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Survey studies in ADR

Dispute resolution in the changing shadow of the law: a study of parties' views on the conciliation process in federal anti-discrimination law

Tracey Raymond and Sofie Georgalis

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Background

Human rights and anti-discrimination law in Australia, as in many other countries, provides individuals and groups with the right to lodge complaints with an administrative agency which has responsibility for the investigation and conciliation of such complaints. The conciliation process can be said to be undertaken in the 'shadow of the law', as complaints are located in a legislative framework with the option of complaints being heard by an administrative tribunal or court if conciliation is not appropriate or is unsuccessful.¹

The Australian Human Rights and Equal Opportunity Commission (HREOC) is empowered to investigate and conciliate complaints under federal human rights and anti-discrimination law. Prior to 13 April 2000, HREOC was also empowered to hear and determine complaints of unlawful discrimination that could not be conciliated or were considered inappropriate for conciliation. The new complaint determination regime that

came into effect in April 2000 now provides for such complaints to be terminated, with complainants then having the right to make an application for their allegations to be heard and determined by the Federal Court or Federal Magistrates Service.² These procedural changes were introduced to address problems in relation to the enforceability of Commission decisions as identified by the High Court in 1995.³

While conciliation is not required to be undertaken with every complaint, it is a central component of HREOC's complaint work.⁴ The essential characteristics of HREOC's conciliation practice can be summarised as follows.⁵ The same HREOC officer will generally handle both the investigation and conciliation of a complaint.⁶ While complaint resolution can occur at any stage of the process and can be compulsory in nature, conciliation generally takes place on conclusion of an investigation and is a voluntary process.

A complaint will proceed to conciliation if there is no basis for recommending that the complaint be terminated, for example, on the ground that it is 'lacking in substance'. In attempting to resolve complaints, HREOC utilises a range

of methods including face-to-face conferencing, shuttle conferencing, tele-conferencing and shuttle telephone negotiations.⁷ In facilitating the conciliation process, HREOC officers are seen to have a legitimate role to intervene to ensure a fair process for both parties, to provide information on a range of possible settlement options and to ensure any agreement does not contravene the intent and purpose of the legislation. HREOC is not a party to conciliation agreements and HREOC does not have a statutory role to monitor compliance with settlement terms.⁸

Debate about ADR in anti-discrimination law

The use of ADR in the context of the administration of anti-discrimination law has been the subject of debate. On one hand, in comparison with formal court-based determination processes, conciliation is seen as more efficient and cost effective, more accessible for disadvantaged sections of the community, better able to deal with the emotional and value laden content of discrimination disputes and better able to ensure party control over process and outcome.

Some writers have, however, drawn



attention to potential disadvantages of conciliation in this context. First, it has been argued that the private and confidential nature of conciliation settlements limits broader social change.⁹ Of particular relevance to this paper are concerns that the conciliation process operates to reinforce power imbalances to the detriment of complainants. Specifically, it has been argued that as complainants are likely to be less articulate, less assertive and have fewer emotional and financial resources than respondents, who are often government departments or private companies, they will be disadvantaged in a private dispute resolution process facilitated by a 'neutral third party conciliator'.¹⁰ Concern has also been expressed that the vulnerability of complainants may be exacerbated by a lack of information about the conciliation process and possible outcomes.¹¹

While the potential disadvantages of ADR in this context cannot be ignored, neither should they be overstated. Previous papers on HREOC's conciliation practice have highlighted developments which aim to address these concerns.¹² For example, reference has been made to HREOC's 'conciliation register'. This document, which is available on the Commission's website, contributes to informed participation in conciliation and broader awareness of conciliation issues through the provision of de-identified information about conciliated complaints. Additionally, writings on HREOC's conciliation practice describe a model prefaced on an understanding that power differentials between parties must be considered and responded to if process and outcomes are to be just and fair. This approach does not reject traditional notions of the 'neutral third party conciliator' but rather reflects more recent understandings of this concept whereby neutrality is seen as involving a requirement to act positively to maximise the involvement and control of both parties.¹³

Debate about the impact of the changing shadow of the law on HREOC's conciliation process

Concern about access and equity issues in the federal anti-discrimination

complaint process were specifically raised in the context of debate surrounding the changes to the complaint determination regime that came into effect on 13 April 2000. While the need for changes to ensure the enforceability of determinations under federal anti-discrimination law were generally acknowledged, sections of the community expressed concern that the move from a 'no costs' determination process before HREOC to a court-based 'cost follow the event'¹⁴ process would be detrimental to complainants.¹⁵ It was contended that as complainants generally have fewer legal and financial resources than respondents, they would have comparatively higher concerns about pursuing a matter to court and this would result in reluctance to bring complaints under federal law. Additionally, it was claimed that where complaints were made, complainants would have decreased bargaining power in conciliation and accordingly would be forced to accept lower outcomes at conciliation or withdraw their complaints.¹⁶ There was also apprehension that in light of the potential for subsequent court action, legal advocates would become more frequent players in the conciliation process causing an increase in the formality and adversarial nature of conciliation proceedings, thus negating accessibility benefits of ADR in this context.

There were, of course, possible alternative views about the potential impact of these procedural changes on HREOC's complaint process. For example, it could be argued that as historically only a small percentage of complaints ever proceeded to determination, the impact of these changes was likely to be minimal.¹⁷ Further, the benefits to complainants of a process which provides for enforceable determinations and the option to recover costs could be seen as leading to increased, rather than decreased use of federal complaint mechanisms. With respect to conciliation, the possibility of enforceable determinations and the fact that the new procedures provide complainants with access to a formal determination process regardless of the reason for termination, could be seen as providing incentives for respondents to settle complaints thus increasing

complainant bargaining power in conciliation.¹⁸ It is also noted that opinions on the issue of legal representation in the complaint process differ, with some academics and practitioners supporting the use of legal advocates given that the end result of the system has always been adversarial in nature.¹⁹

HREOC's research project

With reference to the abovementioned debate, and in light of the government's stated intention to review the impact of these legislative changes,²⁰ HREOC initiated a research project to examine the initial impact of changes to the complaint determination regime on HREOC's complaint handling function.

A component of this research project involved surveying parties who participated in conciliation in the calendar year after the commencement of the procedural changes (2001). In light of limited recent studies on conciliation in this context, HREOC utilised this survey to not only explore how the current complaint determination procedure impacts on decision making in the conciliation process but also to obtain broad information on parties' experiences of conciliation.

The following section of this paper will summarise the methodology and findings of the conciliation related survey and consider the picture this data provides of HREOC's conciliation practice, with reference to past and recent concerns about conciliation in this context. Reference will also be made to some specific findings of the broader research project. The full report of the research project is available on the HREOC website, as is an extended version of this paper, which includes a more detailed discussion of methodology and findings.²¹

Survey methodology

Four specific surveys were designed with the assistance of an external consultant. Some questions included a 5 point Likert-type scale with questions of both positive and negative direction. Other questions provided a series of answers from which parties could select more than one appropriate response. These questions also provided

for free text answers.²² Surveys were predominantly conducted by telephone interview and by a person employed specifically for this task.

Findings

Survey participants

There was an 80 per cent response rate for the survey component of the research project and a total of 459 conciliation related surveys were completed. Approximately the same number of complainants and respondents agreed to participate in the conciliation related surveys (231–228) and demographic data indicates that those who participated in the survey component of the research project are typical of the Commission's main client groups at this time.²³

Form of conciliation process

The majority of survey participants (63 per cent) participated in a face-to-face conciliation meeting. Thirty-six per cent participated in a telephone shuttle process and one per cent in a tele-conference. This information is of interest in light of previous claims by authors that HREOC rarely brings parties together for a conference.²⁴ Clearly a face-to-face conciliation process is the dominant form being utilised by HREOC in its present practice model.²⁵

Legal representation

The majority of participants (59 per cent) had no legal representation in the conciliation process and representation was more common for sex discrimination complaints.²⁶ This is consistent with findings of previous studies of conciliation in this context.²⁷ The reason for increased use of advocacy in sex discrimination matters is unclear but may be due to complainants' perceived need for support in dealing with such issues and/or increased willingness of lawyers to take on these matters in light of the more highly developed case law in this area.

The survey also found that complainants had higher levels of overall representation (that is both legal and non legal) than respondents (51 per cent–44 per cent) and complainants and respondents had the same level of legal representation (41 per cent). While it is

noted that access to legal advice and support for respondents may be hidden, in that government departments and large companies may have 'in-house' legal advice which is not formally disclosed as 'legal representation', the survey data does not indicate an obvious power differential between complainants and respondents due to increased respondent access to, and utilisation of, legal advocacy.

Where complaints were successfully resolved by conciliation, complainants had slightly lower levels of legal representation than respondents (35 per cent–41 per cent) but similar

levels of overall representation (46 per cent–45 per cent). Where matters were not resolved by conciliation, 61 per cent of complainants had some form of representation in contrast with 42 per cent of respondents. In these matters, complainants also had higher levels of legal representation than respondents (53 per cent–40 per cent). Legal representation was higher overall for matters that did not settle. Accordingly, this data does not support a link between legal representation and resolution.

Comparative statistical data obtained as part of the broader review project indicates that there has been a slight increase in the level of legal representation of complainants at the commencement of the complaint process since changes to the complaint determination regime.²⁸ This may be the result of increased complainant desire or perceived need to have legal representation in light of possible court determination and/or increased legal practitioner interest in taking on cases in this jurisdiction.²⁹

Feedback on the conciliator and conciliation process

Reported understanding of conciliation process

The vast majority of survey participants (95 per cent) indicated that they understood what was happening in the conciliation process. Reported understanding was higher where complaints were resolved and in these matters, complainants and respondents reported similar high levels of understanding (98 per cent–96 per cent). Where complaints were not resolved,



complainants reported a lower level of understanding of the process than respondents (85 per cent–98 per cent).

This high reported understanding of the conciliation process was not unexpected in light of HREOC's focus on providing parties with written and verbal information in preparation for conciliation and on ensuring parties have every opportunity to seek clarification and participate in the conciliation process. Of some concern is the lower level of reported understanding of the process by complainants where complaints did not settle. The reason for this is unclear from the data and this result is rather surprising in light of the fact that complainants had higher levels of representation in these matters.

Perceptions of conciliator bias

Very few survey participants (4 per cent) felt that the conciliator was biased against them. Where complaints were resolved, complainants and respondents had similar low levels of reported bias (2 per cent–3 per cent). Reported levels were slightly higher where complaints were not resolved (7 per cent–6 per cent).

These results are seen as very positive, particularly in light of the inherent nature of conciliation in this context whereby officers have a joint investigation/conciliation role, an advocacy role in relation to the legislation, and they are required to attend to power differentials between parties with a view to enabling substantive equality of process.³⁰ The data can be seen to alleviate concerns that a joint investigation/conciliation role will necessarily compromise the perceived impartiality of the conciliator.³¹ The data also supports the view that intervention to enable substantive equality of process, if done appropriately, does not necessarily lead to perceptions of bias.³²

Perceptions of the effectiveness of conciliator interventions

The majority of participants (73 per cent) felt that conciliator interventions during the process assisted parties reach, or attempt to reach, settlement and there was no

difference in ratings by complainants and respondents. Participants were more likely to see the conciliator's interventions as effective where the complaint was resolved by conciliation (78 per cent–62 per cent). The reason for this is unclear from the data but may be the result of a 'halo effect' where complaints were resolved.

Perception of control over settlement terms

Only a relatively small percentage of survey participants (9 per cent) felt that they were not given the opportunity to consider fully settlement proposals. This result is not unexpected in light of HREOC's practice of providing parties with a 'cooling off' period to consider proposals or opportunities for further shuttle negotiations, where this is considered necessary to ensure parties avoid hasty emotive conclusions to face-to-face negotiations.

Parties were more likely to agree that they did not have sufficient opportunity to fully consider settlement proposals where the matter was not resolved by conciliation (14 per cent–7 per cent) and overall more complainants than respondents felt that this was the case (12 per cent–7 per cent). The reason for this variation is unclear from survey data. It is noted that the usefulness of this data in assessing conciliator performance is limited as the data does not differentiate between constraints on consideration of settlement terms imposed by the other party, the party's own advocate or the conciliator.

Satisfaction with settlement terms

Where complaints did settle, the vast majority of survey participants (82 per cent) reported that they were satisfied with settlement terms and 41 per cent indicated that they were highly satisfied. It is of significance that complainants and respondents reported the same high levels of satisfaction (41 per cent–41 per cent). While the highly subjective nature of 'party satisfaction' must be acknowledged, this data does not support a view that complainants are being forced to settle on unsatisfactory terms due to their relative disadvantaged position in the conciliation process. If this was the case, one would

assume that complainant satisfaction would be lower than respondent satisfaction and satisfaction ratings would be lower overall.

Reasons for settlement where unsure or dissatisfied with settlement terms

Where settlement was achieved but parties indicated that they were either unsure of satisfaction or dissatisfied with settlement terms, avoidance of having to deal with the matter in court was the most common reason for settlement identified by both respondents and complainants. It is noted that parties also identified numerous other reasons that impacted on this decision, such as health concerns and a desire to finalise the matter as soon as possible.³³ More respondents than complainants indicated that 'not wanting to go to court' was a reason for settlement (51 per cent–44 per cent) and consequently this data does not support predictions by sections of the community that complainants would have more concerns than respondents about proceeding to a court determination.

Reasons for non-settlement

Both complainants and respondents identified the unreasonableness of the other side's settlement terms as the most common reason for settlement not being achieved (53 per cent). Some 14 per cent indicated that they were advised not to settle by their advocate, with more respondents than complainants indicating they were so advised (17 per cent–10 per cent). A vast array of other reasons for non-settlement were also identified.³⁴

Concerns about court determination

Data on the specific reasons for not wanting to go to court indicates that time and costs associated with court action are of most concern to both complainants and respondents. However, respondents were more concerned than complainants about losing in court (15 per cent–7 per cent) and the public nature of the process (22 per cent–9 per cent). Complainants were significantly more concerned

than respondents about obtaining legal representation (22 per cent–0 per cent).

Compliance with settlement terms

Ninety per cent of participants reported that there had been full compliance with conciliation settlement terms. A further 7 per cent reported part compliance. This figure is very positive in light of the fact that HREOC does not have a role in 'policing' compliance. The high compliance rate may be attributed to the focus of HREOC officers on ensuring that parties have fully considered and are satisfied with settlement terms prior to finalisation of the process. There was a difference in reported compliance by complainants and respondents with more respondents than complainants reporting full compliance (96 per cent–85 per cent). This difference may be due to complainants being unaware of the completion of all aspects of conciliation terms by respondents.³⁵

Summary and conclusions

While data from the broader research project revealed that there has been an increase in legal representation of complainants since the move to a court-based determination process, survey data also indicated that the majority of parties do not have legal representation in the conciliation process. The data also indicated that in contrast to respondents, complainants had higher levels of overall representation and similar levels of legal representation. Accordingly, the data does not support a view that complainants are being disadvantaged by increased respondent access to, and use of, legal representation in the conciliation process.

Data on parties' views of the conciliator and the conciliation process does not indicate any overt disadvantage for either complainants or respondents. Overall, there is high reported understanding of what is happening in the conciliation process and low perceptions of conciliator bias by both complainants and respondents.

In relation to matters that were

resolved by conciliation, the data indicated high satisfaction with settlement terms by both complainants and respondents. Additionally, data on reasons for settlement revealed that while complainants and respondents have different concerns about proceeding to court, they have a similar desire to avoid court action. Considered together, this data does not support a view that in the current complaint process, complainants are being forced to settle on unsatisfactory terms due to reduced bargaining power. This finding is further reinforced by comparative complaint statistics from the broader research project which indicated that in the calendar year following the implementation of the legislative changes there was no decrease in the conciliation rate, no increase in the complaint withdrawal rate, no decrease in the conciliation success rate and no decrease in median financial outcomes obtained in conciliation.³⁶ Overall this data does not support a view that the move to court based determination process has resulted in increased respondent resistance to settlement or comparative disadvantage for complainants.

This research project has provided useful, up to date information on parties' perceptions of conciliation in the current complaint process under federal anti-discrimination law. The data will be of assistance to HREOC in reflecting on and developing its conciliation practice and, it is hoped, will contribute to ongoing study and debate of ADR in this context. ●

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Endnotes

1. The term 'shadow of the law' implies that when participating in conciliation, parties consider the legal parameters of the complaint and how the matter may be heard and determined by the associated court or tribunal.
2. These changes were incorporated

in the *Human Rights and Legislation Amendment Act (No 1) 1999* (Cth). For further discussion of these changes see Roberts, S and Redman, R 'Federal Human Rights Complaints – New Roles for HREOC and the Federal Court' in *Ethos* (166) March 2000: 17-19, 22. The Federal Magistrates Service (FMS) was created by the *Federal Magistrates Act 1999* (Cth). The FMS has been able to hear applications relating to unlawful discrimination since July 2000.

3. *Brandy v HREOC and Ors* (1995) 183 CLR 245. This case considered provisions of the *Racial Discrimination Act 1975* (Cth) that required HREOC, on completion of a hearing to register the determination with the Federal Court, the determination then having effect of an order of the Federal Court. The High Court held that the provisions were unconstitutional as their effect was to vest judicial power in HREOC contrary to Chapter III of the *Constitution*.

4. The President may terminate a complaint prior to attempted conciliation for a number of reasons as set out in s 46PH of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth). These include where satisfied that the complaint is lacking in substance, where satisfied that the alleged discrimination is not unlawful or where satisfied that the subject matter of the complaint involves issues of public importance that should be considered by the Federal Court.

5. Detailed descriptions of HREOC's conciliation practice are provided in other HREOC papers. See for example Raymond, T, Ball, J 'Alternative Dispute Resolution in the context of anti-discrimination and human rights law: Reflections on the past and directions for the future', *Proceedings of the 5th National Mediation Conference*, May 2000 and HREOC submissions to the National Alternative Dispute Resolution Advisory Council's *Discussion paper on Issues of Fairness and Justice in Alternative Dispute Resolution*, 1997.

6. Most Australian anti-discrimination and equal opportunity agencies also operate on the basis of a joint investigation/conciliation role.



7. Shuttle conferencing involves the parties being at the same location, but rather than facilitating a face-to-face meeting of the parties, the conciliator conveys messages between the parties. A face-to-face conference may also involve a component of shuttle conferencing. Shuttle telephone negotiation involves the conciliator assisting parties to resolve the dispute by conveying messages between the parties by means of separate telephone conversations with each party.

8. Where settlement terms involve payment of financial compensation, written apologies or references it is generally the case that officers will assist in conveying these payments/documents between the parties and the file will be finalised on conclusion of these transactions.

9. Scutt, J A, 'The Privatisation of Justice: Power Differentials, Inequality and the Palliative of Counselling and Mediation' in Mugford J (ed) *Alternative Dispute Resolution Proceedings*, Australian Institute of Criminology, Canberra, 1996, p 195.

10. For example, see Thornton's discussion of Kessel, K and Pruitt, D G: Thornton, M, 'Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia' (1989) 52 *Modern Law Review* 733 at 743.

11. See for example Scutt, J A op cit.

12. See Raymond, T and Ball, J op cit.

13. See discussion of mediator neutrality in Cobb, S and Rifkin, J, 'Practice and Paradox: Deconstructing Neutrality in Mediation' *Law and Social Inquiry* Vol 16, No1 Winter 1991 and Astor, H, 'Rethinking neutrality: a theory to inform practice' Pts 1 and 2 *Australasian Dispute Resolution Journal*, May and August 2000.

14. A 'no costs' process is one in which parties pay their own costs regardless of outcome. 'Costs follow the event' means that the party that loses the action pays the successful party's costs.

15. See for example summaries of submissions by the Disability Discrimination Law Advocacy Service,

Women's Electoral Lobby and National Federation of Blind Citizens of Australia in Senate and Legal Constitutional Legislation Committee *Consideration of the Human Rights Legislation Amendments Bill 1996*, Parliament of the Commonwealth of Australia June, 1997.

16. Offenberger, S and Banks, R 'Wind out of the sails - new federal structure for the administration of human rights legislation' *Australian Journal of Human Rights* Vol 6(1) 2000.

17. On average, only 10-12 per cent of complaints were referred for HREOC determination each year with the majority of substantive matters being resolved by conciliation.

Under the previous complaint procedure, the option of referral to a hearing before the Commission was only available where conciliation had failed or was considered inappropriate or in relation to sex and racial discrimination complaints that had been declined on the ground that the alleged act was not unlawful. Complaints that were terminated on other grounds, such as where the allegation was seen to be 'lacking in substance', were provided with the option of an internal review of the decision by the President of HREOC.

18. For instance, see Rayner, N, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Sex Discrimination Legislation*, proceedings of seminar (AGPS, Canberra, 1990).

19. *Hansard*, Monday 20 September 1999, 8407.

20. <www.humanrights.gov.au/complaints> Human Rights and Equal Opportunity Commission, *Review of Changes to the Administration of Federal Anti-Discrimination Law: Reflection on the initial period of operation of the Human Rights Legislation Amendment Act (No 1) 1999* (Cth), 2002.

21. The survey included questions which reflected the key assessment criteria in the Client Assessment of Mediation Services (CAMS) tool developed by Kelly and Gigy in 1988. Key aspects of client satisfaction assessed by this tool are-'effective/sensitive mediator',

'empowerment', 'adequacy of information', 'impartiality' and 'satisfaction with outcomes and agreements'.

22. The majority of participants were from the disability discrimination jurisdiction (55 per cent). Slightly more female complainants (59 per cent) agreed to participate and the majority of complainants were from an English Speaking background (75 per cent). Respondents were predominantly private companies (55 per cent).

23. Bailey, P and Devereux, A, 'The Operation of Anti-Discrimination Laws in Australia' in Kinley, D (ed), *Human Rights in Australian Law*, Sydney, 1998, p 303.

24. It is noted that HREOC officers utilise a variety of forms for the conciliation process with a view to ensuring a fair and effective process for both parties.

25. Fifty two per cent of parties in sex discrimination matters had legal representation in comparison with 39 per cent of parties in race discrimination matters and 35 per cent of parties in disability discrimination matters. Complainants in sex discrimination matters had slightly higher levels of legal representation than respondents (54 per cent-49 per cent).

26. See Devereux, A 'Human Rights by agreement? A case study of the Human Rights and Equal Opportunity Commission's use of conciliation' *Australasian Dispute Resolution Journal*, November 1996. This study found that 47.5 per cent of complainants and 25 per cent of respondents had legal representation. See also Keys and Young *Discrimination Complaints-Handling: a study*, New South Wales Law Reform Commission, 1997. This study of the NSW Anti-Discrimination Board complaint process found that 19 per cent of complainants and 30 per cent of respondents were legally represented at a conciliation conference.

27. Data on legal representation of complainants at the commencement of the complaint process indicates that for the 1998 calendar year 11 per cent of complainants were legally represented; this increased to 14 per cent in the 1999 calendar year and to 17 per cent

in the calendar year following changes to the complaint determination regime (2001).

28. This increase in legal representation of complainants may be seen as a positive development in that an argument for the 'costs follow the event' jurisdiction of the court was that it would be beneficial for complainants as it would encourage legal practitioners to represent cases on a contingency or speculative basis.

29. For further discussion of these challenges see Astor, H and Chinkin, C, *Dispute Resolution in Australia*, Butterworths, 1992, Ch 5.

30. See discussion in Boulle, L

Mediation: Principles, Process, Practice, Butterworths, 1996, Ch 7.

31. The HREOC model requires that any observable different treatment by the conciliator should be explained to the other party with reference to the purpose of ensuring a fair and effective conciliation process.

32. More than one reason could be identified. Complete data on reported 'other reasons' for settlement are provided in the full report of the research project.

33. More than one reason could be identified. Complete data on reported 'other reasons' for non-settlement are provided in the full report of the

research project.

34. For example, in an employment related matter where the complainant is no longer employed by the respondent, the complainant may not be aware of the completion of agreed terms such as the implementation of preventative policies and training programs in the workplace.

35. Human Rights and Equal Opportunity Commission, *Review of Changes to the Administration of Federal Anti-Discrimination Law: Reflection on the initial period of operation of the Human Rights Legislation Amendment Act (No 1) 1999* (Cth), 2002, pp10-12.