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# HAVING MY VOICE HEARD

Fair practices in discrimination  
conciliation





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Kingsford Legal Centre acknowledges the Gadigal and Bidjigal Clans, the traditional custodians of the Sydney Coast. We pay respect to those Elders, past and present and thank them for allowing us to work and study on their lands.



# About Kingsford Legal Centre

Kingsford Legal Centre (KLC) is a community legal centre which has been providing legal advice and advocacy to people in need of legal assistance in the Randwick and Botany Local Government areas since 1981. KLC provides general advice on a wide range of legal issues.

KLC has a specialist discrimination law service (NSW wide), a specialist employment law service, and an Aboriginal Access Program. In addition to this work, KLC also undertakes law reform and policy work in areas where the operation and effectiveness of the law and legal system can be improved.





## Key Recommendations

This project focuses on vulnerable applicants' experiences of discrimination conciliations at the Anti-Discrimination Board of NSW (ADB), Australian Human Rights Commission (AHRC) and the Fair Work Commission (FWC). Our key research questions were:

- ◆ What practices and trends inhibit the full participation of vulnerable applicants at conciliations in discrimination matters?
- ◆ What does or would best practice in conciliations for vulnerable applicants look like?

**In researching these areas, KLC has identified ten key areas for reform:**

### **1. Training of Conciliators**

**1.1** Conciliators should receive extensive training in the legislation they accept complaints under from experts in the field, to ensure that conciliators have an in-depth understanding of the applicable law. Conciliators should undergo 'refresher' training at least biannually to keep up to date with developments in the law.

**1.2** Conciliators should not make statements on issues of law as they do not have an adjudicative role.

**1.3** Conciliators should receive extensive training in alternative dispute resolution (ADR) theory and techniques from experts in the field.

## 2. **Early Referrals for Legal Assistance**

- 2.1** The ADB, AHRC and FWC should implement processes to identify vulnerable applicants at the time a complaint is lodged, and refer these applicants for legal assistance as soon as possible.

## 3. **Improving Consistency in Conciliation**

- 3.1** A basic framework for conciliation procedures should be provided to the parties and any representatives prior to conciliation, similar to the conciliation agenda provided by AHRC to parties.

## 4. **Adjustments**

- 4.1** The ADB, AHRC and FWC should make their policies for the requesting and granting of reasonable adjustments to enable parties to fully participate in the conciliation process publicly available.
- 4.2** The ADB, AHRC and FWC should proactively seek information on what adjustments the parties may require to participate in the conciliation process both on the complaint form and by contacting the parties/representatives prior to conciliation.

## 5. **Flexibility**

- 5.1** Conciliators should have the ability to schedule additional conciliations when it is clear parties could reach settlement in the structured environment that conciliation provides.
- 5.2** Conciliators should contact the parties and representatives prior to scheduling or listing a conciliation conference to confirm their availability.
- 5.3** Conciliators should provide equal time to respondents and applicants to provide documentation, unless an extension is requested and granted by the conciliator for good cause.

## 6. **Power Imbalances and Representation at Conciliation**

- 6.1** Where an applicant has secured free legal assistance, the presumption should be that the lawyer will be allowed to represent the applicant at conciliation.
- 6.2** Funding for free legal assistance services to assist applicants in discrimination matters should be increased.
- 6.3** Conciliators should receive training in how to mitigate power imbalances in conciliation processes and employ these techniques when conducting conciliations.

## 7. **Speed of Resolution**

- 7.1** The ADB, AHRC and FWC should make procedures and considerations for granting an expedited conciliation publicly available on their websites.
- 7.2** The NSW government should provide additional resourcing to the ADB to allow it to perform its functions and provide a quick conciliation conference process.
- 7.3** The Federal government should provide additional resourcing to the AHRC and FWC to allow them to perform their functions and provide a quick conciliation process.

## 8. **Feedback Mechanisms**

- 8.1** The FWC and ADB should introduce feedback mechanisms such as the AHRC's 'Service Survey' to gather feedback on conciliation processes from parties and their representatives.
- 8.2** The ADB, FWC and AHRC should introduce 'user groups' for legal practitioners who frequently appear in their jurisdiction to actively seek feedback on conciliation processes.

## **9. Increasing Knowledge on Conciliations**

- 9.1** The ADB, AHRC and FWC should make available de-identified disaggregated data on conciliation, including:
- ♦ the nature of complaints (protected attributes claimed, relevant area of public life, alleged discriminatory conduct);
  - ♦ the outcomes achieved;
  - ♦ the number of parties that were legally represented; and
  - ♦ the number of complaints accepted, terminated, withdrawn or settled, by protected attribute.
- 9.2** The ADB, AHRC and FWC should publish comprehensive de-identified conciliation registers, to be made available on their respective websites.

## **10. ADB/AHRC/FWC Strategic Assistance**

- 10.1** The AHRC Discrimination Commissioners, ADB President and Fair Work Ombudsman (FWO) should be given powers to investigate and initiate court proceedings in relation to discriminatory conduct that appears unlawful, without an individual complaint. The FWC President should refer matters to the FWO as appropriate.
- 10.2** The role and powers of AHRC Discrimination Commissioners, ADB President and FWO should be expanded to increase the role of these bodies in addressing systemic discrimination. These powers should include monitoring of duty holders, commencing complaints, intervening in matters, and reporting annually to Commonwealth Parliament/State Parliament, and to the public, on discrimination matters.

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## Abbreviations Table

ADR	Alternative Dispute Resolution
ADB	Anti-Discrimination Board NSW
AHRC	Australian Human Rights Commission
ASCR	Australian Solicitors' Conduct Rules
CLC	Community Legal Centre
FWC	Fair Work Commission
FWO	Fair Work Ombudsman
KLC	Kingsford Legal Centre
NADRAC	National Alternative Dispute Resolution Advisory Council
NCAT	NSW Civil & Administrative Tribunal
NMAS	National Mediator Accreditation System
PTSD	Post-Traumatic Stress Disorder
RDA	<i>Racial Discrimination Act 1975 (Cth)</i>
VEOHRC	Victorian Equal Opportunity and Human Rights Commission



# Background To The Project



## Discrimination Law in Australia

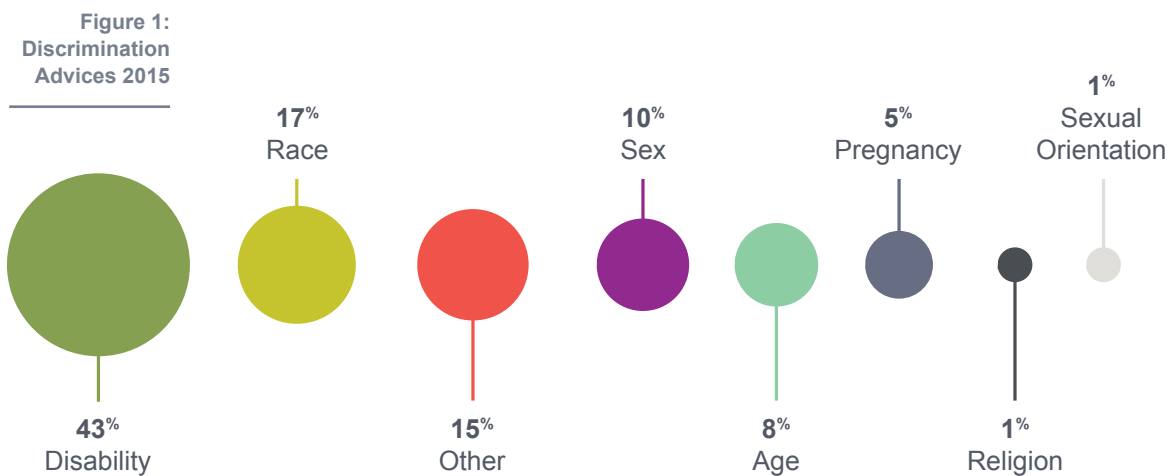
In Australia, discrimination law is one of the primary ways in which human rights are protected. Australian discrimination laws at the Commonwealth and State/Territory levels give expression to many of Australia's international human rights obligations. In the absence of a Bill of Rights and because of the limited rights protection contained in the Australian Constitution, the significance of protection from discrimination assumes greater importance.

Discrimination law in Australia remains a relatively new area of legal protection with the first enactment, the *Racial Discrimination Act 1975 (Cth) (RDA)*, occurring just over 40 years ago. It is, however, an increasingly expansive and complex area of law, with a proliferation of Commonwealth and State/Territory legislation since the enactment of the RDA. Discrimination processes have features which distinguish these protections from other legal rights. Particularly central to almost all discrimination processes is the paramount role conciliation processes play in resolving allegations of discrimination. These processes emphasise the importance of confidentiality and the need for parties to shape their own resolutions. While alternative dispute resolution (ADR) practices have proliferated and gained favour throughout the legal system in the past twenty years, primarily as an efficiency measure, conciliation has always been central to the resolution of discrimination complaints.

## KLC's Work in Discrimination Matters

Because of the preeminent role of discrimination law in Australian human rights protection, KLC has maintained a specialist discrimination practice for its 37 years of existence. KLC provides free legal advice and representation to people affected by discrimination across NSW with a focus on providing intensive casework support and representation to disadvantaged people, including Aboriginal and Torres Strait Islander people, people with a disability, people who experience multiple disadvantages and people from culturally and linguistically diverse backgrounds. Alongside this individual client work, KLC also engages extensively in systemic issues affecting human rights and is actively involved in the monitoring and reporting of Australia's international human rights obligations. KLC also advocates domestically for better protection of human rights and comments on laws and policies that infringe human rights and Australia's international obligations.

In 2015, the year in which the data this report is based on was collected, KLC provided 250 advices on discrimination law, which made up over 13% of all legal advice the Centre provided. These covered a range of protected attributes (see Figure 1). KLC regularly advises on, and appears at, AHRC, ADB and FWC conciliations.



This Report draws on the significant experience of KLC in providing advice and representation to vulnerable people involved in discrimination conciliations. It grew from the reflections of KLC lawyers on the benefits and challenges of conciliation processes for vulnerable people. The Report also stemmed from a desire to consider the environments and processes which enhance the ability of vulnerable individuals to express the personal impact of discriminatory practices. Central to the Report are considerations of how practices, processes and procedures can enhance the resolution of human rights complaints, and how the efficacy and experience of conciliations can be improved for people who experience discrimination.

Through our experience, we have found that the conduct of conciliations in discrimination matters can vary significantly, both between and within jurisdictions. In some cases, conciliation practices may not be adequately responding to the direct experiences of clients who have participated in conciliations. Incorporating these experiences is central to the needs of vulnerable applicants.

KLC is aware that there is a diversity of experiences in conciliation, and that the expectations of applicants in discrimination

matters vary greatly. We believe that understanding the complexity (both legal and emotional) of the needs and aims of people who lodge discrimination complaints is central to understanding the efficacy of conciliation processes.

KLC is particularly concerned that conciliation processes which do not adopt reflective practices, especially where vulnerable clients are involved, can compound the already damaging effects of discrimination and have dramatic negative consequences for individuals. We recognise that these types of conciliations are not common, but hope to draw attention to processes, procedures and practices that can prevent these negative experiences for vulnerable people.

## Aims of Report

The first aim of this Report was to gain a thorough understanding of how conciliations are carried out at the ADB, AHRC and FWC. We were particularly interested in:

- ♦ whether the organisations have their own practice frameworks that guide the conciliation process;

- ◆ whether the organisations have policies in place to identify and support vulnerable clients; and
- ◆ the training the conciliators receive and whether they are trained in how to support vulnerable clients.

The second aim of the Report was to collect qualitative data from expert anti-discrimination legal practitioners on their perspectives on the conciliation process, through structured and semi-structured processes. The third aim was to develop conclusions and guidelines on best practice for vulnerable people in discrimination conciliations.

The final aim was to document and analyse the experience of disadvantaged clients who have participated in conciliations in discrimination matters. To achieve this, we obtained qualitative data from KLC clients who had participated in conciliations to draw on their experiences.

With this research, KLC aims to add greater insight into our understandings of what a 'successful' conciliation in this area may look like.

## Focus of Report

This Report focuses on the experiences of a particular group of applicants, rather than the experiences of people in conciliations generally. We have defined this subset of 'vulnerable' applicants to include:

- ◆ applicants who identify as Aboriginal and/or Torres Strait Islander;
- ◆ applicants who are culturally and/or linguistically diverse;
- ◆ applicants who have a disability/disabilities;
- ◆ applicants who are illiterate; and
- ◆ applicants who have been subjected to particularly severe discrimination.

This Report does not actively question the role or the centrality of conciliation in discrimination matters. Instead it seeks to identify the circumstances in which vulnerable people can achieve maximum participation in conciliation processes and satisfactory resolution of their complaints. However, KLC recognises the ways in which confidential conciliations can obscure and mask systemic discrimination. As a result, we continue to advocate in relation to the significant barriers to litigation in this area and for the improvement and simplification of legal tests for discrimination. Similarly, this area of law is significantly affected by increasing barriers to access to justice and we continue to advocate for improved access to legal advice and the courts for vulnerable people.

## Project Methodology

### Literature review

The first step of the project was to conduct a thorough review of existing international and domestic research on the use of conciliation processes within discrimination matters and general ADR theory. This research particularly focussed on the experience of disadvantaged or vulnerable participants. We then conducted an explorative analysis of the current conciliation process at AHRC, ADB, and FWC through a review of existing documents, and meetings with key staff at these organisations to discuss our preliminary findings and concerns.

### Ethics approval

We obtained ethics approval from UNSW to identify and survey former clients who fell within our definition of 'vulnerable' and who had discrimination matters at the ADB, AHRC or the FWC in 2014–15. In accordance with the ethics approval, these clients were contacted by a KLC researcher who had not worked on their cases.



KLC also obtained ethics approval from UNSW to survey legal practitioners who had experience working with vulnerable clients in discrimination matters.

### Surveys and roundtables

We conducted qualitative research by surveying KLC clients about their experiences at conciliation. This survey is reproduced in Appendix 1. Our client survey focussed on the client's experience of the conciliation process, their satisfaction with the outcomes, and their reflections on the process generally.<sup>1</sup> Former clients were asked a range of questions, which allowed them to comment freely on how they felt about the process as well as the outcome.

We conducted qualitative research by surveying legal practitioners working in discrimination law about their experience advising and representing clients in conciliation at the AHRC, ADB and FWC. This survey is reproduced in Appendix 2.

We also held a roundtable with legal practitioners specialising in discrimination law to gather data on their experience advising and representing disadvantaged applicants at the AHRC, ADB and FWC.

### KLC casework analysis

We conducted an audit of the 2014–15 KLC discrimination advice and casework matters that were conciliated in these jurisdictions. We used this to identify current patterns and trends in conciliation and identify particular problems and successes within the conciliation process.

### The impact of confidential settlements on research

The confidentiality of settlements prevented us from conducting research into the specific outcomes clients received. While outside the scope of this Report, we note that the confidentiality of settlements places limits on research in this area.

<sup>1</sup> See client survey at Appendix 1.

# The Discrimination Complaint Process

**Table 1 – the discrimination complaint process**

	How to make a complaint	Cost of making a complaint	Time limits	Process for response	Cconciliation conference format	Average length of time between lodging and finalisation	Next steps if complaint not resolved
<b>ADB</b>	A complaint to the ADB must be lodged in writing. The complainant can either fill out their complaint form or write a letter to the President covering the information in the form and email, post or fax the letter to the board or hand deliver to the office.	No fee.	12 months	The ADB will acknowledge the complaint within 2 weeks of receiving it. If the complaint is accepted, they will then send a copy to the respondent and give them a deadline to respond by. Many complaints are resolved at this stage, but if not, the next stage is a conciliation conference.	Conciliation conferences are generally held face to face with the assistance of an officer from the ADB. Permission can be granted to bring a support person or lawyer.	5.7 months	If the complaint is unable to be resolved at conciliation the parties may continue negotiating if appropriate. Alternatively, the complaint may be withdrawn or the President of the ADB may be asked to refer the complaint to the NSW Civil and Administrative Tribunal. If the President declines, the complainant may still take the complaint to the Tribunal themselves.
<b>AHRC</b>	Complaints to the AHRC must be made in writing. They prefer that complainants use one of their complaint forms. These can be lodged online, or sent by email, post or fax.	No fee.	There is no strict time limit, but the President of the AHRC may terminate if it is lodged more than 6 months after the discrimination (12 months before April 2017).	The AHRC may contact the complainant for further information. They generally inform the respondent and ask them for information or a response, and let the complainant know what has been said in the response. If appropriate, the complaint will be referred to conciliation.	Conciliation conferences are held either face to face or through a telephone conference. The conciliator decides the format and can give permission for support persons or lawyers.	3.8 months	If the complaint is not resolved at conciliation it may be taken to court. Complainants have 60 days from the finalisation of the matter by the AHRC to make an application to the Federal Court or the Federal Circuit Court.
<b>FWC</b>	Applications to the FWC must be made on one of their approved forms and can be submitted through their online lodgement service. Alternatively, they can be lodged by email, post, fax or in person.	Some applications have a filing fee of \$71.60. These include unfair dismissal and general protection applications.	21 days from dismissal, or if no dismissal, 6 years from the discrimination.	The FWC will reach out to the respondent to lodge a response. If it is a dismissal dispute a private conference will be held, and if it is not a dismissal dispute a private conference will be held if both parties agree.	The conferences are held either face to face or via a telephone conference. Permission can be granted to have representation.	1.9 months	If a dispute is not resolved during the conference and the FWC is satisfied all reasonable attempts were made, they issue a certificate to both parties stating this. For general protection matters, if both parties consent FWC can arbitrate and make a final decision. If both parties do not consent, the applicant has 14 days to apply to the Federal Court or the Federal Circuit Court.

# Alternative Dispute Resolution And Discrimination Law

## Note on Terms

As Astor and Chinkin note, ‘paradoxically, what we now label as “alternative dispute resolution (‘ADR’)” has long been, and continues to be, the dominant method of resolving disputes in many societies’.<sup>2</sup> Given the mainstreaming of ADR through court and legislative schemes, it is now viewed by some as ‘dispute resolution’ rather than an alternative pathway. This report refers to these mechanisms as ADR in line with much of the literature we drew on for the report, while recognising its centrality in resolving disputes.

## What is Conciliation?

The method of ADR that is practiced at the AHRC, ADB and the FWC is called conciliation. The National Alternative Dispute Resolution Advisory Council (NADRAC) defines conciliation as:

- ◆ a process in which the participants, with the assistance of the conciliator, identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement.<sup>3</sup>

The process of conciliation involves the parties:

- ◆ listening to and being heard by each other;
- ◆ identifying what the disputed issues are;
- ◆ identifying areas of common ground; and
- ◆ developing workable agreements.

The conciliation process is flexible and the exact process will vary depending on where it is being carried out.

## ADR Models

The NADRAC Dispute Resolution Terms highlight the differences in approach of mediation and conciliation. Mediation is described as a ‘purely facilitative process’.<sup>4</sup> In comparison, the conciliation process comprises a range of approaches. In practice, the terms mediation and conciliation are often used interchangeably.

Three models of mediation/conciliation are most commonly used in Australia. These are ‘facilitative mediation’, ‘evaluative mediation’ and ‘transformative mediation’.<sup>5</sup> The facilitative approach is generally used in the ADB and FWC jurisdictions. The AHRC tends to use a hybrid facilitative/advisory model.

<sup>2</sup> Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (LexisNexis Butterworths, 2nd ed, 2002) 5.

<sup>3</sup> National Alternative Dispute Resolution Advisory Council, ‘Dispute Resolution Terms’ (September 2003) 5 <<https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Dispute%20Resolution%20Terms.PDF>>.

<sup>4</sup> Ibid 3.

<sup>5</sup> David Spencer and Samantha Hardy, *Dispute Resolution in Australia: Cases, Commentary and Materials* (Thomson Reuters, 2nd ed, 2002) 156.

**Table 2 – ADR approaches (facilitative, evaluative and transformative)**

Approach	What is it?	Practitioner's role	Advantages and Disadvantages
Facilitative	Facilitative or 'interest-based' mediation follows an 'integrative interest-based negotiation process'. <sup>6</sup> The parties are encouraged to acknowledge the issues in dispute and recognise the position of the other party. The goals of this approach are 'party autonomy and self-determination'. <sup>7</sup>	The mediator undertakes a facilitative rather than an advisory role. The mediator's engagement is restricted to process interventions and facilitating constructive negotiation between the parties. <sup>8</sup>	Spencer and Hardy contend that facilitative mediation is best suited to disputes where the parties have a continuing relationship, where the balance of power between the parties is equal and where the dispute comprises multiple legal and non-legal issues. <sup>9</sup> On the other hand, this approach is less effective where a power imbalance exists between the parties.
Evaluative/ Advisory	Evaluative or 'expert advisory mediation' uses a 'positional bargaining approach'. <sup>10</sup> This form of dispute settlement prioritises efficient service delivery. The settlement process is restricted by narrow, legal definitions to the exclusion of broader non-legal issues. <sup>11</sup>	Expert advisory mediators are appointed based on the level of experience or knowledge that they have on the subject matter and engage in a high level of interaction throughout the settlement process. <sup>12</sup>	<p>This form of mediation is particularly suited where the parties lack expert knowledge of the subject matter of the dispute and/or where they would benefit from the involvement of an expert in the related field and where the parties require a quick resolution.<sup>13</sup></p> <p>Some critics have argued that the extent of mediator interaction detracts from the parties' ability to direct the settlement process. This could have a negative impact upon participant satisfaction with the settlement outcome, especially if mediators' settlement proposals fail to properly address party interests. There is also a risk that prioritising the efficient delivery of settlements increases the likelihood that the specific interests of the participants will be overlooked.</p> <p>Unlike a facilitative approach, the focus is not on the participants acknowledging each other's positions.</p>
Transformative	This approach emphasises the potentially transformative effects of mediation for the parties in dispute. It provides the participants with an opportunity to strengthen their capacity to analyse situations and engage in effective decision-making. <sup>14</sup>	From the outset, the mediator makes clear that their role is to create a context for and offer support to the parties to communicate and deliberate with one another. <sup>15</sup> The mediator is responsible for recognising opportunities that may arise during the dispute settlement process for the parties to clarify and discuss issues in dispute. How the parties respond to these opportunities and whether they engage in decision-making falls outside of the scope of the mediator's role.	<p>The transformative approach focuses on self-determination and responsiveness to other viewpoints and considerations. This means that success is not limited to formal settlement. Instead, the process recognises the range of beneficial outcomes of mediation including gaining a better understanding of the other party's views or clarifying issues in contention.</p> <p>Folger and Bush state that the empowering function of the mediator has specific implications for mediations where there is an apparent power imbalance between the parties. They argue that the mediator must refrain from conduct that responds to a perceived power imbalance if a party has not expressed that view themselves.<sup>16</sup> If and when a party does so, the mediator's role is facilitating discussion about the power balance and how the parties may address it. The less interventionist role for the mediator in this approach may cause detriment where one party is unable to effectively advocate for themselves.</p>

6 David Spencer and Samantha Hardy, *Dispute Resolution in Australia. Cases, Commentary and Materials* (Thomson Reuters, 2nd ed, 2002) 157.

7 Ibid.

8 Ibid.

9 Ibid.

10 Ibid 158.

11 Ibid.

12 Ibid.

13 Ibid.

14 Joseph P Folger and Robert A Baruch Bush, 'Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice' (1996) 13 *Mediation Quarterly* 263, 264.

15 Ibid 267.

16 Ibid 270.

## The benefits of ADR

ADR provides avenues of redress for parties disputing matters that fall outside of the narrow ‘legal notions of individualized harm and redress’ that apply to the courts.<sup>17</sup> For example, parties can agree to wider outcomes such as systemic or individualised remedies that the court or tribunal does not have the power to award. This improves the overall accessibility of the legal system by widening the scope of issues that can be resolved.

Similarly, because ADR has greater scope to consider the specific needs, interests, values and beliefs of participants, there is more potential for participant satisfaction with the settlement process.<sup>18</sup> Participants may be empowered as they have a direct role in determining the outcome of a dispute rather than relying on a court or tribunal. While litigation is confined to strict evidentiary rules and narrow legal boundaries, ADR has greater scope to address the human elements of disputes – focusing on these elements and addressing the concerns of the participants provides a space for the law to work as a therapeutic agent.<sup>19</sup> Importantly, the applicants are given the opportunity to voice their complaints. Empirical evidence demonstrates that participants who were able to ‘have their say’ expressed greater satisfaction with the overall process.<sup>20</sup>

Generally, most ADR processes are confidential.<sup>21</sup> This means that information shared in an ADR session is not admissible in court at a later stage.<sup>22</sup> The privacy and confidentiality

of ADR processes encourage open and honest communication between the parties.

ADR processes are less formal than traditional litigation. It is arguable that informality allows for greater participant engagement in the dispute settlement process.<sup>23</sup> Applicants who may be intimidated by more formal court processes may be more inclined to pursue their complaint if ADR is available, increasing access to justice. ADR may also be an effective way to address power imbalances between disputing parties. This is particularly relevant in the discrimination context, where applicants are often vulnerable and from marginalised groups in society. However, if ADR is not conducted in line with recognised principles, this power imbalance may be compounded, to the applicant’s detriment.

ADR plays a critical role in improving access to justice for ordinary people. It offers an informal, collaborative framework for dispute settlement.<sup>24</sup> Significantly, in discrimination claims, ADR is viewed as ‘providing less alienating and hostile forums for the intended beneficiaries of discrimination rights’, that is, those possessing protected attributes.<sup>25</sup>

While ADR can improve access to justice outcomes, the widespread increase in the use of ADR raises a complementary concern of ensuring that ADR processes are designed and implemented to take into account the vulnerabilities of parties, and to enable adjustments to be made to allow parties to fully participate in the process.

17 Tracey Raymond, ‘Alternative Dispute Resolution as a Tool for Social Change: A Discussion of Issues and Evidence’ (Discussion Paper, Australian Human Rights and Equal Opportunity Commission, 2008) 1 <<https://www.humanrights.gov.au/our-work/complaint-information-service/publications/alternative-dispute-resolution-tool-social>>.

18 New South Wales Chief Justice’s Policy and Planning Committee Subcommittee on Court Annexed Mediation, ‘Report of the Chief Justice’s Policy and Planning Subcommittee on Court Annexed Mediation’ (Report, 1991) cited in Judy Gutman, ‘The Reality of Non-adversarial Justice: Principles and Practice’ (2009) 14 *Deakin Law Review* 29, 35.

19 Lillian Corbin, Paula Baron and Judy Gutman, ‘ADR Zealots, Adjudicative Romantics and Everything in Between: Lawyers in Mediations’ (2015) 38 *University of New South Wales Law Journal* 492, 492.

20 National Alternative Dispute Resolution Advisory Council, ‘A Framework for ADR Standards’ (Report, April 2001) 26 <<https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Framework%20for%20ADR%20Standards%20Body%20of%20Report.pdf>>.

21 National Alternative Dispute Resolution Advisory Council, ‘Your Guide to Dispute Resolution’ (Guide, 2012) 8.

22 *Ibid.*, 34.

23 Raymond, above n 17, 4.

24 *Ibid.*

25 Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990) 148.





## Potential Problems with ADR

While ADR has received broad support from the legal community, there are some emerging issues that need to be addressed. As the practice of informal dispute settlement processes increases, so does the need for clear standards of ethics and practice for ADR practitioners.

Presently, a uniform approach to ADR processes does not exist in Australia. As a result, the delivery of ADR processes varies depending on the approach taken by the facilitating organisation. This may result in inconsistency of outcomes and participant experiences. Failing to set a consistent minimum standard

on professional competency for participation in ADR processes for both conciliators and legal practitioners means that the competency of practitioners varies greatly. Continued inconsistency in practice has the potential to undermine the effectiveness and accessibility of ADR services. It will also undermine the legitimacy of the legal system, as public perceptions of the utility of ADR are affected.<sup>26</sup> The skills of an ADR practitioner take on heightened importance in light of the non-reviewable and confidential nature of the process.<sup>27</sup> Consistency in these areas will improve the consistency of outcomes and help to manage participant expectations of the process.

<sup>26</sup> Raymond, above n 17.

<sup>27</sup> Astor and Chinkin, above n 2.

# The Experience Of Conciliation

## How Do Clients Feel in Discrimination Matters?

For many of the former clients surveyed, a significant amount of time (in some cases up to 18 months) had passed since the conciliation and the finalisation of their case. This gave us the opportunity to gain insight into how they viewed the conciliation with the benefit of this time. In particular, we were able to assess whether the client felt the conciliation was a positive or negative experience and whether it allowed them to move on with their lives. This insight is quite rare and valuable as lawyers and support workers that help clients through conciliation processes rarely have ongoing contact with clients. Likewise, the bodies that convene conciliations often do not know what happens to the participants after they conclude the conciliation process, or how participants viewed their experience. The confidential nature of settlements in the majority of conciliation practices also adds to a general lack of knowledge about how applicants feel at the conclusion of their matters.

### Clients' views on their Emotional State in Discrimination Matters

Clients did not reflect in great detail or specificity about the circumstances of their cases due to the confidentiality of settlements. However, it was common across all of the interviews for clients to mention that they felt highly emotional about what had happened to them (that was discriminatory) and that they still felt this way at the time of the conciliation process. Clients described their legal

cases as being very personal to them and as a result, they still felt emotionally affected and upset when the conciliation took place.

Clients' reflections included:

**Client 1:** *'... because I was emotional and just experiencing a lot of pressure I might not have [had] a very good judgment'.*

**Client 2:** *'... it brought tears to my eyes when I was telling my story and "how could you have done this to me when you knew this is what I was going through".'*

**Client 4:** *'...you know what I went through [discrimination] was very traumatic for me'.*

**Client 4:** *'I was angry and torn up about what happened, what they had put me through.'*

**Client 4:** *'[Without a lawyer] I might have made wrong decisions based on emotion ...because I had that much anger – not that I do now, I let it go – but I was that angry and torn up about what happened, what they had put me through, I probably would have made a wrong decision and I could possibly be suffering the pain of it all today'.*

**Client 9:** *'I think I was annoyed with them [the respondent] and I don't believe they handled it the right way'.*

**Client 5:** *'It has caused us a lot of stress...it's caused a lot of heartache'.*

Many of the clients outlined that because of their emotions surrounding their cases, they were aware that they lacked judgment or found it difficult to focus on realistic outcomes.

**Client 1:** *'Because I suffered a lot because of the matter, for months, so my judgment could be a little cloudy because of the matter... I was emotional and just experiencing a lot of pressure I might not have a very good judgment process'.*

**Client 11:** *'I'm a really emotional person, so you know, in my head I'm thinking, "I've done nothing wrong, like I shouldn't negotiate, I shouldn't do anything"'*.

These clients' reflections on how they felt about their legal cases reminds us that the conciliation is the culmination of a challenging and lengthy process, and that because of the personal nature of discrimination actions, clients may feel distressed and emotionally vulnerable. These strong feelings place extra pressure on the legal process and require specific consideration by lawyers working closely with these clients. In our research, clients also identified that this emotionality affected what they wanted from the conciliation and what they saw as a good outcome.

It is also important to remember that due to the limited nature of free legal resources in discrimination matters, the vast majority of applicants in conciliations are unrepresented and must manage these overwhelming emotions with little external support. From this perspective, the clients we surveyed were not typical, as all except one had legal representation for their conciliation. For the surveyed client who did not have legal representation, this was due to the conciliating body's denial of representation, rather than the client being unable to obtain legal assistance.

## Practitioners' views on the Emotional State of Clients in Discrimination Matters

Practitioners who work regularly in this jurisdiction readily identified the heightened emotional state of their clients. Lawyers described their clients with discrimination claims as 'traumatised', with the conciliation process being a potentially re-traumatising process. Practitioners also identified that differences in approaches to conciliation across jurisdictions has had an impact on their advice to clients, especially when the client is highly emotionally traumatised or in matters such as sexual harassment. These specific results are explored in more detail later in this Report. However, it is important to note that the emotional state of the client is a significant factor in the provision of legal advice to clients regarding their options for commencing action in each jurisdiction. The client's emotional state is an active consideration for lawyers that work regularly in this area.

## Power Imbalances in Conciliations for Vulnerable Clients

Clients from culturally and linguistically diverse backgrounds, Aboriginal and Torres Strait Islander clients, clients with low literacy, clients with capacity issues, and clients with a disability can face enormous difficulties engaging with the complaints process and articulating their claims. This can have a significant impact on their negotiating power, particularly where they are unable to effectively frame their complaints with reference to the law. Additionally, where clients have been subject to severe discriminatory conduct such as bullying, harassment and racial vilification, they may suffer from strong emotional and psychological trauma, affecting their ability to effectively advocate for themselves. While we recognise the positives of ADR processes in discrimination complaints (as discussed above), conciliation is not immune to power imbalances between applicants and respondents. The accessible and informal nature of ADR is largely negated if unrepresented applicants are unable to navigate the system.

### Clients' views on Power Imbalances in Conciliation

A client on power imbalances in conciliation:

**Client 7:** *'There were three parties involved and [the respondents] had seven people on their side of the table – I felt like Erin Brockovich. I even joked to my solicitor "have you got some students out there so we can bulk up the numbers on my side?"'*

The inherent power imbalance that is present in the discrimination context can be exacerbated by the issue of access to legal advice and representation. The majority of discrimination complaints occur in the area of employment, where a power imbalance invariably exists between the employer and employee in terms of authority and resources. For example, respondents are often able to claim tax deductions for legal fees where they do not rely on in-house counsel. There are limited free legal assistance services available to represent clients at conciliation, including Legal Aid, CLCs and pro bono schemes. As noted by Gaze and Hunter, there is evidence to suggest that the difficulties experienced by unrepresented litigants can only really be addressed by means of legal representation.<sup>28</sup> Resource disparities can compound inequality during conciliation processes and can lead to a situation in which 'pressures to settle fall more heavily on the individual with the most to lose'.<sup>29</sup>

### Practitioners' views on Power Imbalances in Conciliation

*'We had an experience where the respondent was represented by 3 solicitors and 2 counsel and despite our representations about the inappropriateness of this, all were allowed to appear at the conciliation. Unsurprisingly the*

*conciliation took a very litigious turn which was not managed well by the conciliator.'*

*'Barristers will justify why they are there and talk. You don't need solicitors and barristers.'*

*'The tendency for some respondent legal representatives, usually barristers, to want to conduct a mini hearing and cross-examine on factual issues is too often allowed despite advocating against this. If the matter were to be conducted like a hearing we might as well skip the conciliation stage. Conciliators don't tend to stop this.'*

## The Role of Lawyers in Conciliations

The role of lawyers in ADR is often debated. Peak bodies such as the Law Council of Australia and Law Society of NSW have developed guidelines and professional standards for lawyers in ADR.<sup>30</sup> These guidelines and standards encourage lawyers to:

- ♦ participate in ADR in good faith;
- ♦ participate in ADR in a non-adversarial manner;
- ♦ cooperate with the mediator and the opposing party; and
- ♦ refrain from acting as an advocate.

Legal practitioners are also bound by professional rules, including the Australian Solicitors' Conduct Rules ('ASCR'), which require legal practitioners to:

- ♦ act in the best interests of their clients;
- ♦ be honest and courteous in all dealings in the course of legal practice; and
- ♦ refrain from conduct which could bring the legal profession into disrepute.

28 Beth Gaze and Rosemary Hunter, 'Access to Justice for Discrimination Complainants: Courts and Legal Representation' (2009) 32 *University of New South Wales Law Journal* 699, 701.'

29 Ibid 700.

30 Law Council of Australia, 'Guidelines for Lawyers in Mediation' (Guidelines, August 2011) <<https://www.lawcouncil.asn.au/docs/74c9c71f-0641-e711-93fb-005056be13b5/1108-Policy-Guideline-Guidelines-for-Lawyers-in-Mediations.pdf>>; Law Society of New South Wales, 'Dispute Resolution Kit' (December 2012) 20-1 <<https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/675694.pdf>>.

Parker and Evans argue a lawyer's role in ADR is not to aggressively represent a client's position, but rather to assist the client in working with the other side to attempt to solve their problem through interest-based rather than adversarial negotiation.<sup>31</sup>

KLC agrees that lawyers representing vulnerable clients at conciliation should participate in conciliation processes in good faith, and work with the conciliator and other party to attempt to resolve the matter on fair terms. However, in KLC's view, participating in a non-adversarial manner does not require lawyers to refrain from setting out their views on their client's legal position. Often, this is integral to encouraging parties to settle a matter. Discrimination complaints are a very personal type of legal action and the process can be emotionally draining and stressful for applicants. Without legal advice and representation, many applicants simply do not pursue their complaints. CLCs are not able to meet the current demand for representation in discrimination matters due to funding and resource constraints and cannot act on behalf of all potential clients.

The challenge for unrepresented applicants is further compounded by the shift towards a more formal style of conciliation. In the past, conciliations may have been more informal, with neither party represented. However, in our experience, respondents are increasingly retaining legal representation at the conciliation phase and are more likely to be represented than complainants. This significantly disadvantages applicants who are unrepresented.<sup>32</sup>



31 Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2014) 222.

32 See, eg, Rosemary Hunter and Alice Leonard, 'The Outcomes of Conciliation in Sex Discrimination Cases' (Working Paper No 8, August 1995).

## Clients' Perspectives on the Role of their Lawyers in Conciliations

In our client surveys, we specifically asked the clients how they felt about having a lawyer at the conciliation. Clients emphasised the importance of having a lawyer due to their own emotional state.

One client reflected on the 'unbelievable burden of emotional pressure' of their case and the way in which it affected their judgment as to what a good settlement was. This was exacerbated by the respondent being represented by 10 people at the conciliation. The client commented on the role of their lawyer:

**Client 1:** *'it was not only the legal thing, and it was more an emotional moment for me. Because I suffered a lot because of the matter for months so my judgment could be a little bit cloudy because of the matter and it was good to have a lawyer by your side to visualise what is the pure legal matter, because I couldn't be very realistic about it'.*

Other clients stated:

**Client 3:** *'I don't think I would have been able to do it if I didn't have [a lawyer] sitting there. Sometimes when you go to the legal centre or legal anything, you get used to that person, that person gets to know your story, that person hears you from the start, that person, when I cried in front of [the lawyer] all of that over the different times I'd seen her, cried with anger, with sadness, cried with "I don't think I can do this", do you know what I mean?'*

**Client 4:** *'Oh, I wouldn't have been able to do it without [the lawyer] ... very confusing, confusing time for me, I wouldn't have been able to proceed without her'.*

**Client 4:** *'I owe [the lawyer] a lot. She was great. She gave me a lot of strength to get through what I got through and it was undoubtedly the hardest thing I've ever done and I wouldn't have done it without [the lawyer's] support and knowledge'.*

Clients identified that their lawyer prepared them for how the conciliation would run and that this helped ease the emotional stress of the process.

Other clients reflected that without a lawyer, they were going to 'get the wool pulled over their eyes' (Client 3), and that the respondent would use words that the client did not understand. In two cases, clients faced respondents who brought 10 and 7 representatives each to the conciliation, while the client had a lawyer and a student law clerk. One client described this as 'scary', while the other client saw this as the benefit of having legal representation and being taken seriously.

Clients generally reflected that having a lawyer who they had worked with to prepare their case, helped them emotionally during the conciliation. They stated that having someone on their side, supporting them at the conciliation, made a significant difference to their experience. They also identified that working with their lawyer before the conciliation helped them shift their expectations of what a good outcome would be. The interviewed clients said that this process allowed them to separate their emotionally driven position on what should happen because of their experiences of discrimination to a more realistic view as to what might conclude the matter.

These client reflections confirm the experience of KLC lawyers who have advised hundreds of clients following experiences of discrimination. The deeply personal nature of the circumstances that give rise to discrimination claims, along with the resulting harm (as experiences of discrimination often result in emotional and psychological trauma) suggest that discrimination complainants gain a particular benefit from experienced legal representation. This is especially true because representation of this kind allows a relationship to be built between the client and lawyer.

The circumstances of the clients we surveyed, being former clients of KLC, meant we did not speak to clients who did not have legal representation during their conciliation. However, one client we surveyed had representation in the conciliation denied by the conciliating body,

which prevented KLC's lawyers from attending. The client commented on this experience.

**Client 5:** *'But it was very degrading in the end. I just knew, you know, we didn't have a leg to stand on. Because it was, it was very one sided, we weren't allowed to confer [without lawyers]. We weren't allowed to have them in there [the conciliation] and I am sure if we'd had them in there, they wouldn't have gotten away with what they did.'*

**Client 5:** *'if we'd had lawyers with us, the outcome would have been totally different, the advice they gave me was good advice but I wasn't able to express it legally, which they [the respondent] were because they know the ins and outs of the law system. And they were bringing up things that had nothing to do with the exact case.'*

### Practitioners' views on their Role in Conciliations for Vulnerable Clients

A key area that was consistently raised by legal practitioners in the practitioner survey and roundtable was the importance of legal representation for vulnerable clients in discrimination matters. Legal practitioners emphasised that they felt vulnerable clients had better experiences in conciliation when they were legally represented:

*'Whether or not the client is vulnerable, lawyers improve the process and the outcome dramatically in my experience.'*

*'Speaking generally, legal assistance is much better when the opposition also have legal assistance. The conception that one or both parties shouldn't have a lawyer is wrong.'*

*'The unrepresented applicant, you fear for them because you think of the responses we [lawyers] get from the ADB – how is an*

*unrepresented person getting asked to say why it's discrimination going to answer?'*

*'There's a deep suspicion of lawyers in the process. I don't think we've been refused leave to represent, but we've had to push a few times.'*

*'There's no doubt bad lawyers stuff up the process, but there isn't a recognition that good lawyers will help with the process. Conciliators should understand that they should let us in. I think this comes from a misunderstanding of what our role is. It's very helpful to have someone behind the scenes negotiating, saying that's a reasonable offer, or we can work with that.'*

## The Role of the Conciliator/Mediator in Discrimination Conciliations

A conciliator or mediator is responsible for guiding the participants through the conciliation process, ensuring that the parties are respectful to one another and are given equal opportunities to raise their concerns.<sup>33</sup> The impartiality of the ADR practitioner is a principal characteristic across all ADR processes. This does not limit the ADR practitioner from intervening to address inequity between the parties (i.e. power imbalances), but rather requires them to do so 'with care and skill to ensure it is not seen as advocacy for one party over another, but rather as action to enable substantive fairness of process and outcome through maximising the involvement and control of both parties'.<sup>34</sup>

In some circumstances, the ADR practitioner's role will include providing expert advice or suggesting possible solutions to the parties. In most ADR processes, the ADR practitioner is restricted from determining the outcome of the dispute. However, this does not mean that the conciliator's role is purely passive. As Meredith notes '[a]dvocates do

33 Australian Human Rights Commission, 'Unlawful Discrimination: Understanding and Preparing for Conciliation' (Fact Sheet) 1 <<https://www.humanrights.gov.au/understanding-and-preparing-conciliation-unlawful-discrimination>>.

34 Ibid.

not value conciliators who are passive and “sit on the fence”; they do clearly value open-mindedness, application to the problem, a fair hearing, courtesy and respect’.<sup>35</sup> Conciliators often affect the parties’ experience of the conciliation process as well as their views on whether a conciliation was fair.

### Clients’ views on Conciliators

We asked clients how they viewed the role of the conciliators that convened their conferences at the ADB, FWC and AHRC:

**Client 2:** *‘[The conciliator] was very open and he was very clearly unbiased to either party and was very, very good at communicating what was going on and what the next steps were.’*

**Client 4:** *‘[The conciliator] was...quite...empathetic...towards me...he was actually great. I don’t think he could do anything better.... the conciliator supported me.’*

**Client 11:** *‘I can’t say the conciliator did anything well to be honest.’*

**Client 6:** *‘They [the conciliator] were compassionate, very understanding. They were commendable.’*

### Practitioners’ views on Conciliation

The lawyers involved in our research all readily identified the advantages of conciliation processes for vulnerable clients. Many contrasted conciliation with the court process, which they felt could be slow, stressful and inflexible. Lawyers saw it as especially important that the client is able to express him or herself in the conciliation and shape a resolution. This again suggests that practitioners who work intensively with clients in discrimination matters identify the strong nexus between emotional and legal resolution of their complaints:

*‘Despite occasional problems, [conciliation is] still a much better process for clients than a court or tribunal, and much more accessible.’*

*‘When conciliation processes work well, it can be a great way to settle disputes and avoid litigation, leaving the client feeling empowered.’*

*‘Conciliators have the capacity to encourage parties towards reasonable settlement outcomes and to appeal to interests, not positions.’*

*‘[Conciliation] provides an opportunity [for clients] to discuss and resolve their issues in a relatively quick, inexpensive and accessible forum.’*

*‘[Conciliation is] an opportunity to be creative in settlement solutions.’*

## The Impact of Being ‘Heard’ in Conciliation for Vulnerable People

Conciliation processes, especially at the AHRC and ADB, are distinctive for their face-to-face nature and longer duration. While ADR processes have proliferated across all areas of the legal system, the amount of time involved in preparing prior to conciliation and participating in the conciliation itself is distinctive and particular to the specialist discrimination jurisdictions (the ADB and AHRC). The time taken in conciliations was identified by clients, practitioners and conciliators working within those jurisdictions as a great strength of their processes, as was the emphasis on all the participants coming together at the same time to seek resolution.

The allocation of time and the general structure of discrimination conciliations emphasise the voice of the person who has experienced discrimination. Discrimination conciliations are distinctive for their focus on emotions and experiences, with much time and attention

<sup>35</sup> Frances Meredith, ‘Alternative Dispute Resolution in an Industrial Tribunal: Conciliation of Unfair Dismissal Disputes in South Australia’ (2001) 14 *Australian Journal of Labour Law* 36, 49.





generally paid to the wellbeing of the applicant and the personal impact of the discriminatory conduct. Most conciliations at the ADB and AHRC begin with a statement from the applicant about the nature of the discrimination and the impact it has had on them. These opening statements by applicants are rarely curtailed and often encouraged by conciliators to come directly from the applicant, and not their legal representative. For many clients, it is the first and only opportunity to explain the impact the discrimination has had on them.

Conciliations, when run well, can be a form of restorative justice for parties. In general, restorative justice is perceived to have the following characteristics:

- ◆ emphasis on the offender's personal accountability by key participants;
- ◆ an inclusive decision-making process that encourages participation by key participants; and
- ◆ the goal of putting right the harm that is caused by an offence.<sup>36</sup>

Restorative justice focuses on repairing the harm caused by the offending behaviour. Similar to ADR, this involves the parties collectively resolving the matter. While restorative justice has been most utilised in the criminal justice context, its theory and processes may be adapted to a range of contexts, including conciliation.

<sup>36</sup> Jim Dignan and Peter Marsh, 'Restorative Justice and Family Group Conferences in England: Current State and Future Prospects' in Allison Morris and Gabrielle Maxwell (eds), *Restorative Justice for Juveniles: Conferencing, Mediation and circles* (Hart Publishing, 2001) 85–9.

## Practitioners' views on the Impact of being 'heard' for Clients

Legal practitioners in both the survey and roundtable identified the importance of being heard for clients as a key positive attribute of conciliation processes. Lawyers reflected:

*'Clients find conciliation an empowering process because they are heard, especially considering they feel they never have a voice. Even if no outcome is achieved, or not the one they wanted, the process can make them feel better.'*

*'Victims of sexual harassment really want a voice. They usually don't want to maintain employment, but like to be acknowledged. Even if their experience is acknowledged by the conciliator, not the respondent, it can be a powerful outcome for the client. Often they are not concerned with the compensation.'*

*'Conciliation lets clients feel that they've had their say, there's huge value in having the applicant address the respondent face-to-face.'*

*'I've found the AHRC is engaged, supportive and successful in terms of good outcomes. The engagement shows itself before you even get in the room. The conciliators are proactive to ensure parties respond to the complaint and provide requested documents. They know the law. They're happy to shuttle between rooms all day and encourage parties in a sensible way to move towards a reasonable resolution. We know they have their KPIs, but it seems they're more merit driven, there in good faith to resolve the matter.'*

# Settlements

In all three jurisdictions, conciliation settlements can, to a large extent, be dictated by the parties. They can therefore be crafted in a way which is tailored to particular outcomes desired by the applicant. In KLC's experience, this can include things such as employment references, training in discrimination principles, the development of policies or procedures, or a donation to a charity with particular relevance to the discrimination experienced by the applicant. This can provide more control for applicants as they are able to achieve pragmatic outcomes tailored to have the most impact on their lives. For example, this could involve improving the client's current workplace, allowing them to move to a new job, or improving practices through training at a service they frequently use. This scope for a wide range of creative solutions was identified by clients and legal practitioners as empowering for applicants and was also found to achieve much faster results than a court-based process.

While the key organisations that accept discrimination complaints cite the very high rates of matters resolved by conciliation as a measure of success, there is very little research that sheds light on the experience of people who make discrimination complaints and how they view the success (or otherwise) of conciliation processes. While the number of matters that settle at conciliations is an important way of gauging success, we do not believe that this provides a complete picture of how successful these processes have been.

## What Settlement Outcomes do Clients want from Conciliations?

Often, applicants lodge their complaint but are unaware of the remedies available to them. As noted by Allen, 'during the initial stages the complainant is emotional, which makes it difficult for them to identify a tangible outcome'.<sup>37</sup> In our experience at KLC, clients have difficulty identifying what outcomes they are seeking until we have provided legal advice on the potential outcomes available.

Clients often seek both financial and non-financial outcomes. Often, the most powerful aspect of ADR for complainants is the capacity to hold the respondent to account for their actions by providing a forum to talk about how the experience affected them. Where respondents are unwilling to admit any liability or to make an apology, clients may then become focussed on compensation as an outcome, as an alternative form of acknowledgement that the conduct was inappropriate and/or unlawful.

When asked what they wanted to achieve at conciliation, clients answered:

**Client 2:** *'I wanted for my voice to be heard and to set a precedent so that it wouldn't happen again to someone else.'*

**Client 4:** *'I wanted [the employer] to be held responsible for their actions.'*

**Client 6:** *'I think it was an apology and compensation.'*



**Client 10:** *'I wanted to bring the attention to the company that fired me when I was pregnant that it wasn't acceptable and wanted them to be held accountable.'*

## Why do Clients Settle?

Parties reach settlement for a variety of reasons. Parties may feel pressure to settle through ADR in order to avoid litigation. As Thompson states:

In rights disputes, with adjudication before a court of law or arbitration looming as the final solvent, it is the prospect of loss of control, a dictated decision and the not insignificant matter of legal costs that gives mediation its extra edge.<sup>38</sup>

As discussed above, settlement rates in discrimination matters across the three jurisdictions are relatively high. In KLC's experience, factors that influence settlement include:

- ◆ preserving the relationship between the parties;
- ◆ whether the applicant sees the offer as reasonable or as good as they are likely to get;
- ◆ whether the applicant has received legal advice and is aware of likely outcomes in the jurisdiction;
- ◆ whether applicants have legal representation, or fear they can't afford legal representation at the hearing stage;
- ◆ the respondent's commercial decision to settle or to make the complaint 'go away';

<sup>38</sup> Clive Thompson, 'Dispute Prevention and Resolution in Public Services Labour Relations: Good Policies and Practice' (Working Paper No 277, International Labour Office, 2010) 57.

- ◆ achieving systemic or individualised remedies that the court/tribunal is unable to order;
- ◆ the costs risk of pursuing discrimination matters at the tribunal/courts stage;
- ◆ the matter will become public if it proceeds to hearing;
- ◆ the stress and delay involved in taking a matter to hearing;
- ◆ in an employment dispute, whether the applicant has found alternative employment;
- ◆ any physical or mental health issues;
- ◆ family circumstances;
- ◆ whether the applicant has experienced victimisation as a result of lodging the complaint;
- ◆ the financial circumstances of the applicant;
- ◆ the difficulty of succeeding in a discrimination matter at hearing, due to onus of proof issues;
- ◆ reluctance to give evidence in the witness stand;
- ◆ whether the applicant finds the legal system and process intimidating and complex;
- ◆ the financial and emotional impact of pursuing the matter to hearing; and
- ◆ whether the applicant feels the respondent has acknowledged their experience.

## Is There Pressure to Settle in Conciliations?

While the ability to fully settle matters confidentially can be attractive for applicants, a number of factors can operate to make clients feel that they have little option but to settle. In some cases, conciliators play a direct role in this pressure, strongly advising that settlement should be reached.

A client raised the following incident:

**Client 11:** *I felt, uh, not bullied, but I felt like [the conciliator] wanted to achieve a result that wasn't necessarily the best result for me.*

A legal practitioner described the following:

*'I've had conciliators telling clients they should accept clearly inadequate offers when they have a strong case – their focus seems to be on finalising the matter and getting it off their desk rather than considering client needs.'*

## Costs Pressures

Costs pressures have a strong influence over whether parties settle the matter. Legal practitioners frequently raised the costs jurisdiction in complaints made under the federal discrimination acts. Legal practitioners commented on the impact this had on choice of jurisdiction as well as the pressure on applicants to settle their matters if they lodged at the AHRC:

*'The costs risk at AHRC is a strong incentive for respondents to make no/low settlement offers and a strong incentive for complainants to accept low ball offers of settlement.'*

*'Complainants feel compelled to settle for terms they're not comfortable with at AHRC because of fear of costs risk at the Federal Circuit Court.'*

*'Costs is a big issue, it dissuades most clients from going to AHRC. This is difficult when the federal law is stronger (i.e. in disability discrimination). This plays on the advice we give clients.'*

*'Respondents know costs scare applicants.'*

## Impact of Settlement on Developing Discrimination Law

Despite the 40-year history of discrimination law in Australia, there has been a lack of jurisprudence development in discrimination law as the majority of matters tend to settle at the

conciliation or mediation stage. It is estimated that only approximately 10% of discrimination complaints proceed to hearing, resulting in a small number of adjudicated cases each year.<sup>39</sup> The individualised nature of the complaint-handling process in ADR raises concerns that this approach prohibits the identification and improvement of systemic issues that may otherwise be addressed through formal litigation.<sup>40</sup> As noted by Gaze and Hunter, 'some level of litigation is desirable in the public interest in discrimination cases, in order to establish precedents that will assist future settlement, to achieve outcomes going beyond the interests of an individual complainant, and to publicise the legislation so that it can both empower potential future complainants and deter potential future discriminators'.<sup>41</sup>

The lack of precedent often makes it difficult to comprehensively advise clients on the technical aspects of discrimination claims, with many sections of the law still open to interpretation. Additionally, a lack of clarity can lead respondents to be unaware of what compliance with the law requires. There are concerns as to whether the objects of anti-discrimination law, including eliminating discrimination and achieving substantive equality, can be met if the majority of matters are not adjudicated.<sup>42</sup>



Additionally, the courts have tended to interpret discrimination law in a narrow and technical manner, making it difficult for applicants to establish that discrimination has occurred within the legal sense.

However, despite these concerns, KLC's view is that within discrimination law, systemic outcomes are achievable in ADR. Additionally, with the only alternative to ADR being litigation, KLC recognises the importance of ADR for increasing access to effective remedies for vulnerable groups who have experienced discrimination.

39 Beth Gaze and Rosemary Hunter, 'Access to Justice for Discrimination Complainants: Courts and Legal Representation' (2009) 32 *University of New South Wales Law Journal* 699, 702.

40 Raymond, above n 17, 4.

41 Gaze and Hunter, above n 28, 700.

42 Dominique Allen, 'Against Settlement? Owen Fiss, ADR and Australian Discrimination Law' (2009) 10 *International Journal of Discrimination and the Law* 191, 200.

# Themes Identified

## 1. Training of Conciliators

A number of legal practitioners raised concerns about conciliators' knowledge of discrimination law. There was a perception that some conciliators lacked an understanding of the applicable law, which impacted on the way they conducted the conciliation and left parties and practitioners feeling like the conciliator's priority was to close the matter. Some practitioners were concerned that conciliators sometimes made definitive statements on exceptions or exemptions applying when practitioners felt this was open to interpretation, and best decided by the tribunal or court. Of greatest concern was when conciliators made manifestly incorrect statements on the law, which both damaged their credibility and the conciliation process as a whole.

Hunter and Leonard argue that the use of ADR in discrimination matters must reflect the aims of, and ensure compliance with, anti-discrimination legislation.<sup>43</sup> They further state that conciliators require expertise in discrimination law and specific training in conciliating discrimination matters.<sup>44</sup> KLC agrees with this approach. Currently, the discrimination legislation does not prescribe specific formal qualifications or mediation accreditation for conciliators. At a minimum, KLC believes that conciliators should have specialist knowledge of anti-discrimination law to allow them to understand the issues in dispute. It is imperative that the ADB, AHRC and

FWC provide in-depth training on the applicable discrimination law, ADR theory, and conciliation techniques to ensure their conciliators are competent to run conciliations. Such training requires ongoing resourcing of these bodies by government. Some legal practitioners commented:

*'Generally speaking the [jurisdiction's] conciliators are more focussed [on] getting the matter finished no matter what, they lack an understanding of the legislation they operate under and sometimes the social/ community issues involved which impacts the position they take.'*

*'In [jurisdiction], while some [conciliators] are good, many appear to lack interest in the matter. They are focussed on getting it off their books and want to take the easiest path to that end. These conciliators need to have a deeper understanding of their cases, what the complainant wants and of the legislation. They also often need better conciliation skills generally; just because someone has done a conciliation course does not make them a good conciliator.'*

*'In [jurisdiction] it can be luck of the draw as to the experience/knowledge/interest in discrimination law [of the conciliator].'*

Legal practitioners identified the training of conciliators as integral to remedying concerns with the conciliation process:

<sup>43</sup> Hunter and Leonard, 'Sex Discrimination and Alternative Dispute Resolution', above n 41, 311–12.

<sup>44</sup> Ibid.



*'In AHRC there seems to be a better understanding of the law and areas of discrimination. Conciliators appear to have better communication skills and are better able to recognise the points of disagreement and summarise the issues between the parties.'*

*'I think conciliators need to be legally trained and preferably had some practice experience.'*

*'Conciliators need to use techniques to control the conciliation, to stop parties from sending conciliation off track.'*

*'Can we see the training so we're not going in blind? Why shouldn't we have interaction with the registry to see what they do there? The feedback would be training for everyone.'*

*'It would be good to have training so conciliators understand lawyers' roles in the process.'*



## Case Study

# Yifei

Yifei was working as a dental assistant in a dental practice. When she found out she was pregnant, her doctor gave her a letter to give to her employer explaining that she should not operate the X-ray machine as it could harm her baby. Yifei's employer refused to make adjustments to Yifei's role and continued to force her to perform X-rays even though Yifei repeatedly requested to swap with other available staff. Yifei's boss told her she was causing problems because she was pregnant, and eventually dismissed her from employment.

Yifei lodged a general protections dismissal complaint with the Fair Work Commission. At the conciliation, Yifei was 7 months pregnant. She was very intimidated by the process and was questioned in an aggressive manner by the Commissioner, who put pressure on the parties to come to an agreement within 90 minutes. The Commissioner incorrectly advised Yifei she should have made a bullying complaint instead (despite the fact that the bullying jurisdiction had not been in force when the conduct occurred).

Yifei had a very strong case but decided to settle the matter for only one week's pay because she did not think she could handle the stress of going to the Federal Circuit Court. Yifei was very unhappy with the conference process as she did not feel she was given the opportunity to express the effect her employer's conduct had had on her and felt extremely intimidated during the conference.

## 1. Recommendations

### KLC recommends that:

- 1.1** Conciliators should receive extensive training in the legislation they accept complaints under from experts in the field, to ensure that conciliators have an in-depth understanding of the applicable law. Conciliators should undergo 'refresher' training at least biannually to keep up to date with developments in the law.
- 1.2** Conciliators should refrain from making pronouncements on issues of law as they do not have an adjudicative role.
- 1.3** Conciliators should receive extensive training in ADR theory and techniques from experts in the field.

## 2. Early Referrals for Legal Advice

Legal practitioners, in line with their view that applicants are better off when legally represented, identified when and how referrals are made to the legal assistance sector by the ADB, AHRC and FWC as an area which could be improved. In particular, KLC believes that the ADB, AHRC and FWC should have processes in place to identify vulnerable applicants at the time a complaint is lodged and should refer these applicants for legal assistance as soon as possible. Practitioners commented that:

*'I want a clearer policy for referrals – how they do it, when they do it and why they do it. I feel like at the moment we get a referral*

*when it is “too hard” to deal with or when they just need a deed.’*

*‘I find that the ADB refers matters to us very late – sometimes too late. The ADB only gets us involved at the tribunal stage, as if assistance is only needed then when it is really needed much earlier.’*

*‘If someone is unrepresented and lost, then they should be referred to someone – the ADB should take a more active role in this.’*

## 2. Recommendation

### KLC recommends that:

- 2.1** The ADB, AHRC and FWC should implement processes to identify vulnerable applicants at the time a complaint is lodged, and to refer these applicants for legal assistance as soon as possible.

## 3. Improving Consistency

A key feature of the legal system is the concept of due process, which includes a framework of structured proceedings and equality of treatment of both parties.<sup>45</sup> A concern identified by legal practitioners in response to our surveys was the lack of consistency in conciliation procedures, both within and between jurisdictions:

*‘There’s not much structure. They either starve or exhaust you into submission.’*

*‘For me it comes down to the skill of conciliators across jurisdictions. Some are better than others.’*

*‘We are happy to advise clients to take a matter to AHRC ... it is the most reliable jurisdiction in terms of consistency and it allows parties time to fully discuss issues in more detail.’*

*‘I want greater consistency around requesting settlement proposals and written response[s]. I understand that the bodies may counter that flexibility is a core aspect of their offering to clients but there needs to be improvement in this area.’*

Many practitioners expressed concern that it was difficult to advise clients on the conciliation process when it was often dependent on the individual conciliator’s approach. As one practitioner stated:

*‘Often we can’t advise clients on the conciliation process – it changes depending on who the conciliator is. It’s luck of the draw as to whether you will get a good conciliator or not.’*

While we recognise the importance of flexibility in conciliation processes to adapt to the needs of the parties (including adjustments required), a basic framework for conciliation procedures should be provided to the parties and representatives prior to conciliation. We note that the AHRC usually provides a conciliation agenda to the parties prior to the conference. This assists legal representatives to both advise their clients on the process and prepare for the conciliation conference. If the conciliator feels it is necessary to depart from the basic framework, the conciliator could discuss this with the parties. It is difficult to prepare clients for conciliation and allow them to feel comfortable with the process when it frequently changes, often within the conciliation conference itself.

Some examples of inconsistencies include:

- ◆ some conciliators encourage opening statements to be made, while others do not;
- ◆ some conciliators will want the parties to discuss the contested issues in detail, while other conciliators will require the parties to go into negotiation almost immediately;



- ◆ some conciliators allow legal representatives to speak on behalf of their clients, while others restrict this;
- ◆ some conciliators insist on a settlement proposal prior to a conference, while others do not; and
- ◆ some conciliators will inform parties who will be present at the conference prior to the conference, while others do not.

All these issues can lead to distress for the applicant. These inconsistencies in process lead to inconsistent outcomes for clients and should be addressed.

### 3. Recommendation

#### **KLC recommends that:**

- 3.1** A basic framework for conciliation procedures should be provided to the parties and any representatives prior to conciliation, similar to the conciliation agenda provided by AHRC to parties.

### 4. Flexibility

A complementary concern raised by practitioners is the perceived inflexibility of some conciliation processes in the ADB, AHRC and FWC. While a consistent approach is valuable for setting some baseline expectations and practices, flexibility also needs to be maintained. Practitioners identified procedural concerns including the number of conciliations, the scheduling of conciliations without confirming the availability of legal representatives, and inequality of time given to provide documentation. Some of the comments from legal practitioners about the lack of flexibility were:

*'Another procedural thing that is a concern is that there is only one conciliation – often we need more than one. This is especially the case when respondents need a chance to go and get legal advice.'*

*'When conciliation is scheduled for a date that the lawyer is unavailable, it's difficult, especially when the client is vulnerable and has developed a relationship with their lawyer. Another representative isn't going to be able to build that rapport with the client so quickly.'*

*'How come the respondent got a few months to provide their documentation and I have to provide a response within two weeks because the conciliator is going on leave?'*

*'FWC have allowed me to have multiple conciliations – where a second conference was granted, it was sensible in the situation to do so.'*

*'When I lodged a general protections claim for a client, I made clear to the FWC I was only available Monday–Thursday due to carer's responsibilities. They listed the conciliation for Friday and refused to change the date.'*

The need for flexibility in conciliation processes (within a general framework as discussed above) is highlighted by these concerns. When flexibility is provided, the applicant and respondent are afforded the opportunity to effectively engage with conciliation processes.

## Case Study

# Alexandra

Alexandra was employed by 123 Finance as a finance officer. She suffered a miscarriage and took two weeks off work. When she attempted to return to work, she was dismissed by the company. Alexandra was very distressed by these events and was diagnosed with bipolar disorder and PTSD. Alexandra lodged a general protections complaint with the FWC. Alexandra then came to KLC for advice, and we agreed to represent her at the conciliation conference.

In the week leading up to the conference, we met with Alexandra and were concerned her mental health had deteriorated. Her general practitioner confirmed that Alexandra did not have the capacity to make decisions. As a result, KLC could not go ahead with the conciliation. We requested an adjournment, which the FWC granted. When Alexandra recovered sufficiently so as to have capacity and give instructions, FWC relisted the conciliation conference. At the conciliation conference, it became apparent that the respondent had not sought legal advice, did not understand the proceedings and was not willing to negotiate. The FWC conciliator decided to list the matter for a second conference to allow the respondent time to get legal advice, and to give the parties a chance to resolve the matter without proceeding to court.

## 4. Recommendations

### **KLC recommends that:**

- 4.1** Conciliators should have the ability to schedule additional conciliations when it is clear parties could reach settlement in the structured environment that conciliation provides;
- 4.2** Conciliators should contact the parties and representatives prior to scheduling or listing a conciliation conference to confirm their availability; and
- 4.3** Conciliators should provide equal time to respondents and applicants to provide documentation, unless an extension is requested and granted by the conciliator for good cause.

## 5. Adjustments

As the ADB, AHRC and FWC deal with complaints under anti-discrimination legislation, it is imperative that the bodies act in line with the objects and purposes of the legislation to promote substantive equality and eliminate discrimination. The bodies should proactively seek information on whether parties require adjustments and provide adjustments to allow parties to fully participate in conciliation processes. If lawyers or clients perceive that the agency's goal is to resolve the complaint quickly rather than protecting the individual's interests, this may lead to distrust of the agency and a reluctance to lodge complaints there. Additionally, an unfair conciliation process where adjustments are refused can lead to the client feeling traumatised.



**Case  
Study****Matthew**

Matthew is deaf and has an intellectual disability. Matthew was working in a stockroom and was fired for failure to follow directions. The directions consisted of a manager yelling at Matthew to perform a task, with Matthew being unable to hear and thus follow the directions.

Matthew's mother made a disability discrimination claim on his behalf to a discrimination complaint body. KLC sought permission from the body to represent Matthew in conciliation, which was denied, as the respondent did not have a lawyer.

Matthew's preferred method of communication is to lip read, but the conciliator wore a face mask because she had a cold. Both Matthew and his mother did not understand what was happening in conciliation. The matter was settled at conciliation for a letter of resignation, but Matthew and his mother were confused about what had happened, and KLC had to seek this information from the conciliator on their behalf.

KLC lodged two complaints on Matthew's behalf with the relevant body about the way the conciliation had been conducted but did not receive a satisfactory response. Both Matthew and his mother told KLC that they no longer have any faith in the legal system.

**Case  
Study****Sam**

Sam is an Aboriginal man who works in hospitality. On a number of separate occasions another employee made insulting comments about Aboriginal people and Sam specifically to other colleagues. Sam complained to his employer and an investigation took place, however Sam was not satisfied with his employer's response and so made a complaint of racial discrimination to the ADB. Sam then contacted KLC and asked for our assistance. KLC sought permission from the ADB to represent Sam at the conciliation. Although Sam's employer did not have legal representation the ADB granted our request due to the imbalance of power in an employee/employer relationship and also the sensitive nature of the complaint. The ADB also offered to make an Aboriginal and Torres Strait Islander co-conciliator available to attend the conciliation, which Sam accepted. This made the conciliation a less intimidating experience for Sam. Both KLC and Sam were pleased with the adjustments the ADB made in this instance.

Each of the jurisdictions has varying practices about when to make adjustments to suit applicants. These include measures such as the length or number of conciliation conferences, as well as inclusion of conciliators of particular cultural backgrounds or applicants bringing a support person. Transparency around what sorts of adjustments can be requested would make it easier for applicants when engaging in conciliations. Legal practitioners identified concerns about the length of conferences, face-to-face conferences and support persons:

*'You need a reasonable amount of time to do things – sometimes in the FWC the speed can be really difficult for vulnerable clients. An example is there was a deaf client of mine who lodged at the FWC. When we went to conciliation the FWC time constraints were very difficult. Whilst they accommodated in other regards, they were inflexible with the time period for which the conciliation could run.'*

*'I've requested adjustments i.e. face-to-face shuttle conciliation, or a phone conciliation in sexual harassment. The AHRC was very willing to accommodate, the ADB not so much'.*

*'It can be difficult for rural and remote clients where they won't provide a face-to-face conciliation.'*

*'We were representing two Aboriginal clients in a race discrimination matter at AHRC. AHRC was exemplary in ensuring the clients understood and were comfortable with the process leading up to the conciliation. When the clients asked for an acknowledgement of country at the opening of the conciliation, they were happy to accommodate this. This made the clients feel much more welcome.'*

*'I've had a client show up with their mother as a support person at conciliation at the AHRC without notifying me or the conciliator beforehand. It was a sexual harassment matter and the client was very distressed. The AHRC was great in recognising the client's mental state and allowed her mother in after consulting with the respondents.'*

*'We were able to bring in an Aboriginal support worker in the FWC.'*

## 5. Recommendations

### KLC recommends that:

- 5.1** The ADB, AHRC and FWC should make publicly available their policies for the requesting of and granting of reasonable adjustments to enable parties to fully participate in the conciliation process; and
- 5.2** The ADB, AHRC and FWC should proactively seek information on what adjustments the parties may require to participate in the conciliation process both on the complaint form and by contacting the parties/representatives prior to conciliation.

## 6. Power Imbalances and Conciliation

Applicants in discrimination matters tend to have limited financial resources and are often members of vulnerable groups (as identified in this project). This impacts their ability to effectively engage with the complaints process and the legal system. In our experience of advising unrepresented litigants who have already reached settlement at conciliation, we have found that they often agree to settlement terms we would have advised against. Conciliators need to be aware of the existence of power imbalances and actively engage in techniques to mitigate power imbalances, ensuring that conciliation is a fair process for both parties. This should be recognised as an integral part of the conciliator's role, and conciliators should receive intensive training on evaluating power imbalances between the parties and developing techniques to address these in conciliation. In particular, conciliators should be aware of lawyers engaging in adversarial behaviour such as cross-examining the other party and should make it clear to parties that this behaviour is not appropriate in conciliation.



KLC recognises that ADB, AHRC and FWC conciliators are concerned with ensuring that both the applicant and the respondent perceive the conciliation process to be fair. Solicitors for the complainant can help facilitate this. As Chapman and Mason found, complainants' solicitors have generally had a positive impact on the ADB's processes.<sup>46</sup> Consequently, we believe that a presumption to permit legal assistance lawyers to represent applicants in conciliation would be appropriate given the objects of anti-discrimination legislation. KLC recognises that it is imperative that legal assistance lawyers assist both the applicant and the relevant body (ADB, AHRC or FWC). We also recognise that it is the responsibility of legal assistance lawyers to ensure they assist in the process by acting in good faith, not being unnecessarily adversarial, managing the

applicant's expectations, and ensuring they have expertise in discrimination law.

### **Addressing power imbalances through rights-based conciliations**

As discussed above, the ADB and FWC tend to use a facilitative approach to conciliation, while the AHRC uses a hybrid facilitative/ advisory model. Hunter and Leonard state that the facilitative approach has disadvantages in discrimination complaints, including a limited capacity to address the power imbalance between the parties and a failure to take legal rights into account.<sup>47</sup> They propose a model of rights-based conciliation to overcome the power imbalance between parties in conciliations. This rights-based model includes optional conciliation, binding settlements, and

<sup>46</sup> Anna Chapman and Gail Mason, 'Women, Sexual Preference and Discrimination Law: A Case Study of the NSW Jurisdiction' (1999) 21 *Sydney Law Review* 525, 552.

<sup>47</sup> Rosemary Hunter and Alice Leonard, 'Sex Discrimination and Alternative Dispute Resolution: British Proposals in the Light of International Experience' (1997) *Public Law* 298, 311–12.



the conciliator ensuring the parties are aware of their rights and that the objectives of the legislation are met through the conciliation process.<sup>48</sup> Section 28 of the *Australian Human Rights Commission Act 1986* (Cth) specifically requires the AHRC to have regard to the need to ensure that any settlement reflects a recognition of human rights and the need to protect those rights.<sup>49</sup>

KLC's view is that a rights-based conciliation model is appropriate for discrimination complaints. This would help to take into account the objects and purposes of anti-discrimination legislation and to ensure that a fair conciliation process incorporating natural justice, procedural fairness, and impartiality is available. While the rights-based model retains the advantages of the facilitative approach (including informal, efficient and affordable access to justice), it also emphasises the applicant's experience as being at the centre of the process.<sup>50</sup> A rights-based model also has the advantage of allowing greater conciliator intervention to address the power imbalance. Ball and Raymond note that 'conciliator intervention in outcomes can be seen as justified with reference to the need to ensure that matters are not resolved on terms which vary markedly from what would be considered a fair resolution before the associated court or tribunal'.<sup>51</sup> Taking a more interventionist approach to ensure the conciliation process is made substantively equal does not breach conciliator neutrality if the conciliator employs appropriate strategies and techniques. For these reasons, conciliators require extensive training in the applicable law and the rights-based conciliation model.

## 6. Recommendations

### KLC recommends that:

- 6.1** Where an applicant has secured free legal assistance, the presumption should be that the lawyer will be allowed to represent the applicant at conciliation.
- 6.2** Funding for free legal assistance services to assist applicants in discrimination matters should be increased.
- 6.3** Conciliators should receive training in how to mitigate power imbalances in conciliation processes and employ these techniques in conducting conciliations.
- 6.4** A move towards rights-based conciliations should be considered.

## 7. Speed of Resolution

Legal practitioners raised concerns with the delay between lodging a complaint and attending conciliation in some jurisdictions. While we recognise that this is often due to the resource constraints for the bodies, it is particularly concerning when there is an ongoing relationship between the parties which could be maintained if a conciliation conference was held quickly, such as in employment or housing. Some representatives were unaware that parties can request an expedited conciliation where required, while other practitioners who had requested expedited conciliations were satisfied with the process.

48 Ibid.

49 *Australian Human Rights Commission Act 1986* (Cth) s 28.

50 Allen, 'Against Settlement?', above n 42, 206.

51 Jodie Ball and Tracey Raymond, 'Facilitator or Advisor?: A Discussion of Conciliator Intervention in the Resolution of Disputes under Australian Human Rights and Anti-Discrimination Law' (Discussion Paper, Australian Human Rights Commission, 2004) <<https://www.humanrights.gov.au/our-work/complaint-information-service/publications/facilitator-or-advisor-discussion-conciliator>>.

### Legal practitioners on delays between lodging and conciliation:

*'Some clients dislike the lead up and waiting for conciliation. Matters heard in the FWC are good in this regard as there is a quick turnaround time. Clients want their matters resolved, they dislike waiting 4–6 months just to get to conciliation.'*

*'Matters at the ADB are very slow! They seem anti-lawyer, like they don't want us there. An example of this is a complaint that was made in 2013. It was referred to us in 2015, and only in April 2016 did I receive more paperwork for this matter. This matter has gone on much too long.'*

*'I have had a good experience with the ADB in the past where I needed an urgent conciliation as my client would be homeless if it wasn't decided quickly – the ADB dealt with the matter very quickly.'*

*'Maybe have someone available to deal with urgent applications. It's not very user friendly.'*

*'The FWC is very outcome driven, while the AHRC is very process driven. Which avenue is best depends on the client's needs. For example, a client of mine who was a mother with a young child and pregnant with her next child was very happy with the FWC outcome driven approach which was fast and allowed her to get on with what she needed to get on with.'*

## Case Study

# Maxine and Mara

Maxine and Mara were employed as customer service assistants in a retail store. Maxine and Mara were both in Australia on working holiday visas. Maxine and Mara's boss began sexually harassing them when they commenced employment. Maxine and Mara lodged sexual harassment complaints with the ADB, who referred them to KLC for advice.

KLC agreed to represent Maxine and Mara at conciliation. Both Maxine and Mara were due to return to their home countries shortly after lodging the complaint. KLC contacted the ADB requesting an expedited conciliation conference. The ADB conciliator was extremely helpful and proactive, contacting both sides to propose conciliation dates and organising an interpreter. The conciliator provided flexibility in holding a joint conciliation conference for Maxine and Mara as this was their preferred option. The conciliation conference was held within two weeks of the request for an expedited conference being made. Settlement was reached at the conference.



When we met with the ADB, they informed us that conciliation conferences are often delayed due to applicant and respondent parties requesting extensions in order to provide written responses and documentation. Additionally, the ADB often engages in extensive correspondence and negotiation with respondent parties in order to encourage them to attend a conciliation.

## 7. Recommendations

### KLC recommends that:

- 7.1** The ADB, AHRC and FWC make procedures and considerations for granting an expedited conciliation publicly available on their websites;
- 7.2** The NSW government should provide additional resourcing to the ADB to allow it to perform its functions and provide a quick conciliation conference process; and
- 7.3** The Federal government should provide additional resourcing to the AHRC and FWC to allow them to perform their functions and provide a quick conciliation process

## 8. Feedback Mechanisms

Legal representatives were unanimous that the ADB, AHRC and FWC should provide feedback mechanisms to parties and their representatives. Many practitioners identified the AHRC's 'Service Survey', which is emailed to practitioners and parties following a conciliation in order to acquire feedback on the process, as a good model to allow the AHRC to identify trends, and reflect on the strengths and weaknesses of the conciliation process. Practitioners also suggested that regular meetings of 'user groups' would allow legal practitioners access to inform the bodies about what was working well and areas of concern in conciliation processes:

*'There's no one to complain to at the ADB and AHRC ... they're headless.'*

*'We feel like they hate us. There's no capacity for us to give them feedback. There's no mechanism for that to happen.'*

*'We've all had extensive experience dealing with these problems – they'll keep recurring if we don't have some sort of forum for training or feedback. These bodies know us and should trust us; we're legitimate stakeholders, it would be great to actually sit down with them.'*

*'I am yet to be satisfied with phone conciliation at the FWC. I strongly believe there needs to be training and regular feedback loops, such as through user group meetings, to improve their practices.'*

*'We've met with the ADB this year and they were very open to hearing our concerns. We mentioned we weren't getting many referrals, and since then they have been making an extra effort to refer matters to us – in fact we've got a backlog! It would be useful if we could set up a regular meeting with them.'*

KLC believes that regular users of the three jurisdictions can offer valuable insights on what the bodies are doing well and what could be improved. Given that many applicants are appearing in these jurisdictions without legal representation, it is crucial to ensure that the quality of conciliation processes for all users be improved through receiving user feedback.

## Case Study

# Yasmin

Yasmin is a lesbian who regularly catches taxis. On one occasion Yasmin tried to get into a taxi and had an altercation with the taxi driver. The taxi driver swore at Yasmin and called her a name which is highly offensive to lesbians. After complaining directly to the taxi company and being unsatisfied with their initial response, Yasmin made a complaint of discrimination on the ground of homosexuality in the provision of goods and services to the Anti-Discrimination Board (ADB). Yasmin then contacted KLC and asked for our assistance. KLC sought permission from the ADB to represent Yasmin at the conciliation. Yasmin felt that the conciliator did not manage the complaint as well as they could have and was also concerned about the quality of the settlement agreement they drafted after the conciliation. The settlement agreement did not accurately reflect what was agreed at conciliation. KLC made amendments to the agreement on Yasmin's behalf to ensure that the agreement covered key points agreed to at conciliation and to protect Yasmin's rights. This raises concerns that ADB conciliators without legal backgrounds may be drafting agreements for unrepresented applicants that do not accurately reflect the agreement reached. Although Yasmin was ultimately pleased with what was achieved at conciliation, she felt let down by the ADB in this instance. KLC was concerned what would have happened to Yasmin had she not had a lawyer to check and amend the settlement agreement.

## 8. Recommendations

### KLC recommends that:

- 8.1 The FWC and ADB should introduce feedback mechanisms such as the AHRC's 'Service Survey' to gather feedback on conciliation processes from parties and their representatives.
- 8.2 The ADB, FWC and AHRC should introduce 'user groups' for legal practitioners who frequently appear in their jurisdiction to actively seek feedback on conciliation processes.

## 9. Increasing Knowledge on Conciliations

Due to the confidential nature of conciliation, there is a dearth of publicly available information on the nature of complaints and conciliated outcomes. At the beginning of any conciliation it is standard for all parties to agree to the confidentiality of the process. If settlement is reached it is standard for any settlement agreement to contain a mutual confidentiality clause, prohibiting the parties from disclosing the settlement terms. The ADB, AHRC and FWC provide only limited data on complaints received, withdrawn, terminated and settled in their annual reports. As a result, it is extremely difficult to analyse the conciliation process, the impacts of this process on outcomes, the applicants' and respondents' satisfaction with the process, the nature of outcomes, and how these outcomes are achieved. Perhaps because of this, very few articles examining the process exist.<sup>52</sup> Thornton and Luker note 'anti-discrimination agencies fiercely guard the confidentiality requirement, making it difficult to conduct research which would reveal important information about the process' of conciliation.<sup>53</sup>

While KLC recognises the importance of maintaining confidentiality, particularly of the parties' identities, we believe de-identified data on conciliation processes and outcomes could be made available to assist in identifying trends in conciliations and settlement outcomes. This would benefit lawyers, applicants and respondents by making them aware of likely outcomes in conciliation processes, as well as enabling lawyers to give tailored advice based on previous outcomes. Additionally, such data could be used to identify areas where the law is not operating as intended, or where reform is required. The ADB and AHRC do publish conciliation registers, however, only limited case studies are provided, inhibiting rigorous data analysis.

## 9. Recommendations

### KLC recommends that:

- 9.1 The ADB, AHRC and FWC should make available de-identified disaggregated data on conciliation, including:
  - ♦ the nature of complaints (protected attributes claimed, relevant area of public life, alleged discriminatory conduct);
  - ♦ outcomes achieved;
  - ♦ how many parties were legally represented; and
  - ♦ number of complaints accepted, terminated, withdrawn or settled by attribute.
- 9.2 The ADB, AHRC and FWC should publish comprehensive de-identified conciliation registers, to be made available on their respective websites.

52 See, eg, Tracey Raymond and Sofie Georgalis, 'Dispute Resolution in the Changing Shadow of the Law: A Study of Parties' Views on the Conciliation Process in Federal Anti-Discrimination Law' (2003) 6(2) *ADR Bulletin* 1, 6; Allen, 'Against Settlement?', above n 36; Chapman, above n 17.

53 Margaret Thornton and Trish Luker, 'The New Racism in Employment Discrimination: Tales from the Global Economy' (2010) 32 *Sydney Law Review* 1, 5.



## 10. ADB/AHRC/FWC Strategic Assistance

The ADB, AHRC and FWC, as bodies handling discrimination complaints at the first instance, are in a unique position to identify systemic discrimination and ‘frequent flyer’ respondents. While several overseas jurisdictions enable their discrimination agencies to intervene in matters and support test cases, the ADB, AHRC and FWC do not have this power.<sup>54</sup>

In order to promote substantive equality, we recommend that the ADB, AHRC and FWC be given the power and accompanying resourcing to undertake strategic litigation under their own initiative to address systemic discrimination and run test cases to ensure the development of the law in this area.

### 10. Recommendations

#### KLC recommends that:

- 10.1** The AHRC Discrimination Commissioners, ADB President and Fair Work Ombudsman should be given powers to investigate and initiate court proceedings in relation to discriminatory conduct that appears unlawful, without an individual complaint. The FWC President should refer matters to the FWO as appropriate.
- 10.2** The role and powers of AHRC Discrimination Commissioners, ADB President and Fair Work Ombudsman should be expanded to increase the role of these bodies in addressing systemic discrimination. These powers should include monitoring of duty holders, commencing complaints, intervening in matters, and reporting annually to Commonwealth Parliament/ State Parliament and the public on discrimination matters.

<sup>54</sup> For example, Britain, the USA and Canada, whose discrimination agencies can intervene in proceedings and support test cases.

# Conclusion



Discrimination law dispute resolution processes provide an important avenue for vulnerable applicants to feel heard and to address rights breaches. When conducted thoughtfully, and in line with best practice, these ADR processes can result in clients feeling empowered in exercising their rights. When conducted poorly, conciliation processes can exacerbate power imbalances between the parties and leave clients feeling re-traumatised or that the legal system has failed them.

Employing a rights-based approach to conciliations is particularly relevant in discrimination matters, as one of the few areas of law in NSW in which human rights are protected. The themes we identified from extensive surveys and interviews with vulnerable applicants and legal practitioners working in the field provide key guidance on what works well for vulnerable applicants in discrimination conciliations, and what needs to be improved. We note that many of our recommendations for best practice in conciliations are already in place at the ADB, AHRC and FWC, and congratulate the bodies for the effort they put in to training staff conciliators and taking user feedback on board. We look forward to continuing to work with these bodies and legal practitioners to improve conciliation processes for vulnerable applicants in discrimination matters.

# Appendix 1 – Client Survey



## Conciliation project - KLC Client Survey

This survey is intended to be a record of your experience of the conciliation process for the purpose of identifying common issues, outcomes and trends in conciliation.

Conciliation is becoming increasingly popular form of resolving legal disputes. Kingsford Legal Centre is conducting research into the range of experiences that clients and solicitors have had at conciliation.

If you signed a deed of release as part of a settlement reached at conciliation, you may have agreed to keep the outcome of your conciliation confidential. This survey is not about the outcome you achieved at conciliation, but about your experience of the conciliation process. Should you want independent advice about whether taking part in this research survey is permitted under your deed of release, please let us know and we will refer you to an independent solicitor (not employed by KLC) to give you this advice for free.

We would appreciate you taking the time to complete this survey. Your feedback will help us to improve our services and contribute to the development of best practice models for conciliation. Your individual case will not be identified, and your name will not be used.

Participation in this survey is completely voluntary. Your decision whether to participate in this survey will not affect your ability to access advice from KLC in the future. The solicitors at KLC will not be informed about whether or not you took part in this survey.

If you have any further questions about this survey or our research project, please contact Kingsford Legal Centre on 9385 9566.



Please answer the following questions:

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**1. Gender**

- Male  
 Female  
 Not stated

**2. Do you identify as being one or more of the following:**

- Aboriginal and/or Torres Strait Islander  
 Non-English speaking background/Not born in Australia  
 A person with a disability  
 My complaint was about sexual harassment

**3. Did you need any extra help to allow you to fully participate in the conciliation conference (for example, use of an interpreter, different location, support person, hearing loop etc)?**

- Yes  
 No (Go to Question 7)

**4. Did you or your lawyer ask for this extra help?**

- Yes  
 No (Go to **Question 7**)

**5. How satisfied were you with the answer when you asked for extra help for the conciliation conference?**

- Extremely satisfied  
 Very satisfied  
 Somewhat satisfied  
 Neither satisfied nor dissatisfied  
 Somewhat dissatisfied  
 Very dissatisfied  
 Extremely dissatisfied

**6. Do you have any comments, good or bad, on the experience of asking for extra help for the conciliation conference?**

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**7. What did you want to achieve at the conciliation conference?**

- Apology  
 Owed money for entitlements (such as annual leave & long service leave, etc)  
 Compensation  
 Your job back  
 Statement of Service/Written reference  
 Introduction of workplace policies/procedures  
 Anti-discrimination training  
 Other (please specify)

**8. Were you able to follow what was being talked about at the conciliation conference?**

- Yes  
 No

**9. If you had questions, were you given the chance to ask the conciliator questions during the conciliation conference?**

- Yes
- No

**10. How satisfied were you with the conciliation conference?**

- Extremely satisfied
- Very satisfied
- Somewhat satisfied
- Neither satisfied nor dissatisfied
- Somewhat dissatisfied
- Very dissatisfied
- Extremely dissatisfied

### The Conciliator

**11. Before the conciliation conference, how satisfied were you that you understood what was going to happen?**

- Extremely satisfied
- Very satisfied
- Somewhat satisfied
- Neither satisfied nor dissatisfied
- Somewhat dissatisfied
- Very dissatisfied
- Extremely dissatisfied

**12. How satisfied were you with the quality of the conciliator's communication during the conciliation conference?**

- Extremely satisfied
- Very satisfied
- Somewhat satisfied
- Neither satisfied nor dissatisfied
- Somewhat dissatisfied
- Very dissatisfied
- Extremely dissatisfied

**13. Do you feel that you were given the chance to explain how the discrimination affected you at the conciliation conference?**

- Yes
- No

**14. What did the conciliator do well?**

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**15. What could the conciliator have done better?**

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**Representation**

16. **Were you allowed to have a lawyer at the conciliation conference?**

- Yes
- No (Go to **Question 19**)

17. **Did having a lawyer with you affect your experience of conciliation? What was good and/or bad about having a lawyer?**

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18. **What do you think would have happened at the conciliation conference if you hadn't had a lawyer?**

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19. **Do you have any extra comments about any part of the conciliation process?**

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20. **Would you use the conciliation process again in the future?**

- Yes
- No

# Appendix 2 – Legal Practitioner Survey

## Conciliation project – external practitioners survey

Kingsford Legal Centre is conducting research into the range of experiences that clients and solicitors have had at conciliation.

This survey is intended to gain data of advice and casework matters undertaken at a range of Community Legal Centres (CLCs), Legal Aid NSW and by barristers in NSW in 2014 and 2015 for the purpose of identifying common issues, outcomes and trends in conciliation in discrimination matters at the Anti-Discrimination Board NSW, Australian Human Rights Commission and Fair Work Commission.

**Participation in this survey is completely voluntary.**

If you have any further questions about this survey or our research project, please contact Kingsford Legal Centre on (02) 9385 9566.

### Please answer the following questions:

Name:

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Organisation:

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Role:

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Email Address:

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Phone number:

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**1. Have you advised and/or represented clients at conciliation conferences in any of the following jurisdictions? Please select all that apply.**

- Anti-Discrimination Board NSW
- Australian Human Rights Commission
- Fair Work Commission

## Adjustments

2. **Have you represented a client at the ADB NSW, AHRC or FWC who required adjustments to ensure their full participation in conciliation? For example, an interpreter, support person, hearing loop, change of location of conciliation conference etc.**

- Yes *(please specify what type of adjustment)*  
 No *(please go to **Question 7**)*

3. **Were any adjustments requested?**

- Yes  
 No

4. **Were the requested adjustments provided?**

- Yes  
 No

5. **How satisfied were you with the process of requesting an adjustment?**

- Extremely satisfied  
 Very satisfied  
 Somewhat satisfied  
 Neither satisfied nor dissatisfied  
 Somewhat dissatisfied  
 Very dissatisfied  
 Extremely dissatisfied

6. **Do you have any additional comments about the process of requesting adjustments?**

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7. **How satisfied are you with how conciliators handle the pre-conference stage?**

- Extremely satisfied  
 Very satisfied  
 Somewhat satisfied  
 Neither satisfied nor dissatisfied  
 Somewhat dissatisfied  
 Very dissatisfied  
 Extremely dissatisfied

8. **How satisfied are you with the quality of the conciliator's communication during the conciliation conference? Please provide de-identified examples.**

- Extremely satisfied  
 Very satisfied  
 Somewhat satisfied  
 Neither satisfied nor dissatisfied  
 Somewhat dissatisfied  
 Very dissatisfied  
 Extremely dissatisfied

### Examples:

9. **In conciliation conferences, do you feel you are given adequate opportunity to advocate for your client? Please provide de-identified examples.**

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**Representation**

**10. Have you had any problems obtaining permission to appear for a client at a conciliation conference?**

- Yes
- No (please go to **Question 13**)

**11. If you were denied permission to appear for your client, were you provided with reasons explaining this denial? Please specify what jurisdiction this occurred in.**

- Yes (please specify the jurisdiction)
- No (please go to **Question 13**)

**12. What was the reason, or reasons that you were denied permission to appear for your client?**

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**14. What do you think conciliators do well? Please specify if you are referring to a particular jurisdiction.**

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**15. What do you think conciliators could do better? Please specify if you are referring to a particular jurisdiction.**

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**Process**

**13. In your view, what are the positives and/or negatives of your clients' experiences of conciliations? Please provide de-identified examples.**

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**16. Where there is a choice of jurisdiction, what are the main factors that you consider in advising your clients to choose one avenue over another? For example, the conduct of conciliators, time allocated for conciliation, the speed at which conciliation is scheduled, outcomes, costs jurisdictions.**

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**17. In sexual harassment matters, are you likely to advise clients to make a complaint in one jurisdiction over another? If so, please specify which jurisdiction and your reasons why.**

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**18. Do you have any additional comments that you would like to make on any aspect of conciliation?**

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# Appendix 3 – Legislative Framework

Protected attribute	Commonwealth anti-discrimination legislation*	Fair Work Act 2009 (Cth)	Anti-Discrimination Act 1977 (NSW)
Race, colour, descent, national origin, ethnic origin, national extraction, social origin, nationality	✓	✓	✓
Racial vilification	✓	x	✓
Sex	✓	✓	✓
Sexual harassment	✓	x	✓
Pregnancy	✓	✓	✓
Breastfeeding	✓	x	✓
Transgender status	x	x	✓
Marital or domestic status	✓	✓	✓
Age	✓	✓	✓
Disability	✓	✓	✓
Carer's responsibilities/family responsibilities	✓	✓	✓
Homosexuality/sexual orientation	✓	✓	✓
HIV status	x	x	✓
Gender identity, transgender	✓	x	✓
Intersex status	✓	x	x
Religion	x	✓	x
Political opinion	x	✓	x

**Table 1:  
Protected attributes**

\*Including: Age Discrimination Act 2004 (Cth); Disability Discrimination Act 1992 (Cth); Race Discrimination Act 1975 (Cth); Sex Discrimination Act 1986 (Cth).

Area of public life	Commonwealth anti-discrimination legislation*	Fair Work Act 2009 (Cth)	Anti-Discrimination Act 1977 (NSW)
Employment	✓	✓	✓
Education	✓	x	✓
Goods and Services	✓	x	✓
Accommodation	✓	x	✓
Registered Clubs	x	x	✓
Land	✓	x	✓
Sport	✓	x	✓
Administration of government/state laws and programs	✓	x	✓
Equality before law	✓	x	x
Access to premises	✓	x	x
Requests for information	✓	x	x

**Table 2: Areas of public life**

\*Including: Age Discrimination Act 2004 (Cth); Disability Discrimination Act 1992 (Cth); Race Discrimination Act 1975 (Cth); Sex Discrimination Act 1986 (Cth).

Note: Commonwealth anti-discrimination acts have varying coverage of areas of public life. The list above is not disaggregated by protected attribute.





