CHAPTER 6

COMPLAINTS PROCESS

6.1 The terms of reference required the committee to examine whether the Act provides effective remedies including examining the effectiveness, efficiency and fairness of the complaints process. The committee received detailed evidence concerning the inherent limitations of the individual complaints system as well as the practical difficulties involved in pursuing complaints and how these might be addressed.

Limitations of the individual complaints model

6.2 A recurring theme in the evidence was that the Act is ineffective in addressing systemic discrimination because it adopts an enforcement model based upon individual complaints and remedies. For example, Mr Mathew Tinkler of PILCH submitted that the existing Act:

> ...treats discriminatory conduct as a personal dispute between two parties rather than as an unacceptable act. Also, it relies upon the ability of an individual, in particular, to understand a fairly complex area of law, to elect to make a complaint and then to pursue a remedy, while also assuming that the individual has the resources and the capacity to do that.[1]

6.3 Similarly, the Queensland Council of Unions considered the exclusive adoption of an individual complaint model the greatest limitation on the capacity of the Act to advance gender equality.[2]

6.4 The Women's Electoral Lobby also discussed the intrinsic difficulties in using an individual complaint mechanism as means of eliminating systemic discrimination:

> [T]he complaints-based model relies upon victims identifying and standing up for their rights and prompting social change through individual litigation and its subsequent ripple effect. It assumes that victims have the time, security and resources to pursue such litigation, despite the financial and psychological costs of pursuing a complaint in the public interest against a corporate respondent.[3]

6.5 Dr Belinda Smith argued that the model of enforcement via complaints by affected individuals, with only compensatory damages, is fundamentally weak and cannot address systemic discrimination.[4] She told the committee:

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1 *Committee Hansard*, 10 September 2008, p. 24.

2 *Submission 46,* p. 7. See also Public Interest Law Clearing House *Submission 31*, p. 3; ACTU *Submission 55*, pp 3 and 5.

3 *Submission 8*, pp 7-8.

4 *Submission 12,* pp 5-6, 9-10.

> I do not think we are ever going to get at systemic discrimination if we always leave it up to the disadvantaged victim to bring these claims. We need an agency that has some capacity to support applicants or to initiate claims themselves.[5]

6.6 The Collaborative submission pointed out that the complaints system adopted by the Act also assumes that there will be a single respondent who can be identified and held accountable for each act of discrimination but that this is not necessarily the case. The submission stated:

> As discrimination is woven into the historic fabric of society, it is frequently impossible to identify a single respondent who can be held responsible for a specific act of discrimination. Unless an unbroken causal thread connects the complainant and respondent with the act of discrimination, the complaint fails.[6]

Issues regarding the complaints process

Introduction

6.7 Much of the evidence to the inquiry concerned the practical operation of the complaints process. HREOC submitted that:

> In comparison with judicial determination, the HREOC complaint process with its focus on informal dispute resolution, provides an accessible, timely and cost efficient way for parties to deal with discrimination related disputes. While the complaint process has a necessary focus on individual remedy, it also operates as a significant educative force and a means to achieve outcomes that contribute to the broader social change objectives of anti-discrimination law.[7]

6.8 In particular, HREOC argued that the conciliation process allows for a wide range of negotiated outcomes and for early intervention in disputes:

> [O]utcomes achieved through conciliation extend beyond those likely to be awarded in a judicial process. Outcomes can include training and/or changes to policy and procedures which have benefits for similarly situated individuals and groups and contribute to furthering the social change objectives of the SDA. Additionally, conciliation allows for early intervention in disputes which means that employment relationships can be restored or maintained and effective, practical remedies can be achieved without the need for formal and often lengthy legal proceedings.[8]

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5 *Committee Hansard*, 9 September 2008, p. 60. See also Australian Women's Health Network, *Submission 30*, p. 5; Human Rights Law Centre, *Submission 20*, pp 19-21; NACLC, *Submission 52*, p. 24; Collaborative submission, *Submission 60*, pp 17-18.

6 *Submission 60*, p. 17. See also Women's Electoral Lobby, *Submission 8*, p. 7.

7 *Submission 69*, p. 181.

8 *Submission 69*, pp 194-195.

6.9 HREOC advised that in 2007-08 48 per cent of complaints under the Act were finalised within 6 months and 94 per cent within 12 months.[9] This represents the time from receipt of the complaint to finalisation by HREOC.

6.10 However, HREOC's complaint handling is only part of the process as far as the parties are concerned since complaints which cannot be conciliated may then be pursued in the Federal Court or the Federal Magistrates Court. HREOC explained that:

> [W]here a complaint has been terminated by HREOC, irrespective of the reason for termination, the affected person can make an application to the court for the allegations in their complaint to be heard and determined.[10]

6.11 HREOC advised that:

> Over the past six reporting years, on average, 28% of terminated complaints under the SDA were pursued to court. The SDA has the highest number of applications to the courts as a proportion of terminated complaints.[11]

Difficulties for complainants

6.12 In this context, much of the evidence to the committee was highly critical of the complaints process. For example, the Association of Professional Engineers, Scientists and Managers Australia stated that pursuing a complaint:

> ...can result in victimisation, may be a difficult, time consuming and emotionally challenging process and, even if resulting in a positive outcome, the process may take too long to provide a practicable and useful solution to the complaint.[12]

6.13 Similarly, the Shop, Distributive and Allied Employees' Association submitted that the complaints process is too long, too legalistic, too costly, does not deliver justice to complainants and does not address systemic discrimination.[13]

6.14 Ms Catharine Bowtell of the ACTU told the committee that one of the key problems is the time taken to resolve complaints:

> If you compare anti-discrimination timeframes with workplace relations timeframes, you can lodge an unfair dismissal complaint with a New South Wales tribunal at the moment and you will be conciliated within three weeks. If it is not resolved at conciliation, it will be listed for hearing within another three weeks. If you look at the way anti-discrimination complaints

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9 *Submission 69,* p. 199.

10 *Submission 69,* p. 195.

11 *Submission 69,* p. 196.

12 *Submission 48,* pp 8-9. See also Ms Michelle Panayi, PILCH, *Committee Hansard,* 10 September 2008, pp 32-33.

13 *Submission 42,* pp 2, 7 and 10. See also Queensland Council of Unions *Submission 46,* p. 3; Independent Education Union of Australia, *Submission 49*, p. 6.

> are handled, it is probably 12 months from lodging the complaint to getting anywhere near the court. Then you have the formalities of court proceedings, which means that it is probably 18 months to two years from complaint to outcome for a complainant.[14]

6.15 Ms Bowtell explained the importance of quickly resolving sex discrimination complaints related to employment:

> [I]f you are looking to address a workplace based complaint, the most important thing you can do is to keep people in work. If the complaint is not resolved—that is, they have been either dismissed or suffered a detriment—and that is not resolved until some time down the track, you do not have any remedial outcomes in the workplace, because the complainant is separated from the workplace. Her outcome is not seen by her colleagues and so on, so it does not have that flow-on effect that a rapid response can have where things are fixed, everyone is back, relationships are back to normal and work can continue.[15]

6.16 Miss Elnaz Nikibin of UNIFEM Australia considered that a fundamental difficulty with pursuing a complaint under the Act is the risk of liability for the costs of the respondent:

> You might have the costs to pay for a lawyer to represent you, but it is a much heavier burden if you have to pay for the costs of the other side if you lose. That is not covered by legal aid and it would not be covered by lawyers acting on a pro bono basis. Even if we offered a free legal service the costs of paying the other side's representatives is enough to turn someone away from pursuing a claim under the Sex Discrimination Act.[16]

6.17 The Women's Electoral Lobby also argued that the cost of pursuing complaints deters potential complainants, especially since claims that cannot be conciliated have been dealt with by the Federal Court and the Federal Magistrates Court.[17] Professor Thornton told the committee that research she was conducting in relation to anti-discrimination legislation across the country suggested there was a decline in the lodgement of complaints as well as a decline in the number of complaints proceeding to a formal hearing. She attributed this to the difficulties now confronting complainants:

> We have had a shift away from specialised tribunals to generalist tribunals. That means that the normal rule is that loser pays in terms of costs, so the individual complainant then is less likely to initiate a formal hearing. This has happened at the federal level, for example. Compare that with a

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14 *Committee Hansard*, 9 September 2008, p. 73.

15 *Committee Hansard*, 9 September 2008, p. 73.

16 *Committee Hansard*, 9 September 2008, pp 45-46. See also Australian Women's Health Network, *Submission 30*, p. 10.

17 *Submission 8*, pp 11-12. See also PILCH, *Submission 31*, p. 17; NACLC, *Submission 52*, pp 12 and 26.

> specialist tribunal that was set up to operate within a particular jurisdiction, where the individual could appear without being legally represented.[18]

6.18 Mr Ian Scott of Job Watch noted in relation to Victoria, that the drawbacks of the federal jurisdiction mean that sex discrimination claims, particularly test cases, are more regularly pursued under state legislation:

> In the federal jurisdiction, costs follow the event once the matter goes to the Federal Court. ...If it was what we would call a test case, which might relate to systemic discrimination or whether someone is covered by the Act, our advice to our client might be, 'We'll go through the state jurisdiction because your case is risky and, generally speaking, if you lose in the Victorian system, each party bears its own costs.'[19]

6.19 This appears to be consistent with the experience in other jurisdictions. Legal Aid Queensland submitted that the Commonwealth complaints process is slower and more formal than the complaints process under Queensland's anti-discrimination legislation and, as a result, it is common for their legal practitioners to pursue sex discrimination complaints under the state legislation.[20]

6.20 A further issue raised in relation to the complaints process concerned the power imbalance between the parties. The Australian Women's Health Network considered that:

> Probably the most unfair aspect of the complaints process is the inequality of the power relationship between the complainant and the respondent. This is particularly pertinent during mediation processes where the parties must sit across the table from each other.[21]

6.21 PILCH expressed similar concerns particularly in relation to sexual harassment complaints. PILCH submitted that:

> [M]any victims of sexual harassment have little confidence in the complaints based system, which may, in some cases, exacerbate the trauma associated with sexual harassment.[22]

6.22 Ms Michelle Panayi of PILCH expanded on the difficulties sexual harassment complaints face:

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18 *Committee Hansard*, 11 September 2008, p. 41.

19 *Committee Hansard*, 10 September 2008, p. 37. See also pp 36 and 40; and Victorian Automobile Chamber of Commerce, *Submission 32*, p. 6, regarding the small proportion of complaints pursued through HREOC in Victoria.

20 *Submission 26*, pp 4-5. See also Queensland Council of Unions *Submission 46*, pp 2-3; NACLC, *Submission 52*, p. 26.

21 *Submission 30*, p. 10. See also Shop, Distributive and Allied Employees' Association *Submission 42*, pp 7-8; Independent Education Union of Australia, *Submission 49*, pp 6-7; PILCH, *Submission 31*, pp 16-17.

22 *Submission 31*, p. 3. See also *Submission 31*, pp 11 and 15-16; NACLC, *Submission 52*, p. 19.

> The other reason that it is very difficult for victims to go through the external complaints process is that they fear they will lose their jobs. They fear the publicity that the case attracts. They feel that no one will want them if they know this has happened to them or they have spoken out about it. Victims of sexual harassment can be likened to whistleblowers where they can be seen as troublemakers. They are concerned about the impact that their going through this process will have on their future career.[23]

Issues for respondents

6.23 The Victorian Automobile Chamber of Commerce (VACC) noted that the time and costs involved in defending a complaint are also significant and that employers therefore sometimes feel compelled to make a payment on commercial grounds.[24]

6.24 ACCI also submitted that many employers simply settle claims, regardless of the strength of the applicant's case, in order to avoid the costs of litigation:

> It is well known that many employers simply settle claims (in cases where either party is unsure whether they have legal grounds to initiate or defend proceedings) to make them "go away" (similar to what occurs in unfair dismissal jurisdictions). In most cases, legal advisors will recommend this as the most prudent approach to avoid the costs of litigation.[25]

6.25 In addition, Mr Scott Barklamb of ACCI told the committee that companies have a further incentive to settle even speculative claims because of the possible damage to the company's reputation:

> A lot of very major companies make very significant efforts and investments in this area. ...They take their reputational efforts in this area very seriously. When claims emerge, often speculatively, as we have said, as part of a dismissal or performance management-type processes, there is an extra effort to settle. They are not necessarily ...making solely a financial calculation. There is a reputational calculation involved. Even if the company believes its processes were entirely compliant and would navigate the litigation successfully there is an extra incentive to settle.[26]

Suggested changes to the complaints process

6.26 Many witnesses and submissions made specific proposals for changes to the complaints process. These included:

- providing more assistance to complainants;
- broadening the standing provisions;

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23 *Committee Hansard*, 10 September 2008, p. 26.

24 *Submission 32*, p. 5.

25 *Submission* 25, p. 11.

26 *Committee Hansard*, 10 September 2008, p. 14.

- extending the time limits for lodging complaints;
- altering the burden of proof;
- expanding the remedies available to complainants;
- limiting liability for costs; and
- improving complaint handling procedures.

6.27 In considering these proposals, it is important to note that the complaints process under the Act is shared with other federal anti-discrimination legislation including the *Racial Discrimination Act 1975*, the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004*. As an officer of the Attorney-General's Department pointed out to the committee:

> Whatever changes are made in relation to how you handle a sex discrimination complaint might apply equally to other areas, such as disability or race.[27]

Legal representation for complainants

6.28 The committee received consistent evidence that most complainants experience difficulty obtaining legal representation in sex discrimination and sexual harassment matters. Mr Mathew Tinkler of PILCH submitted:

> In our experience, very few victims of sex discrimination and sexual harassment have the means to afford representation and even fewer qualify for a grant of Legal Aid. We also say that the sensitive nature of sexual harassment and its impact upon a complainant mean that the formality of legal representation is often desirable for many victims.[28]

6.29 The National Foundation for Australian Women pointed to existing legal aid guidelines as a barrier to complainants obtaining legal representation:

> Legal Aid guidelines are currently very restrictive. It is extremely difficult to get legal aid to commence an action under the SDA. Individuals are often in a complex area of law dealing with well-resourced and experienced respondents.[29]

6.30 Similarly, Associate Professor Beth Gaze noted that legal aid is difficult to obtain and that this has particular impact on women in marginalised groups:

> Despite the power in the HREOC Act for the Attorney-General to provide legal aid in unlawful discrimination matters, it appears that virtually no such aid is provided, either by the Attorney or in the legal aid system, and that in many cases women must negotiate the complaints, conciliation and adjudication system unrepresented. Legal aid is very difficult to obtain in

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27 *Committee Hansard*, 11 September 2008, p. 8.

28 *Committee Hansard*, 10 September 2008, p. 24.

29 *Submission 15*, p. 7.

> such cases because it is necessary to pass an extra merits test that is very difficult to satisfy, is not imposed in other areas of law, and suggests that there is no general public interest in the enforcement of human rights laws and respect for the human rights of all members of society. These features affect most adversely the women in the most vulnerable positions: indigenous women, migrant and ethnic minority women, women with disabilities, pregnant women and poor and low skilled women.[30]

6.31 Legal Aid New South Wales explained that, under the existing Commonwealth legal aid guidelines, applicants for legal aid in discrimination matters are required to show a strong prospect of substantial benefit being gained by both the applicant, and the public or a section of the public. Legal Aid New South Wales argued that "this is an unduly high threshold for remedial or beneficial legislation."[31]

6.32 Professor Thornton suggested that the lack of legal aid to complainants has skewed the interpretation of the Act:

> One of the difficulties is in the jurisprudence that emerges from this jurisdiction. As suggested, very few cases have gone on to public hearing, unless it is a well-to-do respondent. Often a state government or a multinational has challenged a decision in a complainant's favour at the lower level. As a result of domination by powerful respondents, the jurisprudence has become skewed in a particular way so that the focus tends to be on the form of the legislation rather than on the substance...
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> To keep skewing the interpretation of the legislation in a particular way over time, I think, is not at all beneficial for complainants. For it to be possible to have legal aid in this regard, I think, would help redress the balance.[32]

6.33 Several submissions recommended broadening legal aid guidelines to provide individual complainants with greater access to legal advice and representation.[33] National Legal Aid advised that the existing agreements between the legal aid commissions and the Commonwealth, which incorporate the Commonwealth legal aid guidelines, expire on 31 December 2008 and that negotiation of the new agreements has commenced.[34]

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30 *Submission 50,* p. 2.

31 *Submission 68,* p. 2. See also National Legal Aid, *Submission 76,* p. 2; Guideline 4.1, Civil Law Guidelines, *Agreement between the Commonwealth of Australia and Legal Aid Commission of New South Wales for the provision of legal assistance services,* March 2005, p. 91.

32 *Committee Hansard*, 11 September 2008, p. 43. See also Collaborative submission, *Submission 60,* p. 24.

33 Women's Electoral Lobby, *Submission 8,* p. 12; National Foundation for Australian Women, *Submission 15,* p. 7; Australian Education Union, *Submissio*n 17, pp 5-6; Legal Aid New South Wales, *Submission 68,* p. 2; National Legal Aid, *Submission 76,* p. 2.

34 *Submission 76,* p. 2.

6.34 HREOC made a related recommendation that funding provided to the working women's centres, community legal centres, specialist low cost legal services and legal aid to assist people make complaints under federal anti-discrimination law should be increased. HREOC argued that these specialist advocacy and legal centres are "an important point of contact and support for people wanting to make complaints to HREOC."[35]

6.35 Other organisations argued that complainants should be provided with legal advocacy and advice either through HREOC or a new body established for this purpose.[36] For example, Ms Bowtell of the ACTU submitted:

> We would like to see a body able to assist complainants with their litigation. It could be a separately funded agency. It depends to some extent on how much HREOC is responsible for compliance as to whether it can also assist with prosecutions. But there can be models whereby a separately funded legal unit can consider public interest-type litigation on behalf of complainants or representative action on behalf of complainants.[37]

6.36 The proposals for broadening the powers of HREOC in relation to advocacy and enforcement of the Act are discussed in more detail in Chapter 10.

6.37 Finally, Mr Geoffrey McMahon suggested that there is a need for better protection of individuals who report or witness discrimination and harassment, akin to whistleblower protection. He pointed out that the tactics of perpetrators of discrimination and harassment include denial, delaying action, defaming the complainant and destroying evidence. In his view, it is therefore necessary to provide a "shield" for individuals who report discrimination and that this function should be performed by a separate agency to the agency responsible for investigation and enforcement ("the sword").[38]

Standing to bring complaints

6.38 At present, under subsection 46P(2) of the HREOC Act a complaint can be lodged with HREOC on behalf of an affected person or persons. However, under subsection 46PO(1) of the HREOC Act court proceedings can only be commenced by an affected person. The former President of HREOC, Mr John von Doussa explained to the committee:

> At the moment a complaint can be brought by an individual who is aggrieved or by some body or an organisation on behalf of that person, and the commission will look at the complaint. But if it is not resolved when it

35 *Submission 69*, p. 203. See also PILCH *Submission 31*, p. 34.

36 See for example, Shop, Distributive and Allied Employees' Association *Submission* 42, p. 7; Queensland Council of Unions *Submission 46*, p. 6; PILCH *Submission 31*, pp 5 and 34; NACLC *Submission 52*, p. 13.

37 *Committee Hansard*, 9 September 2008, p. 73.

38 *Submission 40*.

> comes to the point of issuing proceedings, it is only the aggrieved person who can issue the proceedings.[39]

6.39 This means that public interest organisations are unable to pursue proceedings in the Federal Court or the Federal Magistrates Court on behalf of an individual complainant. HREOC argued that:

> [T]here are sound reasons of public policy to enable appropriate organisations with a legitimate interest in a particular subject-matter to commence discrimination proceedings, particularly where the claim involves a systemic problem that affects a wide class of persons.[40]

6.40 While Part IVA of the *Federal Court of Australia Act 1976* permits representative proceedings in some circumstances, HREOC argued that:

> [T]he rules are technical and complex, compounded by the fact that the requirements at the HREOC and Federal Court stages are not consistent. ...Furthermore, the Federal Magistrates Court does not permit representative proceedings, which limits such proceedings to the more expensive Federal Court jurisdiction. Indeed, to date very few representative proceedings have been commenced under any of the Federal discrimination Acts.[41]

6.41 HREOC recommended that the provisions under the HREOC Act relating to standing to bring claims under the Act (and other federal discrimination Acts) should be amended to widen the scope for proceedings to be brought by public interest-based organisations.[42]

Limitation periods

6.42 Currently, the President of HREOC has a discretion, under paragraph 48PH(1)(b) of the HREOC Act, to terminate a complaint lodged more than 12 months after the alleged discrimination. PILCH noted that this limitation period is problematic in sexual harassment cases where complainants often delay making a complaint due to fear of retaliation or as a result of suffering mental illnesses or disorders caused by the harassment.[43]

6.43 However, ACCI pointed out that a complainant can still lodge a complaint directly with the Federal Court or the Federal Magistrates Court and submitted that it is unclear whether the 6 year limitation period generally provided for under state and territory legislation applies to claims lodged directly with the courts. It is likely that section 79 of the *Judiciary Act 1903* means that such limitation periods are applicable.

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39 *Committee Hansard*, 9 September 2008, p. 29.

40 *Submission 69*, p. 207.

41 *Submission 69*, pp 206-207.

42 *Submission 69*, p. 209. See also Legal Aid New South Wales, *Submission 68*, p. 4.

43 *Submission 31*, pp 24-25. See also Human Rights Law Centre, *Submission 20*, pp 50-51.

Nevertheless, ACCI recommended an absolute limitation period be applicable to claims under federal anti-discrimination legislation.[44]

6.44 Where a complaint is terminated by the President of HREOC, a complainant has 28 days to lodge proceedings in the Federal Court or the Federal Magistrates Court though the court has a discretion to allow further time.[45] HREOC argued that:

> ...28 days is an insufficient period for applicants to seek appropriate advice as to whether to commence court proceedings, and to arrange legal assistance, especially given that:
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> - victims of discrimination and sexual harassment are typically from socially disadvantaged groups;
> - a significant portion of complainants who lodge complaints under the SDA with HREOC are not legally represented;
> - access to free legal advice and representation in relation to discrimination matters is limited; and
> - once proceedings are commenced, applicants face an inherent risk of an adverse costs order.[46]

6.45 For these reasons, HREOC suggested that this 28 day period should be increased to 60 days.[47]

Burden of proof

6.46 Some organisations argued that the burden of demonstrating that discrimination has occurred should not fall entirely upon the complainant. The Collaborative submission explained the difficulties complainants experience because they bear the burden of proof:

> Proving that the ground of any less favourable treatment was sex, marital status or pregnancy or potential pregnancy can be very difficult, as all evidence of the reason for the action lies with the employer. Unless an employer explicitly states that the reason for an action is the sex, marital status or pregnancy of the person affected..., it will often be hard to convince a court why the action was taken. The law provides no assistance to complainants to prove their case, and often they will have to rely on the court drawing inferences from circumstantial evidence, or even form the absence of any evidence at all.[48]

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44 *Submission 25*, pp 15-16.

45 Subsection 46PO(2) of the HREOC Act.

46 *Submission 69*, p. 204. See also p. 195.

47 *Committee Hansard*, 9 September 2008, p. 22. See also *Submission 69*, p. 204.

48 *Submission 60*, p. 12. See also Mr Brook Hely, *Committee Hansard*, 9 September 2008, p. 11; Ms Caroline Lambert, YWCA Australia, *Committee Hansard*, 11 September 2008, p. 62.

6.47 Associate Professor Simon Rice also pointed to the difficulties involved in proving that a respondent's conduct was caused by discrimination:

> A complainant must therefore prove the reason for another person's conduct, when all knowledge of it is in the mind of the other person, any evidence of it is in the control of the other person, and the power to contradict any allegation is with the other person. A complainant must prove as fact, on balance of probabilities, the unarticulated reason for a person's conduct – a very difficult exercise. This approach to proof often enables a person to avoid accountability for their discriminatory conduct, simply because they are not called on to explain it.[49]

6.48 HREOC proposed three options for altering the burden of proof to make establishing causation more achievable:

> The first option is to give guidance under the SDA on relevant common law principles that already apply. It is not effectively changing the law. It would just be reflecting what the common law principles are about drawing adverse inferences when a party has the means to put evidence before the court and they have failed to do so.
>
> The second option is drawing on the experience in the UK and throughout Europe. That is a shifting evidential onus whereby once an applicant ...can establish a prima facie case that there is a relationship between their attribute and the treatment, the evidential onus shifts to the respondent to explain why they acted as they did. The third option ...is a complete reversal of onus.[50]

6.49 The second option identified by HREOC would involve inserting in the Act a provision similar to section 63A of the *Sex Discrimination Act 1975 (UK)* which in paraphrased form provides:

> Where ...the complainant proves facts from which the tribunal could, apart from this section, conclude in the absence of an adequate explanation that the respondent—
>
> (a) has committed an act of discrimination against the complainant...
>
> the tribunal shall uphold the complaint unless the respondent proves that he did not commit ...that act.[51]

6.50 HREOC explained that this provision implements a directive of the European Union on the burden of proof in sex discrimination cases. HREOC quoted the explanation given by the Equality and Human Rights Commission (UK) of the effect of section 63A:

> The effect of s.63A of the SDA is that the [employment tribunal] **must** find unlawful discrimination where the claimant proves facts from which the

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49 *Submission* 53, p. 4.

50 *Committee Hansard*, 9 September 2008, p. 11. See also *Submission 69*, pp 65-71.

51 See HREOC, *Submission 69*, p. 69.

> [employment tribunal] could conclude - in the absence of an adequate explanation from the respondent - that the respondent has unlawfully discriminated, unless the respondent provides a non-discriminatory explanation for the act complained of. (emphasis in original)[52]

6.51 Associate Professor Simon Rice favoured this option of a shifting burden of proof. He noted that:

> A shifting burden is well-known and well-established in areas of Australian law, most relevantly in anti-discrimination provisions in workplace relations law. Section 809 of the Workplace Relations Act (Cth) is only the latest enactment of a provision that can be traced back through s298V Workplace Relations Act 1988 (Cth) and s 334 Industrial Relations Act (Cth) to s 5 of the Conciliation and Arbitration Act 1904 (Cth). ...
>
> In light of the significant international recognition of a shifting burden as a preferable method of inquiring into alleged discrimination, and the century-long operation of such a provision in workplace discrimination legislation in Australia, I submit the SDA should be amended to shift the burden of proof in terms similar to those in the UK SDA and s809 Workplace Relations Act (Cth).[53]

Amount of damages

6.52 HREOC publishes details of the amounts awarded to successful complainants by the Federal Court and the Federal Magistrates Court in sex discrimination and sexual harassment cases since April 2000. The overall awards in sex discrimination cases range from $750 to $41,000. In sexual harassment cases, the range is from $1,000 to $28,000, apart from one case in which a complainant who had been subjected to rape, harassment and victimisation was awarded $390,000.[54]

6.53 The committee received conflicting evidence regarding the adequacy of these damages awards. VACC suggested there should be a statutory ceiling on damages awarded for pain, humiliation and suffering caused by sex discrimination.[55] Similarly, Mr Scott Barklamb of ACCI noted that small to medium sized enterprises are not subject to different damages or different obligations in relation to sex discrimination and that the damages awards can be quite significant for those enterprises.[56]

6.54 On the other hand, the Collaborative submission stated that:

> Except in a few exceptional cases, remedies granted under the SDA have been very low, and arguably do not fully compensate women for their loss,

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52 *Submission 69*, p. 69.

53 *Submission* 53, p. 5. See also Collaborative submission, *Submission 60*, pp 12-13.

54 HREOC, *Federal Discrimination Law*, at http://www.hreoc.gov.au/legal/FDL/index.html (accessed 27 October 2008), Chapter 7, Tables 2 and 3. See also Job Watch, *Submission 62*, pp 33-35; Diversity Council of Australia, *Submission 47*, pp 8-9.

55 *Submission 32*, p. 5.

56 *Committee Hansard*, 10 September 2008, p. 19.

> especially where discrimination or harassment leads to termination of employment. ...
>
> While awards for back pay are common, awards for pain and suffering, and for front pay are often not given, or are unjustifiably low. Pain and suffering awards are often only several thousand dollars, which is quite inadequate in a matter where a complainant has had to persist with litigation in which her competence, personality and motives may have been subject to attack and where she has had to risk the possibility of paying the respondents costs if she lost.[57]

6.55 Similarly, NACLC submitted that the damages awarded by the courts in sex discrimination and sexual harassment matters are "extraordinarily low".[58] NACLC argued that these low awards are manifestly inadequate to compensate for the loss suffered and that this discourages women from pursuing claims under the Act:

> For some women who experience sex discrimination and sexual harassment, the inadequacy of the remedy makes it not worth bringing a formal complaint, or seeing it through to its conclusion at hearing, particularly given the financial and emotional cost of bring a successful action, much less the risk of costs for an unsuccessful one. Thus the lack of an appropriate remedy discourages complaints, or at the very least acts as a disincentive for women to use the SDA to address discrimination.[59]

6.56 The Law Council noted that a further impact of low monetary awards may be to trivialise the nature of the conduct prohibited by the Act:

> The historically low levels of compensation generally awarded under the SD Act have been criticised as being reflective of a view that discrimination against women, and sexual harassment in particular, is unimportant. It has been observed that low levels of monetary compensation trivialise the serious nature of the conduct involved in complaints of sex discrimination and the often devastating impact on the complainant.[60]

6.57 NACLC recommended that damages awarded for discrimination matters should be increased to a comparable level to tort claims.[61] However, the Law Council did not support a general approach of assessing damages along the lines of personal injuries claims, arguing instead that "the measure of damages has to be appropriate to discrimination claims." The Law Council suggested instead that subsection 46PO(4) of the HREOC Act could be amended to provide that, in unlawful discrimination cases which involve termination of employment, damages should be assessed having regard

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57 *Submission 60*, p. 24.

58 *Submission 52*, p. 22.

59 *Submission 52*, p. 22. See also Job Watch, *Submission 62*, p. 27.

60 *Submission 59*, p. 23.

61 *Submission 52*, pp 22-23 and 29. See also PILCH, *Submission 31*, pp 3 and 17-19; Job Watch, *Submission 62*, p. 27; Mr Ian Scott, Job Watch, *Committee Hansard*, 10 September 2008, p. 41.

to the common law principles which apply to awards of damages in termination of employment cases.[62]

Remedies

6.58 Some evidence to the committee argued more broadly that the existing remedies available for breaches of the Act are inadequate. For example, the Women's Electoral Lobby explained that the remedies available under the Act have no capacity to produce systemic changes:

> Even if an employer is found to have discriminated, they will only be ordered to compensate the victim. The courts lack power to order systemic corrective orders—such as a change in policy, the introduction of a compliance program that might prevent further discrimination, or an audit to ascertain further or more widespread incidence of discrimination similar to that of the individual complainant—or to set reform standards. In this way, the laws are more focussed on redressing, not preventing harm or promoting equality.[63]

6.59 Similarly, Dr Smith told the committee that:

> To make the system more sophisticated and preventative ...we need a range of remedies and sanctions, not merely compensation. Under the existing system, it does not matter whether an employer has discriminated 10 times blatantly, egregiously and intentionally, the court can still not order anything but redress for the victim. It cannot say, 'You need to develop a policy. You need to take this legislation seriously. You need a whack over the head.' It cannot do any of that. It is all about what you have caused to the victim post facto.[64]

6.60 The Collaborative submission also noted that the remedies provided for under the Act "do not address systemic issues such as requiring employers to change their systems, to prevent similar discrimination occurring in future."[65] The submission went on to argue that:

> Systemic remedies should be explicitly part of the court's powers and courts should be directed in awarding remedies to do what is necessary not only to compensate the particular complainant but to ensure that any discriminatory practices identified are changed so that others will not be similarly affected.[66]

6.61 Professor Thornton made a similar recommendation that subsection 46PO(4) of the HREOC Act should be amended to allow for court orders requiring respondents

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62 *Submission 59*, pp 23-24.

63 *Submission 8*, p. 8.

64 *Committee Hansard*, 9 September 2008, p. 60.

65 *Submission 60*, p. 24.

66 *Submission 60*, p. 25. See also Dr Sara Charlesworth, *Submission 39*, p. 9.

to discontinue discriminatory practices or to perform acts that aim to create a non-discriminatory environment.[67]

6.62 Dr Smith argued that the sanctions available for breaches of the Act should be expanded not only to include corrective and preventative orders, but also punitive damages or public penalties for egregious acts of discrimination.[68] However, Ms Bowtell of the ACTU submitted that the focus should be on preventative orders rather than adopting the US approach of awarding punitive damages:

> [O]ur preference is not so much for punitive damages but for broad orders that go beyond compensating the individual to organisational change at the workplace. It is preventative orders rather than punitive orders. That would be our preference.[69]

Costs orders

6.63 NACLC noted that the risk of having to pay the respondent's costs, if a complaint is unsuccessful, is a significant barrier to the pursuit of complaints under the Act:

> For those clients who have the capacity to earn an income, or any assets to lose, the risk of an adverse costs order in the Federal Court or Federal Magistrates Court if they lose is a risk they cannot afford to take.[70]

6.64 To address this issue of costs deterring complainants, NACLC recommended that there should be routine capping of costs in unlawful discrimination matters dealt with by the Federal Court and the Federal Magistrates Court.[71] Order 62A of the *Federal Court Rules* permits the Federal Court to make such an order but NACLC noted that this mechanism has not been successfully used. NACLC submitted that:

> Clearly a costs capping mechanism can be used successfully, as has been demonstrated in migration matters where costs have been routinely capped. Such a process could easily be applied to unlawful discrimination matters.[72]

6.65 Alternatively, UNIFEM Australia recommended that the Act (or other appropriate legislation) contain a provision that, as a general rule, costs will be borne by each party.[73] Job Watch also recommended replacing the current rule that costs follow the event with a rule that, in all but the most exceptional circumstances, each party will bear its own costs.[74] Job Watch acknowledged that respondents have a right not to be burdened with unmeritorious or vexatious claims but submitted that an

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67 *Submission 22,* p. 5.

68 *Submission 12,* p. 9.

69 *Committee Hansard*, 9 September 2008, p. 76.

70 *Submission 52,* p. 26.

71 *Submission 52,* pp 27 and 29.

72 *Submission 52,* p. 26.

73 *Submission 19,* p. 9. See also *Committee Hansard*, 9 September 2008, p. 46.

74 *Submission 62*, pp 24-25.

appropriate balance between the rights of respondents and complaints could be struck by prohibiting a costs order against a party unless the party:

- issued proceedings which were vexatious or frivolous; or
- acted unreasonably during the proceedings, including by failing to accept a reasonable offer of settlement, causing the other party to incur costs.[75]

6.66 Mr Scott of Job Watch explained how this approach operates in the Victorian Civil and Administrative Tribunal (VCAT):

> There is a list of things that VCAT can take into account when considering to make a cost order ordering the losing party to contribute to the winning party's costs. It is usually things like: frivolous or vexatious complaint; no reasonable prospect of success; and unnecessary delays, such as not attending hearings...[76]

Complaint handling

6.67 In relation to the process for handling complaints, NACLC submitted that:

> While conciliation conferences are a great assistance to many complainants and respondents to reach a mutually satisfactory outcome, such a conference is not always appropriate. [77]

6.68 In particular NACLC argued, firstly, that if the conciliation process is overly lengthy this increases the burden on already stressed complainants. Secondly, in sexual harassment cases, it is inappropriate and potentially damaging to have the complainant sit in the same room as the respondent to negotiate a settlement.[78]

6.69 NACLC suggested that there should be the capacity for HREOC to undertake expedited conciliation or for a matter to be directly referred to a hearing where conciliation is inappropriate.[79] However, HREOC stated that:

> Conciliation may be attempted at any time during the complaint process, including very early in the process. An early conciliation model is frequently used in complaints lodged under the SDA which raise issues about negotiation of flexible work arrangements, returning to work after a period of maternity leave or where parties are in an ongoing relationship or have already tried to resolve the matter directly.[80]

6.70 Furthermore, HREOC noted that:

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75 *Submission 62*, p. 24.

76 *Committee Hansard*, 10 September 2008, p. 40.

77 *Submission 52*, p. 24.

78 *Submission 52*, p. 24.

79 *Submission 52*, p. 24.

80 *Submission 69*, p. 322.

> The appropriateness of attempting conciliation is assessed on a case by case basis and it is not undertaken with every complaint.[81]

6.71 Finally, HREOC argued that the format of conciliation can be structured to address issues such as a power imbalance between the parties:

> While the majority of HREOC's conciliation processes are conducted in the form of a face–to-meeting between the parties, it will not always be necessary or appropriate to bring the parties together and in some cases, this may be inappropriate and will frustrate resolution. For example, where there is a significant power imbalance between the parties, where one of the parties is emotionally vulnerable or where a face-to-face meeting may exacerbate feelings of distress and anxiety, alternative conciliation formats are employed. These alternative formats include in-person shuttle, which involves the parties being at the same location and the conciliator conveying messages between the parties, telephone shuttle negotiations and teleconferences.[82]

6.72 Dr Sara Charlesworth suggested Australia consider adopting a dispute resolution process similar to that used by the New Zealand Human Rights Commission with the focus being on resolving complaints in the most effective, efficient and informal manner.[83] Dr Charlesworth described the four main stages in this dispute resolution process as follows:

(a) Triage of complaints which involves assessment as to whether the Commission is the right agency and whether information can help the parties clarify or resolve their complaint.

(b) Complaints that relate to unlawful discrimination are either passed to the duty mediator (to start to deal with on the day); or acknowledged and assessed further (if the nature of the complaint suggests that immediate intervention will not be productive).

(c) After assessment, complaints are assigned to mediators.

(d) Where matters are unresolved after mediation, they are referred to the Human Rights Review Tribunal. At this stage, the Office of Human Rights Proceedings, an independent part of the Human Rights Commission, may also be involved in providing legal representation to complainants.[84]

6.73 Dr Charlesworth argued that the New Zealand complaint handling process has a number of advantages:

> The system of triage, in particular, has enormous potential. In a recent project on pregnancy discrimination we found that those who are

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81 *Submission 69*, p. 320.

82 *Submission 69*, pp 322-323.

83 *Submission 39*, pp 7-8.

84 *Submission 39*, p. 8.

> experiencing workplace discrimination require the sort of practical support and non-technical, non-legalistic advice that the NZ system apparently provides in this phase... The role of the Duty Mediators is also an innovative one that would, especially in the employment context, facilitate the speedy resolution of disputes in an informal way that works to maintain rather than exacerbate any rupture of the employment relationship.[85]

6.74 An alternative proposal was put by union groups, including the ACTU. They recommended that the Australian Industrial Relations Commission, or the proposed body Fair Work Australia, should deal with complaints of workplace discrimination and harassment or have shared jurisdiction with HREOC and the Federal Court.[86] For example, the ACTU submitted that:

> Given the significant majority of discrimination complaints are employment related, and the proven capacity of the [Australian Industrial Relations Commission] to resolve complaints effectively and efficiently, the ACTU would support the referral or shared jurisdiction of employment related complaints with Fair Work Australia...
>
> Employees and their trade unions have conventionally seen the Workplace Relations Act and the Australian Industrial Relations Commission ...as preferable mechanisms for dealing with workplace disputes about discrimination.[87]

6.75 However, there was some evidence suggesting that the existing complaint handling processes are adequate. For example, Mr Ian Scott of Job Watch told the committee:

> In my experience of HREOC—which is limited because I often go to the state jurisdiction—I have found their conciliators to be very professional, very good at their job, and willing to go maybe beyond duty to help the parties come to an agreement. From that perspective, it is very good.[88]

6.76 In addition, HREOC submitted that feedback from complainants and respondents on its complaints handling service was overwhelmingly positive. HREOC provided a summary of the 2007-08 customer satisfaction survey results for complaints under the Act which included findings that:

- 78% of parties felt that HREOC dealt with the complaint in a timely manner.
- 94% of parties did not consider staff to be biased.
- 93% of parties were satisfied with the service they received.

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85 *Submission 39*, p. 8. See also Collaborative submission, *Submission 60*, pp 25-26.

86 ACTU, *Submission 55*, pp 15-16. See similar proposals from the Shop, Distributive and Allied Employees' Association *Submission 42*, pp 9-10; and Queensland Council of Unions *Submission 46*, pp 4-5.

87 *Submission 55*, pp 15-16.

88 *Committee Hansard*, 10 September 2008, p. 37. See also ACCI, *Submission 25*, p. 11.

- 64% of parties rated the service they received as very good or excellent.[89]

6.77 Furthermore, HREOC noted that:

> Complaints under the SDA have a consistently high rate of conciliation which has increased to 53% in the last reporting year.[90]

Reporting on complaints and outcomes

6.78 Several submissions recommended publication of more detailed de-identified information concerning complaints received by HREOC and their outcomes.[91] The Women's Electoral Lobby noted that the outcomes of conciliated complaints are generally confidential and that this limits the availability of information required for the purposes of educating potential complainants and respondents in order to reduce discrimination.[92] Professor Thornton explained that:

> [C]onciliation is the main mode of dispute resolution in this jurisdiction. That means that about 98 per cent of complaints never go beyond the conciliation level and there is agreement that conciliation occur behind closed doors.
>
> ...Material is published now—it is a little bit better than it used to be—that tends to focus on statistics and so on. I think having more material available to help other complainants would serve a very important educative function. What is the point of having a jurisdiction that operates almost entirely in private, behind closed doors, and then has very little money to communicate to the general public the outcome of those decisions or settlements that have been ...effected that way?[93]

6.79 Dr Charlesworth also submitted that there would be benefits in publishing more detailed information on inquiries and complaints:

> There needs to be a serious and committed attempt to collect and publish detailed deidentified data on the inquiries and complaints made to HREOC. This would enable both the monitoring of the efficacy of the SDA and HREOC processes and practices. Good data collection and analysis is vital not only for reporting and accountability purposes, but also for monitoring trends in complaints and for the education and research activities undertaken by HREOC. Such data can form the basis of feedback to

89 *Submission 69*, p. 198.

90 *Submission 69*, p. 193.

91 Women's Electoral Lobby *Submission 8*, p. 11. See also Shop, Distributive and Allied Employees' Association *Submission 42*, pp 4 and 11; Queensland Council of Unions *Submission 46*, pp 6-7; ACTU *Submission 55*, p. 14; Collaborative submission, *Submission 60*, pp 26-27 and 28.

92 *Submission 8*, pp 10-11.

93 *Committee Hansard*, 11 September 2008, p. 43.

> employer associations, unions, government and the broader community so that discrimination issues can be tackled in a proactive way.[94]

6.80 HREOC gave evidence that some de-identified information is already published:

> [T]he general confidentiality of the conciliation process or any terms of agreement that may be entered into by the parties does not prevent HREOC from providing public information in a de-identified form about issues raised in complaints and outcomes obtained through conciliation. HREOC has developed a conciliation register that provides de-identified summaries of conciliated complaints. HREOC also publishes de-identified case studies in its annual report, on its webpage and in policy documents.[95]

94 *Submission 39*, p. 6.

95 *Submission 69*, pp 324-325.