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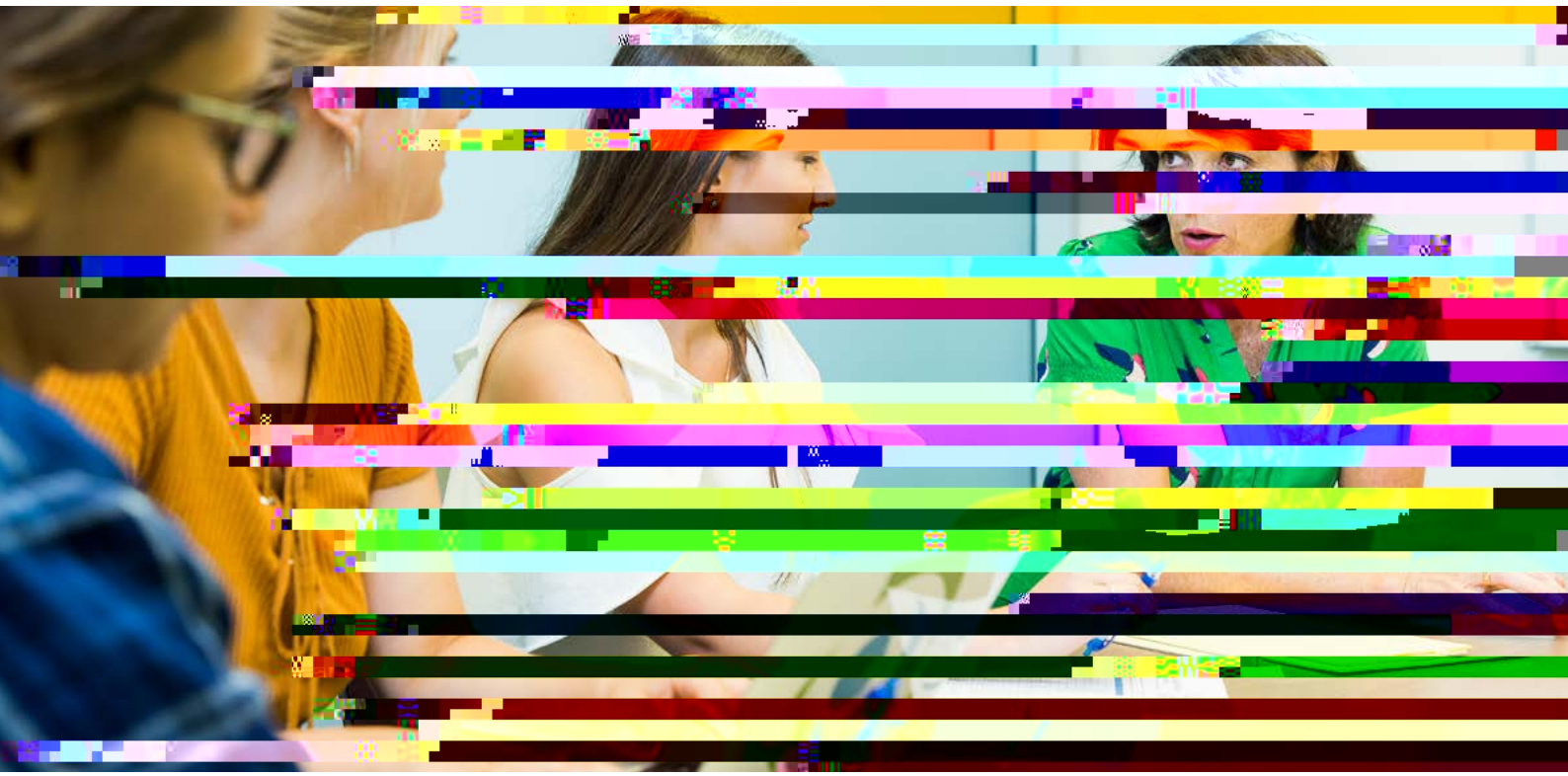
Kingsford Legal Centre acknowledges the Gadigal and Bidjigal Clans, the traditional custodians of the Sydney Coast. We pay respect to those Elders, past and present and thank them for allowing us to work and study on their lands.

KLC
kingsford legal centre

About Kingsford Legal Centre

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

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



2. Early Referrals for **Legal Assistance**

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

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

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

4. **Adjustments**

4.1 The ADB, AHRC and FWC should make their policies for the requesting and granting of reasonable adjustments to enable parties to fully participate in the conciliation process publicly available.

4.2 The ADB, AHRC and FWC should proactively seek information on what adjustments the parties may require to participate in the conciliation process both on the complaint form and by contacting the parties/representatives prior to conciliation.

5. Flexibility

5.1 Conciliators should have the ability to schedule additional conciliations when it is clear parties could reach settlement in the structured environment that conciliation provides.

5.2 Conciliators should contact the parties and representatives prior to scheduling or listing a conciliation conference to confirm their availability.

5.3 Conciliators should provide equal time to respondents and applicants to provide documentation, unless an extension is requested and granted by the conciliator for good cause.

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

6.1 Where an applicant has secured free legal assistance, the presumption should be that the lawyer will be allowed to represent the applicant at conciliation.

6.2 Funding for free legal assistance services to assist applicants in discrimination matters should be increased.

6.3 Conciliators should receive training in how to mitigate power imbalances in conciliation processes and employ these techniques when conducting conciliations.

7. **Speed of Resolution**

7.1 The ADB, AHRC and FWC should make procedures and considerations for granting an expedited conciliation publicly available on their websites.

7.2 The NSW goverf>/ (tor)-26 icants 5y the

9. Increasing Knowledge on Conciliations

9.1 The ADB, AHRC and FWC should make available de-identified disaggregated data on conciliation, including:

- the nature of complaints (protected attributes claimed, relevant area of public life, alleged discriminatory conduct);
- the outcomes achieved;
- the number of parties that were legally represented; and
- the number of complaints accepted, terminated, withdrawn or settled, by protected attribute.

9.2 The ADB, AHRC and FWC should publish comprehensive de-identified conciliation registers, to be made available on their respective websites.

10. ADB/AHRC/FWC Strategic Assistance

10.1 The AHRC Discrimination Commissioners, ADB President and Fair Work Ombudsman (FWO) should be given powers to investigate and initiate court proceedings in relation to discriminatory conduct that appears unlawful, without an individual complaint. The FWC President should refer matters to the FWO as appropriate.

10.2 The role and powers of AHRC Discrimination Commissioners, ADB President and FWO should be expanded to increase the role of these bodies in addressing systemic discrimination. These powers should include monitoring of duty holders, commencing complaints, intervening in matters, and reporting annually to Commonwealth Parliament/State Parliament, and to the public, on discrimination matters.

C t e t

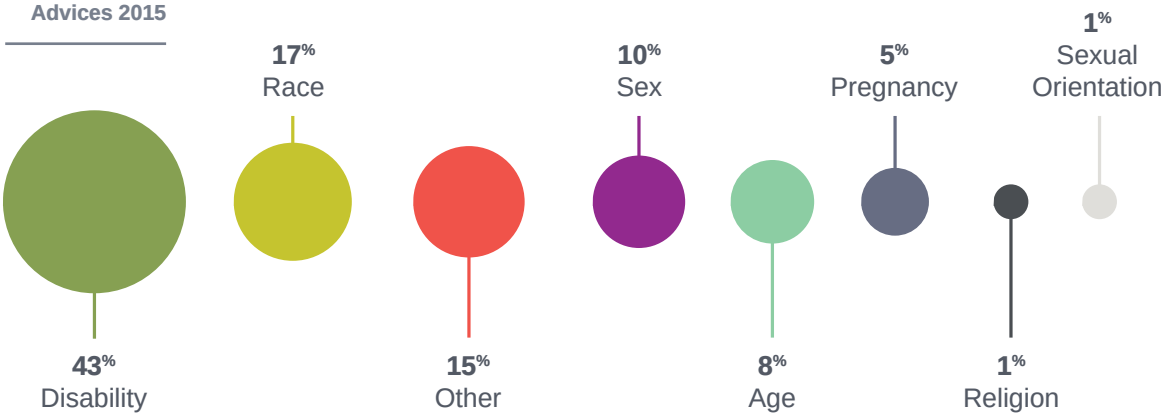
About Kingsford Legal Centre

Abbreviation Table

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

Bac g d T The P e d

Figure 1: Discrimination Advices 2015



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

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

KLC is aware that there is a diversity of experiences in conciliation, and that the expectations of applicants in discrimination matters vary greatly. We believe that understanding the complexity (both legal and emotional) of the needs and aims of people who lodge discrimination complaints is central to understanding the efficacy of conciliation processes.

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

A f Re8 rt

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

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

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

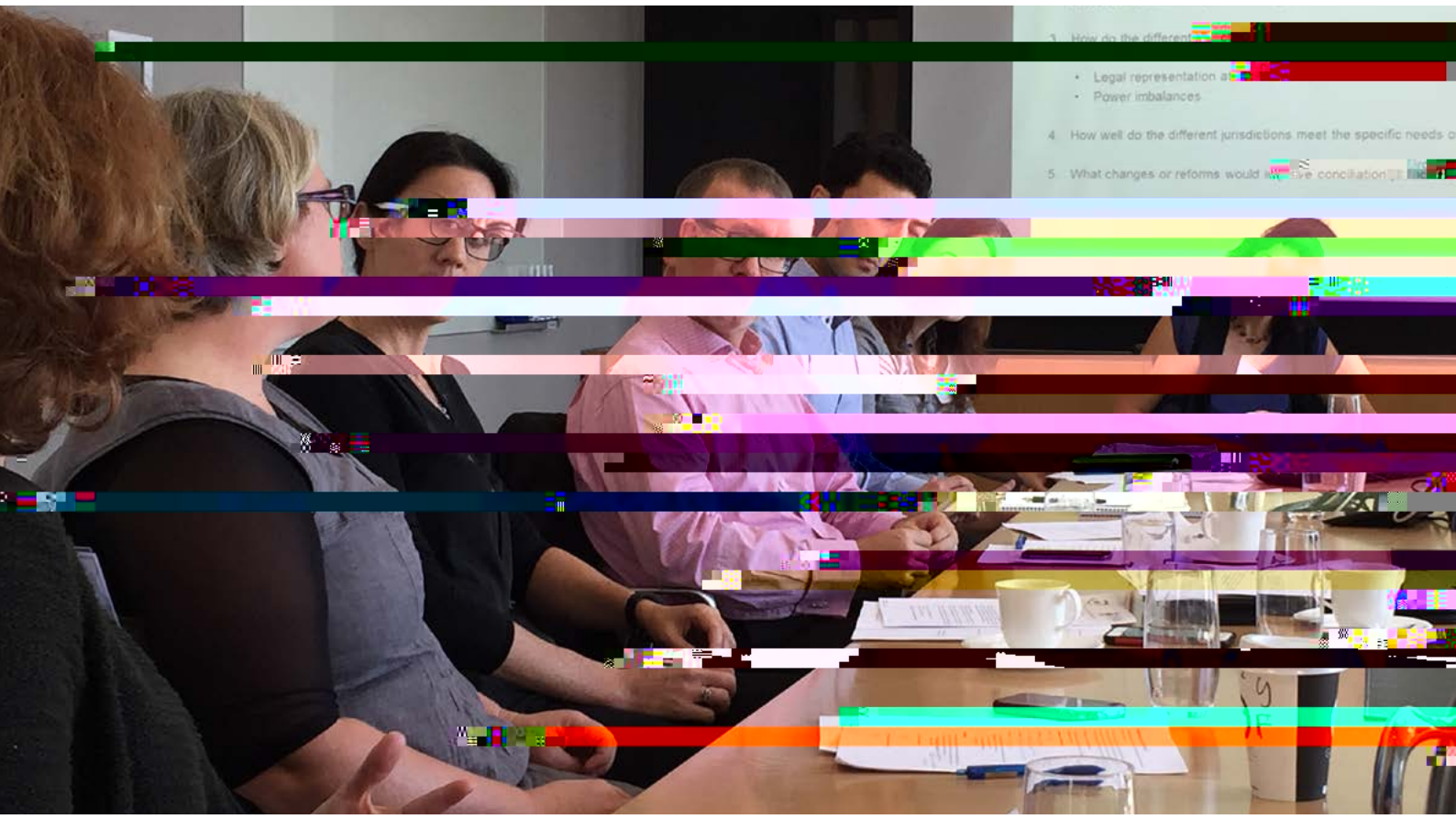
The second aim of the Report was to collect qualitative data from expert anti-discrimination legal practitioners on their perspectives on the conciliation process, through structured and semi-structured processes. The third aim was to develop conclusions and guidelines on best practice for vulnerable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

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

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

F c f Re8 rt

This Report focuses on the experiences of a particular group of applicants, rather than the



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

Surveys and roundtables

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

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

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

KLC casework analysis

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

The impact of conýdential settlements on **research**

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

1 See client survey at Appendix 1.

The D ɑ a′ C 8a t′ P ce

Table 1 – the discrimination complaint process

	How to make **a complaint**	**Cost of making a complaint**	**Time limits**	**Process for response**	**Conciliation conference format**	**Average length of** time between **lodging and** ýnalisation	**Next steps if complaint not resolved**
ADB	A complaint to the ADB must be lodged in writing. The complainant can either fill out their complaint form or write a letter to the President covering the information in the form and email, post or fax the letter to the board or hand deliver to the office.	No fee.	12 months	The ADB will acknowledge the complaint within 2 weeks of receiving it. If the complaint is accepted, they will then send a copy to the respondent and give them a deadline to respond by. Many complaints are resolved at this stage, but if not, the next stage is a conciliation conference.	Conciliation conferences are generally held face to face with the assistance py 3po7/72 nefacsis9 P6C( )]TJ01 -1.286y held		

Alternative Dispute Resolution and Australian Law

The Term

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

What is Conciliation?

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

- a process in which the participants, with the assistance of the conciliator, identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement.[3]

The process of conciliation involves the parties:

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

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

ADR Models

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

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

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

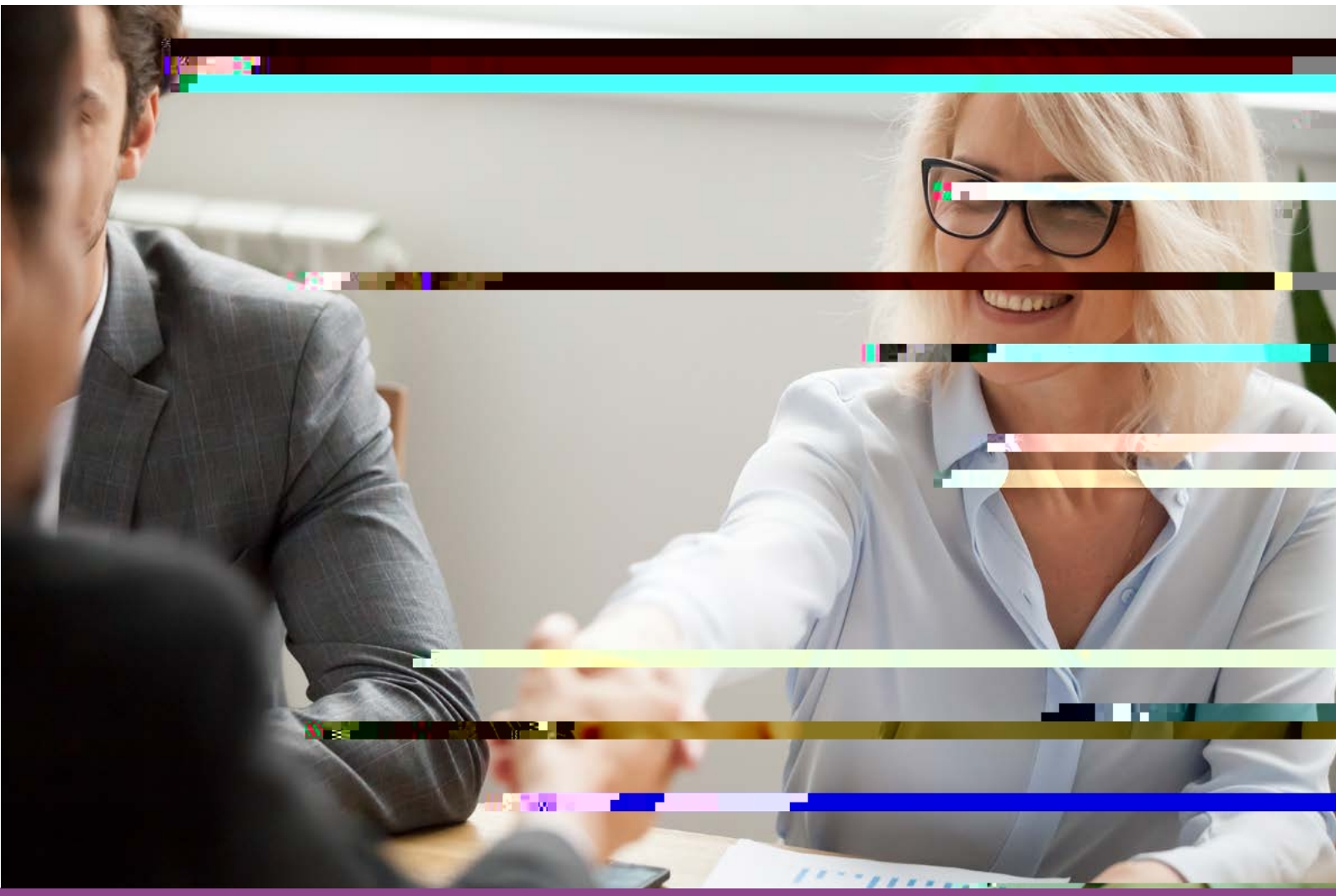
3 National Alternative Dispute Resolution Advisory Council, 'Dispute Resolution Terms' (September 2003) 5 <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Dispute%20Resolution%20Terms.PDF>.

4 Ibid 3.

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

The benefits of ADR

ADR provides avenues of redress for parties disputing matters that fall outside of the narrow 'legal notions of individualized harm and redress' that apply to the courts.[17]



P t e t a P b e t h ADR

How Did Clients Feel About the Process?

For many of the former clients surveyed, a significant amount of time (in some cases up to 18 months) had passed since the conciliation and the finalisation of their case. This gave us the opportunity to gain insight into how they

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

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

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

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

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

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

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

Clients' views on Power Imbalances in Conciliation

A client on power imbalances in conciliation:

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

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

Practitioners' views on Power Imbalances in Conciliation

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

28

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

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

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

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

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

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

> **Client 5:** *'But it was very degrading in the end. I just knew, you know, we*

not value conciliators who are passive and "sit on the fence"; they do clearly value open-mindedness, application to the problem, a fair hearing, courtesy and respect'.[35] Conciliators often affect the parties' experience of the conciliation process as well as their views on whether a conciliation was fair.

Clients' views on Conciliators

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

> **Client 2:** *'[The conciliator] was very open and he was very clearly unbiased to either party and was very, very good at communicating what was going on and what the next steps were.'*
>
> **Client 4:** *'[The conciliator] was…quite… empathetic…towards me…he was actually great. I don't think he could do anything better…. the conciliator supported me.'*
>
> **Client 11:** *'I can't say the conciliator did anything well to be honest.'*
>
> **Client 6:** *'They [the conciliator] were compassionate, very understanding. They were commendable.'*

Practitioners' views on Conciliation

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

> *'Despite occasional problems, [conciliation is] still a much better process for clients than a court or tribunal, and much more accessible.'*
>
> *'When conciliation processes work well, it can be a great way to settle disputes and avoid litigation, leaving the client feeling empowered.'*
>
> *'Conciliators have the capacity to encourage parties towards reasonable settlement outcomes and to appeal to interests, not positions.'*
>
> *'[Conciliation] provides an opportunity [for clients] to discuss and resolve their issues in a relatively quick, inexpensive and accessible forum.'*
>
> *'[Conciliation is] an opportunity to be creative in settlement solutions.'*

The Importance of Being 'Heard' in Conciliation for Vulnerable People

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

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

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

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

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

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

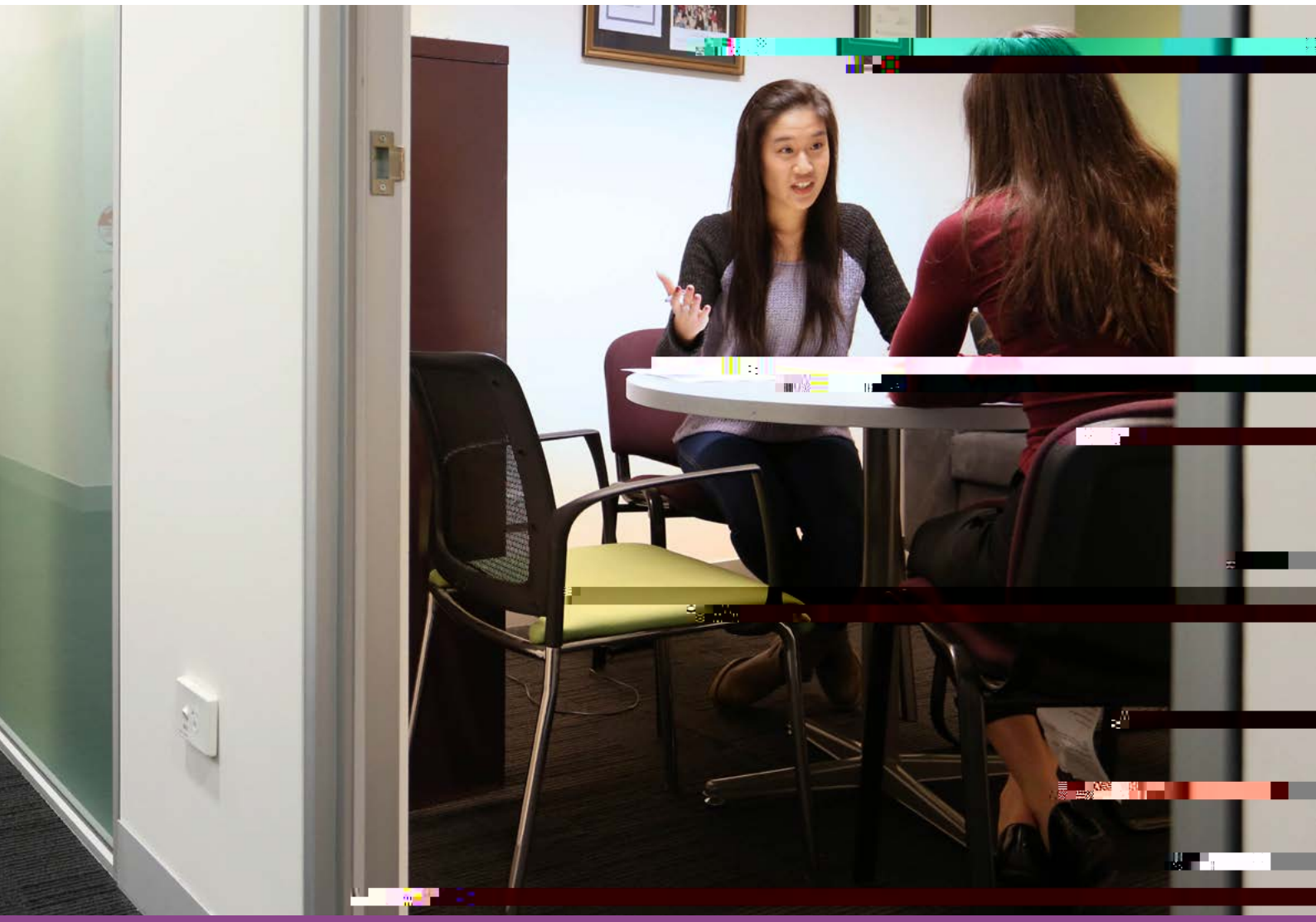
Restorative justice focuses on repairing the harm caused by the offending behaviour. Similar to ADR, this involves the parties collectively resolving the matter. While restorative justice has been most utilised in the criminal justice context, its theory and processes may be adapted to a range of contexts,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

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

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

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

> *'Clients find conciliation an empowering process because they are heard, especially considering they feel they never have a voice. Even if no outcome is achieved, or not the one they wanted, the process can make them feel better.'*
>
> *'Victims of sexual harassment really want a voice. They usually don't want to maintain employment, but like to be acknowledged. Even if their experience is acknowledged by the conciliator, not the respondent, it can be a powerful outcome for the client. Often they are not concerned with the compensation.'*
>
> *'Conciliation lets clients feel that they've had their say, there's huge value in having the applicant address the respondent face-to-face.'*
>
> *'I've found the AHRC is engaged, supportive and successful in terms of good outcomes. The engagement shows itself before you even get in the room. The conciliators are proactive to ensure parties respond to the complaint and provide requested documents. They know the law. They're happy to shuttle between rooms all day and encourage parties in a sensible way to move towards a reasonable resolution. We know they have their KPIs, but it seems they're more merit driven, there in good faith to resolve the matter.'*



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

Wh d Q e t Se l e?

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

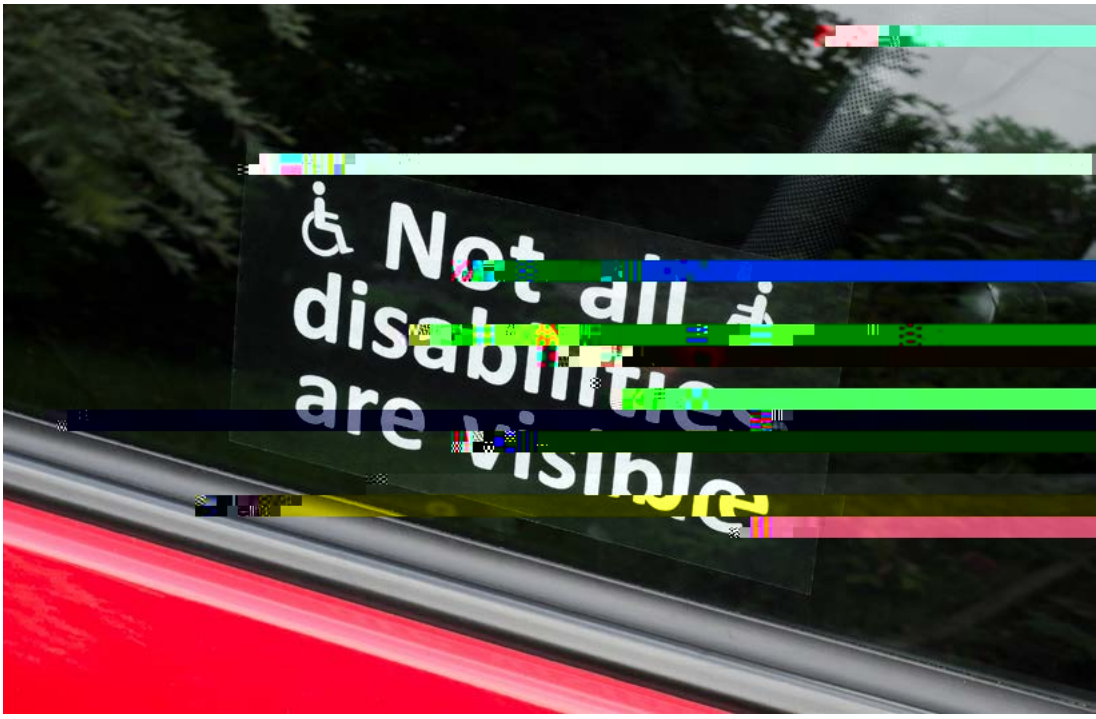
In rights disputes, with adjudication before a court of law or arbitration looming as the fnal solvent, it is the prospect of loss of control, a dictated decision and the not insignifcant matter of legal costs that gives mediation its extra edge.[38]

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

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

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

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



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

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

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

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

40 Raymond, above n 17, 4.

41 Gaze and Hunter, above n 28, 700.

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

Case Study

Yifei

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

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

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

1. Recommendations

KLC recommends that:

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

1.2 Conciliators should refrain from making pronouncements on issues of law as they do not 9.9 (le)-20.1 4cb.9 82 (te(l9.6 7 (v)37.1 6 (r 9.931.6 (.)]TJ/TT1 1 Tc -2.268 -1.783 Td31.2)Tj/Span<</A

> *when it is "too hard" to deal with or when they just need a deed.'*
>
> *'I find that the ADB refers matters to us very late – sometimes too late. The ADB only gets us involved at the tribunal stage, as if assistance is only needed then when it is really needed much earlier.'*
>
> *'If someone is unrepresented and lost, then they should be referred to someone – the ADB should take a more active role in this.*

2. Recommendation

KLC recommends that:

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

3.1 8 gC t'e c

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

> *'There's not much structure. They either starve or exhaust you into submission.'*
>
> *'For me it comes down to the skill of conciliators across jurisdictions. Some are better than others.'*
>
> *'We are happy to advise clients to take a matter to AHRC … it is the most reliable jurisdiction in terms of consistency and it allows parties time to fully discuss issues in more detail.'*
>
> *'I want greater consistency around requesting settlement proposals and written response[s]. I understand that the bodies may counter that flexibility is a core aspect of their offering to clients but there needs to be improvement in this area.'*

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

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

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

Some examples of inconsistencies include:

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

45 Justice D A Ipp, 'Reforms to the Adversarial Process in Civil Litigation – Part I' (1995) 69 *Alternative Law Journal* 705, 712.

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

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

3. Recommendation

KLC recommends that:

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

4. Flexibility

A complementary concern raised by practitioners is the perceived inflexibility of some conciliation processes in the ADB, AHRC and FWC. While a consistent approach is valuable for setting some baseline expectations and practices, flexibility also needs to be maintained. Practitioners identified procedural concerns including the number of conciliations, the scheduling of conciliations without confirming

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

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

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

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

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

Case Study | Alexandra

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

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

4. Recommendations

KLC recommends that:

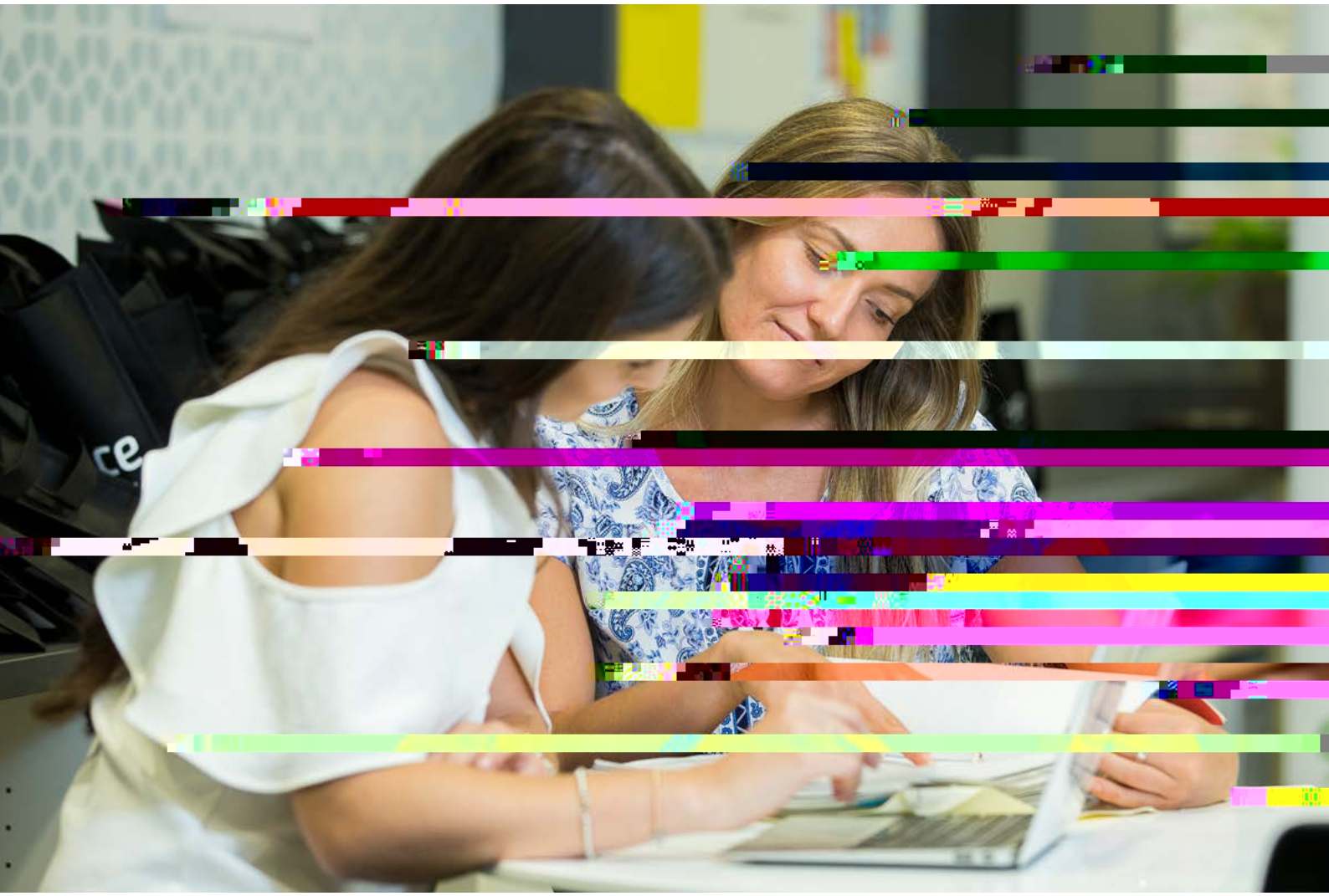
4.1 Conciliators should have the ability to schedule additional conciliations when it is clear parties could reach settlement in the structured environment that conciliation provides;

4.2 Conciliators should contact the parties and representatives prior to scheduling or listing a conciliation conference to confirm their availability; and

4.3 Conciliators should provide equal time to respondents and applicants to provide documentation, unless an extension is requested and granted by the conciliator for good cause.

5. Ad t e t

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



Case Study | Matthew

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

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

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

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

Case Study | Sam

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

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

> *'You need a reasonable amount of time to do things – sometimes in the FWC the speed can be really difficult for vulnerable clients. An example is there was a deaf client of mine who lodged at the FWC. When we went to*

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

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

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

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

KLC's view is that a rights-based conciliation

Legal practitioners on delays between

Case Study

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

7. Recommendations

KLC recommends that:

7.1 The ADB, AHRC and FWC make procedures and considerations for granting an expedited conciliation publicly available on their websites;

7.2 The NSW government should provide additional resourcing to the ADB to allow it to perform its functions and provide a quick conciliation conference process; and

7.3 The Federal government should provide additional resourcing to the AHRC and FWC to allow them to perform their functions and provide a quick conciliation process

8. Feedbac Mecha

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

> *'There's no one to complain to at the ADB and AHRC … they're headless.'*
>
> *'We feel like they hate us. There's no capacity for us to give them feedback. There's no mechanism for that to happen.'*
>
> *'We've all had extensive experience dealing with these problems – they'll keep recurring if we don't have some sort of forum for training or feedback. These bodies know us and should trust us; we're legitimate stakeholders, it would be great to actually sit down with them.'*

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

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

KLC believes that regular users of the three jurisdictions can offer valuable insights on what the bodies are doing well and what could be improved. Given that many applicants are appearing in these jurisdictions without legal representation, it is crucial to ensure that the quality of conciliation pro0.0ctrnlie

Case Study

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

8. Recommendations

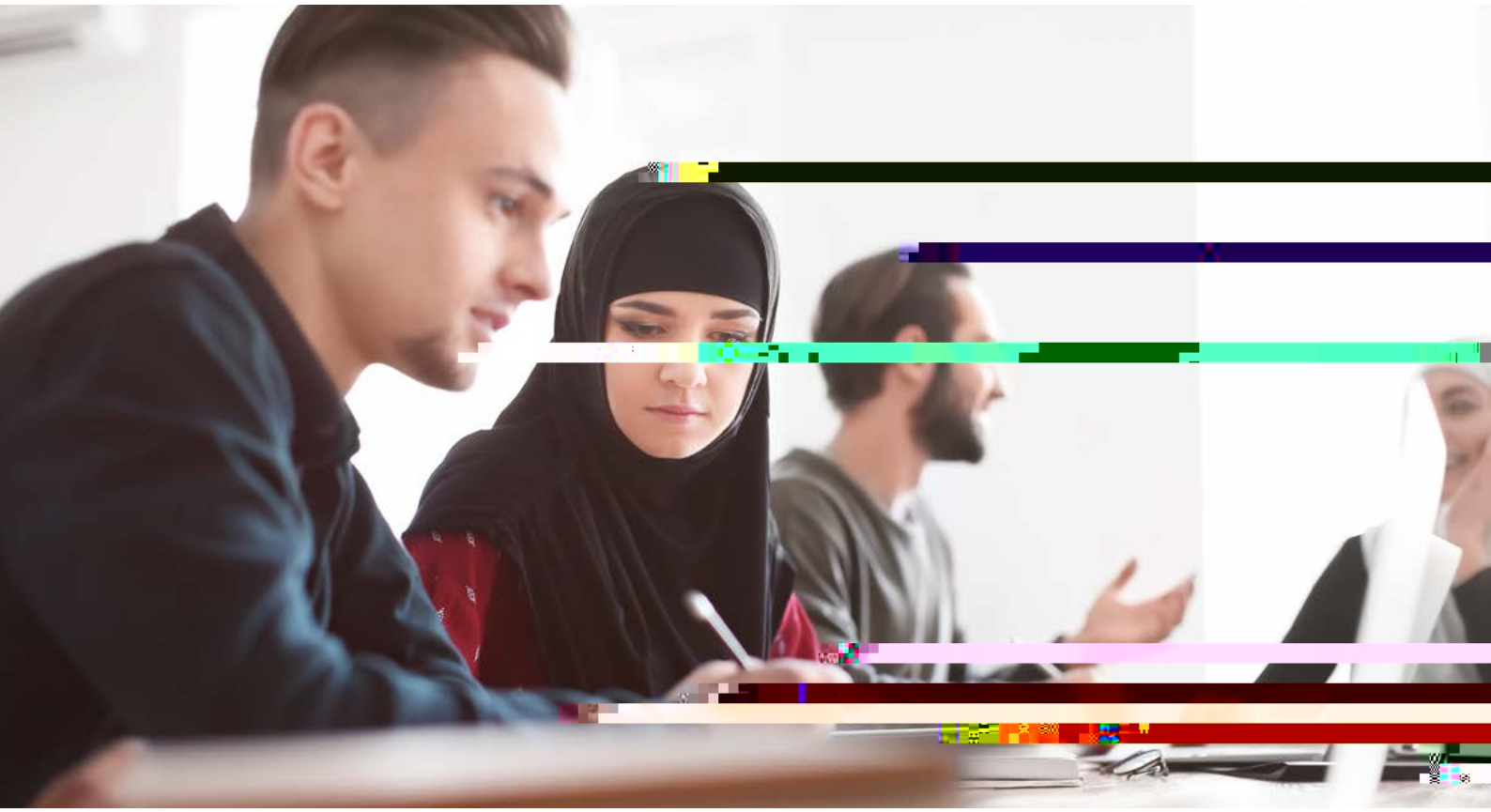
KLC recommends that:

8.1 The FWC and ADB should introduce feedback mechanisms such as the AHRC's 'Service Survey' to gather feedback on conciliation processes from parties and their representatives.

8.2 The ADB, FWC and AHRC should introduce 'user groups' for legal practitioners who frequently appear in their jurisdiction to actively seek feedback on conciliation processes.

9. Increasing Knowledge of Conciliation

Due to the confidential nature of conciliation, there is a dearth of publicly available information on the nature of complaints and conciliated outcomes. At the beginning of any conciliation it is standard for all parties to agree to the confidentiality of the process. If settlement is reached it is standard for any settlement agreement to contain a mutual confidentiality clause, prohibiting the parties from disclosing the settlement terms. The ADB, AHRC and FWC provide only limited data on complaints



10. ADB/AHRC/FWC Strategic Advantage

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

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

10. Recommendations

KLC recommends that:

10.1 The AHRC Discrimination Commissioners, ADB President and Fair Work Ombudsman should be given powers to investigate and initiate court proceedings in relation to discriminatory conduct that appears unlawful, without an individual complaint. The FWC President should refer matters to the FWO as appropriate.

10.2 The role and powers of AHRC Discrimination Commissioners, ADB President and Fair Work Ombudsman should be expanded to increase the role of these bodies in addressing systemic discrimination. These powers should include monitoring of duty holders, commencing complaints, intervening in matters, and reporting annually to Commonwealth Parliament/ State Parliament and the public on discrimination matters.

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

Discrimination law dispute resolution processes provide an important avenue for vulnerable applicants to feel heard and to address rights breaches. When conducted thoughtfully, and in line with

1. Gender

- £ £Male
- £ £Female
- £ £Not stated

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

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

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

- £ £Yes
- £ £No (Go to Question 7)

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

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

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

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

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

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

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

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

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

£ £Yes
£ £No

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

£ £Extremely satisfied
£ £Very satisfied
£ £Somewhat satisfied
£ £Neither satisfied nor dissatisfied
£ £Somewhat dissatisfied
£ £Very dissatisfied
£ £Extremely dissatisfied

The Conciliator

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

£ £Extremely satisfied
£ £Very satisfied
£ £Somewhat satisfied
£ £Neither satisfied nor dissatisfied
£ £Somewhat dissatisfied
£ £Very dissatisfied
£ £Extremely dissatisfied

Representation

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

£ £Yes

£ £No (Go to **Question 19**)

17.

Appendix 2
Legal Practitioner Survey

Conciliation project – external practitioners survey

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

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

Participation in this survey is completely voluntary.

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

Adjustments

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

£ £Yes *(please specify what type of adjustment)*

£ £No (please go to **Question 7**)

3. Were any adjustments requested?

£ £Yes

£ £No

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

£ £Yes

£ £No

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

£ £Extremely satisfied

£ £Very satisfied

£ £Somewhat satisfied

£ £Neither satisfied nor dissatisfied

£ £Somewhat dissatisfied

£ £Very dissatisfied

£ £Extremely dissatisfied

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

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

£ £Extremely satisfied

£ £Very satisfied

£ £Somewhat satisfied

£ £Neither satisfied nor dissatisfied

£ £Somewhat dissatisfied

£ £Very dissatisfied

£ £Extremely dissatisfied

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

£ £Extremely satisfied

£ £Very satisfied

£ £Somewhat satisfied

£ £Neither satisfied nor dissatisfied

£ £Somewhat dissatisfied

£ £Very dissatisfied

£ £Extremely dissatisfied

Examples:

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

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

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

Appendix 3
Legislative Framework

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

Table 1: Protected attributes

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

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

Table 2: Areas of public life

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

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