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Abandoning individual enforcement? Interrogating the enforcement of age discrimination law

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Abstract

Discrimination law primarily relies on individual enforcement for addressing discrimination at work; yet those who are most impacted by discrimination are likely the least able to enforce their rights. The question then becomes: what role should individual enforcement play in discrimination law? Can we effectively abandon individual enforcement as part of the legislative model? Drawing on a mixed method, multi-year comparative study of the enforcement of age discrimination law in the UK, Australia and Sweden, this paper considers the gaps, limits and risks of the individual enforcement model in discrimination law. Integrating doctrinal analysis; statistical analysis of claims and cases, and data from the EU and OECD; qualitative expert interviews; and a survey of legal practitioners, this paper argues that while individual enforcement is inherently limited as a tool for achieving systemic change, it must remain part of any legislative model. Reflecting on the experience in Sweden, where individual enforcement of discrimination law is significantly curtailed, the paper posits that individual rights and individual enforcement remain important complements to other regulatory tools, particularly in jurisdictions with strong enduring age norms. Abandoning or severely restricting individual enforcement is unlikely to support either the macro or micro effectiveness of age discrimination law.

Keywords: labour law; discrimination law; enforcement; age discrimination; United Kingdom; Sweden

Introduction

Discrimination law in the UK primarily relies on individual enforcement for addressing discrimination at work. Scholars and practitioners have repeatedly emphasised the gaps and limits of relying on individual enforcement to address discrimination.[1] Those who are most impacted by

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[1]B Smith 'It's about time – for a new regulatory approach to equality' (2008) 36 Federal Law Review 117; B Smith 'A regulatory analysis of the Sex Discrimination Act 1984 (Cth): can it effect equality or only redress harm?' in C Arup et al (eds) *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets* (Federation Press, 2006); B Gaze 'The Sex Discrimination Act after twenty years: achievements, disappointments, disillusionment and alternatives' (2004) 27 University of New South Wales Law Journal 914; L Dickens (ed) *Making Employment Rights Effective: Issues of Enforcement and Compliance* (Hart Publishing, 2012); L William et al 'Justice obtained? How disabled claimants fare at employment tribunals' (2019) 50 Industrial Relations Journal 314.

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discrimination are often the least likely to enforce their rights.[2] The question then becomes: what role should individual enforcement play in discrimination law? Can we effectively abandon individual enforcement as part of the legislative model?

Drawing on a mixed method, multi-year comparative study of the enforcement of age discrimination law in the UK, Australia and Sweden, in this paper I consider the gaps, limits and risks of the individual enforcement model in discrimination law. Integrating statistical analysis of claims and cases, including 1208 reported UK Employment Tribunal decisions, and 108 Australian cases; 72 qualitative expert interviews with 105 expert respondents in Australia, the UK and Sweden;[3] and a survey of 76 legal practitioners and advocates in the UK and Australia,[4] I argue that while individual enforcement is inherently limited as a tool for achieving systemic change, it must remain part of any legislative model for addressing discrimination.

In Part 1, I map problems with individual enforcement, drawing on my empirical study of enforcement in Australia and the UK.[5] In Part 2, I map the legislative framework in Sweden, where individual enforcement of discrimination law is significantly curtailed, and enforcement instead emphasises the role of trade unions, negotiation and statutory agencies. In Part 3, I compare the macro and micro success of the Swedish model of enforcement with that in the UK and Australia, drawing on OECD and EU statistics on experiences of older workers and discrimination. These statistics illustrate that neither system is ideal; there is scope for significant mutual learning across jurisdictions. Considering gaps in enforcement in Sweden, I argue that individual rights are an important complement to other regulatory tools, particularly in jurisdictions with enduring age norms. We cannot abandon individual enforcement. I therefore put forward reforms to strengthen individual enforcement; and consider the future of the Swedish regulatory model in a concluding section.

1. The problem with individual enforcement: the UK and Australia

Scholars and practitioners are well versed in the difficulties of individual enforcement of discrimination law.[6] At a theoretical level, individual enforcement models reflect an 'individualistic vision'[7] of equality, protecting *individuals* from unfair treatment on the basis of protected characteristics.[8] This ignores or minimises the societal, institutional, communal and collective impacts of inequality.[9] It also prioritises a view of equality as a negative 'duty of restraint',[10] rather than something that should be proactively pursued to prevent harm occurring. Thus, individual approaches to addressing discrimination are unlikely to achieve meaningful systemic change.[11]

In practice, for individuals to use legal mechanisms to address discrimination, they must undergo the process of 'naming, blaming and claiming' which is required for a dispute to arise.[12] Those who experience discrimination: may not recognise it as discrimination; may not be able to identify who is to 'blame' for the discrimination; or may be reluctant to make a claim using legal mechanisms. As a

[2]Smith (2008), above n 1, at 132. See also S Wakefield and C Uggen 'The declining significance of race in federal civil rights law: the social structure of employment discrimination claims' (2004) 74 Sociological Inquiry 128 at 150.

[3]Interviewees have been classified according to their jurisdiction: A for Australia, UK for the UK, Sw for Sweden, then allocated a number.

[4]These methods are described in detail in A Blackham, *Reforming Age Discrimination Law: Beyond Individual Enforcement* (Oxford University Press, 2022) ch 1.

[5]This section summarises the findings reported at length in Blackham, ibid.

[6]See eg Gaze, above n 1, at 919.

[7]S Fredman 'Equality: a new generation?' (2001) 30 Industrial Law Journal 145 at 156.

[8]M Bell and L Waddington 'Reflecting on inequalities in European equality law' (2003) 28 European Law Review 349 at 351.

[9]Ibid, at 352. See the detailed discussion in Blackham, above n 4, at 73–75.

[10]S Fredman 'Changing the norm: positive duties in equal treatment legislation' (2005) 12 Maastricht Journal of European and Comparative Law 369 at 370.

[11]S Sturm 'Second generation employment discrimination: a structural approach' (2001) 101 Columbia Law Review 458.

[12]WLF Felstiner et al 'The emergence and transformation of disputes: naming, blaming, claiming …' (1980) 15 Law & Society Review 631.

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result, then, few individuals actually use available legal mechanisms:[13] age discrimination complaints in both Australia and the UK are rare, despite the reported prevalence of discriminatory treatment.[14] I have estimated that statutory agencies receive less than 0.09% (in Australia) or 0.08% (in the UK) of possible age discrimination complaints from older workers.[15] In the Australian Human Rights Commission's (AHRC) National Prevalence Survey, for example, of those who had experienced age discrimination in the last two years (n=309), 43% took no action; the least common way to take action was to discuss or raise the issue with an external organisation (5%) – this was less common than leaving the job in question (6%).[16]

There are many factors that might explain this reluctance to engage with legal complaints mechanisms. Those who are impacted by discrimination rarely fit the stereotype of the rational, utility-maximising individual with the agency required to bring a claim;[17] instead, those most affected by discrimination are often the most vulnerable at work, lacking both rights awareness and the capacity to pursue their legal rights and entitlements.[18] As Smith concisely summarises:

> Anti-discrimination legislation is designed to protect disempowered groups – those who traditionally experience marginalisation and exclusion. Expecting members of such groups to have the time, security and resources to pursue legal action in order to gain compensation and possibly bring about wider change represents a fundamental regulatory weakness.[19]

For these individuals to undergo the process of 'naming, blaming and claiming'[20] would be unusual. The process of claiming is individually costly in terms of time, emotional energy, financial costs, social norms against claiming, and fear of retribution.[21] Further, claiming is made difficult by limited access to information and legal advice, legal complexity, the need for proof of discrimination, information asymmetries and power disparities between the parties,[22] restrictive time limits,[23] low perceived prospects of success, fear of adverse costs orders, and a legislative focus on individualised and retrospective remedies.[24] Those who experience discrimination are 'one-shotters', who rarely use legal mechanisms, whereas employers and respondents tend to be 'repeat players', who typically come

[13]In the UK, in the 2008 Fair Treatment at Work survey, around 3% of respondents made an application to an Employment Tribunal (ET): R Fevre et al 'Fair treatment at work report: findings from the 2008 Survey' (2009) Employment Relations Research Series 103 at 136. In the 2004 Unrepresented Worker Survey, only 2.4% of respondents began ET proceedings: A Pollert and A Charlwood 'The vulnerable worker in Britain and problems at work' (2009) 23 Work, Employment and Society 343 at 351. These surveys were conducted before the introduction and subsequent abolition of ET fees.

[14]In Australia see AHRC 'Willing to work: national inquiry into employment discrimination against older Australians and Australians with disability' (2016) p 321. In Great Britain see House of Commons 'Oral evidence: older people and employment' (2018) HC 359 Q43, available at https://web.archive.org/web/20230131003214/https://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/older-people-and-employment/oral/76656.html (accessed 31 January 2023).

[15]Blackham, above n 4, p 136.

[16]AHRC 'National prevalence survey of age discrimination in the workplace: the prevalence, nature and impact of workplace age discrimination amongst the Australian population aged 50 years and older' (2015).

[17]Fredman, above n 10, at 371.

[18]L Dickens 'Introduction – making employment rights effective: issues of enforcement and compliance' in L Dickens (ed) *Making Employment Rights Effective: Issues of Enforcement and compliance* (Hart Publishing, 2012) p 3.

[19]Smith (2008), above n 1, at 132.

[20]Felstiner et al, above n 12.

[21]Blackham, above n 4, ch 4.

[22]M Thornton 'Equivocations of conciliation: the resolution of discrimination complaints in Australia' (1989) 52 The Modern Law Review 733 at 743.

[23]A Blackham 'Enforcing rights in Employment Tribunals: insights from age discrimination claims in a new "dataset"' (2021) 41 Legal Studies 390.

[24]Fredman, above n 10, at 370.

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out ahead.[25] These barriers are similar across both Australia and the UK.[26] Understandably, then, those impacted by discrimination may be more likely to 'lump it' or leave, rather than to make a formal claim or complaint,[27] especially if they wish to repair social relationships, or avoid future risk of hurt or harm.[28]

Even if a claim is made, both Australia and the UK rely heavily on confidential conciliation to resolve individual discrimination complaints, especially as they relate to work.[29] This means most discrimination matters are resolved privately, behind closed doors, and often with a non-disclosure agreement. This has a number of systemic impacts, prompting a culture of secrecy and stigma around discrimination claims.[30] Further, it makes it difficult to identify 'lightning rod' cases that can change public opinion and effect broader change.[31] Instead, discrimination complaints tend to be resolved quietly, with small amounts of financial compensation, effecting limited change to individual or organisational behaviour.

Overall, then, the UK House of Commons Women and Equalities Committee has concluded that individual enforcement 'is not fit for purpose'.[32] Individual enforcement may undermine the transformative potential of equality law[33] and is ineffective for addressing age discrimination.[34] There is a compelling case, then, to think about how we might move beyond individual enforcement; or, indeed, abandon it entirely as a regulatory tool. It is here that the experience of Sweden is particularly illuminating.

2. The Swedish context

Like the UK, Swedish discrimination law has largely been shaped by EU Directives. However, unlike the UK, Sweden has an enduring tradition of collective bargaining and negotiation with the social partners. The Swedish model has been described as 'corporatist', that is, the 'concertation of economic and social policies amongst interest associations and state actors'.[35] The enforcement of discrimination law has been strongly shaped by this context; as a result, while both the UK and Sweden have adopted similar legislative frameworks to address age discrimination, individual enforcement has been effectively minimised in the Swedish context. For Carlson, then,

> The Swedish social partners, the employers, their organizations and the labor unions, keep a fiercely tenacious grip on controlling all labor market issues including discrimination protections,

[25]M Galanter 'Why the "haves" come out ahead: speculations on the limits of legal change' (1974) 9 Law & Society Review 95.

[26]In Australia see AHRC, above n 14, pp 321–327. In the UK see Women and Equalities Committee 'Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission' (2019) Tenth Report of Session 2017–19 HC 1470 p 7, https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/1470/1470.pdf (accessed 20 January 2023).

[27]F Regan 'Dilemmas of dispute resolution policy' (1997) 8 Australian Dispute Resolution Journal 5 at 7.

[28]L Smart Richman and MR Leary 'Reactions to discrimination, stigmatization, ostracism, and other forms of interpersonal rejection: a multimotive model' (2009) 116 Psychological Review 365 at 368.

[29]A Blackham and D Allen 'Resolving discrimination claims outside the courts: alternative dispute resolution in Australia and the United Kingdom' (2019) 31 Australian Journal of Labour Law 253.

[30]D Allen and A Blackham 'Under wraps: secrecy, confidentiality and the enforcement of equality law in Australia and the UK' (2019) 43 Melbourne University Law Review 384.

[31]Blackham, above n 4, p 211.

[32]Women and Equalities Committee, above n 26, p 3.

[33]M Thornton *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990) pp 38, 151.

[34]A3; A5; A10; A71; A153; A160; A164; UK78; UK80; UK81; UK97; A99; A100; A101; A103; A104; A108; A115; UK117; UK162.

[35]S Jochem 'Nordic corporatism and welfare state reforms: Denmark and Sweden compared' in G Lehmbruch and F van Waarden *Renegotiating the Welfare State* (Routledge 2004) p 114.

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> viewing employment discrimination claims as a collective labor, rather than a human rights, issue with no need for individual access to justice mechanisms.[36]

This stands in stark contrast to the 'privatised' enforcement model in the UK. It is these national differences that make the comparison between the UK and Sweden particularly apt[37] and supportive of mutual learning.[38]

(a) The legal framework

Equality is embedded in Swedish constitutional law. Under the Instrument of Government Chapter 1, s 2, there is a non-binding policy provision that:[39]

> The public institutions shall promote the opportunity for all to attain participation and equality in society and for the rights of the child to be safeguarded. The public institutions shall combat discrimination of persons on grounds of … age.

Chapter 2, Article 12 also affords protection against discrimination:

> No act of law or other provision may imply the unfavourable treatment of anyone because they belong to a minority group by reason of ethnic origin, colour, or other similar circumstances or on account of their sexual orientation.[40]

These constitutional protections are embedded in the Discrimination Act,[41] which is based, in part, on the Framework Directive.[42] The Act prohibits direct and indirect age discrimination in employment,[43] with exceptions for genuine and determining occupational requirements; and different treatment on the basis of age with a legitimate purpose and using appropriate and necessary means.[44] This closely reflects the Framework Directive.

Strong age norms remain in the Swedish labour market.[45] In relation to retirement, the so-called '67-year-rule' (as it then was) provides protection for employees to remain at work

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[36]L Carlson 'The Paris principles, NHRIs, and enabling legal frameworks' (2021) 2 Rutgers International Law & Human Rights Journal 90 at 94.

[37]E Örücü 'Developing comparative law' in E Örücü and D Nelken (eds) *Comparative Law: A Handbook* (Hart Publishing, 2007) p 52.

[38]D Schiek 'Enforcing (EU) non-discrimination law: mutual learning between British and Italian labour law?' (2012) 28 International Journal of Comparative Labour Law and Industrial Relations 489 at 508.

[39]This analysis uses official and unofficial English translations of Swedish legislation. In the case of more recent amendments to the Discrimination Act (those after 2017), I used Google translate, as there was no official or unofficial English translation available (as at July 2022). While this is far from desirable, I compared this analysis with secondary materials to ensure its accuracy, confirmed the translation with native Swedish speakers, and complemented my doctrinal analysis with qualitative expert interviews to address any potential cultural misunderstandings.

[40]See also Art 13 regarding gender.

[41]Diskrimineringslag (2008:567).

[42]Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303, p 16.

[43]Diskrimineringslag (2008:567) ch 2, s 1.

[44]Ibid, ch 2, s 2. This has been held to not justify a redundancy program that targeted employees over the age of 60, given employees have a general protection to remain in work until the age of 67 (now 69): Swedish Employment Protection Act s 32a; Swedish Labour Court judgment AD 2011:37.

[45]M Kullander and J Nordlöw 'Sweden: the role of governments and social partners in keeping older workers in the labour market' (*Eurofound*, 2 June 2013), https://www.eurofound.europa.eu/publications/report/2013/sweden-the-role-of-governments-and-social-partners-in-keeping-older-workers-in-the-labour-market (accessed 20 January 2023). See also JJ Votinius 'Age discrimination and labour law in Sweden' in A Numhauser-Henning and M Rönnmar (eds) *Age Discrimination and Labour Law. Comparative and Conceptual Perspectives in the EU and Beyond* (Kluwer, 2015) pp 290, 295.

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until the age of 67.[46] Thereafter, employers have the freedom to terminate an employee's employment with one month's notice,[47] or to deploy fixed-term contracts. Seniority rules are also often in place for redundancy (that is, the last-in-first-out principle)[48] and wage setting. That said, even these age norms are shifting: under 2019 amendments to the Employment Protection Act (1982: 80), protection from forced retirement increased to age 68 from 1 January 2020, and to 69 in 2023.

(b) Enforcement

The Equality Ombudsman (Diskrimineringsombudsmannen, DO) is responsible for supervising compliance with the Discrimination Act.[49] The DO may bring a court action on behalf of an individual with their consent,[50] as may a non-profit organisation.[51] The DO may only bring an action if an employees' organisation does not do so.[52] Disputes brought by an employers' or employees' organisation, or the DO, are heard in the Swedish Labour Court as the court of first instance.[53] Individuals may only bring a complaint to the District Court;[54] in these cases, the Labour Court is the superior appellate jurisdiction.[55] Cases brought by a trade union are subject to mandatory negotiation before proceeding to the Labour Court.[56]

Someone who breaches the Discrimination Act is liable to pay compensation to the person affected.[57] This is not solely compensatory: according to Ch 5, s 1 of the Discrimination Act, when determining compensation, particular attention should be given to the aim of discouraging or counteracting infringements of the Act. In the context of work, an employer is also responsible for paying compensation for any loss, so long as that loss does not relate to recruitment or promotion.[58] If there are special grounds or reasons to do so, compensation can be reduced or set at zero.[59] Discriminatory provisions of individual contracts and collective agreements can be modified or declared invalid.[60] Termination of a contract can also be declared invalid, and workplace rules can be modified or declared to be of no effect.[61]

Time limits for bringing a claim are set by reference to time limits in employment law.[62] Consistent with the Employment Protection Act (1982:80) ss 40–42, for example, actions relating to termination or summary dismissal have a time limit of two weeks for a declaration of invalidity, and four months if seeking damages. For other actions, time limits are consistent with the Employment (Co-determination in the Workplace) Act (1976:580). The DO may 'toll' or interrupt the statute of

[46]Swedish Employment Protection Act, s 32a; see the CJEU decision in Case C-141/11 *Hörnfeldt v Posten Meddelande AB*, where the objectives behind the 67-year rule were held to be legitimate. See also A Numhauser-Henning and M Rönnmar 'Compulsory retirement and age discrimination – the Swedish Hörnfeldt case put in perspective' in P Lindskoug et al (eds) *Essays in Honour of Michael Bogdan* (Juristförlaget, 2013).

[47]Swedish Employment Protection Act, s 33.

[48]Though this has been 'watered down' by other developments: Votinius, above n 45, pp 293–294.

[49]Diskrimineringslag (2008:567) ch 4, s 1.

[50]Ibid, ch 4, s 2; ch 6, s 2.

[51]Ibid, ch 6, s 2.

[52]Ibid, ch 6, s 2.

[53]Labour Disputes (Judicial Procedure) Act (1974:371), ch 2, s 1.

[54]Ibid, ch 2, s 2.

[55]Ibid, ch 2, s 3.

[56]Co-Determination Act, s 11, Labour Procedure Act (1974:371), ch 4, s 7.

[57]Diskrimineringslag (2008:567), ch 5, s 1

[58]Ibid, ch 5, s 1.

[59]Ibid, ch 5, s 1.

[60]Ibid, ch 5, s 3.

[61]Ibid, ch 5, s 3.

[62]Ibid, ch 6, s 4.

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limitations, such that a new statute of limitations starts to run.[63] Time limit rules are complex; this may deter claiming for unrepresented workers.[64]

In the Swedish system, costs typically follow the event;[65] however, parties can be ordered to pay their own costs in the Labour Court 'if the losing party had reasonable cause to have the dispute tried'.[66] This provision is rarely used in practice.[67] It typically takes around 12 months from the time of application until judgment.[68]

The Labour Court generally receives few cases: according to the Court's website, each year, the Court receives somewhere between 400 and 450 cases, though many cases are subsequently withdrawn.[69] The court generally issues somewhere between 150 and 160 judgments per year; few of these relate to age discrimination.[70] In some years, though, the number of cases may be even lower: in the 2019 financial year, for example, the Labour Court received 272 cases, which resulted in 57 decisions.[71] Only 5% of all disputes related to the Discrimination Act.[72] The Labour Court issued no judgments concerning discrimination in 2019, and only six discrimination judgments during 2018.[73] As at 28 July 2022, the DO had recorded only four age discrimination cases decided by the Labour Court,[74] and four age discrimination settlements relating to work.[75]

That said, as in other jurisdictions, few cases do not necessarily mean few disputes: most disputes will be resolved via negotiation before proceeding to the Labour Court.[76] Indeed, a matter that proceeds to the Labour Court is seen as a failure of collective negotiation;[77] matters are typically resolved well before a formal claim is required: if 'you come from a culture, where going to court is always a bad option, then someone has already lost if you go to court'.[78] Case and claim statistics therefore do not fully represent the success – or otherwise – of the legal framework; this point is considered in more detail below.

(c) Transparency and equality law

Sweden is notable for its approach to transparency and confidentiality in the context of discrimination law. The Swedish Constitution consists of four fundamental laws, which take precedence over all other laws.[79] One of these, the Instrument of Government, creates a right to freedom of information when dealing with government bodies. According to Chapter 2, Article 1:

[63]Ibid, ch 6, s 5.

[64]P Lappalainen *Country Report: Non-discrimination: Sweden 2018* (Publications Office of the European Union, 2018) p 95, http://op.europa.eu/en/publication-detail/-/publication/4eaa2a51-1310-11e9-81b4-01aa75ed71a1 (accessed 20 January 2023).

[65]Arbetsdomstolen 'In English – presentation of the Swedish Labour Court' (*Arbetsdomstolen*), https://web.archive.org/web/20230131003704/https://www.arbetsdomstolen.se/sv/en/in-english/ (accessed 31 January 2023).

[66]Labour Disputes (Judicial Procedure) Act (1974:371), ch 5, s 2.

[67]Lappalainen, above n 64, p 96.

[68]Arbetsdomstolen, above n 65.

[69]Ibid.

[70]Ibid.

[71]Arbetsdomstolen, 'Årsredovisning 2019' (2020) p 5.

[72]Ibid, p 9.

[73]P Lappalainen *Country Report: Non Discrimination: Transposition and Implementation at National Level of Council Directives 2000/43 and 2000/78: Sweden* (European Commission Publications Office, 2020) p 63, https://data.europa.eu/doi/10.2838/2479 (accessed 20 January 2023).

[74]Case 2015, no 51/15 (16 September 2015) (renewal of bus driver contracts after the age of 70); Swedish Labour Court judgment AD 2013:64 (alleged age-based salary); Swedish Labour Court judgment AD 2014:28 (recruitment of cleaners); Swedish Labour Court judgment AD 2010:91 (discrimination in recruitment).

[75]Record number 2014/1997; ANM 2014/1882; ANM 2014/803; ANM 2012/695.

[76]Lappalainen, above n 64, p 94.

[77]Sw3.

[78]Sw3.

[79]See *The Constitution of Sweden: The Fundamental Laws and the Riksdag Act* (Sveriges Riksdag, Stockholm, 2016), https://web.archive.org/web/20230131004348/https://www.do.se/choose-language/english/handling-of-personal-data-and-the-principle-of-public-access-to-official-documents (accessed 31 January 2023). (accessed 20 January 2023).

> Everyone shall be guaranteed the following rights and freedoms in his or her relations with the public institutions: … freedom of information: that is, the freedom to procure and receive information and otherwise acquaint oneself with the utterances of others.

This, then, creates a general right of openness and transparency in the workings of government bodies, including the DO. This means that all documents sent to and created by the DO are public records, which can be requested by the public, and which must be released unless they contain sensitive personal data.[80] Thus, all settlement agreements held by the DO are also public records, and potentially subject to disclosure. Non-disclosure agreements are not possible in this context.[81] Further, if the DO conducts an investigation, the respondent is provided with full access to the investigation file.[82] This stands in stark contrast to the focus on confidentiality in other jurisdictions such as the UK and Australia:[83] in Sweden, confidentiality is contrary to the national requirement of public transparency.

That said, the potential for disclosure in Sweden can be bypassed if the parties resolve their complaint without the DO's assistance or intervention; in that case, the requirement of public transparency would not apply if both parties were private entities. Where settlements are publicised, though, 'that's an important aspect … [we] consider it is [the] most important aspect rather than just the compensation'.[84]

(d) Beyond individual enforcement

The Swedish experience is notable as there is far less emphasis on individual enforcement than in the UK and Australia. This recognises the very real limits of the individual enforcement model: there are other tools to deal with discrimination in Sweden, and 'often the other tools could be viewed as more efficient' than discrimination law.[85] As one respondent in this study noted,

> the expectation of private enforcement, as a method, does not account for the great difficulty of actually doing that work … I think there is a flaw to think that this could be solved by private enforcement, unless you have a system with very heavy damages which we will not have in [our] legal culture and not in most European countries either.[86]

The Swedish legal framework is therefore, by design, structured to move beyond individual enforcement. Indeed, it is difficult (if not impossible) for individuals to bring a case without the support of a trade union or the DO.[87] The weight of enforcement, then, is not on individuals, but on collective and agency processes.

This is consistent with the broader view of the enforcement of rights in Sweden: as one respondent in this study noted,

> there are three parallel tracks of enforcing. One is litigation, going to court, with or without support, or trade union or worker representatives, or authorities; but individual cases in courts, one way or another. And the other is public enforcement, where you have some labour inspector or

[80]See Diskrimineringsombudsmannen *Handling of personal data and the principle of public access to official documents*, https://web.archive.org/web/20230131004348/https://www.do.se/choose-language/english/handling-of-personal-data-and-the-principle-of-public-access-to-official-documents (accessed 31 January 2023).

[81]Sw2.

[82]Sw2.

[83]Blackham and Allen, above n 29; Allen and Blackham, above n 30. See also Women and Equalities Committee 'The use of non-disclosure agreements in discrimination cases' (2019) Ninth Report of Session 2017–19 HC 1720.

[84]Sw2.

[85]Sw3.

[86]Sw2.

[87]Sw4; Lappalainen, above n 73, p 62.

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> public authorities which is responsible for detecting and enforcing for individuals. The third is [an] industrial relations approach. … trade unions[88]

The issue in practice, though, is that it can be difficult for individuals to gain either DO or union support to challenge age discrimination.[89] It is difficult to find evidence or proof of discrimination,[90] making success in court proceedings unlikely.[91] Further, unions, the DO and individuals themselves tend not to prioritise or recognise age discrimination, limiting the success of enforcement.[92] There is a need, then, to scrutinise these non-individualised forms of enforcement more closely.

(i) The DO

The DO is responsible for supervising compliance with the Discrimination Act,[93] working to ensure discrimination does not occur and promoting equal rights and opportunities,[94] including through informing and educating government agencies, enterprises, individuals and organisations.[95] The DO is to provide advice and support to help those who have experienced discrimination to assert their rights.[96]

In the first instance, the DO is to attempt to achieve voluntary compliance with the Discrimination Act.[97] The DO may investigate whether an organisation is complying with the Act:[98] those who are subject to the Discrimination Act must, at the DO's request, provide information, give access to workplaces, and attend discussions with the DO.[99] The DO can order a financial penalty for non-compliance.[100]

The DO may bring a court action on behalf of an individual with their consent[101] but only if an employees' organisation does not do so.[102] While the DO receives complaints of discrimination, not all complaints will be actioned or even acknowledged with more than a form letter.[103] Litigation is not always the most efficient way of achieving change:[104] the DO's focus has therefore shifted 'from the individual … to a structural focus, a move from dispute resolution to bringing cases of strategic value'.[105] Strategic litigation particularly focuses on cases that clarify the law or highlight and draw attention to problems that exist.[106] Overall, though, the DO is focusing less on litigation and more on its public enforcement function.[107] While the DO has extensive legal powers, it is costly to exercise those powers;[108] running a discrimination claim is costly and time-consuming, even for the DO,[109] and may not be the best use of finite resources.

Instead of seeking settlements and pursuing litigation, then, complaints are used to inform the DO's enforcement work, by highlighting barriers to equality of opportunity. Thus, complaints are a

[88]Sw1.
[89]Sw4.
[90]Sw4, Sw3.
[91]This may, in part, relate to how the Labour Court has applied the burden of proof: see Lappalainen, above n 73, pp 67–71.
[92]Sw4.
[93]Diskrimineringslag (2008:567) ch 4, s 1.
[94]Equality Ombudsman (2008:568) s 1.
[95]Ibid, s 3.
[96]Ibid, s 2.
[97]Diskrimineringslag (2008:567) ch 4, s 1.
[98]Ibid, ch 4, s 1a.
[99]Ibid, ch 4, s 3.
[100]Ibid, ch 4, s 4.
[101]Ibid, ch 4, s 2; ch 6, s 2.
[102]Ibid, ch 6, s 2.
[103]Lappalainen, above n 64, p 118.
[104]Sw2.
[105]Sw2.
[106]Sw2.
[107]Sw2.
[108]Sw4.
[109]Sw4.

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'knowledge base' for the DO's other work.[110] In some cases, though, a complaint may lead to the DO initiating a supervisory measure, or proceeding to court in cases of strategic importance. Other complaints might be passed to trade unions.[111] The challenge, though, is that this shift in the DO's approach was not effectively communicated to the public:

> one thing that the Ombudsman could have done better … is communication because this expectation about the reports and what the reports are, that the reports are not just a report of a general problem or a problem, there is also the expectation that the report will also lead to a Court action which is an expectation that cannot be fulfilled. … by not being sufficiently clear in that matter, [the DO has] created expectations or have contributed to maintaining an expectation that cannot be fulfilled.[112]

This might lead individuals to become disillusioned with the DO and equality law more generally. The DO's website is now clear about there being no guarantee of action where discrimination is reported; reporting has also been expanded to encourage by stander reporting.[113]

Perhaps consequently, the DO has been criticised for the low number of complaints it pursues.[114] The disparity between complaints received and complaints actioned is evident in the DO's statistics. Age discrimination complaints received by the DO have increased by 121% between 2015 and 2021.[115] Age complaints across all areas increased from 497 in 2020 to 624 in 2021, though this increase largely related to age discrimination in healthcare during the Covid-19 pandemic.[116] As Table 1 shows, however, few discrimination complaints received by the DO lead to supervisory investigations, court proceedings or judgments;[117] court proceedings initiated equated to 0.09% of all complaints received in 2021 (and court proceedings do not necessarily originate as complaints).

These criticisms and concerns over complaint handling led to a public inquiry into the DO and its handling of matters. The Inquiry report emphasised the DO's role in promoting settlements and agreements:

> The Equality Ombudsman's primary task, also in the future, should be to help the parties reach agreement. However, in our opinion the Equality Ombudsman should broaden its work involving consensual solutions and examine the possibility for parties to reach agreement in more cases.[118]

The Inquiry report arguably reflects a fundamental disagreement about what the role of the statutory regulator should be:

> there was a general perception that there was a great problem that we did not bring individual claims to Court in a sufficient amount; [the] underlying presumption [is] that's what you should be doing. … They do still think we should work for settlements in some cases, which we don't.[119]

[110]Lappalainen, above n 73, p 85.
[111]Sw2.
[112]Sw2.
[113]Sw2.
[114]Sw4; Lappalainen, above n 64, p 117.
[115]Diskrimineringsombudsmannen (DO) 'Statistik 2015–2021: Statistik över anmälningar som inkom till Diskrimineringsombudsmannen 2015–2021' (2022) Rapport 2022:2 p 14 https://www.do.se/download/18.56175f8817b345aa7651d15/1648791921824/Rapport_Statistik-2015-2021.pdf (accessed 20 January 2023).
[116]Ibid.
[117]Some of these numbers – taken from Statistik 2015–2021 – differ slightly from those in the DO's annual reports.
[118]White Paper SOU 2016:87, p 34; translation in Lappalainen, above n 73, p 84.
[119]Sw2.

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Table 1. Complaints received and enforcement action, DO, 2019–2021

	2019	2020	2021
Discrimination complaints received (all grounds)	2166	2882	3278
Age discrimination complaints received	301	497	624
Complaints relating to working life	626	988	849
Age complaints received in working life	149		153 (approx)
Court proceedings initiated (all grounds)	5	3	3
Court judgments (all grounds)	5	3	6
Settlements (all grounds)	0	3	4
Supervisory investigations initiated (all grounds)	530	66	192
Supervisory investigations initiated – working life	56	26	66
Supervisory investigations initiated – age	14	9	13

Source: DO Annual Reports; DO, 'Statistik 2015–2021' (2022)

The DO remains disinclined to promote settlements – unless a claimant wants it – in part because it represents a poorer form of justice for those who experience inequality, compared to those who are wronged in other ways:

> I do think that there is a rule of law aspect here, which I think needs to be highlighted because somehow just because we are talking about this Commission, just because we are talking about these victims, somehow, the ordinary operations of how we normally ensure the law is complied with disappears.[120]

The DO's focus on strategic litigation has left a gap in assistance for individual claimants.[121] To address this, local anti-discrimination bureaus have been established as non-governmental organisations designed to combat discrimination. Bureaus typically offer free legal advice to people who have experienced discrimination, and may take cases to court.[122] The DO is increasingly referring complaints to Bureaus.[123] However, Bureaus lack the capacity to address all instances of discrimination.[124]

Instead of focusing on complaints and settlements, the DO emphasises its 'general supervision' or public enforcement function[125] and role in influencing public debate.[126] This might include, for example, conducting investigations into specific organisations or whole sectors.[127] This has distinct advantages over individual enforcement, as it does not rely on individuals making a complaint:

> you don't need necessarily an individual victim who is willing or capable to go to Court. You are not risking [that] the matters you handle are uniquely the ones that are reported. As we know, there are groups in a society that are not aware of their rights and are [un]likely to report. Some

[120]Sw2.
[121]Lappalainen, above n 64, p 97.
[122]Ibid.
[123]Ibid.
[124]Sw4.
[125]Sw2. See Act on the Discrimination Ombudsman (2008:568); Diskrimineringslag (2008:567) ch 4, s 1.
[126]Lappalainen, above n 64, p 109.
[127]Diskrimineringslag (2008:567) ch 4, s 1a.

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> of them cannot read or write and this enables the Ombudsman to act based on other information to take initiatives on their motion.[128]

This approach offers significant advantages, then, over using complaints to determine a statutory agency's priorities, and recognises that gaps in complaining may not mean there is no need for agency intervention.[129]

There is a risk, though, that organisations or entire sectors might delay or defer action to advance equality, on the basis that the DO is conducting an investigation: 'sectors [that] are under investigation state that: "we are waiting [on the] investigation to see." So, they are sort of saying an impartial body is looking into this, so we don't need to do anything'.[130] This might delay progress in addressing discrimination, putting further pressure on the DO – not organisations – to achieve change.

Focusing beyond individual claims also de-emphasises the individualised remedies that are pervasive in the UK and Australia.[131] As in those comparative jurisdictions, those who experience discrimination in Sweden tend to want something other than monetary compensation:

> I would say, [in] nine out of ten cases, the individuals are not in it for the money, you know. [They say] 'I want this to stop or I want to prevent it from happening to someone else' or in the general interest of sanctions 'they should not get away with these kinds of matters', so very often the compensation aspect is secondary.[132]

However, even where individual enforcement is de-emphasised, equality law is not well set up to move beyond individualised remedies; there are limited financial penalties or sanctions in equality law, for example:

> For some reason, when it comes to discrimination equality law, the sanction is supposed to be reparation for the individual that's affected and, preferably, that should be resolved by settlement whereby there is no admission of guilt or anything as part of it. We have tremendous difficulty seeing that as an attractive way of dealing with discrimination cases.[133]

Thus, an emphasis on systemic, supervisory enforcement needs to be backed by more tailored remedies and sanctions: 'sanctions are the great deficiency'.[134] These sanctions do not need to be used to be effective; the threat of sanctions can be sufficient.[135] This is an important area of reform for equality law – in Sweden and elsewhere.

(ii) Collective mechanisms

Unlike the UK, Swedish labour law is typified by substantial collective negotiation and bargaining between the social partners. In 2018, 88% of Swedish employees had the right to bargain, and 65.5% were union members (see Table 2 and Table 3). In 2013, the proportion of Swedish employees in companies that were members of an employers' organisation was around 81%.[136] Thus, both employers and employees have a strong collective presence in Sweden. This compares markedly with the other countries under study.

Understandably, then, trade unions and the social partners are seen as playing a substantial role in addressing discrimination at work in Sweden. As one respondent noted, 'the Swedish system works, or

[128] Sw2.
[129] cf the approach of the UK and Australian statutory agencies, which often hinges on complaints: Blackham, above n 4, ch 8.
[130] Sw2.
[131] Blackham, above n 4, ch 6.
[132] Sw2.
[133] Sw2.
[134] Sw2.
[135] Sw2.
[136] Swedish National Mediation Office *Annual Report 2013* (Stockholm, 2014) p 32.

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Table 2. Employees with the right to bargain (%), 2005–19

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Australia	..	63.3	..	59.3	..	61.1	..	60.0	..	62.0	..	61.3	..	61.2	..
Sweden	89.4	88.7	87.5	88.9	89.6	88.7	88.3	88.8	88.4	88.6	88.7	88.6	87.7	88.0	..
United Kingdom	35.0	33.4	34.7	33.7	32.8	30.9	31.2	29.3	29.5	27.5	27.9	26.3	26.0	26.0	26.9

Source: OECD Stat, 2021, OECD/AIAS database on Institutional Characteristics of Trade Unions, Wage Setting, State Intervention and Social Pacts (ICTWSS)

Table 3. Trade union density (% all employees), 2005–19

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Australia	22.5	20.4	18.8	18.8	19.6	18.4	18.4	18.2	17.0	15.1	..	14.6	..	13.7	..
Sweden	75.7	74.3	70.8	68.3	68.4	68.2	67.5	67.5	67.7	67.3	67.0	66.7	66.1	65.5	65.2
United Kingdom	28.6	28.3	28.0	27.5	27.4	26.6	26.0	26.1	25.6	25.0	24.7	23.6	23.3	23.4	23.5

Source: OECDStat, 2021, OECD/AIAS database on Institutional Characteristics of Trade Unions, Wage Setting, State Intervention and Social Pacts (ICTWSS)

[is] leaning very heavily, I would say, in practice, on the industrial relations process [for enforcement]'.[137] This system is grounded in collectively negotiated agreements, and local dispute resolution:

> The main idea is that if … a trade union representative at [the] local level talks with a member [who] says, 'Well, I've been discriminated [against] on a matter of this, and I've been dismissed', or they haven't got paid, 'I haven't got my holidays', then you take up grievance negotiations in the workplace; and if you don't agree, then you can have a central negotiation; and if you don't agree on that, then you could go directly to the Labour Court. … There's a hell of a lot of negotiation taking place, but [there are no] clear statistic[s], because it just happens.[138]

Thus, discrimination disputes are likely being resolved at the local level, but this has not been measured or quantified. Trade unions estimate that around 1–4% of central grievance negotiations progress to the Labour Court.[139] In this context, progressing to court is seen as a failure of the system; ideally, the courts are not required, and disputes are resolved at the local level. For respondents, then, 'there's reasons we need to be very proud of this system, where it creates rather few court cases'.[140]

However, it is questionable whether unions have engaged with age equality as a priority. For example, Tikkanen and others found that, while measures adopted by the Swedish social partners were often focused on combating discrimination in working life, this did not focus on any particular age group.[141] Collective agreements do not generally appear to refer to age discrimination, though they may cover age-specific issues such as notice periods, integration measures for younger workers, partial retirement and pensions.[142] There is limited evidence, too, that informal mechanisms are being used in relation to age discrimination specifically.

There is a question, then, as to whether trade unions are well adapted to dealing with discrimination issues in particular: 'does this really work in discrimination cases; are trade unions suited for taking into account this kind of pressures of interests, other interests [than] the interest between capital and work?'[143] Unions arguably have conflicting interests that make them inadequate enforcers of discrimination law;[144] there are problems with relying on established structures and players to challenge the status quo.[145] Indeed, claims of discrimination may (indirectly) implicate unions themselves:

> there are situations where trade unions … might very well have been involved in the hiring process. … And at least, we have been consulted, so that would be negotiated. So, in a sense, when that decision comes, we are a little part of it. Then that becomes a sort of outside challenge to the system when someone says, 'I have been discriminated against'.[146]

[137]Sw1.
[138]Sw1.
[139]Sw1.
[140]Sw1.
[141]T Tikkanen and B Guðmundsson *Social Partners Out With Early Exit: In Lifelong Learning and Career Development* (Nordiskt nätverk för vuxnas lärande, 2011) p 21, http://www.nordvux.net/download/6690/social_partners.pdf (accessed 20 January 2023).
[142]M Rönnmar 'Intergenerational bargaining in Sweden' Report for the project iNGenBar Intergenerational Bargaining: towards integrated bargaining for younger and older workers in EU countries, https://lucris.lub.lu.se/ws/portalfiles/portal/5840678/5276117.pdf (accessed 20 January 2023). See also EurWORK 'Industrial relations and the ageing workforce: a review of measures to combat age discrimination in employment' (*Eurofound*, 27 October 2000), https://www.eurofound.europa.eu/sr/publications/report/2000/industrial-relations-and-the-ageing-workforce-a-review-of-measures-to-combat-age-discrimination-in (accessed 20 January 2023).
[143]Sw1.
[144]Sw4.
[145]Sw4.
[146]Sw3.

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It is unclear how unions will respond to discrimination claims that involve a conflict of interests between employees or groups of employees, as opposed to between the employer and employee.[147] Further, while discrimination claims may sometimes come from union members,[148] they are more likely to come from relative 'outsiders'[149] – those unprotected by collectively negotiated solutions. At the same time, the attention of unions tends to be on 'core' workers.[150] Tensions between individual and collective rights[151] may lead to discrimination law being seen as a threat by trade unions.

The very nature of discrimination law – or, at least, how discrimination law is perceived – may also lead to hesitancy among trade unions: 'discrimination is so absolute, right? It makes it a bad fit for our system, which is very pragmatic'.[152] This partly reflects the different dynamic of discrimination law to other industrial laws:

> [trade unions] like to negotiate and in order to negotiate, you need something to negotiate about. Anti-discrimination law … first of all, the nature of anti-discrimination law is that there are hard borders; there are some things that you cannot negotiate about, right? Whereas, we are really comfortable negotiating with everything else, right? So that has made it also more difficult.[153]

There is a strong perception that discrimination law is 'inflexible' and therefore not well aligned with established collective mechanisms. In practice, too, trade unions might want to avoid bringing discrimination claims and creating case law or precedent on specific issues, the better to facilitate negotiation in an ambiguous or flexible space:

> When we have a landmark case, that changes everything. … a landmark case, if it becomes well known, it can change the framework of those negotiations. … Sometimes, we negotiate in the shadow of the perception of the law … Or you negotiate in the shadow of not really wanting to know what the law says, because that's risky, because that might change the next negotiations. … We don't want to go to court on a thing, because we didn't want an answer.[154]

Further, as in other jurisdictions, alleging discrimination has a strong moral weight or stigma attached: 'Discrimination is a very strong statement, in a sense. … If someone says, "You are discriminating," that's escalating a conflict'.[155] Thus, any reference to discrimination or discrimination law might be avoided to support collegiate negotiation. Trade unions may also avoid discrimination claims due to a lack of government funding to train and upskill union representatives in equality law: 'Maybe if we had seen that kind of massive training of trade unionists and employers, [discrimination law] would have had a bigger impact'.[156]

Overall, then, discrimination law is seen as a limited tool for Swedish trade unions, as it does not always assist in negotiations; this compares, then, to the situation in other jurisdictions, where discrimination law might be useful:

> for colleagues in other countries, discrimination law is a fantastic tool, because it gives them something – and also something to use in negotiations, clearly. But for us, we have other tools that are better.[157]

[147]Sw4.
[148]Sw3.
[149]Sw4.
[150]Sw4.
[151]Sw4.
[152]Sw3.
[153]Sw3.
[154]Sw3.
[155]Sw3.
[156]Sw3.
[157]Sw3.

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Thus, in practice, trade unions appear to rarely seek to enforce discrimination law, either in negotiation or bargaining, or through supporting individual claims. While disputes might be resolved at the local level, it is difficult to assess how common this might be.[158]

(iii) Positive duties

The Discrimination Act also makes provision for 'active measures' in working life, a form of positive duty.[159] Active measures are preventative, and seek to counteract discrimination and promote equal opportunities.[160] Until 2017, this did not extend to the ground of age: it was confined to sex, ethnicity, and religion or other belief. Active measures now apply to all grounds, including age.

Employers must undertake specified work in relation to active measures.[161] Work related to active measures must be continuous[162] and involves:

- identifying risks of discrimination and obstacles to equal opportunities;
- analysing the causes of these risks and obstacles;
- taking preventative and promotional measures that may be required; and
- following up and evaluating the work undertaken.[163]

Employers need to conduct this work in relation to:

- working conditions;
- salary and terms of employment;
- recruitment and promotion;
- education and skills development; and
- combining work and parenthood.

Employers and employees are required to cooperate in undertaking this work;[164] employers, then, need to provide relevant employee organisations with information to facilitate that cooperation.[165] Work on active measures needs to be documented each year by employers with more than 25 employees;[166] those with 10–24 employees only need to document their salary survey.[167] Failure to comply with the active measures requirements may lead to an order to fulfil the obligations and a fine.[168]

Active measures have significant potential to put the obligation on employers – not employees – to identify and address equality risks.[169] They have the potential to reframe equality law to achieve systemic change.[170] However, the way active measures requirements are framed have proven difficult for the DO to monitor and enforce:

> there's been a false truth that [the DO does] not monitor [active measures]. We do, but the problem with that is … the way the duties are expressed. It is their duty to do that, monitor it, but they are not necessarily qualified to say how you should do it, and what you should do etc, so, the

[158]Sw4.

[159]See eg S Fredman *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, 2008).

[160]Diskrimineringslag (2008:567) ch 3, s 1.

[161]Ibid, ch 3, s 4.

[162]Ibid, ch 3, s 3.

[163]Ibid, ch 3, s 2.

[164]Ibid, ch 3, s 11.

[165]Ibid, ch 3, s 12.

[166]Ibid, ch 3, s 13.

[167]Ibid, ch 3, s 14.

[168]Ibid, ch 4, s 5.

[169]S Fredman 'Breaking the mold: equality as a proactive duty' (2012) 60 American Journal of Comparative Law 265 at 266.

[170]S Fredman *Discrimination Law* (Oxford University Press, 2nd edn, 2011) p 299.

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> focus is very much 'have you done it, yes or no?'. And if you've done it, 'have you identified something, yes or no?' and if you have, 'are you planning to do something about it?'[171]

This represents a minimal standard of scrutiny. Further, for the DO to challenge what an organisation has (not) done, 'you have to have a pretty clear thing of what it is that they should do'.[172] This can be difficult to assess in more fluid areas, such as making a work environment supportive of people of all ages.[173] It is also arguably contrary to one of the key aims of positive duties, which is to promote organisational problem-solving:

> the whole point is that you're supposed to have a structural thinking about it and, with all due respect, it's very difficult to order someone to have a structural thinking about something. … The purpose of the legislation is to force employers to consider these matters and have an active work, and it's difficult to force people to have an active work without telling them what they should be doing, which we don't have the right to do. So, there's a little bit of a catch-22 there.[174]

That said, enforcement of the active measures requirements can work hand-in-hand with supervision of the general prohibition of discrimination; if organisations lack the processes to undertake active measures, they are also at risk of infringing the stricter prohibitions against discrimination.[175]

Further, trade unions may appreciate the fluidity of the active measures requirements, and the emphasis on cooperation in determining active measures work, which is more in keeping with the focus on negotiation in Swedish labour law:

> what we have been saying is that we want more of this sort of semi-mandatoriness [sic], which we have got now, more possibilities – especially this active measure, negotiate active measures, that's what we want and now we have that.[176]

The challenge going forward, then, is to make active measures 'part of the ordinary systems of negotiation'.[177] Thus, while enforcement by the DO might be difficult, the breadth and flexibility of the active measures requirements may lend them to action and enforcement by trade unions, providing a way for trade unions to better engage with equality law.

(iv) Gaps in enforcement

What this discussion shows, then, is that there are critical gaps in enforcement for age discrimination law in Sweden. While the Swedish 'corporatist' model has moved beyond individual enforcement, collective and agency enforcement mechanisms are rarely used. Very few cases are brought by the DO or by trade unions.[178] There is an 'ambiguity' as to who is responsible for the enforcement of discrimination law in the Swedish context,[179] and a general lack of interest in age equality.[180] Further, as few cases are brought, important issues have not been clarified or tested in case law.[181]

[171] Sw2.
[172] Sw2.
[173] Sw2.
[174] Sw2.
[175] Sw2.
[176] Sw3.
[177] Sw3.
[178] Lappalainen, above n 64, pp 110–11.
[179] Sw3.
[180] Sw4.
[181] Sw4.

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If the DO, trade union or other non-profit organisation are unable or unwilling to bring a claim, individuals face substantial barriers in enforcing their rights, including the risks of adverse costs orders;[182] costs typically follow the event. As Carlson has mapped, costs can significantly outstrip the damages awarded.[183] Individuals left without the support of a trade union or the DO can take on significant financial risks in pursuing a claim:

> the employees represented by trade unions at the Labour Court, they are generally getting a very good legal representation, without huge economic risks. The ones not represented by trade unions, but [who] choose their own legal advice or lawyers, … we see a lot of cases where people are given bad legal advice, which costs them a hell of a lot of money. They lose their job, and they go to court to [challenge their] employers and they end up losing their job, and losing the case, and having to pay two, or three, or four hundred thousand Swedish kronor [in costs][184] … I'm sitting there saying, 'You should have asked. I could have told you that it was impossible.' … [lawyers] are not risk-averse on behalf of them.[185]

This makes it nearly impossible for individuals to pursue their rights without support:

> the system … is not conducive at all because of the costs and because of these things. … in reality what it means is that a great number of people will not get their matters to Court … these matters are extraordinarily difficult to bring to Court successfully. There is also a gap between what is perceived as discrimination, what is legally something you can determine as discrimination and what you can actually succeed with in Court [with] credibility and witnesses and all sorts of other stuff.[186]

It is likely, then, that many instances of discrimination simply go unaddressed.

3. Macro and micro perspectives on the effectiveness of enforcement

For individuals, then, it can be nearly impossible to pursue a discrimination claim in Sweden without the support of an institutional actor. The courts appear effectively inaccessible for those without the backing of the DO, a trade union or a local anti-discrimination bureau.

However, the accessibility of individual enforcement is not the only way to evaluate the effectiveness of legal systems. Malmberg posits that there are two different ways of measuring whether enforcement is 'effective'.[187] The first, 'micro', view considers whether individuals (with or without the assistance of regulators or trade unions) can enforce their rights.[188] This micro view is focused on the accessibility of enforcement mechanisms.

The second, 'macro' view considers 'how rules manifest in society as a whole'; that is, is equality achieved in practice?[189] For Malmberg, enforcement through trade unions or industrial relations approaches will often lead to high levels of compliance or macro effectiveness.[190] As one respondent noted,

[182]Lappalainen, above n 64, p 95.
[183]Carlson, above n 36 at 127–129.
[184]Approximately £32,000 at the time of writing.
[185]Sw1.
[186]Sw2.
[187]J Malmberg 'Enforcement of labour law' in B Hepple and B Veneziani (eds) *The Transformation of Labour Law in Europe: A Comparative Study of 15 Countries 1945–2004* (Hart Publishing, 2009) p 264.
[188]Ibid.
[189]Ibid. See also J Malmberg 'Effective enforcement of EC labour law: a comparative analysis of Community law requirements' (2004) 10 European Journal of Industrial Relations 219 at 223–224.
[190]Malmberg, above n 189, at 223.

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> the industrial relations approach … could be effective, from a macro perspective of enforcement, because … depending on how the industrial relations system works in different countries, there is better presence at the workplace to determine what's actually happening out there, making sure this is in line with the rules, and so on.[191]

However, an industrial relations approach does not always offer sufficient guarantees of individual rights to achieve micro effectiveness.[192] On the surface, this appears to be an apt description of the current enforcement of age discrimination law in Sweden.[193]

That said, it is unclear whether trade unions are adequately enforcing age discrimination law to achieve 'macro' effectiveness; indeed, the interviews conducted in this study seem to indicate that there is limited enforcement occurring at the local level. With strong and enduring age norms, a strong statutory agency – and strong agency action – is likely required to challenge the existing status quo.[194] Relying on the social partners to negotiate in a way that challenges age-normative standards will likely prove ineffective, particularly when those most affected by age discrimination are rarely 'core' workers.[195]

Given these concerns, in this Part I ask – is there evidence of 'macro' effectiveness of age discrimination law in Sweden? Or, rather, what evidence, if any, can we identify of macro effectiveness? Answering these questions is difficult, given the lack of relevant data collected by government and international bodies. This is a challenge for empirical legal research more generally and reflects our (de)valuing of legal data.[196]

However, there is some, limited, survey data that provides an indication of the macro effectiveness of age discrimination law and its enforcement in Sweden. In particular, if age discrimination law were being enforced effectively, we would expect to see:

- high rates of workforce participation for older workers;[197]
- high reported job quality for older workers;
- low reported rates of age discrimination at work; and
- high perceptions of equality law's effectiveness.

This raises a related question, though: who is our comparator, and what are 'high' and 'low' rates of these indicators? For this study, it makes sense to use the UK and Australia as the comparators (given they were the comparative jurisdictions under study); but, given this research has identified compelling problems with the enforcement of age discrimination law in those jurisdictions, achieving similar rates to jurisdictions with individual enforcement models may indicate enforcement problems. Age discrimination law in the UK and Australia has been generally ineffective at achieving workplace change;[198] thus, if the figures for Sweden are similar to those in the UK and Australia, enforcement mechanisms may be similarly ineffectual across the jurisdictions.

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[191]Sw1.

[192]Malmberg, above n 189, at 223.

[193]Another way of seeing these issues is to focus on the primary right – that is, the right not to be discriminated against; and the secondary right – that is, the right to reparations if the primary right is infringed: Sw2. The secondary right is only engaged if the primary right is not respected.

[194]Sw4.

[195]Sw4.

[196]A Blackham 'When law and data collide: the methodological challenge of conducting mixed methods research in law' (2022) 49(S1) Journal of Law & Society S87.

[197]Age discrimination law protects both older and younger workers; space prohibits consideration of the position of younger workers, but this is an important additional point of comparison when considering the effectiveness of age discrimination law.

[198]Blackham, above n 4, ch 1; A Blackham *Extending Working Life for Older Workers: Age Discrimination Law, Policy and Practice* (Hart Publishing, 2016).

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Table 4. Labour force participation rate (%), by sex, 55–64, 2010–21

		2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
Australia	Men	71.2	71.7	71.7	72.1	72.2	72.8	71.9	72.8	73.1	73.3	73.3	73.9
	Women	54.1	55.0	55.7	55.8	56.2	57.3	58.8	60.1	60.5	61.3	61.2	62.8
	All persons	62.6	63.3	63.6	63.8	64.0	64.9	65.2	66.3	66.7	67.2	67.1	68.2
Sweden	Men	79.4	80.1	81.0	81.8	81.7	82.0	82.6	83.3	84.8	84.2	85.5	85.2
	Women	70.4	72.3	73.1	73.5	75.2	75.7	76.9	77.9	78.7	79.0	79.6	79.9
	All persons	74.9	76.2	77.1	77.7	78.4	78.9	79.8	80.6	81.7	81.7	82.6	82.6
United Kingdom	Men	68.7	67.4	68.8	70.2	70.6	71.2	72.0	72.0	72.7	73.3	73.1	72.0
	Women	50.6	50.4	52.0	54.9	56.1	57.4	58.5	60.1	62.1	63.1	63.0	62.3
	All persons	59.5	58.7	60.2	62.4	63.2	64.2	65.1	65.9	67.3	68.1	67.9	67.1

Source: OECD Stat, 2022

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Table 5. Labour force participation rate (%), by sex, 15–64 and 55–64, 2019 and 2021

		2019			2021		
Country	Sex	15-64	55-64	Difference	15-64	55-64	Difference
Australia	Men	83.2	73.3	9.9	83.3	73.9	9.4
	Women	73.9	61.3	12.6	75.1	62.8	12.3
	All persons	78.5	67.2	11.3	79.1	68.2	10.9
Sweden	Men	84.6	84.2	0.4	84.9	85.2	(0.3)
	Women	81.1	79.0	2.1	80.8	79.9	0.9
	All persons	82.9	81.7	1.2	82.9	82.6	0.3
United Kingdom	Men	83.2	73.3	9.9	81.9	72.0	9.9
	Women	74.4	63.1	22.3	74.7	62.3	12.4
	All persons	78.8	68.1	10.7	78.2	67.1	11.1

Source: OECD Stat, 2022

In terms of the labour force participation rate for older workers (Table 4), Sweden significantly outperforms both Australia and the UK, for both men and women.

Perhaps, though, this simply reflects higher workforce participation rates in Sweden, across the life course? Table 5 therefore compares workforce participation rates across the life course (ages 15–64) with participation rates for those aged 55–64, at two times periods (prior to the Covid-19 pandemic, and during/after). While workforce participation rates are higher in Sweden for the general workforce, there is also significantly less disparity between the rates of participation for all ages, and those for older workers in Sweden. Sweden is significantly outperforming Australia and the UK in the employment of older workers.

Further, job strain among older workers in Sweden appears far less common than in Australia or the UK (Table 6). Older workers in Sweden are far more likely to experience workplace autonomy. Thus, it is not just that workforce participation rates are high: older workers in Sweden likely also experience better job quality than those in the UK and Australia.

Strong workforce participation rates and high job quality in Sweden may reflect stronger employment protection generally, not the effectiveness of age discrimination law.[199] Our attention must therefore turn to discrimination law specifically. EU surveys have found that the UK and Sweden perform similarly in relation to reports of age discrimination. In the 2019 *Special Eurobarometer 493: Discrimination in the EU*, for example, age discrimination was perceived as being less common in Sweden than in the UK (Table 7).[200] The issue, of course, is that strong age norms may mean that respondents do not perceive age-based treatment as being discriminatory.

Indeed, when respondents were asked if they *personally* had felt they had been discriminated against or harassed on the basis of age (being perceived as old, or young) in the last 12 months,[201] this was reported by *double* the number of respondents in Sweden (10%, or 96 respondents) as in the UK (5%, or 50 respondents) (Table 8). In both jurisdictions, age discrimination was one of the most common forms of discrimination reported (eclipsed only by gender discrimination, at 11% and 6% of respondents in Sweden and the UK respectively).

[199]Indeed, respondents thought that age-based practices might increase older worker's job security and access to training: the last-in, first-out rule, for example, may encourage (or force) employers to train and upskill their older workers, as they cannot simply be made redundant: Sw3.

[200]QC1.5 For each of the following types of discrimination, could you please tell me whether, in your opinion, it is very widespread, fairly widespread, fairly rare or very rare in (OUR COUNTRY)? Discrimination on the basis of… Being perceived as too old or too young.

[201]QC2 In the past 12 months have you personally felt discriminated against or experienced harassment on one or more of the following grounds? Please tell me all that apply.

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Table 6. Job strain (%) and job strain indicators (%), 50–64, 2015

		Job Strain					
		High level of job demands			Low level of job resources		
	Job Strain	Physical health risk factors	Long working hours	Inflexibility of working hours	Work autonomy and learning opportunities	Training and learning	Opportunity for career advancement
Australia	25.14	29.66	13.77	26.73	23.06	49.54	13.61
Sweden	18.03	29.72	2.37	27.00	55.22	66.06	7.47
United Kingdom	20.61	30.55	5.98	30.55	25.49	68.74	10.83

Source: OECD Stat, 2022, OECD calculations from European Working Conditions Surveys (EWCSs) and International Social Survey Programme (ISSP)

Table 7. Perceived frequency of age discrimination, *Special Eurobarometer 493: Discrimination in the EU (2019)*

	UE28 EU28	UE28-UK EU28-UK	SE	UK
Total respondents	27438	26416	1008	1022
Very widespread	2726	2363	86	174
	10%	*9%*	*8%*	*17%*
Fairly widespread	8163	7716	345	344
	30%	*29%*	*34%*	*34%*
Fairly rare	8856	8598	381	310
	32%	*32%*	*38%*	*30%*
Very rare	6162	6244	171	143
	22%	*24%*	*17%*	*14%*
Non-existent (spontaneous)	483	506	9	7
	2%	*2%*	*1%*	*1%*
Don't know	1048	989	15	45
	4%	*4%*	*2%*	*4%*
Total 'Widespread'	10889	10079	431	518
	40%	*38%*	*42%*	*51%*
Total 'Rare'	15018	14842	552	453
	54%	*56%*	*55%*	*44%*

Table 8. Personal experiences of age discrimination, last 12 months, *Special Eurobarometer 493: Discrimination in the EU (2019)*

	UE28 EU28	UE28-UK EU28-UK	SE	UK
Total respondents	27438	26416	1008	1022
Age (being perceived as old, or young)	1157	1090	96	50
	4%	*4%*	*10%*	*5%*
Total 'Has felt discriminated' (all grounds)	4550	4216	259	216
	17%	*16%*	*26%*	*21%*

That said, this may simply reflect the demographics of respondents in each jurisdiction: the Swedish sample was significantly older than respondents in the UK (Table 9). This may distort the reported responses, assuming older respondents are more likely to experience (or recognise) age discrimination.

Importantly, though, when respondents were asked whether efforts to fight discrimination in their jurisdiction were effective,[202] UK respondents were more likely to see efforts as effective than

[202] QC7 Using a scale from 1 to 10, please tell me if you think that the efforts made in (OUR COUNTRY) to fight all forms of discrimination are effective. '1' means you consider that these efforts are "not at all effective", and '10' that these efforts are "very effective".

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Table 9. Age of respondents, SE and UK, *Special Eurobarometer 493: Discrimination in the EU (2019)*

	SE	UK
TOTAL	1008	1022
15–24	77	159
	8%	*16%*
25–39	241	246
	24%	*24%*
40–54	252	256
	25%	*25%*
55+	438	361
	43%	*35%*
Average	51.4	47.0

Table 10. Perceptions of effectiveness of efforts to fight discrimination, SE and UK, *Special Eurobarometer 493: Discrimination in the EU (2019)*

	UE28 EU28	UE28-UK EU28-UK	SE	UK
Total respondents	27438	26416	1008	1022
Total 'Not effective'	7697	7630	310	226
	28%	*29%*	*31%*	*22%*
Total 'Moderately effective'	9756	9470	373	342
	36%	*36%*	*37%*	*34%*
Total 'Effective'	7257	6587	287	382
	26%	*25%*	*28%*	*37%*
No efforts are made in our country (spontaneous)	923	1012	1	0
	3%	*4%*	-	-
Don't know	1805	1717	36	73
	7%	*6%*	*4%*	*7%*
Average	5.3	5.2	5.2	5.8

respondents in Sweden (Table 10). This may indicate, then, that there is scope to do more to achieve both micro and macro effectiveness of age discrimination law in Sweden.

Conclusion: the future of the Swedish model

Individual enforcement of discrimination law is inherently problematic. Few complaints are likely to be raised; even fewer will be successful in courts or tribunals. There is much to be learnt from the Swedish model for countries with 'privatised' enforcement models, like the UK. In particular, there are compelling lessons for the UK around transparency, moving beyond complaints to set statutory agency priorities, and expanding the role of trade unions and collective action to advance equality.

It appears, though, that the Swedish corporatist model, which severely curtails individual access to courts and tribunals, has fundamental limitations for achieving systemic change, particularly in an

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area like age discrimination law. The social ambivalence to age equality in Sweden makes reliance on collective negotiation a fraught path for achieving social change.[203] Age discrimination law 'collides' with accepted social values like seniority;[204] this goes to the heart of how Swedish society sees fairness and equality: 'in due time, you get your share. … seniority is … this kind of idea [of] what is just. Everybody gets [a share] in due time, and a huge part of society is based on such ideas'.[205] Thus, the 67-year rule (as it then was) is an accepted feature of the labour market.[206] The ability to retire is a point of pride[207] and a success for the welfare state; people needing to work into older age is, conversely, a failure of the welfare state.

This social acceptance of age discrimination may explain why there is a general lack of interest in age discrimination law in Sweden:[208] age discrimination is not a priority for statutory regulators or the social partners; there is generally little consideration of age discrimination.[209] This is likely to raise further problems in the implementation of active measures requirements; age equality is unlikely to be at the forefront of organisational change processes.

Gaps are evident, too, in the way equality law is framed; the remedies and sanctions that can be imposed under equality law do not support or enhance a focus on systemic, collective enforcement. At the same time, though, Swedish discrimination law is firmly constrained by EU law, the framing of which was influenced by discrimination law in the US and UK.[210] The focus on individual enforcement in EU law[211] is an awkward fit with the Swedish model of industrial relations. It is unsurprising, then, that these issues of enforcement have emerged in practice. There is seen to be little that can be done to amend Swedish discrimination law within the confines of EU law.[212] Our focus, then, should turn to how these mechanisms are being used in practice.

Improving the effectiveness of age discrimination law in Sweden therefore requires grappling with perceived tensions between 'fixed' and 'rigid' discrimination laws and a tradition of collective negotiation. Individual discrimination rights and collective action do not need to be in conflict with each other. As Bogg has argued, while '"individualism" and "collectivism" can seem to be locked in a kind of zero-sum game for supremacy',[213] the reality is more complex.[214] Indeed, strong legal regimes tend to have *complementary* individual and collective legal protections,[215] including in relation to age discrimination law.[216] There is scope, then, to use individual discrimination rights to strengthen collective enforcement, and vice versa.[217] This potential has not yet been realised in the Swedish context.

It is likely, too, that increasing retirement ages – and extending the 67-year rule to become the 69-year rule – may lead to higher numbers of age discrimination claims and disputes into the future[218] and a renewed focus on age discrimination law. Employers may be more inclined to challenge workers

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[203]Sw4.

[204]Sw1.

[205]Sw1.

[206]Sw2.

[207]Sw2.

[208]Sw4.

[209]Sw3.

[210]Though this influence goes both ways: Fredman, above n 170, p 43.

[211]Malmberg, above n 189, at 225.

[212]Sw3. Though Sweden could choose to legislate beyond the 'floor' of EU directives.

[213]A Bogg '"Individualism" and "collectivism" in collective labour law' (2017) 46 Industrial Law Journal 72 at 73.

[214]Blackham, above n 4, ch 9.

[215]Bogg, above n 213 at 100–101.

[216]M Harcourt et al 'Do unions affect employer compliance with the law? New Zealand evidence for age discrimination' (2004) 42 British Journal of Industrial Relations 527.

[217]EJ Heery 'Debating employment law: responses to juridification' in PR Blyton et al (eds) *Reassessing the Employment Relationship* (Palgrave Macmillan, 2010) pp 89–90. That said, this complementarity can be undermined by the legal framework: L Dickens 'The road is long: thirty years of equality legislation in Britain' (2007) 45 British Journal of Industrial Relations 463 at 483.

[218]Sw3.

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on performance grounds if they are expected to engage a worker until the age of 69.[219] Growth in precarious, part-time, and insecure employment arrangements might also challenge age normative standards,[220] though Sweden is not there yet.[221] There are broader concerns, too, as to how long the Swedish system can endure; even Sweden is seeing declining union density in some areas. As one respondent noted, 'the power of the trade union density is the key. If it falls much more, somewhere down the line it becomes problematic'.[222] There is a need to be attuned to how these issues continue to evolve over time.

Overall, then, individual rights and individual enforcement remain important complements to other regulatory tools, particularly in jurisdictions with strong enduring age norms. Abandoning or severely restricting individual enforcement is unlikely to support either the macro or micro effectiveness of age discrimination law. While over-reliance on individual claims is highly problematic, excluding or preventing individual claiming can be just as damaging. There is thus a need to better enable individual claims in the Swedish system, through a review of costs orders, conciliation options, the Labour Court's approach to the burden of proof, and broader provision of legal aid. Individual enforcement can become a critical tool for advancing the effectiveness of age discrimination law, and can be mutually reinforcing and supportive of other, non-individualised approaches.[223] Our challenge going forward is to strengthen administrative, judicial, individual and collective approaches to enforcement, so they can work together to advance age equality.

[219]Sw3.

[220]J Fudge and A Zbyszewska 'An intersectional approach to age discrimination in the European Union: bridging dignity and distribution?' in A Numhauser-Henning and M Rönnmar (eds) *Age Discrimination and Labour Law: Comparative and Conceptual Perspectives in the EU and Beyond* (Kluwer Law International, 2015) p 146.

[221]Sw4.

[222]Sw1.

[223]Dickens, above n 217 at 481.

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