Dominique Allen*

A COMPLEX TERRAIN: NAVIGATING WORKPLACE DISCRIMINATION LAWS

Abstract

Discrimination in the workplace is prohibited by laws operating at both the state and territory, and federal levels. A shortcoming of anti-discrimination law is that it is complex, both in terms of substance and procedure. This is due, in part, to our federal structure and because the law developed organically in each jurisdiction, so it now lacks consistency. What was already a complex terrain increased with the introduction of the *Fair Work Act 2009* (Cth), which gives employees the option of using industrial relations law to pursue a discrimination claim.

Potentially, an employee has three options available for resolving a workplace discrimination claim and there are many factors to consider when choosing the most appropriate forum. This article examines the complexities that result from having multiple forums before exploring the impact this is having on how lawyers run cases. The goal of the article is to consider what factors influence the decisions lawyers make about how to pursue a discrimination claim. It draws on interviews conducted with barristers and solicitors specialising in discrimination matters in Victoria, New South Wales and Queensland at both the state and federal levels.

I Introduction

Australia's anti-discrimination laws have evolved organically over the last 40 years in response to changing social norms and expectations. A suite of laws prohibit discrimination in the workplace across a range of attributes at the federal level and in each state and territory. Federal industrial relations law has long prohibited termination because of a defined attribute and this prohibition was extended in 2009 by the *Fair Work Act 2009* (Cth) ('*FWA*') to other forms of behaviour.[1]

* Associate Professor of Law, Department of Business Law and Taxation, Monash Business School, Monash University.

1 *Fair Work Act 2009* (Cth) s 351 ('*FWA*').

While these laws are similar in form and substance, they are not consistent. The complexity of anti-discrimination laws is compounded by the fact that a workplace discrimination claim will often include a claim for worker's compensation, a contractual claim, and a claim for another workplace entitlement, each with their own jurisdictional, temporal, and procedural requirements. Obtaining expert legal advice has become increasingly important, including for respondents.

The type of protection an employee has from workplace discrimination can vary depending upon their postcode, work arrangements, and the way that they were treated. Footballer Israel Folau discovered this when he had to rely on a rarely used provision of the *FWA* because neither his local anti-discrimination law, nor any of the federal anti-discrimination laws, protected him from religious discrimination in the workplace. The Folau matter is explained in more detail in Part II to contextualise the problem of having a multitude of overlapping workplace discrimination laws. There are potentially three avenues open to an employee to pursue a discrimination claim, which creates its own complexity as identified in Part II. Yet what is difficult to ascertain is the impact this complexity in the legal framework is having on how lawyers run discrimination claims and the advice they provide to their clients.

Drawing on interviews conducted with barristers and solicitors who specialise in discrimination matters and practice in Victoria, New South Wales ('NSW') and Queensland, Part II considers what aspects of anti-discrimination law are influencing the decisions lawyers make about how to pursue a discrimination claim. As Part III explores, the unanticipated finding of this study is that the law is not having a great impact on the way cases are pursued because this decision has often been made before lawyers are involved. When lawyers play a role, financial considerations are the most influential factors, and their influence is significant.

II Complex Legal Intersections

A *The Israel Folau Matter*

In late 2019, rugby union player Israel Folau settled a discrimination claim against the NSW Waratahs and Rugby Australia for an undisclosed sum. Both parties issued an apology.[2] Folau's $4 million contract was terminated by the NSW Waratahs after he posted on social media that Hell awaits '[d]runks, homosexuals, adulterers, liars, fornicators, thieves, atheists, idolaters'.[3] This was not the first time Folau, a devout

2 Remy Varga, 'Rugby Australia Boss Raelene Castle Defends Her Role in Israel Folau Saga', *The Australian* (online, 5 December 2019) <https://www.theaustralian.com.au/sport/rugby-union/israel-folau-rugby-australia-reach-settlement/news-story/2935ab2395fcbd35c9b1a9c527f34c82>.

3 izzyfolau, (Instagram, 10 April 2019 ACDT) <https://www.instagram.com/izzyfolau/p/BwEWt2uHcLI/>.

Christian, had used social media in such a way.[4] Fearing a backlash from fans and sponsors, Rugby Australia terminated his contract.[5] Following a three day hearing before an internal *Code of Conduct* Committee constituted by Rugby Australia, Folau was found to have committed a high-level breach of Rugby Australia's *Code of Conduct* which requires players to '[t]reat everyone equally, fairly and with dignity regardless of … sexual orientation' and to '[u]se social media appropriately'.[6] Folau ultimately lodged a claim under s 772 of the *FWA*, which prohibits an employer from terminating employment because of, inter alia, the employee's religion. He was required to act quickly because *FWA* claims relating to termination must be lodged at the Fair Work Commission ('FWC') within 21 days of the dismissal taking effect.[7] This is quite different to anti-discrimination laws, which have much longer timeframes.[8]

Regardless of what one thinks of the nature and content of Folau's post, the matter is a concise illustration of some of the problems with how workplace discrimination is regulated, particularly the complexity of having overlapping schemes. Before outlining them, it is necessary to work through the statutory options which were open to Folau for addressing his termination.[9]

Folau claimed that, in terminating him for his social media post, Rugby Australia discriminated against him on the basis of his religion, specifically the expression of his religion. Religious discrimination is not prohibited by federal law.[10] The only recourse an employee has under federal law is to lodge a complaint at the Australian Human Rights Commission ('AHRC'). The President of the AHRC can conduct an

4 Australian Associated Press, 'Israel Folau Conduct Hearing Set For May', *Canberra Times* (online, 22 April 2019) <https://www.canberratimes.com.au/story/6084111/israel-folaus-code-of-conduct-hearing-date-set/>.

5 Aaron Patrick, 'Inside Story: How Israel Folau's Legal Team Played Rugby Australia', *Australian Financial Review* (online, 21 December 2019) <https://www.afr.com/companies/sport/inside-story-how-israel-folau-s-legal-team-played-rugby-australia-20191216-p53kcr>.

6 Rugby Australia, *Code of Conduct* (2019) pt 2, cls 1.3, 1.7.

7 *FWA* (n 1) s 366.

8 See, eg: *Equal Opportunity Act 2010* (Vic) s 116(a) ('*EOAV*'); *Australian Human Rights Commission Act 1986* (Cth) s 46PH(1)(b) ('*AHRC Act*').

9 As a high-income earner, Folau did not meet the jurisdictional requirements for lodging an unfair dismissal claim: *FWA* (n 1) s 382(b)(iii).

10 Over the last five years, various federal governments have entertained the idea of introducing a Religious Discrimination Act. This has included exposure draft Bills in 2019 and 2022 which were not passed, and an Australian Law Reform Commission inquiry focusing on education: Australian Law Reform Commission, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws* (Final Report No 142, December 2023). However, progress appears to have stalled with the Government announcing recently that it will not proceed with religious discrimination legislation without bipartisan support: Rosie Lewis, 'Mark Dreyfus Wants "Line-By-Line" Response from Michaelia Cash on Draft Religious Discrimination Laws', *The Australian* (online, 9 July 2024)

inquiry into the matter and attempt to resolve it through conciliation[11] but, if that fails, the employee cannot take the claim to court. If the President of the AHRC finds that a breach has occurred, they can prepare a report for the Attorney-General.[12] Reports are also published on the Commission's website.[13]

All states and territories prohibit religious discrimination, except NSW, where Folau was employed, and South Australia. The *Anti-Discrimination Act 1977* (NSW) ('*ADANSW*') prohibits race discrimination, which includes 'ethno-religious origin'.[14] As discussed below, the NSW Administrative Decisions Tribunal has held that this is not broad enough to cover 'religion'.[15] Moreover, the essence of Folau's claim was that he was discriminated against on the basis of his *expression* of his religious beliefs, rather than on the basis of his religion. In his claim, Folau said that he was compelled to communicate the word of God and doing so was a manifestation of his religion.[16] Discrimination of this kind is clearly not covered by the law in NSW, so neither federal nor state anti-discrimination laws protected him.

The fact that Folau did not have a claim under an anti-discrimination law affected his *FWA* claim. Section 351 of the *FWA* prohibits an employer from taking adverse action (including dismissal) against an employee on the basis of their religion. However, s 351 does not apply if the adverse action was not unlawful in the jurisdiction where the employee works.[17] As religious discrimination is not unlawful in NSW, Folau did not have a claim under s 351, leaving him with s 772, which is what he ultimately pursued. Section 772 is not as broad as s 351, in that it only applies to termination, so if Rugby Australia had demoted Folau or denied him a benefit, he would not have had any cause of action under statute.

The Folau matter illustrates many problems with the substance of workplace discrimination laws in terms of their definitions, coverage and application. They are considered in more depth in the remainder of Part II. Before doing so, it is necessary to note how discrimination laws are enforced. In each jurisdiction, claims are enforced in much the same way, in that the employee can lodge a claim at a statutory equality agency or at the FWC if it is a *FWA* claim. Claims are initially

<https://www.theaustralian.com.au/nation/politics/mark-dreyfus-wants-linebyline-response-from-michaelia-cash-on-draft-religious-discrimination-laws/news-story/b2f5932a0ac620bf09b7b44cec6d36ee>.

11 *AHRC Act* (n 8) ss 11(1)(f), 31(b).

12 Ibid s 32A.

13 See 'Reports to the Minister under the *AHRC Act*', *Australian Human Rights Commission* (Web Page, 30 May 2022) <https://humanrights.gov.au/our-work/legal/projects/human-rights-reports>.

14 *Anti-Discrimination Act 1977* (NSW) s 4 (definition of 'race') ('*ADANSW*').

15 *Jones and Harbour Radio Pty Ltd v Trad (No 2) (EOD)* [2011] NSWADTAP 62 ('*Jones v Trad (No 2)*').

16 Patrick (n 5).

17 *FWA* (n 1) s 351(2)(a).

subject to compulsory conciliation facilitated by the agency — except in Victoria, where this is not compulsory — before the employee can proceed to the federal courts for adjudication or to a civil tribunal if it is a state and territory claim. The significant difference between the schemes is that civil tribunals are generally cost-free, as are *FWA* claims,[18] but federal discrimination claims may be subject to an adverse costs order.[19]

B *Complex Concepts and Definitions*

Workplace discrimination laws are complex, both in terms of the concepts they deal with and their failure to define key terms. They are statute-based without a rich, common law footing or body of jurisprudence. In fact, the body of case law is small. Laws require judicial interpretation to give them meaning but, as Alysia Blackham and Dominique Allen have documented, most cases — strong and weak — settle, so the opportunity for courts to apply the law does not arise.[20]

Alice Taylor has described the resulting body of case law as lacking both consistency and coherency.[21] Many years ago, Beth Gaze lamented the small body of case law, particularly the absence of superior court decisions, and highlighted that most decisions favour employers.[22] A small and unfavourable body of case law means

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18 Costs will only be awarded if a party acted vexatiously or caused the other party to incur costs: *FWA* (n 1) s 570.

19 *AHRC Act* (n 8) s 46PO. See also: *Federal Court of Australia Act 1976* (Cth) s 43; *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 214. For an overview of how the provisions operate, see Phillipa Alexander, 'Costs Update: Costs in Unlawful Discrimination Proceedings' (2015) 128 *Precedent* 55, 55–7.

20 Alysia Blackham, *Reforming Age Discrimination Law: Beyond Individual Enforcement* (Oxford University Press, 2022) ch 6; Dominique Allen, 'Behind the Conciliation Doors: Settling Discrimination Complaints in Victoria' (2009) 18(3) *Griffith Law Review* 778, 786–9.

21 Alice Taylor, 'The Conflicting Purposes of Australian Anti-Discrimination Law' (2019) 42(1) *University of New South Wales Law Journal* 188, 188.

22 Beth Gaze, 'The Costs of Equal Opportunity' (2000) 25(3) *Alternative Law Journal* 125, 126. This concern has been raised by others. For example, Alysia Blackham noted in 2020 that there had not been a successful case brought under the *Age Discrimination Act 2004* (Cth): 'Why Do Employment Age Discrimination Cases Fail? An Analysis of Australian Case Law' (2020) 42(1) *Sydney Law Review* 1. Blackham notes that this changed in 2023: 'Federal Age Discrimination Law Finally Coming of Age: *Gutierrez v MUR Shipping Australia Pty Ltd*' (2023) 36(3) *Australian Journal of Labour Law* 289. As Neil Rees, Simon Rice and Dominique Allen point out, the High Court has only considered an individual's discrimination claim seven times: *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 26.

claims are settled because no one wants to be the 'test case'. Even Israel Folau chose this path.[23]

Anti-discrimination laws often contain terms that are not defined. For example, the definition of 'race' in the *ADANSW* includes 'ethno-religious origin' but this is not defined. When the term was added to the Act in 1994, the NSW government intended it to cover ethno-religious groups such as Jews, Muslims, and Sikhs.[24] The NSW Administrative Decisions Tribunal has since said that, to be covered, a group must have a common religious origin and it proposed a long list of relevant factors to consider when determining whether a group is protected by the Act or not.[25] This is an example of where the law is unnecessarily complex. For an employee in NSW, it is not clear from the wording of the statute whether or not they are protected, while the statutory equality commission, Anti-Discrimination NSW, cannot provide either party with legal advice. A lawyer who is familiar with the *ADANSW* will be able to advise the employee but, ultimately, as the Tribunal noted, it is for the Tribunal to decide whether or not a person is a member of an ethno-religious group and it may require sociological evidence and expert knowledge to make a decision.[26] This will potentially make it a difficult and costly exercise for the employee and, perhaps, make them more inclined to settle. The combination of complex legal concepts and undefined terms means that it can be important for employees to obtain legal advice, as considered separately below.

C *Inconsistencies and Gaps*

State, territory, and federal anti-discrimination laws are similar to one another in the sense that they each prohibit direct and indirect discrimination across a range of attributes, as well as prohibiting sexual harassment and victimisation. Although the laws are similar, they are not consistent. There are many instances of inconsistencies, as the earlier discussion of religious discrimination showed. It is not necessary to document them all, only to provide some examples. One is family and carer's responsibilities. The *Sex Discrimination Act 1984* (Cth) ('*SDA*') prohibits discrimination on the basis of family responsibilities, but only if it is direct discrimination,[27] whereas all of the states and territories except the Northern Territory prohibit direct *and* indirect discrimination on this basis.[28] Further, the statutes do not use the same

23 Folau ultimately settled his claim on confidential terms, which was unfortunate for the development of the law because there are so few cases about religious discrimination and religious expression. Folau's legal team had canvassed the idea of taking the case to the High Court and attempting to define the law on religious freedom: Patrick (n 5).

24 New South Wales, *Parliamentary Debates*, Legislative Council, 4 May 1994, 1827 (John Planta Hannaford, Attorney-General).

25 *Jones v Trad (No 2*) (n 15) [36].

26 Ibid [34].

27 *Sex Discrimination Act 1984* (Cth) s 7A ('*SDA*').

28 See, eg: *EOAV* (n 8) s 6(i); *ADANSW* (n 14) s 49T; *Anti-Discrimination Act 1991* (Qld) s 7(d) ('*ADAQ*').

wording to define these attributes,[29] nor are they consistent in how far the responsibilities or status extend. For example, in South Australia, 'family responsibilities' include Aboriginal and Torres Strait Islander peoples who have responsibilities to care according to kinship rules.[30] By contrast, the *SDA* contains a much narrower definition.[31]

The statutes are also inconsistent in how they define discrimination. Victoria and the Australian Capital Territory use a different test for direct discrimination from the rest of the states and the Northern Territory.[32] The definition of direct discrimination in the *Racial Discrimination Act 1975* (Cth) ('*RDA*') is different from the three other federal laws and not replicated in any other piece of legislation.[33]

The statutes contain different tests for indirect discrimination. Indirect discrimination occurs when a seemingly neutral requirement, condition, or practice has a disadvantageous impact on an employee because of a protected attribute they possess. In NSW, South Australia, and Western Australia,[34] the employee must show that a substantially higher proportion of people without the attribute could have complied. In Queensland, the proportion does not have to be 'substantially' higher.[35] The other jurisdictions removed this requirement because of its complexity resulting from the High Court's decision in *AIS v Banovic*.[36] In Victoria, the Australian Capital Territory, and Queensland, and federally in the *SDA*, *Disability Discrimination Act 1992* (Cth) ('*DDA*') and *Age Discrimination Act 2004* (Cth) ('*ADA*'),[37] the employer is required to prove that the requirement, condition, or practice was reasonable. Elsewhere, the employee is required to prove this element.

There are many other examples which show the differences between the jurisdictions and the resulting complexities this leads to.[38] These differences are a consequence

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29 Some, like the *SDA* at s 7A, and the *Equal Opportunity Act 1984* (WA) at s 35A ('*EOAWA*'), refer to 'family responsibilities'. Others use 'caring responsibilities': *Equal Opportunity Act 1984* (SA) s 85T(6) ('*EOASA*') or refer to the person's status as a 'parent' or 'carer': *Discrimination Act 1991* (ACT) s 7(1)(e) ('*DAACT*').

30 *EOASA* (n 29) s 5(3)(b).

31 *SDA* (n 27) s 4A.

32 They refer to 'unfavourable' rather than 'less favourable' treatment which, arguably, does not require a comparator to be established: *EOAV* (n 8) s 8; *DAACT* (n 29) s 8(2).

33 *Racial Discrimination Act 1975* (Cth) s 9(1) ('*RDA*'). Cf *SDA* (n 27) s 5(1).

34 See, eg: *ADANSW* (n 14) s 7(1)(c); *EOASA* (n 29) s 29(2)(b); *EOAWA* (n 29) s 8(2).

35 *ADAQ* (n 28) s 11(1)(b).

36 *Australian Iron & Steel v Banovic* (1989) 168 CLR 165.

37 *EOAV* (n 8) s 9(2); *DAACT* (n 29) s 8(2); *ADAQ* (n 28) s 205; *SDA* (n 27) ss 7B, 7C; *Disability Discrimination Act 1992* (Cth) ss 6(3), (4) ('*DDA*'); *Age Discrimination Act 2004* (Cth) s 15(2) ('*ADA*').

38 For a useful overview of the coverage in each jurisdiction of the protected attributes and areas, definitions of direct and indirect discrimination and the exceptions, see Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 295–322 (Tables 1–4).

of the federal system and of legislatures enacting laws at different points in time, which has, of course, occurred throughout our history in most areas of law. But they make compliance difficult and add to the 'red tape' imposed on business, particularly for those operating across state/territory borders.

D *Complexity Embedded in the* Fair Work Act

The *FWA* is quite different conceptually from traditional anti-discrimination laws. Initially, it was thought that this would make the *FWA* a more attractive jurisdiction for employees,[39] but the legislature's failure to define some concepts and its eagerness to embark on a different course from traditional anti-discrimination laws has added unnecessary complexity.[40]

Section 351 of the *FWA* prohibits adverse action because of an employee's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction, or social origin. Unlike most anti-discrimination laws, none of the attributes are defined. Thus, in the absence of judicial interpretation, not only could the meaning of an attribute be unclear,[41] it may also be difficult to predict whether an attribute has the same meaning as it has under anti-discrimination law. The federal courts have said consistently that s 351 is not to be interpreted in reference to anti-discrimination laws[42] and that makes the task of predicting the meaning of an attribute even more difficult.

The *FWA* does not define discrimination in the same way as anti-discrimination law. It prohibits adverse action on the basis of an attribute. 'Adverse action' is defined as dismissal, injuring an employee in their employment or altering an employee's position to their detriment, or discriminating against an employee.[43] 'Discrimination' is not defined. The federal courts have held that it means anything from its ordinary dictionary meaning, to different treatment, to less favourable treatment.[44] It is unclear whether it includes indirect discrimination and, given that uncertainty, an employee with an indirect discrimination claim may be well advised to pursue their claim under an anti-discrimination law.

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39 Belinda Smith, 'Fair and Equal in the World of Work: Two Significant Federal Developments in Australian Discrimination Law' (2010) 23(3) *Australian Journal of Labour Law* 199, 210.

40 Dominique Allen, 'Adverse Effects: Can the *Fair Work Act* Address Workplace Discrimination for Employees with a Disability?' (2018) 41(3) *University of New South Wales Law Journal* 846 ('Adverse Effects').

41 This has been a problem for 'physical or mental disability'. See also Allen, 'Adverse Effects' (n 40).

42 *Hodkinson v Commonwealth* (2011) 248 FLR 409, 442–3; *Wilkie v National Storage Operations Pty Ltd* [2013] FCCA 1056, [49].

43 *FWA* (n 1) s 342.

44 Allen (n 40).

There is a great deal of overlap with the protected attributes in s 351 of the *FWA* and anti-discrimination laws but the *FWA* does not use the same terminology as anti-discrimination laws.[45] For example, the *FWA* uses 'family or carer's responsibilities' which may well be different from 'family or carer's status' which is the term in some anti-discrimination laws.[46]

Another example is political opinion. The states and territories that protect this attribute use political 'conviction',[47] 'belief',[48] and 'opinion'.[49] Neil Rees, Simon Rice and Dominique Allen write that no jurisdiction defines these terms with precision and there are differences in their coverage.[50]

While there is some overlap in the protected attributes between the *FWA* and anti-discrimination laws, there are also gaps. One is religion, as the discussion of the Folau matter showed.[51] Another example is political opinion, which is not listed as a protected attribute in NSW or South Australia, and 'national extraction'. The *RDA* prohibits discrimination on the basis of an employee's 'national origin'[52] but is that the same?

Differences in terminology would not ordinarily contribute to the law's complexity, but for the exception to s 351 in sub-s (2)(a). The exception states that s 351 does not apply if the adverse action was not unlawful under an anti-discrimination law where the adverse action occurred. This encompasses the four federal anti-discrimination laws, and applicable state and territory laws.[53] The exception means that, if the conduct is lawful because it is permitted by an exception contained in an anti-discrimination law or because the attribute is not a protected attribute in that state

45 As discussed above, anti-discrimination laws are not consistent in what relationships this attribute covers either. Simon Rice and Cameron Roles, '"It's a Discrimination Law Julia, But Not as We Know It": Part 3–1 of the *Fair Work Act*' (2010) 21(1) *Economic and Labour Relations Review* 13, 13–14.

46 See above n 29.

47 *DAACT* (n 29) s 7(o); *EOAWA* (n 29) pt IV.

48 *ADAQ* (n 28) s 7(j); *Anti-Discrimination Act 1998* (Tas) s 16(m); *EOAV* (n 8) s 6(k).

49 *Anti-Discrimination Act 1992* (NT) s 19(1)(n) ('*ADANT*').

50 Rees, Rice and Allen (n 22), 539–40.

51 The South Australian legislation only protects 'religious appearance or dress': *EOASA* (n 29) s 85T(5).

52 State and territory anti-discrimination laws include 'national origin' in their definition of race. See, eg: *EOAV* (n 8) s 4; *ADAQ* (n 28) sch 1; *EOAWA* (n 29) s 4.

53 *FWA* (n 1) s 351(3).

or territory, it will not be unlawful under the *FWA*.[54] This was the reason Folau could not use s 351.[55]

In such circumstances, the employee must show that they are unable to make a claim under s 351 before they can use s 772.[56] They are likely to need legal advice to identify that they cannot make a s 351 claim,[57] ideally from a lawyer who is familiar with their local anti-discrimination law.[58] This will further add to the employee's cost and may cause delay. Moreover, s 772 will not be useful in every situation because it only applies to unlawful termination, thus if the employee was demoted or denied a benefit, they will not have a claim.

Anti-discrimination laws are not consistent across the country, as outlined above, so it is not unusual for there to be variations in laws that deal with the same subject matter. What is unusual is to have a national statute that contains a provision guaranteeing rights that vary depending upon the location of the breach. As this discussion shows, the *FWA* has added another layer of complexity to what was already a difficult field.

54 *Sayed v Construction, Forestry, Mining and Energy Union* (2015) 327 ALR 460, 492 [161]. Since no jurisdiction prohibits social origin discrimination, no employee can lodge a claim under the *RDA* (n 33) s 351.

55 An academic at the University of Sydney had to rely on the *RDA* (n 33) s 772 when he pursued a claim for discrimination on the basis of political opinion: Workplace Express, 'Swastika Use Protected Political Opinion, Argues Sacked Academic' (online, 16 May 2019) <https://workplaceexpress.com.au/nl06_news_print.php?selkey=57821>. Ultimately, he did not pursue the s 772 claim: *National Tertiary Education Industry Union v University of Sydney* (2020) 302 IR 272. In 2015, SBS sports reporter Scott McIntyre also found himself in the same position when he claimed he was terminated for posting politically inappropriate tweets about ANZAC Day, however he mistakenly lodged his claim under the *RDA* (n 33) s 351. When it failed to settle and the error was identified, he lodged a claim under s 772: *McIntyre v Special Broadcasting Services Corporation* [2015] FWC 6768 ('*McIntyre*'). The claim was ultimately settled: Workplace Express, 'SBS and Tweeting Journalist Resolve Unlawful Dismissal Case' (online, 11 April 2016) <https://workplaceexpress.com.au/nl06_news_print.php?selkey=54400>. More recently, a casual journalist was relying on s 772 in her claim that the ABC discriminated against her on the basis of her political opinion, race and national extraction or social origin: Workplace Express, 'Lattouf Opens Up Second Front in ABC Stoush' (online, 28 February 2024) <https://workplaceexpress.com.au/nl06_news_print.php?selkey=63144>.

56 *FWA* (n 1) s 723.

57 See Rice and Roles (n 45) on the challenges in doing this: at 29.

58 In *McIntyre* (n 55), Commissioner Cambridge said that it was unfortunate but not unsurprising that whoever advised the employee was not aware that political opinion discrimination was not unlawful in NSW because it meant that he had erroneously pursued a claim under s 351 initially: at [29].

E *Legal Advice is Necessary*

For most, workplace discrimination laws are a difficult terrain to navigate without a guide, which suggests that it is important to obtain legal advice in order to determine the best way to proceed. Without advice, an employee will potentially file their claim in the wrong jurisdiction or in one that is not ideal for their claim. Having filed the claim in one forum, they may be prevented from subsequently filing a claim in another.[59] An employee who does not obtain timely legal advice could miss the opportunity to file at all. This is particularly important for *FWA* claims involving a dismissal because they must be lodged within 21 days of the dismissal.[60]

III Navigating a Complex Terrain

The picture that emerges in Part II is one of a complex system which requires legal advice to navigate. There is uncertainty about the law's application — both for employees and employers — and the law's development is stymied because most claims do not reach a hearing. Since the laws are complex, and it is costly to obtain legal advice and to litigate a discrimination claim, settling is understandable and often the most prudent decision to make

Part III considers the impact these factors are having on the decisions lawyers make regarding how to pursue a claim, based on interviews conducted with lawyers in Victoria, Queensland, and NSW, all of whom had experience in advising on matters and running cases in both the state and federal jurisdictions.

A *Research Method*

There is a growing body of empirical scholarship about discrimination law. Examples of earlier empirical research include studies which examined the impact of significant changes to the law and the effectiveness of legislation,[61] and those

59 *FWA* (n 1) s 725. See, eg, the discussion of the jurisdictional issues Scott McIntyre faced after lodging his claim incorrectly under s 351 of the *FWA*: *McIntyre* (n 55).

60 *FWA* (n 1) s 366.

61 See, eg: Sara Charlesworth and Fiona MacDonald, *Hard Labour? Pregnancy, Discrimination and Workplace Rights: A Report to the Office of the Workplace Rights Advocate* (Report, October 2007); Beth Gaze and Rosemary Hunter, 'Access to Justice for Discrimination Complainants: Courts and Legal Representation' (2009) 32(3) *University of New South Wales Law Journal* 699 ('Access to Justice for Discrimination Complaints'); Dominique Allen, 'An Evaluation of the Mechanisms Designed to Promote Substantive Equality in the *Equal Opportunity Act 2010* (Vic)' (2020) 44(2) *Melbourne University Law Review* 459 ('An Evaluation of the Mechanisms').

focused on particular types of discrimination such as age,[62] pregnancy,[63] sex[64] and sexuality.[65] Empirical data is commonly collected by examining complaint files and data collected by the statutory equality agencies, and by interviewing staff at the agencies and/or lawyers practicing in the area.[66] Previous studies have not considered the impact that the complexity of the system (particularly since the introduction of the *FWA*) is having on the choices lawyers make about pursuing a claim and whether this varies depending upon the employee's location.

Part III attempts to identify the factors lawyers take into account when they are determining the most appropriate way to pursue a discrimination claim and to determine what aspects of this increasingly complex area of law are influencing their decisions. To examine this, semi-structured interviews were conducted with a small group of solicitors and barristers who practice in Victoria, Queensland, and NSW.[67] These jurisdictions were chosen because they are the largest and have the highest number of claims, and because they vary in terms of how claims are enforced[68] and the remedies available. Victoria has the newest legislation,[69] whereas the NSW legislation has not been substantially modified since it was enacted. Other notable variations are that the state tribunal systems are generally cost free, as is the FWC, whereas an unsuccessful complainant in a federal discrimination claim may be ordered to pay costs.[70] A time limit of 21 days applies to *FWA* claims involving

62 Blackham (n 20).

63 Charlesworth and McDonald (n 61); Adriana Orifici and Dominique Allen, 'Expecting More: Rethinking the Rights and Protections Available to Pregnant Workers under the *Fair Work Act 2009* (Cth)' (2022) 50(4) *Federal Law Review* 504.

64 Rosemary Hunter and Alice Leonard, 'The Outcomes of Conciliation in Sex Discrimination Cases' (Working Paper No 8, Centre for Employment and Labour Relations Law, University of Melbourne, 1995) 13–14.

65 Anna Chapman and Gail Mason, 'Women, Sexual Preference and Discrimination Law: A Case Study of the NSW Jurisdiction' (1999) 21(4) *Sydney Law Review* 525.

66 See, eg: Gaze and Hunter, 'Access to Justice for Discrimination Complaints' (n 61); Allen, 'An Evaluation of the Mechanisms' (n 61); Blackham (n 20). Due to the confidentiality agreements the parties sign if they settle and agency's own privacy restrictions, researchers have found it difficult to interview complainants and respondents.

67 The project received ethical clearance from the Monash University Human Research Ethics Committee (Project ID: 17309). Interviews were conducted in 2019, prior to the release of the AHRC's *Respect@Work* report and subsequent legislative reforms, the inquiry into the *ADAQ* and the announcement of an inquiry into the *ADANSW*.

68 Victoria is the only jurisdiction to permit direct access to the tribunal: *EOAV* (n 8) s 122.

69 At the time of writing, a Bill was before the Queensland Parliament to modernise the state's anti-discrimination law but this was not contemplated at the time the interviews were conducted.

70 See above nn 18–19 and accompanying text.

a termination[71] and, at the time the interviews were conducted, a time limit of six months applied to federal discrimination claims.[72]

The interviews were conducted by the author in person during 2019. They were audio-recorded and transcribed and the transcripts were coded using NVivo software. Codes were derived from predefined areas of study from that research project and inductively identified from the transcripts. The interviews were conducted as part of a broader study about the dispute resolution processes used to resolve discrimination complaints in each jurisdiction and so the interview questions covered more issues than what is reported on herein. As this article is concerned with identifying the factors lawyers consider when making decisions about how to pursue a discrimination claim, it only reports on responses to questions about which of the three schemes the lawyers prefer to use and why, any that they avoid and why, and in what way court decisions (or lack thereof) influence their advice.

Discrimination matters often comprise only part of a lawyer's overall practice, which may be focused on employment law more broadly or human rights and public law.[73] Since most discrimination claims settle,[74] many solicitors may not have much litigation experience. For this reason, purposive sampling was used. Potential interview participants were approached because they had experience in running claims in the federal courts and/or their local civil tribunal (in both employment and non-employment), including the FWC. The AHRC's office is located in the Sydney CBD. Whether the AHRC's location is a factor in deciding to use the federal system and whether this varies depending on the lawyer's location was of interest, making it important to interview lawyers located in Sydney.

The solicitors worked at a mix of mid-tier law firms and community legal centres and all represented complainants. The barristers represented both parties. The participants are referred to by their role. Their jurisdiction is only noted if it is relevant to understanding the context of their comment.

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71 *FWA* (n 1) s 366.

72 *AHRC Act* (n 8) s 46PH(1)(b) but note that it was extended to 24 months in 2021 in relation to *SDA* claims by sch 1 of the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth) and to *RDA*, *DDA* and *ADA* claims by sch 8 of the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth). In the states and the Northern Territory the time limit is 12 months (see eg *EOAV* (n 8) s 116(a), whereas in the Australian Capital Territory it is two years: *Human Rights Commissions Act 2005* (ACT) s 78(1)(a).

73 Blackham has also raised this point in her study of age discrimination claims in Australia and the United Kingdom and noted that the lack of specialists leads to less claims being run which in turns means there are too few cases for lawyers to build their expertise: (n 20), 159–60.

74 Allen (n 20); Blackham (n 20) 210–1; Alysia Blackham and Dominique Allen, 'Resolving Discrimination Claims Outside the Courts: Alternative Dispute Resolution in Australia and the United Kingdom' (2019) 31(3) *Australian Journal of Labour Law* 253.

Table 1: Interview Participants

Location	Solicitor	Barrister	Total
Melbourne	2	3	5
Brisbane	3	0	3
Sydney	2	4	6
Total	7	7	14

B *Interview Study Findings*

Participants identified several factors which impact upon how they choose to pursue a claim but this is, of course, dependent upon their advice being sought before the complainant lodges their claim. It became clear from the initial questions the lawyers were asked that, for the most part, which jurisdiction to use is not a decision they are involved in. Typically, their advice is sought once the claim is in progress. This aspect is discussed first and then the factors the lawyers consider when they are called upon to advise on a matter are presented.

1 *Typically Lawyers are not Involved in Choosing a Jurisdiction*

Lawyers were asked about the point at which they become involved in the claim and provide legal advice. Community legal centres are regularly involved in providing information about workplace discrimination and giving general advice through their helplines and drop-in services. One of those lawyers said that they advise clients at all stages of the process and that their local equality commission refers people to their community legal centre when they lodge a complaint and are without representation. Another lawyer said they provide advice to clients before they lodge the claim about the various avenues available and 'nine times out of ten',[75] the client uses this information and proceeds with the claim themselves, rather than engaging a lawyer to complete the application. However, they noted that many of their clients are union members and the union will assist them to prepare the claim.

Overall, the lawyers said that by the time most clients seek advice, they have already made a choice about which jurisdiction to use. One barrister said that not obtaining legal advice can have significant consequences: 'the mistakes are terminal … if you make the wrong choice, you can't change it'. They offered an example: 'if you lodge a complaint and you're a state public servant at the [AHRC], they'll boot you out which is a real problem'.[76]

Very few barristers are briefed for conciliation. One said, 'they don't need me for a conciliation … There's no point in paying me for going through that'.[77] Barristers

75 Interview with Q1 (Dominique Allen, 2019).

76 Interview with N1 (Dominique Allen, 2019).

77 Interview with N2 (Dominique Allen, 2019).

become involved once a court application has been filed and this is more common in the federal courts than in the state system. The barrister will prepare the pleadings and represent the complainant at the next stage, which is mediation.

Lawyers said that clients seek their advice because they have received a settlement offer at a conciliation conference or they have commenced litigation. There is, then, no ability for the lawyer to advise on jurisdiction; rather their role is about procuring the best outcome for their client in whichever system they have entered.

2 *Time Limits can Exclude a Jurisdiction*

As noted above, each Act contains a time limit for lodging a claim. Time limits in the state anti-discrimination systems are longer than in the federal system.[78] Lawyers said that the time limit often removes the federal system as an option. The same applies to the Fair Work system. Some of the lawyers said that they prefer to use the *FWA* but sometimes they cannot, because claims involving a dismissal must be lodged within 21 days of the dismissal.[79] They said that often clients do not seek legal advice within this timeframe because they are not in a position to do so because they are dealing with the immediate impact of losing their job.

3 *Lawyers Consider the Practicalities of Running the Claim*

In an instance where a lawyer does have the opportunity to advise on which jurisdiction to use, the practicalities of running the claim are at the forefront. A community centre lawyer described the AHRC's processes as 'not as friendly to complainants' compared to their local system, especially to those 'who are not sophisticated and often unrepresented'.[80] The lawyer said they have to tell their clients that they might not be able to represent them if their claim proceeds and so in providing advice, they have to take into account which system the client would be better off using if they are self-represented.

Another community centre lawyer said that they would not choose to use the AHRC because they had found that its processes were 'ripe for exploitation by employers seeking to delay the process'.[81] A Victorian lawyer said that the Victorian Equal Opportunity and Human Rights Commission's ('VEOHRC') processes are easier to navigate than the federal system, including if the claim proceeds to the Victorian tribunal, and this is particularly so for complainants who proceed without a lawyer.

The lawyers said that the time they will have to wait to participate in conciliation is a very important factor. A lawyer said that 'nine times out of ten, complainants

78 See above n 72. When the interviews were conducted, the *AHRC Act* required claims to be lodged within six months of the contravention.

79 *FWA* (n 1) s 366.

80 Interview with Q2 (Dominique Allen, 2019).

81 Q1 (n 75).

in discrimination … want [the] quickest, cheapest way to get to early resolution'.[82] A lawyer in NSW reported that, even in Sydney, where both they and the AHRC are located, it can take 'months and months and months' to get a conciliation organised because the AHRC requires both parties to consent to the conciliation.[83] The lawyer said that the state process was quicker than the federal one and that they will use the state system if their client wants a 'speedy resolution'.[84] They said the downside of using the local system in NSW was that damages are lower and it is a no-cost jurisdiction.

A Victorian lawyer said the timeframes at both the AHRC and the VEOHRC are 'ridiculously' long and had found that a conciliation at the AHRC could take a couple of months.[85] Another lawyer said that if there were delays in the federal system, they would tell the AHRC that they do not think conciliation will be useful and ask it to issue a certificate so that they could commence proceedings in the federal courts.

However, another lawyer had experienced delays in each jurisdiction in terms of how long it takes to obtain a conciliation but, in their opinion, the likelihood of delay was 'not a proper basis on which to advise a client'.[86] They said that they do not wait until a conciliation to talk to the other side and will start the conversation prior to the complaint being filed.

Not all of the lawyers had used the Fair Work system but those who had reported that the FWC is much quicker than the equality commissions in scheduling a conciliation. One lawyer said conciliation was generally scheduled within six weeks of lodging the application, and that is one 'huge benefit' of the Fair Work system.[87] The downside, though, is what one lawyer described as the FWC having a 'get them in, get them out' approach in that it deals with matters very quickly.[88] But the lawyer acknowledged that it has to work this way due to the quantity of matters the Commission processes.

4 *The Cost and Costs Orders are Significant Factors*

One of the factors considered in the context of the practicalities of pursing a claim is what follows if the claim does not settle. Ultimately, that is litigation and all the formalities and evidentiary requirements that it entails. There is a cost to litigating

82 Interview with N3 (Dominique Allen, 2019).

83 N1 (n 76).

84 Ibid.

85 Interview with V2 (Dominique Allen, 2019).

86 Interview with N4 (Dominque Allen, 2019).

87 V2 (n 85).

88 Q1 (n 75).

and the cost is significant. As one participant said, the cost means any settlement offers are considered 'very seriously'.[89]

There are two aspects to the cost. The first is litigation expenses. A barrister said it was not always clear how well the other side's solicitors had prepared their client for the costs that will be involved in running litigation. The barrister said it 'sometimes helps to hear that in a mediation, that this is really going to be a very expensive process for you if you choose to go ahead'.[90]

The expenses can include obtaining medical reports, such as from a psychiatrist or psychologist, to substantiate a claim for psychological damage. One lawyer said:

> [The client will] say I've read *Richardson v Oracle*. I can get $100,000 in my general damages. Because community standards say that that's what happens when you're sexually harassed. But they haven't read *Richardson v Oracle*. They haven't looked at the evidence that was required to be mounted in order to substantiate a claim like that.[91]

Lawyers also take these costs into account if they are considering representing a client on a conditional basis because they will have to cover the costs of expert reports and travel upfront.

The second aspect is the risk that the employee may have to pay the other side's costs if they lose. As discussed above, state and territory claims are heard in civil tribunals, which are generally cost free, while federal discrimination claims are heard in the federal courts and may be subject to an adverse costs order.[92]

Most of the lawyers said that they advise clients not to use the federal system because of the risk of an adverse costs order. As many pointed out, it will still cost clients to run their claim in the tribunal (particularly if they need to brief a barrister) but there is not the risk of an adverse costs order. One lawyer said that 'all things being equal… in terms of the context of the law', they would prefer to use the state system because if the claim does not settle, there is not a cost risk for the employee.[93] Another lawyer said that they will only use the federal system if it was a case that had 'good prospects' because they could recover their costs.[94] By contrast, a lawyer said that if the claim had 'a bit of clout', it can be advantageous to lodge it in the Federal Court because of the respondent's fear that the claim could end up in court and/or in the media. They said that this provides 'more leverage for it to resolve'.[95]

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89 V2 (n 85).

90 Interview with V3 (Dominique Allen, 2019).

91 Interview with V1 (Dominique Allen, 2019).

92 See above nn 18–19 and accompanying text.

93 N4 (n 86).

94 N1 (n 76).

95 Interview with N5 (Dominique Allen, 2019).

The final aspect to the issue of the cost of litigation is the likely compensation award. Lawyers weigh the cost of litigating against what the employee is likely to recover if their claim is successful. One barrister said that the award the complainant will get is 'disproportionate to the cost that [they will] incur in the litigation'.[96]

One of the lawyers in NSW preferred using the federal system because they said 'the money is not as big' in the state system.[97] Another NSW lawyer said that they avoid the state system because of the cap on damages awards which means that it is not possible to have a proper assessment of what the damages should be. Until the cap on damages is removed, they said 'I won't be going there [to Anti-Discrimination NSW]'.[98]

5 *The Law's Role is Limited*

The interpretation of the law appears to play a limited role in determining how to pursue a claim. A lawyer said that in the instances where there are differences in the definitions of what constitutes discrimination, if one is more favourable for the employee, they will use that system. Similarly, another lawyer said they take the law into account for each client but what deters them from the federal system, even when the law is better for their client, is the cost and they have to explain that risk to the client. Another lawyer said that they 'tend to steer people away from the Commonwealth and towards the *Fair Work Act* or the state'. They acknowledged that the federal legislation was 'more cutting edge' in some areas than their own state's (citing the *DDA*'s reasonable accommodation provision as one example) and said that 'all things being equal I would send every disability discrimination client that way [but] I don't because of costs'.[99]

Two other NSW lawyers noted the significance of the provision in the *DDA* that the failure to make reasonable adjustments may amount to discrimination.[100] One of them said it was a 'powerful part' of the *DDA* and a reason to use it as opposed to the state Act which does not contain an equivalent provision.[101] The other said, 'you would be nuts to go state because you don't have the RA [reasonable adjustments] advantage'.[102]

There are instances in which the law will not bear much weight because one system might not apply to the employee or to the form of the discrimination. A lawyer from NSW said that is the only time they use the state system — if the protected attribute is only covered by the state legislation or if they are representing a public servant

96 V1 (n 91).

97 N2 (n 77).

98 Interview with N6 (Dominique Allen, 2019).

99 Q2 (n 80).

100 *DDA* (n 37) ss 5(2), 6(2).

101 N5 (n 95).

102 N2 (n 77).

who cannot access the federal jurisdiction. Two other NSW lawyers noted that state government employees have to use the local Act. One said that, in the past, the state government did not take issue if the public servant used a federal Act but now the state government does take issue.

Generally, the law itself does not play a great role until the claim reaches litigation. One of the lawyers said that they will refer to a case in conciliation if it will strengthen their claim. They said, 'if there's a lawyer there who I know knows the law, and I also think it's worth their client hearing it, in case their client thinks, we're sitting pretty here, I'll put that out there as a way to say, well, no'.[103] However, another lawyer said it was very difficult to convince the other side of their own legal position in a conciliation because they can simply disagree with their interpretation of the law and there is no opportunity to test their positions. A barrister said that when they are acting for the respondent, the law plays more of a role and it is debated during a conciliation. They said that then the law becomes more important than the facts and they will raise jurisdictional issues and defences in that situation. However, another barrister said they found it difficult to refer to cases in conciliation because they turn on their own facts.

IV Cost and Complexity

Given the academic critique that anti-discrimination law has become overly complex, this interview study attempted to shed light on what aspects of those laws are influencing how lawyers run discrimination claims and the choices they make in pursuing matters.

It is pleasing to note that, since the interviews were conducted, the federal government has addressed one of the problems participants identified with the federal system, namely the time limit for lodging a claim. Now, complaints can be lodged up to 24 months after the alleged discrimination occurred.[104]

Perhaps the most significant insight one can draw from the interviews is that, in many instances, the decision about which jurisdiction to use is not made by lawyers. Typically, employees are unrepresented at the early stages.[105] They do not seek

103 N5 (n 95).

104 *AHRC Act* (n 8) s 46PH(1)(b).

105 Although the equality agencies publish information about the attributes and areas upon which they receive inquiries and complaints in their annual reports, they do not include data about whether or not the parties have representation. Empirical research in the field has, however, considered legal representation. For example, in their study of federal discrimination claims, Gaze and Hunter found that over 55% of complainants had representation at some stage, but for most this was once conciliation had failed and they were nearing litigation: Beth Gaze and Rosemary Hunter, *Enforcing Human Rights in Australia: An Evaluation of the New Regime* (Themis Press, 2010) 297 [Table 4.17].

legal advice until they have received a settlement offer, or the claim has failed to settle and they are contemplating litigation by which time they have already selected a jurisdiction. This suggests that the advantages and disadvantages of the three systems of law and the interplay between them is academic at best; it does not appear to be factored into the decision-making process of employees.

In saying that, multiple systems are attractive because they allow different jurisdictions to experiment and learn from one another. For example, a positive duty to promote equality was first introduced in Victoria in 2010.[106] Having watched Victoria and learned from its experience, three jurisdictions introduced their own individually crafted positive duty.[107] The drawback of multiple systems, as has been highlighted, is the complexity arising from overlap and variation, which is a problem for both employees and employers. One might then be tempted to recommend introducing a national system, as occurred with federal industrial relations law, as a way of streamlining and simplifying the jurisdiction. It is beyond the scope of this article to outline the benefits and risks of doing so, but it is worth reiterating one of the reoccurring themes from the interview data — there is value in having an alternative system if one is deficient. For example, if one system does not cover the employee or the unlawful conduct, if the definitions of discrimination are clearer in one compared to the other, or if one system is more accessible. This benefit would be lost if a national system was introduced.

The findings also highlight that further research is needed to explore the degree of awareness potential complainants have of the law and their rights and what factors they consider when deciding where to lodge a discrimination claim. Empirical studies of this type have proven to be difficult to conduct because most claims settle confidentially and include terms restricting the complainant's ability to discuss the circumstances of the claim, which means it is difficult to identify research participants.[108]

When lawyers do have the opportunity to advise, the factors they take into account are not surprising. The time lapse between lodging the claim and participating in a conciliation conference and the cost of litigation are the most important considerations. This study shows that the possibility of having to pay the other side's costs is the factor that carries the most weight in deciding which jurisdiction to use. In fact, the likelihood of paying costs is high in the federal system. Recently, Margaret Thornton, Kieran Pender and Madeleine Castles found that unsuccessful

106 *EOAV* (n 8) s 15.

107 *SDA* (n 27) s 47C; *ADANT* (n 49) s 18B; *DAACT* (n 29) s 75.

108 In one of the earliest empirical studies, confidentiality clauses prevented Margaret Thornton from undertaking a full-scale study of conciliation processes in three jurisdictions: 'Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia' (1989) 52(6) *Modern Law Review* 733, 733; see also above n 32. Parties who have been interviewed for research either did not settle or litigated and are not bound by confidentiality. See, eg: Gaze and Hunter (n 105); Orifici and Allen (n 63).

complainants in federal sex discrimination and sexual harassment claims have been ordered to pay costs 34% of the time.[109]

The risk of having to pay a costs order is no doubt a factor in deciding how to pursue many other of types of civil litigation, not just a workplace discrimination claim, but because the amount of compensation sought in a discrimination claim is usually small and claims are pursued by individuals, the risk of paying costs is significant.[110] Indeed, when they asked lawyers what they expected the effect of what was then a new costs provision in the federal system to be, Beth Gaze and Rosemary Hunter reported that their interview participants thought it would encourage settlement.[111]

Since the interviews were conducted, the detrimental impact that the risk of an adverse costs order is having in pursuing sex discrimination and sexual harassment claims has been highlighted in the AHRC's landmark *Respect@Work* report.[112] The report recommended consistency between the *SDA* and the *FWA*.[113] In late 2024, Parliament changed the costs provision in federal discrimination claims and introduced an 'equal access' cost protection provision.[114] Now, the complainant cannot be ordered to pay the respondent's costs. However, an exception applies if (a) the court is satisfied that the complainant instituted the proceedings vexatiously or without reasonable cause; or (b) the court is satisfied that the complainant's unreasonable act or omission caused the respondent to incur costs, or (c) if all of the following apply: (1) the respondent was successful in the claim; (2) they do not have a significant power advantage over the complainant; and (3) they do not have significant financial or other resources relative to the complainant.[115]

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109 Margaret Thornton, Kieran Pender and Madeleine Castles, 'Damages and Costs in Sexual Harassment Litigation: A Doctrinal, Qualitative and Quantitative Study' (Paper, Australian National University, 2022) 37.

110 Despite having the backing of the Public Interest Advocacy Centre when he pursued a claim for disability discrimination against RailCorp NSW, Graham Innes was at risk of losing his home if he lost. It was later revealed that RailCorp NSW, a statutory authority, spent $420,000 defending the claim: Jacob Saulwick, 'Disability Case Costs RailCorp $420,000', *Sydney Morning Herald* (online, 29 March 2013) <https://www.smh.com.au/national/nsw/disability-case-costs-railcorp-420-000-20130328-2gxn5.html>.

111 Gaze and Hunter, 'Access to Justice for Discrimination Complaints' (n 61) 710.

112 Australian Human Rights Commission, *Respect@Work: Sexual Harassment National Inquiry Report* (Report, 2020) <https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>. The AHRC received submissions which claimed that the existing costs provision was a disincentive to pursuing a federal discrimination claim: at 507.

113 Ibid 45 [Recommendation 25].

114 *AHRC Act* (n 8) s 46PSA.

115 Ibid s 46PSA(6). Initially the government responded with a proposal for a costs neutrality provision for all federal discrimination claims. Under that proposal the default position would be that each party bear its own costs: item 3 in sch 5 of the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 as introduced into the House of Representatives, 27 September 2022. However,

The final reflection that can be drawn from the interviews is that the substantive law itself seems to be having less of an impact than what would be expected in those instances where lawyers are involved — the practicalities of running the case are more important factors. The exception is NSW, where lawyers reported that they avoid using the state legislation unless they have no option, such as if they are representing a state government employee. The NSW Law Reform Commission is currently reviewing the state Act.[116] That inquiry may well result in the streamlining of protections between the NSW and federal systems. It is hoped that at the very least, the antiquated cap on damages in the Act is removed.

V Conclusion

The story of Israel Folau's termination illustrates how the layers of anti-discrimination law intersect. It also reveals that this is an area of law that is unnecessarily complex and which can be confusing in terms of both procedure and substance. Navigating anti-discrimination laws requires specific legal knowledge but even with that expertise, the law can be unclear due to the lack of jurisprudence. Lawyers do not typically act as a guide across this complex terrain; employees are navigating it on their own and seeking advice once they have already embarked on their journey.

Consequently, the law's complexity does not appear to weigh heavily on the decisions employees make about how to pursue a claim. Practicalities are far more important. Employees are seeking quick, inexpensive resolutions to their claims and this is facilitated by the statutory equality commissions which provide conciliation. This study highlights the importance of the commissions' role in providing education and training about the law. Armed with information about their rights, employees will be better equipped to make a decision about their claim. This is even more so when novel and new concepts are introduced into the terrain, such as positive duties to promote equality, which need to be accompanied by information and guidance materials.[117]

the proposal did not receive support and the Attorney-General's Department was tasked with consulting further on the issue in 2023. Subsequently, the 'equal access' model was proposed and ultimately passed by the Parliament.

116 See also 'Anti-Discrimination Act Review', *NSW Law Reform Commission* (Web Page) <https://lawreform.nsw.gov.au/current-projects/anti-discrimination-act-review.html>.

117 See, eg, the extensive guidance materials the AHRC produced when the positive duty in pt IIA of the *SDA* was introduced: 'The Positive Duty in the Sex Discrimination Act', *Australian Human Rights Commission* (Web Page) <https://humanrights.gov.au/our-work/sex-discrimination/projects/positive-duty-under-sex-discrimination-act>.