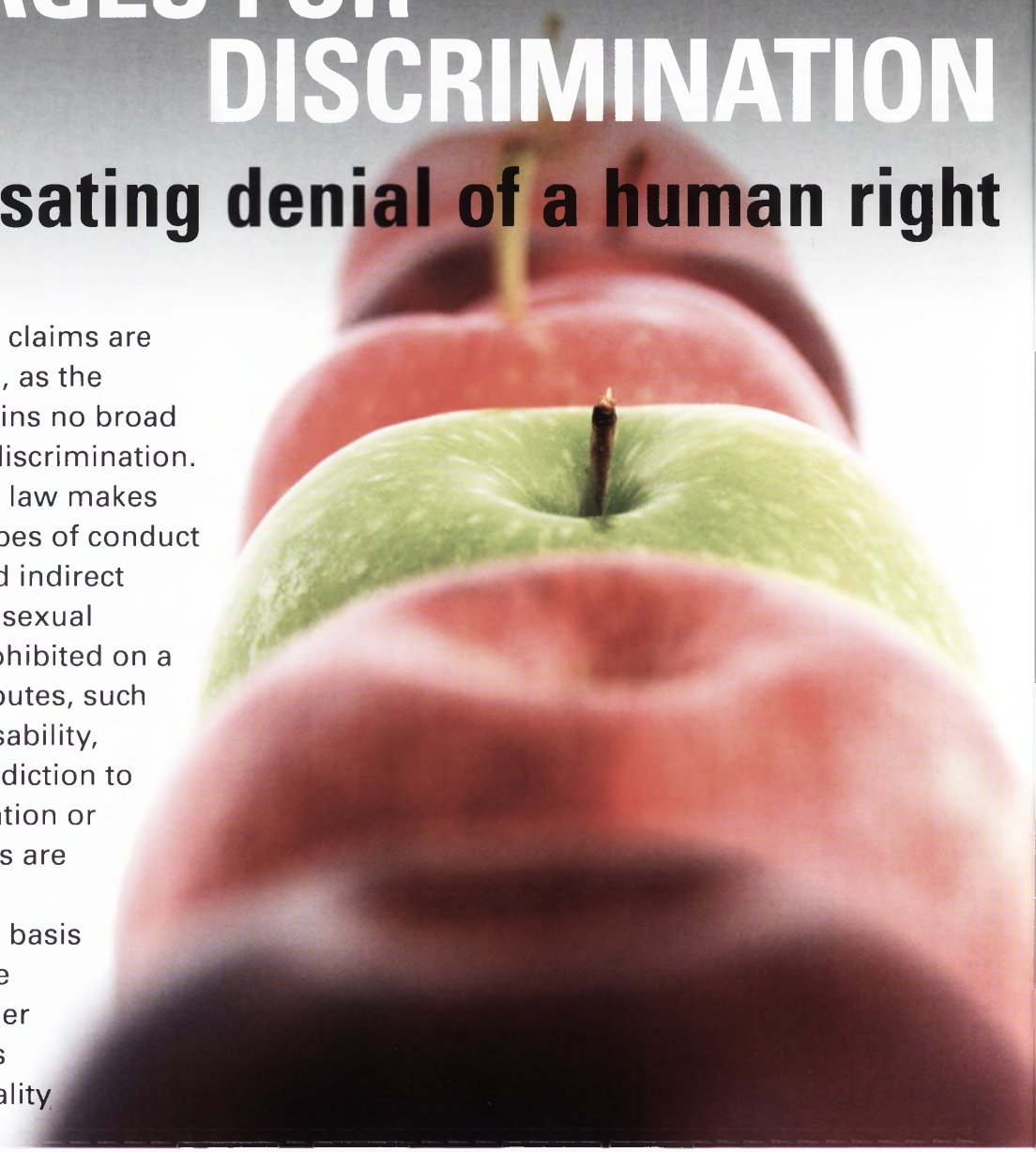
By Dr Beth Gaze

DAMAGES FOR DISCRIMINATION

Compensating denial of a human right



Anti-discrimination claims are creatures of statute, as the common law contains no broad principles against discrimination. Anti-discrimination law makes several different types of conduct unlawful: direct and indirect discrimination and sexual harassment are prohibited on a wide range of attributes, such as race, sex and disability, that vary from jurisdiction to jurisdiction. Vilification or group hatred claims are prohibited in most jurisdictions on the basis of race, but in some jurisdictions on other protected attributes such as homosexuality or religion as well.

The remedial powers conferred on tribunals and courts by anti-discrimination legislation also vary. Once a claim has been established, there is power in all jurisdictions to order that the respondent not continue or repeat the unlawful discrimination; direct the respondent to perform any reasonable act to redress any loss or damage suffered by the complainant; and pay damages by way of compensation to the complainant.[1] Caps on the amount of damages exist only in New South Wales (NSW) ($100,000) and Western Australia (WA) ($40,000).[2] In some jurisdictions, the respondent can also be ordered to employ or re-employ the complainant;[3] to vary aspects of a contract or agreement;[4] and to make an apology or retraction.[5] These specific remedies are arguably implicit in other jurisdictions in the common powers to order discrimination to stop, or for the respondent to perform any reasonable act to redress the complainant's loss.

In some jurisdictions the tribunals that hear and determine discrimination complaints also have remedial powers that raise the possibility of dealing with systemic aspects of discrimination. The Queensland Tribunal's powers to order damages and to order discriminatory conduct to stop can be exercised in favour of the 'complainant or another person',[6] and it can also make orders 'to implement programs to eliminate unlawful discrimination',[7] and order interest on compensation.[8] In Tasmania, the Tribunal can order the respondent to pay a fine of up to 20 penalty units, and make 'any other order it thinks appropriate'.[9] Vilification cases

attract broader remedies in some jurisdictions: in NSW there is power to order a respondent to develop and implement a policy aimed at eliminating unlawful discrimination,[10] and in South Australia (SA) there is power to award punitive damages in vilification cases up to a limit of $40,000.[11]

The widest remedial powers are the Commonwealth and Tasmanian powers to make any orders the court or tribunal thinks fit.[12] Although expressed differently (the federal power is an inclusive, non-exhaustive introductory power, while the Tasmanian power is a catch-all clause at the end of a list of remedial powers) they perform the same function, making available orders beyond those specifically listed.[13] In contrast, the remedial powers in other states and territories are all expressed as exhaustive lists without a general power.

DAMAGES AS A REMEDY IN DISCRIMINATION CASES

By far the most common remedy in discrimination cases is damages, which most legislation provides can be awarded to compensate the complainant for loss or damage resulting from the discriminatory conduct. No compensation is awarded simply for having been a victim of discrimination, so all loss or injury must be proved as a question of fact. Many judicial discussions of damages focus on the appropriate award for the particular case, so there is limited discussion of general principles or scales of damages in discrimination matters. In *Hall, Oliver & Reed v Sheiban*, the Full Federal Court acknowledged that tort law is the closest analogy to discrimination law, but also stated that the possible development of discrimination law should not be precluded where a different approach might be needed.[14] Tort principles have generally been used as a basis for assessing damages, and the aim of compensation is understood to be placing the complainant in the position in which they would have been had the discriminatory act not occurred.[15] French J commented, however, that the 'measure of damages is to be governed by the statute and the rules applicable in tort can be of no avail if they conflict with it'.[16] While the tort analogy is valuable, discrimination law involves a breach of a human right and has public significance in addition to private civil compensation.

As in tort law, damages for both economic and non-economic loss can be claimed, and evidence in support of each claim should be provided. The legislation (in various formulations) allows compensation for loss or damage 'caused by' the unlawful action, and damage can be excluded for being outside this sphere.[17] However, the fact that a complainant has a special susceptibility that exacerbates the harm they suffer does not limit the liability of the respondent to compensate for that harm.[18]

Special damages can be awarded for financial and quantifiable losses such as medical or psychological costs and loss of pay (including superannuation, holiday pay, leave loading and other entitlements). All claims must be proved by evidence or they are likely to fail.[19] Compensation for unlawful termination of employment is taxable so it should be assessed as a gross amount.

Special damages can also be awarded for future expenses and loss of earnings, although estimating these is more difficult and, like tort law, will involve making predictions of the likelihood of future events. For example, an award of damages for future loss of earnings may be discounted to take account of the possibility that the complainant would have left the job, not been kept on, or not remained in the position for their whole career.[20] Often these issues can be complicated by other processes, such as performance issues or pregnancy and proposed maternity leave. Since loss of employment can have a serious long-term impact, it is important to ensure that future losses are fully explored and documented. For example, a woman who loses her job as a result of pregnancy discrimination will also lose rights to maternity pay and maternity leave, and also any potential right to stay in the job and seek flexible work after she returns from leave. Instead, she will have to look for work while she has a young baby, in a job market where part-time work tends to be limited and low quality. Any difficulty in obtaining employment with the same status, security and prospects of advancement is a loss flowing from the discrimination. To compensate her adequately, any loss of job quality as well as her right to seek reasonable flexibility would need to be considered in both the short and long term.

General damages awarded to compensate for pain and suffering can also be difficult to assess. Introduction of evidence in support of claims is again very important, as tribunals may refuse to grant compensation where no evidence is introduced in support. To get compensation for >>

hurt, humiliation and distress arising from the discrimination, evidence is needed of the extent and impact of the distress. This is an area in which self-represented complainants are often at a significant disadvantage. There is little principled guidance in the case law about setting amounts for general damages, and there has been substantial variation in awards (see quantum of damages below).

Aggravated damages are compensatory and are clearly available where the manner of the respondent's contravention or conduct during litigation has increased the distress suffered by the complainant.[21] There is conflicting case law on exemplary or punitive damages. On the one hand, exemplary damages of $7,500 were awarded by Federal Magistrate Raphael in *Font v Paspaley Pearls*, where the respondent had insisted on seeking admission of evidence which was irrelevant in an attempt to 'blacken the applicant's character to impugn her evidence'.[22] Since aggravated damages are compensatory, they should be based on factual findings of further harm suffered as a result of the conduct. Rather than require the applicant to seek an adjournment and return with further medical evidence of harm, Raphael FM preferred to recognise 'the punitive element in these damages'.[23] Other federal magistrates have disagreed with this approach, holding that exemplary damages are not available because damages are limited to compensation and not punishment.[24] However, these decisions did not consider the role of the introductory words in s46PO of the *Australian Human Rights Commission Act* 1986 that authorise the making of any order the decision-maker thinks fit, which could provide a basis for awards of exemplary damages.[25]

QUANTUM OF DAMAGES

Damages awarded by the tribunals and courts in discrimination matters have always been quite low. Damages awards in discrimination matters around Australia are summarised in a table in the CCH Australia and New Zealand Equal Opportunity Reporter,[26] and awards in federal cases are summarised in Federal Discrimination Law Online.[27] The majority of awards are under $10,000, with many around $1,000-2,000. In the lifetime of anti-discrimination law in Australia, very few total awards have been over $50,000, and some listed in the table were overturned on appeal.[28] Even when federal dispute resolution moved in 2000 from the Human Rights and Equal Opportunity Commission to the federal courts, with the introduction of normal costs rules, there was little increase in the size of damages awarded, despite the substantial increase in the cost and risks of bringing a claim.[29]

The low level of damages tends to undermine incentives for enforcement of anti-discrimination law in both courts and tribunals. Individual complaints are the only method of enforcing anti-discrimination law in Australia, so if there is insufficient reason to litigate, or a substantial deterrent, the law cannot be enforced. In courts, low damages awards are disproportionate to the personal stress and financial risks involved in litigating a claim. In tribunals, where costs are generally awarded only if a party behaves unreasonably in conducting the case, awards of costs are rare. It is not uncommon for a successful tribunal applicant to merely break even or be left out of pocket after covering their legal costs from their damages award. For example, a state government department in one case spent more than $1 million defending a complaint, and the compensation order made against the department was for $20,000, which did not cover the complainant's legal fees.[30] This outcome effectively deters any similar challenges in the future.

Most damages awards are too low to operate in themselves as a deterrent to organisations contravening the law. Many could be considered part of a risk management budget in a large organisation, and offer little incentive to adopt best practices. These systemic problems in the enforcement of anti-discrimination law have led to pressure for broadening the range of enforcement methods to relieve the burden on complainants. Alternatively, increasing the quantum of damages awarded could also have deterrent effect.

There have been a number of cases over the years involving much larger damages awards. Some involve large awards for economic loss after termination of long-term or well-paid employment.[31] In some of these cases, very large awards for general damages were also made where the complainant suffered serious psychological consequences.[32] In three sexual harassment cases from Victoria, large awards for general damages have been made without any award for special damages, with no explanation of why special damages were not sought or compensated.[33]

COMPENSATION BY SETTLEMENT

Most discrimination complaints settle. Press reports and data on conciliation outcomes suggest that better outcomes can be obtained in settlement than litigation.[34] Larger amounts of compensation, and remedies not available under the legislation such as changes to policies or procedures, or training of staff to prevent future problems, have been obtained by agreement. Such remedies are outside the scope of legislative powers, which are largely focused on the individual complainant rather than systemic processes and prevention of discriminatory practices. The conciliation data shows that while most cases are settled for low amounts, in a few cases larger amounts of compensation have been obtained (up to $100,000 for senior employees).[35] There are likely to be unreported settlements outside the Australian Human Rights Commission system involving much higher figures as well.

High-profile cases involving sexual harassment claims by very senior women have received close press attention and led to reported settlements of several hundred thousand dollars,[36] even multiple millions of dollars.[37] In these cases, a breach of contract claim was brought alongside the discrimination claim, which allowed the case to be brought directly in the Federal Court without the delay involved in undergoing conciliation. This approach was later exploited in *Fraser-Kirk v McInnes*[38] (the David Jones case), where a major public relations campaign accompanied the complainant's claim for $35 million damages for sexual harassment and breach of contract brought directly in the Federal Court. The case was reportedly settled for around $800,000.[39] This approach

to sexual harassment litigation was further tested in *Ashby v Commonwealth*.[40]

CONCLUSION: THE NEED FOR SYSTEMIC REMEDIES

For many complainants, money is not the sole point of their action. Discrimination involves unfair treatment, and the denial of a human right. An important element of taking action may be to reject victimhood, and to seek the employer's acknowledgement of wrongdoing and commitment to change its practices to prevent repetition. In the US, this can be achieved through damages awards that are large and can include punitive damages, which have a deterrent effect for all employers when publicised. But in Australia, damages are generally too low to have much deterrent effect, especially on large companies or government departments.

Australian courts have been unable or reluctant to acknowledge the need for deterrence in a discrimination claim through the damages award. In choosing a remedy and in assessing damages, little attention is given to the systemic effects of discriminatory behaviour and the need to deter conduct which breaches human rights. Where systemically oriented remedies are available, their use can give a decision broader effect beyond protecting just the complainant. For example, in *Zareski v Hannanprint Pty Ltd*, an order to arrange workforce retraining to the satisfaction of the tribunal was made.[41] Some Acts contain provisions for broader orders,[42] but the extent to which these powers are used is not clear. The challenge is to ensure that remedies not only compensate the individual complainant, but also protect people in the groups that are most vulnerable to discrimination, and provide an effective incentive to change systems and practices that lead to discrimination. ■

Notes: **1** See: *Australian Human Rights Commission Act* 1986 (Cth) s46PO (AHRC Act); *Anti-Discrimination Act* 1977 (NSW) s108 (ADA); *Equal Opportunity Act* 2010 (Vic) s125; *Anti-Discrimination Act* 1991 (Qld) s209; *Equal Opportunity Act* 1984 (SA) s96; *Equal Opportunity Act* 1984 (WA) s127 (EOA); *Anti-Discrimination Act* 1998 (Tas) s89; *Discrimination Act* 1991 (ACT) s53E; *Anti-Discrimination Act* 1992 (NT) s88. The three basic powers are the only remedial powers in Victoria, ACT and SA. **2** ADA 1977 (NSW) s108(2)(a); EOA 1984 (WA) s127(b)(i). SA has a cap of $40,000 on damages for vilification: *Racial Vilification Act* 1996 (SA) s 6(1), (3). **3** AHRC Act (Cth) s46PO(4)(c); ADA (Tas) s89(1)(c). **4** Alter 'termination of a contract' AHRC Act s46PO(4)(e); power to declare void in whole or part ADA (NSW) s108(2)(f), and ADA (NT) s88(1)(d); to vary the terms WA 127(b)(iv), Tas 89(1)(f). Power in ADA (Qld) s209(1)(h) applies only to an agreement made in connection with a contravention of the Act. **5** ADA (NSW) s108(2)(d) 'publication', ADA (Qld) s209(1)(d)(e): private or public apology. **6** ADA (Qld) s209(1)(b)(c). **7** *Ibid*, s209(1)(f). **8** *Ibid*, s209(1)(g). **9** ADA (Tas) s89(1)(e), (h). **10** ADA (NSW) s108(2)(e). **11** See note 2 above. **12** AHRC Act (Cth) s46PO(4); ADA (Tas) s89(1)(h). **13** Jonathan Hunyor, 'Remedies for unlawful discrimination' (2005) *Law Society Journal* 40, 40. **14** *Hall, Oliver & Reed v Sheiban* [1989] FCA 72; 20 FCR 217 per Lockhart J at [71]-[72]. **15** *Ibid* per Lockhart J at [73]. See also Hunyor, note 13 above. **16** *Ibid* at [61]. **17** For example, in *Williams v Robinson* [2000] HREOCA 42, the Commission held that Williams was capable of working elsewhere after she lost her job, so her compensation for lost earnings should be limited to two years. Any other loss was the result of her choice not to work, rather than the respondent's actions. **18** For example, *South Pacific Resort Hotels Pty Ltd v Trainor* [2005] FCAFC 130. **19** *Hurst v Queensland (No. 2)* [2006] FCAFC 151 at [26], cited by Chris Ronalds and Elizabeth Raper, *Discrimination Law and Practice* (4th ed, Federation Press), 2012 at 213. **20** See, for example, *Cosma v Qantas Airways* [2002] FCA 640. **21** See *Hall*, note 14 above per Lockhart J at [74]-[76], French J at [64]. For example, *South Pacific Hotels v Trainor*, note 18 above. **22** *Font v Paspaley Pearls & Ors* [2002] FMCA 142 at [160]. **23** *Ibid* at [165]. **24** *Hughes v Car Buyers* [2004] FMCA 526 at [68]; *Frith v Glen Straits Pty Ltd, trading as The Exchange Hotel* [2005] FMCA 402 at [99]. See Ronalds, note 19 above, 214. **25** Per Hunyor, see note 13 above. Lockhart J in *Hall, Oliver and Reed*, note 14 above at [78]-[83] preferred to leave the issue of exemplary damages open, as it had not been fully argued. That case focused only on the compensation power, not the broader introductory words. The Full Federal Court noted this point without deciding it in *Employment Services Australia v Poniatowska* [2010] FCAFC 92 at [133]. **26** CCH Australia and New Zealand Equal Opportunity Reporter Para 89-960. **27** Available on the Australian Human Rights Commission web page at <http://humanrights.gov.au/legal/FDL/index.html>. **28** For example, *Schou v State of Victoria* (2000) was overturned twice in the Victorian Supreme Court after twice succeeding in VCAT: *State of Victoria v Schou* [2001] VSC 321; *State of Victoria v Schou* [2004] VSCA 71. **29** See, generally, Gaze and Hunter, *Enforcing Discrimination Law: An Evaluation of the New Regime* (Themis Press, 2010). **30** Dominique Allen 'Remedying Discrimination: the Limits of the Law and the Need for a Systemic Approach' (2010) 2 *University of Tasmania Law Review* 85, 95. **31** Large awards of special damages were made in cases under the *Disability Discrimination Act 1992* (Cth): *Garity v Commonwealth Bank of Australia* [1999] HREOCA 2; *Cosma v Qantas Airways* [2002] FCA 640; *Gordon v Commonwealth of Australia* [2008] FCA 603. *Sex Discrimination Act 1984* (Cth): *Williams v Robinson* [2000] HREOCA 42; *Lee v Smith & Ors (No. 2)* [2007] FMCA 1092; *Poniatowska v Hickinbotham* [2009] FCA 680 (upheld in *Employment Services Australia v Poniatowska* [2010] FCAFC 92); and in the Qld political belief discrimination case of *Carey v Cairns Regional Council* [2011] QCAT 26. **32** General damages were awarded in *Lee v Smith* of $90,000 and in *Poniatowska v Hickinbotham* of $100,000 (both note 31 above). **33** See *McKenna v State of Victoria* [1998] VADT 83 where $125,000 general damages was awarded (upheld by the Supreme Court in *State of Victoria v McKenna* [1999] VSC 310); and $100,000 general damages was awarded in *Tan v Xenos (No. 3)* [2008] VCAT 584 and *GLS v PLP* [2013] VCAT 221. In all three cases, the respondent(s) was a man in a position to strongly influence the subsequent career success of the complainant. **34** See conciliation registers maintained by the Australian Human Rights Commission <http://humanrights.gov.au/complaints_information/register/index.html>. **35** *Ibid*, Sex discrimination conciliation register, June-December 2011. **36** In *Thomson v Orica Australia Pty Ltd* [2002] FCA 939, the pregnancy discrimination claim was successful in court, but undisclosed compensation was subsequently negotiated between the parties. **37** In *Rich v PriceWaterhouseCoopers*, the settlement was 'believed to be worth about $5 to $6 million plus costs': Susannah Moran, 'Rich pickings top $5m', *The Australian*, 29 March 2008; Bellinda Kontominas 'Richer, happier: partner wins harassment payout', *The Sydney Morning Herald*, 29 March 2008. **38** Bruce Arnold, Patricia Easteal, Keziah Judd, Skye Saunders 'Sexual harassment on trial : the DJs case' (2011) 36 *Alternative Law Jnl* 230-35. **39** *Fraser-Kirk v McInnes* was settled for $850,000 inclusive of legal costs: 'Kristy Fraser-Kirk says her sex harassment lawsuit against David Jones will lead to change', *The Australian*, 18 October 2010. **40** *Ashby v Commonwealth of Australia (No. 4)* [2012] FCA 1411 (on appeal at the time of writing). **41** [2011] NSWADT 283. The discrimination claim failed (due to lack of connection with ethnic origin) but a victimisation claim succeeded. The Administrative Decisions Tribunal awarded $5,000 damages and ordered the employer to arrange equal opportunity training (subsequently approved by the tribunal) for its staff. The basis for the order was not discussed. **42** Explicit power to make broader orders is found only in the ADA 1991 (Qld), s209(1)(f). The ADA (NSW) s108(2)(e) provides for such orders only in vilification cases. Implied power exists in the Cth and Tas Acts, see note 12 above.

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