

ALTERNATIVE DISPUTE RESOLUTION AS A TOOL FOR SOCIAL CHANGE: A DISCUSSION OF ISSUES AND EVIDENCE

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ABSTRACT

Human rights and anti-discrimination law in Australia, as in many countries in the Asia Pacific, provides for complaints about discrimination and violations of human rights to be resolved by conciliation. The use of Alternative Dispute Resolution (ADR) in this context has been criticised. In particular, it has been claimed that the individualised form of the complaint process, coupled with the confidential nature of conciliation outcomes, restricts the social reformative potential of human rights and anti-discrimination law. ADR practitioners working in this field however refer to the potential educative effect of involvement in an ADR process. They also note the capacity for conciliation outcomes to extend beyond privatised individual remedy and include measures which contribute to furthering the objectives of the law to eliminate discrimination and promote equality. This paper considers the broader debate about the role of ADR as a tool for social change and social justice and discusses the potential for ADR, as conducted in the anti-discrimination law context, to contribute to the social change objectives of the law. The paper also refers to preliminary findings of research that is currently being undertaken by the Australian Human Rights and Equal Opportunity Commission, which considers educative effects and systemic change arising from involvement in an anti-discrimination complaint process.

Keywords: social change, human rights, conciliation

1. INTRODUCTORY COMMENTS

1.1 Clarification of terms used in this paper

In this paper ‘ADR’ is used as an acronym for Alternative Dispute Resolution and refers to processes other than judicial determination, in which a third person assists parties to resolve a dispute. Where terms such as ‘mediation’, and ‘conciliation’ are used, they refer to processes as defined by the Australian National Alternative Dispute Resolution Advisory Council (‘NADRAC’) (NADRAC 2003). The term ‘social justice’ is used to refer to a form of social change which is focused on addressing issues of inequality and unfairness in society. In the paper, the term ‘systemic’ refers to problems or outcomes which extend beyond the personal or individual and are linked with policies, practices or systems affecting broader groups.

1.2 Views represented in this paper

The views represented in this paper are the author's own and do not necessarily represent the views of the Australian Human Rights and Equal Opportunity Commission.

2. THE DEBATE REGARDING ADR AS A TOOL FOR SOCIAL CHANGE

2.1 The divergence of views

The question of whether Alternative Dispute Resolution (ADR) can be a tool to achieve social change, including social justice, is not new. The debate regarding this issue is interlinked with the emergence of ADR in the Anglo-American context and different responses to this question reflect different views regarding the purpose and value of ADR, as well as how best to achieve a more just society.

On one hand, ADR can be seen as merely a pragmatic development in response to overcrowded courts. From this perspective, the key value of ADR is its reduced cost and increased efficiency and the broader social benefits of ADR are increased dispute resolution options for consumers and a better functioning court system.

In an alternative view, the genesis and purposes of ADR in the Anglo-American context is intimately connected with the social justice movements of the 1950s and '60s which were concerned with issues of structural inequities and had an associated distrust of established institutions. ADR was seen as not only a more accessible way to resolve disputes but also a 'better' way. Historically, in some sectors such as the Community Mediation and Community Justice Centre movements, ADR was considered a means of 'grass roots democratisation' which not only resolved individual disputes but also built neighbourhoods and encouraged self governance and empowerment (Schoeny & Warfield 2000). Mediation, it was suggested, had the potential to produce aggregate social effects that would involve shifts in power relations (Baruch Bush 1996).

While the rhetoric of structural change and group/community empowerment is rare within mainstream ADR today, the notion of ADR having an impact on individuals that can then influence groups and society in general, continues to be expressed in different forms of ADR practice. Many practitioners refer to individual empowerment and the recognition of different perspectives that can occur in an ADR process and then be carried over and applied to the broader networks of those involved in the dispute. The social change goals of some particular areas of ADR are, in fact, very clearly stated. For example, transformative mediators describe their main goal as fostering social change through individual empowerment and recognition with a view to "*creating a better world.... a world in which people are not just better off but are better; more human and more humane.*" (Bush and Folger 1994, pg.29).

The ability for ADR to actually effect social change and in particular social justice, has, however been assailed from many different angles.

Firstly, limitations on the role of ADR as a tool for social change can be seen as inherent in the theoretical framework of ADR itself. In the formal dispute resolution process of western liberal democracies, the 'neutrality' of the legal adjudicator is considered central to fairness and justice. This connection between third party 'neutrality' and fairness takes on heightened importance in ADR, in light of the non-reviewable and privatised nature of such processes (Astor 2000; 2007). The notion of ADR practitioner neutrality that is drawn from rule-of-law values has been seen to imply that the ADR practitioner cannot bring the broader social context or social objectives into the dispute resolution process (Gadlin & Sturm 2007, Schoeny & Warfield 2000). From this perspective, the social context of the dispute, including group issues, would only be relevant to the process and outcomes of ADR when raised and/or developed by the parties. Thus, outcomes that advance social justice objectives would be dependent on the parties seeing the dispute in broader societal or structural terms and having the capacity to move beyond individualised self-interest. This theoretical framework has prompted criticism that in ADR practices such as mediation, disputes are generally abstracted from the social context in which they occur, with broader social and structural issues being reduced to the level of misunderstandings and miscommunication between individuals.

The potential for ADR to effect social change is also seen to be limited by the confidential and privatised nature of the content of disputes and the terms of their resolution, which means that binding precedent and public norms that may assist social change are not generated. Hence, some critics of ADR argue that formal court determination processes are better mechanisms for dealing with public interest issues and achieving social justice in that in this forum, inequities of process can be seen and addressed and beneficial public norms generated (Fiss 1984, Imbrogno 1999).

From yet another perspective, ADR is seen to directly work against social justice. Some social justice theorists express the view that ADR is merely an instrument of social control in liberal legal democracies (Abel 1982) in that it acts to increase State control in relation to certain types of disputes that raise issues about inequalities fundamental to capitalism. From this perspective, ADR provides a semblance of justice and a voice for individuals and groups which acts to neutralise the protest and social unrest required to achieve real equality in society (Schoeny & Warfield 2000).

2.2 Reconsidering the potential of ADR to generate social change effects

The perceived limitations on ADR as a tool for social change, as noted above, continue to be debated. Some recent writers have called for reconsideration of the issue from new perspectives which reflect developments in theory and the diversity of ADR practice (Gadlin & Sturm 2007).

For example, limitations on the ability of ADR to enable social change, which are said to arise from the requirement of ADR practitioner neutrality, have been effectively challenged. Detailed expositions in feminist and critical legal theory have highlighted the myth of the rule-of-law notion of 'absolute neutrality' and this in turn has led to reconsideration of the connection between neutrality and fairness in ADR practice. In an

alternative understanding, fairness of the ADR process is not dependent on the unrealistic goal of detached neutrality, but rather requires that practitioners restrain from acting on personal biases and conduct the process in a way that does not privilege one party over the other and maximises party control. From this perspective, recognition of the social context of the dispute and associated power disparities of the parties can be seen as necessary in order for the ADR practitioner to ensure that one party is not privileged or disadvantaged (Cobb and Rifkin 1991, Gadlin & Sturm 2007, Astor 2000 & 2007).

Additionally, the notion that ADR processes cannot generate or advance public values has been challenged. For example, it can be argued that as ADR processes are not restricted by legal forms and technicalities, there is potential within the ADR process to echo legal norms in more generalised ways and generate norms which draw on valued social behaviour such as fairness and equity (Gadlin & Sturm 2007, Belthorn 1999). Additionally, ADR processes are more likely to be able to facilitate systemic outcomes to disputes as, unlike courts, terms of resolution are not bound by legal notions of individualised harm and redress.

It has also been contended that insufficient attention has been paid to the interplay between the individual and the systemic in ADR and the potential for ADR processes to have broader social and structural impacts that may not be directly observable. It can be argued, for example, that the individualised nature of disputes and the general confidentiality of ADR processes do not necessarily preclude outcomes which involve systemic change. For example, issues raised by an individual dispute can trigger broader system analysis and intervention to prevent recurrence of the problem. Further, the resolution of an individual dispute may be ultimately interlinked with broader structural change in that a change to a practice or procedure arising from an individual agreement may have broad positive impact for others in comparable situations (Gadlin & Sturm 2007).

As the discussion at 2.1 and 2.2 above indicates, the question of the extent to which ADR may act as a tool for social change and contribute to social justice is complex. Part of this complexity arises from the various ways in which ADR processes may generate social change effects. Additionally, in light of the range of ADR processes and the different frameworks in which these processes operate, the context of the ADR process will no doubt be relevant to consider. Factors such as how the ADR process is classified, the institutional framework in which it is located, and the manner in which practitioners are trained and act will no doubt impact on the social change potential of the process.

The following sections of this paper consider the potential for ADR to be a tool for social change in the specific context of the dispute resolution work of National Human Rights Institutions (NHRIs). This is an interesting context to explore given the social change and social justice objectives of the law administered by NHRIs, the statutory framework of the ADR process and the issues of systemic disadvantage and social structure that are likely to underpin disputes brought to NHRIs.

3. ADR AND NATIONAL HUMAN RIGHTS INSTITUTIONS

3.1 An overview of the work of NHRIs

NHRIs have been established by many countries in the Asia Pacific region to assist the fulfilment of domestic obligations arising from international human rights treaties. ‘Human rights’, as codified in international treaties, are understood as universal legal guarantees protecting individuals and groups against actions and omissions that interfere with fundamental freedoms, entitlements and human dignity (United Nations 2006). The objectives of these treaties can be summarised as the achievement of equality, dignity and justice for all. It is not surprising then that the language of ‘human rights’ has been utilised throughout the world as a means of enabling social change and achieving social justice.

The notion of NHRIs as agents of social change and social justice is evident in the legislative frameworks in which they operate and in public statements of their mission and purpose. For example, legislation administered by the Australian Human Rights and Equal Opportunity Commission has objectives which include :

“...to eliminate, as far as possible, discrimination against persons on the ground of disability...; and to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community.” (Part 1 - Disability Discrimination Act)

“...to eliminate so far as possible, discrimination against persons on the grounds of sex, marital status, pregnancy or potential pregnancy..... discrimination involving sexual harassment....; discrimination involving dismissal of employees on the ground of family responsibilities;...and to promote recognition and acceptance within the community of the principle of the equality of men and women.” (Part 1 – Sex Discrimination Act)

The role of NHRIs in promoting and protecting human rights includes providing advice to government in relation to law and policy, conducting public education and investigating and resolving complaints regarding alleged violations of rights. Thus, NHRI responsibilities span both individual issues, as raised through complaints, and systemic issues. NHRIs generally do not have authority to impose legally binding outcomes in relation to complaints. Rather, the enabling legislation provides for informal resolution of complaints through ADR processes often described as ‘mediation’ or ‘conciliation’. Where attempted resolution is unsuccessful, complaints may proceed to tribunals or courts which can issue final and binding determinations. The United Nations has described NHRIs as ‘ADR mechanisms’ and referred positively to this role for NHRIs in providing a more accessible, quick and inexpensive means to resolve disputes in contrast with judicial determination (United Nations 1995).

Complaints brought to NHRIs can be made by individuals or groups and the subject matter may range from alleged violations of civil and political rights by government to sexual harassment and racial discrimination by private individuals and/or organisations.

While complaints are likely to relate to alleged instances of less favourable treatment of individuals, the issues raised by complaints are entwined with systemic and institutional issues which international human rights treaties and associated domestic law aim to address. For example, individual complaints about sex, race or disability discrimination in employment or other areas of public life are underpinned by issues of historic social and structural disadvantage for women, Indigenous groups and people with disabilities.

3.2 Views of ADR in this context

While the comparative accessibility and efficiency of ADR processes in this context is acknowledged, concerns are often expressed about the potential for informal resolution processes to restrict the social reform objectives of human rights and anti-discrimination law. These concerns, which mirror arguments negating the social change potential of ADR noted in 2.2 above, can be summarised as follows. Firstly, there is concern that the ‘neutrality’ of the ADR practitioner combined with the individualised nature of the complaint process, will mean that issues which relate to patterns and practices of discrimination will be dealt with as exceptional individual incidents. Thus, remedy will focus on individual redress and there will be no identified need or incentive for common respondents, such as government and corporations, to address systemic causes. Concern is also expressed that the ‘neutrality’ of the ADR practitioner will mean that inherent power differentials between complainants and respondents will not be addressed in the process, leading to unfair outcomes for complainants which further detract from the social change objectives of the law (Thornton 1989, 1990). Additionally, the confidential nature of ADR process are said to detract from the development of legal rights for disadvantaged groups and prevent public declarations that will impact on social change (Scutt 1986). Some may even hold a view that the ADR processes of NHRIs are indicative of the tokenism of anti-discrimination law and the way in which it can provide a semblance of justice which detracts from action to achieve substantive social change (See for example the reference to Creighton in Gaze 2002 pg 326).

These concerns about the complaint resolution work of NHRIs, which in part appear to be based on generalisations about ADR and how it is practiced, are not only raised by academics but may even be voiced within NHRIs. For some, the complaint handling functions of NHRIs are seen as a ‘poor relative’ of the institution’s direct education and policy work and therefore an area that is often overlooked and perhaps even apologised for.

While limitations on the ability of ADR to act as a direct agent of social change need to be acknowledged, calls for reconsideration of the potential for ADR to generate social change effects have resonance in the NHRI context. The following section discusses approaches to ADR practice in the human rights and anti-discrimination law context and highlights the often unrecognised potential for ADR processes of NHRIs to significantly contribute to the social change objectives of human rights and anti-discrimination law.

4. THE POTENTIAL FOR ADR TO BE A TOOL FOR SOCIAL CHANGE IN THE NHRI CONTEXT

4.1 Classification of the ADR process and the role of the ADR practitioner

Concerns about ADR restricting the social reform objectives of human rights and anti-discrimination law, discussed at 3.2 above, appear to be based on assumptions that the ADR process within NHRIs is generally ‘facilitative’ in nature and that practitioner interest in the social context of the dispute and associated interventions regarding content, process and outcomes will undermine the fairness of the process and be contrary to ADR theory. In fact, as explained below, an advisory and interventionist role for the ADR practitioner is appropriate in this statutory context.

The complaint resolution work of NHRIs is conducted within a legislative framework with clear public interest objectives. The legislation provides parameters for the content, process and outcome of disputes in that the subject matter of the dispute must be covered by the law; the manner in which the ADR process is conducted must accord with the law; and the terms on which the dispute is resolved must concur with, or at least not detract from, the law (See for example, section 28 of the Australian *Human Rights and Equal Opportunity Commission Act 1986*). Therefore, the role of the ADR practitioner in NHRIs cannot be merely process focused as would be expected in a pure ‘facilitative’ ADR process. Rather, as has been noted in previous papers (Ball and Raymond 2004; Raymond 2006), the ADR work of NHRIs is indicative of ‘advisory’ dispute resolution processes in that the role of the practitioner is likely to include some level of investigating the dispute and also the provision of advice regarding “... *the facts of the dispute, the law and, in some cases, possible, probable and desirable outcomes, and how these may be achieved.*”(NADRAC 2003, pg 6).

In the NHRI context, the ADR practitioner cannot be a ‘detached neutral’. The legal framework requires that the practitioner have a professional interest in the content, process and outcome of the dispute which includes attending to its social context. In accordance with more recent understandings of the legitimate parameters of the ADR practitioner role as discussed at 2.2 above, professional interest in the content and outcome of the dispute will not undermine fairness where parties participate in full knowledge of the statutory framework and where practitioner interventions are not based on personal interest or biases but rather, reflect the institution’s statutory authority and the facts and evidence before the institution. Additionally, consideration of power disparities between the parties arising from the social context of the dispute and process interventions by the practitioner in this regard can be seen as essential to, rather than a negation of, fairness where such intervention is undertaken to ensure that one party is not disadvantaged in terms of process and outcome.

An appreciation of the legitimate role of the ADR practitioner in relation to content, process and outcome within NHRIs, highlights the potential for the process to be conducted in a manner which advances the social reform objectives of the law. Firstly, it is legitimate for the practitioner within this context to provide information and educate parties about rights and responsibilities in the law. Additionally, there is a legitimate role for the ADR practitioner to provide information about potential terms of resolution

and encourage outcomes which further the objectives of the law. This advisory role must, of course, be implemented in a manner which balances public interest objectives with the needs and interests of the parties to the dispute and supports key ADR values of party empowerment and ownership of outcomes. (For further discussion of the appropriate parameters of this advisory role in this context, see Ball & Raymond 2004).

4.2 Approaches to ADR practice

An appreciation of different possible approaches to ADR practice within NHRIs also highlights the potential for informal dispute resolution processes to contribute to the law's social change objectives of eliminating discrimination and promoting equality.

Due to the legal framework, intervention by NHRI ADR practitioners in relation to the content and outcomes of a dispute is often indicative of a rights-based approach to ADR. That is, information and advice provided by the ADR practitioner focuses on rights and duties as articulated in law, the manner in which other similar matters have been determined and the manner in which the dispute at hand may be heard and determined. However, as has been noted in previous papers (Raymond 2006), interest-based approaches to dispute resolution which focus on framing the dispute in terms of the parties' underlying needs and interests rather than rights, can also have value in this context. Both of these approaches can be observed in the ADR practices of NHRIs and it is contended that these different approaches have the potential to generate social change effects in different ways.

As mentioned, intervention by practitioners from a rights-based perspective will generally include providing information to both parties about rights and responsibilities in the law and the potential relevance of the law to the dispute at hand. As the law in this context relates to the rights of groups that share particular attributes, contextualising the dispute in the law also means that individual disputes are overtly connected to collective rights, for example, the rights of women, people with disabilities and Indigenous groups. Therefore, the broader social and structural issues underpinning the law are germane to the issues raised in an individual complaint and discussion of the purposes of the law may, in fact, be important to understanding the issues in dispute and to terms of resolution. Additionally, intervention from a rights-based perspective may include the practitioner providing information to the parties about relevant case law and how the dispute at hand might be considered by a determining body. In this way, the ADR process can provide a powerful avenue to echo legal norms and expand legal norms through generalisation to the dispute at hand. Further, discussion of case law can provide guidance to parties about potential terms of resolution and in this way, assist to ensure that outcomes of the informal resolution process reflect what has been publicly determined to be 'fair' with reference to the broader purposes of the law.

In contrast with a more adversarial rights-based approach, interest-based approaches to ADR focus on encouraging parties to understand each other's views, maintain constructive dialogue and develop creative resolution options to address mutual needs and interests. While an interest-based perspective may not be appropriate for some types of disputes before NHRIs (Astor & Chinkin 2002, pp. 126-7; Raymond 2006), this approach, where used, may generate social change effects in different ways. For

example, a focus on positive, constructive communication and on ‘needs’ and ‘interests’ rather than ‘rights’ and ‘demands’ can enable an environment in which respondents to complaints are more open to learn about the expectations of the law and appreciate the experiences and concerns of individual complainants or the group they are seen to represent. This, in turn, may contribute to attitudinal change and broader social change in that the positive view of the ‘other’ arising from the ADR process may be replicated in future interactions and in social networks over time (Baruch Bush 1996). Additionally, an interest-based focus on generating creative outcomes to address mutual interests can facilitate consideration of outcomes which have systemic impact, in addition to outcomes which address individual remedy. For example, a complainant’s stated interests in pursuing a dispute may be to obtain remedy for personal loss and to ensure that “*other women are not treated in the same discriminatory way*”. The respondent’s stated interest in resolving the dispute may be “*to prevent further complaints and to be seen as a fair employer*”. An interest-based intervention by the ADR practitioner in this situation can assist the parties consider inclusion of an outcome such as a change to workplace policy or practice, that may not only address mutual interests but also have beneficial effects for other similarly situated female employees.

4.3 Confidentiality

The private and confidential nature of ADR is central to concerns that ADR processes will restrict the social reform objectives of human rights and anti-discrimination law. As noted at 3.2, it is claimed that as the content and outcomes of the process are confidential, the process cannot generate public norms and therefore cannot generate social change effects. However, a closer examination of confidentiality in the NHRI context indicates it is not the insuperable constraint to social change that some may claim.

Firstly, the general confidentiality of ADR processes is not necessarily a barrier to the provision of public information about the content and outcomes of disputes before NHRIs. In accordance with education and reporting functions, NHRIs often provide information about the content and outcomes of ADR processes to the public in the form of de-identified case studies and/or conciliation precedent registers. Therefore, the content and outcomes of the ADR processes of NHRIs are, to some extent, placed in the public domain.

Additionally, while the law administered by the NHRI may have stipulations regarding conciliation being conducted ‘in private’ and may require conciliation related material to be excluded from future determination proceedings if the matter cannot be resolved, there may not be any specific statutory requirement regarding the confidentiality of terms of agreement. It may be the case that where confidentiality is not imposed by the NHRI, parties may agree to forgo confidentiality in the agreement. For example, where an outcome involves changes to practice and procedure that will benefit customers or clients and will contribute to a positive image of a company, both parties may see value in the outcome being publicised.

It is also important to recognise that even where the terms of an agreement arising from a conciliation process are confidential, implementation of the terms may involve

changes to practices and procedures which will have a systemic impact regardless of any confidentiality provision in the agreement.

5. IS THE POTENTIAL BEING REALISED?

The above discussion highlights the potential for ADR processes conducted by NHRIs to generate social change effects and thus further the objectives of human rights and anti-discrimination law to eliminate discrimination and promote equality. Specifically, there appears to be potential for the process to contribute to attitudinal change in individuals, to educate about the law and thus encourage self-initiated compliance, and to stimulate systemic change in key areas of public life.

It remains then to consider the extent to which such potential is being realised. Discussions with ADR practitioners in NHRIs can provide anecdotal evidence of: individuals becoming more aware of the issues and problems experienced by those who lodge complaints; individuals and organisations becoming more aware of rights and responsibilities in the law; and terms of resolution which have systemic impact. Conciliation case studies in NHRI publications also refer to systemic outcomes from complaints such as: modifications to public transport to ensure access for people with physical disabilities; provision of breast feeding facilities for women; and changes to services to ensure access for people with visual disabilities and hearing disabilities. However, there is minimal detailed evidence of such social change effects.

In 2007, the Australian Human Rights and Equal Opportunity Commission commenced a research project to gather information relevant to this issue. This project, which is expected to be completed in the second half of 2008, aims to obtain information about the level to which: involvement in the complaint process increases knowledge and understanding of the law; conciliated agreements include elements which are likely to have systemic impact; and respondents initiate systemic change as a result of their involvement in the complaint process. A brief summary of the project and outcomes to date is provided below.

5.1 Research design/methodology

The research project has two separate components. The first component which commenced in mid 2007, involves a review of conciliation agreements relating to finalised complaints of unlawful discrimination against companies and organisations. The first set of data, discussed at 5.2.1, relates to 220 complaints finalised by HREOC in the period 1 July 2006 – 31 December 2006. The second component of the project involves a telephone survey with companies/organisations who were respondents to unlawful discrimination complaints finalised by HREOC since 1 September 2007. The first round of data, which is discussed at 5.2.2, relates to 150 completed surveys.

HREOC sought expert external advice in relation to research design and methodology and file reviews and surveys are conducted by staff with no direct involvement in the investigation or conciliation of complaints.

5.2 Findings to date

5.2.1 Terms of conciliation agreements

The types of unlawful discrimination raised by complaints in the sample and the categories of respondents and complainants are summarised in Appendix 1. It is noted that the majority of complaints related to disability discrimination (53%) and were lodged by individuals (89%). The majority of complaints were against private companies (76%).

Of the agreements in this sample where the terms were known to HREOC (192 complaints), 54% of the agreements included a component which was categorised as systemic in that it was likely to have benefits beyond the specific complainant(s). The types of outcomes in this category included changes to practices and procedures external/customers (15%); changes to practices and procedures internal/staff (8%); modification of facilities/premises (11%); conduct of anti-discrimination/anti-harassment training (12%); and the introduction or review anti-discrimination/anti-harassment policies (8%). Eighty seven percent of agreements included an individual remedy such as financial compensation (52%), an apology (25%) and/or a reference/statement of service (10%).

Where the confidentiality of the terms of agreement could be discerned from the file, 77% of agreements were confidential. As expected, there was a high correlation between confidentiality of agreements and cases in which financial compensation formed a component of settlement. Confidentiality clauses were less common in agreements which only involved terms classified as 'systemic'. Only 31% of these agreements contained confidentiality clauses.

5.2.2 Respondent feedback on involvement in the complaint process

The types of unlawful discrimination raised by complaints in this sample, the categories of respondents to complaints and complaint outcomes are summarised in Appendix 1. It is noted that the majority of complaints related to disability discrimination (61%) and were against private companies (65%).

The survey asks respondents to reply to statements regarding the impact of a specific finalised complaint /actions taken as a result this complaint.

In the surveys completed to date, more than half of the respondents (54%) reported that as a result of the complaint they had gained a better understanding of anti-discrimination law and responsibilities under the law. Approximately half of respondents (46%) reported that as a result of the complaint, they had introduced or revised anti-discrimination/anti-harassment or Equal Employment Opportunity (EEO) policies and 51% reported that they had introduced or revised anti-discrimination/anti-harassment or EEO training. Forty-three percent reported that they had made 'other changes' to their internal work practices or external service delivery. Information on these 'other changes' indicates that they would generally be classified as positive actions to prevent discrimination and ensure equality of opportunity. Examples of these

changes included: educating staff to ensure customers with visual disabilities have better access to services; introduction of a specific class to assist children with forms of autism; review and amendment of a flexible work policy; revision of recruitment procedures to ensure a merit-based process; and commitment of funds to upgrade bathrooms in shopping centres to enable access for people with disabilities and parents with children. Seven percent of respondents reported that as a result of the complaint they had made changes to their facilities or premises and examples of these reported changes included modification of premises to allow space and facilities for guide dogs and modifications to premises to ensure access for people who use wheelchairs. Forty-one percent reported that they had taken action other than that specified in the survey. Examples of this 'other action' included lodgement of a Disability Action Plan to ensure ongoing improvements in facilities, creation of a disability consultative committee and liaison with other regulatory bodies to attempt to address the issues raised by the complaint.

It is noted that where a negative response was recorded to all statements on the survey, respondents indicated that they had responded in this way because they felt that the particular complaint did not have merit and/or because they felt they already have a good understanding of the law and associated responsibilities and their company/organisation already has good training and policies in place.

A summary of findings for each question by complaint outcome is provided in Appendix 1.

On the data assessed to date, the reported educative impact of the complaint process was relatively consistent, regardless of the outcome of the complaint. Where conciliation was attempted, 55% of respondents indicated that as a result of the complaint they had gained a better understanding of anti-discrimination law and responsibilities under the law. Where the complaint was dismissed, 56% responded positively to this question and where the complaint was withdrawn, 41% responded positively.

The data outlined in Appendix 1 also supports a view that regardless of the outcome of the complaint, involvement in the complaint process can stimulate companies/organisations to review and make changes to their practices, policies and service delivery which support the objectives of the law. For example, even where complaints were dismissed by HREOC for reasons including an assessment that the complaint was lacking in substance, 26% indicated that they introduced or reviewed anti-discrimination/ anti-harassment or EEO policies; 30% indicated that they introduced or reviewed staff training on anti-discrimination/ anti-harassment or EEO; and 26% indicated that they made other changes to internal work practices or service delivery.

The data also supports a view that respondents are much more likely to undertake positive actions referred to in the survey where conciliation is attempted and is successful. For example, where the complaint was successfully conciliated, 56% of respondents indicated that as a result of the complaint they introduced or reviewed their anti-discrimination/anti-harassment or EEO policies. Positive responses to this question dropped to 40% where conciliation was unsuccessful and to 26% where the complaint

was dismissed. Where the complaint was successfully conciliated, 66% of respondents indicated that as a result of the complaint they had introduced or reviewed staff training on anti-discrimination/anti-harassment or EEO. Positive responses to this question dropped to 40% where conciliation was unsuccessful and 30% where the complaint was dismissed.

6. CONCLUSION

The preliminary findings of HREOC's research support a view that the informal dispute resolution processes of NHRIs contribute to advancing the social change objectives of human rights and anti-discrimination law in a number of ways.

Firstly, the data supports anecdotal evidence that the ADR processes of NHRIs such as the HREOC, can increase knowledge and awareness of rights and responsibilities under the law. The complaint resolution process can therefore be seen to complement the public education functions of such institutions which aim to increase knowledge of responsibilities under the law and encourage self-initiated compliance with the law.

Importantly, the data also supports anecdotal claims that even where complaints are raised by individuals and may be resolved on confidential terms, terms of resolution are not limited to self-interested bargains but in many cases, include outcomes which are likely to have broader benefits for similarly situated individuals and groups covered by the law. The data highlights how the complaint process can stimulate outcomes such as policies and training that are unlikely to be awarded by a court or tribunal. The data also shows that a complaint which relates to a specific ground of discrimination, may initiate training and policies that refer to discrimination generally and thus have positive effects for other groups. Policies and training can have significant impact in both the short and longer term by setting behavioural standards, reinforcing norms of non discrimination and equality and encouraging attitudinal change. Other outcomes that the data demonstrates can be achieved in conciliation, such as modifications to buildings and facilities, will often have profound and immediate effects. Such outcomes highlight the value of ADR in this context in providing an avenue for implementation of practical changes which address patterns of social exclusion, without the need for a lengthy and potentially costly determination process.

The discussion and evidence in this paper supports a view that ADR processes have potential to generate social change effects in different ways, for example: through individual empowerment and attitudinal change; through the reinforcement and generation of public norms; and through systemic change that is stimulated by individual disputes. With reference to a particular statutory context, the paper has highlighted how the individual and the systemic may be interrelated in a presenting dispute and how the unique attributes of ADR can be utilised to reinforce and generate public norms and enable outcomes that reconcile public interest objectives with individual remedy .

APPENDIX 1

Terms of conciliation agreements

Type of discrimination alleged in complaints

Disability discrimination - 53%
Sex discrimination - 33%
Race discrimination - 8%
Age discrimination - 6%

Categories of complainants

Individual female - 59%
Individual male - 30%
Individual on behalf of other individual - 10%
Organisation on behalf of an individual - 1%
Joint/multiple - 0%
Class or representative complaint - 0%

Categories of respondents to complaints

Private enterprise - 76%
Government agencies - 20%
Clubs/incorporated organisations - 4%

Respondent survey

Types of discrimination alleged in complaints

Disability discrimination - 61%
Sex discrimination - 15%
Race discrimination - 10%
Age discrimination - 6%
Combination of above grounds of discrimination - 8%

Categories of respondents to complaints

Private enterprise - 65%
Federal and state government agencies - 22%
Other organisations including clubs and incorporated organisations - 9%
Non government organisations - 4%

Outcomes of complaints in sample

Conciliation attempted - 74%
[Successfully resolved by conciliation - 57%
Unable to be resolved by conciliation - 17%]

Dismissed as lacking in substance or for another reason - 15%
Withdrawn after investigation of dispute had commenced - 11%

Responses to questions x complaint outcome

As a result of the complaint, the company/organisation has gained a better understanding of anti-discrimination law and responsibilities under the law.

Response for all surveys = 54%; Conciliation attempted = 55% (conciliation successful 54% conciliation unsuccessful 60%); Dismissed = 56%; Withdrawn = 41%.

As a result of the complaint the complaint company/organisation has introduced new anti-discrimination, anti-harassment or Equal Employment Opportunity (EEO) policies or reviewed/revised its policies.

Response for all surveys = 46%; Conciliation attempted = 56% (conciliation successful 56% conciliation unsuccessful 40%); Dismissed = 26%; Withdrawn = 29%.

As a result of the complaint, the company/organisation has introduced staff training on anti-discrimination, anti-harassment or EEO or reviewed /revised its training.

Response for all surveys = 51%; Conciliation attempted = 60% (conciliation successful 66% conciliation unsuccessful 40%); Dismissed = 30%; Withdrawn = 23%.

As a result of the complaint the company/organisation has made other changes to internal work practices or other changes to service delivery to the public/customers.

Response for all surveys = 43%; Conciliation attempted = 48% (conciliation successful 52% conciliation unsuccessful 36%); Dismissed = 26%; Withdrawn = 29%.

As a result of the complaint the company/organisation has made changes to facilities or premises.

Response for all surveys = 7%; Conciliation attempted = 9% (conciliation successful 9% conciliation unsuccessful 8%); Dismissed = 4%; Withdrawn = 0%.

As a result of the complaint the company/organisation has taken other action.

Response for all surveys = 41%; conciliation attempted = 45% (conciliation successful 43% conciliation unsuccessful 52%); Dismissed = 39%; Withdrawn = 18%

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