

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S PORTFOLIO

Program: Australian Human Rights Commission

Question No. SBE16/039

Senator Fawcett asked the following question at the hearing on 18 October 2016:

Senator FAWCETT: Could I take you to your annual report for last year—page 136. I will give you the figures that are written there. I just want to extrapolate from those if I can. On page 136, it says the commission had 2,388 complaints in that year and that 24 per cent of those complaints related to the Racial Discrimination Act, which gives us roughly 574. If you then go to page 144, it gives some breakdowns specifically to the RDA about how many were conciliated and some other categories. Conciliated ones were 51.5 per cent, which is about 296. Then there is a category where it says no conciliation was possible, and that is about 144, based on the percentage table and the total numbers. I am aware this is for all sections of the act, but could you just explain to the committee: when it says no conciliation is possible, what does that actually mean in practice for both the claimant and the respondent?

Prof. Triggs: What it means is that efforts to conciliate the matter between the two parties have failed. We try various avenues and various mechanisms, but in the end it becomes necessary to say that the parties will not agree on a compromise or on a position and we can assist no further. On that basis, the matter is formally terminated, the parties are advised accordingly and they are then free to go to the Federal Court if they choose to. About two per cent of matters will ultimately go to the Federal Court because, overwhelmingly, most parties choose not to take the matter further even though they are not conciliated.

Senator FAWCETT: For those who do choose to take it further—I am assuming it would generally be the claimant as opposed to the respondent who may choose to take things further—do they have to pay their own court costs or are they supported by legal aid? Does the commission, in fact, ever provide any support?

Prof. Triggs: No. There are some statutory obligations to assist a complainant if they want to provide some written background to the case. I would have to check those provisions, but they are in the act. It is relatively minor. Basically, when it has not been possible to resolve the matter the parties are free to go to the Federal Court. If they fall within the guidelines on income, and also depending on the nature of the matter that is the cause of the issue, they would get legal aid. But most of course would not, and they would then have to pay their own legal costs to go to the Federal Court.

Senator FAWCETT: For those where there is conciliation that has occurred, what percentage of those cases would involve a payment from the respondent to the claimant?

Prof. Triggs: I would have to take that on notice. The payments can go from \$1,000, typically with an apology, very often with an agreement by the respondent, where appropriate, to achieve some sort of systemic change—typically, again, in an employment context—but others can be very, very significant payment agreements that are a compromise agreement between the two parties.

Senator FAWCETT: Regardless of the size of the payment, how many of the conciliated cases have a non-disclosure requirement placed upon the parties?

Prof. Triggs: That would be a matter of agreement for the parties. Typically, they would want something of that order in place and, as I say, fundamental to the process is confidentiality, in any event. But in some cases, relatively unusually, one of the parties will put the matter into the public arena. But usually, parties value their privacy and confidentiality and, indeed, that is why we have such a relatively high success rate of conciliation—because it is confidential and no

materials would be leaked or made available in relation to it.

Senator FAWCETT: That does not quite answer my question. I accept the fact that it may be at the will of one or both of the parties. My question is: how many of the—in this case—296 that were conciliated, in that last year, would have some kind of confidentiality clause around them?

Prof. Triggs: I will have to take that precise question on notice. A very high number of them would.

Senator FAWCETT: Sure.

The answer to the honourable senator's question is as follows:

In the 2014-2015 reporting year referred to by Senator Fawcett, the Commission received 561 complaints under the RDA and finalised 405. Of the 405 finalised complaints, 202 were conciliated. Of the 202 conciliated complaints approximately 102 recorded financial compensation as being a component of the conciliation agreement reached between the complainant and respondent.

The terms of any agreement reached by a complainant and respondent is subject to negotiation between the parties – the Commission does not have a role in determining the terms upon which an agreement may be reached. Of the 202 complaints that were resolved, 111 contained a confidentiality clause in the written agreement or deed signed by the parties. This figure does not include instances where parties agreed to resolve the complaint by way of a private agreement where the terms of that agreement were not disclosed to the Commission.