 'Legal insider' status is context dependent and may vary from project to project and according to the legal subject matter. In the context of empirical legal research, we view legal insiders as those who work in or experience legal and/or policy processes on a regular or semi-regular basis. This might include legal practitioners, judges, government policy makers, and academics. It may also extend to repeat players in the legal system or, perhaps, users of the legal system, as discussed below.

'Legal outsiders' might include the general public, media, and lobby groups, though – of course – these groups may have interactions with the legal system in some contexts and situations. Where users of the legal system sit is harder to categorise, and will depend on their experience with and exposure to the legal system. For example, a corporate respondent with experience litigating commercial matters may well be an insider for a project about commercial law because they are a repeat player. For a research project about environmental law, they may be an outsider if they have had limited exposure to the field. Similarly, individual litigants may be regarded as insiders if they are regularly exposed to a legal process, such as the criminal law. Most, though, will be 'one shotters'²⁰ who do not encounter the legal system regularly and for whom the stakes are high. These individual litigants will be regarded as outsiders.

This shows that it is important to recognise the difficulty of defining and distinguishing legal insiders and outsiders: while some groups might generally be classed as 'legal insiders', the classification of others will be situation and context-dependent, and may change from project to project, depending on the research aims and objectives. Indeed, even legal 'insiders' such as legal practitioners may become outsiders in some contexts, such as where they themselves are discriminated against in the workplace, or when they need to pursue a claim on their own behalf beyond their area of expertise or experience. Thus, who is classed as an insider and who is an outsider will depend on the nature of the research question being asked and the object of study.

²⁰ This term and 'repeat player' is used by Galanter to describe participants in the legal system: Galanter (1974).

This will have significant consequences for research design.

In equality law research, ‘legal insiders’ are likely to include staff of equality commissions, government, lawyers, judges, tribunal members, mediators, unions, community legal centres, and possibly even some lobby groups if they are repeat players in the legal system. Outsiders might include the general community, journalists, politicians, and even some government policy makers, if they have limited exposure to the legal system. While these classifications are context-dependent, and liable to change depending on the object of study, we depict this in a general sense in Figure 1, with those falling between the categorisations of ‘insider’ and ‘outsider’ – ‘thresholders’ – in the circle shaded in grey.

Figure 1: Depiction of Insiders and Outsiders in Equality Law

C. Appropriate Use of Legal ‘Insiders’ in Empirical Equality Research

The knowledge of legal insiders could be used in empirical projects via a variety of methods, including qualitative expert interviews and surveys. The use of legal insiders as a source of data in empirical equality research is attractive for a number of reasons. First, insiders are often willing to

participate in equality research, as they frequently have a professional or personal interest in the subject matter. This tends to increase response rates, and reduce the time, cost and administrative difficulty of conducting empirical research. Second, insiders can be easy to access, particularly if they have a professional profile on a public website with visible contact details. It is often clear what role insiders play in equality law, and therefore comparatively straightforward to identify who might be a relevant respondent for a particular project. That said, government websites can be opaque in some jurisdictions, making it more difficult to find relevant contacts and legal insiders, and reducing this ease of access. Third, research conducted with legal insiders is typically seen as being of low risk and low sensitivity, as respondents are often participating in a professional capacity. This makes ethics approval fairly straightforward in many research institutions, and far easier to obtain than for projects involving the general public or more vulnerable respondents. Fourth, for some (particularly legal) researchers, legal insiders are seen as a familiar and straightforward research respondent, and may already be within the researchers' own professional network. Further, legal insiders tend to share a common legal 'language' with legal researchers, facilitating ease of communication and efficient data gathering.

In sum, then, the practical attractions of using legal insiders as research respondents may, in part, explain their extensive use in empirical equality projects. However, the use of legal insiders to facilitate equality research is also attended by a number of risks. First, legal insiders operate within a legal frame, and may have a tendency towards self-replication or autopoiesis in their response to questioning: Teubner describes the 'homing instinct of lawyers, their natural inclination towards their own legal order'.²¹ If a researcher is also operating in this legal sphere, there is a risk that assumptions underlying a research project will not be questioned through the research process, as new or challenging ideas will not emerge. This risks undermining the transformative and creative potential of legal research.

Second, legal insiders tend to be stakeholders in any legal research project, and often have a vested interest in particular reforms or, alternatively, the maintenance of the status quo. Indeed, legal insiders often stand to benefit professionally from the maintenance of the status quo, as this preserves their privileged position in the legal process. Thus, legal insiders may be disinclined to desire legal change. Any information or data obtained from legal insiders is therefore more likely to be conservative and norm-preserving, and should be used with caution in assessing the viability or desirability of legal reform.

Third, legal insiders are often privileged members of society, and do not often represent society's most marginalised groups. There has long been recognition that judicial diversity is a challenge facing courts in many jurisdictions,²² particularly in relation to gender diversity, but also in relation

²¹ Teubner (1993), p 109.

²² For a small sample, see Barmes and Malleson (2011); Blackham (2013); Feenan (2008); Handsley and Lynch (2015); Hurwitz and Lanier (2016); Malleson (2009); Moran (2006); Gee and Rackley (2017).

to ethnicity and sexuality. The legal profession is equally unrepresentative of the general population,²³ and especially so in senior positions and at the bar.²⁴ While progress has been made, the judiciary and legal profession are still, as a generalisation, overwhelmingly ‘middle to upper class white males’.²⁵ Though equality law certainly has the potential to protect the interests of educated white males, it is not typically this group that suffers disadvantage or exclusion due to a protected characteristic. Instead, equality law is often designed to protect women and ethnic minorities, who are typically underrepresented among legal insiders. By using legal insiders as research respondents, equality research risks perpetuating the exclusion, underrepresentation and lack of voice often experienced by minority groups. In this way, equality research could serve to undermine the very aims of the law it seeks to study. For Fredman, a key aim of equality law is to promote equal participation in social institutions.²⁶ Similarly, Collins sees discrimination law as promoting social inclusion, including through full participation in society.²⁷ Thus, in order to achieve these aims in practice, equality research – more so than other types of legal empirical research – must be attuned to the potential exclusion of certain groups as research respondents, and the risk that privileged legal insiders will seek to conserve and protect their established position of power.

Finally, research involving legal insiders may be undermined by a lack of access or lack of data. For example, in some Australian jurisdictions, strict confidentiality and privacy requirements often prevent researchers from gaining access to equality agency data, and can seriously limit the scope of research that can be conducted. This limitation of legal insider research emerges repeatedly in existing Australian empirical equality research projects.

Overall, then, it is necessary to view critically the use of legal insiders in empirical equality research. While legal insiders can be appropriate research respondents in some contexts and to answer some research questions, a research design solely drawing on insider perspectives risks marginalizing important insights and critiques of equality law, and will rarely be an effective means of assessing how well equality law assists underrepresented groups in practice.

Part 4 – Surveying the Use of Legal Insiders in Existing Empirical Equality Research Projects

In this Part, then, we turn this critical gaze to existing empirical equality studies, to obtain a clearer understanding of how legal insiders are used in empirical equality research projects. We do this by outlining the methodological insights that can be derived from previous empirical studies of

²³ Nicolson (2005); Rhode (2015); Hilary Sommerlad et al (2010); Wald (2011).

²⁴ Ozarow et al (2015); Needham (2015); Vaughan (2016).

²⁵ Menkel-Meadow (1988), p 29.

²⁶ Fredman (2011), pp 31–33.

²⁷ Collins (2003), p 24.

equality law in the United Kingdom and Australia.²⁸

A. The United Kingdom: Limited Empirical Equality Research

Overall, empirical equality projects appear more numerous in Australia than the UK: this may reflect the relative dearth of empirical scholarship in the UK legal academy. As Genn, Partington and Wheeler conclude following a survey of the field of UK empirical legal research,

while a wide range of themes and issues have been addressed [in empirical legal research], the number of empirical researchers working on any particular area is very small and the coverage of issues is thin and patchy, with entire areas largely untouched. There are many fields calling out for empirical research and this is important for reasons of policy, for reform and for deeper understanding of the law and legal processes in action. The field is therefore wide open for researchers and the scarcity of empirical legal research virtually guarantees originality.²⁹

The authors' own survey of empirical equality scholarship in the UK is consistent with this earlier finding.³⁰ That said, since the *Nuffield* report, far more empirical equality research has emerged in the UK, which has used both insiders and outsiders as legal respondents. However, the vast majority of empirical research in the equality field has appeared to focus on employers and organisational practices, not the views of legal insiders. For example, Davies and Robinson conducted a small qualitative study of employers and their use of positive action via a survey of HR representatives;³¹ Barmes and Ashtiany used case studies of UK investment banks to explore the shift to a diversity perspective in organisations;³² and Harwood conducted interviews with representatives from 33 local authorities to explore the use of reasonable adjustments for disabled workers.³³ Other studies have used empirical methods to examine how certain groups (such as a charities) use equality law to achieve their own policy objectives,³⁴ the potential consequences of legal change for employers in specific sectors³⁵ and how organisational management thinks about diversity.³⁶ Others have surveyed employers to consider the risk of discrimination in certain employment practices, such as employee-referral schemes;³⁷ or interviewed HR representatives

²⁸ Note that this discussion excludes studies of vilification complaints, which are usually part of the same statutory framework but have not been as difficult to enforce as equality claims. We also exclude discussion of studies that have analysed case law only, whether through the doctrinal method, discursive or content analysis, or quantitative analysis of numbers of cases. We have focused solely on empirical studies in the UK and Australia to provide context for our own.

²⁹ Genn, Partington and Wheeler (2006), p 6.

³⁰ In the context of positive action, see similarly Davies and Robison (2016).

³¹ Davies and Robison (2016).

³² Barmes (2003).

³³ Harwood (2014).

³⁴ Sigafos (2016).

³⁵ Manfredi (2011); Manfredi and Vickers (2013).

³⁶ Barmes (2003).

³⁷ Connolly (2015).

and union officials to investigate the interaction of hard law and collective action in practice.³⁸ There is also a growing body of statistical research on equality law, some of which draws on government surveys of employers.³⁹ Most of these UK studies use employers and HR representatives as respondents, many of whom have no interaction with the legal system, and are better classified as legal outsiders.

Going a step further, Shah combined the views of both legal insiders and outsiders, interviewing ‘leading actors in the field of religious diversity’ in England about the potential for religious accommodation.⁴⁰ While these respondents were largely persons who worked on behalf of a religious or ethnic community, the sample also included ‘public intellectuals who take a particular interest in that field’, such as academics, politicians and judges.⁴¹ Thus, legal insiders were included incidentally as part of a sample of ‘leading actors’,⁴² though not necessarily due to their legal insider status or knowledge.⁴³

In contrast to this body of work focusing on legal outsiders, few studies canvas the views of legal insiders in the UK. Even in projects focusing on judicial mediation of discrimination claims, like that conducted by Boon et al., interviews and surveys were conducted with ‘thresholders’ in the grey-area of Figure 1 above – namely complainants and respondents in the legal process – not the actual mediators themselves.⁴⁴ Boon et al. drew on satisfaction surveys of complainants and employers who had experienced and not experienced judicial mediation; mediation reports completed by judicial mediators; and eight in-depth interviews with participants in the satisfaction survey.⁴⁵ This extensive access to participants in the mediation process was likely facilitated by the fact that the Ministry of Justice funded the research in question.

While not strictly focused on equality law, the European Research Council-funded project *Citizens Advice Bureaux and Employment Disputes* may incidentally touch upon equality matters. In this project, data was collected from at least 150 Citizens Advice Bureaux (‘CAB’) clients. This was complemented with observation of CAB advisor and client interviews, interaction with CAB clients, observation of ET hearings, and interviews of CAB advisors and managers.⁴⁶ In the later stages of the project, the study also examined the impact of Employment Tribunal fees on workers who sought advice from the CAB, drawing on interviews with 14 workers to explore the impact

³⁸ McLaughlin (2014). This study also included an interview with one law firm representative – a clear legal insider – though this did not appear to be the focus of the study.

³⁹ See, for example, Blackham (2016).

⁴⁰ Shah (2013), p 84.

⁴¹ Shah (2013), p 84.

⁴² Shah (2013), p 84.

⁴³ For a similar methodological approach, which involved six interviews with (generally outsider) ‘stakeholders’ on the anticipated impact of age discrimination law in the UK, see Harcourt, Wilkinson and Wood (2010).

⁴⁴ Boon, Urwin and Karuk (2011), pp 50–51.

⁴⁵ Boon, Urwin and Karuk (2011), pp 50–51.

⁴⁶ Busby et al (2013).

of fees on their decision-making as to how and whether to pursue their claim at Tribunal.⁴⁷ Interview participants were recruited through the CAB, and the project was made possible by the participation of at least seven CABx.⁴⁸ This project offers valuable insights, combining the views of legal insiders (such as CAB advisors and managers) and legal outsiders (workers who sought advice from the CAB). Harwood also drew on the experiences of potential claimants (as legal outsiders) to examine the impact of Tribunal fees on workers with disabilities, via two qualitative online surveys of 265 disabled workers, follow-up questions emailed to a sample of respondents, and 11 semi-structured telephone interviews.⁴⁹

Barnes's research on individual employment rights (including equality rights) also canvasses the views of both legal insiders and (potential) legal outsiders, drawing on interviews with 13 lawyers (as legal insiders) and 22 senior managers in organisations, some of whom would be classed as legal insiders.⁵⁰ Using this dual insider / outsider perspective, Barnes notes the risk that a legal insider gaze might distort 'the reality of working life', as legal insiders have their own, distinct views of the legal process derived from their close proximity to the law and witnessing of an 'unusual sample' of (especially contentious) situations.⁵¹ This, then, emphasises the particular importance of comparing insider and outsider perspectives, to manage, mediate and reveal any potential distortion.⁵²

Overall, then, the views of legal insiders have played only a limited role in existing empirical research in the equality field in the UK. Studies have more often focused on employers and organisational practices, rather than the views of legal insiders. This stands in marked contrast to the situation in Australian scholarship.

B. Australia: A Dominant Focus on Legal Insiders

In contrast, Australian empirical equality projects have had a much stronger (and sole) focus on legal insiders as participants. Many studies have used legal insiders to assess the practical operation of equality law or to assess the impact of substantive legal change.⁵³ Before considering these projects, though, it is first important to understand three aspects of the complaint resolution process for discrimination claims in Australia, which help to explain the methodological challenges faced by Australian empirical researchers. First, employees must lodge their discrimination complaint at a statutory equality agency before they can proceed to court.⁵⁴ Second, this agency will attempt to

⁴⁷ Rose et al (2015).

⁴⁸ Indeed, later related research has involved the CAB as a collaborative partner: see Rose et al (2017).

⁴⁹ Harwood (2016).

⁵⁰ Indeed, Barnes notes that nearly a third of the senior manager respondents were former lawyers or had legal training, indicating that they are more likely to still be classed as legal insiders: Barnes (2016), p 185.

⁵¹ Barnes (2016), pp 183–184, 213.

⁵² Barnes (2016), p 184.

⁵³ See, for example, Gaze, Chapman and Orifici (2017).

⁵⁴ This has been optional in Victoria since 2011 but this change post-dates all of the Australian studies considered in this paper.

resolve the complaint through (mostly compulsory) conciliation. Third, most complaints are settled confidentially or withdrawn prior to hearing.

In the earliest empirical study in the field, Thornton wanted to examine how the victims of discrimination (such as women, Indigenous people and people with a disability) fared in the informal dispute resolution process in NSW, Victoria and South Australia.⁵⁵ Thornton found she was not able to conduct a complete empirical study of the conciliation process due to the confidentiality terms included in settlement agreements. However, she was permitted to observe a selection of conciliation conferences and to study complaint files and summaries in her study of the pros and cons of using conciliation to resolve discrimination complaints.⁵⁶

Subsequent studies have also used quantitative data taken from complaint files as their primary method of data collection.⁵⁷ The purpose and subject matter of these studies have varied. Most have considered a particular type of discrimination, along with the conciliation process. The purpose of Hunter and Leonard's study was to explore the outcomes of conciliation in sex discrimination claims and the reasons for withdrawing a claim. They examined complaint files and interviewed agency staff and a handful of complainants.⁵⁸ Devereux reviewed a sample of 40 of the federal agency's complaint files about sex and race discrimination and human rights complaints which were successfully resolved. Her objective was to investigate how the conciliation process operated and whether it met the parties' expectations.⁵⁹ Chapman and Mason sought to examine the nature of the conduct that is the basis of complaints about sexuality discrimination and vilification and the outcomes of conciliation by reviewing complaint files held by the NSW Anti-Discrimination Board and through a small number of interviews with agency staff.⁶⁰ Charlesworth reviewed complaint files relating to sex and gender discrimination over a three month period at what was then the Victorian Equal Opportunity Commission to gain insight into the employment context in which these claims are made, the complaint handling process and its outcomes.⁶¹

The remaining studies have considered the impact of law or a specific reform. Thornthwaite examined the operation of the NSW legislation during its first ten years by reviewing agency publications, tribunal files and complaint statistics, though her study was restricted to discrimination in employment.⁶² In their study of pregnancy discrimination in the workplace, Charlesworth and Macdonald interviewed female sex discrimination complainants for the purpose of identifying whether changes to the federal industrial relations law had exacerbated the

⁵⁵ Thornton (1989).

⁵⁶ Thornton (1989), p 733.

⁵⁷ Thornthwaite (1993); Hunter and Leonard (1995); Devereux (1996); Chapman and Mason (1999); Chapman (2000); Charlesworth (2008).

⁵⁸ Hunter and Leonard (1995).

⁵⁹ Devereux (1996).

⁶⁰ Chapman and Mason (1999). See also Chapman (2000).

⁶¹ Charlesworth (2008).

⁶² Thornthwaite (1993).

difficulties experienced by Victorian women workers before, during and after they took maternity leave.⁶³ Gaze and Hunter evaluated the impact of changes to the then federal agency's hearing function through interviews with parties, agency staff and lawyers practicing in the federal system.⁶⁴

Only some researchers have publicly acknowledged the challenges they have faced in conducting their research on equality law and identified why they made certain decisions about what methodology to use. The problems they encountered included incomplete data,⁶⁵ inadequate information about whether or not the complaint was resolved,⁶⁶ the agencies recording information in different ways which made it difficult to compare findings between jurisdictions,⁶⁷ and agencies that were unable to provide information due to confidentiality clauses or privacy legislation⁶⁸ or who said that these mechanisms prevented the researcher analysing the conciliation process.⁶⁹ In addition, one agency had not specifically recorded information on its electronic database and so some researchers found that it was necessary to read the complaint files to extract relevant information.⁷⁰

This has made it difficult to obtain a complete picture of the conciliation process in Australia. More recently, researchers have turned to researching 'legal insiders' to help fill these gaps. In this context, 'insiders' are staff at the statutory agency responsible for handling discrimination complaints before they proceed to court; solicitors, barristers and other advocates such as union representatives; and, in some cases, parties to complaints (including those that settle and those that proceed to hearing). Most studies of legal insiders are triangulated with case law and documents produced by statutory agencies, such as complaint handling manuals and annual reports.⁷¹

Lawyers and staff at the statutory agency (who are usually conciliators) have been the most common 'insiders' for researchers to interview. Interviewing only a small number of agency staff is common, and often a necessity, given these agencies do not have great numbers of staff performing various functions. For example, in their study of complaints lodged by women on the basis of homosexuality discrimination and vilification in NSW, Chapman and Mason interviewed 'some' staff at the NSW Anti-Discrimination Board.⁷² As Hunter and Leonard identify in their study of sex discrimination complaints, small numbers of respondents meant they had to make the

⁶³ Charlesworth and Macdonald (2007).

⁶⁴ Gaze and Hunter (2010),

⁶⁵ Thornthwaite (1993), p 33.

⁶⁶ Chapman and Mason (1999), p 559.

⁶⁷ Thornthwaite (1993), p 33.

⁶⁸ Devereux (1996), p 281.

⁶⁹ Thornthwaite (1993), p 33.

⁷⁰ This is noted by Charlesworth who collected data based on a pro forma she developed, which was based on questionnaires used by Hunter and Leonard and Chapman and Mason: Charlesworth (2008), p 3.

⁷¹ See, for example, discussed by Gaze and Hunter (2010), p 39.

⁷² Chapman (2000), p 324.

decision to discuss their data generally rather than by identifying the agency concerned to protect confidentiality,⁷³ as they only interviewed 14 staff at multiple equal opportunity agencies and six complainants from Victoria and South Australia.⁷⁴ Gaze and Hunter note that the views from the 10 conciliators they interviewed were ‘necessarily impressionistic’ but still found that they provided a useful perspective.⁷⁵

Gaze and Hunter also faced challenges in recruiting lawyers to interview. This may be partly explained by the federalised structure for discrimination complaints: the researchers’ focus was on the Commonwealth system; outside Sydney, there were few lawyers with experience bringing a complaint in the federal system, because most lawyers preferred to use their local State or Territory system to the federal one.⁷⁶ The other reason for a lack of respondents was that the research focused on the hearing process, whereas the Australian system generally focuses on settlement. Thus, most lawyers did not have much experience of the federal hearing procedures. Finally, the researchers noted that few lawyers (particularly complainant lawyers) specialise in anti-discrimination law for economic reasons; their practice is usually in employment law.⁷⁷ However, they said that the interviews they were able to conduct with lawyers ‘yielded rich qualitative information about anti-discrimination practice’⁷⁸ which highlights the value of this type of research.

Most studies have not interviewed parties to complaints. Those who have generally only conducted small numbers of interviews:⁷⁹ the exception being Gaze and Hunter in their study of the effect of procedural changes in the federal system, who interviewed 68 litigants and six potential litigants, 23 experienced lawyers in Sydney and Melbourne who were involved in cases before and after the changes, and 10 agency Conciliators.⁸⁰ Charlesworth and Macdonald conducted interviews with female sex discrimination complainants for the purpose of identifying the difficulties experienced by Victorian women workers before, during and after taking maternity leave and to identify whether changes to the federal industrial relations law had exacerbated those difficulties.⁸¹ Devereux notes that due to the privacy requirements of the equality agency’s procedures, ‘it was not deemed possible or appropriate’ for her to approach parties to discuss their perceptions of the process of resolving a discrimination complaint.⁸² Five years later, Gaze and Hunter had a similar experience when the federal agency initially agreed to assist the project by contacting parties who settled or withdrew their case (and whose details were held only by the agency) and inviting them

⁷³ Hunter and Leonard (1995), p 2.

⁷⁴ Hunter and Leonard (1995), p 2.

⁷⁵ Gaze and Hunter (2010), p 35.

⁷⁶ They explore some of the reasons for this in Chapters 3 and 6.

⁷⁷ Gaze and Hunter (2010), pp 36–37.

⁷⁸ Gaze and Hunter (2010), p 36.

⁷⁹ For example, Chase and Brewer interviewed five women who lodged a sexual harassment complaint in Queensland: Chase and Brewer (2009).

⁸⁰ Gaze and Hunter (2010), Ch 2.

⁸¹ Charlesworth and Macdonald (2007).

⁸² Devereux (1996), p 281.

to participate in the research, but then decided privacy law and its responsibilities to parties prevented it from doing so.⁸³ Even Gaze and Hunter were not able to contact parties whose complaints did not proceed to court and into the public domain: the researchers instead sought to obtain data about parties' experience by interviewing agency conciliators. The researchers also contacted lawyers whose clients may have been interested in participating in the research, and asked them to refer clients to the project: this laborious process yielded only six research participants.⁸⁴

Gaze and Hunter had assistance from both the statutory agency and court registry to contact parties whose claims did proceed to court. Both sent letters of invitation to participate to parties who did not settle and filed a court complaint, thereby bringing their dispute into the public domain. Despite this assistance, Gaze and Hunter received a low response rate, particularly from respondents.⁸⁵ They identify the following factors as contributing to this:

the reluctance of parties to relive a stressful and unrewarding experience of litigation, the difficulty for those parties who were employees of finding work time in which to respond to our questions, or parties feeling that they had nothing useful to say to researchers about their experience.⁸⁶

In sum, then, existing Australian empirical projects in equality law reveal both the challenges and benefits of research focusing on legal insiders. While issues of access are recurring themes in the studies, particularly given the confidentiality and privacy restrictions placed on equality agencies, where access has been negotiated the studies have presented rich and rewarding data that reveal new insights into equality law and its operation in practice. That said, the primary reliance on legal insider perspectives in Australian empirical equality projects to assess the practical operation of equality law or the impact of substantive legal change may be of concern, particularly where there is limited access to legal outsider perspectives to complement or challenge insider data.

In the Australian context, this focus on legal insiders appears to be driven by practical considerations, and limited access to conciliation participants. However, despite the significant impact of these practical limitations on research design, few of the projects discussed above have reported in detail on their research methods or the challenges experienced in the research process. To address this gap, in the sections that follow we consider the methods and challenges of legal insider research in more depth in the context of two research projects in different jurisdictions: the first on the use of alternative dispute resolution ('ADR') to resolve equality disputes in Australia; the second on the impact of age discrimination legislation on UK organisations.

⁸³ Gaze and Hunter (2010), p 32.

⁸⁴ Gaze and Hunter (2010), pp 32–33.

⁸⁵ Gaze and Hunter (2010), pp 29–30.

⁸⁶ Gaze and Hunter (2010), p 30.

Part 5 – Methods and Challenges of Legal Insider Research

Settling in the Shadow of the Law: Discrimination Claims, Settlement and Alternative Dispute Resolution in Australia

Very little is known about how claims of workplace discrimination are being addressed in Australia. As noted above, the vast majority of claims are settled through ADR; very few proceed to the courts each year. The ADR process itself is confidential and settlement agreements usually contain a confidentiality clause. Moreover, the statutory agencies, which are responsible for providing ADR, do not release comprehensive information about settlements.⁸⁷ So not only are the outcomes of settlement unknown, it is difficult to ascertain the level of discrimination, its extent and nature, and the reasons parties prefer to settle. This makes this a fertile area for empirical research, notwithstanding the practical difficulties of conducting the work.

The research question this project sought to address was why the vast majority of discrimination complaints settle rather than proceed to hearing. The purpose of the project was to identify problems with the law that are deterring parties from using the formal legal system. A secondary purpose of the project was to gather information about the settlement process, in particular the nature and terms of settlements themselves.

A. Research Method

This project drew on interviews with legal insiders conducted in 2006–07, as detailed in Table 1. That data was triangulated with doctrinal and documentary analysis. Focus groups were held with staff from a statutory agency, the Victorian Equal Opportunity and Human Rights Commission (‘VEOHRC’) of various occupations, namely Commission Members, Managers, Complaint Handlers, Conciliators and legal staff. Semi-structured interviews were conducted with solicitors and non-legal advocates (such as union representatives) who regularly represent parties to discrimination complaints at the VEOHRC; and barristers who are regularly briefed in discrimination cases.

VEOHRC Staff	27
Solicitors	14
Barristers	7
Union Advocates	3

Table 1: Participants in Project 1

⁸⁷ Some agencies release de-identified information about the nature of the claims they have received, such as in their annual report, but this is not a comprehensive register of all claims and all settlements. Rather, they are usually vignettes which illustrate the type of matters the agency deals with. See eg the AHRC’s ‘Conciliation register’ which summarises a selection of resolved complaints: <https://www.humanrights.gov.au/complaints/conciliation-register>; Anti-Discrimination Commission Queensland (2016), 27-29.

It was not possible to interview parties to discrimination complaints because of the restrictions imposed in the confidentiality agreements the parties sign when they settle a complaint. It was the opinion of staff at the VEOHRC that the clause is usually drafted in such a way that it restricts the parties' ability to discuss any aspect of the complaint, including anonymously. Instead the VEOHRC issued a written questionnaire to parties once their complaint was resolved. The response rate to this survey was very low, and the results therefore did not bear much weight in the project's overall findings and are not considered further.

Before examining what the experience of conducting this project reveals about empirical equality research, it is necessary to briefly note the study's key findings. Parties decide to settle their complaint for a variety of reasons, including the emotional cost of pursuing the complaint, the time lapse between the incident and the hearing, the difficulties of proving discrimination, the cost of pursuing litigation, the possibility of losing the claim and the risk of a low compensation order if their claim is successful, which may not be enough to cover legal costs. Although complainants seek a range of outcomes and some lawyers are creative in what they attempt to negotiate, complaints are predominantly settled with compensation. The role of economic considerations is significant. In other areas of law, a complainant may be offered a higher monetary settlement to avoid a hearing: the qualitative data from legal representatives suggested that in this jurisdiction, due to the disparity between settlements and court orders, there is little incentive for pursuing the complaint to hearing. The picture that emerged from the data gathered for this project was of complainants who are forced to settle due to a combination of the normal pressures of litigation and the likelihood of a low compensation award if they successfully prove their complaint.⁸⁸ These conclusions were strengthened by an analysis of remedies ordered by courts in three jurisdictions, and reviewing publicly available information and research on settlement outcomes, of which there was very little.

B. Benefits and Challenges

The process of conducting the project and the subsequent analysis highlighted the benefits of conducting this type of research on workplace equality law, as well as revealing some of the challenges future researchers may encounter.

The primary benefit of conducting empirical research with legal insiders in this project was that it provided a new and unique perspective that could not be gained from reading case law or academic commentary. The questions asked of legal insiders in this study were centred around their experience of representing employers and employees, so the responses revealed the law 'in action', a perspective that it was not possible to obtain otherwise. By speaking to a range of legal insiders (including lawyers who represented both employees and employers), the study gathered a range of perspectives and a balanced set of data.

⁸⁸ See further Author (2009), Author (2010).

The dearth of publicly available information about how discrimination claims are settled in Australia is a significant problem, which is made worse by confidentiality clauses in settlement agreements and the fact that the agency does not publish comprehensive information about how claims are resolved. Thus the second – and important – benefit to this form of research is that legal insiders provided much needed data about this, which goes part of the way towards addressing this significant gap in knowledge.

On a personal level, empirical research is a very interesting form of research to conduct. In the researcher's experience, most insider respondents (particularly lawyers) were very happy to participate and willing to discuss their experience and their opinion of the law and its effectiveness. Overall, it was a very satisfactory form of research to undertake. In saying that, it is worth noting one of the drawbacks of this type of research – it can take a long time to complete and this can increase if unforeseen challenges arise. Empirical research requires ethics clearance⁸⁹ which can take time to obtain, depending upon how often ethics committees meet, whether applications require amendments and if it is regarded as a 'high risk' project (for instance, if one proposed to interview parties who were regarded as vulnerable, this would lengthen the application process). Sourcing interview subjects can be time consuming, depending upon the recruitment method used, and once the interviews are conducted, the data then needs to be put into a useful form for analysis, whether that be notes taken at the time, a recording, an interview transcript or a combination of these, and it then needs to be analysed either manually or with the aid of computer software. Such time related challenges are certainly manageable (even those that are unanticipated) but they need to be borne in mind when planning an empirical research project.

The project also revealed some of the challenges with using legal insiders as participants. The VEOHRC participated as a partner organisation in this project so it sent invitations to participate to its staff (and it provided the time and a venue for their participation). It also sent invitations to a select group of lawyers and advocates on the researcher's behalf. Accessing barristers was more difficult because they are rarely briefed to appear at the VEOHRC, so participants were obtained through a combination of word of mouth, snowball sampling and direct mailing. The VEOHRC's participation and the fact that at the time it was required to handle workplace discrimination complaints before they proceeded to court alleviated some of the problems with identifying and contacting suitable participants. Thus the participation of a key insider was central to the success of this project.

All of the participant solicitors and advocates were based in Melbourne, with offices in the city, and most were from large, well known law firms. So although the research was focused on the law 'in action', it could be said that the data gathered was not as broad or representative as it could be.

⁸⁹ This project had to be approved by both the university's ethics committee and the Department of Justice (Victoria), which is responsible for administering the VEOHRC.

It would be beneficial for future projects to ensure that they capture the views of those working outside metropolitan areas, particularly those lawyers working in regional areas where the issues will be quite different from the city. This project intentionally included a balanced number of lawyers who regularly represented employees and employers, which is a methodological challenge for future projects. What also needs to be considered from a methodological perspective is how to achieve balance in the perspectives the participants offer – are those who are of the view that the system is ‘broken’ more likely to participate in this type of research than those who believe it works? It is important to have both perspectives, just as one needs to hear from both employee and employer representatives.

Part 6 – Methods and Challenges of Legal Insider Research

Evaluating the Impact of UK Age Discrimination Laws on Organisational Practice

While the UK has had age discrimination laws in place since 2006, age discrimination in employment is still widespread. Questions have therefore been raised about the effectiveness of legal intervention in this area, and how employers are responding (if at all) to the introduction of age equality law. To explore these questions, this project involved a mixed method study of the implementation of age discrimination legislation in the UK, drawing on qualitative and quantitative research methods including doctrinal analysis, qualitative expert interviews, statistical analysis of the UK Workplace Employment Relations Study, organisational case studies, comparative doctrinal analysis, and the Delphi method to assess legal impact. The study addressed two overarching research questions in the employment field: How are UK age discrimination laws operating in practice? How (if at all) could UK age discrimination laws be improved? The knowledge of legal insiders contributed to this study through the government statistical datasets, qualitative expert interviews, organisational case studies and the Delphi method.⁹⁰

A. Research Method

For the purposes of this project, ‘experts’ were defined as those who were active participants in ageing issues and likely to have special knowledge regarding older workers.⁹¹ Experts were initially purposively sampled to identify respondents who were most likely to contribute meaningfully to the research.⁹² Suitable individuals were identified from the literature review, lists of individuals and organisations consulted during government reviews, media articles and online staff databases. As the study progressed, further respondents were identified who were likely to extend or further develop emerging concepts and theory⁹³ in conjunction with snowball sampling (where experts identify other potential respondents).⁹⁴ A substantial proportion of these ‘experts’ were legal insiders, including government legal advisors, judges, and legal academics. In the

⁹⁰ The full results of the project are published in Author (2016).

⁹¹ Meuser and Nagel (2009), p 24.

⁹² Stake (2008), p 130.

⁹³ Eisenhardt, (2002), p 13; Corbin and Strauss (2008), p 117.

⁹⁴ May (1993), p 100; Webley (2010), p 934.

sections that follow, we report on two phases of the research that drew on the knowledge of legal insiders: qualitative expert interviews; and the Delphi method.

1. Qualitative expert interviews

Qualitative expert interviews were conducted with insiders to explore the operation of UK age discrimination laws in their social context. Qualitative expert interviews were selected for this study as an effective and efficient means of canvassing expert opinions,⁹⁵ developing new theoretical models⁹⁶ and expanding theoretical thinking.⁹⁷

Interviews were conducted with 17 experts between September and November 2012. The breakdown of participants and their organisations is outlined in Table 2.

Type of organisation	Number of experts
Government (including non-departmental government agencies and the judiciary)	5
Non-government organisations (including trade unions and employer associations)	9
Academia	3

Table 2: Break down of expert interview participants

2. The Delphi method

Later in the project, the Delphi method was used as a ‘capstone’ research tool to bring together the other research methods in the mixed method study, explore legal and policy solutions to demographic ageing, and to evaluate potential legal reforms to age discrimination law.⁹⁸ The Delphi method is a structured group communication process that allows individuals to deal with complex problems as a group.⁹⁹ Where knowledge is uncertain or imperfect, the Delphi method can achieve reliable group consensus¹⁰⁰ and identify divergence of opinion on hypothetical future scenarios.¹⁰¹ The Delphi method is effective for exploring solutions in policy areas with high levels of uncertainty.¹⁰² While the Delphi method has been used to answer a range of legal and semi-

⁹⁵ Webley (2010), p 937.

⁹⁶ Bogner, Littig and Menz (2009), p 2.

⁹⁷ Dilworth-Anderson and Cohen (2009), p 490.

⁹⁸ Full reporting of the Delphi method and its results is included in Author (2015) and Author (2016).

⁹⁹ Linstone and Turoff (1977), p 3.

¹⁰⁰ Aichholzer (2009), pp 252–253.

¹⁰¹ Rayens and Hahn (2000), p 308.

¹⁰² See Rotondi and Gustafson (1996), p 42.

legal questions, it has rarely been used to inform the process of law reform.¹⁰³ Thus, this project used the Delphi method in a methodologically innovative way to complement doctrinal and mixed methods research.

The policy Delphi method adopted in this study was a multistage process with two asynchronous rounds of online surveys conducted with the experts after the qualitative expert interviews, to identify, examine and estimate the impact, consequences and acceptability of particular law reform and policy options.¹⁰⁴ The process involved:

- initial measurement of opinions (Round 1);
- data analysis;
- design of a subsequent questionnaire based on initial responses; and
- second measurement of opinions (Round 2).¹⁰⁵

Between rounds, participants were provided with statistical group feedback about the beliefs of other participants as a means of promoting consensus¹⁰⁶ before the second survey was completed.¹⁰⁷ This is depicted in Figure 2.

Figure 2: The Delphi Method as a Multistage Process

The response rate for each round of the Delphi is included in Table 3. To encourage a higher response rate, the researcher met with most respondents in person as part of the expert interview process, to develop stronger relationships and commitment to the research; provided respondents with an extended period of time in which they could answer the survey; encouraged experts to respond by sending out follow-up emails (up to two follow-up emails were sent for each round, as required); and emphasised the importance of individual respondents contributing, given the need

¹⁰³ This may be attributable to the significant practical challenges associated with the Delphi method, limited knowledge of the method in the legal community, and the traditional dominance of doctrinal research in legal scholarship. See further Author (2015).

¹⁰⁴ Turoff (1977) p 83.

¹⁰⁵ Rayens and Hahn (2000), p 309.

¹⁰⁶ Rayens and Hahn (2000), p 309.

¹⁰⁷ Turoff and Hiltz (1996), p 58; Aichholzer (2009), p 252.

for a diversity of opinion.

Round	Number of participants	Response rate	Period of survey
1	13	77%	May – July 2013
2	8	62%	October 2013 – January 2014

Table 3: Response rate for Delphi roundtable by survey round

Using this method, the UK experts were asked to consider a range of scenarios derived from previous phases of the research project that could help the government and employers to promote the employment and retention of older workers. More particularly, the experts were asked to evaluate whether reforms would be desirable, important and practicable in the UK context.

At the end of the Delphi survey, there was consensus among respondents that promoting the business case for age management, providing additional information and guidance on managing an older workforce, and effective leadership were desirable, feasible and important implementation measures for securing organisational age management. While training and development opportunities were seen as desirable and important, respondents disagreed regarding their feasibility, perhaps due to the potential cost of such programs. Respondents were also less supportive of regulation and the use of financial incentives, neither of which were seen as being feasible or important. Respondents questioned where funds would come from to finance incentives, and doubted whether there would be sufficient political will to introduce regulations. Therefore, respondents appeared far more supportive of ‘persuasion’ measures and non-governmental activity to promote age management approaches at the workplace level than government regulation or intervention.

B. Benefits and Challenges

The research methods deployed in this project laid the foundation for a nuanced, sophisticated and practical evaluation of the impact of UK age discrimination law on organisational practices. The study revealed the practical difficulties associated with implementing one area of equality law, and provided new and innovative insights into age discrimination law in action. Further, the mixed method design allowed for results to be triangulated, corroborated and tested across the various research methods, revealing new insights and different perspectives across the life of the project. Drawing on legal insiders was an essential part of this research design, and helped to narrow and direct the focus of the project as a whole.

That said, the use of legal insiders in this project encountered a number of practical difficulties. First, the process revealed the existence of power differentials within the research process itself. In conducting this research, the researcher was a younger, female academic conducting interviews in a largely male-dominated field. This (lack of) status may have influenced interactions with the experts¹⁰⁸ and prompted respondents to make jokes regarding their own age and ageing process (a frequent occurrence during the interviews). In conducting this study, the researcher also experienced a degree of antipathy towards ‘academic researchers’, with respondents occasionally treating the researcher as an uninformed observer or proclaiming her (assumed) love of long, complicated documents. Some experts were initially reluctant to participate in the research, and while all eventually agreed to take part, the researcher occasionally arrived at the experts’ offices to find a shorter time had been allocated for the interview than was originally agreed (e.g. in one case, 25 minutes rather than an hour). The experts’ attitudes towards the researcher, and prevailing power differentials, therefore occasionally made the research process more challenging in practice.

Second, the project experienced challenges related to the limits of expert knowledge. Through triangulating mixed research methods, this project found that age discrimination laws were having limited impact in practice in the UK: while some improvements had been made since the introduction of age discrimination legislation in 2006, the law had limited success at changing organisational and employer behaviour, and there were few examples of proactive employer responses to the ageing workforce. Thus, there was a serious need to consider legal reform to more effectively respond to demographic ageing. While legal reform appeared necessary and desirable, given the limited impact of existing laws, legal insiders were reluctant to consider legal reform, and felt the existing legal framework was adequate. The legal insiders did not feel it was the role of law to secure good practice, and government respondents felt the government could not and should not occupy a broader, more proactive role in addressing the ageing workforce. This is consistent with a *laissez-faire*, ‘hands-off’ approach to government and a minimalist view of legal regulation, which mirrors the approach taken in government documents. This, then, supports the argument that expert knowledge is not neutral,¹⁰⁹ and that legal insiders may also be acting as stakeholders when participating as research respondents.¹¹⁰ This may encourage more conservative approaches to legal change and renewal, and hinder the development of more critical perspectives.¹¹¹

This, then, illustrates the risks of using legal insiders to inform equality research: if legal insiders are allowed to dictate or determine priorities for reform, this might lead to a more conservative approach to legal change. While legal insiders can, of course, be critical of the system of which they are a part, this did not appear to be the case in this study. Though the experts in this project were unwilling to consider legal change, there was still a strong case for legal reform in this area.

¹⁰⁸ Meuser and Nagel (2009), pp 34–35.

¹⁰⁹ See Van Audenhove (2007).

¹¹⁰ Wroblewski and Leitner (2009), p 236.

¹¹¹ See Van Audenhove (2007).

Academic doctrinal research thus fulfils a vital function, both in offering alternative legal options to the existing legal framework (whether these options are seen as ‘practicable’ or not), and in offering a perspective that transcends the limits of a deregulatory governmental agenda. Thus, academic and legal doctrinal research occupy an essential role in identifying and promoting change, which is unlikely to be fulfilled by other ‘experts’ or legal insiders.

Third, and relatedly, the use of experts also raised challenging questions relating to the nature and identity of ‘expert’ knowledge. The line between respondents participating in the research in a personal capacity and in an organisational capacity was often blurred, particularly in the expert interviews. While respondents were selected based on their institutional role, it is potentially difficult (if not impossible) to distinguish individual views and ideas from organisational views, particularly where respondents feel strongly about an issue (as was often the case here). In many cases, it appeared that the respondents’ personal views coincided with their professional responsibilities, minimising the issue of which role they were occupying at any given time. However, future studies should consider instructing respondents on the capacity in which they should answer questions. While this appears a simple solution, it may affect the utility of answers received: respondents appeared far more comfortable responding to contentious questions in their personal capacity.¹¹² This is also likely to be an issue for future studies.

Fourth, this study encountered significant practical challenges in its use of empirical research. For example, the Delphi method is a complex empirical tool for advancing legal research: the process can be time-consuming and demanding; maintaining response rates and participant enthusiasm is a constant challenge; scenarios may be misinterpreted or lead to confusion; and administering an online survey requires a level of technical expertise. That said, the method remains an excellent tool for exploring solutions in policy areas with high levels of uncertainty and divided opinion. Therefore, it is particularly well suited for developing long-term solutions and hypothetical scenarios for the advancement of law reform. Thus, the Delphi method provides new opportunities to consider constructively and generate consensus around policy options.

While the Delphi method has significant potential to develop law and legal reform, it is likely to raise additional challenges when used with legal insiders as respondents. Lawyers are ‘professional pessimists’, expected to consider and plan for worst-case scenarios.¹¹³ In creating something new, lawyers become ‘mired in contemplating and planning for every possible mishap that might occur’.¹¹⁴ While pessimism is helpful for the legal profession, it limits the potential for broad, unburdened thinking about future scenarios. Instead, lawyers consider the limitations and potential hazards of scenarios, and fail to distinguish the theoretical merit of an idea from its practical implementation. Policy makers or scientists may therefore be more comfortable participating in a

¹¹² See similarly Rauch (1979), p 167.

¹¹³ O’Grady (2006), p 23; see also Seligman, Verkuil and Kang (2005), p 56.

¹¹⁴ O’Grady (2006), p 24.

Delphi study than lawyers. Thus, this flags the potential limits of using legal insiders to inform the development of legal and policy reform.

Part 7 – Conclusion

These projects illustrate the substantial value of moving beyond law on the books to consider how law operates in practice, which will be valuable to practitioners, academics and policymakers alike. Both projects highlight the challenges of conducting empirical research in equality law. The most challenging aspect we each faced was in recruiting appropriate interview participants for the following reasons. First, it is difficult to identify relevant legal insiders, particularly in Australia where the dominant use of ADR to resolve claims means few cases are reported or publicly noted. Second, identifying relevant respondents in government departments and agencies is a difficult process, particularly as governments become less transparent and more risk averse. Third, even where an appropriate respondent can be identified, resource limitations and large workloads may mean they are unwilling to participate in research. Fourth, participants may experience research fatigue from being over-researched where they are accessible or identifiable to researchers.

The two projects also identify gaps requiring further empirical research. In particular, these projects struggled to engage with individual complainants and respondents to explore their lived experiences of resolving discrimination claims. This is one of the key limitations of using interviews with legal insiders as the primary form of research data.

It is noteworthy that based on our survey of empirical equality research in both jurisdictions, and according to our classification of ‘insiders’ and ‘outsiders’, the use of legal insiders as respondents appears more prevalent in Australian empirical equality research than in the UK. This may be the case for three reasons. First, the prevalence and significance of ADR in resolving discrimination claims in Australian jurisdictions means case law is more piecemeal and limited than in the UK. This, then, draws researchers’ attention to the conciliation process, and the likely outcomes that are being achieved. With limited data flows and disclosure of information from equality agencies in Australia, the use of legal insiders (and conciliators in particular) becomes a natural focus of empirical research. In contrast, conciliation has been less of a focus in UK equality law, though this may change with the introduction of early conciliation. Second, and similarly, the reluctance or inability of equality agencies in Australia to provide researchers with access to complainants and respondents or to facilitate contact with those who have participated in the conciliation process, makes research focusing on the parties to proceedings particularly problematic: finding useful outsider or thresholder respondents is nearly impossible, if contact details cannot be obtained from agencies or courts. Instead, then, Australian researchers often speak with legal practitioners, who effectively act as data proxies for their aggregate client base in the research project. Third, some Australian universities have far more rigorous ethical review processes in place than their UK counterparts, making the use of legal insiders attractive in an administrative

sense. Thus, a range of institutional factors may promote the primary reliance on legal insiders as respondents in Australian equality scholarship.

In sum, then, legal insiders are likely to continue to play a significant role in empirical equality research, particularly in Australia, but we caution against relying on legal insiders as a sole form of research ‘data’. There is much scope to interview and survey ‘outsiders’ about their perceptions of the law in practice, and to triangulate this with traditional doctrinal analysis and quantitative data (such as complaint data from agencies, tribunals and courts), while still considering the views of legal insiders (see Figure 3). This triangulated approach offers a more nuanced and aspirational methodological method for future scholarship in equality law, and closely reflects a case study method, where a combination of data sources are triangulated to derive in-depth insights into a phenomenon.¹¹⁵ As Epstein and King note, ‘when an opportunity exists to collect more data, we should generally take advantage of it’, so as to gather ‘data of many different types from many different sources’.¹¹⁶ Indeed, ‘we should ... judge empirical research by how much information the researcher brings to bear on the inference at issue’.¹¹⁷ An approach of this nature may more easily enable inferences to be drawn, allowing observations to be (carefully) extrapolated to other, unobserved scenarios.¹¹⁸

Going beyond existing scholarship on the case study method, though, our focus on insiders and outsiders emphasises the different positioning of research respondents in a legal context. As illustrated by Figure 3, it is important to be mindful not just about different *sources* of data in empirical equality research (that is, by sourcing qualitative, quantitative and doctrinal data), but also to be attuned to the voices that make up those data sources, sourcing respondents from insider, outsider and threshold groups.

¹¹⁵ Webley (2016), Yin (2009).

¹¹⁶ Epstein and King (2002).

¹¹⁷ Epstein and King (2002).

¹¹⁸ Webley (2016), Epstein and King (2002).

Figure 3: A triangulated approach to empirical equality research

Finally, this paper has offered new insights into the utility of the insider / outsider lens for analysing, critiquing and framing empirical equality research. While it is problematic to definitively identify and categorise respondents as insiders or outsiders, the lens offers a useful means of identifying trends towards inclusion or exclusion in empirical equality scholarship, and draws attention to the importance of drawing on a range of respondents in empirical research. Thus, this paper has focused attention on how to build inclusion and participation of non-traditional groups in empirical equality scholarship, particularly given national structural constraints that may impede research of this nature. The need to give voice and participatory opportunities in empirical research is likely to be an ongoing challenge and opportunity for empirical equality research in both jurisdictions in years to come.

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