ACCESS TO JUSTICE FOR DISCRIMINATION COMPLAINANTS: COURTS AND LEGAL REPRESENTATION

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I INTRODUCTION

In the terms of Marc Galanter's classic article, 'Why the "Haves" Come Out Ahead',[1] people making complaints of discrimination are typically 'one shotters' who have little or no prior contact with the legal system and who are deeply invested – both emotionally and financially – in the outcome of their case. They tend to have limited financial resources, may be members of ethnic minorities with limited English language abilities or have a disability that affects their capacity to function effectively within the legal system, and may experience social exclusion that both contributes to and exacerbates the discriminatory treatment they allege. Those complaining of discrimination in employment may have access to assistance from a trade union, but those complaining in other areas (such as education, provision of goods and services, accommodation, and racial vilification) do not. By comparison, respondents to discrimination complaints are generally better resourced, even as individuals or small business owners, often have access to assistance from an employer or industry organisation, and, in the case of businesses, can claim a tax deduction for legal fees. Some respondents are large corporations and public sector entities which are, in Galanter's terms, 'repeat players' in the jurisdiction. They may be the subject of a number of complaints over time, and are sufficiently disinterested and have sufficiently deep pockets to be able to 'play for rules', settling or litigating cases strategically in order to create precedents that are favourable to their interests.

There are several ways in which the power and resource imbalances between discrimination complainants and respondents may be mitigated so as to produce at least a more level playing field. These include alternative dispute resolution,

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1 Marc Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law and Society Review* 95.

representation or other forms of assistance for complainants by a specialist agency concerned with enforcing anti-discrimination legislation, adjudication of complaints in an inquisitorial or informal tribunal, and free or low-cost legal representation for complainants.[2] The first of these options – alternative dispute resolution – is relatively low cost, limits the advantage enjoyed by respondents in litigation, and may enable complainants to achieve outcomes not available through adjudication, but it is not immune to power and resource disparities, as pressures to settle fall more heavily on the individual with the most to lose. It also cannot provide a complete answer to the question of access to justice for complainants, as some level of litigation must inevitably occur where matters genuinely cannot be resolved between the parties (a 100 per cent settlement rate would indicate excessive pressures to settle). Indeed, 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.[3]

The second option – agency assistance – seeks to counter the deep pocket/repeat player advantage enjoyed by some respondents by introducing a reasonably well resourced repeat player on the side of complainants, which can also act strategically and play for rules. This form of assistance is available in several overseas jurisdictions, including Britain, the United States, and some Canadian jurisdictions. The British Equality and Human Rights Commission, for example, does not have formal dispute resolution functions, but is charged with promoting equality and human rights in various ways, which may include both intervening in existing proceedings, and directly supporting strategic cases in tribunals and courts.[4] This option is important for the pursuit of test cases and

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2 It should be noted that this article is solely concerned with mechanisms that might facilitate access to justice for individual discrimination complainants. It does not deal with non-complaint-based methods of enforcing anti-discrimination legislation, such as agency inquiry powers or regulatory compliance mechanisms. Although such methods are important and may reduce the need for individual complaints, they would never do so entirely, even if implemented to a far greater extent than is currently the case in Australia. For recent discussions of regulatory enforcement models in the anti-discrimination field, see Belinda Smith, 'Not the Baby and the Bathwater: Regulatory Reform for Equality Laws to Address Work-Family Conflict' (2006) 28 *Sydney Law Review* 689; House of Representatives Standing Committee on Legal and Constitutional Affairs, *Access All Areas: Report of the Inquiry into Draft Disability (Access to Premises – Buildings) Standards* (2009) 149–51. A further mechanism, also not discussed here, is the possibility in some cases for a complaint to be brought by an advocacy organisation or trade union on behalf of its members. The *Australian Human Rights Commission Act 1986* (Cth) (hereafter '*AHRC Act*') s 46P(2)(c) allows for this, but in *Access for All v Harvey Bay City Council* (2007) 162 FCR 313, the Federal Court held that in order to have standing, the organisation must itself be a 'person aggrieved' by an alleged act of unlawful discrimination, and not merely concerned about alleged unlawful discrimination suffered by its members, which has severely limited the scope for representative organisations to bring complaints.

3 See, eg, Jean Sternlight, 'In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis' (2004) 78 *Tulane Law Review* 1401.

4 See, eg, Equality and Human Rights Commission, *Legal Strategy 2008-9* (2008) <http://www.equalityhumanrights.com/uploaded_files/legal_strategy_0809.doc> at 17 September 2009.

cases with the potential to have a wider impact, but will not cover all meritorious claims that deserve a hearing.

The third option – an active, enabling and/or inquisitorial tribunal – seeks to counter the resource and procedural advantages enjoyed by respondents and their legal representatives by making the hearing process accessible to and negotiable by self-representing litigants. This is the theory, for example, behind the employment tribunal system in England and Wales, where legal aid is unavailable for tribunal representation.[5] Although earlier English studies found that in practice, the chances of success for discrimination and other employment tribunal claimants increased with legal representation, while self-represented litigants were disadvantaged,[6] more recent studies suggest that employment tribunals do in fact operate more inquisitorially than adversarially and assist unrepresented claimants reasonably effectively, with the result that success is no longer strongly correlated to the presence of legal representation.[7]

The fourth option – free or low cost legal representation – assumes that legal representation is necessary, but finds ways to overcome disparities in the ability to afford representation by reducing or eliminating the cost of representation for complainants. There are a variety of ways in which this might be done, including legal aid, generalist and specialist Community Legal Centres ('CLCs'), pro bono schemes, and conditional fee arrangements, which are discussed further below.

The four options should be seen as complementary rather than mutually exclusive. Although tribunal assistance and legal representation may be considered as alternatives, there is evidence to suggest that some kinds of difficulties experienced by unrepresented litigants, such as the production of inadequate evidence and communication difficulties, cannot necessarily be overcome even by the assistance of an informal, inquisitorial tribunal, and can really only be addressed by means of legal representation.[8] This article discusses the choices made in the configuration of the Australian federal hearing system for discrimination complaints and the effect of those choices on complainants. It concludes that discrimination complainants currently lack access to justice in the

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5 Sir Andrew Leggatt, *Tribunals for Users: One System, One Service* (2001).

6 Justice, *Industrial Tribunals* (1987); Alice Leonard, *Judging Inequality: The Effectiveness of the Industrial Tribunal System in Sex Discrimination and Equal Pay Cases* (1987); Hazel Genn and Yvette Genn, *The Effectiveness of Representation at Tribunals* (1989); Gerald Chambers with Christine Horton, *Promoting Sex Equality: The Role of Industrial Tribunals* (1990); Christopher McCrudden, David J Smith and Colin Brown, *Racial Justice at Work: The Enforcement of the 1976 Race Relations Act in Employment* (1991).

7 Alison Brown, Angus Erskine and Doris Littlejohn, *Review of Judgments in Race Discrimination Employment Tribunal Cases* (Employment Relations Research Series No 64, UK Department of Trade and Industry, 2007); Michael Adler, *Tribunals Ain't What they Used to Be* (2009) Administrative Justice and Tribunals Council <http://www.ajtc.gov.uk/adjust/09_03.htm> at 17 September 2009. Note, however, that the Brown et al. study, while finding 'no obvious relationship between success and representation', conflates legal and other forms of representation. See also Alison Brown and Angus Erskine, 'A Qualitative Study of Judgments in Race Discrimination Employment Cases' (2009) 31 *Law and Policy* 142.

8 Paul Lewis, 'Litigants in Person and their Difficulties in Adducing Evidence: A Study of Small Claims in an English County Court' (2007) 11 *International Journal of Evidence and Proof* 24.

Australian federal system and considers what would be required in order to remedy the situation.

II DISCRIMINATION COMPLAINT PROCEDURES

Both State and federal anti-discrimination legislation in Australia operates according to a relatively common scheme, which is well-endowed – indeed arguably over-endowed – with opportunities for alternative dispute resolution. Complaints are initially lodged with a statutory agency, which investigates the complaint and must attempt to resolve it by conciliation. At federal level, the complaint handling body is now the Australian Human Rights Commission ('AHRC'),[9] although at the time of the study discussed in this article, it was known as the Human Rights and Equal Opportunity Commission ('HREOC'), and this is how we will refer to it when discussing the study below. If conciliation is unsuccessful, the complaint may then proceed to adjudication. Under State legislation, hearings were initially conducted by specialist tribunals (such as the Victorian Equal Opportunity Tribunal), although in some States, these have been merged into larger, generalist tribunals dealing with a range of jurisdictions (such as what is now the Victorian Civil and Administrative Tribunal). All hearing bodies offer opportunities for cases to be mediated before proceeding to a final hearing. The net result of the conciliation process is that only a small proportion of complaints proceed to hearing (around 10 per cent on average), and there is then further attrition through mediation and settlement discussions, resulting in quite small numbers of adjudicated cases each year. As a consequence, anti-discrimination jurisprudence remains somewhat underdeveloped given its 30-year history. The legislation is quite complex and technical, and it is still possible for the interpretation of significant elements to be radically revised by a single case proceeding to the superior courts on appeal.

In the federal system, HREOC initially functioned both as the complaint-handling agency and the adjudication body, with complaints that could not be conciliated by the Commission's conciliation staff being referred to part-time Hearing Commissioners for hearing. In its hearing capacity, HREOC operated as a relatively informal tribunal, although, as noted below, unrepresented complainants could still be disadvantaged. In 2000, however, the adjudication of federal anti-discrimination matters was shifted from HREOC to the federal courts,[10] in delayed response to the High Court's decision in *Brandy v Human Rights and Equal Opportunity Commission*,[11] which affirmed that as HREOC was an administrative tribunal rather than a Chapter III court, it was only empowered to make non-binding determinations. Thus, if respondents did not comply voluntarily with its determinations, it was necessary for complainants to

9 See *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) sch 3, commencing 5 August 2009.

10 *Human Rights Legislation Amendment Act 1999* (Cth).

11 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

take enforcement proceedings in the Federal Court, which required a complete re-hearing of the case.[12] The ultimate 'solution' adopted by the federal government to the problem of the unenforceability of HREOC determinations was simply to shift the hearing functions under federal anti-discrimination law to the Federal Magistrates Court ('FMC') (for less complex matters) and the Federal Court. Under the current hearing regime, complaints that cannot be conciliated – as well as complaints that the AHRC considers to be vexatious, misconceived or lacking in substance – are terminated by the AHRC, and the complainant then has 60 days to lodge a claim in the FMC or the Federal Court.[13] Following the proposed restructuring of the federal courts system,[14] all claims will go to the Federal Court.

Not surprisingly, when the shift of hearing functions to the mainstream courts was proposed, it was objected that the courts, with their formal, adversarial procedures, would be likely to disadvantage complainants, who would generally be unable to afford the necessary legal representation.[15] This was in the context of HREOC's general lack of capacity to assist individual complainants in bringing their cases. The AHRC does have some legislative powers that would enable it to support people pursuing discrimination claims in the FMC or Federal Court, but they fall far short of assistance with representation or even legal advice. For example, the President of the AHRC may provide the relevant court with a written report on a complaint in which conciliation has been unsuccessful.[16] Such a report may not refer to anything said or done in the course of conciliation proceedings, but it may include information uncovered through the investigation process, which could be of assistance to the court. In practice, however, this power is not routinely exercised. It could be exercised on the request of the parties or the court, but parties are given copies of all the relevant documents that would make up a report, and generally do not seek the exercise of this power.[17] Given the adversarial nature of the court process, it is also not clear what weight the court would accord to such evidence.

Secondly, the AHRC 'may help a person to prepare the forms required for the person to make an application' to the FMC or Federal Court.[18] However, the AHRC is rarely called upon to do this. The courts themselves provide assistance

12 *Aldridge v Booth* (1988) 80 ALR 1.

13 *AHRC Act* s 46PO(2). As discussed below, the original time limit was 28 days. The extension to 60 days was introduced by the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth).

14 Attorney-General for Australia, 'Rudd Government to Reform Federal Courts' (Press Release, 5 May 2009 <http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/MediaReleases_2009_SecondQuarter_5May2009-RuddGovernmenttoReformFederalCourts> at 17 September 2009.

15 Senate Legal and Constitutional Legislation Committee, *Report on the Human Rights Legislation Amendment Bill 1996* (1997) [2.24], [4.12]; Sharon Offenberger and Robyn Banks, 'Wind Out of the Sails: New Federal Structure for the Administration of Human Rights Legislation' (2000) 6(1) *Australian Journal of Human Rights* 239.

16 *AHRC Act* s 46PS.

17 Email from Jonathon Hunyor, Director, Legal Section, AHRC, to Beth Gaze, 7 September 2009.

18 *AHRC Act* s 46PT.

to people lodging applications, and the AHRC advises parties to contact the courts about this even before a matter is terminated so they are familiar with the requirements.[19] Such assistance, though, would not involve the provision of expert legal advice in discrimination law that might be necessary for effectively drawing up a claim, preparing affidavits or assessing the likelihood of success. Finally, AHRC Commissioners have the capacity to appear, with the court's permission, as *amicus curiae* to provide expertise to the court.[20] Such expertise may support the complainant's argument, but this will not always be the case. In any event, these provisions do not invest the AHRC with any kind of a strategic litigation role that could mitigate the need for individual legal representation.

In response to concerns about complainants' need for, but inability to afford, representation, it was argued that the shift to the federal courts would make it easier for complainants with good cases to find legal representation. This was because, while HREOC had no power to make an award of costs, the general rule in the courts is that costs followed the event. As a result, it was anticipated that lawyers would be more willing to take cases on a conditional fee basis, because successful complainants would be able to recover their costs. This contention was accepted by the majority of the Senate Committee that inquired into the amending legislation,[21] although a minority report by two ALP Senators rejected this view and also expressed concerns about the effect of recent cutbacks to legal aid on the ability of complainants to obtain adequate representation.[22]

We undertook an empirical study to determine the impact of the shift of hearing functions from HREOC to the federal courts. The study looked broadly at the consequences of moving from an informal tribunal to formal court proceedings, from a specialist to a generalist jurisdiction, and from a cost-free regime to one in which costs follow the event. This article focuses on the first aspect of the shift, the increased formality inherent in the court system, and its impact on access to justice for complainants, although clearly, the other two aspects were closely related and also contributed to subsequent difficulties experienced by complainants in obtaining access to justice.[23]

III THE STUDY

In order to determine the impact of the new hearing regime, our study took a 'before and after' approach, gathering statistics, looking at decided cases, and interviewing parties and lawyers involved in claims under the old and new

19 Hunyor, above n 17.

20 *AHRC Act* s 46PV. In 2007–08, HREOC appeared as amicus curiae in only three matters, all of which were disability discrimination claims: HREOC, *Annual Report 2007-8* (2008) ch 5.

21 Senate Legal and Constitutional Legislation Committee, above n 15.

22 Senate Legal and Constitutional Legislation Committee, *Human Rights Legislation Amendment Bill 1996: Report by Senators Bolkus and McKiernan* (1997).

23 For the full report of the study, see Beth Gaze and Rosemary Hunter, *Enforcing Human Rights in Australia: An Evaluation of the New Regime* (forthcoming).

regimes. There has been little other Australian research evaluating the adjudication of discrimination claims (most other empirical investigations of the discrimination complaints process have focused on the conciliation stage).[24]

We intended to interview parties to cases that had both settled in conciliation and proceeded to hearing under the two regimes, as we hypothesised that the new regime would have an impact not just on parties' experience of the adjudication process, but also on parties' decisions whether or not to settle their matters in conciliation. In the event, however, this proved virtually impossible, and our interviews ultimately focused on parties ('litigants') whose cases had either been referred for hearing by HREOC under the old regime, or in which court proceedings had been initiated under the new regime. Some of these litigants had settled their cases before proceeding all the way to a tribunal determination or judicial decision. Although we had more ready access to this group of litigants than to those who had settled in conciliation, we did also experience some difficulties in recruiting them to participate in the study. Our total sample of litigant interviewees numbered 68, consisting of 49 complainants (29 from the old system, 20 from the new) and 19 respondents (10 from the old system and nine from the new). As a consequence, our findings in relation to litigants' perceptions and experiences are limited. They are supplemented, however, with interview data from lawyers. We conducted 23 interviews with lawyers (barristers, solicitors, and other advisers) who work regularly in the federal anti-discrimination jurisdiction, and who had experience under both the old and new hearing regimes. Fourteen of these specialised in complainant work (four solicitors, seven legal service lawyers, two barristers and one union advocate), while nine specialised in respondent work (two solicitors, six barristers, and one in-house advocate). All interviews were conducted with University Ethics Committee approval and on the condition of strict anonymity in the reporting of interview data.

Our major data on legal representation and success rates is derived from a statistical analysis of decided cases. We analysed all available discrimination decisions made under the federal anti-discrimination legislation then in force – the *Racial Discrimination Act 1975* (Cth) ('*RDA*'), the *Sex Discrimination Act 1984* (Cth) ('*SDA*'), and the *Disability Discrimination Act 1992* (Cth) ('*DDA*') –

24 See Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990) ch 5; Rosemary Hunter and Alice Leonard, *The Outcomes of Conciliation in Sex Discrimination Cases* (Centre for Employment and Labour Relations Law Working Paper No 8, University of Melbourne, 1995); Anne-Maree Devereux, 'Human Rights by Agreement? A Case Study of the Human Rights and Equal Opportunity Commission's Use of Conciliation' (1996) 7 *Australian Dispute Resolution Journal* 280; Luke McNamara, 'Research Report: A Profile of Racial Vilification Complaints Lodged with the New South Wales Anti-Discrimination Board' (1997) 2 *International Journal of Discrimination and the Law* 349; Anna Chapman, 'Discrimination Complaint-Handling in NSW: The Paradox of Informal Dispute Resolution' (2000) 22 *Sydney Law Review* 321; Tracey Raymond and Sophie 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 *ADR Bulletin* 31. An exception was the Keys Young report commissioned by the NSW Law Reform Commission, which dealt with both the conciliation and hearing aspects of enforcement: NSW Law Reform Commission, *Discrimination Complaints-Handling: A Study*, Research Report No 8 (1997).

in the period 1 January 1995 to 30 June 2004. Our database contained a total of 530 cases: 334 under the old system (261 HREOC determinations, 73 Federal Court reviews of HREOC determinations) and 196 under the new system (105 FMC, 91 Federal Court). The analysis included the types of proceedings involved, outcomes of cases, and parties' legal representation.

Finally, we examined the sources of free or low-cost legal advice and representation available to complainants, including access to legal aid for discrimination matters, access to specialist community legal centres, pro bono schemes and conditional fee arrangements, in order to determine the extent to which any or all of these possibilities were contributing to access to justice for discrimination complainants under the new hearing regime.

IV COMPLAINANTS

The complainants we interviewed were relatively well-educated, with the majority having post-secondary qualifications, which may have been a factor in their willingness both to take their claim to adjudication, and to participate in our study. Only a minority, however, were in paid employment, and of these, half were employed only part-time. Consequently, the majority of the complainants interviewed had no or low incomes – considerably below the national average.

One specific problem with the change to the new system was the provision of an unrealistically short time-limit for proceedings to be brought. As originally provided under the new hearing regime, complainants were required to decide within 28 days of their complaint being terminated by HREOC whether to bring proceedings in the FMC or the Federal Court. Some complainants could not even get a decision on legal aid eligibility within this time, let alone get the advice needed to assess whether to proceed. Although a complainant in this situation could theoretically initiate proceedings and then discontinue them if legal aid was not available or they obtained advice that they had little chance of success, it was also necessary to lodge an affidavit with the claim, which could not easily be drafted by an unrepresented complainant. Thus, even the initiation of court proceedings introduced a problem of access to justice for complainants. Around one third of new regime complainants interviewed had difficulties with the 28-day limit, and these tended to be complainants from non-Anglo backgrounds and/or with a disability – that is, groups who would be expected to make regular use of anti-discrimination legislation.[25] Their difficulties were not always due to lack of legal assistance; indeed some who said they had experienced difficulties had received legal advice, and a few had legal representation at the time, but they were compelled to absorb information and make decisions at an uncomfortable speed. Clearly, legal representation does not always overcome the barriers for

25 The Productivity Commission, in its review of the *DDA*, recommended that the time limit for lodging court proceedings be extended to 60 days: Productivity Commission, *Review of the Disability Discrimination Act 1992*, vol 1 (Report No 30, 2004) Recommendation 13.2. It took a further five years, however, for this recommendation to be implemented.

disadvantaged litigants when faced with procedural formalities. While it may put them in a considerably better position than being unrepresented, it is not a guarantor of success.

Complainants who commenced proceedings but ultimately withdrew their cases without settlement under the old and new regimes cited different reasons for doing so which related to the specific hearing regime. Those who withdrew under the old system emphasised the high personal cost of continuing and the unenforceability of HREOC determinations, while those who withdrew under the new system emphasised their inability to afford legal representation, their unwillingness to represent themselves, and their inability to pay the other party's costs if they were to lose. The personal cost of continuing still rated highly, but not as highly as the new factors of financial cost of litigation, risk of paying costs, and lack of representation.

For complainants who settled their cases before hearing, the fact that they did not want to represent themselves at hearing was also a more important factor in the decision to settle among complainants under the new regime than under the old regime, although in both cases, other factors were more important in the decision to settle. These findings suggest both that complainants perceived a greater need for legal representation under the new regime and that they were not readily able to access free or low cost representation.

A Legal Advice and Representation

The great majority of litigants interviewed (around 80 per cent from the old system and 90 per cent from the new system) obtained at least some advice from a lawyer about their discrimination case. It appeared that sex discrimination complainants were most likely to obtain legal advice, while race discrimination complainants were least likely to do so. For the small minority of complainants who did not obtain legal advice, their main reason was economic – they could not afford it, or they could not find any free legal advice, get legal aid, or obtain assistance from a specialist legal service. Only one complainant (under the old system) said it did not occur to them to seek advice. By contrast, the three respondents who did not obtain legal advice did not think they needed it.

The majority of the litigants we interviewed also obtained legal representation as well as advice, with the proportion of complainants obtaining legal representation varying little between the old and new regimes (59 per cent and 55 per cent respectively). The stages at which litigants obtained legal representation did, however, vary between the old and new regimes, with those under the new regime tending to obtain legal representation at an earlier stage (for example, before or during conciliation) than those under the old regime. This was borne out by a report published by HREOC in 2005 on the operation of the complaint-handling process under the new hearing regime.[26] The report indicated an increase in complainants' legal representation in the conciliation process after

26 HREOC, *Five Years On: An Update on the Complaint-Handling Work of the Human Rights and Equal Opportunity Commission* (2005).

the introduction of the new regime, from 11 per cent in 1998 to 17 per cent in 2001, 22 per cent in 2002,[27] and 44 per cent in 2004.[28] Complainant representation was higher under the *SDA* than under the *RDA* and *DDA*. In 2001, 23 per cent of sex discrimination complainants were represented, compared to 14 per cent of racial discrimination and disability discrimination complainants.[29] By 2004, 63 per cent of *SDA* complainants were legally represented, 23 per cent had a non-legal advocate, and 14 per cent were unrepresented; compared to *DDA* complainants (39 per cent legal representation, 22 per cent non-legal advocate, 39 per cent unrepresented), and *RDA* complainants (36 per cent legal representation, no non-legal advocates, 64 per cent unrepresented).[30]

Only a minority of the represented complainants we interviewed (47 per cent under the old regime, 36 per cent under the new regime) said they had paid for their lawyers. Of these, under the old regime one was a disability discrimination complainant, while seven were sex discrimination complainants, although under the new regime they were more evenly spread across all three grounds. The fact that a majority of complainants had not paid for their lawyers suggests that the ability to obtain free legal representation is an important factor in determining whether complainants feel they can take their cases to hearing. Complainants who had not paid for their lawyers had been represented variously by a Disability Discrimination Legal Centre ('DDLC'), another CLC or a trade union or other advocacy body (12), had received legal aid (two), or had been represented by a private lawyer either on a pro bono (three) or 'no win no fee' basis (one). One complainant who received legal aid noted that if they were successful, they would have to return 50 per cent of their compensation award to the Legal Aid Commission by way of contribution.

A number of complainants, however, expressed dissatisfaction with the legal representation they had received. They said that their lawyers had not been very good, had given them no information, had communicated poorly, had handled the case badly, had appeared to know very little about the law, had failed to follow instructions, had failed to understand the complainant's desire for policy change or to make a point rather than to obtain compensation, and had pressured them to settle. In particular, while the DDLCs were generally praised, private solicitors and barristers – whether acting for fees or on a pro bono basis – received a measure of criticism. These comments suggest that complainants may have difficulty obtaining sufficiently expert and experienced legal representation in this area.

Litigants who had no legal representation during their cases were asked why they had not obtained such representation. There was a difference between unrepresented complainants under the old regime, whose main reason was that they did not think legal representation was necessary, and those under the new regime, whose main reason was that they could not afford a lawyer. Those under

27 Ibid Table 6.
28 Ibid Table 12.
29 Ibid Table 6.
30 Ibid Table 13.

the new regime were also more likely to mention ineligibility for legal aid, while those under the old regime were more likely to mention their inability to find a competent lawyer specialising in the area. One new system complainant commented that his inability to obtain legal aid had left him at a considerable disadvantage, as he had a speech impairment that made it extremely difficult for him to speak for himself in court.

As noted above, it proved virtually impossible for us to obtain comparable information from parties to discrimination complaints who had settled or withdrawn their cases during the conciliation process. However, there is some comparable data available from a HREOC survey of parties to cases finalised at the conciliation stage, conducted during the first calendar year of the operation of the new hearing procedures.[31] The survey covered parties 'involved in the conciliation process' and complainants who had withdrawn their complaints during 2001. It received 626 responses, 351 from complainants and 275 from respondents. Of these, 93 complainants (27 per cent) but only 25 respondents (9 per cent) indicated that they had concerns about going to court, which had affected their decision either to withdraw or settle their complaint, or not to proceed to court if conciliation was unsuccessful.

Complainants and respondents who answered this part of the HREOC survey were both strongly deterred from court proceedings by the belief that court processes would be complex and involve too much time and effort, and that the costs associated with the court action would be too high (84–85 per cent of complainants, 92–96 per cent of respondents). The other main reason given by complainants, however, was that they would need legal representation and had difficulty obtaining it (61 per cent), whereas no respondents gave this as a reason for not going to court. Respondents were more concerned to avoid the matter being made public (73 per cent of respondents and 19 per cent of complainants). This again indicates that complainants perceived both a need for and a problem of obtaining legal representation under the new hearing regime.

V LAWYERS

Although the lawyers interviewed identified several shortcomings of the old hearing regime (such as delays, and lack of enforceability meaning that it was not taken seriously), and advantages of the new (greater efficiency, more respected by legal representatives), they observed that the procedural requirements of the new hearing regime made participation by unrepresented parties more difficult than under the old system. Two lawyers pointed out that a rigid procedural timetable can be a problem for unrepresented parties, especially country people, who may not get enough time to prepare their case. The requirement for an

31 HREOC, *Review of Changes to the Administration of Federal Anti-Discrimination Law: Reflections on the Initial Period of Operation of the HRLAA (No. 1) 1999 (Cth)* (2002). See also Raymond and Georgalis, above n 24.

affidavit to be lodged with the complaint was considered to be generally beyond the capacity of an unrepresented complainant. The preliminary procedures all took place in open court, which was hard for complainants living outside the metropolitan area, whereas HREOC had been prepared to conduct this business by telephone. The conclusion was that complainants needed legal representation to manage this process. Complainant lawyers further commented that a court was more daunting or terrifying for some complainants than HREOC, which was more informal, had a friendly face, and would travel to complainants' locations. This was another reason why complainants needed legal representation. A barrister who worked for both complainants and respondents noted that the court was much more formal and although it tried to help unrepresented litigants, it could not relate to them in the same way as HREOC had because it had detailed rules of procedure and evidence to follow.

In answering the question 'What advice would you now give a client about whether to proceed to a hearing?', the new costs position was the key to responses. Most lawyers commented that they always advised clients to settle if possible, and that the new costs position would encourage this, although if the case was strong the client could be advised to take it to a hearing. By contrast, CLC lawyers, who can provide advice but not always representation for clients, and must frequently see them go off to a hearing unrepresented, were much clearer about the need for clients to try to settle their cases if at all possible and avoid a hearing at which they would not be represented. A lawyer advising people with disabilities in a CLC, for example, said that now, even if the case had merit, the client must either have no assets, or have a better than reasonable prospect of success to go to hearing. This comment illustrates the interaction between formality/need for legal representation and the costs regime. If a complainant cannot afford or otherwise obtain legal representation, their chances of losing are increased, which in turn increases their risk of an adverse costs award.

As well as being asked about their own views, lawyers were asked what features of the new hearing procedures clients regarded as important. The features lawyers saw as being important to their clients included the enforceability of decisions, the speed of the process, court procedural requirements, the need for but unavailability of legal representation, and costs rules. Even minor issues, such as (waiver of) a lodgement fee, were important to disadvantaged clients who may be dependent on welfare benefits.

Lawyers said that their clients had seen lack of enforceability as the biggest disincentive to using HREOC. But, although the new scheme had brought speed and enforceability, other problems had come with it. Court was more daunting and complainants were more nervous going there. One of the keys was the need for legal representation. Complainants were often very powerless and needed legal representation to have some feeling of equality, which was vital to enable them to assert their rights. Because of the informality of the old system, legal representation had not been so important. The formality and procedures in the new system meant complainants needed legal representation, as they could not prepare the affidavits, witness statements, witnesses and so on required in the

federal courts on their own. People with disabilities were said to experience particular difficulties in dealing with the necessary paperwork themselves. However clients with complex communication and support needs both found court more intimidating and found it harder to get representation.

VI STATISTICAL ANALYSIS OF REPORTED DECISIONS

This section considers both levels of representation, and the relationship between representation and success, for complainants and respondents under the old and new hearing regimes. Cases under the old hearing regime consisted of HREOC determinations, judicial reviews of HREOC determinations by the Federal Court, and appeals to the Full Federal Court in judicial review cases.[32] Cases under the new hearing regime consisted of first instance decisions in the FMC, first instance decisions before a single judge of the Federal Court, and appeals from the FMC or the Federal Court at first instance to either a single judge or the Full Court of the Federal Court.

There was some change in the nature of the claims that were litigated between the old and new systems. Under the old system, a small majority of cases involved sex discrimination claims, while under the new system, disability discrimination claims made up the largest group of cases. In addition, one of the striking features of court proceedings under the new regime was the burgeoning of procedural litigation, such as applications for extensions of time to lodge proceedings, summary dismissal of claims, joinder of parties, interim orders, costs and other interlocutory issues. While very few HREOC decisions (6 per cent) concerned procedural issues (mainly clarifying parties and procedures), under the new system, procedural hearings assumed a much more prominent role.

A Representation

Table 1 shows the percentage of complainants and respondents who were represented in different types of proceedings under the old and new hearing regimes. In the HREOC figures, all representatives have been counted, including non-legal representatives appearing for corporations and individual parties. In the federal courts, however, only lawyers with rights of appearance in the relevant court may represent clients.

It can be seen that under the new hearing regime, the majority of first instance decisions in both the FMC (52 per cent) and the Federal Court (62 per cent) concerned procedural matters.

32 Because HREOC was an administrative tribunal, its decisions were usually challenged by means of judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5(1)(e) and (f), on the basis that the decision involved an error of law.

Table 1: **Representation by Type of Proceeding**

Type of Proceeding	Complainants represented	Respondents represented
Old hearing regime, 1995–2000		
HREOC (n=258)	56%	75%
Federal Court judicial reviews (n=39)	87%	100%
Federal Court appeals (n=12)	58%	100%
New hearing regime, 2000–2004		
FMC substantive decisions (n=50)	78%	92%
FMC procedural decisions (n=55)	49%	95%
Federal Court substantive decisions (n=24)	67%	88%
Federal Court procedural decisions (n=39)	36%	94%
Federal Court appeals (n=22)	55%	96%

Respondents had higher levels of representation than complainants in all types of proceedings, but respondents' level of representation did increase in first instance proceedings between the old and new hearing regimes.

Complainants' representation also increased in substantive matters under the new regime, rising from 57 per cent in HREOC to 67 per cent in the Federal Court and 78 per cent in the FMC. This is also reflected in the difference under the old regime between complainants' level of representation in HREOC proceedings and in judicial review proceedings in the Federal Court (87 per cent). Complainants evidently saw a greater need for representation in court than in the specialist anti-discrimination tribunal.

By contrast, however, complainants' representation in procedural matters under the new regime was lower than it had been in HREOC. This may possibly reflect the fact that weak cases were most likely to attract procedural litigation while being least likely to attract legal representation. But it may also reflect complainants' misapprehension of the importance of procedural hearings (when, for example, a procedural decision to summarily dismiss their application could spell the end of their case), or their desire to conserve limited resources for the substantive proceedings. Similarly, complainants' representation in appeals remained about the same under the old and new regimes, and at a relatively low level, perhaps indicating that some complainants had exhausted their resources by this stage. The same patterns were not evident for respondents, who maintained high levels of representation in both procedural matters and appeals, producing a stark differential between complainants' and respondents' levels of representation in these proceedings.

Table 2 breaks down levels of representation by grounds of discrimination in HREOC under the old regime, and in all proceedings in the FMC and Federal Court under the new regime.

Table 2: **Representation by Act**

Venue	Role	RDA	SDA	DDA	Total
HREOC (n=258)	Complainants	45%	57%	63%	56%
	Respondents	76%	68%	89%	75%
FMC (n=96)	Complainants	44%	88%	53%	63%
	Respondents	91%	91%	97%	94%
Fed. Court (n=86)	Complainants	42%	58%	55%	50%
	Respondents	94%	95%	97%	95%

In HREOC, respondents' representation varied by Act, with respondents in sex discrimination cases less likely to be represented than those in racial or disability discrimination cases (unrepresented respondents in sex discrimination cases may have been individual or small business respondents to sexual harassment claims, but this could not be verified in this research). Under the new hearing regime, however, this variation disappeared, with respondents' levels of representation being high and consistent across all three Acts.

Variation persisted between complainants on different grounds under the new regime, however, in a manner consistent with the patterns of representation in the conciliation process found by the HREOC survey discussed earlier. Complainants under the *RDA* were least likely to be represented in both the old and new systems, with only a minority being represented in all three venues, and little change in their levels of representation between the old and new systems. This suggests ongoing difficulties for racial discrimination complainants in obtaining legal representation, which did not change under the new hearing regime.[33]

SDA complainants were most likely to be represented under the new hearing regime, particularly in the FMC, where their level of representation increased to 88 per cent. This suggests fewer difficulties of access to legal representation under the new regime for sex discrimination complainants, apparently reflecting the existence of relatively strong, employment-related *SDA* cases with reasonably good prospects of being awarded costs (the great majority of *SDA* substantive matters in which the complainant was represented in both the FMC and the Federal Court concerned discrimination or sexual harassment in employment). The fact that procedural litigation was lowest under the *SDA* (35 per cent in the FMC, 32 per cent in the Federal Court, compared to the 61 per cent FMC, 53 per cent Federal Court under the *RDA* and 51 per cent FMC, 45 per cent Federal Court under the *DDA*), may also have accounted for the higher levels of legal representation in *SDA* cases, given the association noted above between

33 There may be a variety of reasons for these difficulties. The reasons for not having legal representation cited by the *RDA* complainants we interviewed under both the old and new hearing regimes included: inability to afford representation (5), thinking they would not need representation (3), ineligibility for legal aid (2), inability to find a lawyer to represent them (2), and lack of confidence in the Aboriginal Legal Service (1). The majority of these complainants offered multiple reasons for lack of representation.

procedural matters and self-representation. However even in procedural matters, *SDA* complainants were more likely than *RDA* or *DDA* complainants to be represented (for example, in procedural matters in the FMC, 62 per cent of *SDA* complainants were represented, compared to 37 per cent of *RDA* and 42 per cent of *DDA* complainants). Curiously, however, *SDA* complainants were considerably less likely to be represented in the Federal Court (58 per cent) than in the FMC. It is difficult to account for this discrepancy, other than by reference to the relatively small number of *SDA* cases involved.

DDA complainants were most likely to be represented in HREOC cases (63 per cent), but their representation declined somewhat under the new hearing regime. This does appear to reflect the increase in procedural litigation in which complainants tended to be unrepresented, but it may also reflect the fact that *DDA* complainants could be represented by non-legal advocates in HREOC, but this is not possible in the federal courts. *DDA* complaints often involve education or the provision of goods and services, with a lower proportion of employment-related matters than under the *SDA*, and the availability of legal representation seems to have been more limited for these matters.

B The Relationship Between Representation and Success

Table 3 correlates success rates with representation in the various types of proceedings under the old and new hearing regimes.

Table 3: **Success Rates by Representation and Type of Proceedings**

Type of Proceeding	Represented Complainant	Unrepresented Complainant	Represented Respondent	Unrepresented Respondent
Old hearing regime, 1995–2000				
HREOC	63%	26%	54%	43%
Federal Court review	38%	*	59%	n/a
Federal Court appeal	14%	*	92%	n/a
New hearing regime, 2000–2004				
FMC substantive	74%	18%	39%	*
FMC procedural	33%	4%	77%	*
Federal Court substantive	50%	0%	76%	*
Federal Court procedural	57%	0%	78%	*
Federal Court appeal	25%	20%	81%	*

*Excludes figures where number of unrepresented litigants was too small for percentages to be meaningful.

The presence of legal representation was consistently correlated with higher success rates for complainants. In HREOC under the old system, 63 per cent of represented complainants were successful, compared with 26 per cent of unrepresented complainants. The contrast in success rates became even more striking under the new system. In substantive matters in the FMC the equivalent figures were 74 per cent and 18 per cent. In substantive matters in the Federal Court under the new system they were 50 per cent and zero. In seeking an explanation for this pattern, we must note that there is little doubt that self-represented litigants often appear to pursue cases that a lawyer would regard as hopeless. This may indicate either that the applicant had no access to legal resources or advice, or else that the applicant received and ignored legal advice to the effect that they had no case, and persisted in their quest to achieve justice through the courts. In at least some cases, however, it appears that legal representation could either have prevented the case from proceeding to hearing in the first place, or improved the applicant's chances of success. Indeed, the figures suggest that parties seeking to claim unlawful discrimination even in the more straightforward matters dealt with by the FMC should not contemplate self-representation other than in exceptional circumstances.

Because of their relatively high levels of representation overall, there was less discernible relationship between representation and success for respondents. Indeed, under the new system, there were so few unrepresented respondents that their success rates could not meaningfully be calculated. Nevertheless, it is apparent that in HREOC, success rates for represented and unrepresented respondents did not differ greatly, and in FMC, substantive proceedings represented respondents were successful in only 39 per cent of cases, suggesting much less of a benefit from representation for respondents than for complainants.

At the same time, however, only in HREOC and in FMC substantive proceedings did represented complainants have a higher success rate than represented respondents. In all Federal Court proceedings, by contrast, whether at first instance or on appeal, respondents had a clear advantage, being represented at high rates, and represented respondents having much higher success rates than represented complainants. The same was true in procedural matters in the FMC. This suggests that factors other than legal representation contributed to complainants' lack of success in Federal Court proceedings and in relation to procedural issues in the FMC. These factors could include the quality of representation available (respondents having greater access to senior counsel or more experienced barristers); an inherent bias towards respondents in procedural litigation (involving technical legal arguments, regardless of the strength of a complainant's substantive case); and/or the non-specialist nature of the Federal Court, which results in it applying to anti-discrimination legislation approaches

to statutory interpretation developed in other contexts, with little or no concession to the legislation's egalitarian and remedial purposes.[34]

VII ACCESS TO LEGAL REPRESENTATION

The empirical data set out above indicates that, in the absence of agency or tribunal assistance for unrepresented complainants in the post-2000 Australian federal hearing system for discrimination claims, there is a clear need for free or low cost, skilled legal representation in order to begin to provide access to justice for discrimination complainants. The data also suggests, however, that that need is often unmet – that complainants may have difficulty in obtaining such representation, particularly in racial and disability cases, but also more generally in relation to procedural litigation and appeals. This section examines the possible sources of free or low cost representation for complainants – legal aid, CLCs, pro bono schemes, and conditional fees – in order to determine the practical availability of such assistance.

A Legal Aid

The Commonwealth Legal Aid Guidelines for Civil Law matters have, since 2000, provided that:

> Legal assistance may be granted to a party to an action provided it is shown that, where the party is likely to receive damages or property if successful, the action could not reasonably be expected to be conducted under a conditional costs agreement or similar arrangement with a private practitioner and no other scheme of assistance is available.[35]

As discussed further below, determining which matters could be conducted pursuant to a conditional costs arrangement is not necessarily easy, and may be subject to misperceptions on the part of funding decision makers, given that in

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34 The aspect of our study concerning the specialist/generalist distinction, not reported here, established that while Federal Magistrates in Melbourne and Sydney quite rapidly built up a reasonable level of experience and expertise in discrimination cases, individual Federal Court judges were rarely exposed to such cases and had no other opportunities to gain expertise in the area unless they had previously practised in it regularly as a barrister (which was rare). Indeed, the Federal Court was described by lawyers we interviewed as a specialist in procedure (as opposed to substance). Moreover, our jurisprudential analysis of Federal Court decisions indicated persistently unsympathetic attitudes towards complainants and narrow interpretations of the legislation, making it more difficult for complainants to establish their cases. See also Rosemary Hunter, 'Sex Discrimination Legislation and Australian Legal Culture', in Anne Thacker (ed), *Women and the Law: Judicial Attitudes as they Impact on Women* (1998); Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' (2002) 26 *Melbourne University Law Review* 325; Loretta de Plevitz, 'The Briginshaw "Standard of Proof" in Anti-Discrimination Law: "Pointing With a Wavering Finger"' (2003) 27 *Melbourne University Law Review* 308; Jonathon Hunyor, 'Skin Deep: Proof and Inferences in Racial Discrimination in Employment' (2003) 25 *Sydney Law Review* 537; Beth Gaze, 'Has the Racial Discrimination Act Contributed to Eliminating Racial Discrimination? Analysing the Litigation Track Record 2000-04' (2005) 11(1) *Australian Journal of Human Rights* 171.

35 Commonwealth Legal Aid Guidelines, Part 4, Civil Law Guidelines, Guideline 1.

the Australian legal aid system, in many cases, eligibility for funding is determined by non-legally trained grants officers within Legal Aid Commissions rather than by the applicant's prospective lawyer.

In relation to unlawful discrimination, Guideline 5, 'Equal Opportunity/Discrimination Cases' provides that 'Legal assistance may be granted for equal opportunity/discrimination cases where there are strong prospects of substantial benefit being gained not only by the applicant but also by the public or any section of the public'. There is no such public interest requirement in the tests for other civil matters (or for criminal or family law matters), so the legal aid guidelines for federal discrimination matters set a higher bar for applicants to hurdle than in other areas. This was recognised and criticised by the Senate Legal and Constitutional Committee in its *Third Report on Legal Aid* in 1998. The Committee argued that the Guideline 'fails to recognise that the community has a definite interest in ensuring that discrimination does not occur in individual cases. It is essential that legal aid be available to achieve this'.[36]

Further the Commonwealth guidelines only allow for the funding of matters in which the claim is for $5000 or more. This is likely to exclude a significant number of racial and disability discrimination complaints in the areas of provision of goods and services and access to places and facilities, and many racial vilification complaints. It also excludes cases in which the complainant seeks a systemic or policy outcome rather than damages. Indeed, this criterion may directly conflict with the public interest requirement.[37]

The merit test for federal family and civil law matters has three parts. The claim must have 'reasonable prospects of success', meaning that it appears more likely to succeed than not; it must be one in which an 'ordinarily prudent self-funding litigant' would risk his or her own funds; and it must be one on which it is appropriate to spend 'limited public legal aid funds'. Because of the complexity of anti-discrimination legislation and the under-developed jurisprudence noted above, it might be very difficult to satisfy the merit test in discrimination cases. Further, because the application of the merit test involves a high level of discretion on the part of legal aid grants officers, its operation may vary over time and across the country, depending on the amount of funding available.[38]

Commonwealth legal aid is generally available only for the legal representation of the applicant, which overlooks the risk of having to pay costs to the other party. Thus, even if a complainant was successful in obtaining legal aid, they would still face the possibility of being personally liable to meet an adverse

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36 Senate Legal and Constitutional References Committee, *Inquiry into the Australian Legal Aid System (Third Report)* (1998) [7.33]. Indeed, by contrast, the Queensland State Legal Aid guidelines provide that if a discrimination complaint has been accepted by the State complaint-handing agency, then the public interest element is automatically made out.

37 We are grateful to one of the anonymous referees for pointing this out.

38 Rosemary Hunter and Jeff Giddings, Submission 24, Senate Legal and Constitutional References Committee, *Legal Aid and Access to Justice Report* (2004); Rosemary Hunter, Tracey De Simone and Louise Whitaker, with Jane Bathgate and Alicia Svensson, *Women and Legal Aid: Identifying Disadvantage – Final Report* (2006) 167–9.

costs order. Only the NSW Legal Aid Commission will grant an indemnity against costs to be paid if the party loses, up to a limit of $15 000. This provision, however, has been held to be inconsistent with the costs provisions in the Federal Court rules, and hence does not limit the costs that may be awarded in the Federal Court or the FMC.[39] Consequently, a legally aided federal discrimination complainant in NSW still has to take the risk of bearing an award of costs larger than $15 000, which is quite likely to occur (for example, three of the eight respondents we interviewed who had gone to court under the new hearing regime said they had incurred costs in excess of $20 000). Thus, although the risk factor of an adverse costs order is reduced for legally aided complainants in NSW, it is by no means eliminated.

The 2003 *Federal Civil Justice System Strategy Paper* reported on the numbers of Commonwealth legal aid applications approved in 2002–03. Out of a total of 40 363 grants approved in that year, a mere 28 were in the area of anti-discrimination law.[40] This cannot be regarded as coming anywhere near meeting the level of demand. In the same year, 1055 complaints of unlawful discrimination were lodged with HREOC, and 135 matters were commenced in the FMC and the Federal Court. This low level of legal aid provision is consistent with the fact that only two of the complainants we interviewed had received grants of legal aid. On any view this cannot amount to adequate resourcing to ensure effective access to justice for discrimination complainants.

B Community Legal Centres

Specialist CLCs are funded by federal and/or State and Territory governments to look after the needs of specific groups who may well make discrimination complaints, such as people with disabilities (through the DDLCs, Disability Employment Advocacy Service or Mental Health Legal Services), women (Working Women's Centres, Women's Legal Services), and Indigenous people (Aboriginal and Torres Strait Islander Legal Services ('ATSILS')), or in relation to particular categories of rights such as employment rights (Jobwatch). These services handle varying amounts of discrimination work (for example, the work of ATSILS is overwhelmingly focused on criminal law). In addition, generalist CLCs may take on discrimination work, depending usually on whether a staff member has an interest and expertise in the area. CLCs are extremely valuable not only for the services they provide through salaried staff, but for their ability to harness the work of volunteer lawyers, who provide a large amount of the labour involved. Nevertheless, the level of funding available to CLCs generally restricts the assistance they are able to provide to clients to advice and

39 See *Minns v State of NSW (No.2)* [2002] FMCA 197 (Unreported, Raphael FM, 2 September 2002), discussing the effect of s 47 of the *Legal Aid Commission Act 1979* (NSW) on legally aided federal proceedings.

40 Commonwealth Attorney-General's Department, *Federal Civil Justice System Strategy Paper* (2003) 108.

negotiations. It rarely extends as far as representation in a court or tribunal, unless the client is funded by legal aid or pays the barrister's fee themselves.

The DDLCs are unique in being funded specifically to provide services in relation to discrimination claims. They were created with funding allocated in connection with the commencement of the DDA for

> the provision of advocacy support services at the community level, not for litigation costs. The *Disability Discrimination Act* is intended, as far as possible, to achieve systemic change through education and example. Its objective is to find remedies for complaints through conciliation.[41]

This makes clear that the aim of the DDLCs was never to provide sufficient advocacy services to regularly represent clients in litigation. In response to the question of whether they were keeping up with demand, a 1999 review of DDLCs concluded:

> Generally speaking the services attempt valiantly to keep up with demand, and identify a high level of un-met need for assistance ... In most cases the DDA staff (legal professionals and others):
>
> - Work a lot of unpaid hours
> - Make hard choices about not following up on some cases…
>
> Most services attempt to control their case load to a level which allows time for [community legal education] or developmental work and which provides access to service for as many clients as possible within their resources.
>
> There is a crying need for skilled-up non-legal advocates who can take some of the conciliation work and free up the legal professional for major case work and/or systemic/test cases or law reform.[42]

Despite CLCs' limited resources, seven of the complainants we interviewed were assisted by a CLC (three by a general service and four by a DDLC). These free legal services thus represented a larger source of assistance for our interviewees than did grants of legal aid, despite their limited capacity to provide full litigation services.

C Pro Bono Schemes

Since the late 1990s both the federal and State governments have strongly supported moves to increase and coordinate the pro bono provision of legal services in Australia. The Senate Legal and Constitutional Committee in its 2004 report on legal aid, however, cautioned that 'pro bono legal services should not be seen as a substitute for adequate legal aid funding'.[43] In addition, this option deals only with the cost of the complainant's own legal representation and fails to counter the disincentive effect of the risk of having to pay the other party's costs if the claim is unsuccessful.

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41 Commonwealth Attorney-General's Department, *Review of the Disability Discrimination Act Legal Services - October 1999* (1999) [2.3] <http://www.ag.gov.au/www/agd/agd.nsf/Page/Legalaid_Reviews_ReviewoftheDisabilityDiscriminationActLegalServices-October1999> at 17 September 2009.

42 Ibid [6.1.2.1].

43 Senate Legal and Constitutional References Committee, above n 36, xix.

Law firm pro bono activities have expanded considerably in recent years, prompted, in some cases, by requirements or encouragement to observe certain commitments to the provision of pro bono services in order to obtain government work. These activities cover a range of types of assistance, including governance advice to community organisations, law reform activities, facilitating legal volunteers in CLCs, and individual advice and case work.[44] While legal advice and negotiation may be available, firms may be less willing to undertake litigation due to its uncertain and potentially open-ended impact on their budgets and resources.[45] The National Pro Bono Resource Centre has noted, too, that there is a mismatch between the areas in which law firms are able to supply legal services and the demand for legal services by the poor, and that this is a primary reason why pro bono services cannot be expected to fill the gap left by inadequate legal aid provision. In the Centre's observation, pro bono services are inappropriate to fill 'the need for routine assistance in many areas of civil law, especially those which require high levels of specialization'.[46] Law firms report that they are able to meet only around one quarter to one third of the demand for pro bono services, due, among other things, to lack of expertise and capacity.[47]

In preparation for the transfer of discrimination cases from HREOC in 2000, the Federal Court set up a pro bono network to provide advice and assistance in these cases. The Federal Court Rules provide that a judge may refer a party for pro bono assistance in respect of either legal advice, drafting of documents, representation at interlocutory or other hearings, or generally.[48] The criteria for such referrals are not specified but the cases suggest that the party must show some 'particular need' for pro bono assistance.[49] A similar scheme is established under Part 12 of the Federal Magistrates Court Rules 2001. There is little public information on the use of either scheme, however.[50] The FMC's *Annual Report 2004-05* noted only three referrals in discrimination law matters for that year,[51] and subsequent annual reports of the Federal Court and the FMC provide no figures on referrals of discrimination law matters. In response to our specific inquiry, we were advised by the Federal Court registry that up to June 2004 there had been a total of nine referrals under the Federal Court scheme in unlawful discrimination matters.[52] Given that the court dealt with a total of 99 new anti-discrimination matters during this period, this represents access to pro bono assistance in less than 10 per cent of cases, some of which would have involved

44 See generally the National Pro Bono Resource Centre's web page: <http://www.nationalprobono.org.au>.
45 National Pro Bono Resource Centre, *Mapping Pro Bono in Australia* (2007) 104.
46 Senate Legal and Constitutional References Committee, above n 36, 172.
47 National Pro Bono Resource Centre, above n 45, 85.
48 Federal Court Rules, Order 80, r 4.
49 See *Low v Commonwealth* [2001] FCA 702 (Unreported, Marshall J, 13 June 2001) [22].
50 What information there is suggests that referrals have been mainly directed towards applicants in migration matters: Denise Healy, 'Pro Bono in the Federal Magistrates' Court' (2003) 77 *Law Institute Journal* 84; Federal Magistrates Court, *Annual Report 2004-05* (2005) 39; National Pro Bono Resource Centre, above n 45, 83–4.
51 Federal Magistrates Court, ibid.
52 Letter from Phillip Kellow, Deputy Registrar of the Federal Court, to Beth Gaze, 17 September 2004.

advice rather than representation. Table 2 (above) showed that nearly 40 per cent of complainants in the Federal Magistrates Court and 50 per cent in the Federal Court were unrepresented, so most of them would not have had access to pro bono representation. No data is reported by the courts on the role or usage of pro bono assistance in discrimination matters. The Annual Report of the Federal Magistrates Court comments that referrals to the scheme have been confined to general federal matters, particularly migration matters.[53]

Pro bono schemes have also been established by barrister and solicitor bodies, but once again, little information is available on the extent to which these schemes provide services in the area of discrimination law. The Victorian Public Interest Law Clearing House ('PILCH'), for example, indicates only the relative proportions of inquiries in different areas of law made to the Victorian Bar, Law Institute and its own Public Interest Law schemes,[54] but specifies neither the number of inquiries nor the number of referrals made in each area. According to the National Pro Bono Resource Centre, the Victorian Bar Legal Assistance Scheme made fewer than five referrals in the equal opportunity/human rights/discrimination area in 2004–05.[55]

More generally, the Centre has observed that 'there is no comprehensive data on the areas of law in which pro bono legal services are provided'.[56] This dearth of information makes it difficult to draw conclusions about the scope of pro bono provision, but given the specialist nature of discrimination law, the need that exists for representation for court proceedings, the level of unmet demand for law firms' pro bono services and the fact that discrimination law matters appear not to have made a notable impact on Bar or court-based pro bono schemes, it seems likely that pro bono services provide only a relatively limited supplement to the minimal provision of legal aid for representation in federal discrimination matters.

D Conditional Fees

American-style contingency fees, in which a percentage of any damages award is paid to the lawyer as reimbursement, are not available in Australian courts. Rather, the only 'no win no fee' arrangement permitted in Australian courts is a conditional fee agreement, whereby the legal fee paid if an action is successful is related to the legal costs of the services provided, with an 'uplift' or increased percentage to compensate for the risk involved.[57] There are many obstacles in the path of this mechanism for obtaining legal representation in discrimination cases, however.

First, in any given case, the facts may be less than clear and rest more on establishing inferences than on direct evidence, in a context in which the

53 Federal Magistrates Court, *Annual Report 2007–08* (2008) 59–60.
54 Public Interest Law Clearing House, *Annual Report 2006-2007* (2007).
55 National Pro Bono Resource Centre, above n 45, 84.
56 Ibid 83.
57 See, eg, *Legal Profession Act 2004* (Vic) ss 3.4.28–3.4.29.

complainant generally bears the full onus of proof. Secondly, as noted above, the scope and principles of liability are not well-established and are subject to being reshaped at quite fundamental levels due to new judicial interpretations of complex legislation, which can be raised for argument in each case. Both of these factors make it difficult for a lawyer to predict whether the complainant is likely to be successful in a discrimination claim, and hence make it less likely that they will take the risk of a conditional fee arrangement. Thirdly, while there is a system of referrals by trade unions to a handful of law firms in discrimination cases, the relatively small number of cases makes it difficult for those firms to achieve economies of scale or effective cross-subsidisation in those cases, while lawyers who do not practise regularly in the jurisdiction are even less likely to take the risk of offering to act on a conditional fee basis. Fourthly, if the respondent is a large corporation or public sector body, they will have the resources and usually the inclination to appeal adverse decisions until they achieve success. The low rate of success for represented complainants in appeals, identified above, indicates that it would be rational for a lawyer to eschew a conditional fee arrangement in such a situation.

Other factors militating against the use of conditional fee arrangements in discrimination cases include the fact that some complainants are difficult to act for, such as people with very serious disabilities or a mental illness, and the fact that, like the other methods discussed in this section, such arrangements do not remove the threat of an adverse costs order if the complainant loses, and thus may not be attractive to complainants themselves.

As noted earlier, our interview data (albeit collected relatively early in the life of the new system) did not suggest that conditional fees had taken off as a means of funding discrimination litigation. The experienced lawyers we interviewed had not embraced such arrangements, and the litigants we interviewed had rarely experienced them. The hope that conditional fees might make a material difference under the new system appears to have been wishful thinking which ignored much of the complex reality of discrimination litigation.

VIII CONCLUSION

The foregoing discussion demonstrates that the Australian federal system for dealing with discrimination complaints fails at every turn to provide access to justice for complainants seeking to enforce their rights under the legislation. Although it provides ample opportunity for alternative dispute resolution, the overwhelming emphasis on non-litigious resolution produces settlements which might not be agreed if proceeding to adjudication was an affordable or less risk-laden option, while even 'good' settlements usually remain confidential. It operates to the detriment of the public interest in having precedents set and seeing the legislation enforced, and also reduces the possibilities for the funding of litigation by means of conditional fee arrangements.

When it comes to litigation, complainants are not able to rely upon the statutory equality agency to take over the running of test cases or other cases

having broader significance. Moreover, the shift of hearing functions from HREOC to the federal courts in 2000 removed any real possibility of unrepresented complainants obtaining effective assistance from an interventionist, inquisitorial tribunal in the presentation of their cases. Rather, the relocation of hearings to the federal courts has meant that complainants need skilled legal representation in order to have any realistic prospect of succeeding in their claims. This position may only be exacerbated by the proposed merger of the FMC into the Federal Court for general civil matters, so that all discrimination claims will be heard in the Federal Court.

At the same time, however, the availability of free or low-cost legal representation is severely limited. Legal aid eligibility guidelines are excessively restrictive and actual legal aid provision appears to be minimal. Pro bono schemes have not plugged this gap and are not apt to do so. For reasons that should have been obvious, conditional fee arrangements have failed to take off in this jurisdiction. CLCs appear to play the most substantial role in providing free legal assistance to discrimination complainants, but their capacity to do so is limited, particularly in relation to advocacy as opposed to advice and settlement negotiations.

There is no doubt that there were substantial defects in the enforcement system prior to 2000 which needed to be addressed. However, moving to a court-based system, without having provided a mechanism for ensuring access to justice for complainants who cannot afford to pay for legal representation, was to throw the baby out with the bathwater. While the Constitution requires the use of a court in order to make binding decisions in federal discrimination law, it does not prevent the reform of other problematic features of the new system.

In the first instance, there is a need for increased legal aid (both enhanced funds and wider eligibility guidelines) and increased funding of specialist CLCs to provide free and sufficiently expert legal representation to discrimination complainants. This would enable complainants to resist undue settlement pressures, receive expert advice about the strength of their case and the merits or otherwise of proceeding to a court hearing, hopefully deter weak cases from proceeding, possibly reduce the amount of procedural litigation generated by complainants, and better equip complainants to defend procedural applications brought by respondents, as well as increasing their chances of success in substantive hearings. There would also be a need either for legal aid to provide a costs indemnity, or for reinstatement of the rule that each party bears their own costs, in order to remove the disincentive effect on complainants of the risk of an adverse costs order. It is hoped that the new, 60-day time limit for bringing proceedings in a federal court after a complaint is terminated by the AHRC will give complainants sufficient time to apply for legal aid, obtain and process advice, make decisions, and give instructions on the preparation of affidavits, but its operation in practice should be kept under review.

In addition, the AHRC or an independent agency should be given the capacity and resources to provide legal assistance to complainants in selected cases with the potential to enhance the enforcement of equality rights in significant ways. In particular, this would help to counteract the deep pockets and

repeat player status of large corporate and public sector respondents, and would also provide a source of expert advocacy for more expansive interpretations of the legislation, contrary to the restrictive Federal Court jurisprudence that has developed to date. A more extensive and complainant-friendly body of discrimination law in turn could provide the conditions for the greater use of conditional fee agreements, if a regime of costs following the event were to be retained.

These changes would mean that complainants unable to afford a lawyer would not be faced with the choice to settle, withdraw or appear in court unrepresented, with all the attendant disadvantages of doing so. Otherwise, as Galanter so clearly predicted, the 'haves' will continue to come out ahead.