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# Evaluating Claims for Workplace Discrimination: A Five-Stage Model

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## Abstract

Psychological assessment for workplace discrimination is often complex, as each complainant has a particular personal history and context, including different coping skills, psychopathologies and unique life circumstances. A five-stage model based on best practice guidelines can assist forensic assessment practitioners in determining compensatory damages for psychological or psychiatric injuries and in formulating defensible, evidence-based reports that meet legal standards. The model incorporates legally relevant theories of causation to guide the evaluating psychologist to discern the nature and extent of any injury, and whether discrimination was the likely proximate cause. The focus not on diagnosis but on functional performance (cognitive, affective, interpersonal and physical) in four key contexts: activities of daily living, relationships, the workplace and hedonic pursuits. Assessment compares functioning in the complainant's life up until the "day before" the alleged discrimination event with the complainant's condition at the time of the alleged discrimination, and any symptoms or reactions experienced subsequently. The five-stage model provides a systematic method to examine workplace discrimination compensatory damages claims and increase the comprehensiveness and accuracy of the forensic evaluation.

## Introduction

Despite protections encompassed in several anti-discrimination laws, many workers in Australia are subjected to acts of discrimination due to their age, race, sex, disability, and other protected attributes. According to the Anti-Discrimination Board's 2007-2008 annual report, over 1000 formal complaints were lodged in this period, the most common of which alleged discrimination on the grounds of sex ( $n = 242$ , 21.2%), disability ( $n = 239$ , 20.9%) and race ( $n = 211$ , 18.4%). Although a slight decrease in complaints on the grounds of race was observed (2007-08: 211 vs. 2006-07: 240), complaints on the grounds of disability (2007-08: 239 vs. 2006-07: 213) and sex (including

sexual harassment) (2007-08: 242 vs. 2006-07: 240) increased from the previous year ([www.lawlink.nsw.gov.au](http://www.lawlink.nsw.gov.au)).

In addition to formal complaints about discriminatory acts, the Anti-Discrimination Board's Enquiry and Liaison Officers received a substantial number (2007-08:  $N = 7539$ , an average of 30 calls per day) of enquiries about what entails an act of discrimination. In 2007-08 the most common enquiries were about discrimination based on sex (15.9%) and race (12.2%). In line with complaints about specific types of discrimination, the Board reported an increase (4.8%) in the number of enquiries received from the previous year (2006-07:  $N = 7194$ ) ([www.lawlink.nsw.gov.au](http://www.lawlink.nsw.gov.au)). This increase in enquiries and complaints suggested that many Australians have difficulty in interpreting and utilising the legislation that is presently in place to protect them from discriminatory acts.

Currently, Australia has four federal anti-discrimination laws designed to protect workers from acts of discrimination in their employment on the basis of their race, colour, sex, religion, political opinion, national extraction, social origin, age, medical record, criminal record, marital status, impairment, disability, nationality, and/or sexual preference. These Acts are: (1) *Age Discrimination Act 2004* (Cth); (2) *Disability Discrimination Act 1992*; (3) *Racial Discrimination Act 1975*; and (4) *Sex Discrimination Act 1984*. The *Age Discrimination Act 2004* (Cth) is designed to protect both the young and old from being discriminated against on the basis of their age. The *Disability Discrimination Act 1992* legislates that it is unlawful to discriminate an employee on the basis of physical, intellectual, psychiatric, sensory, neurological or learning disabilities. It also protects individuals from being discriminated against due to physical disfigurement; disorders, illness or diseases that affect thought processes, perceptions of reality, emotions or judgement, or results in disturbed behaviours; and/or the presence in body of organisms causing disease or

illness. The *Racial Discrimination Act 1975* states that it is unlawful to discriminate against someone on the basis of their race, colour, descent or national or ethnic origin. The *Sex Discrimination Act 1984* protects workers from being discriminated due to their sex, marital status, pregnancy and/or their family responsibilities. All acts of discrimination covered by these laws are prosecutable in the Federal Court of Australia or the Federal Magistrates Court ([www.hreoc.gov.au](http://www.hreoc.gov.au)).

In April 2010, Australia's Attorney-General, Robert McClelland, and the Federal Government's Minister for Finance and Deregulation, Lindsay Tanner, in a media release, announced the Federal government's plan to consolidate all four of the above-mentioned anti-discrimination laws into one consolidated Act. The purpose of this reform is to "address current inconsistencies and make the system more user-friendly by clarifying relevant rights and obligations." According to Mr. McClelland "anti-discrimination law should be clear and easy to understand because people shouldn't need expensive legal advice to know their rights and obligations." Furthermore, it is proposed that the creation of a single act will "create a more effective system by ensuring adequate protections from unlawful discrimination." In order to enhance the efficacy of the new legislation the Government further announced plans to consult the opinions and advice of key stakeholders and the public as they develop the draft legislation ([www.ag.gov.au](http://www.ag.gov.au)).

In anticipation of this consultation process, a group of discrimination law experts who "are committed to ensuring that Australian law promotes equality, and guarantees effective protection against discrimination" prepared a report comprised of a series of recommendations, underpinned by both academic scholarship and practical experience, to assist those involved in the consultation process "ensure that a consolidated Act will best serve a wide range of interests in achieving a fair Australian society." The 24 recommendations proposed by the group include the addition of other attributes to those classified as 'protected' under anti-discrimination law (e.g., sexuality and socio-economic status), streamlining the definition of discrimination by no longer distinguishing between direct and indirect forms of discrimination, and placing the burden of proof that the alleged act of discrimination was justified on the respondent (<http://sydney.edu.au/law>). They further recommended that any new anti-discrimination legislation should include guidance to triers of fact or others responsible for assessing compensation. Specifically, the anti-discrimination experts recommended that the new Act "require courts to consider all adverse effects on a successful complainant, past and future, in assessing compensation for having been subject to

discrimination" (p. 16). Forensic psychology has much to offer in facilitating this determination.

### **Role of Evaluating Psychologists in Anti-Discrimination Cases**

In a civil legal context, psychologists are often asked to evaluate a complainant who seeks compensation for non-pecuniary injuries allegedly caused by a defendant employer. The legal role of evaluators is to provide their opinion on whether the conduct of the defendant employer was a significant contributor to the injury claimed and whether the injury would not have been sustained if the alleged act of discrimination did not occur. The three central concerns of the evaluator are (1) injury: whether injuries were sustained; (2) severity: the extent of those injuries; and (3) causation: whether the employer was the proximate cause of those injuries. In order to do this efficiently, the evaluator should attempt to address five key questions: (1) is there a measureable injury; (2) how severe is that injury; (3) how to determine to what extent the claimed injuries were caused by pre-existing or coincident sources other than the alleged discrimination; (4) how to measure the extent to which any injury arose as a consequence of retaliation or victimisation of the complainant at work; and (5) how to assess injury stemming from the litigation process itself (Goodman-Delahunty & Foote, 2011).

The process of establishing the presence, severity and causation of an injury is inherently complex as each complainant has his or her own personal history, with multiple potential causes of harm, different levels of coping skills, and ongoing psychopathology, all of which may influence the complainant's reactions. Consequently, the expert evaluator must gain an in depth understanding of the complainant's life both before and after the alleged incident. In addition to examining details of the alleged incident and the context in which it occurred, the evaluator must also gain an appreciation of other risk factors or non-discriminatory events that may have contributed to the nature and severity of the complainant's responses to the alleged incident. Specifically, the expert must (a) determine if the complainant's alleged injuries were sustained by an event(s) other than the alleged discrimination; (b) determine whether the complainant had a pre-existing condition or ongoing problem that may have increased his or her vulnerability or risk for injury or more severe harm (e.g., child abuse; previous workplace harassment); (c) determine whether the presence of an ongoing condition possessed by the complainant exacerbated the harm incurred; and (d) determine whether the complainant had their social support system eroded as a result of the alleged incident.

## **The Need for a Model**

Given the complex process that experts should undertake in order to fully evaluate complainants' cases and reach objective conclusions regarding appropriate compensation it would be advantageous if experts had a systematic and comprehensive process to guide their evaluation. Goodman-Delahunty and Foote (2011) propose a Five-Stage Model of data collection and analysis which can assist experts to collect a wide-breath of case-relevant data that will aid them to objectively assess both the most plausible cause of the harm alleged by the complainant and the severity of the injury sustained by the complainant. Various models and procedural approaches have been developed by psychologists to assist experts in evaluating the scope and severity of harm incurred by claimants (e.g., Cocchiarella & Andersson, 2001; Greenberg, Otto, & Long, 2003; Wilson & Moran, 2004; Young, Kane, & Nicholson, 2007). However, only Goodman-Delahunty and Foote's model presents a comprehensive guide to assist psychologists in determining the most plausible cause of harm; specifically whether the defendant's discriminatory actions were causally related to the complainant's injuries. In order to assist evaluators to focus on objective rather than subjective methods of data collection, Goodman-Delahunty and Foote's Five-Stage Model is divided into three key temporal phases: assessment of the complainant's condition (1) before the alleged harassment; (2) during the alleged events; and (3) then subsequent to those events. The model also addresses issues related to possible malingering and takes into account the future mental health of the complainant, which is critical in the assessment of compensation. Together these unique strengths of the model aid expert evaluators to prepare objective and comprehensive assessments which meet the legal requirements of the court (Goodman-Delahunty & Foote, 2011).

### **Forms of Reasoning**

A key feature of the Five-Stage Model is that it brings together knowledge from academic research, psychological practice, and the law through hypothesis testing. The model encourages experts to use deductive, inductive and abductive reasoning in their determination of the most likely cause of harm. First, the evaluator should employ deductive reasoning to develop hypotheses regarding the authenticity of the complainant's alleged injuries. Through the process of deduction, the expert can use scientific research findings and previous knowledge about similar cases to develop hypotheses about the validity of the complainant's injuries on the basis of what is known about documented reactions to similar discriminatory acts. Although the participants involved in previous

research or complainants in previous cases may not have been exposed to the exact conditions as the complainant being evaluated, a base knowledge of injuries commonly sustained in similar circumstances, by individuals with similar backgrounds, can assist the expert to determine whether the reactions of the complainant are in line with similar cases or whether the complainant may be exaggerating their injuries (malingering) (Goodman-Delahunty & Foote, 2011). This knowledge can also provide an understanding of the "natural history" or usual course of these reactions (Foote & Larue, 2012).

Second, the evaluator should use inductive reasoning to draw conclusions about the complainant's claims. Drawing on the quantitative and qualitative evidence collected from the complainant and other case-relevant sources, the expert can use inductive reasoning to test specific theories and hypotheses about the complainant's case. The evaluator can then draw objective conclusions about the complainant's case that can aid in the assessment of compensation (Goodman-Delahunty & Foote, 2012).

Finally, the expert should use abductive reasoning when the hypotheses developed through deductive and inductive reasoning conflict. It is very rare for all of the information collected from multiple case-relevant sources to point to only one probable conclusion. Consequently, the expert must examine all of the available information and objectively determine the most likely conclusion that best fits the available information (Stiles, 2009). The use of the Five Stage Model facilitates data collection, data integration, hypothesis testing, and the formation of defensible conclusions. Throughout this process, the evaluator assesses alternative sources of causation, and the degree to which symptoms or problems arise from non-discrimination sources.

### **The Specific Stages of the Five-Stage Model**

In order to fully evaluate the complainant's claims, it is critical that the expert evaluate and develop an understanding of how aspects of the complainant, the defendant and the workplace where the alleged incident(s) occurred interacted and possibly contributed to the complainant's allegations and claims of injury. It is also critical that the expert evaluate possible alternative causes of the alleged injury (Goodman-Delahunty & Foote, 2009). The Five-Stage Model presents evaluators with a step-by-step method to evaluate a complainant's injuries and prepare a defensible report which meets the legal requirements of the court and which can be used to assess compensation. Specifically, the model recommends that the evaluator conducts an investigation into: (1) the "day before" the alleged discriminatory incident; (2) events occurring at the time of the alleged incident; (3)

events occurring after the alleged incident; (4) the complainant's current status (at the time of the evaluation; and (5) future damages (Goodman-Delahunty & Foote, 2011).

### **Stage 1: Analysis of the “Day Before” the Alleged Discriminatory Incident**

The evaluator's first step should be to collect information on the psychological condition of the complainant prior to the alleged act(s) of discrimination. This information can be collected from both the complainant and collateral sources. Specifically, in addition to conducting a life-history interview with the complainant, the evaluator can conduct interviews with the complainant's family, friends, neighbours and colleagues. The evaluator should also collect case-relevant information from the complainant's medical, mental health, vocational and other records. It is important for the evaluator to collect information from a wide variety of sources in order to ensure the assessment of the complainant's condition is accurate and balanced, as research has shown that complainants may be at risk of exaggerating their previous well-being, a cognitive phenomenon known as hindsight bias (Goodman-Delahunty & Foote, 2011).

Assessment of the complainant's condition prior to the alleged incident is a critical component of the evaluation and compensation assessment process for three reasons. First, the evaluator must determine if a pre-existing condition, which has nothing to do with the alleged discrimination, can account for the complainant's symptoms or problems. Second, this information can assist the evaluator in determining whether the complainant's previous and/or ongoing condition(s) increased his or her vulnerability for harm or exacerbated his or her alleged injuries. This in line with the “eggshell skull” rule which, in the US legal context specifies that the wrongdoer is responsible for all of the damage incurred by the complainant even if the damage incurred was exacerbated by previous conditions and the unusually high level of damage incurred was not foreseeable (Goodman-Delahunty & Foote, 2009). Third, the complainant's previous level of functioning can serve as a baseline for comparison to the complainant's current level of functioning (at the time of evaluation, after the alleged incident) which will ultimately be used by the courts to determine the nature and severity of damages sustained by the complainant as a result of the discrimination (Goodman-Delahunty & Foote, 2011).

### **Stage 2: Analysis of the Complainant at the Time of the Alleged Discrimination**

In the second stage of the investigative process, the evaluator should examine other sources of stress at the time of the harassment. This is necessary to determine

if other common stressors, such as family problems, financial setbacks, deaths of loved ones or non-discrimination-based job problems caused the complainant's symptoms. Goodman-Delahunty and Foote (2011) recommend that evaluators compile a chronological sequence of both on- and off-the-job events and stressors to assist them in determining which of the injuries sustained by the complainant were the result of the behaviour of the defendant rather than from concurrent events that were unrelated to the alleged incident. In order to develop this timeline, it is important that the evaluator gather information from many sources including the complainant and collateral interviews, as well as more objective sources, such as employment and medical records.

### **Stage 3: Analysis of the Complainant after the Alleged Discrimination**

In the third stage of their evaluation, the psychologist must gather information about the reactions and symptoms of the complainant following the alleged discriminatory events. This may include information about retaliation by the employer following the complaint, as well as questions regarding constructive discharge (when the worker quits on grounds that no reasonable person could work under such conditions). Although not always possible, collateral interviews with co-workers can provide information about the complainant's state as well as workplace dynamics following the alleged events. Other non-discrimination related life events, such as those noted earlier, can also prompt emotional reactions, and must be ruled out as causation for the claimed damages.

### **Stage 4: The Complainant's Current Status**

The evaluator is usually in no position to, and is therefore not asked to determine whether or not the alleged discrimination occurred. Rather, determination of the complainant's current symptom pattern and the cause of those problems are the central aims of the evaluator's task. Specifically, the evaluator must: (a) clearly document the symptoms being displayed by the complainant (physical, social, psychological and work-specific); (b) document any functional impairments stemming from the symptoms that are affecting the complainant's work and/or social life; (c) determine the most probable cause of the symptoms; and (d) determine whether the alleged discriminatory act exacerbated any pre-existing condition suffered by the complainant. The determination of the impairment of complainant's functions is critical, as this information is the basis for the assessment of damages (Goodman-Delahunty & Foote, 2011). It is also important for the evaluator to note that “the presence of a diagnosis is not as important as the changes in functions sustained by

the plaintiff as a result of the alleged discrimination” (Foote & Goodman-Delahunty, 36, 2005).

The opinion of the expert evaluator should always be based on reliable and valid scientific evidence and theory (*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 1993; *Kumho Tire Co. v. Carmichael*, 1999). Consequently, when assessing the symptoms of the complainant and the impact that the symptoms may have had on the complainant, it is critical that the evaluator uses objective tools that are accepted within the research community as being valid and reliable (Goodman-Delahunty & Foote, 2009). For example, both the commonly employed Minnesota Multiphasic Personality Inventory-2 (MMPI-2) (Greene, 2011) and the Personality Assessment Inventory (Morey, 2007) are recognised as providing reliable information when administered and interpreted by a skilled evaluator.

### Stage 5: Future Damages Sustained by the Complainant

Finally, the evaluator may sometimes be asked to make projections about the likelihood that the complainant’s symptoms will improve or deteriorate and to assess future compensable damages that may be incurred by the complainant. For example, the evaluator may be asked to assess the cost of any future psychological treatment or practical assistance that the complainant may require as a result of the discrimination and whether the complainant should be compensated for any loss of future work time as a consequence of the symptoms suffered on the complainant’s capacity to work in the future. The evaluator may also be asked to determine future pain and suffering that may be ongoing (Goodman-Delahunty & Foote, 2012). Table 1 displays a summary of the Five-Stage Model.

Table 1: *The Five-Stage Model*

Stage	Issue	Data
1	<b>Pre-existing conditions:</b> •Continuous/for later exacerbation •Vulnerability <b>Assess past:</b> affective, cognitive, interpersonal and physiological symptoms	<b>Functional analysis</b> •Activities of daily life •Relationships •Workplace functioning •Hedonic injuries
2	<b>Rule-out:</b> Work stress, family problems, financial	<b>Injury onset</b> Natural history of disorder from discrimination

difficulties, illness Co-morbidity

3	<b>Rule-out:</b> Financial change not caused by discrimination, family problems, litigation stress	<b>Subsequent injuries</b> Onset of injuries caused by reprisal Fallout from wrongful discharge
4	<b>Consequences of discrimination?</b> <b>Assess current:</b> affective, cognitive, interpersonal and physiological symptoms <b>Rule out:</b> malingering/exaggeration •Exacerbation of pre-existing conditions •Remainder attributable to discrimination	<b>Functional analysis</b> • Activities of daily life •Relationships •Workplace functioning •Hedonic injuries
5		Future treatment needs Projected loss of work capacity

### Conclusion

The Five-Stage Model provides an assessment strategy that can assist psychologists in determining the most likely cause of a complainant’s injuries by ensuring they thoroughly take into consideration all possible causes of the harm that occurred prior, during and after the alleged discriminatory act(s). By using scientifically reliable investigative techniques to garner the widest breadth of case-relevant facts possible and logical reasoning to establish the most plausible cause of the injury, psychologists can better assist courts in awarding appropriate compensation.

In the past decade, many Australian mental health professionals supported proposals to end compensation for psychological injury, except where it was proved to be "permanent" or was associated with a physical trauma such as homicide or sexual assault. This approach was particularly detrimental to victims of workplace discrimination whose injuries are rarely permanent or associated with homicide or sexual assault (Goodman-Delahunty & Foote, 2012). Criteria for compensation have been driven more by economically motivated concerns of “floodgates” than

by empirical evidence or systematic evaluation of victim injuries. The former legislative focus on establishing a set diagnosis as a prerequisite to recovery of compensation was counterproductive. Sadly, mental health professionals have espoused popular cynical views of victims as persons motivated by financial gain or “green poulitces,” by referring to their conditions as “pre-financial gain stress disorder,” endorsing the notion that psychological injuries are feigned and that victims “get well just after they get their cheque” (Hills, 1998). These attitudes foster popular cultural stereotypes of victims as untrustworthy, making the context for genuinely injured claimants hostile and antitherapeutic.

The Five-Stage Model guides practitioners to focus on functional analyses that are more useful to courts than formal diagnoses, namely affective, cognitive, interpersonal and physiological symptoms. A rigorous evaluation includes steps to identify and/or rule out malingering. By using this model, any compensable loss of amenities is determined by systematically comparing plaintiff functionality before and after the alleged injury in four key contexts: activities of daily living, workplace functioning, relationships and hedonic pursuits.

On average, monetary awards of compensation for psychological injuries caused by workplace discrimination have typically been very modest, with very few awards approaching the statutory caps or maxima. The Australian Federal government’s proposed plan to integrate the four, currently independent, anti-discrimination laws into one consolidated Act presents an opportunity for psychologists who assist in the assessment of complainant cases to evaluate their assessment methodology. In order to ensure that prevailing complainants are fully compensated for the adverse effects caused by discriminatory acts in the workplace it is essential that the court or tribunal take into consideration, with the assistance of the evaluating psychologist, the breadth of the negative effects suffered, both past and future.

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