Human Rights and Equal Opportunity Commission

President
The Hon. John von Doussa, QC

September 2003

Mr Paul Belin
Assistant Commissioner
Disability Discrimination Act Inquiry
Productivity Commission
Locked Bag 2
Collins Street Wast
Melbourne VIC 8003

Dear Mr Belin

Please find enclosed the Human Rights and Equal Opportunity Commission's response to your letter of 11 June 2003 requesting details of complaints lodged under the *Disability Discrimination Act 1992*. This is the third submission made by HREOC to the Productivity Commission's inquiry into the *Disability Discrimination Act 1992*.

The submission addresses your request for statistical information and also provides information about the complaint process, the customers satisfaction survey conducted by the Commission's Complaint Handling Section and details of a research project conducted by the Commission following legislative amendments in 2000 that removed HREOC's hearing function and gave complainants under the *Disability Discrimination Act 1992* access to the Federal Court and Federal Magistrates Service.

If you would like to discuss any aspect of this submission or seek clarification of any aspect please contact Karen Toohey, Principal Investigation Conciliation Officer, on 02 9284 9746.

Thank you for the opportunity to provide this information.

Yours sincerely

John von Doussa QC
President

PRODUCTIVITY COMMISSION REVIEW OF DISABILITY DISCRIMINATION ACT

THIRD SUBMISSION

HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION:

COMPLAINT STATISTICS

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Introduction

This submission is being made by Human Rights and Equal Opportunity Commission (HREOC) in response to a request from the Productivity Commission for statistical data about complaints lodged under the Disability Discrimination Act 1992 ("DDA"). This submission provides information about the complaint handling processes supplementary to two earlier submissions made by HREOC.

The President of HREOC, with the assistance of the Complaint Handling Section (CHS), is responsible for the investigation and conciliation of complaints lodged under federal anti-discrimination and human rights laws. Accordingly, CHS plays a key role in fulfilling HREOC's objectives of delivering an Australian society in which human rights are protected. Educating the community about the law and the complaint process is also a part of the CHS's work. CHS is structured according to the legislation HREOC administers and so a specialist team exists to handle complaints lodged under the DDA. Staff have particular expertise in the DDA and are able to utilise that expertise to provide advice to parties throughout the complaint process.

The complaint process provided for by the *Human Rights and Equal Opportunity Commission Act 1986* (HREOCA) provides the mechanism by which individuals, groups and classes of people who are aggrieved can seek legal redress when the rights granted by the DDA are alleged to have been breached. The recognition of individual justiciable rights is basic to the broader justice system and is not unique to discrimination law. The HREOCA provides a number of mechanisms by which an individual complaints process is supplemented by the ability for organisations and classes of people to use the complaints process, and through the broader policy, education and inquiry powers granted to HREOC by the HREOCA and the DDA.

The individual complaints process has been utilised by thousands of people with disabilities since the DDA came into effect in March 1993. DDA complaints constitute between 35 - 40%[1] of the complaints received annually by HREOC. The number of DDA complaints received has remained around 450 per year since 1999 although there was an increase of about 9% in the 2002/03 year.

Generally there is a high level of satisfaction with the complaints process, the service provided by HREOC staff and the outcomes achieved through the complaint process[2]. HREOC notes the contrary view expressed in some of the submissions received by the Productivity Commission. CHS undertakes the customer satisfaction survey to obtain and assess feedback from a large number of people who have utilised the process and the CHS incorporates that feedback into a continuous improvement program in which the process is reviewed and, where appropriate and possible, adjusted to meet the requirements of the parties using the process. HREOC seeks to address some of those concerns by providing details of the customer satisfaction survey and other research conducted by HREOC in this submission.

[1] Refer to Appendix B for details of DDA complaints received
[2] Information about the customer satisfaction survey is at Appendix A

The complaint process

The procedures for handling complaints of alleged disability discrimination are detailed in Part IIB of the HREOCA. These procedures are standard for all complaints of unlawful race, sex and disability discrimination received by the Commission. The legislation administered by HREOC stipulates that there is no statutory basis for action by HREOC unless a written complaint is received. All correspondence is assessed by the Director, Complaint Handling. If the correspondence meets the requirements of a complaint as detailed in section 46P of the HREOC, that is, it alleges unlawful discrimination and is lodged by an aggrieved person or on behalf of an aggrieved person[3] then it will be accepted as a complaint. Complaints are then referred to the President and are assessed by him. This process is generally completed within two days of receipt of the correspondence. A letter of acknowledgement is then sent to the complainant confirming the matter has been accepted and advising they will be contacted when the matter is allocated. CHS aim to allocate matters within 4 weeks of receipt and are generally able to meet this timeframe. Complaints are generally allocated in the order in which they were received by HREOC except where there is a need for priority allocation. Complaints that are assessed as a priority matter[4] require immediate allocation are generally allocated within a few days of receipt.

Procedures for handling complaints are outlined in the Complaint Procedures Manual. When a matter is allocated to an Investigation/Conciliation Officer that officer will generally have conduct of the matter from allocation until the matter is finalised. The complaint practice aims to be flexible and responsive to individual complaints and accordingly, the procedures are designed to provide guidance for staff rather than be strict rules of practice. The manual is reviewed regularly and is supplemented by other material including the legislation administered by HREOC, case precedent, policy and training.

When a complaint is allocated to an officer, contact is generally made with the complainant or their advocate or representative and the respondent to advise the contact person for the file and provide general information about the complaint process and the steps to be undertaken from that point. Generally the President will issue a customised letter of inquiry to the respondent outlining the complaint and requesting particular information and documents in response to the allegations. The respondent is asked to provide their response within twenty one days of receiving the letter. There are very few instances where a response is not provided, although there are some complaints that require complex responses that may take longer than the standard timeframe. HREOC endeavours to balance the need to ensure the matter is dealt with in a timely manner with the benefits of having a complete and comprehensive response provided. There are few occasions when the President would need to exercise his authority pursuant to 46PI of the HREOCA to compel the

[3] Complaints can be lodged by a person on their own behalf, on behalf of themselves and other aggrieved persons, by a person or trade union on behalf of one or more aggrieved persons, or as a representative complaint on behalf of a class of aggrieved persons.

[4] Matters that will be accorded priority may include those about students suspended from school or experiencing difficulties with the education authority, people in current employment, people experiencing immediate difficulties with access or who are very ill. Parties are advised that they can request priority in the acknowledgement letter although HREOC determines what priority can be accorded to a matter.

production of a information or documents, and when necessary, those requests are generally complied with.

When a response is received from the respondent, the officer reviews that information and discusses the matter with their supervisor. At that stage the response is generally sent on to the complainant with an assessment of HREOC's view of the matter and an indication of how the matter will proceed. The complainant is given an opportunity to consider the response and provide their comments on it and any further information requested, or that they feel is relevant to the inquiry.

If it is appropriate that the matter proceed to conciliation, the complainant will generally be asked to outline their proposals for settlement so they can be provided to the respondent for their consideration prior to the conciliation conference being convened.

If it appears a complaint is to be terminated, the officer will discuss this with the complainant and provide them with an opportunity to provide further information or submissions if they wish to. The officer will explain the reasons why the matter is to be terminated and the options for the complainant after the matter is terminated. When the President issues a notice of termination pursuant to section 46PH of the HREOCA detailed reasons are provided to the complainant explaining why the matter has been terminated and outlining the Federal Court application process. Details of the nearest Federal Court and Federal Magistrates Service Registry are provided.

The HREOCA gives the President authority to attempt to conciliate complaints. Where a complaint is assessed as being lacking in substance or appropriately terminated for some other reason HREOC will generally not suggest conciliation to the parties as this may raise issues of bias. In 2002/03, 41% of finalised DDA complaints were conciliated with a success rate of 73%[5].

Conciliation may be attempted at any time during the complaint process, including at the outset of a matter, depending on the circumstances of the complaint. HREOC's experience is that in many cases detailed investigation of the allegations in a complaint assists with the success of the conciliation process but early conciliation may be suggested to the parties where a matter is relatively simple or where the parties have expressed an interest in trying to resolve the complaint quickly. The Complaint Procedures Manual deals extensively with the conciliation process and section 46PK of the HREOCA provides specific guidance on the conduct of conciliation conferences.

The conciliation process may take many forms depending on the circumstances of the complaint. It will not always be necessary or appropriate to bring the parties together for a face to face conference and in some case this may be inappropriate and frustrate the settlement. A variety of factors need to be considered when assessing the most appropriate means of conciliation. Where there is a significant power imbalance or where one of the parties is emotionally vulnerable it may not be beneficial to conciliate the matter through a face to face discussion.

[5] Of the number of matters where conciliation was attempted 73% were successfully resolved.

CHS staff travel regularly to conduct conciliation conferences interstate and in remote and regional areas and HREOC is committed to ensuring the same level of service is provided to parties irrespective of their geographic location[6].

Conciliation may also be conducted through shuttle negotiation with the officer contacting both parties and assisting in an exchange of information, proposals and offers. In some circumstances a telephone conciliation conference may be conducted[7]. This may occur where the complainant and respondent are in different states or it may be that some of the attendees attend by telephone while others attend in person[8].

HREOC notes that there is a high level of satisfaction with the conciliation process indicated in the customer satisfaction survey (Appendix A) and in the review of the legislative changes that came into effect in April 2000 (Appendix K).

Charter of service

CHS operates in accordance with its *Charter for customers of the Human Rights and Equal Opportunity Commission's complaints service* which outlines the level of service that will be provided and the mechanisms available to people who have concerns about their complaint has been handled. A copy of the Charter is at Appendix L.

The Charter notes that the CHS will ensure that complaints are handled in a courteous, prompt and efficient manner, that staff will provide information about the process, that staff will be professional and objective and answer all questions clearly and that the service will be accessible. The customer satisfaction survey conducted by CHS requests feedback on the accessibility of information provided by HREOC. DDA complainants and respondents consistently rate the service very highly, in particular the accessibility of forms and correspondence and information conveyed to them by CHS staff[9].

HREOC notes that one complaint has been received under the Charter regarding the handling of any complaint under the DDA in recent years. Issues that may arise during the complaint handling process are generally discussed with the party by the officer handling the file and their supervisor and most concerns are resolved through this process.

The Charter provides a commitment to the prompt and efficient handling of complaints. Complaints are generally dealt with in a timely manner with over 90% of matters being finalised within 12 months of receipt of the complaint. Timeframes generally compare with complaint handling timeframes in other discrimination

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[6] 219 conciliation conferences were conducted in regional NSW and interstate in 2002/03. The breakdown of these conciliations by jurisdiction is not available.

[7] No specific statistics on the number of telephone conferences that are convened are kept but statistics were obtained during the review of the changes to HREOC legislation which indicated that teleconferences made up less than 1% of matters where conciliation was attempted.

[8] In some cases an advocate or legal representative may attend by telephone where they are geographically remote from the complainant or respondent eg where a national advocate body represents a complainant from another state and elects not to attend in person.

[9] See details in Appendix A

jurisdictions. Information about the timeliness of HREOC's complaint handling and is provided at Appendix B.

Accessibility

HREOC has a national complaint handling responsibility and is located in Sydney. HREOC has implemented processes and practices to ensure that the complaint process is accessible to all people wishing to utilise the service. People from all over Australia utilise the Commission's Complaint Information Service and complaint handling process[10].

The CHS operates a Complaint Information Service (CIS) which provides information about the legislation and the complaint handling process to enquirers. The CIS can be contacted by telephone (including local call cost), email, visit, fax and TTY (also local call cost). Where the issue raised by the enquirer does not fall within the jurisdiction of the Commission the enquirer is provide an appropriate referral to an agency or organisation that may be able to assist them. The CIS handles between 9000 and 10000 telephone/TTY calls, emails and visits per year. Of 9468 enquires received in 2002/03, 2002 raised issues related to disability.

A substantial amount of information about the complaint process, conciliation process and outcomes in complaints is available on HREOC's website. Complaint related information is also available in alternative accessible formats as required. On average the complaints information page on the website receive 2000 'hits' per month. Many complainants utilise the accessible online complaints form to lodge their complaint and use information about conciliated complaints to assist them in developing their proposals for resolution. Other areas of the website provide information about HREOC policy work, projects, links to other relevant sites and access to Federal Court and Federal Magistrates Service decisions.

HREOC is committed to ensuring the complaint handling process is accessible to people with disabilities and providing reasonable adjustment where appropriate. This may include assistance with writing down a complaint and accepting a complaint in a wide variety of formats including electronic, audio and Braille. Access to language and Auslan interpreters for interviews and conciliation conferences is provided as required. HREOC's Sydney facilities are accessible to people with disabilities and venues used interstate and in regional and remote areas are assessed for accessibility prior to the venue being utilised. Arrangements exist with some of the state discrimination bodies for the use of their facilities for conciliation conferences.

The flexibility provided for by HREOC's complaint process ensures that reasonable adjustment can be provided as required. Complainants may require additional time to consider or prepare information relevant to the investigation or conciliation process. While HREOC ensures a complaint does not unnecessarily extend over lengthy periods of time the process can allow adequate time for people with disabilities to participate fully in the process.

[10] Statistics on complaints received and finalised by state are at Appendix E

Information about the complaint process is available in a wide range of community languages and a short version of the complaint process guide has been developed to assist with the accessibility of information about the process.

The CHS established an Access Working Group a number of years ago to ensure an ongoing focus on improving the accessibility of the complaints service. The Committee reviews information provision, community liaison strategies and coverage, develops resources for particular community groups and reviews the general accessibility of the service.

Community education

The CHS regularly conducts presentations, meetings and information sessions with organisations interested in information about the complaint process. In 2002/03 over 170 organisations attended information sessions conducted by CHS staff and 70 community liaison visits were conducted by the CHS indigenous liaison officer[11]. These information sessions provide information about the complaint handling process and legislation administered by the HREOC, including the DDA, to community groups, advocacy and advisory bodies, and legal services.

CHS staff working in the DDA area have regular contact with peak disability groups and regularly conduct information sessions regarding the DDA for community groups, advocacy bodies and legal centres.

All CHS information sheets are available in alternative format. Information is regularly distributed to key disability organisations, legal centres and community organisations and through the liaison visits conducted by CHS staff. The CHS is currently involved in developing a video about the conciliation process which will assist peoples understanding of the conciliation process. It is anticipated the video will be available to parties, advocacy groups and through HREOC's website.

DDA Complaints Statistics

The HREOC complaint process seeks to provide a timely, fair and consistent service. The Productivity Commission has requested a wide range of statistics. Those statistics are provided in Appendix B to J.

Statistics cover the reporting periods from 1998/99 to 2002/03. Prior to this complaints information was recorded in a different manner and the detailed information sought is not available. The five year period provides information about complaint statistics prior to and after the amendments to the HREOCA and DDA that removed HREOC's hearing function and provided access for complainants to the Federal Court.

[11] Regions covered include Wagga Wagga, Cootamundra, Grafton, Lismore in NSW. Melbourne Albury/Wodonga, Portland, Warnambool and Geelong in Victoria. Launcetson, Burnie and Hobart in Tasmania. Brisbane, Rockhampton, Townsville, Gympie, Hervey Bay, Maroochydore, Cairns in Queensland. Perth and Karratha in Western Australia. Darwin, Alice Springs and Tennant Creek in Northern Territory. Adelaide and Whyalla in South Australia. Canberra.

The statistics provided may not reflect those reported in HREOC's annual reports over this period because of the specific nature of data sought, which differs from HREOC's standard reporting process.

The Productivity Commission requested that statistics be reported in a consistent fashion using consistent definitions. In 2000 the legislation administered by HREOC was amended to consolidate the complaint handling functions in the HREOCA. Changes were also made to the terminology used for a number of termination grounds and so the enclosed statistics reflect data recorded prior to and after those legislative changes took effect.

Statistics have been provided for complaints received and handled by the Sydney office only. Prior to 1999 the Commission had a co-operative arrangement for the handling of DDA complaints with the Equal Opportunity Commission of Victoria[12]. In 1999 that arrangement was terminated following a detailed review and the imminent structural and functional changes brought about through the *Human Rights and Legislation Amendment Act (No. 1)* 1999 (Cth).

HREOC was satisfied that the arrangement did not provide the best value for money and that inconsistencies in the complaint handling process could be rectified by the centralised management of all DDA complaints particularly given the President was to become responsible for the complaint handling function. An interim arrangement existed through which a complainant could lodge their complaint with the EOCV and it would be referred to HREOC, but this arrangement was terminated in 2003. Complaint numbers received from Victoria have not decreased as a result of changes in these arrangements.

The Productivity Commission requested detailed statistics and information about complaints received under the DDA that would have been handled by the EOCV in 1998/99. Detailed information about those complaints is not available and so could not be included. The method for counting complaints differed between HREOC and the EOCV[13] and statistics for DDA complaints received by the EOCV under the co-operative arrangement from the 1998/99 period are not comparable.

In 1999, following the enactment of the *Tasmanian Anti Discrimination Act 1998*, HREOC closed its Tasmanian office. Detailed statistics for complaints received by

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[12] Co-operative arrangements existed with the Equal Opportunity Commission of Victoria, the South Australian Equal Opportunity Commission and the Western Australian Equal Opportunity Commission, however DDA complaints were not part of the agreements with South Australia or Western Australia.

[13] This explanation was detailed in the HREOC Annual Report of 1996/97. HREOC has traditionally counted its complaints by complainant and matter; that is, one complainant who is complaining about a matter is counted as one complaint. It is understood that the Equal Opportunity Commission of Victoria has counted its complaints by the number of grounds of complaint and the number of respondents. If one complainant complains of direct disability discrimination and harassment against a fellow employee for example, this would be counted as three complaints by the state commission because the employer may be directly liable for the alleged discrimination well as vicariously liable for the conduct of the alleged individual harasser. The individual alleged harasser would also be the subject of complaint.

HREOC's Tasmanian office are not available and those matters are not included in the statistical information provided for the 1998/99 period.

A. CUSTOMER SATISFACTION SURVEY DATA

1. Survey methodology

The Customer Satisfaction Survey was developed in 1997 with input from the Australia Bureau of Statistics (ABS) regarding sample design, sample selection and survey methods. The survey was commenced in December 1997. Survey methodology has been consistent since the introduction of the survey in 1997.

At the beginning of each month a sample of files from each jurisdiction is randomly drawn from files closed in the previous month. The sample is based on fixed sample fraction for each jurisdictional sub-population, developed for HREOC by the ABS.

Participation in the survey is voluntary and names or other personal details of participants are not included on the survey form. The survey is primarily undertaken by means of telephone interviews conducted by Administrative Officers who are not directly involved in handling complaints. Officers administrating the survey utilise Telephone Interpreter Services where required. Where a party cannot be contacted by telephone or there is some reason why a telephone interview is inappropriate, for example where the person has a hearing disability, the survey is sent to the participant for completion along with a covering letter and a reply paid envelope.

The survey is conducted directly with complainants and respondents wherever possible. Where a complainant or respondent cannot be contacted and where they were represented by an advocate during the process, the survey is conducted with their advocate.

Survey data is processed and compiled by an external consultant.

The survey questionnaire was redesigned in June 1998 to reduced repetition and improve clarity of data.

2. Survey participation data

a. Participation x Act

	98-99	99-00	00-01	01-02	02-03
DDA	67 (44%)	102 (42%)	116 (40%)	92 (39%)	94 (45%)
SDA	33 (22%)	53 (22%)	75 (26%)	68 (29%)	62 (29%)
RDA	28 (18%)	48 (19%)	55 (19%)	43 (19%)	28 (13%)
HREOCA	25 (16%)	42 (17%)	45 (15%)	31 (13%)	27 (13%)
TOTAL	153 (100%)	245 (100%)	291 (100%)	234 (100%)	211 (100%)

Across the past 5 reporting years, parties involved in DDA complaints have consistently made up the majority of survey participants.

b. Participation x complaint outcome*

	98-99**	99-00**	00-01	01-02	02-03
Declined/ Terminated	72 (47%)	137 (56%)	192 (66%)	135 (58%)	138 (65%)
Conciliated	80 (52%)	97 (40%)	71 (24%)	72 (31%)	63 (30%)
Withdrawn	N/A	N/A	26 (9%)	26 (11%)	10 (5%)
Administrative closure	1 (1%)	2 (1%)	2 (1%)	1 (0%)	0 (0%)
Referred	0 (0%)	8 (3%)	N/A	N/A	N/A
TOTAL	**153 (100%)**	**244*** (100%)**	**291 (100%)**	**234 (100%)**	**211 (100%)**

**Data on DDA survey participants is provided in brackets*
*** Changes in reporting on complaint outcomes is related to legislative changes which came into effect in 2000.*
****Outcome data for cone complaint was not recorded*

The majority of survey participants were involved with a complaint that was terminated by the Commission.

c. Participation x complainants and respondents*

	98-99	99-00	00-01	01-02	02-03
Complainant	94 (61%)	144 (59%)	164 (56%)	124 (53%)	94 (44.5%)
Respondent	59 (39%)	101 (41%)	127 (44%)	110 (47%)	117 (55.5%)
TOTAL	**153 (100%)**	**245 (100%)**	**291 (100%)**	**234 (100%)**	**211 (100%)**

**Data on DDA survey participants is provided in brackets*

For all but the last reporting year, more complainants than respondents have agreed to participate in the survey.

3. Data for period 1998 – 2003*

Measure	98-99**	99-00**	00-01	01-02	02-03
Agreed staff explained things in a way that was easy to understand	84% (91%)	81% (74%)	80% (84%)	84% (88%)	85% (87%)
Agreed forms and correspondence were easy to understand	87% (91%)	87% (86%)	90% (91%)	91% (91%)	89% (86%)
Agreed the Commission dealt with the complaint in a timely manner	59% (61%)	65% (70%)	66% (72%)	66% (79%)	67% (73%)
Felt staff were unbiased/ impartial	84% (86%)	87% (85%)	89% (91%)	91% (93%)	87% (89%)
Satisfied with the outcome of the complaint	49% (51%)	47% (52%)	51% (53%)	54% (60%)	62% (65%)
Satisfied with service	67% (72%)	65% (65%)	86% (88%)	83% (87%)	84% (86%)
Rated overall service as 'very good' or 'excellent'	N/A	N/A	52% (60%)	47% (61%)	50% (54%)

**Data on DDA survey participants is provided in brackets*
***The survey was redesigned in 2000 and accordingly data for the periods 98-99 & 99-00 is not exactly comparable with later years.*

It is noted that survey responses from complainants and respondents involved in DDA complaints are generally more favorable than overall ratings.

4. Data for period 1998 – 2003 x complainant and respondent*

Measure	98-99**	99-00**	00-01	01-02	02-03
Agreed staff explained things in a way that was easy to understand	C 80% R 90%	C 75% R 89%	C 78% R 82%	C 77% R 92%	C 78% R 91%
Agreed forms and correspondence were easy to understand	C 82% R 95%	C 81% R 94%	C 85% R 96%	C 83% R 99%	C 80% R 96%
Agreed the Commission dealt with the complaint in a timely manner	C 62% R 54%	C 60% R 70%	C 68% R 63%	C 61% R 72%	C 56% R 75%
Felt staff were unbiased /impartial	C 79% R 93%	C 83% R 92%	C 85% R 95%	C 88% R 94%	C 77% R 95%
Satisfied with the outcome of the complaint	C 37% R 70%	C 33% R 69%	C 35% R 72%	C 36% R 76%	C 36% R 82%
Satisfied with service	C 59% R 80%	C 52% R 83%	C 78% R 96%	C 73% R 95%	C 71% R 95%
Rated overall service as 'very good' or 'excellent'	N/A	N/A	C 46% R 60%	C 43% R 52%	C 42% R 56%

** DDA data on ratings by complainants and respondents is not available.*
***The survey was redesigned in 2000 and accordingly data for the periods 98-99 & 99-00 is not exactly comparable with later years.*

Over these reporting periods, respondents have generally provided more favourable feedback than complainants. This may in part be due to the fact that across almost all reporting periods, the majority of survey participants were involved in complaints that were terminated by the Commission. Where complaints are terminated by HREOC, for example on the ground that the complaint is determined to be lacking in substance, it is likely that the complainant will be less satisfied with the outcome and the respondent more satisfied. This satisfaction or dissatisfaction with outcome is likely to influence overall service ratings. Anecdotal evidence indicates that another contributing reason may be expectations of parties. For example, many complainants approach HREOC with an expectation that HREOC will advocate for them and are therefore dissatisfied with impartial handling of the complaint. Alternatively, respondents often have an initial view that HREOC is 'pro-complainant' and that they will not receive a 'fair go' and therefore they respond positively to impartial handling of the complaint.

HREOC RESEARCH PROJECT DATA

1. Research Project

On 13 April 2000, the *Human Rights Legislation Amendment Act (No.1) 1999* (Cth) commenced operation. A key change arising from this amending legislation was the removal of HREOC's public hearing function with complainants being provided access to the Federal Court should conciliation fail to resolve their complaint or where the complaint is terminated for some other statutory reason.

In 2001, HREOC initiated a research project to examine the initial impact of changes in the complaint determination regime on HREOC's complaint handling function. A component of this research project involved surveying parties who participated in conciliation in the calendar year after the commencement of the procedural changes (2001). HREOC utilised this survey to not only explore how the current complaint determination procedure impacts on decision making in the conciliation process but to also obtain broad information on parties' experiences of conciliation.

There was an 80 percent response rate for the survey component of the research project and a total of 459 conciliation related surveys were completed. Approximately the same number of complainants and respondents agreed to participate in the conciliation related surveys (231 – 228) and demographic data indicates that those who participated in the survey component of the research project are typical of HREOC's main client groups at this time. Accordingly, data obtained from this research project provides a detailed and current overview of key aspects of HREOC's complaint handling work.

Selected data from the research project, including breakdowns of data relating to DDA complaints, is extracted below. Full findings of this research project are contained in HREOC's publication, "Review of Changes to the Administration of Federal Anti-discrimination Law: Reflections on the initial period of operation of the *Human Rights Legislation Amendment Act (No.1) 1999 (Cth)"*, a copy of which is provided at Appendix L. Findings of the conciliation component of the research project are outlined in "Dispute resolution in the changing shadow of the law: A study of parties' views on the conciliation process in federal anti-discrimination law", a copy of which is provided at Appendix M.

2. Survey participant data

a. Conciliation survey participants x jurisdiction

	Complainants	Respondents	Total
RDA	28 (12%)	26 (11%)	54 (12%)
SDA	76 (33%)	75 (33%)	151 (33%)
DDA	127 (55%)	127 (56%)	254 (55%)
TOTAL	**231 (50%)**	**228 (50%)**	**459 (100%)**

Parties involved in DDA complaints made up the majority of survey participants.

3. Conciliation survey findings*

a. Type of conciliation process conducted

	Total
Face to face conference	63% (61%)
Shuttle only*	-
Telephone shuttle**	36% (37%)
Tele-conference***	1% (2%)
TOTAL	**100%**

*Parties at same location, conciliator conveys messages between parties
** Conciliator facilitates resolution by means of separate telephone conversations with parties
*** Conciliator facilitates meeting of parties via telephone link-up of parties

A face-to-face conciliation process is the dominant form being utilised by HREOC in its present practice model

b. Parties' perceptions of conciliator and conciliation process where the complaint was successfully conciliated

	Complainant	Respondent	Total
I understood what was happening during the conciliation process	Agreed 98% (99%)	Agreed 96% (99%)	Agreed 97% (99%)
The conciliator was biased against me	Agreed 2% (3%)	Agreed 3% (0%)	Agreed 3% (2%)
The things the conciliator said and did helped us to reach agreement	Agreed 81% (79%)	Agreed 74% (73%)	Agreed 78% (76%)
I was not given the opportunity to fully consider settlement proposals*	Agreed 9% (4%)	Agreed 6% (1%)	Agreed 7% (3%)

* It is noted that this question does not discern whether the limitations perceived by parties were the result of intervention by the other side, their advocate or the conciliator.

c. Parties' perceptions of conciliator and conciliation process where the complaint could not be resolved by conciliation

	Complainant	Respondent	Total
I understood what was happening during the conciliation process	Agreed 85% (83%)	Agreed 98% (100%)	Agreed 91% (91%)
The conciliator was biased against me	Agreed 7% (3%)	Agreed 6% (0%)	Agreed 7% (2%)
The things the conciliator said and did helped us to try and reach agreement	Agreed 55% (59%)	Agreed 69% (73%)	Agreed 62% (66%)
I was not given the opportunity to fully consider settlement proposals *	Agreed 18% (21%)	Agreed 10% (3%)	Agreed 14% (12%)

* It is noted that this question does not discern whether the limitations perceived by parties were the result of intervention by the other side, their advocate or the conciliator.

Overall, these ratings paint a positive picture of HREOC's conciliation process. It is noted that survey responses from complainants and respondents involved in DDA complaints are generally equivalent to, or more favorable than overall ratings.

d. Satisfaction with settlement terms where matter resolved

	Complainants	Respondents	Total
Highly satisfied	41% (43%)	41% (51%)	41% (47%)
Satisfied	41% (42%)	41% (39%)	41% (40%)
TOTAL satisfied	**82% (85%)**	**82% (90%)**	**82% (87%)**

This data indicates high satisfaction with conciliation outcomes by both complainants and respondents. Again, it is noted that survey responses from complainants and respondents involved in DDA complaints are generally more favorable than overall ratings.

e. Reported compliance with settlement terms the complaint was successfully conciliated

HREOC has no role with respect to monitoring or enforcement of conciliation agreements. However, many agreements specify terms of settlement that must be honoured before the complaint can be finalised.

	Complainants	Respondents	Total
Full compliance	85% (84%)	96% (94%)	90% (89%)
Partial compliance	10% (9%)	3% (5%)	7% (7%)
No compliance	5% (7%)	1% (1%)	3% (4%)
TOTAL	**100%**	**100%**	**100%**

These figures are very positive in light of the fact that HREOC does not have a role in monitoring agreement terms. Survey responses from complainants and respondents involved in DDA complaints are generally similar to overall responses. The difference in reported compliance by complainants and respondents may be understood with reference to the fact that complainants may not be aware of the completion of all aspects of conciliation terms. For example, in an employment related matter where the complainant is no longer employed by the respondent, the complainant may not be aware of the completion of agreed terms such as the implementation of preventative policies and training programs in the workplace.

B. DDA Complaints received and finalised

	98-99	99-00	00-01	01-02	02-03
Received	366	445	443	452	493
Finalised	376	581	505	443	463
DDA complaints as % of total complaints received by HREOC	34%	34%	35%	36%	40%

Complaint Handling Timeliness

Statistics on timeliness were not requested by the Productivity Commission. HREOC notes that some concerns have been raised about the timeliness of the complaint process and so provides some data on the timeliness of complaints dealt with under the DDA and other Acts administered by HREOC for comparative purposes. HREOC notes that statistics on timeliness of complaint handling timeframes indicate that HREOCS timeframes are comparable with state discrimination bodies, where that information is available[14]. HREOC reports timeliness based on the time from receipt to finalisation of a complaint because it provides the true 'customer perspective' of the timeliness of the process.

[14] Statistics for State discrimination bodies detailed below are taken from the 2001/02 annual reports as no reports for the 2002/03 period are currently available. Statistics relate to all complaints received and were not broken down by type of complaint, eg disability. Some variances in the method of recording and reporting indicate that statistics are not directly comparable. For example the difference in measuring from receipt or allocation of a complaint can make a substantial difference in counting.

- No timeliness statistics were reported by the NSW Anti Discrimination Board, Anti-Discrimination Commission of Queensland, The Tasmanian Anti-Discrimination Commission, The Australian Capital Territory Human Rights Office in the 2001/02 Annual Report.
- The Equal Opportunity Commission of Western Australia reports that of 1027 complaints handled in 2001/02, 577 were finalised and about 40% were finalised within six months. It reports that of those matters finalised 78.2% were finalised in under 12 months. It is not reported whether this timeframe is from receipt or allocation of the complaint to an officer for action.
- The South Australian Equal Opportunity Commission reports that 65% of complaints were finalised within six months and 92% were finalised within 12 months. It is not indicated whether this is from receipt or allocation of the complaint to an officer for action.
- The Equal Opportunity Commission of Victoria reports that 65% of complaints were finalised in under 6 months and 99% under 12 months. It is not indicated whether this is from receipt of initial correspondence, acceptance as a formal complaint or allocation of the matter to an officer for action.
- The timeliness statistics provided in the 2001/02 Annual Report of the Northern Territory Anti Discrimination Commission do not appear to be directly comparable as there is no equivalent receipt to finalise or allocate to finalise timeliness information provided. Timeframes provided relate to particular components of the complaint process.

Time from receipt to finalisation for complaints finalised during 2002-03

	RDA	SDA	DDA	HREOCA	Cumulative Total
0-3m	12%	16%	17%	31%	**18%**
3-6m	21%	25%	26%	25%	**42%**
6-9m	20%	31%	33%	19%	**70%**
9-12m	10%	17%	15%	11%	**84%**
> 12m	11%	10%	8%	10%	**94%**
> 18m	1%	1%	1%	4%	**95%**
> 24m	25%*	-%	-%	-%	**100%**

Time from receipt to finalisation for complaints finalised during 2001-02

	RDA	SDA	DDA	HREOCA	Cumulative Total
0-3m	19%	19%	23%	28%	**22%**
3-6m	22%	27%	27%	28%	**48%**
6-9m	24%	29%	29%	21%	**75%**
9-12m	18%	13%	13%	10%	**88%**
> 12m	11%	9%	7%	8%	**96%**
> 18m	3%	2%	-%	3%	**98%**
> 24m	3%*	1%	1%	2%	**100%**

C. DDA complaint outcomes

1. Finalised DDA complaints - Outcome by year

	98-99	**99-00**	**00-01**	**01-02**	**02-03**
Terminated/declined#	**192 (31%)**	**371 (49%)**	**259 (38%)**	**203 (31%)**	**219 (33%)**
Not unlawful	34	41	27	11	25
Withdrawn – settled outside/advised commission/lost contact+	60	90	86	70	43
more than 12 months old	7	19	9	8	5
More appropriate remedy	18	34	23	11	8
Adequately dealt with	12	21	15	12	11
Vexatious, misconceived, lacking in substance	61	166	110	92	100
Referred for hearing/ No reasonable prospect of conciliation*	**44 (9%)**	**55 (10%)**	**74 (16%)**	**69 (16%)**	**70 (16%)**
Conciliated§	**116 (26%)**	**144 (25%)**	**181 (37%)**	**156 (37%)**	**186 (41%)**
Administrative closure%	**11**	**9**	**22**	**14**	**15**
Total finalised	**376**	**581**	**505**	**443**	**463**

Notes for the above table

Prior to 14 April 2000 complaints were 'declined' under the DDA. In 2000 legislative amendments were made to the DDA and HREOCA and complaints that were not conciliated are now terminated. The grounds for decline and termination are generally but not exactly comparable.

+ Withdrawal figures include matters where the parties advise HREOC they wish to withdraw and where a matter settles outside and the complainant then withdraws. For the period up to and including 00-01 matters where HREOC 'lost contact' with a complainant were also included in 'withdrawal' for recording purposes. From 00-01 complaints finalised because we are unable to contact the parties are included in the

figures for matters terminated where there is no reasonable prospect of conciliation. In 2002-03 withdrawals constituted 10% of all complaints finalised under the DDA.

***** Where conciliation is attempted but is unsuccessful and the complaint is not terminated for some other reason, it is terminated on the basis there is no reasonable prospect of conciliation pursuant to section 46PH(1)(i) of the HREOCA. Prior to the amendments to the HREOCA that came into effect in 2000 complaints that were unable to be conciliated were referred to HREOC for hearing.

% Prior to legislative change in April 2000 complaints were 'terminated' where a complaint about the same subject matter had been made to a state agency or where the person was not aggrieved or there was an administrative error in accepting the complaint. Following the legislative amendments in 2000 these complaints are recorded as an 'administrative closure'.

§ The rate of conciliation of DDA complaints, and HREOC's overall conciliation rate, is generally favourably comparable with conciliation rates reported by state anti-discrimination agencies. For example in 2001/02 HREOC's rate of conciliation across all Acts was 30% and 37% in DDA. WAEOC reported 17.2% of their matters were conciliated; TADC reported 25% resulted in a conciliated agreement; EOCV reported 21.5%. Statistics related only to disability complaints are generally not available from the state anti-discrimination agencies.

2. Outcome by area

2.1. Finalised DDA Complaints – Outcome by area - 1998-99

A complaint may be lodged under more than one area. Outcomes are reported by area and so the number of outcomes may be greater than the number of complaints finalised for the same period.

Area	Conciliation	Referral/ NRPC	Decline/Terminated for other reasons	Administrative closure
Access to premises	33	4	10	2
Accommodation	1	1	5	0
Administration of commonwealth laws & programs	2	3	12	0
Requests for information	0	2	0	0
Clubs	6	1	3	0
Education	5	8	20	2
Employment	72	26	165	8
Provision of goods, services and facilities	37	15	63	3
Land	0	0	1	0
Superannuation & insurance	2	1	5	0
Registered organisations	0	0	1	0

2.2. Finalised DDA complaints - outcome by area - 1999-2000

Area	Conciliation	Referral/ NRPC	Decline/Terminated for other reasons	Administrative closure
Access to premises	24	8	15	0
Accommodation	2	1	11	0
Administration of commonwealth laws & programs	3	0	14	0
Requests for information	0	0	0	0
Clubs	5	2	7	0
Education	11	2	17	2
Employment	86	48	253	10
Provision of goods, services and facilities	38	6	93	2
Land	0	0	0	0
Sport	1	0	2	0
Superannuation & insurance	5	0	3	0
Registered organisations	0	0	0	0

2.3. Finalised DDA Complaints – outcome by area - 2000-2001

Area	Conciliation	Referral/ NRPC	Decline/Terminated for other reasons	Administrative closure
Access to premises	30	13	9	1
Accommodation	4	2	6	0
Administration of commonwealth laws & programs	5	2	15	0
Requests for information	0	0	0	0
Clubs	10	2	4	0
Education	18	6	20	1
Employment	123	74	242	16
Provision of goods, services and facilities	62	20	63	11
Land	0	0	0	0
Sport	2	0	0	0
Superannuation & insurance	5	2	2	0
Registered organisations	0	0	0	0

2.4. Finalised DDA complaints – outcome by area - 2001-2002

Area	Conciliation	Referral/ NRPC	Decline/Terminated for other reasons	Administrative closure
Access to premises	24	13	5	0
Accommodation	5	4	8	0
Administration of commonwealth laws & programs	1	1	10	0
Requests for information	0	0	0	0
Clubs	9	3	5	0
Education	12	2	16	0
Employment	121	66	224	13
Provision of goods, services and facilities	58	28	64	8
Land	0	0	0	0
Sport	0	0	0	0
Superannuation & insurance	4	1	5	0
Registered organisations	0	0	0	0

2.5 Finalised DDA complaints – outcome by area - 2002-2003

Area	Conciliation	Referral /NRPC	Decline/Terminated for other reasons	Administrative closure
Access to premises	22	6	3	1
Accommodation	3	0	7	0
Administration of commonwealth laws & programs	3	2	3	0
Requests for information	0	0	0	0
Clubs	1	0	3	1
Education	24	9	17	4
Employment	155	81	232	13
Provision of goods, services and facilities	78	21	48	5
Land	1	0	0	0
Sport	0	0	0	0
Superannuation & insurance	0	2	7	0
Registered organisations	0	0	0	0

D. Number of applications made to the Federal Court and Federal Magistrates Service

While HREOC is generally advised of applications made by a complainant to the Federal Court or Federal Magistrate's Service, HREOC relies on information from the parties and from the court registries for this information and so cannot give an assurance it is completely accurate.

It should be noted that where a complaint has been terminated by HREOC, irrespective of the reason for termination, and a notice is issued the affected person can make an application to the FC or FMS for the court to hear the applications.

Applications to the federal court under the DDA

Year	# of Applications
99-00	33
00-01	63
01-02	41
02-03	44

E. DDA complaints received and finalised by state of origin of complainant

HREOC notes that proportion of complaints received from each state generally reflects the population by state. HREOC notes there has been no significant variance in the number of complaints received from each state over the last five years.

As noted earlier statistics below reflect only those matters received by the HREOC office and do not include matters dealt with under co-operative arrangements or through the HREOC Tasmanian office in 1998/99.

1. DDA complaints received by state

	98/99	**99/00**	**00/01**	**01/02**	**02/03**
NSW	147	147	177	157	187
VIC	44	132	113	121	143
SA	70	46	41	52	68
WA	30	19	28	30	27
Qld	49	50	54	51	38
ACT	8	13	20	25	12
Tas	2	11	8	9	9
NT	6	3	3	8	6

Note: Complaints under the DDA are also received from people located overseas and these complaints are not included in the statistics above. The statistics may not match the number of complaints received by state reported in HREOC's annual report for this reason.

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2. DDA Complaints finalised by state of origin

The statistics in the received and finalised tables differ as a complaint may not be finalised in the same period it is received.

2.1. DDA Finalised complaints by state 1998-99

State	Conciliated	Referral /NRPC	Other decline/ termination	Administrative Closure	Total
ACT	1		7	1	9
NSW	57 (35%)	23	84	3	167
NT	1 (20%)	1	3	0	5
QLD	11 (26%)	2	29	1	43
SA	26 (49%)	5	22	3	56
TAS*	0	0	0	2	2
VIC#	3 (21%)	1	10	0	14
WA	4 (16%)	3	16	1	24

Note: In accordance with annual report calculations Administrative Closure's are not included when calculating conciliated outcomes.

2.2 DDA Finalised complaints by state 1999-00

State	Conciliated	Referral /NRPC	Other decline/ termination	Administrative Closure	Total
ACT	4 (44%)		5	0	9
NSW	44 (26%)	25	103	3	175
NT	3 (43%)	0	3	1	7
QLD	7 (15%)	3	37	2	49
SA	27 (39%)	4	36	1	68
TAS	1 (12%)	1	6	0	8
VIC#	21 (22%)	7	66	1	95
WA	6 (23%)	1	19	0	26

2.3 DDA Finalised complaints by state 2000-01

State	Conciliated	Referral /NRPC	Other decline/ termination	Administrative Closure	Total
ACT	7 (38%)	3	8	0	18
NSW	71 (41%)	23	76	10	180
NT	1 (33%)	1	1	0	3
QLD	26 (47%)	8	21	5	60
SA	15 (25%)	11	34	3	63
TAS	4 (50%)	2	2	0	8
VIC	44 (33%)	21	68	2	135
WA	9 (31%)	10	9	1	29

2.4. Finalised complaints by state 2001-02

State	Conciliated	Referral /NRPC	Other decline/ termination	Administrative Closure	Total
ACT	13 (48%)	2	11	1	27
NSW	50 (31%)	25	84	8	167
NT	1 (25%)	1	1	1	4
QLD	8 (16%)	9	33	2	52
SA	15 (15%)	5	17	0	37
TAS	5 (50%)	0	5	0	10
VIC	51 (45%)	18	43	1	113
WA	11 (41%)	12	3	1	27

E. DDA Finalised complaints by state2002-03

State	Conciliated	Referral /NRPC	Other decline/ termination	Administrative Closure	Total
ACT	3 (20%)	5	7	0	15
NSW	70 (48%)	22	54	8	154
NT	2 (33%)	1	3	1	7
QLD	11 (19%)	5	27	1	59
SA	24 (39%)	12	26	1	62
TAS	2 (25%)	2	4	0	8
VIC	53 (44%)	25	56	3	124
WA	21 (64%)	0	11	1	33

F. DDA complaints received by type of disability of complainant

The Productivity Commission requested information about the nature of complainant's disability for three areas of complaint.

Information on nature of disability is generally obtained from the complainant. A complainant may identify more than one disability.

1. Education complaints - received

Type of disability	**98-99**	**99-00**	**00-01**	**01-02**	**02-03**
Mobility aid used eg wheelchair	**1**	**0**	**3**	**0**	**3**
Intellectual disability	**1**	**5**	**3**	**6**	**5**
Learning disability	**3**	**6**	**8**	**13**	**7**
Medical condition eg diabetes	**1**	**3**	**3**	**3**	**1**
Neurological disability eg epilepsy	**1**	**4**	**4**	**5**	**5**
Physical disability	**1**	**5**	**8**	**8**	**10**
Physical disfigurement	**1**	**1**	**1**	**0**	**0**
Presence in body of organism causing disability	**1**	**1**	**0**	**0**	**0**
Psychiatric disability	**1**	**7**	**9**	**9**	**9**
Sensory disability - blind	**1**	**0**	**0**	**2**	**2**
Sensory disability - deaf	**1**	**1**	**1**	**1**	**2**
Sensory disability hearing impaired	**2**	**3**	**3**	**1**	**1**
Sensory disability – vision impaired	**3**	**0**	**3**	**4**	**1**
Work related injury	**1**	**1**	**1**	**2**	**0**
Other	**1**	**3**	**2**	**6**	**1**

2. Employment complaints - received

Type of disability	**98-99**	**99-00**	**00-01**	**01-02**	**02-03**
Mobility aid used eg wheelchair	**5**	**4**	**6**	**5**	**4**
Intellectual disability	**1**	**3**	**4**	**10**	**1**
Learning disability	**2**	**3**	**8**	**7**	**9**
Medical condition eg diabetes	**8**	**11**	**27**	**19**	**19**
Neurological disability eg epilepsy	**8**	**13**	**13**	**15**	**9**
Physical disability	**35**	**48**	**52**	**54**	**57**
Physical disfigurement	**1**	**5**	**6**	**4**	**5**
Presence in body of organism causing disability	**3**	**5**	**9**	**8**	**8**
Psychiatric disability	**12**	**17**	**39**	**59**	**33**
Sensory disability - blind	**-**	**2**	**1**	**2**	**-**
Sensory disability - deaf	**3**	**3**	**4**	**3**	**5**
Sensory disability hearing impaired	**7**	**7**	**11**	**14**	**10**
Sensory disability – vision impaired	**7**	**5**	**7**	**11**	**11**
Work related injury	**37**	**35**	**40**	**41**	**33**
Other	**4**	**10**	**15**	**13**	**16**

3. Goods and services complaints - received

Type of disability	**98-99**	**99-00**	**00-01**	**01-02**	**02-03**
Mobility aid used eg wheelchair	**13**	**18**	**31**	**23**	**31**
Intellectual disability	**6**	**8**	**4**	**6**	**3**
Learning disability	**6**	**6**	**3**	**5**	**4**
Medical condition eg diabetes	**6**	**12**	**13**	**12**	**13**
Neurological disability eg epilepsy	**12**	**6**	**14**	**9**	**10**
Physical disability	**33**	**45**	**60**	**50**	**48**
Physical disfigurement	**7**	**1**	**0**	**6**	**7**
Presence in body of organism causing disability	**6**	**1**	**7**	**3**	**5**
Psychiatric disability	**4**	**22**	**18**	**28**	**18**
Sensory disability - blind	**2**	**4**	**16**	**16**	**6**
Sensory disability - deaf	**3**	**17**	**12**	**10**	**9**
Sensory disability hearing impaired	**8**	**11**	**13**	**10**	**5**
Sensory disability – vision impaired	**5**	**12**	**5**	**7**	**7**
Work related injury	**3**	**3**	**8**	**3**	**2**
Other	**4**	**8**	**6**	**9**	**4**

G. DDA Complaints received in employment

The Productivity Commission requested information about employment complaints that raised specific issues and grounds.

1. Grounds of complaint

	98/99	99/00	00/01	01/02	02/03
Direct & Indirect Discrimination	180	235	330	433	461
Associate of a person with a disability	3	6	6	5	4
Victimisation	2	0	2	1	2
Harassment	6	11	6	12	10

Note: One complaint may have multiple areas, a complaint may raise multiple issues and grounds. The list above is not a complete list of grounds on which employment complaints can be made as it reflects only the grounds and events HREOC was asked to provide information about. Given this, the statistics may not reflect those reported in the annual report.

2. Event identified in complaint

	98/99	99/00	00/01	01/02	02/03
Hiring	40	43	48	38	43
Firing	68	94	100	96	117

When a complaint is assessed the general issue raised by the complaint is identified. The majority of complaints raise 'less favourable terms'. Complaints that relate to ongoing issues in employment and result in the termination of the complainant will be assessed by the dominant issue and so the above statistics may not be a complete representation of all complaints where the complainant's employment was terminated.

H. DDA Complaints received in Education

	Total Education Cmplts	Primary School	Secondary School	TAFE	Univ	Other	Public	Private
98-99	23	5	4	6	5	3	**19**	**4**
99-00	35	9	11	6	9	9	**25**	**10**
00-01	34	10	10	4	10	0	**28**	**6**
01-02	41	13	10	3	14	1	**33**	**8**
02-03	51	11	15	4	17	4	**39**	**12**

Note: Complaint numbers in public and private include all education institutions eg TAFE and University.

I. DDA Complaints received - Superannuation and Insurance

Information was sought about complaints received in the area of insurance and superannuation.

Complaints received in insurance and superannuation are as reported in HREOC's annual report. An area is recorded for each ground of complaint so one complaint may have multiple and different areas eg direct and indirect discrimination.

	Complaints received
98-99	6
99-00	10
00-01	19
01-02	15
02-03	17

J. DDA Complaints against the Commonwealth

Includes complaints against Commonwealth agencies and authorities and business entities where the Commonwealth is the majority shareholder.

1. Employment

	Total recd	Conciliated	Referral/ NRPC	Other decline/term	Not yet finalised
98-99	58	13	1	44	
99-00	58	14	9	35	
00-01	57	22	7	28	
01-02	75	20	11	42	2
02-03	61	10	2	16	33

2. Administration of Commonwealth laws and programs

	Total recd	Conciliated	Referral/ NRPC	Other decline/term	Not yet finalised
98-99	17	1	0	16	0
99-00	12	2	1	9	0
00-01	18	6	1	20	0
01-02	15	2	2	11	15
02-03	9	1	1	1	6

3. Provision of goods, services and facilities

	Total recd	Conciliated	Referral/ NRPC	Other decline/term	Admin close	Not yet finalised
98-99	22	4	1	17		0
99-00	22	7	2	13		0
00-01	17	4	0	13		0
01-02	21	5	3	12	1	0
02-03	9	2	0	3	0	4

Note: The above tables relate to complaints where the respondent is the Commonwealth or Commonwealth agency or authority. One complaint may have multiple grounds and areas and so reporting of complaints in these areas in annual reports may differ.

'Not yet finalised' refers to those complaints received in that period that have not yet been finalised. Outcomes relate to complaints received in the same period.

K. Charter of services to customers

Charter for customers of the Human Rights and Equal Opportunity Commission's complaints service

1. About the Commission

The Human Rights and Equal Opportunity Commission is an independent body which investigates and conciliates complaints of discrimination and breaches of human rights.

The Commission aims to provide a high quality complaint handling service which is prompt, clear and fair.

2. Our customers

Customers of the complaint handling service include complainants, respondents and others who have an interest in, or who may become involved in, the complaints process.

3. The service

Under the law administered by the Commission, people can complain about unlawful discrimination on the basis of sex, race and disability. Complaints can also be made about discrimination in employment on additional grounds (such as age, sexual preference, criminal record) and against Commonwealth government authorities about breaches of human rights.

Complaints which are covered by the law will be inquired into and the Commission will try to conciliate them, where appropriate. If a complaint cannot be resolved, action for a binding determination may be taken in the Federal Court.

4. Service charter

This Charter sets out the Commission's commitments about the service we will provide to you. It also sets out your rights and your responsibilities. The Commission is committed to continuous improvement of its complaint handling service and values your comments on how its service can be improved.

5. Our service standards

When you are dealing with the Commission we will

a. Treat you with dignity and respect - staff will be helpful and courteous

b. Ensure that you understand how the process works by
   - providing information about the process from the start
   - identifying the officer responsible for the complaint and
   - clearly answering any questions that you have during the process.

c. Be prompt and efficient in dealing with complaints by
   - assessing complaints upon receipt and giving priority where necessary
   - answering letters and phone calls quickly and clearly and
   - keeping you informed about the status and progress of a complaint.

d. Be professional and objective in handling all complaints by
   - providing accurate information

- taking a balanced approach to all persons involved and
- ensuring that complaint procedures are fair to everybody involved.

e. Make our service accessible to all by
   - providing trained, culturally sensitive staff
   - providing translation and interpreting services
   - ensuring access and availability of the service for persons with disabilities
   - accommodating a support person when needed
   - providing a national toll free telephone number and
   - providing local conciliation services when appropriate.

f. Give full reasons for our decisions including notice of any rights of appeal.

The Commission welcomes your suggestions on how our service can be improved and will thoroughly investigate any complaints about our service. Any problem you have with the service should first be raised with the officer handling your complaint or their supervisor. If you are not satisfied with the response you can complain to:

The Executive Director
Human Rights and Equal Opportunity Commission
GPO Box 5218
Sydney NSW 1042

This will not effect the way the complaint of discrimination is handled.

6. How you can help

You can help the Commission to deliver the best complaints service it can by:

- providing full and accurate information at all times;
- keeping appointments or advising us if you cannot;
- advising us of any change in your circumstances or contact details; and
- complying with reasonable requests during the complaints process.

L. Review of changes to the administration of federal anti-anti-discrimination law – Reflections on the initial period of the operation of *Human Rights Legislation Amendment Act (No. 1)* 1999 (Cth)

M Dispute resolution in the changing shadow of the law: A study of parties views on the conciliation process in Federal anti-discrimination law

DISPUTE RESOLUTION IN THE CHANGING SHADOW OF THE LAW: A STUDY OF PARTIES' VIEWS ON THE CONCILIATION PROCESS IN FEDERAL ANTI- DISCRIMINATION LAW[1]

Tracey Raymond & Sofie Georgalis[2]

Background

The conciliation work of the Human Rights & Equal Opportunity Commission

Human rights and anti-discrimination law in Australia, as in many other countries, provides individuals and groups with the right to lodge complaints with an administrative agency which has responsibility for the investigation and conciliation of such complaints. The conciliation process can be said to be undertaken in the 'shadow of the law' as complaints are located in a legislative framework with the option of complaints being heard by an administrative tribunal or court if conciliation is not appropriate or is unsuccessful[3].

The Australian Human Rights & Equal Opportunity Commission (HREOC) is empowered to investigate and conciliate complaints under Federal human rights and anti-discrimination law. Prior to 13 April 2000, HREOC was also empowered to hear and determine complaints of unlawful discrimination that could not be conciliated or were considered inappropriate for conciliation. The new complaint determination regime that came into effect in April 2000 now provides for such complaints to be terminated, with complainants then having the right to make an application for their allegations to be heard and determined by the Federal Court or Federal Magistrates Service[4]. These procedural changes were introduced to address problems in relation to the enforceability of Commission decisions as identified by the High Court in 1995[5].

While conciliation is not required to be undertaken with every complaint, it is a cental component of HREOC's complaint work[6]. The essential characteristics of HREOC's conciliation practice can be summarised as follows[7]. The same HREOC officer will generally handle both the investigation and conciliation of a complaint[8]. While complaint resolution can occur at any stage of the process and can be compulsory in nature, conciliation generally takes place on conclusion of an investigation and is a voluntary process. A complaint will proceed to conciliation if there is no basis for recommending that the complaint be terminated, for example, on the ground that it is 'lacking in substance'. In attempting to resolve complaints, HREOC utilises a range of methods including face-to-face conferencing, shuttle conferencing, tele-conferencing and shuttle telephone negotiations[9]. In facilitating the conciliation process, HREOC officers are seen to have a legitimate role to intervene to ensure a fair process for both parties, to provide information on a range of possible settlement options and to ensure any agreement does not contravene the intent and purpose of the legislation. HREOC is not a party to conciliation agreements and HREOC does not have a statutory role to monitor compliance with settlement terms[10].

Debate about Alternative Dispute Resolution in this context

The use of Alternative Dispute Resolution (ADR) in the context of the administration of anti-discrimination law has been the subject of debate. On one hand, in comparison with formal court-based determination processes, conciliation is seen as more efficient and cost effective, more accessible for disadvantaged sections of the community, better able to deal with the emotional and value laden content of discrimination disputes and better able to ensure party control over process and outcome. Some writers have, however, drawn attention to potential disadvantages of conciliation in this context. Firstly, it has been argued that the private and confidential nature of conciliation settlements limits broader social change[11]. Of particular relevance to this paper are concerns that the conciliation process operates to reinforce power imbalances to the detriment of complainants. Specifically, it has been argued that as complainants are likely to be less articulate, less assertive and have less emotional and financial resources than respondents, who are often government departments or private companies, they will be disadvantaged in a private dispute resolution process facilitated by a 'neutral third party conciliator'[12]. Concern has also been expressed that the vulnerability of complainants may be exacerbated by a lack of information about the conciliation process and possible outcomes[13].

While the potential disadvantages of ADR in this context cannot be ignored, neither should they be overstated. Previous papers on HREOC's conciliation practice have highlighted developments which aim to address concerns about conciliation in this context[14]. For example, reference has been made to HREOC's 'conciliation register'. This document, which is available on the Commission's website, contributes to informed participation in conciliation and broader awareness of conciliation issues through the provision of de-identified information about conciliated complaints. Additionally, writings on HREOC's conciliation practice describe a model prefaced on an understanding that power differentials between parties must be considered and responded to if process and outcomes are to be just and fair. This approach does not reject traditional notions of the 'neutral third party conciliator' but rather reflects more recent understandings of this concept whereby neutrality is seen as involving a requirement to act positively to maximise the involvement and control of both parties[15].

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

Concern about access and equity issues in the Federal anti-discrimination complaint process were specifically raised in the context of debate surrounding the changes to the complaint determination regime that came into effect on 13 April 2000. While the need for changes to ensure the enforceability of determinations under Federal anti-discrimination law were generally acknowledged, sections of the community expressed concern that the move from a 'no costs' determination process before HREOC to a court-based 'cost follow the event'[16] process would be detrimental to complainants[17]. It was contended that as complainants generally have less legal and financial resources than respondents, they would have comparatively higher concerns about pursuing a matter to court and this would result in reluctance to bring complaints under Federal law. Additionally, it was claimed that where

complaints were made, complainants would have decreased bargaining power in conciliation and accordingly would be forced to accept lower outcomes at conciliation or withdraw their complaints[18]. There was also apprehension that in light of the potential for subsequent court action, legal advocates would become more frequent players in the conciliation process causing an increase in the formality and adversarial nature of conciliation proceedings, thus negating accessibility benefits of ADR in this context.

There were, of course, possible alternative views about the potential impact of these procedural changes on HREOC's complaint process. For example, it could be argued that as historically only a small percentage of complaints ever proceeded to determination, the impact of these changes was likely to be minimal[19]. Further, the benefits to complainants of a process which provides for enforceable determinations and the option to recover costs could be seen as leading to increased, rather than decreased use of Federal complaint mechanisms. With respect to conciliation, the possibility of enforceable determinations and the fact that the new procedures provide complainants with access to a formal determination process regardless of the reason for termination, could be seen as providing incentives for respondents to settle complaints thus increasing complainant bargaining power in conciliation[20]. It is also noted that opinions on the issue of legal representation in the complaint process differ with some academics and practitioners supporting the use of legal advocates given that the end result of the system has always been adversarial in nature[21].

HREOC's research project

With reference to the abovementioned debate and in light of the Government's stated intention to review the impact of these legislative changes[22], HREOC initiated a research project to examine the initial impact of changes to the complaint determination regime on HREOC's complaint handling function.

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

The following section of this paper will summarise the methodology and findings of the conciliation related survey and consider the picture this data provides of HREOC's conciliation practice with specific reference to past and more recent concerns about conciliation in this context. Reference will also be made to some specific findings of the broader research project, where relevant. It is noted that the full report of the research project is available on the HREOC website, as is an extended version of this paper, which includes a more detailed discussion of methodology and findings[23].

Survey methodology

Four specific surveys were designed with the assistance of an external consultant. Some questions included a 5 point likert-type scale with questions of both positive

and negative direction. Other questions provided a series of answers from which parties could select more than one appropriate response. These questions also provided for free text answers[24]. Surveys were predominantly conducted by telephone interview and by a person employed specifically for this task.

Findings

Survey participants
There was an 80 percent response rate for the survey component of the research project and a total of 459 conciliation related surveys were completed. Approximately the same number of complainants and respondents agreed to participate in the conciliation related surveys (231 – 228) and demographic data indicates that those who participated in the survey component of the research project are typical of the Commission's main client groups at this time[25].

Form of conciliation process
The majority of survey participants (63%) participated in a face-to-face conciliation meeting. Thirty-six percent participated in a telephone shuttle process and 1 percent in a tele-conference. This information is of interest in light of previous claims by authors that HREOC rarely brings parties together for a conference[26]. Clearly a face-to-face conciliation process is the dominant form being utilised by HREOC in its present practice model[27].

Legal representation
Survey data indicated that the majority of participants (59%) had no legal representation in the conciliation process and that representation was more common for sex discrimination complaints[28]. This is consistent with findings of previous studies of conciliation in this context[29]. The reason for increased use of advocacy in sex discrimination matters is unclear but may be due to complainants' perceived need for support in dealing with such issues and/or increased willingness of lawyers to take on these matters in light of the more highly developed case law in this area.

The survey also found that complainants had higher levels of overall representation (that is both legal and non legal) than respondents (51% - 44%) and complainants and respondents had the same level of legal representation (41%). While it is noted that access to legal advice and support for respondents may be hidden, in that government departments and large companies may have 'in-house' legal advice which is not formally disclosed as 'legal representation', the survey data does not indicate an obvious power differential between complainants and respondents due to increased respondent access to, and utilisation of, legal advocacy.

Where complaints were successfully resolved by conciliation, complainants had slightly lower levels of legal representation than respondents (35% - 41%) but similar levels of overall representation (46% - 45%). Where matters were not resolved by conciliation, 61 percent of complainants had some form of representation in contrast with 42 percent of respondents. In these matters, complainants also had higher levels of legal representation than respondents (53% - 40%). Legal representation was higher overall for matters that did not settle. Accordingly, this data does not support a link between legal representation and resolution.

Comparative statistical data obtained as part of the broader review project indicates that there has been a slight increase in the level of legal representation of complainants at the commencement of the complaint process since changes to the complaint determination regime[30]. This may be the result of increased complainant desire or perceived need to have legal representation in light of possible court determination and/or increased legal practitioner interest in taking on cases in this jurisdiction[31].

Feedback on the conciliator and conciliation process

(i) Reported understanding of conciliation process
The vast majority of survey participants (95%) indicated that they understood what was happening in the conciliation process. Reported understanding was higher where complaints were resolved and in these matters, complainants and respondents reported similar high levels of understanding (98% - 96%). Where complaints were not resolved, complainants reported a lower level of understanding of the process than respondents (85% - 98%).

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

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

These results are seen as very positive particularly in light of the inherent nature of conciliation in this context whereby officers have a joint investigation/conciliation role, an advocacy role in relation to the legislation and are required to attend to power differentials between parties with a view to enabling substantive equality of process[32]. The data can be seen to alleviate concerns that a joint investigation /conciliation role will necessarily compromise the perceived impartiality of the conciliator.[33] The data also supports the view that intervention to enable substantive equality of process, if done appropriately, does not necessarily lead to perceptions of bias[34].

(iii) Perceptions of the effectiveness of conciliator interventions
The majority of participants (73%) felt that conciliator interventions during the process assisted parties reach, or attempt to reach settlement and there was no difference in ratings by complainants and respondents. Participants were more likely to see the conciliator's interventions as effective where the complaint was resolved by conciliation (78% - 62%) The reason for this is unclear from the data but may be the result of a 'halo effect' where complaints were resolved.

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

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

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

Reasons for settlement where unsure or dissatisfied with settlement terms
Where settlement was achieved but parties indicated that they were either unsure of satisfaction or dissatisfied with settlement terms, avoidance of having to deal with the matter in court was the most common reason for settlement identified by both respondents and complainants. It is noted that parties also identified numerous other reasons that impacted on this decision such as health concerns and a desire to finalise the matter as soon as possible.[35] More respondents than complainants indicated that 'not wanting to go to court' was a reason for settlement (51% - 44%) and consequently, this data does not support predictions by sections of the community that complainants would have more concerns than respondents about proceeding to a court determination.

Reasons for non settlement
Both complainants and respondents identified the unreasonableness of the other side's settlement terms as the most common reason for settlement not being achieved (53%). Some 14 percent indicated that they were advised not to settle by their advocate, with more respondents than complainants indicating they were so advised (17% - 10%). A vast array of other reasons for non settlement were also identified[36].

Concerns about court determination
Data on the specific reasons for not wanting to go to court indicates that time and costs associated with court action are of most concern to both complainants and respondents. However, respondents were more concerned than complainants about

losing in court (15% - 7%) and the public nature of the process (22% - 9%). Complainants were significantly more concerned than respondents about obtaining legal representation (22% - 0%).

Compliance with settlement terms
Ninety percent of participants reported that there had been full compliance with conciliation settlement terms. A further 7 percent reported part compliance. This figure is very positive in light of the fact that HREOC does not have a role in 'policing' compliance. The high compliance rate may be attributed to the focus of HREOC officers on ensuring that parties have fully considered and are satisfied with settlement terms prior to finalisation of the process. There was a difference in reported compliance by complainants and respondents with more respondents than complainants reporting full compliance (96% - 85%). This difference may be due to complainants being unaware of the completion of all aspects of conciliation terms by respondents[37].

Summary and conclusions

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

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

In relation to matters that were resolved by conciliation, the data indicated high satisfaction with settlement terms by both complainants and respondents. Additionally, data on reasons for settlement revealed that while complainants and respondents have different concerns about proceeding to court, they have a similar desire to avoid court action. Considered together, this data does not support a view that in the current complaint process, complainants are being forced to settle on unsatisfactory terms due to reduced bargaining power. This finding is further reinforced by comparative complaint statistics from the broader research project which indicated that in the calendar year following the implementation of the legislative changes there was no decrease in the conciliation rate, no increase in the complaint withdrawal rate, no decrease in the conciliation success rate and no decrease in median financial outcomes obtained in conciliation[38]. Overall this data does not support a view that the move to court based determination process has resulted in increased respondent resistance to settlement or comparative disadvantage for complainants.

This research project has provided useful, up-to date information on parties' perceptions of conciliation in the current complaint process under Federal anti-

discrimination law. The data will be of assistance to HREOC in reflecting on and developing its conciliation practice and, it is hoped, will contribute to ongoing study and debate of ADR in this context.

ENDNOTES

[1] This is an edited version of a paper presented by the authors at the 6th National Mediation Conference, September 2002

[2] Tracey Raymond is the Principal Training and Policy Officer, Complaint Handling with the Human Rights and Equal Opportunity Commission (HREOC). Sofie Georgalis is an Investigation/Conciliation Officer with HREOC. Tracey Raymond can be contacted at traceyraymond@humanrights.gov.au

[3] The term 'shadow of the law' implies that when participating in conciliation, parties consider the legal parameters of the complaint and how the matter may be heard and determined by the associated court or tribunal.

[4] These changes were incorporated in the *Human Rights and Legislation Amendment Act,(No1.)* 1999 (Cth). For further discussion of these changes see Roberts, S & Redman, R "Federal Human Rights Complaints – New Roles for HREOC and the Federal Court" in **ETHOS** (166) March 2000: 17-19, 22
The Federal Magistrates Service (FMS) was created by the *Federal Magistrates Act* 1999 (Cth). The FMS has been able to hear applications relating to unlawful discrimination since July 2000.

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

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

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

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

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

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

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

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

[13] See for example Scutt, J.A., op. cit.

[14] See Raymond, T. & Ball, J., op. cit.

[15] See discussion of mediator neutrality in Cobb, S. & Rifkin, J., "*Practice and Paradox:*

Deconstructing Neutrality in Mediation", **Law & Social Inquiry** Vol 16, No.1 Winter 1991 and Astor, H., "Rethinking neutrality: a theory to inform practice" - Parts 1 and 2 **Australasian Dispute Resolution Journal**, May and August 2000.

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

17 See for example summaries of submissions by the Disability Discrimination Law Advocacy Service, Women's Electoral Lobby and National Federation of Blind Citizens of Australia in Senate and Legal Constitutional Legislation Committee "**Consideration of the Human Rights Legislation Amendments Bill 1996"** The Parliament of the Commonwealth of Australia June, 1997

18 Offenberger, S. & Banks, R., *"Wind out of the sails – new federal structure for the administration of human rights legislation"* **Australian Journal of Human Rights** Vol 6(1) 2000.

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

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

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

22 Hansard, Monday 20 September 1999, 8407/

23 www.humanrights.gov.au/complaints

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

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

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

26 Bailey, P & Devereux, A., "The Operation of Anti-Discrimination Laws in Australia" in Kinley, D. (editor), **Human Rights in Australian Law** (Sydney, 1998), p. 303.

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

28 52 percent of parties in sex discrimination matters had legal representation in comparison with 39 percent of parties in race discrimination matters and 35 percent of parties in disability discrimination matters. Complainants in sex discrimination matters had slightly higher levels of legal representation than respondents (54% - 49%).

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

30 Data on legal representation of complainants at the commencement of the complaint process indicates that for the period 1/1/98 - 31/12/98 11 percent of complainants were legally represented, this increased to 14 percent in the 1999 calendar year and to 17 percent in the calendar year following changes to the complaint determination regime (2001).

31 This increase in legal representation of complainants may be seen as a positive development

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

[32] For further discussion of these challenges see Astor, H.& Chinkin, C., **Dispute Resolution in Australia,** Butterworths, 1992 Chapter 5

[33] See discussion in Boulle, L Mediation: **Principles, Process, Practice,** Butterworths 1996 Chapter 7

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

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

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

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

[38] Human Rights and Equal Opportunity Commission, **Review of Changes to the Administration of Federal Anti-Discrimination Law: Reflection on the initial period of operation of the *Human Rights Legislation Amendment Act* (No.1) 1999 (Cth),** 2002 pp.10 -12.

Human Rights and
Equal Opportunity
Commission

Review of Changes to the Administration of Federal Anti-Discrimination Law

Reflections on the initial period of operation of the *Human Rights Legislation Amendment Act (No.1) 1999 (Cth)*

Table of Contents

Executive Summary

On 13 April 2000, the *Human Rights Legislation Amendment Act (No.1)* 1999 (Cth) (HRLAA) commenced operation. This legislation was introduced to ensure enforceability of determinations under Federal anti-discrimination law. Key changes arising from this amending legislation included the transfer of complaint handling functions from portfolio specific Commissioners to the President of the Human Rights and Equal Opportunity Commission (HREOC) and removal of HREOC's public hearing function with complainants being provided access to the Federal Court should conciliation fail to resolve their complaint or where the complaint is terminated for some other statutory reason. The subsequent passing of the *Federal Magistrates Act* 1999 (Cth) established the Federal Magistrates Service (FMS), which provided an alternative avenue for the hearing and determination of Federal anti-discrimination matters.

While HREOC and sections of the community saw benefits in a move from the 'cost free' HREOC determination process to the 'costs follow the event' jurisdiction of the court in that it would encourage legal representation of parties as practitioners would be able to recover their fees, some sections of the community expressed concerns about the impact of this change on complainants. In particular, it was contended that the formality and potential cost of court action would discourage complainants from bringing complaints under Federal law and pursuing matters to determination. The changes were also seen as having a potentially negative impact on HREOC's conciliation process in that due to apprehension about the costs of court action, complainants would have decreased bargaining power in conciliation and would therefore be forced to accept lower outcomes at conciliation or withdraw their complaint.

In light of community concerns and broader interest in the impact of the changes, HREOC considered it would be beneficial to conduct an initial review of the impact of the procedural changes as soon as possible after commencement of HRLAA, with this review providing the framework for future additional reviews as required.

This initial review sought to assess complaint related data for the calendar year after the introduction of HRLAA to examine:

- what, if any, impact the procedural changes have had on the number of complaints lodged under Federal anti-discrimination law;
- the number of complainants pursuing matters to determination before the court;

- what, if any, concerns complainants and respondents had about a court determination process; and
- what, if any, impact the procedural changes have had on complaint outcomes and the relative position of complainants in the complaint process.

As the issue of legal representation of complainants was relevant to the debate about the impact of a court based determination process, data on levels of legal representation in the complaint process was also considered.

In light of community concerns about the move to a 'costs follow the event' determination process and in recognition of the fact that the willingness of complainants to bring and pursue complaints under Federal anti-discrimination law would be influenced by Federal Court and FMS decisions in relation to cost awards, the review also analysed the approach of the Federal Court and FMS to such awards over a twelve month period from the date of the first decision in this jurisdiction[1].

The key findings of the review can be summarised as follows:

- Comparative data indicates that in the calendar year following the commencement of HRLAA (2001) there was no decrease in the number of complaints brought under Federal anti-discrimination law.
- A significant number of complainants are utilising the new determination process. Statistics for 2001 indicate that approximately 23 percent of terminated matters proceeded to an application in the Federal Court or FMS and approximately 46 percent of surveyed complainants whose matters could not be resolved by conciliation indicated that they had lodged, or intended to lodge an application with the Federal Court or FMS.
- While both complainants and respondents are predominantly concerned about the potential cost, time and effort involved in court action, complainants are much more concerned than respondents about obtaining legal representation and respondents more concerned than complainants about losing at court and the public nature of the determination process.
- Comparative data indicates that in 2001 there was a rise in the percentage of complaints that were conciliated, an increase in the conciliation success rate and a decrease in the percentage of complaints that were withdrawn. There was also no overall decrease in median financial outcomes achieved at conciliation. Additionally, survey data from parties who participated in conciliation in 2001 shows that complainants had high levels of satisfaction with conciliation settlement terms and complainants and respondents had similar levels of concern about proceeding to court determination. This data suggests that the procedural changes have not resulted in complainant disadvantage due to increased

respondent resistance to conciliation and decreased complainant bargaining power in conciliation.

- Comparative data indicates that in 2001 there was an increase in the level of legal representation of complainants at the commencement of the complaint process. This may be indicative of an increased desire or perceived need for legal representation in light of potential court determination and/or increased legal practitioner interest in this jurisdiction since the move to a 'costs follow the event' determination process.
- For the review period, the Federal Court and the FMS approached the award of costs differently. Costs generally followed the event in the Federal Court; that is, the successful party had an order made in its favour. In the FMS, however, while successful applicants were generally awarded costs, applicants whose claims were dismissed were most likely to have no costs order made against them or parties were ordered to bear their own costs.

While the short time period considered by this review limits the strength of the conclusions that can be drawn from the data, this preliminary review suggests that the procedural changes introduced by HRLAA have not significantly impacted on the manner in which parties approach complaints before HREOC nor has it deterred complainants from bringing matters under Federal anti-discrimination law. Furthermore, while complainants and respondents do express concern regarding the potential effort and cost involved in dealing with a matter before the Federal Court or FMS, a significant number of complainants are utilising the new determination procedure.

This continued strong utilisation of Federal law is not unexpected as complainants and advocates are no doubt aware that historically, only a small percentage of complaints have proceeded to determination with the majority of substantive complaints being resolved by conciliation. Additionally, there are obvious benefits in the new system with complainants being able to obtain enforceable determinations and seek to recover their costs. Also of significance is the FMS's approach to costs awards identified in this review, which should go some way to alleviating complainant anxiety about unfavourable costs awards being made against them should they proceed to determination.

1. Background

1.1 Changes to the administration of Federal anti-discrimination legislation

In 1995 the High Court in the case of *Brandy v HREOC*[2] held that HREOC did not have power to make enforceable decisions in discrimination cases in relation to respondents other than the Commonwealth government. As a result of this decision, the then government introduced legislation[3] which reverted to the pre-1992 enforcement process whereby in order to enforce a HREOC determination, a complainant was required to apply to the Federal Court for a fresh hearing of the complaint and have the Federal Court find in their favour. The HRLAA (1999) sought to address this cumbersome enforcement proceeding by amending and repealing provisions of the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth) (HREOCA), the *Racial Discrimination Act* 1975 (Cth) (RDA), the *Sex Discrimination Act* 1984 (Cth) (SDA) and the *Disability Discrimination Act* 1992 (Cth) (DDA). HRLAA commenced operation on 13 April 2000 and key changes arising from this amending legislation can be summarised as follows:

(i) the complaint handling provisions in the RDA, SDA and DDA were repealed and replaced with a uniform scheme in HREOCA;

(ii) the President, rather than portfolio Commissioners[4] ("the Commissioners"), was given responsibility for handling complaints;

(iii) HREOC's public hearing function was removed and complainants were provided with access to the Federal Court should conciliation fail to resolve their complaint;

(iv) the procedure for presidential review of decline decisions was removed and complainants provided with access to the Federal Court where the President decides not to commence, or to discontinue an inquiry; and

(v) Commissioners were provided with an amicus curiae function in relation to proceedings in the Federal Court[5].

In relation to hearings before the Federal Court, HRLAA states that the court is not to be bound by technicalities or legal forms. The legislation does not however make any stipulation in relation to costs of proceedings before the court. Accordingly, it is the judge's discretion to award costs with reference to the circumstances of the particular case and in light of the usual rule that 'costs follow the event'[6]. In relation to this new jurisdiction, the Federal Court provided for a reduced filing fee ($50) and waiver provisions apply for situations of financial hardship and for welfare beneficiaries. A Plain English application form was also developed by the Court which includes

provision for information regarding any special needs applicants may have, for example, the need for language or other interpreters or for carers or assistants.

The other relevant development to be noted in relation to the legislative changes was the passing of the *Federal Magistrates Act* 1999 (Cth) (FMA). The FMA creates the Federal Magistrates Service (FMS) which is intended to provide an affordable, simple and quick way of dealing with less complex matters arising under Federal law. The FMA provides that a party can make an application to, or transfer a proceeding from, the Federal Court or the FMS or visa versa. The FMS has been in operation and able to hear applications relating to unlawful discrimination since July 2000.

1.2 Debate surrounding the impact of this legislative change

While the necessity of legislative change to ensure enforceability of determinations under Federal anti-discrimination law was broadly acknowledged, the impact of the abovementioned changes, specifically the transfer of HREOC's hearing function to the Federal Court, was the subject of debate within the community.

Of particular concern to some sections of the community was the move from the 'cost free'[7] HREOC determination process to the 'costs follow the event' jurisdiction of the court. It was contended that the formality and potential cost of court action would discourage complainants from bringing complaints under Federal legislation and pursuing matters to determination[8]. Associated with this was concern that the changes would negatively impact on the complaint process. For example, there was apprehension that lawyers would become more frequent players in the conciliation process and that this would increase the formality and adversarial nature of conciliation proceedings. Additionally, there was concern that the hesitancy of complainants to pursue matters to court would decrease their bargaining power in conciliation and result in lower conciliation outcomes[9].

From an alternative perspective it was considered that the option of enforceable determinations may result in an increased number of complaints being brought under Federal law. Further, the costs jurisdiction of the court was seen as being beneficial to complainants as it would encourage legal practitioners to represent cases on a contingency or speculative basis. It was also noted that the possibility of enforceable determinations and the fact that the new process provided complainants with access to the court regardless of the reason for termination, may act as incentives for respondents to settle complaints and thus increase complainant bargaining power in the conciliation process.

1.3. Background to this review

In parliamentary discussions regarding HRLAA, the Government indicated its commitment to reviewing the impact of the changes[10]. HREOC is well placed to contribute to any such review as it has specialised knowledge of the law, specialised knowledge of complaint handling processes pre and post legislative amendment, access to complaint data and access to complainants and respondents. Additionally, it is noted that sections 11(1)(e) and (h) of the HREOCA provide HREOC with the power to examine enactments and to undertake research for the purpose of promoting human rights.

In light of concerns by some sections of the community about the impact of the changes, HREOC considered that it would be beneficial to conduct a preliminary review as soon as possible after the commencement of the amended legislation. This initial review would provide the framework for future additional reviews as required. The objectives and framework for this initial review are outlined at 2 below.

2. Objectives

This review aims to consider the impact of the procedural changes introduced by HRLAA on HREOC's complaint handling function, with particular regard to community concerns that the move to a 'costs follow the event' determination process before the court would be disadvantageous to complainants. It has been contended that as complainants are generally less legally and financially resourced than respondents, who are often government departments and companies, they would have higher levels of concern about a court determination process and therefore would:

- be deterred from utilising Federal anti-discrimination law;
- be deterred from pursuing complaints to determination; and
- suffer relative disadvantage in the complaint process in that due to decreased bargaining power, they would be forced to accept lower outcomes at conciliation or withdraw their complaint[11].

The first two components of this review sought to examine specific complaint related data for the calendar year after the introduction of HRLAA to examine:

- what, if any, impact the procedural changes have had on the number of complaints lodged under Federal anti-discrimination law;
- the number of complainants pursuing matters to determination before the court;

- what, if any, concerns complainants and respondents have about a court determination process; and
- what, if any, impact the procedural changes have had on complaint outcomes and the relative position of complainants in the complaint process.

As the issue of legal representation of complainants was relevant to the debate about the impact of a court based determination process, data on levels of legal representation in the complaint process was also considered.

In light of community concerns about the move to a 'costs follow event' determination process and in recognition of the fact that the willingness of complainants to bring and pursue complaints under Federal anti-discrimination law would be influenced by Federal Court and FMS decisions in relation to cost awards, the third component of this review analysed the approach of the Federal Court and FMS to such awards over a twelve month period from the date of the first decision in this jurisdiction. While it was acknowledged that the general jurisprudence of the Federal Court and FMS would also be influential on complainants' utilisation of Federal law, it was felt that the twelve month time period considered by this initial review would not be sufficient to provide a sound overview of jurisprudential trends. It is noted that HREOC is preparing a separate paper on the jurisprudential development of the law since the jurisdiction was transferred to the Federal Court and FMS which will cover a two year period from the date of the first decision, that is 13 September 2000 to 13 September 2002.

3. Methodology

3.1 Review of complaint data

This first component of the review involved the collation of complaint data relating to:

- the number of complaints received by the Commission;
- complaint outcomes;
- conciliation success rate;
- median financial payments obtained at conciliation; and
- level of legal representation of complainants.

In relation to the above variables, data for a two year period prior to the legislative amendments was compared with similar data for a one year period after the commencement of HRLAA. The comparative periods were selected to avoid data

from the year in which both the old and new procedures were in operation (2000). The specified data periods for comparison were:

- 1 January 1998 - 31 December 1998
- 1 January 1999 - 31 December 1999
- 1 January 2001 - 31 December 2001

This data was obtained from the Commission's complaint data base and related to complaints received at the Commission's head office in Sydney[12].

Additionally, data was obtained on the number of matters terminated and the number of applications to the Federal Court or FMS in the period 1 January 2001 - 31 December 2001.

3.2 Survey of parties

The second component of the review involved the development of detailed surveys to be undertaken with complainants and respondents involved in the conciliation process and complainants who had withdrawn their complaint in the period 1 January 2001 to 31 December 2001. This part of the review does not aim to provide comparative assessment of the impact of the different complaint determination procedures on the complaint process. Rather, it seeks to provide information from parties as to how the current determination procedure impacts on decision-making in the complaint process and identify any specific concerns they may have about court determination. Surveying parties involved in the complaint process in the years prior to the commencement of HRLAA was considered, but not pursued, on the basis of presumed difficulties involved in contacting parties and obtaining accurate information on events that occurred so long ago.

Five specific surveys were designed to address complainant and respondent groups across three complaint outcomes – successfully conciliated, unable to be resolved by conciliation and withdrawn. Survey questions were developed in consultation with an expert consultant[13] and examples of complainant and respondent surveys are provided at Appendix 1.

Where matters were successfully resolved by conciliation the surveys sought:

- information on parties' satisfaction with settlement outcomes;
- where parties were not satisfied with settlement terms, to explore the extent to which concerns about the court process played a part in their decision to settle; and

- where parties were not satisfied with settlement terms and indicated that a reason for settlement was that they did not wish to pursue the matter in court, to explore their specific concerns about potential court action.

In relation to matters not resolved by conciliation the surveys sought:

- to explore parties views on why the matter did not settle;
- complainant views on whether they had lodged, or intended to lodge an application in the court; and
- if complainants had not lodged an application, or did not to intend to lodge an application with the court, to identify reasons for this decision.

The review process provided an ideal opportunity for HREOC to also collect broader order data on parties' experiences of the conciliation process which could be utilised in ongoing improvement of HREOC's alternative dispute resolution work. The additional data that was sought included parties' reported understanding of the conciliation process, parties' perceptions of conciliator bias, parties' views on the helpfulness of conciliator interventions and feedback on compliance with settlement terms.

In relation to complaints that were withdrawn, the surveys sought to explore reasons for withdrawal and where complainants noted that a reason for withdrawal was concern about having to take the matter to court, to identify their specific concerns about potential court action.

Participation in the survey was voluntary and the surveys were conducted by an officer employed specifically for this purpose, who was not directly involved in handling complaints. The role of an independent interviewer was seen as central to ensure candid feedback from parties. The primary method for completion of the survey was by telephone interview. However, where a party could not be contacted by telephone or there was some reason why a telephone interview was inappropriate, the survey was sent to the participant for completion[14]. It was felt that telephone interviews would contribute to a higher response rate, ensure accurate and common understandings of questions and facilitate the provision of useful additional comments.

The use of telephone interviews proved very successful with HREOC obtaining 544 completed surveys over the 12 month period. This constitutes an 80 percent response rate. Table 1 in Appendix 2 provides further data on response rates across the various surveys.

Completed surveys did not include names or contact details of parties and were only referenced by complaint number. The completed surveys were also coded in terms of broad demographic data that had been voluntarily provided to HREOC for research and review purposes. Demographic data on survey participants is provided in Tables 3, 4, 5, 9 and 10 in Appendix 2.

Surveys relating to the conciliation process were also coded in terms of the type of conciliation process parties were involved in for example a 'face to face' meeting, an in-person shuttle process[15], a telephone shuttle process[16] or a teleconference. A summary of this data is also provided in Table 7 in Appendix 2.

Survey data was processed and compiled by an external consultant[17].

3.3 Costs awards

In the one year period after the handing down of the first decision in the new anti-discrimination jurisdiction on 13 September 2000, the Federal Court handed down twenty four decisions[18] and the FMS handed down nineteen decisions[19].

The third component of the review involved analysis of each of these decisions so as to reveal:

- the nature of the matter being decided by the Federal Court or FMS (that is, was it a decision on the substantive issue in the proceedings – an allegation of discrimination - or was it a procedural matter such as an application for an extension of time for the period for making an application);
- the outcome of the proceedings and the costs order, if any, made in the proceedings; and
- any statement by the judge or magistrate as to the principles applied in deciding the costs order.

4. Findings

4.1 Review of complaint data

4.1.1 Complaints received

Table 1: Complaints received by jurisdiction

	Racial Discrimination	Sex Discrimination	Disability Discrimination	

	Act (RDA)	Act (SDA)	Act (DDA)	TOTAL
1/1/98 - 31/12/98	640 *	221	352	1213
1/1/99 - 31/12/99	270	244	447	961
1/1/01 - 31/12/01	265	412	486	1163

** This figure is seen to be artificially inflated by the receipt during the 1998-99 reporting year of 246 individual complaints dealing with the same subject matter.*

The data in Table 1 indicates that there has been no decrease in complaints lodged with HREOC in the calendar year after the commencement of HRLAA. The figures for 2001 indicate a 4 percent decrease in comparison with 1998 but a 21 percent increase in comparison with 1999. If the comparative period is extended to include figures for 1996 and 1997[20] there is no apparent upward or downward trend in complainant numbers. Rather, one observes an ongoing rise and fall of complaint numbers which is difficult to attribute to any one factor. This pattern is also evident in HREOC's annual report data on complaints lodged with the central office since 1997.

4.1.2 Complaint outcomes

Table 2: Complaint outcomes

	1/1/98 – 31/12/98		1/1/99 – 31/12/99		1/1/01 – 31/12/01	
Outcomes	**No.**	**%**	**No.**	**%**	**No.**	**%**
Conciliated	286	34%	205	26%	432	39%
Withdrawn	147	18%	106	14%	122	11%
Declined/Terminated	327	39%	366	14%	388	35%
Referred/ Terminated - no reasonable prospect of conciliation	80	9%	104	13%	172	15%
TOTAL	**840**		**781**		**1114**	

Data for 2001 indicates an increase in the conciliation rate and a decrease in the withdrawal rate in comparison with the two comparator years. The data also shows a slight increase in matters terminated on the ground of 'no reasonable prospect of conciliation' and a decrease in matters terminated for other reasons.

Table 3: Percentage of matters where conciliation attempted and successful

	1/1/98 – 31/12/98	1/1/99 – 31/12/99	1/1/01 – 31/12/01
Conciliation Success Rate	80%	68%	71%

In 2001, there was an increase in the conciliation success rate in comparison with the previous comparator year.

4.1.3 Complaint settlement amounts

Table 4 below provides a jurisdictional breakdown of median financial payments obtained at conciliation over the comparative periods. A median rather than average measurement has been utilised to avoid calculations being skewed by one or two extreme financial payments linked to specific individual circumstances.

This data is obtained from HREOC's complaint data base and relates to conciliation processes facilitated by HREOC.

Table 4: Median financial payments obtained in conciliation

	RDA	SDA	DDA	All jurisdictions
1/1/98 - 31/12/98	$7,000.00	$5,500.00	$3,000.00	$7,000.00
1/1/99 - 31/12/99	$1,410.00	$5,000.00	$2,875.00	$4,000.00
1/1/01 - 31/12/01	$9,000.00	$5,000.00	$1,500.00	$4,000.00

The above figures indicate that, with reference to the two comparative periods, there was no decline in the median financial payment obtained at conciliation in the calendar year after the commencement of HRLAA.

4.1.4 Level of legal representation

The tables below show the level of representation of complainants as indicated at the commencement of the complaint handling process. While accurate data on respondent representation over the three year period is not available, data on respondent representation in the conciliation process during 2001 is provided in Table 6 of Appendix 2. It is noted that complainant representation may vary during the process in that a complainant may not have representation at commencement of the process but obtain representation later in the process. These figures should also be considered in association with figures in Table 6 of Appendix 2 which refer to complainant representation in the conciliation process during 2001.

Table 5: Complainant representation

	Legal		Other advocate		No representation		Total	
	No.	%	No.	%	No.	%	No.	%
1/1/98 - 31/12/98	132	11%	*515	42%	566	47%	1213	100%
1/1/99 - 31/12/99	133	14%	54	6%	774	80%	961	100%
1/1/01 -31/12/01	198	17%	88	8%	877	75%	1163	100%

** This figure is seen to be artificially inflated by the receipt during the 1998-99 reporting year of 246 individual complaints dealing with the same subject matter and with non-legal representation.*

Table 6: Complainant legal representation by jurisdiction

	RDA		SDA		DDA		Total	
	No.	%	No.	%	No.	%	No.	%
1/1/98 - 31/12/98	31	5%	49	22%	52	15%	132	11%
1/1/99 - 31/12/99	30	11%	51	21%	52	12%	133	14%
1/1/01 - 31/12/01	36	14%	95	23%	67	14%	198	17%

The data indicates that in the calendar year following the legislative change, there was an overall increase in legal representation of complainants. The data also indicates a slight increase in non-legal representation in comparison with 1999 figures. It is noted, however, that in 2001 75 percent of matters were initially recorded as having no representation. Comparison of the above figures for 2001 with those for complainant representation in the conciliation process in the same period (Table 6 - Appendix 2) indicates that complainant representation increases as a complaint moves through the process. Statistics on matters where conciliation was attempted in 2001 show that at that stage of the process, 41 percent of complainants had legal representation and 10 percent utilised another form of representation.

4.1.5 Applications to the Federal Court and FMS

Table 7: Complaints terminated and number of applications to the Federal Court and FMS in 2001 by jurisdiction*

	RDA		SDA		DDA		All jurisdictions	
	No.	%	No.	%	No.	%	No.	%
Terminated	204		151		205		560	
Applications lodged with Federal Court or FMS	43	21%	36	24%	52	25%	131	23%

** This data is based on copies of applications forwarded to HREOC by the complainant or the Federal Court/FMS*

Table 7 indicates that in 2001 approximately 23 percent of terminated matters were pursued to the Federal Court or FMS.

4.1.6 Summary of findings - complaint data

Comparative data indicates that the legislative changes have not caused a decrease in the number of complaints lodged with HREOC. In fact, the 2001 figures indicate a 21 percent increase in complaints received in contrast with the number received in 1999. The pattern over the comparative period is reflective of an ongoing rise and fall of complaints over the past five years that cannot be linked to any one factor. The data also indicates that a significant number of complainants are making applications to the Federal Court or FMS.

Statistics on complaint outcomes go some way to alleviating concerns that the legislative changes would result in respondents being less willing to resolve matters by conciliation and complainants more likely to withdraw their complaint due to concerns about the new determination process. In 2001 there was an increase in the conciliation rate and a decrease in the withdrawal rate in comparison with both comparator years and an increase in the conciliation success rate in comparison with the figure for 1999.

Comparative data on median financial payment obtained at conciliation does not suggest that the new determination regime has negatively impacted on the relative position of complainants in the conciliation process in terms of reduced bargaining power and associated reduced settlement amounts. The data shows that there was no decrease in median financial payments in 2001.

The data also indicates that there has been an increase in legal representation of complainants at commencement of the process in 2001. This increased level of representation may be an indication that more complainants want, or consider they need, legal representation in the complaint process and/or an increased legal practitioner interest in representing matters in this jurisdiction since the move to a ‘costs follow the event’ determination process.

4.2 Survey of parties

Findings in relation to the second component of the review are divided into sections which reflect the different complaint outcomes as outlined below:

- Findings in relation to matters successfully resolved by conciliation
- Findings in relation to matters that could not be resolved by conciliation
- Findings in relation to withdrawn complaints

4.2.1 Survey participants

As noted previously, participation in the survey process was voluntary and a breakdown of broad demographic data on survey participants along with information on the type of conciliation process they were engaged in is provided at Appendix 2. Those who agreed to participate in the surveys are typical of HREOC's main client group at this time[21].

A similar number of complainants and respondents agreed to participate in the conciliation related surveys. The majority of participants were from the disability discrimination jurisdiction (55%). Slightly more female complainants (59%) agreed to participate and the majority of complainants were from an English Speaking background (75%). Respondents were predominantly private companies (55%). The main form of conciliation process experienced by survey participants was a 'face to face' conciliation meeting facilitated by a HREOC officer (63%). Participant characteristics are similar across both types of conciliation surveys.

In relation to withdrawn complaints, once again most participants were from the disability discrimination jurisdiction (48%), female (58%) and of English speaking background (59%).

4.2.2 Representation of parties

Summary data on representation of parties is provided in Tables 6 and 11 of Appendix 2. The majority of the participants in the conciliation related surveys had no form of representation in the conciliation process (53%). While complainants had more overall representation than respondents (51% - 44%), complainants and respondents had the same level of legal representation (41%). More complainants than respondents utilised other forms of representation (10% - 3%).

In relation to surveys where the complaint was successfully resolved by conciliation, complainants had slightly lower levels of legal representation but similar levels of overall representation to respondents. In relation to surveys where matters were not resolved by conciliation, 61 percent of complainants had some form of representation in contrast with 42 percent of respondents. In these matters, complainants also had higher levels of legal representation than respondents (53% - 40%).

4.2.3 Matters successfully resolved by conciliation

Table 8: Satisfaction with settlement terms

	Complainants		Respondents		Total	
	No.	**%**	**No.**	**%**	**No.**	**%**
Highly satisfied	65	41%	68	41%	133	41%
Satisfied	65	41%	68	41%	133	41%
Unsure	10	6%	11	7%	21	6%
Dissatisfied	13	8%	9	5%	22	7%
Highly Dissatisfied	6	4%	10	6%	16	5%
TOTAL	**159**	**100%**	**166**	**100%**	**325**	**100%**

Both complainants and respondents reported a similar high level of satisfaction with settlement terms with 82 percent indicating they were either satisfied or highly satisfied.

Table 9: Reason(s) for settlement where parties unsure of satisfaction or dissatisfied with settlement terms*

	Complainants		Respondents		Total	
	No.	**%**	**No.**	**%**	**No.**	**%**
My lawyer/advocate advised me to accept the terms	11	22%	10	20%	21	21%
I did not want to take the matter to court/defend the matter in court	22	44%	26	51%	48	47%
I agreed to settle because of another reason	17	34%	15	29%	32	32%
TOTAL RESPONSES	**50**	**100%**	**51**	**100%**	**101**	**100%**

** More than one reason could be selected*

Where parties were unsure or dissatisfied with settlement terms, the most common reason for settlement was the desire to avoid court action. It is noted that a higher percentage of respondents indicated that this was a reason for settlement (51% - 44%). The next most common reason for settlement was ‘another reason’.

The specific ‘other reasons’ given by complainants and respondents are categorised in Table 12 of Appendix 2. The main ‘other reasons’ identified by complainants were that the settlement was “better than nothing” and personal reasons such as health. The main ‘other reason’ identified by respondents was the desire to have no further contact with the complainant.

Table 10: Reason(s) why parties did not want matter to go to court*

	Complainants		Respondents		Total	
	No.	%	No.	%	No.	%
I thought I might not win	5	7%	13	15%	18	12%
I thought costs associated with court action would be too high	20	29.5%	24	28%	44	29%
I did not want the matter made public	6	9%	19	22%	25	16%
I thought the court process would be complex and involve too much time and effort	20	29.5%	25	30%	45	29%
I thought I would need legal representation and would have difficulty getting legal representation	15	22%	-	-	15	10%
Another reason	2	3%	4	5%	6	4%
TOTAL RESPONSES	**68**	**100%**	**85**	**100%**	**153**	**100%**

** More than one reason could be selected*

Both complainants and respondents indicate that they are predominantly concerned about the potential time and effort and costs involved in court action. While legal representation was a significant concern for complainants, it was of no concern to respondents. Respondents were more concerned than complainants about success at court and about the matter being made public. The 'other reasons' identified by complainants and respondents are categorised in Table 13 of Appendix 2.

4.2.4 Matters that could not be resolved by conciliation

Table 11: Reason(s) why matter was not resolved*

	Complainants		Respondents		Total	
	No.	%	No.	%	No.	%
The other parties' settlement terms were unreasonable	55	51%	60	56%	115	53%
My lawyer/advocate advised against settlement	11	10%	18	17%	29	14%
Another reason	43	39%	29	27%	72	33%
TOTAL RESPONSES	**109**	**100%**	**107**	**100%**	**216**	**100%**

** More than one reason could be selected*

The unreasonableness of other parties' settlement terms was the most common identified reason for non-settlement by both complainants and respondents.

More respondents indicated that the advice of their lawyer/advocate was a reason for non-settlement while more complainants than respondents felt there was another reason why the matter did not settle. 'Other reasons' given by complainants and respondents are categorised in Table 14 of Appendix 2. The main 'other reason' identified by complainants was "respondent unwilling to negotiate" and the main 'other reason' identified by respondents was their view that "the complaint lacked substance".

Table 12: Lodgement in court by complainants

	Complainants	
	No.	**%**
Yes	26	36%
Not yet, but intend to	7	10%
Unsure	14	19%
No	25	35%
TOTAL	**72**	**100%**

Almost half of the complainants whose matter had not resolved by conciliation indicated that they had lodged, or intended to lodge an application with the court. This figure is consistent with other Commission data on the percentage of complainants lodging applications with the Federal Court or FMS after unsuccessful conciliation[22].

Table 13: Reason(s) for not lodging an application in the court*

	Complainants	
	No.	**%**
I thought I might not win	18	14%
I thought costs associated with court action would be too high	32	26%
I did not want the matter made public	6	5%
I thought the court process would be complex and involve too much time and effort	33	26%
I thought I would need legal representation and would have difficulty getting legal representation	24	19%
Another reason	13	10%
TOTAL RESPONSES	**126**	**100%**

** More than one reason could be selected*

The most common reasons for not lodging an application in the Federal Court or FMS were concerns about time and effort and costs involved in court action. Concern about difficulty in obtaining legal representation was the next most common response to this question. Other reasons given by complainants are categorised in Table 15 of Appendix 2. The main 'other reasons' identified were personal reasons such as health and the desire to have no further contact with the respondent.

4.2.5 Withdrawn complaints

Table 14: Stage in complaint process when matter withdrawn

	Complainants	
	No.	**%**
Prior to written notification to respondent	41	48%
Following respondent's reply and prior to decision re termination or conciliation	35	41%
Following conciliation attempt	9	11%
TOTAL	**85**	**100%**

The majority of surveyed complainants withdrew their complaint prior to the Commission notifying the respondent of the complaint or after receipt of the respondent's reply to the allegations.

Table 15: Reason(s) for withdrawal of complaint*

	Complainants	
	No.	**%**
I thought my case was not strong enough	22	13%
My lawyer/advocate advised me to withdraw the complaint	14	9%
My complaint was resolved privately	20	12%
I did not want to have to take the matter to court	32	19%
I decided to pursue the complaint elsewhere or in another way	15	9%
I was not satisfied with how HREOC was handling my complaint	15	9%
Another reason	49	29%
TOTAL RESPONSES	**167**	**100%**

** More than one reason could be selected*

The most common identified reason for withdrawal was 'another reason'. The next most common reasons for withdrawal were that the complainant did not want to have

to take the matter to court and concerns about the strength of the complaint. The specific 'other reasons' for withdrawal are categorised in Table 16 below.

The most common 'other reasons' were personal reasons such as health and resolution of the complaint in another jurisdiction.

Table 16: Other reasons for withdrawal of complaint*

Other reasons given by complainants	No.
Personal reasons e.g. health	11
Complaint already resolved in other jurisdiction	6
Process to long	5
Legislation did not cover complaint	3
HREOC lacked power	3
Respondent would not reply to complaint	3
I had no legal representation	2
Advised by Officer **	2
Respondent company had gone into receivership	2
Could not contact respondent	2
Simply wanted to bring matter to the attention of the respondent	2
Did not want to jeopardise future employment	2
Did not want to resolve by conciliation	2
Respondent stopped discriminatory behaviour	1
Process was too legalistic	1
Respondent's reply was discouraging	1
Unable to locate witnesses to support case	1

** More than one reason could be selected*

*** While these complainants may have been of the view that they were advised to withdraw the complaint, HREOC officers do not provide such advice to parties. Officers do, however, assist complainants and respondents to consider the relative strengths and weaknesses of their case on the basis of the information and evidence that is before HREOC.*

Table 17: Reason(s) why complainant did not want to go to court *

	Complainants	
	No.	**%**
I thought I might not win	9	10%
I thought costs associated with court action would be too high	26	30%
I did not want the matter made public	6	7%
I thought the court process would be complex and in involve too much time and effort	26	30%
I thought I would need legal representation and would have difficulty getting legal representation.	18	20%
Another reason	3	3%
TOTAL RESPONSES	**88**	**100%**

** More than one reason could be selected*

The most frequently identified reasons for not wanting to go to court were concerns about the time and effort and costs involved in court action. The next most identified reason was concern about obtaining legal representation. 'Other reasons' given by complainants are categorised in Table 16 of Appendix 2.

4.2.6 Summary of findings - survey of parties

Conciliation outcome

The vast majority of both complainants and respondents (82%) were satisfied with settlement terms. Where parties indicated that they were either unsure of satisfaction or dissatisfied with settlement terms, avoidance of having to deal with the matter in court was the most common reason for settlement for both respondents and complainants. A higher percentage of respondents indicated that 'not wanting to go to court' was a reason for settlement. It is noted, however, that parties identified a number of other reasons that impacted on this decision such as personal health and a desire to finalise the matter as soon as possible.

Data on the specific reasons for not wanting to go to court reveal that the perceived time and effort and costs involved were the main concerns of both complainants and respondents. Respondents were more concerned than complainants about losing in court and the public nature of the process and complaints were significantly more concerned than respondents about being able to obtain legal representation. This data in relation to conciliation outcomes does not indicate that complainants are being forced to resolve their complaints on unsatisfactory terms due to higher levels of

concern about having to proceed to a court determination. While this maybe the situation in relation to some matters, the data indicates that the majority of complainants have high levels of satisfaction with settlement terms and respondents appear to have as many, albeit different, concerns about going to court.

Where conciliation was not successful

Both complainants and respondents identified the unreasonableness of the other side's settlement terms as the most common reason for settlement not being achieved. More respondents than complainants indicated that they were advised not to settle by their advocate. A vast array of other reasons for non-settlement were also identified. It is noted that 21 of the 72 complainants (29%) felt that a reason for not reaching resolution was the respondent's unwillingness to negotiate while 17 of the 62 respondents (27%) felt a reason was the weakness of the complaint. The data reinforces the common sense view that respondent willingness to negotiate is linked, in part, to the respondent's view of the strength of the complaint.

The data indicates that almost half of the complainants whose matters did not resolve by conciliation (46%) had lodged, or intended to lodge an application with the court. Accordingly, it can be said that a relatively large proportion of complainants are pursuing matters to determination after unsuccessful conciliation. There is difficulty in obtaining an accurate comparable measure on willingness to pursue to determination after unsuccessful conciliation under the previous HREOC regime as no statistics are available on the number of complainants that withdrew after unsuccessful conciliation. It is noted that while on average, 9 percent of matters were referred for a HREOC determination each year[23], Table 7 above indicates that in 2001 approximately 23 percent of terminated matters were pursued in the Federal Court or FMS. While this latter figure includes matters terminated on grounds other than 'no reasonable prospect of conciliation' and therefore is not directly comparable, it does indicate that more complainants have access to a determination process under the new regime.

In relation to the 54 percent of complainants who stated they were unsure if they would lodge or did not intend to lodge an application with the court, the main reasons they identified for not pursuing the matter were concerns about the time and effort and costs involved in court action. Once again, concerns about obtaining legal representation were common.

Withdrawn complaints

The fact that the predominant reason for withdrawal was 'another reason' and the vast array of additional reasons provided by complainants indicates that there are

numerous factors that contribute to withdrawal of complaints. The next most frequently identified reasons for withdrawal were that the complainant did not want to have to take the matter to court and concern about the strength of the complaint. The most common 'other reasons' were personal reasons such as health and resolution of the complaint in another jurisdiction. Survey data on reasons for withdrawal becomes more meaningful when the raw data is cross referenced by the stage at which the complaint was withdrawn.

The majority of complaints were withdrawn very early in the process and prior to respondent notification. Further analysis of the raw data indicates that in these matters where the desire to avoid court action was identified as a reason for withdrawal, it was not identified as the sole reason, but rather was one of a number of identified reasons. The desire to avoid court action was predominantly identified in conjunction with private resolution, pursing the matter elsewhere or concerns about the strength of the case. In relation to those matters withdrawn after the respondent's reply to the allegation but prior to a decision on substance, the data indicates that the other primary reason linked to the desire to avoid court action was concern about the strength of the complaint and withdrawal due to personal reasons such as health. Only 11 percent of matters were withdrawn after attempted conciliation. In these matters, the desire to avoid court was, once again, not the sole reason for withdrawal but was identified alongside other reasons such as concerns about the substance of the matter/procedural difficulties at law, private resolution or identification of other avenues for resolution.

This examination of withdrawal data indicates that complaint withdrawal should not be interpreted as complainants conceding their rights due to a desire to avoid court action. Rather, the data appears to indicate that while parties generally did not wish to undertake court action, they primarily withdrew because they had obtained resolution, identified alternative means of resolution or had concerns about the substance of their complaint.

4.3 Costs awards

4.3.1 Statistics regarding costs

Decisions at first instance of the FMS

A review of the nineteen decisions of the FMS during the review period (whether they involve substantive issues, procedural issues or interim injunctions) reveal that 'costs followed the event' in nine matters (47%). This trend was the same regardless of the subject matter of the case.

(a) Substantive hearings

For the review period of 13 September 2000 to 13 September 2001, the FMS decided fourteen cases that concerned the substantive issue raised in the application[24] and found the complaint substantiated in nine (64%) of these matters[25]. In the nine cases where the complaint was substantiated, costs were awarded in favour of the complainant[26] in five cases (55%)[27]. In the five cases where the complaint was not substantiated, costs were awarded against the complainant in two of those cases (40%)[28].

The above figures reveal that, at least for the period considered, the traditional principle that 'costs follow the event' was only applied in seven of the fourteen substantive matters determined by the FMS.

(b) Applications for extensions of time

During the relevant review period for costs orders, three applications for an extension of time to make a complaint of unlawful discrimination were made to the FMS[29].

Of those applications, one was granted and no order for costs was made[30]. In the two matters in which an extension of time was not granted, no order for costs was made in one matter[31] and costs were awarded against the unsuccessful complainant in the other matter[32].

Once again, in this small category of matters, it was the exception rather than the rule for the FMS to apply the 'costs follow the event' principle.

(c) Disqualification of magistrate

There was one proceeding during the review period where a successful application was made to disqualify a magistrate from hearing a matter and no order was made as to costs[33].

(d) Interim injunctions

During the relevant period, the FMS dealt with one application for an interim injunction[34]. The interim injunction was granted and costs were awarded in favour of the successful applicant.

Decisions at first instance in the Federal Court

A review of the twenty four decisions of the Federal Court, at first instance and on appeal, during the review period (whether they involve substantive issues, procedural issues or interim injunctions) reveal that 'costs followed the event' in eighteen matters (75%). It is interesting to note though that in the decisions relating to substantive matters only, the unsuccessful applicant was only required to pay the respondent's costs in 50% of cases . In the procedural matters and interim injunction matters, however, the unsuccessful applicant was ordered to pay the respondent's costs in 70% of cases .

(a) Substantive hearings

In the period 13 September 2000 to 13 September 2001, there were eleven matters considered by the Federal Court in which the substantive issue in the proceedings was considered[35]. The complaint was substantiated by the Federal Court in three of those matters (27%)[36]. In the three cases in which the complaint was substantiated, costs were awarded in favour of the complainant in every case. In the eight cases where the complaint was not substantiated, costs were awarded against the complainant by the Federal Court in four cases (50%)[37] and no costs order was made in one matter[38].

This sample, albeit a small one, reveals that in the first year of the operation of the jurisdiction, the Federal Court in its substantive hearings ordered costs so that they followed the event in seven of the eleven matters (64%) determined by it.

(b) Applications for extension of time

One application for an extension of time to make a complaint of unlawful discrimination was made in the relevant period and was granted[39]. Costs were ordered against the applicant in that matter.

(c) Applications for summary dismissal

During the relevant period, five applications for summary dismissal[40] were made to the Federal Court and the applications were granted in four of those cases (80%)[41] with costs orders in favour of the applicant seeking summary dismissal. In the matter where the application was not granted, the unsuccessful applicant had costs ordered against it[42].

(d) Interim Injunctions

The Federal Court has dealt with one interim injunction application and dismissed it[43]. Costs were awarded against the applicant for the interim injunction.

(e) Other procedural matters

There have been three decisions by the Federal Court dealing with procedural issues such as the scope of the complaint before the Court[44], a hearing to determine the order to be made as to costs[45] and the non-appearance of the applicant at a date for hearing[46]. There was no order for costs in the first two of those matters and an order against the absent applicant in the third matter.

Appeal Decisions in the Federal Court

HREOC is aware of three decisions on appeal handed down during the relevant period[47]. One of those matters was an appeal against a substantive decision[48]. The original complainant was unsuccessful on appeal and costs were awarded against him.

In the other two decisions, one applicant appealed against a decision not to grant an extension of time to lodge an application[49] and in the other matter, the applicant appealed against an order of the Federal Court for summary dismissal of her application[50]. In both decisions, costs were ordered against the applicant.

It follows that in all of the matters dealt with on appeal considered in this review, costs orders were made so that they followed the event.

4.3.2 Analysis of approach of the FMS and the Federal Court to the issue of costs

FMS

As the above statistics reveal, the FMS has applied, during the review period, the principle of ‘costs following the event’ in less than half of all matters determined by it.

An analysis of the approach of the FMS to the issue of costs, at least in this review period, reveals that there have been some decisions that have asserted that costs follow the event and others that assert that human rights matters are usually no costs matters. A statement of Driver FM in *Theodore Xiros v Fortis Life Assurance Ltd*

[2001] FMCA 15 ("Xiros") shows the scope for flexibility in consideration of costs orders[51]:

> Ordinarily, in this jurisdiction as in others, costs follow the event. But there is no absolute rule to that effect. There is a general principle that, in civil non jury trials, in the absence of special circumstances, a successful party has a reasonable expectation of obtaining an order for costs in its favour unless, for some reason connected with the case, a different order is specifically warranted: *Donald Campbell & Co v Pollack* [1927] AC 732 at 812, cited by McHugh J in *Latoudis v Casey* (1990) 170 CLR 534 at 569. A departure from that general principle cannot be arbitrary or idiosyncratic, but there is no right to an order for costs, notwithstanding success in litigation: *Donald Campbell & Co v Pollack* op cit at 811…

Furthermore, Raphael FM in *Tadawan v State of South Australia* [2001] FMCA 25 ("Tadawan") stated[52] that:

> The Court has accepted that these matters were normally considered to be "no costs" matters, as evidenced by the practice of state tribunals and the fact that there was no power in HREOC to award costs. The Court has recognised that where proceedings are brought a successful party should not have the benefit of his or her victory lost in costs. The Court is also anxious not to discourage litigants from bringing claims which may well have merit because of the fear of an adverse costs order in the event that the applicant is unsuccessful. On the other hand, the Court can use its powers in relation to costs to discourage unmeritorious claims.
>
> Although the applicant has not succeeded in this case the Court is of the view that her claim was justifiable. It was brought against the background of poor communication, which I have attempted to discuss in some detail. I believe that this is a case where the court should acknowledge the "no cost" nature of the jurisdiction and make no order.

It is significant to note that in both *Xiros* and *Tadawan*, the applicants were unsuccessful but neither of them were ordered to pay costs, notwithstanding the different starting positions stated by the Federal magistrates.

The approach of the FMS will undoubtedly become clearer as more decisions are handed down. For the review period, apart from whether human rights matters are prima facie a costs or a no-costs jurisdiction, the following matters were considered by the FMS when deciding whether or not to award costs in discrimination matters:

- the relevance of there being a public interest element to the complaint;

- the relevance of the complaint being bona fide but ultimately unsuccessful;
- the relevance of the applicant being unrepresented and not in a position to assess the risk of litigation;
- the successful party should not lose the benefit of their victory because of the burden of their own legal costs;
- the courts should not discourage litigants from bringing meritorious claims and should be slow to award costs at an early stage;
- the courts will discourage unmeritorious claims and will not award costs where the trial is prolonged by either party; and
- self represented applicants are not entitled to any legal costs.

Each of these matters will be considered in turn.

(f) Where there is a public interest element to the complaint

In Xiros, as discussed above, Driver FM declined to award costs to the respondent after dismissing the application. His Honour stated[53]:

> A further circumstance that may warrant a departure from the general principle is where the proceedings contain a significant public interest element: *Oshlack v Richmond River Council* (1998) 152 ALR 83. All human rights proceedings contain some element of public interest in that the legislation is remedial in character, addressing the public mischief of discrimination. But the legislation confers private rights of action for damages. There will be many human rights proceedings where no sufficient public interest element can be shown: *Physical Disability Council of NSW v Sydney City Council* [1999] FCA 815.
>
> In the present case, the proceedings have called for the interpretation and application of s.46(2) of the DDA, a provision on which I have found no previous judicial consideration. The decision of this Court will have some precedent value and will have implications for other insurance policies; and possibly a large number of similar policies. The proceedings therefore contain a public interest element of substance.

(g) Where the complaint is bona fide but ultimately unsuccessful

In *Michael Walter Ryan v The Presbytery of Wide Bay Sunshine Coast and the Presbyterian Church of Queensland* [2001] FMCA12, Baumann FM stated[54]:

> Whilst I have the power to award costs, the nature and intent of anti-discrimination legislation could be thwarted if citizens were unreasonably inhibited from prosecuting bona fide, even ultimately unsuccessful claims.

Baumann FM went on to make[55] the following conditional costs order, which reflected a long history of litigation in a number of fora between the applicant and respondent:

> On the undertaking given by the applicant to the Court as set out in the undertaking signed by him, that application number BZ76 of 2001 in this Court be discontinued, and the applicant be ordered to pay costs of $10,000.00. The execution of such order for costs be stayed unless the applicant breaches his undertaking given to the Court.

Reference should also be made to the comments of Raphael FM in *Tadawan* referred to above.

(h) Where the applicant is unrepresented and not in a position to assess the risk of litigation

In Xiros, referred to above, Driver FM declined to award costs to the respondent after dismissing the application. His Honour stated[56]:

> Another circumstance that may warrant a departure from the general principle is where the unsuccessful party is unrepresented and was not in a position to make a proper assessment of the strength or weakness of his case, and, hence, the risk associated with the litigation. Mr Xiros had the benefit of legal assistance for his complaint to HREOC but he was unrepresented in these proceedings. The issue to be resolved was a technical one: whether there was a sufficient actuarial basis for the exclusion from benefits in the insurance policy of HIV/AIDS derived conditions, an issue on which the respondent bore the onus of proof. That issue could only be resolved by the pursuit of the present application to this Court, and Mr Xiros was not in a position to make a reliable assessment of his prospects of success.

(i) The successful party should not lose the benefit of their victory because of their legal costs

In *Donna Marie Shiels v Trevor Leighton James and Lipman Pty Ltd* [2000] FMCA 2, Raphael FM held that the amount of the award would be totally extinguished if no order for costs was made and in those circumstances costs should follow the event.

In *Stephanie Travers by her next friend Wendy Travers v State of NSW* [2001] FMCA 18, Raphael SM stated[57]:

> This matter was originally commenced in the Federal Court. There was a lengthy hearing of Notice of Motion before Justice Lehane and the case before me lasted 2 ½ days. If costs were not awarded Stephanie would lose the benefit of the entire judgment. I order that the respondent should pay the applicant's costs to be taxed on the Federal Court scale if not agreed.

Similarly in *Christine McKenzie v The Department of Urban Services & the Canberra Hospital* [2001] FMCA 20, Raphael FM ordered that the respondents pay the costs of the applicant, stating[58]:

> Anti-Discrimination matters are generally considered to be a type of dispute which do not attract orders for costs. There was no provision for costs in the inquiry system previously operated by HREOC. In state tribunals there is provision to award costs but this is not often done. The Federal Court and the Federal Magistrates Court are courts of law and not tribunals and the *HREOC Act* does not contain any prohibition on the award of costs. In previous matters which have come before me e.g. *Donna Marie Shiels v Trevor Leighton James & Anor* [2000] FMC 2 and *Stephanie Travers by her next friend, Wendy Lorraine Travers v State of New South Wales* [2001] FMC 18 I have indicated that I think an award of costs is appropriate where otherwise a party may have the benefit of his or her award of damages totally eliminated by the cost of the proceedings.

His Honour further declined to order that the applicant pay the costs of the second respondent, against whom the applicant's case was dismissed, on the basis that they had been represented by the same lawyers as the first respondent, and the matter was not significantly lengthened by the defence of the second respondent.

In *Sarah Johanson v. Richard Blackedge and Lucimar Blackedge trading as Michawl Blackedge Meats* [2001] FMCA 6 Driver FM ordered that costs should follow the event. He agreed with the views expressed by Raphael FM in *Shiels v James* concerning the general desirability of an award of costs in favour of a successful applicant in human rights proceedings, so as to avoid an award of damages being swallowed up by the cost of litigation.

(j) The courts should not discourage litigants from bringing meritorious claims and should be slow to award costs at an early stage

In *Lan Low v Australian Tax Office* [2000] FMCA 6, Driver FM dismissed the application on the basis that an extension of time for the filing of the application should not be granted because the application did not disclose an arguable case. His Honour declined to award costs, however, stating[59]:

> In my view the Court should be slow to award costs at an early stage of human rights proceedings so that applicants have a reasonable opportunity to get their case in order, to take advice and to assess their position. It would, in my view, be undesirable for costs to be awarded commonly at an early stage, as that would provide a deterrent to applicants taking action under what is remedial legislation in a jurisdiction where costs have historically not been an issue.
>
> By disposing of the application now at this relatively early stage the respondent is able to avoid being put to the substantial expense of a full hearing and in those circumstances I do not think it necessary or appropriate to make any order as to costs.

(k) The courts will discourage unmeritorious claims and will not award costs where the trial is prolonged by the conduct of either party

In *Hassan & Hassan v James Smith & Ors* [2001] FMCA 52, Raphael FM held that the applicant should pay the party-party costs because although he was told of the difficulties he faced in establishing his claim by HREOC upon termination, and by Raphael FM at two directions hearings, he nevertheless "wanted his day in court". However, Raphael held that the applicant's conduct was not so unreasonable so as to warrant indemnity costs being awarded.

In *Maevida Horman v Distribution Group Limited* [2001] FMCA 52, in which the applicant was successful, Raphael FM quoted several High Court authorities in relation to costs. In particular, he noted the principles that costs follow the event, the trial judge has discretion to award only a proportion of a successful party's costs if the conduct of that party in a trial was such as to unreasonably prolong the proceedings[60], and that another order may be justified in certain circumstances, including the making of allegations which ought never to have been made or the undue prolongation of a case by groundless contentions[61]. Raphael FM held that the fact that the trial was prolonged by the conduct of the applicant and her untruthfulness and that her Counsel persisted in suggesting a conspiracy between the respondent's witnesses militated against the usual type of order for costs that is given by the court

where costs do not follow the event. His Honour held that each party should pay their own costs.

This departure from the generally lenient approach of the FMS can be explained by noting that *Horman* was the only case of those examined in which the applicant's honesty and bona fides were found to be dubious.

In *Xiros*, although Driver FM declined to award costs to the respondent after dismissing the application, in the course of that decision he made the following observation[62]:

> One circumstance that might disentitle a successful litigant to an order for costs can be the behaviour of the litigant during the course of the proceedings, for example, by taking unnecessary technical points or otherwise inappropriately prolonging the proceedings. That is certainly not the case here. On the contrary, the respondent, through its legal representatives, has behaved impeccably.

(l) Self-represented applicants are not entitled to any legal costs

In *Wattle v Raymond Kirkland & Daphne Kirkland (t/as Kirk's Radio Cab)* [2001] FMCA 66 Raphael FM held the applicant was self-represented and was thus not entitled to any legal costs. In relation to the claim against Mrs Kirkland, which was dismissed, Raphael FM did not make any order as to costs as he held that no extra costs were involved by her being joined.

Federal Court

As the statistical information above reveals, the Federal Court has applied the costs follow the event principle in most cases. It is interesting to note, though that in relation to unsuccessful applicants in substantive matters, it appears to have taken a more flexible approach to the application of the principle and has only done so in half of those matters.

In *Paramasivam v Wheeler & Ors* [2000] FCA 1559, Moore J held that even though the applicant represented herself and held a genuine belief about the conduct of the respondents, this did not warrant departure from the rule. He did, however, invite the respondents to give consideration as to whether they ought to recover the costs. Similarly, in *Paramasivam v Wheeler &Ors* [2001] FCA 545, the applicant was ordered to pay the respondents' costs because no reasonable cause of action was shown (the application was summarily dismissed).

In the appeal judgment of *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2001] FCA 123, the appellant argued that costs should not be awarded as he was not receiving Legal Aid and the proceedings concerned a public rather than a private right. The Full Federal Court dismissed the appeal with costs and held that[63]:

> This is not an appropriate case in which to consider whether there should be some departure in human rights litigation from the ordinary principles governing the court's discretion to order payment of costs. In our view, this appeal should be dismissed with costs because the appeal was without merit, having no realistic prospects of success.

There have, however, been some interesting departures from the general rule. In the first instance decision of *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615, Drummond J did not award costs without giving reasons for his decision in this respect.

In *Tate v Raffin and Wollongong District Cricket Club Inc* [2000] FCA 1582, Wilcox J dismissed the application, but declined to order costs because of the conduct of the respondent:

> Generally speaking, it may be expected an order will be made in favour of the successful party. However, in the present case, I do not think it appropriate to make an order for costs. Although I have determined the proceeding must be dismissed, the respondents bear substantial responsibility for the fact that it was commenced in the first place; generally, because of the way they handled the situation that arose at the training session and, more particularly, because of the misleading impression conveyed by the fifth paragraph of the letter of 20 February 1996 [which suggested that the decision to revoke the applicant's membership was by reason of his disability][64].

In *Creek v Cairns Post Office* [2001] FCA 1150, Kiefel J noted that neither the RDA nor HREOCA provide that costs are not to be awarded but ordered the unsuccessful applicant to pay only half of the respondents costs because of the time taken in the proceedings to consider defences which were not available to the respondent.

4.3.3 Summary of findings - Costs awards

Although the Federal anti-discrimination jurisdiction is at an early stage during the review period, it is possible to offer some conclusions from the above statistical and jurisprudential analysis:

- costs orders made by the FMS during the review period were not strictly governed by the 'costs follow the event' rule and, in fact, a costs order against an unsuccessful party has been more the exception than the rule; and

- the Federal Court has followed adhered rather closely to the traditional principle that 'costs follow the event' in its decisions dealing with procedural issues but taken a more flexible approach in the application of the rule to the unsuccessful applicants in its substantive matters.

It follows that while the approach of the Federal Court may have borne out some groups' concerns about the Federal anti-discrimination jurisdiction being a costs jurisdiction, the FMS experience is a different one and, combined with its features of informality and timeliness, has resulted in it being a jurisdiction where the possibility of an unfavourable costs order being made should not necessarily be a significant deterrent to an applicant.

5. Conclusions

The data obtained in this initial review indicates that the procedural changes introduced by HRLAA have not deterred complainants from lodging complaints under Federal anti-discrimination law and a significant number of complainants are utilising the new determination procedures.

This continued strong utilisation of Federal law is not unexpected as complainants and advocates are no doubt aware that historically, only a small percentage of complaints have proceeded to determination with the majority of substantive complaints being resolved by conciliation[65]. Furthermore, there are obvious benefits in the new system with complainants being able to able to obtain enforceable determinations and seek to recover their costs. Of significance also is the approach to costs awards identified in this review, which should go some way to alleviating complainant anxiety about unfavourable costs awards being made against them should they proceed to determination. Specifically, this review has identified that while the Federal Court has adhered rather closely to the traditional principle that 'costs follow the event' in its decisions dealing with procedural issues, it has taken a more flexible approach in the application of the rule to unsuccessful applicants in its substantive matters. Additionally, costs orders made by the FMS during the review period were not strictly governed by the 'costs follow the event' rule and, in fact, a costs order against an unsuccessful party has been more the exception than the rule.

This initial review data does not indicate that the procedural changes have resulted in complainant disadvantage in the conciliation process. Comparative data on complaint outcomes does not show a trend of increased resistance to settlement by respondents. In fact, the data shows a rise in both the conciliation rate and the conciliation success rate in 2001 in comparison with the previous comparator year. The survey data also indicates that while the specific concerns of respondents about court action may differ

from those of complainants, complainants and respondents have a similar desire to avoid court. The data shows that complainants and respondents are predominantly concerned about the potential costs and the time and effort involved in court action. Complainants, however, are much more concerned than respondents about obtaining legal representation and respondents more concerned than complainants about losing at court and the public nature of the determination process.

Survey data shows that where matters were resolved through conciliation, both parties had similar high levels of satisfaction with settlement terms. While no comparative data is available in relation to satisfaction with conciliation outcomes in the pre-HRLAA complaint process, one would assume that if complainants were being forced to settle on unsatisfactory terms due to their disadvantaged position, their satisfaction rating would be lower than respondents and satisfaction ratings would be lower overall. Additionally, comparative data on median financial payments at conciliation, does not support a view of complainants being required to 'settle for less' in conciliation.

In relation to concerns that the reduced bargaining power of complainants would mean that complainants would be forced to withdraw their complaint, comparative outcome data does not support this prediction. The data shows that there has been a decrease in the withdrawal rate in the year following the legislative amendments[66]. Detailed examination of survey data reveals that there are numerous reasons for withdrawal and that withdrawal cannot be merely interpreted as complainants conceding their rights due to a desire to avoid court action. Rather, the data indicates that while parties generally did not wish to undertake court action, they primarily withdrew because of perceived weaknesses in their claim or because they had achieved, or found some other means of achieving, a satisfactory outcome.

The data also indicates that while the majority of parties in the complaint process are not legally represented, there has been an increase in legal representation of complainants at the commencement of the complaint process in the year following the HRLAA enactment. This may be indicative of an increased desire or perceived need for legal representation in light of potential court determination and/or increased lawyer interest in taking on cases in this jurisdiction since the move to a 'costs follow the event' determination process. As discussed at 4.1.6 above, this may be seen as a positive development by some, in that an argument in favour of the 'costs follow the event' rule applying to the anti-discrimination jurisdiction was that it would result in increased legal representation of complainants. Alternatively, concerns have been expressed about legal involvement in the complaint process increasing the formality and adversarial nature of the complaint process, particularly in relation to conciliation. While examination of this latter issue was not specifically included in the parameters of this review, some general comments can be made with reference to

HREOC's complaint procedures and anecdotal evidence of HREOC officers. Firstly, the conduct of the complaint process is not dictated by party advocates but rather is in the control of Investigation/Conciliation Officers who aim to ensure a flexible, fair and accessible process for all complainants and respondents. While the legal context and the adversarial nature of the final determination process must be acknowledged, officers seek to facilitate a conciliation process which, while acknowledging areas of dispute in relation to facts and law, moves beyond this to assist parties identify areas of agreement in relation to presenting issues and work cooperatively to find resolutions that meet identified needs. Officers report that in general, legal representatives are supportive of HREOC's approach and are often of great assistance to the conciliation process.

In summary, while the short time period considered in this initial review limits the strength of the conclusions that can be drawn from the data, the data indicates that the proceduralchanges introduced by HRLAA have not significantly impacted on the manner in which parties approach complaints before HREOC nor has it deterred complainants from bringing matters under Federal anti-discrimination law. Furthermore, while complainants and respondents do express concern regarding the potential effort and cost involved in dealing with a matter before the Federal Court or FMS, a significant number of complainants are utilising the new determination procedure.

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APPENDIX 1
Survey examples
SURVEY 1A: Conciliated Outcome [Complainant]

Instructions

Please indicate the most appropriate answer(s) to each question.

1a) Which of the following, if any, were useful in helping you prepare for conciliation?

1b) And which one of these was most helpful? [please tick only one box in the last column].

Which of these were helpful?	A		B
	Yes	No	Most Helpful
i. Written information from the Commission	☐	☐	☐
ii. Discussions with the Conciliation Officer	☐	☐	☐
iii. Discussions with friends and family	☐	☐	☐
iv. Discussions with your lawyer/advocate	☐	☐	☐
v. Other (please specify in the space below what this was)	☐	☐	☐

_____

_____

2. In deciding what outcome you wanted at conciliation, which of the following things, if any, did you do?

Did you ….?	Yes	No
i. Ask the advice of your lawyer/advocate	☐	☐
ii. Ask the advice of friends and family	☐	☐
iii. Discuss the matter with the Conciliation Officer	☐	☐
iv. Look at other conciliated settlements and decisions of the Commission/Court	☐	☐
v. Do something else (please specify below what this was)	☐	☐

_____

_____

3. To what extent do you agree or disagree with each of the following statements about the conciliation process? (Please circle one number in each row to indicate the extent to which you agree or disagree with each statement.)

Statement	Agree - Disagree				
i. I understood what was happening during the conciliation process	**Strongly Agree**				**Strongly Disagree**
	1	**2**	**3**	**4**	**5**
ii. The conciliator was biased against me	**Strongly Agree**				**Strongly Disagree**
	1	**2**	**3**	**4**	**5**
iii. The things the conciliator said and did helped us reach an agreement	**Strongly Agree**				**Strongly Disagree**
	1	**2**	**3**	**4**	**5**
iv. I was not given the opportunity to fully consider settlement proposals	**Strongly Agree**				**Strongly Disagree**
	1	**2**	**3**	**4**	**5**

4. How satisfied or dissatisfied are you with the terms of settlement?(Please circle one number).

Highly Satisfied				***Highly Dissatisfied***
1	**2**	**3**	**4**	**5**

5. If you gave a score of 3, 4 or 5 to question 4, why did you agree to settle on these terms? (If you gave a score of 1 or 2, please go to question 7.)

You agreed to settle the complaint because ……?	**Yes**	**No**
i. Your lawyer/advocate advised you to accept the terms	☐	☐
ii. You did not want to have to take the matter to the Federal Court/Federal Magistrates Service	☐ Go to Question 6.	☐
iii. Of another reason (please specify in the space below)	☐	☐

_____

_____

6. If you answered 'Yes' to Question 5ii, please tell us why you did not want to defend the matter in court?

You did not want to take the matter to court because….?	**Yes**	**No**
i. You thought you might not win at court	☐	☐
ii. You thought costs associated with court action would be too high	☐	☐
iii. You did not want the matter made public	☐	☐
iv. You thought the court process would be complex and involve too much time and effort	☐	☐
v. You thought you would need legal representation and that you would have difficulty getting legal representation	☐	☐
vi. Of another reason (please specify in the space below)	☐	☐

_____

_____

7. Have the terms of settlement been complied with? - i.e., has the money been paid or promised acts completed. [Tick only one box below and elaborate where appropriate]

☐ Yes - Fully

☐ Yes - Partly (Please elaborate)

_____

_____

☐ No (Please elaborate)

_____

_____

Office Use Only

File No: M F O L OA

RDA SDA DDA ESB NESB ATSI

TS TC FF S D

SURVEY 2A: Conciliated Outcome [Respondent]

Instructions

Please indicate the most appropriate answer(s) to each question.
Please note: where we refer to 'you' in the questionnaire, that can mean either you personally or the organisation you represented in the conciliation process.

1a) Which of the following, if any, were useful in helping you prepare for conciliation?

1b) And which one of these was most helpful? [please tick only one box in the last column].

Which of these were helpful?	A		B
	Yes	No	Most Helpful
i. Written information from the Commission	☐	☐	☐
ii. Discussions with the Conciliation Officer	☐	☐	☐
iii. Discussions with friends and family	☐	☐	☐
iv. Discussions with your lawyer/advocate	☐	☐	☐
v. Other (please specify in the space below what this was)	☐	☐	☐

_____

_____

2. In deciding what outcome you wanted at conciliation, which of the following things, if any, did you do?

Did you ….?	Yes	No
i. Ask the advice of your lawyer/advocate	☐	☐
ii. Ask the advice of friends and family	☐	☐
iii. Discuss the matter with the Conciliation Officer	☐	☐
iv. Look at other conciliated settlements and decisions of the Commission/Court	☐	☐
v. Do something else (please specify below what this was)	☐	☐

_____

_____

3. To what extent do you agree or disagree with each of the following statements about the conciliation process? (Please circle one number in each row to indicate the extent to which you agree or disagree with each statement.)

Statement	Agree - Disagree				
i. I understood what was happening during the conciliation process	**Strongly Agree**				**Strongly Disagree**
	1	**2**	**3**	**4**	**5**
ii. The conciliator was biased against me	**Strongly Agree**				**Strongly Disagree**
	1	**2**	**3**	**4**	**5**
iii. The things the conciliator said and did helped us reach an agreement	**Strongly Agree**				**Strongly Disagree**
	1	**2**	**3**	**4**	**5**
iv. I was not given the opportunity to fully consider settlement proposals	**Strongly Agree**				**Strongly Disagree**
	1	**2**	**3**	**4**	**5**

4. How satisfied or dissatisfied are you with the terms of settlement?(Please circle one number).

Highly Satisfied				***Highly Dissatisfied***
1	**2**	**3**	**4**	**5**

5. If you gave a score of 3, 4 or 5 to question 4, why did you agree to settle on these terms? (If you gave a score of 1 or 2, please go to question 7.)

You agreed to settle the complaint because ……?	**Yes**	**No**
i. Your lawyer/advocate advised you to accept the terms	☐	☐
ii. You did not want to have to defend the matter in the Federal Court/Federal Magistrates Service	☐ Go to Question 6.	☐
iii. Of another reason (please specify in the space below)	☐	☐

_____

_____

6. If you answered 'Yes' to Question 5 ii, please tell us why you did not want to defend the matter in court?

You did not want to defend the matter in court because….?	**Yes**	**No**
i. You thought you might not win at court	☐	☐
ii. You thought costs associated with court action would be too high	☐	☐
iii. You did not want the matter made public	☐	☐
iv. You thought the court process would be complex and involve too much time and effort	☐	☐
v. You thought you would need legal representation and that you would have difficulty getting legal representation	☐	☐
vi. Of another reason (please specify in the space below)	☐	☐

_____

_____

7. Have the terms of settlement been complied with? - i.e., has the money been paid or promised acts completed. [Tick only one box below and elaborate where appropriate]

☐ Yes - Fully

☐ Yes - Partly (Please elaborate)

_____

_____

☐ No (Please elaborate)

_____

_____

Office Use Only	
File No:	PC FG SG I O
RDA SDA DDA	L OA
TS TC FF S	<20 20-100 >100

APPENDIX 2

1. Survey response rates

Table 1: Response rate by survey type

	Complainants		Respondents		Total	
	No.	**%**	**No.**	**%**	**No.**	**%**
Conciliated outcome	159	80%	166	84%	325	82%
Unable to be resolved by conciliation	72	79%	62	68%	134	74%
Withdrawn	85	87%	N/A	N/A	85	87%
TOTAL	**316**	**81%**	**228**	**79%**	**544**	**80%**

2. Survey participant data

2.1 Conciliation matters

Table 2: Survey participants x jurisdiction

	Complainants		Respondents		Total	
	No.	**%**	**No.**	**%**	**No.**	**%**
RDA	28	12%	26	11%	54	12%
SDA	76	33%	75	33%	151	33%
DDA	127	55%	127	56%	254	55%
TOTAL	**231**	**50%**	**228**	**50%**	**459**	**100%**

Table 3: Complainant participants x category

	Complainants	
	No.	**%**
Male	92	40%
Female	136	59%
Other*	3	1%
TOTAL	**231**	**100%**

** Complaints lodged by organisations rather than individuals*

Table 4: Complainant participants x ethnicity

	Complainants	
	No.	**%**
ESB	172	75%
NESB	54	23%
ATSI	5	2%
TOTAL	**231**	**100%**

Table 5: Respondent participants x category

	Respondents	
	No.	**%**
Federal government	27	12%
State government	28	12%
Private company	124	55%
Other organisation	39	17%
Individual	10	4%
TOTAL	**228**	**100%**

Table 6: Representation in conciliation process

	Complainants		Respondents		Total	
	No.	**%**	**No.**	**%**	**No.**	**%**
Legal	94	41%	93	41%	187	41%
Other Advocate	23	10%	7	3%	30	6%
No representation	114	49%	128	56%	242	53%
TOTAL	**231**	**50%**	**228**	**50%**	**459**	**100%**

Table 7: Type of conciliation process

	Complainants		Respondents		Total	
	No.	**%**	**No.**	**%**	**No.**	**%**
Face to face conference	145	63%	142	62%	287	63%
Shuttle only*	1	-	-	-	1	-
Telephone shuttle**	81	35%	83	37%	164	36%
Tele-conference***	4	2%	3	1%	7	1%
TOTAL	**231**	**100%**	**228**	**100%**	**459**	**100%**

** Parties at same location, conciliator conveys messages between parties*
*** Conciliator facilitates resolution by means of separate telephone conversations with parties*
**** Conciliator facilitates meeting of parties via telephone link-up of parties*

2.2 Withdrawn complaints

Table 8: Survey participants by jurisdiction

	Complainants	
	No.	**%**
RDA	21	25%
SDA	23	27%
DDA	41	48%
TOTAL	**85**	**100%**

Table 9: Complainant participants by category

	Complainants	
	No.	**%**
Male	35	41%
Female	49	58%
Other	1	1%
TOTAL	**85**	**100%**

Table 10: Complainant participants by ethnicity

	Complainants	
	No.	**%**
ESB	50	59%
NESB	33	39%
ATSI	2	2%
TOTAL	**85**	**100%**

Table 11: Complainant representation

	Complainants	
	No.	**%**
Legal	13	15%
Other Advocate	9	11%
No representation	63	74%
TOTAL	**85**	**100%**

3. Additional survey data

Matters successfully resolved by conciliation

Table 12: Other reasons for settlement where parties unsure of satisfaction or dissatisfied with settlement terms

Other reasons given by complainants		Other reasons given by respondents	
Better than nothing	4	Did not want any more contact with complainant	10
Personal reasons eg health	4	Felt pressured by conciliator	2
Advised by conciliator *	3	Recognised that complainant had a strong case	1
Process too long and stressful	3	Process too long and stressful	1
Felt pressured by conciliator	2	Lack of understanding of process	1
Advised by other	1		

** While these complainants may have been of the view that they were advised to accept the settlement terms, HREOC officers do not advise parties to accept or decline settlement offers.*

Table 13: Other reasons why parties did not want matter to go to court

Other reasons given by complainants		Other reasons given by respondents	
Personal reasons eg health	1	Did not want any future contact with complainant	3
Process would be too difficult because I am deaf	1	Too embarrassing	1

Matters unable to be resolved by conciliation

Table 14: Other reasons why matter was not resolved

Other reasons given by complainants		Other reasons given by respondents	
Respondent unwilling to negotiate	21	Complaint lacked substance	17
Respondent unwilling to attend face to face meeting/no face to face meeting held	8	Too much focus on monetary settlement	4
Conciliator was not proactive	5	Advised by conciliator*	2
Realised complaint was not strong enough/lacked substance	4	Complainants solicitor too pushy/ raised complainant's expectations	2
HREOC has no power	3	Complainant did not attend face to face meeting	2
Felt under resourced - Respondent was too large and powerful	2	Parties too emotional	1
		Tele-conference too impersonal	1

** While these respondents may have been of the view that they were advised to accept the settlement terms, HREOC officers do not advise parties to accept or decline settlement offers.*

Table 15: Other reasons for not lodging in court

Other reasons given by complainants	No.
Personal reason e.g. health	3
Wanted no future contact with respondent	3
Unable to locate witnesses to support case	2
Respondent too large and powerful	1
Court not appropriate way to resolve	1
Achieved private agreement after HREOC process	1
Respondent company went into receivership	1
Pursuing complaint in other jurisdiction	1

Withdrawn complaints

Table 16: Other concerns about court process

Other concerns about court process	No.
Lack of support from advocacy group	1
Poor health	1
I did not have sufficient evidence to support allegations	1

End Notes

[1] While the general jurisprudence of the Federal Court and FMS would also be influential on applicants' utilisation of Federal law, it was felt that the twelve month time period considered by this initial review would not be sufficient to provide a sound overview of jurisprudential trends. It is noted that HREOC is preparing a separate paper on the jurisprudential development of the law since the jurisdiction was transferred to the Federal Court and FMS which will cover a two year period from the date of the first decision, that is 13 September 2000 – 13 September 2002.

[2] Brandy v HREOC (1995) 183 CLR 245.

[3] The *Sex Discrimination and Other Legislation Amendment Act* 1992 (Cth).

[4] Being the Race Discrimination Commissioner, Sex Discrimination Commissioner and Disability Discrimination Commissioner.

[5] For further discussion of the background and details of the legislative changes see Roberts, S & Redman, R 'Federal Human Rights Complaints – New Roles for HREOC and the Federal Court', *Law Society Journal* Vol 38 No.7 August 2000 at pg 69.

[6] 'Costs follow the event' means that the party that loses the action pays the successful party's costs.

[7] That is, each party bore its own costs.

[8] See for example submissions by the Disability Discrimination Law Advocacy Service, Women's Electoral Lobby and National Federation of Blind Citizens of Australia to the Senate Legal and Constitution Legislation Committee in relation to the Human Rights Legislation Amendments Bill 1996 - June 1997.

[9] See for example concerns raised in Offenberger, S & Banks, R "Wind out of the sails – new federal structure for the administration of human rights legislation" *Australian Journal of Human Rights* Vol 6(1) 2000.

[10] Hansard, Monday 20th September 1999, 8407.

[11] Offenberger, S & Banks, R "Wind out of the sails – new federal structure for the administration of human rights legislation" *Australian Journal of Human Rights* Vol 6(1) 2000.

[12] Comparisons are based on Sydney office data only as detailed data is not available on Federal complaints handled by state anti-discrimination offices in 1998 - 99. Formal arrangements for state agencies to fully handle Federal complaints were concluded in 1999.

[13] Dr Fadil Pedic of The Research Forum, Parramatta NSW.

[14] Access issues were considered in the administration of the survey with appropriate services such as the Telephone Interpreter Service being utilised as required.

[15] This process involves the parties being at the same location, but rather than facilitating a 'face to face' meeting of the parties, the conciliator conveys messages between the parties. It is noted that a 'face to face' conference also usually involves a component of shuttle facilitation.

[16] This process involves the conciliator assisting parties to resolve the dispute by conveying messages between the parties by means of separate telephone conversations with each party.

[17] The Statistical Laboratory, a Division of Macquarie Research Ltd.

[18] Being six decisions under the DDA, seven decisions under the SDA and 12 decisions under the RDA. These figures include decisions at first instance and on appeal.

[19] Being six decisions under the DDA, five decisions under the SDA and nine decisions under the RDA: please note that some decisions relate to complaints made under more than one Act.

[20] 914 complaints were received in the 1996 calendar year and 894 in 1997.

[21] In the 2000-01 reporting year, complaints regarding alleged disability discrimination were most prevalent (35%), complaints were made equally by females and males, complainants were predominantly of English Speaking Background (60%) and respondents were predominantly private companies (50%).

[22] For example, data on complaints terminated during the period 1/1/01 – 31/12/01 on the ground of 'no reasonable prospect of conciliation' and data on applications to the Federal Court or FMS during this same period indicates that approximately 42 percent of complainants whose matters are terminated after unsuccessful conciliation, lodge an application with the Federal Court or FMS. This data is based on copies of applications forwarded to HREOC by complainants or the Federal Court/FMS.

[23] Calculated on the basis of the percentage of matters referred for hearing by the Sydney office in the 1994 – 1999 annual reporting periods.

[24] [Please note that for ease of reference by the reader, the citations used for FMS decisions is that used in the electronic version at www.fms.gov.au rather than the citation in the Federal Court Reports]. *Donna Marie Shiels v Trevor Leighton James & Lipman Pty Ltd* [2000] FMCA 2 ("*Shiels*"); *Sarah Johanson v Richard Blackledge and Lucimar Blackledge t/as Michael Blackledge Meats* [2001] FMCA 6 ("*Johanson")*; *Maevida Horman v Distribution Group Ltd* [2001] FMCA 52 ("*Horman*"); *Margaret Jean Wattle v Raymond Kirkland and Daphne Kirkland (t/as Kirkland Radio Cab)* [2001] FMCA 66 ("*Wattle*"); *Kerryn Haar v Maldon Nominees Pty Ltd & Christella Demetrios* [2000] FMCA 5 ("*Haar*"); *Stephanie Travers by her next friend Wendy Travers v State of NSW* [2001] FMCA 18 ("*Travers*"); *Theodore Xiros v Fortis Life Assurance Ltd* [2001] FMCA 15("*Xiros*"); *Christine McKenzie v Department of Urban Services & Canberra Hospital* [2001] FMCA 20 ("*McKenzie*"); *Rajiv Oberoi v HREOC & Ors* [2001] FMCA 34 ("*Oberoi*") ; *Warwick Howard McMahon v Ronald Maxwell Bowman* [2001] FMCA 3 ("*McMahon*"); *Mark Gibbs v Ian Wanganeen* [2001] FMCA 14 ("*Gibbs*"); *Yohanna Tadawan v State of South Australia* [2001] FMCA 25 ("*Tadawan*"); *Joseph Williams v Tandanya Cultural Centre & Ors* [2001] FMCA 46 ("*Williams*") and *Omar Hassan & Ahmend Hassan v James Smith & Ors* [2001] FMCA 58 ("*Hassan*").

[25] *Shiels; Johanson; Horman;Wattle; Haar; Travers; McKenzie; Oberoi* and *McMahon.*

[26] An example of a case in which a successful complainant was not awarded costs in her favour is *Horman*.

[27] *Shiels*; *Johanson*; *Travers*; *McKenzie* and *McMahon*.

[28] *Williams* and *Hassan.*

[29] *Lan Low v Australian Taxation Office* [2000] FMCA 6 ("*Low*"); *Lech Janusz Keller v Cth Department of Foreign Affairs and Trade* [2001] FMCA 96 ("*Keller*") and *Michael Walter Ryan v The Presbytery of Wide Bay Sunshine Coast* [2001] FMCA 12 ("*Ryan*").

[30] *Ryan.*

[31] *Low.*

[32] *Keller.*

[33] *Christine McKenzie v Department of Urban Services* [2001] FMCA 5.

[34] *Gardner v National Netball League Pty Ltd* [2001] FMCA 50.

[35] Please note that for ease of reference by the reader, the citations used for Federal Court decisions is that used in the electronic version at www.fedcourt.gov.au rather than the citation in the Federal Court Reports. *Donald William Tate v Claude Rafin & Wollongong District Cricket Club* [2000] FCA 1582 ; *Leroi Court v Richard Hamlyn-Harris t/as Shearwater Oysters* [2000] FCA 1870 ("*Court*"); *Leanne Grulke v KC Canvas Pty Ltd* [2000] FCA 1415 ("*Grulke*"); *Gilroy v Angelov and Botting and Botting t/a C&T Botting Cleaning Co* [2000] FCA 1775 ("*Gilroy*"); *Leanne Elliott v Prem Nanda and Commonwealth of Australia and Leanne Elliott v. Commonwealth of Australia* [2001] FCA 418 ("*Elliott*"); *Dorothy Joy Kennedy v. ADI Limited* [2001] FCA 614 ("*Kennedy*"); *Deborah Worsley-Pine v. Kathleen Lumley College Inc* [2001] FCA 818 ("*Worsley-Pine*"); *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615 ("*Hagan*"); *Gaja Lakshmi Paramasivam v. Professor Alice Tay* [2001] FCA 758 ("*Paramasivam v. Tay*"); *Patricia Donna Creek v. Cairns Post Pty Ltd* [2001] FCA 1007 ("*Creek*") and *Gaja Lakshmi Paramasivam v. Milena Jureszek* [2001] FCA 704 ("*Paramasivam v. Jureszek*").

[36] *Grulke*; *Gilroy* and *Elliott.*

[37] *Court*; *Worsley-Pine; Paramasivam v. Jureszek* and *Creek*.

[38] *Kennedy*.

[39] *Patricia Donna Creek v. Cairns Post Pty Ltd* [2001] FCA 293.

[40] *Gaja Lakshmi Paramasivam v.Chris Wheeler & Ors* [2000] FCA 1559 ("*Paramasivam v. Wheeler & Ors*"); *Gaja Lakshmi Paramasivam v. Jonathon Shier & Anor* [2001] FCA 545 ("*Paramasivam v. Shier & Anor*"); *Gaja Lakshmi Paramasivam v. Grant & Anor* [2001] FCA 758 ("*Paramasivam v. Grant & Anor*"); *Eileen Hutson Parker v. Swan Hill Police* [2000] FCA 1688 ("*Parker*"); *Stephanie Travers by her next friend Wendy Travers v. State of NSW* [2000] FCA 1565 ("*Travers No. 2*").

[41] *Paramasivam v. Wheeler & Ors*; *Paramasivam v. Shier & Anor*;*Paramasivam v. Grant & Anor* and *Parker*.

[42] *Travers.*

[43] *McIntosh v Australian Postal Corporation* [2001] FCA 1012.

[44] *Mervyn Charles v. Fuji Xerox* [2000] FCA 1531.

[45] *Leanne Elliott v. Prem Nanda & Cth of Australia* [2001] FCA 550.

[46] *Charles Pham v. University of Queensland & Anor* [2001] FCA 1044.

[47] *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2001] FCA 123 ("*Hagan*"); *Gaja Lakshmi Paramasivam v.Chris Wheeler & Ors* [2001] FCA 231("*Paramasivam v. Wheeler & Ors No.2*") and *Lan Low v. Australian Taxation Office* [2001] FCA 702 ("*Low No.2*").

[48] *Hagan*.

[49] *Low No.2*.

[50] *Paramasivam v. Wheeler & Ors No.2*.

[51] At para.[20].

[52] At paras. 62] and [63].

[53] At paras. [24] and [25].

[54] At para. [20].

[55] At para. [2].

[56] At para. [23].

[57] At para. [74].

[58] At para. [95].

[59] At p.11.

[60] *Cummings v Lewis* (1993) 113 ALR 285.

[61] *Colgate Palmolive v Cussons* (1993) 118 ALR 248.

[62] At para. [22].

[63] At para. [31].

[64] At para. [71].

[65] The referral rate for complaints handled by the Sydney office in the 1998 calendar year was 8% and the conciliation success rate was 80%. The referral rate for the 1999 calendar year was 11% and the conciliation success rate was 68%.

[66] It is noted that withdrawal rates post conciliation are unlikely to be a sound measure of reduced bargaining power in conciliation as where conciliation has been unsuccessful, the matter would be terminated by the President on the grounds of 'no reasonable prospect of conciliation'. It can be assumed that where a complainant has not been able to achieve their desired outcome through conciliation and does do wish to pursue the matter further because of concerns about court action, they would not 'withdraw' their complaint, but rather would just not make an application to the Federal Court or FMS.