GIVING A VOICE TO AGE DISCRIMINATION COMPLAINANTS IN FEDERAL PROCEEDINGS

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No age discrimination complaint made pursuant to the *Age Discrimination Act* (Cth) has been successfully litigated since the legislation was first introduced in 2004. This article examines the dispute resolution procedure use to resolve age discrimination complaints in the federal system, with particular reference to alternative dispute resolution processes. It considers the outcomes of the complaints handling processes undertaken at the Australian Human Rights Commission and a selection of litigated outcomes, and the interrelationship of these processes. The article identifies potential impediments to age discrimination complainants having a voice in such processes, and explores ways of diminishing their impact.

I INTRODUCTION

Each year age discrimination complaints constitute roughly six to seven per cent of all complaints made to the Australian Human Rights Commission ('AHRC'), with employment-based complaints comprising, on average, over 60 per cent of total complaints. Formal complaints, however, offer only a limited view of the extent to which discrimination on the basis of age is experienced by individuals. The 2015 *National Prevalence Survey of Age Discrimination in the Workplace* reported that over one quarter (27 per cent) of Australians aged 50 years and over had experienced some form of age discrimination in the workplace.[1] Of those who

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[1] Australian Human Rights Commission, 'National Prevalence Survey of Age Discrimination in the Workplace: The Prevalence, Nature and Impact of Workplace Age Discrimination Amongst the Australian Population Aged 50

reported experiencing age discrimination, 43 per cent did not take any action and of those who did take action, only five per cent discussed the issue with an external organisation.[2] A similar trend in prevalence and under-reporting is confirmed in the AHRC's *Willing to Work* report.[3]

In the case of federal age discrimination complaints made pursuant to the *Age Discrimination Act 2004* (Cth) ('*AD Act*'), very few claims progress beyond the alternative dispute resolution ('ADR') phase to litigation. In relation to claims of age discrimination that have proceeded to a hearing, none has been successful since the legislation was first introduced in 2004. One response is to see this as a product of the shortcomings of the substantive law in this area. This article takes a different approach by looking instead at the dispute resolution framework that applies to such claims and considering whether age discrimination complainants can be regarded as having a 'just' avenue for seeking redress available to them, with particular reference to the notions of voice and the treatment they receive in the dispute resolution process.

Voice and the opportunity to be heard are not only evidenced by a successful outcome. It has been established that complainants who believe they have been treated fairly in a dispute resolution process are more likely to regard the process and the institution that oversaw it as legitimate, which in turn promotes compliance with the outcome, even if the outcome is not personally favourable.[4] These effects have been found in both court proceedings and non-adjudicative settings such as mediation.[5] Moreover, rates of

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Years and Older' (Research Report, April 2015) 19.

2 Ibid 67.

3 Australian Human Rights Commission, *Willing to Work: National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability*, Report (2016).

4 Nancy A Welsh, 'Disputants' Decision Control in Court-Connected Mediation' (2002) 1 *Journal of Dispute Resolution* 179, 184–185.

5 Rebecca Hollander-Blumoff and Tom R Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution' (2011)

resolution do not necessarily reflect satisfaction with the dispute resolution process or with the settlement outcomes themselves. Rather, they may be a consequence of the limited options and resources available to individual complainants or the difficulties with establishing that discrimination occurred as the concept is defined in the particular legislative scheme. In this context, the notion of voice is used to convey the sense of a genuine opportunity to participate. Such participation facilitates a dialogue that may have an impact on the outcome, but its value is not dependant on a favourable outcome. It is valued in its own right because of the opportunity it presents for meaningful interaction with the relevant authorities responsible for the process.[6]

Given the limited information that is available about conciliated outcomes and the very small sample of decided cases, it is not possible to accurately assess whether complainants actually have a 'voice' in such proceedings. Ultimately this article seeks to identify factors that may be having an adverse impact on the opportunity offered to complainants to have a voice in the process, and to explore ways of diminishing the impact of such factors. These include the manner in which claims of age are perceived; the ability of non-adjudicative processes, such as conciliation, to hold respondents to account for their discriminatory practices; the reluctance of courts and tribunals to draw inferences of discriminatory conduct; and the inability of human rights agencies to support and assist complainants in pursuing complaints.

Part Two critiques the dispute resolution framework applicable to age discrimination complaints in the federal system and the limitations that arise from these arrangements. Part Three looks at the dispute resolution framework through the lens of a 'just' avenue for seeking redress and considers what this entails, particularly in the

1 *Journal of Dispute Resolution* 1, 4, 6–7.

6 Denise Meyerson 'The Moral Justification for the Right to Make Full Answer and Defence', (2015) 35 (2*) Oxford Journal of Legal Studies* 237, 256; Tom R Tyler and Steven L Blader 'The Group Engagement Mode" Procedural Justice, Social identity and Cooperative Behavior' (2003) 7 *Personality and Social Psychology Review* 349.

context of non-adjudicative processes. The outcomes of the complaints handling processes undertaken at the AHRC are considered in Part Four, and a selection of litigated cases is examined in Part Five. This case law discussion focuses on employment related complaints by older workers as the complaints statistics confirm that this is the most common type of complaint. These cases also offer insight into the approach of the courts in determining whether a claim is substantiated. Using this material, Part Six then identifies a range of factors that may operate as impediments to age discrimination complainants having a voice in such processes, suggests ways to minimise the impact of these factors, and considers how institutional support could be shaped to enhance this prospect. In addressing these points, this article focuses on the *Age Discrimination Act 2004* (Cth) as the national legislation applicable in all Australian jurisdictions. The distinct lack of success in pursuing claims under the federal legislative scheme warrants consideration of what factors, apart from the substantive law itself, may be contributing to this result. The article acknowledges that when the situation federally is compared to various state and territory legislative schemes and to employment claims pursued under the *Fair Work Act 2009* (Cth), success rates and contributing factors may differ.

II THE BINARY DISPUTE RESOLUTION FRAMEWORK

The prevailing model in most countries for the resolution of discrimination complaints is a combination of adjudicative and non-adjudicative procedures. The Australian system adopts a linear approach with ADR as the precursor to the adjudication of complaints in most federal, state and territory anti-discrimination jurisdictions except Victoria, where direct access to the tribunal is permitted.[7] The conciliation provided by the AHRC for federal anti-discrimination complaints operates as a mandatory filter to the

[7] See Julian Gardner, Equal Opportunity Review, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report* (State of Victoria, Department of Justice, 2008).

system, with the aim of providing a quick and cost-effective form of dispute resolution that is relatively informal and accessible to the parties.

Enforcement is the domain of the individual(s) subject to the alleged discriminatory treatment, who must initiate the process through a complaint and must shoulder the responsibility of pursing the claim and the risk of an adverse costs order should they be unsuccessful in litigating the claim. The capacity of most federal, state and territory human rights agencies is restricted to investigating the circumstances surrounding a complaint and seeking to resolve the complaint by conciliation. Few such agencies have the authority to initiate complaints on behalf of individuals or to provide legal advice or support.[8] In comparison to other Australian regulatory agencies, human rights agencies also have a limited array of enforcement mechanisms at their disposal, as their authority does not extend to functions such as auditing procedures, imposing sanctions such as infringement notices, or requiring enforceable undertakings.[9]

Blended dispute resolution models that use both adjudicative and non-adjudicative dispute resolution mechanisms are designed to give parties both 'their day in court and also the opportunity to engineer their own outcome'.[10] A combined conciliation-litigation model is an interdependent arrangement. It works most effectively where there is a genuine prospect of litigation in the event that non-adjudicative procedures fail to resolve the matter and where the parties are aware, or are made aware, of the likely outcome of litigation by reference to precedent cases.[11] There is much less

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8 But see *Equal Opportunity Act 1984* (SA) s 95C; *Equal Opportunity Act 1984* (WA) s 93A.

9 Therese MacDermott, 'The Role of Mandatory ADR and Agency Engagement in Resolving Employment Discrimination Complaints: An Australian Perspective' (2015) 31(1) *International Journal of Comparative Labour Law and Industrial Relations* 27.

10 Cady Simpson, 'Hearing-Med in Australian Super-Tribunals: Which Cases and What Process?' (2014) 23(4) *Journal of Judicial Administration* 220, 226–7.

11 Robert H Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88(5) *Yale Law Journal* 950.

incentive for genuine dialogue or attempts to satisfy the parties' underlying interests in the conciliate phase if the risk of further litigation is minimal or non-existent.[12] In the context of federal age discrimination complaints, potential litigants and their advisors cannot point to decided cases to persuade a respondent about how the legislative scheme is likely to be interpreted and the likely outcome if the allegations are substantiated. In addition, the lack of power on the part of Australian human rights agencies to strategically use litigation as part of their enforcement armoury weakens the overall dispute resolution process. These factors also impact on the approach respondents may adopt in the conciliation process. Respondents may feel emboldened not to resolve a complaint at the conciliation stage or propose minimal redress, based on their knowledge that, on their own, individual complainants are less likely to be able to fund any subsequent court proceedings or run the risk of an adverse cost order.[13]

The compulsion used to channel all complaints in the federal anti-discrimination jurisdiction through conciliation is a flaw in the process. Not all complainants' interests, or the interests of the broader community, are served by conciliation. While it may be advantageous to some complainants, its merits are not uniform. With at least 50 per cent of age discrimination complaints not resolved by conciliation, the funnelling of all complaints through this process is not necessarily an efficient or timely resolution mechanism. It is interesting to compare this model to the labour law dispute resolution framework in Australia, which historically used compulsion for the resolution of collective disputes. The Fair Work Commission ('FWC') now offers conciliation on a voluntary basis with respect to individual rights claims, such as unfair dismissal applications, although parties usually avail themselves of the opportunity and see value in the process.[14] While the AHRC submits

[12] Jean R Sternlight, 'Dispute Resolution and the Quest for Justice' (2007–08) 14 *Dispute Resolution Magazine* 12.

[13] See Attorney-General's Department, Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009) at 113.

[14] MacDermott, 'The Role of Mandatory ADR and Agency Engagement in Resolving Employment Discrimination Complaints', above n 9.

that it rarely resorts to compulsion,[15] the legislative framework does mandate that a complaint be terminated by the AHRC before legal proceedings can be initiated.[16] A factor in the voluntary uptake of the conciliation offered by the FWC may be the fact that it operates in a relatively timely manner, which is not necessarily replicated in the AHRC processes due to under-resourcing.[17]

In the context of the proposed consolidation of federal anti-discrimination laws, the AHRC expressed concerns about acquiring additional enforcement functions, on the basis that this could be seen as limiting its impartiality in seeking to resolve complaints by ADR.[18] Moreover the AHRC saw its role as best served through the provision of ADR, which it regarded as unsuitable for outsourcing to an external provider.[19] Most modern regulatory agencies (such as those operating in corporate or work health and safety compliance) have regulatory powers that seek to facilitate resolution through varying pathways using different dispute resolution and enforcement functions.[20] These pathways are made available by such institutions in a manner that does not compromise impartiality or generate the perception that the differing functions are in conflict.

Furthermore, there is the additional consideration of the extent to which the process set out above respects the parties' control over their disputes. Historically, ADR is steeped in the traditions of

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15 Australian Human Rights Commission, Submission No 13 to the Parliamentary Joint Committee on Human Rights, *Freedom of Speech in Australia: Inquiry into the Operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and Related Procedures under the Australian Human Rights Commission Act 1986 (Cth)*, 9 December 2016, [241].

16 *Australian Human Rights Commission Act 1986* (Cth) s 46PO.

17 Australian Human Rights Commission, *Annual Report 2015–2016* (Report, 11 October 2016) 30.

18 Australian Human Rights Commission, Submission to the Attorney-General's Department (Cth), *Consolidation of Commonwealth Anti-Discrimination Laws*, 6 December 2011, 58 [261].

19 Ibid 60 [271].

20 Dominque Allen, 'Wielding the big stick: Lessons for enforcing anti-discrimination law from the Fair Work Ombudsman' (2015) 21(1) *Australian Journal of Human Rights*, 119.

empowerment and autonomy through voluntary participation in its processes. Control is clearly absent where the use of ADR is a mandated step that is imposed by the statutory framework, although in theory, control is still retained over whether settlement occurs. Yet even control over whether to settle may be challenged, where the resources and other circumstances of one or both of the parties make the use of ADR one of the few viable options for resolving the dispute.[21] ADR providers suggest that when parties are forced to undertake a form of ADR as the first step in managing their dispute they often come to realise the opportunity they have to resolve the matter by agreement. But discrimination claims are not all suited to this type of private resolution. Discrimination claims can involve distinct and difficult questions of law, or conduct that warrants public condemnation — factors that could be identified at the outset as making a claim better suited to a determination, and fast-tracked to litigation.

Different views have been presented over who should select the appropriate process, with some arguing that a human rights agency is best placed to make this selection, based on the range of interests at stake. In a system that is entirely dependent on the lodging of complaints by individuals, it is complainants who should be empowered to select a forum in which to voice their concerns that best serves their interests. Complainants should not be compelled to exhaust their time, resources and emotional energy on a process that they do not see as having value in resolving their dispute, particularly where understaffing of agencies can make this a very drawn out process. However, this decision–making on the part of complainants needs to be informed by appropriate advice and support, either from the agency itself or provided in some other form, and the resourcing of any ligation strategy addressed.

[21] Rachael Field, 'Using the Feminist Critique of Mediation to Explore "The Good, the Bad and the Ugly": Implications for Women of the Introduction of Mandatory Family Dispute Resolution in Australia' (2006) 20 *Australian Journal of Family Law* 45; 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.

Overall, a binary dispute resolution model where ADR is the precursor to litigation can work well in some circumstances, but it does not operate optimally where successfully litigated outcomes are absent, as is the case for federal age discrimination complaints. Moreover, it does not enable complainants to have direct access to a court or tribunal if they see this as the best avenue for seeking redress and voicing their concerns. The imposition of a single system for the resolution of discrimination complaints has been described as 'inevitably leave[ing] some sets of interests ill-served'.[22] The next section examines the dispute resolution framework from the perspective of identifying factors that are relevant to whether complainants can be regarded as having a 'just' avenue for seeking redress available to them, particularly in the case of non-adjudicative processes.

III WHEN IS AN AVENUE FOR SEEKING REDRESS JUST?

In the case of adjudicative processes, the 'justness' of the procedures is determined through the application of the principles of procedural justice and its two core requirements; the hearing rule and the bias rule.[23] Hence where claims under the *AD Act* are litigated, the justice of the processes utilised are evaluated in that way. But given so few complaints of age discrimination proceed to litigation, the traditional markers of procedural justice are not the core considerations. This section focusses on what a just avenue for seeking redress might look like with respect to a federal age discrimination complaint in the context of ADR procedures.

[22] Jean R Sternlight, 'In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis' (2004) 78(5) *Tulane Law Review* 1401, 1490.

[23] Matthew Groves, 'The Evolution and Entrenchment of Natural Justice' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 206.

There is some support for the argument that the principles of procedural justice are not confined to adjudicative processes. In its recent submission to the federal Parliamentary Joint Committee on Human Rights' inquiry into freedom of speech in Australia,[24] the AHRC confirmed that it is required to afford procedural justice to both complainants and respondents in its complaint handling processes. This accords with the position adopted by the courts where they have been required to determine whether a particular ADR procedure must afford procedural fairness to the parties. This has occurred in the context of a statutory requirement to conciliate before the matter can proceed, where the issuing of a certificate at the end of the conciliation is regarded as a decision with the potential to affect the legal interests of the parties.[25] In a similar vein, the Federal Circuit Court of Australia recently found with respect to a certificate requirement in seeking to resolve a general protections claim under the *Fair Work Act 2009* (Cth) ('*FW Act*'), that the FWC was bound to afford the parties procedural fairness.[26] These types of certification processes are a common feature of dispute resolution processes for resolving discrimination complaints. However, even if it is accepted that procedural justice principle do apply to non-adjudicative processes, these examples do not resolve the question of what form procedural justice should take in this context.

In the context of adjudicative processes, the hearing rule and the bias rule are the indicia of procedural justice.[27] With respect to the bias rule, this criterion is transferable between adjudicative and non-adjudicative processes. However, it is necessary to look beyond the confines of the 'hearing rule' to accommodate the non-adjudicative nature of ADR procedures that are a mandatory first step in resolving age discrimination complaints. The traditional approach to assessing this is to ask whether a person is made aware of the allegations against them, is given access to material that forms the

[24] Australian Human Rights Commission, *Freedom of Speech in Australia*, above n 15, [226].
[25] *Koppen v Commissioner of Community Relations* [1986] FCA 174.
[26] *Bognar v Skilled Offshore Pty Ltd* [2016] FCCA 2962.
[27] Matthew Groves, above n 23.

basis of the allegations, and has an opportunity to make submissions or representations with respect to the allegations.[28] However, in the broader social science context, procedural justice is articulated in terms of how individuals experience particular procedures. A large body of empirical research conducted over a number of decades in social psychology has established that procedures that are experienced as just are central to how people evaluate the legitimacy of legal authorities.[29] This includes not only adjudicative procedures but non-adjudicative procedures as well.[30] These studies have consistently shown that in assessing the fairness of processes claimants set great store by relational factors that support a sense of self-respect.[31]

The elements that are considered important to individuals in terms of whether they regard their treatment as fair in both adjudicative and non-adjudicative dispute resolution settings are the opportunity to tell one's own story (voice), the neutrality of the decision-maker, trustworthiness and dignified treatment.[32] Hence, this article contends that an understanding of what makes an avenue for seeking redress just should have regard to these relational considerations. Factors such as voice are pertinent to ADR procedures, which seek to depart from the formality of adjudicative procedures and provide a forum for the parties to engage in a dialogue to resolve their disputes. The nature of the personal treatment parties receive has been identified as a key factor in how individuals respond to their

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28 Australian Human Rights Commission, *Freedom of Speech in Australia*, above n 15, [229].

29 E Allan Lind and Tom R Tyler, *The Social Psychology of Procedural Justice* (Plenum Press, 1988).

30 Hollander-Blumoff and Tyler, 'Procedural Justice and the Rule of Law', above n 5, 2; Rebecca Hollander-Blumoff and Tom R Tyler, 'Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential' (2008) 33(2) *Law and Social Inquiry* 473.

31 Tom R Tyler and E Allan Lind, 'A Relational Model of Authority in Groups' (1992) 25 *Advances in Experimental Social Psychology* 115, 140-141; Tom R Tyler and Steven L Blader, *Cooperation in Groups: Procedural Justice, Social Identity, and Behavioral Engagement* (Psychology Press, 2000) 171.

32 Hollander-Blumoff and Tyler, 'Procedural Justice and the Rule of Law', above n 5, 5–6; Welsh, above n 4, 180.

dealings with legal authorities.[33] The social psychology research also confirms that individuals are looking for signs that the authority that they interact with is 'benevolent and caring',[34] which can be conveyed by such an authority listening to their story and providing explanations 'in ways that show an awareness of and sensitivity to people's needs and concerns'.[35]

The following sections of this article examine the available data on the resolution of federal age discrimination complaints in Australia, in order to gauge whether factors such as voice and being treated with respect are reflected in the dispute resolution processes for resolving age discrimination complaints. The limited information about conciliated outcomes and the very small sample of decided cases cannot form the basis for broad conclusions on the operation of the system as a whole,[36] but they can serve to highlight some of the problems faced by age discrimination complainants in having a voice and being 'heard' in such processes.

IV WHAT HAPPENS TO FEDERAL AGE DISCRIMINATION COMPLAINTS?

The AHRC has stated that claims made pursuant to the *AD Act* have a high rate of resolution through conciliation and that they compare favourably to the rates of resolution of complaints made under other

[33] Lind and Tyler, above n 29; Tom R Tyler and Jonathan Jackson, 'Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement' (2014) 20(1) *Psychology, Public Policy, and Law* 78, 82.

[34] Tom R Tyler, 'Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority' (2007) 56 *DePaul Law Review* 661, 664, 670.

[35] Tyler and Jackson, above n 33.

[36] See Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' (2002) 26 *Melbourne University Law Review* 325, 328; Margaret Thornton and Trish Luker, 'Age Discrimination in Turbulent Times' (2010) 19(2) *Griffith Law Review* 141, 144.

federal anti-discrimination legislation.[37] However the data shows that the rate of resolution through conciliation for age discrimination complaints is marginally lower than for federal complaints generally. An earlier study which looked at five years of complaint statistics relating to federal age discrimination complaints[38] showed that the percentage of complaints resolved by conciliation over the period was relative stable (between 44 and 47 per cent), and that this was slightly lower than the rate for federal complaints generally. Table One and Two (below) build on this earlier work. The first summarises the outcomes of finalised complaints under the *AD Act* between 2011 and 2016; the second is a summary of the outcomes for all complaints made under federal anti-discrimination legislation over the same period.

Table 1: Outcomes of Finalised Complaints AD Act

Outcome	**2011–12**	**2012–13**	**2013–14**	**2014–15**	**2015–16**
Terminated (total)	56 (27%)	39 (38%)	34 (20%)	35 (24%)	28 (17%)
— no reasonable prospect of conciliation	45 (21%)	24 (13%)	26 (15%)	28 (19%)	20 (12%)
Conciliated	102 (46%)	78 (44%)	75 (47%)	65(45%)	81 (50%)
Withdrawn	41	45	34	31	28
Discontinued	12	10	23	14	21
Total	218	178	168	146	161

[37] Human Rights and Equal Opportunity Commission, Submission No 92 to the House of Representatives Standing Committee on Legal and Constitutional Affairs, *Inquiry into Older People and the Law*, 15 December 2006, [6.18].

[38] Therese MacDermott, 'Resolving Federal Age Discrimination Complaints: Where Have All the Complaints Gone?' (2013) 24 *Australian Dispute Resolution Journal* 102, 104.

Table 2: Outcomes of Finalised Complaints Over the Past Five Years[39]

Outcome	**2011–12**	**2012–13**	**2013–14**	**2014–15**	**2015–16**
Terminated/declined	31%	33%	23%	23%	19%
Conciliated	48%	45%	49%	51%	52%
Withdrawn	12%	13%	16%	16%	17%
Discontinued	8%	9%	9%	9%	9%
Referred for reporting (AHRCA only)	1%	-	3%	1%	3%

Overall, only 50 per cent or less of age discrimination complaints are conciliated in any year. The percentage settled through conciliation is relatively stable, but it remains consistently lower than the percentage of all complaints conciliated in each of the reporting years between 2011 and 2016. This continues the trend shown in the earlier study. Therefore, complaints under the *AD Act* do not have any higher rate of resolution by conciliation than complaints more generally under federal anti-discrimination law. If anything, their resolution has consistently been lower over the timeframe of the two sets of data.

It is also worth examining separately the complaints that are terminated on the basis that there was no reasonable prospect of the complaint being resolved by conciliation, a subset of the broader category of claims terminated. This percentage shows how many complainants were not able to negotiate an agreed outcome and therefore did not secured redress out of the conciliation process. Over the last five-year period, this group represents between 12 and 21 per cent of all complaints. It includes the very small percentage of complainants who might have gone on to instigate litigation, as well as those who chose not to pursue the matter any further. Given no litigated cases were successful over the same period, members of this group were not able to secure any form of redress whatsoever. Factors that may have an impact on the decision not to

[39] Table compiled from Australian Human Rights Commission Annual Report data (see, eg, Australian Human Rights Commission, *Annual Report 2015–2016*, above n 17).

litigate include difficulties in proving the nexus between a person's age and the discriminatory treatment and in challenging the systemic nature of age discrimination, as well as the risk of an adverse costs order in pursuing an age discrimination complaint. The lack of success in any litigated complaints under the *AD Act* must also weigh heavily on those contemplating whether to pursue a complaint further.

A new regime for the termination of federal anti-discrimination complaints was introduced in 2017, to allow for discretionary and mandatory terminations, with no reasonable prospect of the complaint being resolved by conciliation now in the mandatory category.[40] The mandatory aspect may influence the timing of when a complaint is terminated, but as this category already existed under the previous scheme, it appears unlikely that it will impact significantly on the percentage of complaints terminated on the basis that there was no reasonable prospect of the complaint being resolved by conciliation. However as new statistics on complaints are compiled going forward, the situation should become clearer.

Finally, it is worth noting that over the period between 2007 and 2016 no single complaint of age discrimination is recorded in the AHRC's annual reports as having been terminated on the basis that the subject matter was of public importance,[41] and hence would be better suited to being litigated in a public forum, rather than privately resolved through conciliation. It could simply be that the types of matters that have been the subject of complaints just do not

[40] The discretionary category includes where it is not unlawful; more than six months old; an inquiry into the complaint is not warranted; adequately dealt with already; more appropriate remedies available; better dealt with by another statutory authority; and subject matter of public importance: *Australian Human Rights Commission Act 1986* (Cth) s 46PH. Mandatory termination now applies to complaints that are trivial, vexatious, misconceived or lacking in substance; where there is no reasonable prospect of the matter being settled by conciliation; or the President is satisfied that there would be no reasonable prospect that the Federal Court or the Federal Circuit Court would be satisfied that the alleged acts, omissions or practices are unlawful discrimination (see *Human Rights Legislation Amendment Act 2017 (No 3) 2017* sch 2).

[41] *Australian Human Rights Commission Act 1986* (Cth) s 49PH(h).

have that aspect of public importance about them. Even if we accept that explanation at face value, it does confirm that solely relying on individuals coming forward with complaints is inadequate, and that the AHRC needs the power to initiate complaints itself, particularly where it becomes aware of systemic practices of a discriminatory nature. Another explanation is that the public importance of such complaints is not being identified and that the opportunity to fast-track these matters to litigation is being missed because the focus of the ADR processes is on the individualised nature of the complaint. A final explanation is that there may be little point in identifying a matter as being of public importance and as warranting a litigation approach where mechanisms for funded test case litigation are lacking.

The confidential nature of conciliation makes it difficult to draw conclusions about how individuals may have experienced the process. The AHRC's own survey data reports high levels of satisfaction with the process.[42] Conciliation can offer a relatively informal, accessible and cost-effective method of dispute resolution for some complaints, for example where it might resolve a misunderstanding or clarify an entitlement. It can also offer confidentiality to a complainant who is concerned about airing their complaint in a public forum and the consequences that can follow. But not all discrimination cases involve a simple misunderstanding or misinterpretation, and there are complaints where the nature of the dispute warrants adjudication. There are persistent concerns that in some circumstances complainants have no option but to settle for whatever they can obtain through the conciliation process,[43] and that this is exacerbated by the disparity in access to advice and representation between complainants and respondents. The mandatory nature of conciliation can mean that some complainants exhaust the time and resources they have on this process, and pursuing the matter further is simply not an option.

[42] Australian Human Rights Commission, *Annual Report 2016–2017* (Report, September 2017) 34.

[43] Starting with Margaret Thornton 'Equivocations of Conciliation: The resolution of Discrimination Complaints in Australia' 52 (1989) *Modern Law Review* 733, 760.

There have been a limited number of studies conducted on how participants view their experience of mediation in the Australian court context.[44] As conciliation is a procedure that is structured in a very similar manner to mediation, these findings can shed some light on how age discrimination complainants might experience the conciliation process. These studies have raised concerns about the extent of participation by claimants in the process and the pressure to settle they experience. The utilisation of conciliation as *an* aspect of the dispute resolution framework is not in dispute. What is open to debate is whether its mandatory nature limits the capacity for some complainants to pursue their complaints, whether it becomes the only viable option open to a complainant in some circumstances, and that direct access to a tribunal should be available to complainants who see this as their best option for seeking redress.

V LITIGATED CASES

Case law plays an important part in a dispute resolution process that combines adjudicative and non-adjudicative procedures, as it provides the shadow of the law and defines the parameters within which parties may seek to resolve their disputes through ADR. Litigated outcomes also serve a broader public function in identifying the type of conduct that can form the basis for an alleged breach of the *AD Act*, and the appropriate outcomes for resolving such complaints. In the period between 2011 and 2016, around ten matters alleging discrimination under the *AD Act* reached a final determination in the court system.[45] Some of these only raised preliminary points or involved exemptions based on direct

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44 Tania Sourdin and Tania Matruglio, 'Evaluating Mediation – New South Wales Settlement Scheme 2002' (Mediation Paper No 7, La Trobe University and University of Western Sydney, 2004). Tania Sourdin, 'Mediation in the Supreme and County Courts of Victoria' (Victorian Department of Justice Report, Australian Centre for Justice Innovation, 2009).

45 Final number depends on whether all matters that may involve a consideration of compliance with the *AD Act*, but the claim itself does not arise under the *AD Act*, are included.

compliance with another statutory regime,[46] such as social security or tax laws.[47] Because of the expansive nature of the statutory exemptions embedded into the *AD Act*, the cases predominantly involve questions about individual treatment, rather than broader systemic issues. A number of the reported cases are summary dismissal applications. These are particularly problematic from a 'voice' perspective, as they are based on an argument that a full hearing is not warranted because there is no reasonable prospect of establishing that age discrimination has occurred. A very small number of cases involved intersectional claims, with the dual claims of disability and age discrimination being the most common. Very few cases were brought by women. Some matters have been pursued under the alternative regime offered by the *FW Act*, with one of the few successful outcomes being a case of blatant discriminatory conduct where the employer communicated in writing that it did not employ any staff once they reached 65 years of age.[48]

In the discussion that follows, three cases have been selected as a way of looking at what happens to the story of the complainants in age discrimination cases and what this means for their ability to have a voice in the process and ultimately in their ability to seek redress. Three examples is a limited pool, but arises as a consequence of the scarcity of litigated complaints under the *AD Act* in the designated period, and the fact that many of the cases that are heard are resolved through the application of an exception rather than dealing with the substantive issues of whether the allegations of age discrimination were made out. In order to broaden the pool of cases, the following discussion includes a case brought under the provisions of the *FW Act* (which prohibits adverse action on the basis of age) as it raises similar concerns regarding how an allegation of age discrimination is dealt with by the courts. Of particular interest from these cases are comments made in the workplaces in question that could be seen as indicative of a prevailing sentiment in that workplace antagonistic to

[46] See, eg, *Harley v Commonwealth of Australia* [2011] FMCA 197.

[47] *McLeod and Secretary, Department of Social Services* [2016] AATA 853; *Harste and Commissioner of Taxation* [2013] AATA 544.

[48] *Fair Work Ombudsman v Theravanish Investments Pty Ltd* [2014] FCCA 1170.

older workers or reflecting ageist attitudes, and how these comments are reconciled in the courts' determinations.

An interesting example of how comments that could be construed as giving rise to an allegation of age-based discrimination are dealt with by the courts is demonstrated in the case of *Fernandez v University of Technology, Sydney.*[49] The applicant was employed by the University for over 20 years. In 2007 a complaint was lodged in respect of her conduct, and the outcome of the grievance procedure expressed disapproval for the applicant's conduct. At the conclusion of this procedure, the applicant was offered a pre-retirement fixed term contract and pursuant to this contract her employment was terminated in 2010. Four years later, the applicant lodged a complaint under the *AD Act*, after a conciliation process failed to resolve the dispute. While the case raised a number of jurisdictional issues, the pertinent aspect to this discussion is whether the age discrimination complaint had any prospect of success in terms of establishing that she was forced to give up her tenured position and enter into a pre-retirement contract because of her age. The alleged evidential link was the statement made by her supervisor that 'why don't you consider retiring; 20 years is a long time'.[50] In its determination, the court took a very literal view of this comment and highlighted the absence of any specific mention of her chronological age per se, as indicated in the following extract from the judgment:

> In my view, these facts, if accepted, would not establish that any reason for UTS' conduct was her age. First, her age is never mentioned. The fact that a person has worked in one workplace for 20 years does not give an accurate indication of their age. Secondly, *although a reference to retirement might give rise to some inference connected to a person's age*, the matter specifically mentioned by Professor Matolcsy was the length the [sic] applicant's employment. Thirdly, the applicant's case is that age must have been the dominant reason for UTS' conduct because she had been a model employee. However, it will be recalled that the context of the reported conversations was the grievance procedure undertaken in respect of the applicant's conduct towards a junior staff member. The outcome was disapproval of the applicant's conduct.[51]

[49] [2015] FCCA 3432
[50] Ibid [19].
[51] Ibid [39] (emphasis added).

While the applicant may have had difficulty in establishing her claim, to dismiss the matter summarily as occurred here, in the context of the comments referred to above having been made, suggests a limited view on what may constitute discriminatory conduct on the basis of age. At the very least, the nature of her supervisor's comments warranted further explanation and a consideration of the broader context. It was premature not to give the applicant the opportunity to explore the impact of these comments at a hearing, and to fully test the available evidence. This case also raises the question of what do references to a person's extensive length of service, made together with comments about the prospect of retirement, indicate if not a person's age? The case is reminiscent of a much earlier decision in a state anti-discrimination jurisdiction where a reference to a person being 64 years of age was merely a 'passing comment',[52] and questions regarding when he might retire or resign were found not to give rise to any inference that age was a factor in the treatment he received.[53]

The case of *Vink v LED Technologies Pty Ltd*[54] did not involve proceedings under the *AD Act*, but rather a claim that the employer took adverse action against the claimant under the *FW Act* in dismissing him because of his age (67 years). The applicant argued he had been told that the employer wanted a '"youthful and vibrant" work atmosphere'.[55] The dismissal was justified by the employer (Mr Ottobre) on the basis of performance issues. The decision at first instance accepted the employer's explanation, despite the employer's view about the performance issues being founded on incorrect factual information, and the failure to call as a witness the employee who could deny the conversation about the youthful atmosphere the employer allegedly wanted. The Court at first instance concluded:

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[52] *Mooney v Commissioner of Police, New South Wales Police Service (No 2)* [2003] NSWADT 107, [50].
[53] Ibid.
[54] [2012] FMCA 917
[55] Ibid [18], [32].

> In all of the circumstances of this case, I consider that it is probable that Mr Clerk did tell the applicant that Mr Ottobre wanted a vibrant and youthful culture. However, that is not to say that Mr Ottobre did want a vibrant and youthful culture or that that was his reason for dismissing the applicant. *It may be that Mr Clerk told the applicant that Mr Ottobre wanted a vibrant and youthful culture because he thought that would be less hurtful than telling the applicant that Mr Ottobre thought he was incompetent*. However, as Mr Clerk was not called to give evidence, that is speculative. Whatever Mr Clerk might have told the applicant, the court's enquiry must be into Mr Ottobre's reasons for dismissing the applicant.[56]

In this way the statement regarding the youthful atmosphere was dismissed, and no inference drawn from the failure to call Mr Clerk. The incorrect factual basis for the performance issues was also discounted, as reflected in the following statement: 'I also accept that Mr Ottobre believed, rightly or wrongly, when he made the decision to terminate the applicant's employment, that bills were going unpaid and payments were being incorrectly made'.[57]

While the respondent did not have the evidence to support his assertion, his version of events was accepted.

> It would have been preferable if the respondent had provided documentary evidence substantiating Mr Ottobre's concerns about the applicant's performance. The attempts to provide documentary evidence to substantiate the applicant's performance issues were unsuccessful. However, notwithstanding those deficiencies in the respondent's case, *I do find Mr Ottobre's unsubstantiated evidence persuasive*.[58]

On appeal the decision was upheld in the following terms:

> It is not to the point to argue that LED had been forced to disavow reliance on certain other evidence, that there was a dearth of corroborative documentary evidence supporting the allegation of incompetence or that there was evidence by Mr Vink that he performed his duties to an appropriate standard. These were claims which may well

[56] Ibid [35] (emphasis added).
[57] Ibid [18], [42].
[58] Ibid [45] (emphasis added).

> have weighed heavily in an unfair dismissal claim. Had such a claim been made the trier of fact may well have concluded that Mr Ottobre was mistaken in his assessment of Mr Vink's performance or that there was insufficient evidence before Mr Ottobre to justify him dismissing Mr Vink. In a case such as the present, however, where what was alleged was a contravention of s 351 of the FW Act, the focus was on the substantial and operative reasons which motivated Mr Ottobre to dismiss Mr Vink. Provided that those reasons did not include Mr Vink's age, it mattered not that they were based on a mistaken assessment or were not supported by the weight of the evidence.[59]

This approach to the casual nexus required in complaints pursued through the *FW Act* provisions is consistent with the view adopted by the High Court of Australia on whether adverse action has been taken *because* of a proscribed reason.[60]

Another relevant consideration is whether an inference should be drawn that age was the reason for particular treatment where there is no evidence directly indicating that age was a factor. In *Gardem v Etheridge Shire Council*[61] a complainant pursued a claim under the *AD Act* regarding the employer's failure to appoint him to an acting high duties position, which he claimed was because of his age. The applicant had on previous occasions being in dispute with his employer regarding various aspects of the council's management practices, and saw the failure to appoint him as an act of reprisal. In addition, he asserted that his age was at least one of the reasons that he was not given the appointment, and this inference could be drawn from the fact that the applicant was 64 years old at the time; the person appointed to the position was 47 years of age, but less qualified for the position; and that the employer had indicated in writing that it had a 'managerial prerogative to appoint a person for reasons that I consider to be in the long term interest and development of Etheredge Shire Council'.[62] The Court declined to draw an inference regarding the applicant's age as being a reason for

[59] *Vink v LED Technologies Pty Ltd* [2013] FCA 443, [45].
[60] See *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32.
[61] [2013] FFCA 1324
[62] Ibid [2], [37], [55], [67].

him not being appointed to the role. It concluded that the applicant had taken the statement regarding the long-term interests of the Council 'out of context'[63] and stated that:

> It was a reference to the long-term interests of Council in offering existing employees with a range of experience, skills and leadership qualities the opportunity to further develop and deploy those skills. It was not a reference to any requirement, or any newly formed policy of the Council or the CEO that younger employees were more attractive to the Council than older employees because they had a potentially longer period of service to offer the Council.[64]

A different aspect of the applicant's treatment in the workplace was pursued as a complaint under the *Disability Discrimination Act 1992* (Cth), but was also unsuccessful. In subsequent proceedings Mr Gardem was subject to an order to pay the respondent's costs, on the basis that there were no special circumstances to warrant departing from the usual rule that costs should follow the event.[65] A comparable examination of case law undertaken in Canada on age discrimination complaints in hiring attests to similar difficulties in convincing courts of the existence of age discrimination, with complaints rarely upheld.[66]

VI IDENTIFYING AND MINIMISING IMPEDIMENTS TO VOICE

A threshold question is whether the voice of age discrimination complainants is not heard because there is a 'level of social acceptance of ageist attitudes',[67] despite the existence of statutory regimes prohibiting age discrimination. Age discrimination has not captured the public consciousness in the same way as areas such as

63 Ibid [81].
64 Ibid.
65 *Gardem v Etheridge Shire Council [No 2]* [2014] FCCA 28, [23].
66 Pnina Alon-Shenker, 'Legal Barriers to Age Discrimination in Hiring Complaints' (2016) 39(1) *Dalhousie Law Journal* 289.
67 Thornton and Luker, above n 36, 143.

race and sex discrimination.[68] There is a certain ambivalence about the concept of age-based discrimination, and a 'greater uncertainty about its "wrongness" when compared to other grounds'.[69] The qualitative study commissioned by the AHRC in 2016 on employment discrimination against older Australians attested to common perceptions that older workers are more costly to a business due to the diminishing value of their skills and experience compared to the cost of employing them, and a perceived lack of the vitality and enthusiasm of youth.[70] Another prevalent sentiment is that mature age workers have had a 'fair innings' and should make way for younger workers. This has a particularly insidious impact on opportunities for older women, who often have not had the chance of an extended and uninterrupted career.

Where complainants have recounted their experience and attributed this treatment to their age, the cases discussed in the previous section show a reluctance on the part of the courts to accept that the conduct is linked to age, with alternative explanations for the comments proffered or observations made that the remarks were taken 'out of context'. The cases do raise concerns about the possibility of the unjust deflating of the credibility of complainants, and patterns of who is believed that may reflect stereotypes of non-dominant groups. This has been described in the literature as a form of epistemic injustice, referred to as 'testimonial injustice'.[71] Others argue that dominant group members may lack knowledge and understanding of the experience of marginalised groups,[72] or that the

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[68] Sol Encel, 'Age Discrimination in Law and in Practice' (2004) 3 *Elder Law Review* 1, 2–4.

[69] Ann Numhauser-Henning, Jenny Julén Votinius and Ania Zbyszewska, 'Equal Treatment and Age Discrimination — Inside and Outside Working Life' in Ann Numhauser-Henning (ed), *Elder Law: Evolving European Perspectives* (Edward Elgar Publishing, 2017) 151, 151.

[70] EY Sweeney, 'Willing to Work: Qualitative Study of Employment Discrimination Against Older Australians' (Research Paper No 25397, Australian Human Rights Commission, 6 April 2016), 15.

[71] Miranda Fricker, 'Epistemic Justice as a Condition of Political Freedom?' (2013) 190(7) *Synthese* 1317, 1318–9; see also Rachel McKinnon, 'Epistemic Injustice' (2016) 11(8) *Philosophy Compass* 437.

[72] See Gaze, above n 36; Rebecca Mason, 'Two Kinds of Unknowing' (2011) 26(2) *Hypatia* 294, 302–6.

voices of marginalised group members are simply not taken into account.[73] There has been some exploration of these practices in the context of proving racial discrimination claims in employment situations, examining how the 'innocent' explanations presented by employers in proceedings are often accepted by the courts so as to make the occurrence of discrimination appear improbable.[74] Without having the first-hand experience of the initial trier of fact it is not possible to reach any specific conclusion on this point, but it is legitimate to consider ways to enhance the likelihood that the testimony of those who claim to have been discriminated against on the basis of age are considered credible and given due consideration. This could also work to moderate the perception that courts and tribunals may be less sympathetic to such complaints, and give complainants more confidence that if they pursue their complaints beyond conciliation they will have a genuine opportunity to be heard.

Proving that the discriminatory treatment that is the subject of the complaint is causally connected to a prohibited attribute such as race or age is a heavy burden for complainants, and a consistently problematic aspect of Australian anti-discrimination regimes.[75] Allegations of age discrimination rarely arise in circumstances where there is direct evidence of discriminatory conduct, such as an explicit statement by an employer that a person is 'too old'. All that a person is likely to receive is a perfunctory explanation or no explanation at all, making the evidential burden almost impossible to overcome. Even in regimes where a type of 'reserve onus' applies, problems of proof do remain. For example, under the *FW Act* regime a genuine belief on the part of a decision maker about what caused them to act in a particular way, no matter how ill-informed, can

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[73] Kristie Dotson, 'Tracking Epistemic Violence, Tracking Practices of Silencing' (2011) 26(2) *Hypatia* 236.

[74] Jennifer Nielsen, '"There's Always an Easy Out": How "Innocence" and "Probability" Whitewash Race Discrimination' (2007) 3(1) *Australian Critical Race and Whiteness Studies Association Electronic Journal* 1 < http://www.acrawsa.org.au/files/ejournalfiles/68JenniferNielsen.pdf>. See also *Wotton v State of Queensland (No 5)* [2016] FCA 1457.

[75] See, eg, Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' (2009) 31(4) *Sydney Law Review* 579.

discharge the onus and prevent the causal link from being established.[76]

Courts and tribunals have been reluctant to draw inferences of discriminatory treatment, where there is no direct evidence on which to base the causal link. The standard approach in Australian case law is that '[a]n adverse inference should not be drawn that the conduct occurred on the basis of a prohibited characteristic unless there is sufficient evidence to *reject all innocent explanations* for that conduct.'[77] In addition, the fact that a respondent could have countered the suggested inference had she or he chosen to provide certain evidence, or call a particular witness, is taken into account as a circumstance in favour of drawing the inference.[78] The experience of discrimination from survey and interview data confirms that age operating as a barrier in employment is commonplace, and is reflected in prevailing negative perceptions of older workers. However, the propensity of courts to seek out more 'innocent' explanations and their reluctance to draw inferences from the surrounding circumstances, suggests an inability to conceive that age could present such a barrier. This brings into consideration whether complainants feel they have been afforded dignified treatment through the dispute resolution process, in terms of the signals they receive regarding whether they have been listened to and that the authority is aware of their needs and concerns.

If we look to the type of evidence that might convince a court or tribunal, it is likely to necessitate detailed information on an employer's practices in employing older workers, whether there is any pattern of rejecting the applications of older workers in the past, and the overall age composition of the workforce — a task often beyond the capacity of individual complainants. This knowledge is very much in the domain of the employer, making it difficult for an

[76] See Anna Chapman, Beth Gaze and Kathleen Love, 'The Reverse Onus of Proof Then and Now: The Barclay Case and the History of the Fair Work Act's Union Victimisation and Freedom of Association Provisions' (2014) 37(2) *University of New South Wales Law Journal* 471.

[77] *Phillip v State of New South Wales* [2011] FMCA 308, [119].

[78] *Jones v Dunkel* (1959) 101 CLR 298, 312.

individual complainant to hold an employer to account for the manner in which a particular workplace operates. It is particularly burdensome for those who allege the discrimination occurs in recruitment, where the complainant has no ongoing connection to that workplace.

What type of institutional arrangements could help to facilitate this type of information being made available? The inquiry stage of the complaint handling process undertaken by an agency should facilitate obtaining sufficient information to enable any conciliation to proceed in an informed manner regarding both the factual background and surrounding circumstances with respect to the alleged discrimination. It is important to achieve transparency about the broader context in which the discrimination is alleged to have occurred at the outset. Complainants need to be in a position to scrutinise the practices in question in the conciliation phase, as this may be their only viable opportunity to challenge a respondent. It should not be limited to explanations of why conduct was misinterpreted or comments 'taken out of context'. For example, where performance issues are proffered as an alternative explanation of actions taken, the factual matrix that supports this explanation should be provided and open to scrutiny. The premise that conciliation offers an equal playing field in which each party is able to voice their concerns and challenge discrimination practice is unfounded where the informational and contextual basis for parties to make informed decisions about what is alleged in the complaint are absent.

A more comprehensive focus on the disclosure of information and material relevant to the complaint at the conciliation stage does not need to jeopardise the impartiality of the process where it is instituted as a fact finding undertaking and not as a partisan pursuit of disputed facts. Impartiality could also be bolstered by allocating agency staff to such a function who will not be engaged in any facilitative role in the conciliation itself. An alternative scenario would be a legislative regime where employers are required publicly to disclose information relevant to the age composition of their workforce and actions taken to bring about improvements, in an

analogous form to what is required with respect to gender under the *Workplace Gender Equality Act 2012* (Cth). Regular auditing of employment practices with respect to age and the making available of such information publicly could also shed light on this area.

Studies in Australia and the United Kingdom attest to the fact that individual complainants often do not pursue claims further because they feel the need to be legally represented in such proceedings, which is not generally available to prospective complainants.[79] This problem could be ameliorated to a degree if the AHRC was given the capacity to support and/or fund individual complainants or to initiate proceedings in its own right where the circumstances warrant test case litigation. There have been calls for this to be implemented by various bodies for some time.[80] There are also other ways in which the role of the AHRC could facilitate the opportunity for complainants to be heard; for example, recognising early on that a matter is of public importance and should be diverted to a different pathway and supported. Ensuring that the first stage of the dispute resolution process proceeds in a timely manner would also mean that the time and resources of parties are not exhausted before a litigation process is even considered. Although recent procedural amendments directed at the timeliness of the complaints handling process and early notification of disputes seek to facilitate this,[81] it is primarily a problem of under resourcing that has gone unheeded for some time. There are a range of other long-standing procedural difficulties common to anti-discrimination complaints that also have an adverse impact,

[79] Beth Gaze and Rosemary Hunter, *Enforcing Human Rights in Australia: An Evaluation of the New Regime* (Themis Press, 2010); Nicole Busby and Morag McDermont, 'Workers, Marginalised Voices, and the Employment Tribunal System: Some Preliminary Findings' (2012) 41(2) *Industrial Law Journal* 166; Anna Pollert, 'The Unorganised Worker: The Decline in Collectivism and New Hurdles to Individual Employment Rights' (2005) 34(3) *Industrial Law Journal* 217.

[80] See, eg, Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2008); Productivity Commission, Commonwealth of Australia, *Review of the Disability Discrimination Act 1992*, Report No 30 (2004).

[81] *Human Rights Legislation Amendment Act (No 3) 2017*, sch 2.

including restrictive standing provisions, fragmentation of regulatory regimes, the applicable costs regime, and the complexity of instituting representative proceedings.

VII CONCLUSION

The existing framework for the resolution of discrimination complaints in Australia is structured to funnel all disputes through a mandatory conciliation mechanism, with litigation only being an option where conciliation does not resolve the matter. This article raises concerns that the rigidity of the framework and the singular pathway of individual complaints may be inhibiting the opportunity for parties to be heard. It uses the example of age discrimination complaints, where there has been no successfully litigated outcomes to date, to suggest that the available mechanisms for resolving such complaints do not appear to be operating in an optimal manner. This article argues that the lack of success in the litigation phase has a direct impact on the conciliation stage as the processes are interdependent. The article suggests that at the heart of the problem are four core deficiencies: first is the way claims of age are perceived and/or believed; secondly the absence of any capacity on the part of human rights agencies to facilitate litigated outcomes or pursue complaints on behalf of individuals; thirdly the reluctance of courts and tribunals to draw inferences of discriminatory conduct; and finally, the failure of ADR processes to hold respondents to account for their practices with respect to age and the attitudes that pervade their workplaces. These factors need to be addressed in order for age discrimination complainants to have a voice in federal anti-discrimination proceedings and a genuine opportunity to be heard.